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STATE GOVERNMENT

Bates and Field's

STATE GOVERNMENT

THIRD EDITION

by OLIVER P. FIELD

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STATE GOVERNMENT, THIRD EDITION

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PREFACE

TO THE THIRD EDITION

Bates and Field's *State Government* has been a leading text for more than two decades. Attempts to find substitutes for it were disappointing to both students and instructors in Government 101b at Indiana University. While it may be admitted on behalf of the instructors that our conception of what such a course should include may be accounted for in part by our introduction to the field of State Government via Bates and Field, we have found their work to be teachable, adequate in content, and stimulating to students. Our desire that the text be brought abreast of the times is not nostalgia for familiar paths. That alone supplies neither the energy for rewriting nor the patience for inching a manuscript through the press. To keep a good and useful book alive to the end that eager young minds may mature and achieve understanding and insight in a field vital to our national life is peculiarly satisfying to practitioners of that vocation of vicarious parenthood, teaching.

"This book has been written," Professors Bates and Field wrote in 1928 in the preface of the first edition, "to serve as a textbook in a survey course in State Government offered to undergraduates in colleges and universities. The authors," they continued, "have been governed in the selection of material and in its treatment by the experience gained in the classroom through several years' teaching of the subject. No attempt has been made to make radical departures from the traditional methods of presentation. Some minor variations both in topical arrangement and in emphasis from the models set by previous writers in this field will be detected by the reader. While the

topics treated have, for the most part, been arranged in their logical order, occasional modifications have been introduced where experience has shown that effectiveness in presentation may be increased."

This purpose, declared in the first edition and carried forward in the second, is the standard for this, the third edition. Additions and changes have been made as trends of government have developed, but the basic structure of the original book remains.

The introduction of current materials occurs throughout the book from the first chapter, in which communism is discussed in more detail and a consideration of fascism appears for the first time, to the last, which brings the city-manager movement up to date.

Developing trends which required additions, even structural changes, include such matters as intergovernmental relations, both nation-state and among the states; the popular control of government; and administrative organization and operation. The requirements, methods and devices of popular participation and control in government are covered in three chapters, namely Suffrage and Elections, Political Parties, and The Popular Control of Government. This latter chapter brings the material on the initiative, referendum, and recall together in one place and also discusses the role of pressure and interest groups. In the administrative area new chapters on The Administrative System and on Personnel, Purchasing, and Planning, together with the new material introduced in rewriting other chapters on Administrative Services, will bring the student abreast of these expanding functions of state government.

When the press of events made the meeting of deadlines appear impossible, Professor Field generously offered a helping hand. He is chiefly responsible for Chapters 4, 11, 12, 13, 18; Professor Sikes for Chapters 5, 6, 7, 8, 9, 10, 14, 20, 21; and Professor Stoner for Chapters 1, 2, 3, 15, 16, 17, 19, and for guiding the manuscript through the press.

Professor Emeritus Frank G. Bates, that loyal son of old New England, has been an inspiration and a spur with his youthful

interest, keen wit, penetrating insight, frank comment, and kindly encouragement. For their faithful, diligent, and untiring energy in preparing the manuscript, the authors acknowledge their indebtedness to Joan Doyle, Frances Kirch, and Loretta Slaton; and to Mrs. Slaton and Estelle Wyckoff there is a special obligation for their work in the preparation of the index.

PRESSLY S. SIKES
JOHN E. STONER

Bloomington, Indiana
September, 1949

STATE GOVERNMENT

CHAPTER I

INTRODUCTION TO THE STUDY OF POLITICAL SCIENCE

In the pursuit of happiness civilized man works alone and with others. Alone and unaided the wants he can satisfy whether of a physical or other nature will be few and elementary. It is when he coöperates with others that he begins to achieve mastery over his physical environment and to open the door to a social development that makes his life significant.

Wants satisfied by: 1. Individual effort

A wide range of wants is satisfied through voluntary coöperation. As a result, voluntary associations emerge which serve his economic needs. Such associations include the relation of master and servant, employer and employee, buyer and seller, landlord and tenant, and a great variety of other contractual relations. Man's instinct for fellowship leads him to form other contacts with his kind. First there is the family and then a variety of relationships ranging from the ordinary unorganized intercourse of neighbors, through the more formal relations of the society, the club, and the fraternal order. These we call social relations.

2. Voluntary cooperation

In some instances, voluntary coöperation breaks down or fails to secure the desired ends. This may occur for a variety of reasons. The work may need to be done quickly, whereas waiting for all to agree necessitates too much delay. Coöperation in a community enterprise may seriously injure some participants. The proposed routing of a new street may cut through a man's house. The benefit to the community is small comfort to him for the inconvenience of having to move, perhaps away from an ancestral home. A sanitary sewer is proposed for a densely populated neighborhood. To contribute his fair share would be an expense that one householder cannot afford. And he may still

3. Political action

refuse when he is shown that a failure to install the sewer will endanger the health of the whole neighborhood. In such a situation, the community may decide to introduce the factor of compulsion in order to satisfy its needs. When society deems it expedient for the common good thus to exercise compulsion, a political situation may be said to have arisen.

Definitions

Political science

Although legal compulsion in a given social relation is the key as to whether it is political or not, compulsion does not need to be exercised; it may be potential only. Thus 99 percent or even all of the citizens in a community may desire the construction of a sanitary sewer, but the fact that legal compulsion is potentially available makes its installation a political procedure. Since compulsion in behalf of the organized group is an inherent characteristic of the political relationship, it is sometimes said that political science is a study of the power relationship in society. This does not mean, however, that political science is concerned only with action which is legally compelled. But it is concerned with man's political relations as distinguished from his moral, social, or economic relations.

Uses of the word "state"

The expression "state government" has been employed in the title of this book, and the word "government" will be used repeatedly in this chapter. What do these words mean? The word "state" is used in more than one sense, and care should be taken to distinguish between them. In its more precise and technical use the word is employed to denote a group of people living within a definite territory, being organized for political action and possessing sovereignty. The necessary elements, then, are people, territory, government, and sovereignty. Used in this sense, the state is an international unit among the states of the world.

The forty-eight component members of our Union are legally denominated states, and it is as applied to these units that the word is employed in the title of the present volume. It will be obvious, presently, that these "states" are not such in a technical

sense, since they do not conform to the definition already given in not possessing "sovereignty." It is likewise obvious that in law and in practice they will continue to bear the name. Likewise our lesser organized groups such as counties, not being sovereign, are not states.

Sometimes the word "state" is employed in a popular fashion with a meaning akin to that of the term "nation," which will be presently considered. In that case the use is somewhat synonymous, too, with the word "country" as popularly used when we say that a certain person "comes from a foreign country," or that "our country" takes a particular attitude toward a given international situation.

The state is not merely a group of people possessing a territory, sovereignty, and government. It is all this, but it is something more and separate from its component parts. It is an association or society distinct from the members who compose it and in that respect resembles a corporation. X, Y, and Z may form a corporation, but they are not the corporation. The corporation is a fourth person, a legal person, entity, or being distinct from the members who associated in it. So we must conceive of the state as a corporate person. It is the supreme political person since it possesses "sovereignty."

Sovereignty

Here we are brought to a consideration of the meaning of the term "sovereignty." This term is employed in two senses in political science. In the first place, it is used to signify a condition of freedom from external control. This means that the state is the equal of other states and subject to no external control except the rules of international law as established by treaties and custom. In the second place, the word "sovereignty" is employed to denote the ultimate and supreme legal power which the state possesses over all persons and things within its territorial boundaries. This is sometimes spoken of as "internal" sovereignty to differentiate it from international or "external" sovereignty. Every state possesses both internal and external sovereignty.

Nation

At this point it will be well to distinguish between state and "nation." "Nation" is a word which is loosely used, but it may

be defined as a group of people having predominantly a common language, race, civilization, and habit of thought, but especially a consciousness of unity and separateness from other groups. The people composing a nation may be located wholly within a single state or they may be within the boundaries of several states. The term "nation," then, expresses a social concept, while "state" has a political significance. "Nation" is also used in a popular sense as the equivalent of "country," meaning an international state. In the United States the government at Washington is constantly referred to as the "national government." This expression has gained such currency that it would be mere pedantry to seek to avoid it, and it will be found thus used in the pages of this book. Care must be exercised in interpreting written or oral expositions of government or of international relations because it is frequently impossible to determine in which sense the words "state" and "nation" are used except by reference to the context.

Government

It has been said that one of the elements combining to make up the existence of a state is organization for political action. Government is the organization, machinery, or agency through which the state or a subordinate political unit performs its functions. Whatever the state or its lesser political units undertake to do, it is through government that its purpose is accomplished.

The purpose of government

Governments have come into being in various ways, but in our own day and among civilized peoples they are engaged in rendering services of various kinds to their citizens. These services include first of all those in connection with which political action is most likely to be found necessary. Such, for example, are the protection of persons and property from attack from without and from violence from within the state, the safeguarding from disease and from the exploitation of the weak by the strong.

Government having been established, it is customary everywhere at the present time to make use of it for the performance of a great variety of services of an economic or social character,

such as, for example, the supplying of water, the building of roads, and the undertaking of public education.

Scope of the study of government

The study of government is concerned, for the most part, with the structure and operation of the machinery which has been devised to discharge the various duties assumed by it. The actual composition of this organization, the methods of selecting those who are to compose the governing body, and the functions of each, as well as the manner in which the functions are executed, are to a large extent the subject matter of any course in government.

Functions of Government

Nearly every person has his own ideas as to the nature and amount of work the government should do. Some want it to do much, others little, and still others would try to do without it altogether for one reason or another. Most people have never tried to systematize their thoughts in respect to the functions of government. But political theorists have approached this problem in a systematic manner. The result of their work can be discussed under six headings. The reader will probably find that most of the ideas he has heard as to the nature of governmental activity will fall into one of these classes. But he also probably will recall having heard the same persons advocate ideas belonging to several categories. This short summary may help the reader to ponder the nature and scope of governmental activities more systematically.

Anarchists

At one extreme stands the *anarchist*. He believes that men are fundamentally good. They become evil because of coercion. Government coerces; therefore, government is evil. True, if government were eliminated, some of the men warped and twisted by government would act in an evil way; but no more men would be warped and twisted, so that the ultimate gain would justify the temporary inconveniences. In place of government as an organizing principle in society, others would be available. Different anarchists have suggested various substitutes, such as

scientific knowledge, the golden rule, and voluntary coöperation.

Individualists

The *individualist* agrees that government is evil; but it is a necessary evil, because some men are evil. They must be restrained. The function of government according to this view is to restrain those persons. It has no other function. It is sometimes said that the individualist regards the proper governmental function to be of a police nature. It is twofold: to protect the group against attacks from foreign enemies, and to protect individuals against attack by their immediate neighbors; that is, governmental activity is external and internal police protection. Their motto is sometimes said to be: The best government is the one *that governs least. This theory was influential in the early history* of the United States and is still proposed in one form or another by many persons.

Collectivists

The *collectivist*—sometimes also referred to as the person who believes in the *general welfare* theory of government—has a different view as to the nature of government. He regards it as a tool in the hands of the people to promote the general welfare. It may build hospitals, care for the poor, supervise conditions under which people work in factories, own and operate manufacturing establishments, provide health insurance, or whatever the people need. There is nothing that, by its nature, the government should not do. The test as to whether or not the government should perform a particular service is: Can the government perform it better and more satisfactorily than it can be done otherwise? No doubt more Americans adhere to this belief than to any other as to the proper function of government. Certainly many who profess individualism act on the collectivist assumption.

Socialists

Other ideas as to the proper function of government grow out of the belief as to the basic nature of social dynamics, the urges which make men act as they do. There are those—followers of Karl Marx—who believe that the basic motivations are economic. In fact, all law, social institutions, and religions are reflections of the way men earn their living. A pastoral people,

living by their herds and flocks, will have rules concerning the ownership of animals, whereas a society which tills the soil will have rules enabling its members to determine exact property lines. These persons, sometimes called economic determinists, are concerned primarily with economic theory, but incidental to this they have ideas as to the functions of government. Here there is a tendency to split into two groups—the socialists and the communists.

The socialists believe that the government should own and operate all the major agencies of production, communication, the machinery of economic distribution, and the natural resources. Parenthetically it may be added that they are willing to take control of government and extend its control over economic functions by a gradual process. The British Labor party is an example of a group possessed with socialist ideas.

Communists

In order to describe the communist idea as to the function of government, it is necessary to explain their idea as to the nature of society. Society is, and has been since the beginning of history, divided into two classes: the "haves" and the "have-nots," or the oppressors and the oppressed. In different stages of history, the haves and have-nots are known by different names—freeman and slave; patrician and plebian, lord and serf. At present, the two classes are capitalists and workers, or bourgeoisie and proletariat. There is an irreconcilable conflict between them, the communists say, as irreconcilable as between the butcher and the steer. Government is the tool in the hands of the haves to exploit the have-nots. The whole movement of history is toward an eventual solution of this conflict when the have-nots take control and organize society in their own interest. The ineluctable movement is thus toward this, the classless society. But the haves will not surrender their privileged position without a struggle, so the have-nots must eventually seize the power. Nor will the haves be dispossessed easily; they must be exterminated. Then the workers will turn the tables on their oppressors; they will use the government to eradicate them. When the capitalists have been destroyed and their ideas of oppression have been

liquidated, then there will be no need for the instrument of oppression since there will be no oppression. At that time, the government "will wither away." According to this theory, the function of government is in the class society a means of oppression; in the preliminary stages of the classless society it will be a means of liquidating the former oppressors, but eventually it will cease to exist altogether, since, by its nature, it can be used only for oppressive purposes.

Contrasted to the socialists, the communists think it is possible to achieve their ends only by violence, not because they favor violence, but because the haves will not surrender without a struggle. It is for this reason that they believe progress is possible only through revolution; they want no shift in degree but a change in kind. They want no gradual improvement, but a worsening of conditions, for the revolution will come quickest out of catastrophe. It is when the workers become sufficiently revolted by their oppressors that they will arise and "cast off their chains."

Fascists

A series of groups can be classified as *fascists*. Chief among them were the disciples of Mussolini and Hitler. They had many separate ideas with respect to other matters but as to the function of government their actions seemed to develop a more or less common pattern. These men were not theorists; they were concerned with action; ideas were useful to them only as a means of influencing action. Consequently, some observers have said that fascism had no philosophy. But men seldom act without any preconceived notions. Even an avowal of opportunism becomes a kind of principle in itself. Certain assumptions have appeared to underlie fascist choices.

Different from the five foregoing political beliefs, all of which were based on the premise that the individual person was to be served by social arrangements, the fascist started with the assumption that the individual by and in himself had no value. It was only as he became a part of the state that his life began to have meaning. It was the function of the state to take possession of the individual and through its use of him become glorious—

whether by his life or death did not matter. The individual's highest end was to contribute to the glory and power of his state. All talk of private rights, of who should run and operate property was irrelevant. The question was: What procedure made the state strongest and most feared by its neighbors? To do that was the *summum bonum* of all life.

Forms of Government

Governments classified according to:

If an attempt is made to distinguish among the bewildering and various types of government which now exist or have existed in the past, it will be found that the most significant classification is that based upon the location of the supreme governing authority.

1. Location of supreme governing authority

a. Autocratic

When the complete power of government is vested in a single individual, the government is known as an autocracy. This type of government prevailed two centuries ago.

Between World Wars I and II there developed in several European countries "dictators" bearing various titles. In some instances where this development took place the idea stressed was that their rule rested on popular consent and some of the forms of popular government were retained. The fact is, however, that their position was not in substance clearly distinguishable from that of the autocrats of an earlier day.

b. Aristocratic

The supreme power of government may be vested in a small class of the population, and in that case the government is known as an aristocracy. The terms oligarchy, plutocracy, and theocracy have been used to distinguish aristocracies with respect to the particular class in whom authority is vested. Since aristocratic forms of government have disappeared, they may be dismissed from further consideration.

c. Popular

When the supreme governing authority becomes vested in the mass of the people, the government is spoken of as popular. It has been said that the purpose of popular government is to perform services for the people. If the mass of the people takes a direct part in policy-forming—i.e., in deciding what services shall be undertaken and how they shall be accomplished—we

Popular government either democratic or representative

properly call it a democratic form of popular government, or a democracy. If, on the contrary, the work of determining policy is delegated by the people to representatives who are to act in their stead, we have a representative form of popular government. Democracy and representative government, then, are subclasses or varieties of popular government. It should be observed that whether it be a democratic or a representative government, the work of carrying policies into execution is delegated to representatives, for not even in a democracy do the citizens undertake actually *en masse* to carry out the policies which they have formed. Manifestly, democracy can exist only within areas which are small and among small populations. The New England "town" government is the best example of direct democracy in this country. Such a government would obviously be impracticable for the United States, for a state, or even for a moderate-sized city. In these cases the people must resort to representative government. The word "democracy" is used to apply to all popular governments, and also to denote a condition of social equality or equality of opportunity. Such uses of the word have no necessary connection with political democracy.

2. The head of the state

The old familiar contrasting terms, monarchy and republic, are still frequently encountered both in popular speech and in official usage. Since autocracies of the type prevailing two centuries ago have disappeared, the words have little significance, for where monarchs and thrones persist these rulers generally retain little governing power. It may be said, then, today, that a monarchy is a government in which the nominal head of the state inherits his position, holds it for life, and bears some historic title such as king or emperor. A republic is a government in which the nominal head of the state is designated by popular choice, holds office for a fixed term, and usually bears the title of president.

a. Monarchy

b. Republic

Whatever may be the type of government with respect to the location of the supreme power or with respect to the characteristics of the head of the state, there still remain the problems of

distinguishing among the several functions to be fulfilled and of distributing them among the various governmental areas and organs. But however these may be distinguished and distributed, it must be remembered that in a given country they are all parts of a single governmental system.

Governmental functions distinguished

The work of government may be looked at from a functional point of view and classified accordingly. By a functional classification is meant the dividing of the work according to the tasks to be done. The traditional classification on this basis distinguishes three functions: legislative, executive, and judicial.

1. Legislative

2. Executive

3. Judicial

The legislative function is said to be that of formulating the policies of government, or deciding what services shall be rendered by government. The executive function has usually been defined as that of carrying policies into effect or performing the services which have been decided upon by those exercising the legislative function. The judicial function is said to be that of interpreting the policies laid down by the legislative authority and of determining the validity of the acts of those who perform executive functions.

4. Administrative

Within the present century there has appeared in some quarters among students of political science a disposition to reëxamine the classification of governmental functions and to reclassify the activities of government into five functions instead of three. According to this classification, the administrative and the electoral are recognized as distinct functions. The legislative and the judicial functions are conceived of as retaining the same boundaries as always. But among the growing variety and complexity of the work which the executive branch has been called upon to do within the last century there have been distinguished not a single function but two. These functions, to which the names executive and administrative have been given, not only differ in their essential characteristics but also call for particular qualities of ability and training in those who are to perform them. No corresponding administrative branch of government has as yet been set up, but both executive and administrative functions

are carried out within the same branch. The nature of the distinction between these functions will be considered further in a subsequent chapter.

5. Electoral

Likewise, the increasing extent and variety of the participation of the citizen at the ballot box in the processes of government have made it seem proper to some scholars to recognize in modern governments a separate function—the electoral, performed by the electorate, distinguishable from each of the four already mentioned. This function will be the subject of the subsequent chapters on Political Parties, Suffrage, and Elections.

Governmental functions distributed

The territory of a state may be so large in its extent that one governmental organization may be thought insufficient to perform adequately the many services demanded by the people in all parts of the state. Or, very probably, the people of the various communities of the state will wish to have local governmental organizations to discharge those duties which are thought to be primarily local in their nature. It may even be that the people of one locality will wish a different type of governmental organization in their locality from that desired by many other localities. Thus it will be seen that, although there is only one government, there may be many divisions of that government for the purpose of distributing the performance of functions on a territorial basis. In some instances, it is desirable to make such a distribution because the state may have been formed out of a group of existing states. These may refuse to combine with the others unless they receive assurance that they will have separate governmental agencies to carry out the demands of the people of that particular state. This situation existed in the formation of the United States.

1. Territorially

a. Unitary government

The territorial distribution of the work of government is frequently touched upon in the constitution, and the distribution may be accomplished in either of two ways. The central government, in terms more or less express, may be authorized to establish such areas and organs of local government as it may see fit, and to give to them such powers and functions as may be deemed proper. But when such local authorities are set up they

are still subject to the control of the central government. The local governments thus set up may be altered or abolished and their powers modified at the will of the central government. Thus the central government is placed in a strong position of control over all governmental subdivisions. Under such circumstances the government is said to be *unitary*. It will be observed that it is not the absence of local governmental units which makes a government unitary, but rather the subordination of such units to the central government. France, Belgium, Norway, Sweden, Spain, and Italy are examples of unitary government.

b. Federal government

In other instances the local areas of government may be recognized by the constitution, and the distribution of functions between them and the central government carefully regulated in that instrument. In such cases the government is said to be a *federal* government. Again it is not the existence of local areas which makes a federal government, but their relation to the central government. In the United States, for instance, the thirteen states were recognized in the constitution and their relation to the central government was carefully defined. This was accomplished by enumerating the particular powers which should be conferred upon the central government and by specifically stating that all others were to be retained by the states or the people. The effect is that each has its own field of action and neither can encroach upon the other.

2. Organically

Everywhere in the United States, save in the field of local government, it will be observed that the functions of government are distributed among three sets of organs spoken of as three branches or "departments": legislative, executive, and judicial. To each of these is assigned, for the most part, the performance of the function appropriate to its name. The practical purpose of this division is to obtain the advantages of the division of labor and of specialization of effort. A more powerful reason actuating the minds of those who planned this distribution was that the government thus set up should conform to the doctrine of the separation of powers. The French political writer, Montesquieu, about the middle of the eighteenth century called attention to

Separation of powers

the fact that there existed in government these three "powers" or functions now familiar to all. He furthermore declared that the distribution of these three "powers" into the hands of three distinct branches or organs of government was necessary to the maintenance of political liberty. This doctrine, which has come to be known as the doctrine of the separation of powers, found wide acceptance, especially in France and America. Having gained general currency at that time, the doctrine was usually observed in the framing of the federal and the state constitutions. Although it is not formally incorporated in the text of many constitutions, the courts have quite generally read it into those documents until it is an accepted principle of our constitutional law. Not a few statutes have been declared unconstitutional because they attempted to confer upon a certain branch functions which, under this doctrine, must be conferred only upon another.

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CHAPTER 2

NATIONAL-STATE RELATIONS

"The Constitution," observed Chief Justice Chase, "looks to an indestructible Union composed of indestructible States."[1] And he might have added that the essence of their indestructibility is their power to adapt themselves to the changing world, to roll with the punch—as it were—of the impact of the material and moral demands of a dynamic people. As we turn to an examination of the relation of the Union to the states, we will note that it can be divided, for purposes of discussion, into two parts. The first is concerned with the description of the constitutional distribution of powers between the national government and the states. Here the areas within which the national government and the states may operate are marked out. Provision is made for cases of the overlapping of, or the conflict of, powers between the states and the central government. The second part is concerned with extra-constitutional relations. Here, ways have been developed of doing what needs to be done. Sometimes the procedures are legal; sometimes they are informal and extra-legal. This separation of national-state relations into two parts is only for purposes of description, for neither is now existent without the other. Officials working within the framework established by the constitutions and under the authority conferred on them by law, do what they must. But more than that, they find ways of filling in the gaps by doing more than they are constitutionally required to do; often they find ways of doing indirectly what the constitution does not provide for when the public demand is insistent for a long time. But ever in the background of any official act is the law, and what seems a ques-

Federalism

[1] Texas *v.* White, 7 Wall. 700 (1869).

tionable legal improvisation in one generation becomes the solid legal foundation for another generation. Therefore as we examine first the constitutional framework of the federal relation, then the practices which have developed outside of the constitution, it is well to bear in mind that both belong together in the living governmental organism we know.

Constitutional Distribution of Powers

Delegated powers

It was pointed out in the preceding chapter that in a federal system the powers of government are distributed between the central and the state governments by a constitution. In the United States the powers given to the national government are called *delegated* powers. For that reason it is commonly referred to as a government of delegated powers, for it possesses only those and can exercise no others.

Types of delegated powers

These delegated powers are of three types. (1) Some are expressly enumerated in the constitution and are therefore known as *enumerated* powers. The power of Congress to pass laws on such subjects as patents and copyrights, coinage of money, the establishment of an army or navy, and the process of naturalization, are illustrations of this type. (2) But Congress is also authorized to pass such laws as are necessary and proper to carry out any of the enumerated powers. Powers of Congress derived in this manner are said to be *implied*. The power to establish post offices and post roads is expressly given to Congress, but the city and rural free delivery system is probably not included in the literal meaning of the terms post office and post road. However, Congress may establish such a system because the right to do so can be inferred from the express power referred to above. But in order to imply a power from an expressly enumerated one, the former must be fairly within the meaning of the latter. Whether a power can be implied or not is then a matter of interpretation. Congress in the first instance is the body to decide on this; but in the final analysis it is the Supreme Court of the United States which must decide whether an enumerated power is sufficiently broad in meaning to include the one sought to be implied from it.

1. Enumerated

2. Implied

The fact that the exercise of this power would be convenient is not alone sufficient to allow the implication; but the court will be more likely to view the implication favorably if it is convenient, suitable, and almost necessary to the effective execution of the enumerated power. (3) A third type is the *resultant* power. A resultant power is one implied from several enumerated powers. Instead of being implied from a single enumerated power it is implied from several taken as a group. The power to control immigration is not enumerated. Neither is it implied, because it is not implied from any single enumerated one. But it is a resultant power, because it is implied from the control of Congress over foreign commerce and the naturalization of aliens, as well as from the power to make treaties. The power to issue paper money results from the right to borrow money and to coin money.

3. Resultant

Much misunderstanding has arisen over the meaning of the opening sentence of Article I, section 8, of the constitution, which states, "The Congress shall have 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. . . ." Some have thought that this gives to the national government the power to pass all laws that are for the general welfare of the people of the United States. This, of course, would mean that the government of the United States was unitary and not federal. But inasmuch as it was intended by those who established it that the government be federal and inasmuch as the American public since that time has intended to keep it federal, it must be assumed that the reference to the general welfare in this statement is intended to give the national government only the power to lay taxes for that purpose. But to give to the national government the power to lay taxes and spend money for the general welfare is not the same as to give it the power to pass laws on all subjects relating to the general welfare. For example, a law regulating the price of haircutting might be for the general welfare but it does not follow that Congress has the right to enact such a law.

The general welfare clause

Uses of taxation

The power to levy taxes and spend money is greater in the national government than is its power to enact laws regulating private conduct. This was brought out clearly by the decision of the Supreme Court that taxes could validly be levied and the money spent for giving grants-in-aid to the states to encourage their engaging in a service which the national government thought for the general welfare but which it was not itself allowed to perform. The Congress may accomplish some regulation through a tax law, of course, but the Supreme Court will decide for itself when it thinks that the legislation has crossed the line into the field of régulation through the forms of taxation. If the regulation is incidental to the exercise of the power to tax, that is one thing; if it is the primary purpose, then it is another thing, and unconstitutional. The line that must be drawn here is very fine but it is necessary as long as federalism is to be the American form of government.

Increase in exercise of national powers

The national government has only those powers granted to it in the constitution. Aside from those added by amendment, it technically has no more power than it had when the government was established in 1789. Yet the central government does exercise vastly greater and more numerous powers than it did in its early history. How then can the above statements be reconciled? First, some powers conferred on the national government were not used for a long time. For example, Congress was given power to regulate interstate commerce, but it scarcely used it until 1887 when it passed the first act to regulate interstate railroads. In the second place, the meanings of words change with usage. At one time the word "election" as used in the constitution[2] was considered to mean only the act of selecting a United States Representative or Senator for service in Congress. Later it was decided that the primary in which political parties nominate candidates for the office of Representative or Senator is included in the word election. Under the first meaning of the word the Supreme Court decided that Congress had no power to regulate party primaries; but later, when the meaning of the word elec-

[2] Art. I, sec. 4.

tion was broadened, the Court held that Congress could regulate primaries in which Congressional candidates are nominated. A third explanation of the increase in the exercise of power by Congress is the change in conditions in the country which bring them within the scope of power of the constitution. For example, no one in 1789 would have considered Congress empowered to enact legislation to regulate the brakes on a stagecoach operating between Baltimore and Philadelphia. But no one today would doubt the power of Congress to enact legislation for the regulation of brakes on trains running between the same cities. Yet there was no change in the constitutional provisions to regulate interstate commerce. The change was in commerce; what had formerly been local and therefore intrastate in character had become national and therefore interstate.

Scope of power

We have then the apparent contradictory situation of a government which, from a constitutional standpoint, has power only to do that authorized by the constitution, but which, from a practical standpoint, does virtually anything for which there is a consistent and continuing national demand. It has been able to regulate the amount of grain grown and to fix the prices paid for it, and to conserve the soil and the water resources. It has specified the conditions for the marketing of livestock, the issuance of securities, the preparation of drugs, the weaving of clothes, and the management of banks. It has regulated practices of businesses, hours, wages and working conditions of labor, and the building of roads; and it allays the helplessness of old age by conserving the savings from salaries and wages. And in wartime, its powers are even more pervasive. It has supported research, it has engaged in manufacturing, allocated goods, set prices, and reorganized the civilian economy. But withal, the constitutional lawyers trace back to the constitution the roots of the authority which the government uses.

Residual powers

In spite of the range and scope of power exercised by the national government, the states possess an infinite variety. The word used to describe the body of powers possessed by the states is *residual.* that is to say, out of the vast reservoir of govern-

mental powers in existence, some are selected and delegated to the national government, but those remaining, unless the constitution prohibits the states from using them, are reserved for the states or the people,[8] hence the term residual.

State functions

The possession of these residual powers enables the states to perform a great number of functions. Most interpersonal matters, such as the registration of births, marriage, family relations, and the rules concerning property, contracts, and health, the provision of services like fire and police protection, and education fall within the domain of the state governments. Indeed, as the national government expands the area of its operations, the functions of the states also expand.

Exclusive and concurrent powers

Some of the powers given to the national government exclude the states entirely from any control over the subjects included in the particular grant. Whenever exclusive control of a particular subject is entrusted to Congress, the laws passed by Congress in that connection are supreme and state laws on that subject are of no effect. But, on the other hand, Congress has no power to legislate concerning subjects reserved to the control of the states. The states have as complete authority over the matters reserved to them as Congress has over those which have been placed under its jurisdiction. Each is supreme in its own field, subject, of course, to the restrictions contained in the Constitution of the United States. But not all of the powers delegated to the central government are of the exclusive nature of those just considered. The fact that certain powers have been delegated to the central government does not necessarily mean that the states are excluded entirely from any exercise of them. There are some subjects which have been placed under the control of the central government which are by their very nature susceptible of local regulation. If Congress does not take any affirmative action with regard to these, the states may make reasonable regulations concerning them. But if Congress enacts any laws relative to them,

[8] Tenth Amendment: "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."

such laws have the effect of suspending the state laws previously in force. Powers thus susceptible of exercise by both the central and state governments are called *concurrent* powers. The power to pass bankruptcy laws is an illustration. The standards of weights and measures are also subject to both state and national regulation.

From the foregoing paragraphs it will be seen that the states are not independent or sovereign units of government. They are only parts of a larger whole which we call the Union. The central government has its own sphere of activity and the states have theirs. Each of them acts directly upon the people; each has its own officers and machinery of government. Together they carry on the business of government in the United States. Naturally, controversies will arise over the question of how far the powers of each extend in a particular case. The framers of the constitution foresaw that this would happen and provided for a peaceable method of settling such disputes. The Supreme Court of the United States is the body that finally determines the extent of the constitutional powers of Congress or of the states. This is often a very difficult task, and one which brings the Supreme Court into direct contact with the work of government as it is carried on by the state and national administrations.

National-state disputes

Many factors influence the Court as it adjusts the balance between the states and the central government. Among them are the conceptions of the judges as to what the proper function of each is to be. But more important still are conditions in the country and the demands of public opinion. The predominant and more insistent demands have favored the central government and the Supreme Court has, sometimes grudgingly and other times willingly, found ways of deciding close cases in favor of the extension of national power.

What has been said in the foregoing paragraphs upon the subject of national and state power has related primarily to the power that each of them has to make laws regulating the conduct of private individuals. When it comes to the position of the states as parts of the Union, it should be said that the national govern-

National government is supreme

ment is constitutionally superior. For example, within the field of national-state relationships, as part of the Union, national authority overrides state authority in taxation. Thus, if the state has a claim for taxes of five hundred dollars against a piece of property and the national government has a claim against the same piece of property for a like sum and the property is worth only five hundred dollars, the national government gets the whole five hundred. It is not divided between the two of them. Or, if the national government is attempting to discipline a soldier, a state court may not interfere with the procedure and order the person set free. But the national courts may interfere with the work of the state courts and set a man free from the state's custody if under certain circumstances he claims that he is being deprived of some constitutional right. The national government may sue a state in the Supreme Court, but a state may not sue the national government. The general rule, therefore, is that in their relationship as units of government within the federal system the national government seems to be favored in the eyes of the Supreme Court as well as in the eyes of the nation. The states may still have all the powers they had formerly, but they have certainly lost a good deal of prestige and position.

Admission of new states

The Articles of Confederation contained a provision permitting Canada to join the United States if she wished to do so. When the Constitution of 1787 was framed, this clause was changed to give Congress general control over the admission of states to the Union. Not all of the territory of the United States was organized into states at the time of the making of our present constitution, and at the present time the United States owns important possessions which are not member-states of the Union. These territories are under the control of Congress and do not enjoy all of the privileges and immunities accorded to states. Therefore the people of the territories are usually seeking to have them admitted to the Union as states.

Congress "may" admit states to the Union, but is not compelled to do so.

The language of the constitution gives Congress complete dis-

cretion in admitting new states into the Union, except that no state may be carved out of an existing state or parts of states without the consent of the legislature of the state or states concerned. In the usual case Congress is petitioned to grant statehood by the legislature of the territory desiring admission. If Congress wishes to do so, it passes an *enabling act* to authorize the people in the territory to elect a convention to frame a suitable constitution for the proposed state. In a few instances this step is omitted because the people in the territory have first set up a convention and made a constitution and then petitioned Congress for admission. Sometimes the Congress or the President, or both, does not affirm the proposed constitution and changes may be made in it. These changes then have to be affirmed by the people in the territory if they wish to be admitted. Formerly, when Congress was satisfied with the constitution, it enacted a *statehood* bill admitting the state into the union "on an equal footing with other states." This bill, different from any other act passed by Congress, cannot be repealed, since to do so would make the new state subject to expulsion and therefore not equal to the other states, especially the original thirteen. In the cases of Arizona and New Mexico, Congress provided that when the conditions for admission laid down in the enabling act were complied with, the President was directed to issue proclamations announcing the fact, whereupon the states were "deemed admitted by Congress into the union." Congress did reserve power to itself to prevent admission if it was not satisfied with the proposed constitution. In these instances both states had unacceptable provisions in their constitutions. By joint resolutions Congress amended the unacceptable articles and directed that these amendments be submitted to the people for approval. After this was done, these states were admitted under the provisions of the enabling act when the President issued proclamations of their compliance.

Procedure

1. Petition

2. Enabling act

3. Other steps

Two states have been admitted to the Union without having passed through the territorial stage of government. Texas and California were not territories when they were admitted. Five

states were carved out of the territory of some existing state and admitted. The constitution provides that this may not be done without the consent of the state from which the new one is formed, but in the case of the admission of West Virginia this portion of the federal constitution was disregarded in the heat of Civil War. Virginia was not asked whether she would consent to the establishment of a state within the territory belonging to her, but New York, Virginia, North Carolina, and Massachusetts, respectively, consented to the formation of Vermont, Kentucky, Tennessee, and Maine as states.

Conditions as price of admission

As has been pointed out, the people of a territory cannot force their way into the Union as a state, but must obtain the permission of Congress to enter. In a number of instances Congress has imposed restrictions upon the territories before allowing them to enter the Union. Missouri was forced to change her constitution to allow free Negroes to enter that state. Nevada was compelled to give the Negro the right to vote as one condition of her admission. Ohio had to promise not to tax lands within the state which belonged to the United States for a period of five years after their sale. Utah was denied admission until she complied with the requirement of Congress that the practice of polygamy be abolished, and Oklahoma was compelled to promise that the state capital would not be moved for a period of ten years.

The President may also impose conditions on incoming states by refusing to sign the statehood bill until his conditions are complied with. Congress could, of course, pass the statehood bill over the President's veto, but this would not often happen.

Thus it is clear that incoming states must often submit to various restrictions by either Congress or the President. However, once the state has been admitted to the Union it is politically equal to all the other states. These new states, therefore, have the same power to control their own domestic affairs that the other states have. There being, then, no provision in the Constitution of the United States restricting state action on the subject of polygamy, or on the location of state capitals, the states which had been forced to change their constitutions on

these topics as the price of admission to the Union can turn about and change their constitutions back to their original form or make new ones at will, provided they observe the limitations contained in the Constitution of the United States.

There is one exception to the rule that the conditions required of a state as the price of admission cannot be enforced after the state has entered the Union. When a condition precedent to admission relates to the future regulation of some private proprietary or business interest, it may be enforceable in the courts. If the national government as an owner of land makes an agreement with a state with respect to the future disposition of that land, this has been considered by the Supreme Court as a contract which does not make the state politically inferior to any other state; therefore the state cannot disregard it after admission into the Union.

Duties of states to Union

The United States could not exist without the states, and because of this certain duties devolve upon the states which must be performed in order that the Union may be preserved. The duties of states to one another will be considered in the next chapter. At this point only those duties which the states owe the federal government will be considered.

1. To conduct federal elections

The states are under a duty to conduct elections for federal officers. Presidential electors are state officers and they are selected in such manner as the legislature of the state directs. If there is a dispute over an electoral vote the state is given a share in settling the controversy. Congress does not attempt to settle a question of disputed electoral returns from a state until the state itself has failed to do so. United States Senators formerly were chosen by state legislatures, and even under the present system of popular election the legislature and governor of a state participate in filling vacancies in the senatorial representation from their state. Members of the lower house of Congress are elected from districts in most instances, and these are laid out by the state legislature. For many years Congress made no rules governing the conduct of Congressional elections. At the present time many phases of them are still regulated by

state law and they are administered entirely by state election officers. Thus the states play an important part in the conduct of federal elections. If they were to refuse to perform their duties in this connection the Union would soon fall apart. There seems to be no method of compelling a state to conduct federal elections, but it is very unlikely that any state would refuse to perform this function.

2. To consider amendments

When Congress submits a proposed constitutional amendment to the states, it will designate whether the proposal is to be considered by the state legislatures or by conventions formed in each of the states. Since these bodies receive their power to act not from their respective state constitutions or law but from the national constitution, anything in any state constitution hindering them from discharging their national obligation to consider the proposed amendment would be repugnant to the national constitution. They are bound only to consider the proposal, not to ratify it. Each legislature or convention must decide for itself whether to affirm or reject the amendment.

3. To appoint militia officers

Congress is given the power to organize, arm, and discipline the militia, but the states have the duty to appoint officers of the militia. If the states failed to appoint militia officers, that branch of the military organization of the United States would be rendered ineffectual because Congress has no power to appoint them. The state is, therefore, under a duty to appoint officers of the militia and is also obliged to train the militia in accordance with rules and regulations prescribed by Congress.

4. To refrain from secession

The states owe a duty to the Union not to secede. A bitter controversy raged for many years following the foundation of the present central government as to whether a state could or could not secede from the Union. The dispute was settled for all practical purposes by the Civil War. It is now settled that the Union is an indissoluble one and that no state can secede from it without the consent of the other states. The Union is intended to be permanent.

Rights and privileges of states

Not only do the states owe certain duties to the Union, but the Union and the national government owe certain duties to

the states. One of these is to protect the states against foreign invasion. The states are not permitted to maintain an army or navy, so they are unable to defend themselves against a foreign enemy. It is only just, therefore, that the central government should be bound to aid the states in case of invasion. There is little danger that it will not do so, for an invasion of a state is also an invasion of the United States and would be regarded ordinarily as a cause for war.

1. Protection from foreign invasion

A second right of the states is to receive aid in suppressing domestic uprising. If the state legislature is in session it is the body authorized to ask the President for help, but if the legislature is not in session the governor of the state may issue the call for help. It is not always easy to tell what constitutes an uprising. The governor may ask the President for assistance, but the President may not think that the situation is serious enough to warrant sending regular troops into the state. In such a case the President is the final judge of whether or not he will send troops into the state in answer to the call of either the governor or the legislature. The President may in some cases send troops into the state on his own initiative, and even against the protest of the state governor. This may be done if the disturbance is of such a nature that it interferes with some activity of the federal government, such as carrying the mails. The same may be true in case some activity which is under federal regulation is being interferred with. Interference with interstate commercial transactions would come in this class. A distinction should be made between the cases where the disturbance affects some federal function and where only state interests and the enforcement of state laws are involved. The federal government may always act in the first case, but may or may not act when requested by the state to do so in the second.

2. Aid in suppressing domestic uprising

A third privilege of the states is that of territorial integrity. No state may have its boundaries changed or any of its territory taken away from it without its consent.

3. Guarantee of territorial integrity

The fourth privilege is that of a republican form of government. It is not easy to define the term, but it was probably used

4. Republican form of government

by the founders of our government in the sense of some type of popular government, such as representative or democratic as distinguished from the autocratic or oligarchic types. It is to be presumed that when Congress admits a state to the Union the government of that state is republican in form, and because of this any state whose representatives are admitted by Congress is said to have a republican government. The President could declare a state government unrepublican in form, but if Congress admitted the representatives from that state to their seats, a very awkward situation might arise should he attempt to pass upon this question. During the Reconstruction period Congress established military governments in several of the Southern states, and the power to do this was said to be derived from the duty of the federal government to guarantee a republican form of government to the states. Most people would perhaps consider military government quite different from republican government as the latter term is commonly understood at the present time. At one time each of two rival factions in Rhode Island claimed to be the rightful government of that state. Each of them appealed to the President for aid in suppressing the other. One of them collapsed before its representatives came to Congress, so Congress did not have to pass upon the claims of the two governments. The President had, however, indicated his intention of coming to the aid of the charter government in case his help should be needed to suppress the Dorr faction. The Supreme Court of the United States will not attempt to pass upon the question of which of two governments in a state is the legal one, but will look to see whether Congress or the President has passed upon the question, and if either of them has done so the court will follow the decision made by them. Such questions are called *political questions* because their final disposition rests with the political departments of the government rather than with the judicial branch.

5. Each state to have two Senators

In order to preserve the equality of the states in the United States Senate the constitution provides that no state shall be deprived of its representation in the Senate without its own

consent. This does not mean that this portion of the constitution cannot be amended, as some have thought, but means that in order to amend the constitution so as to change this clause the particular state whose representation in the Senate is to be changed must be among those ratifying the amendment; or, if there are several states affected, it may mean that a unanimous ratification will be required.

6. Ports to be free from discrimination

A sixth privilege of the states is to be free from any preference by Congress "by any regulation of commerce or revenue to the ports of one State over those of another." The purpose of this provision was to forbid Congress favoring one state over another commercially. Congress may favor one port over another. That is done every time Congress votes to improve the harbor of one port without at the same time improving the harbor of every other port. The regulations which were prohibited were those which would prefer one state and its ports over another state commercially.

7. Protection to vessels of each state

Closely connected with the provision just considered is the clause which provides that vessels bound to, or from, one state shall not be obliged to enter, clear, or pay duties in another. A vessel bound from Georgia to New York may not be forced to enter, clear, or pay duties at Norfolk, Baltimore, or any other port except the one to which or from which it is proceeding.

8. Immunity from suit

The state governments are immune from suit brought by natural persons in the federal courts, by virtue of the Eleventh Amendment. This means that a state may not be sued in the federal courts by a citizen of another state or of a foreign state. The amendment has been interpreted as rendering the state immune from suit, in the federal courts, which may be brought by citizens of the defendent state itself. And it should be remembered in this connection that a state can be sued in its own courts only by its own consent.

States and foreign relations

The founders of the present national government were very anxious that its control of foreign relations should not be interfered with by the states. To this end, the framers of the constitution included several explicit restrictions on the states which

Restrictions on states

were designed to exclude the states from any control over this subject. These are four in number.

1. Army or navy

The states are forbidden to keep troops or ships of war without the consent of Congress. The power to maintain an army and navy as well as to declare war is given to Congress, and from the nature of the questions involved, exclusive control over their settlement is centered in the national government. The states do not need an army or navy to protect themselves from one another because a judicial method of settling disputes between them was provided for in the grant of jurisdiction to the Supreme Court. Neither do the states need an army to protect themselves against foreign nations because the central government has guaranteed them protection against foreign invasion. This restriction refers only to a regular army and navy and does not mean that the states may not maintain a state militia for the preservation of order. If, for some special reason a state wishes to keep an army or navy, it may do so if it obtains the consent of Congress.

2. Declaring war

The states are further precluded from any control over foreign relations by a limitation on their power to engage in war unless they are actually invaded or are in such danger of imminent invasion that delay cannot be tolerated. It has been said that if such a case were to arise the "probabilities are that war would be resorted to by any of the states whether there was a provision in the constitution authorizing it or not."

3. Letters of marque and reprisal

The federal constitution further provides that "No state shall . . . grant any letter of marque or reprisal." Letters of marque and reprisal are so closely connected with the war power that it is not surprising to find that the power to issue them is given to Congress and denied the states. A *letter of marque* is a commission from the government to a private individual authorizing him to take the property of a foreign state or of a citizen or subject of a foreign state as reparation for an injury committed by the foreign state or its citizens. Coupled with this authorization is a grant of power to retake property which has been seized by a foreign state or its citizens. This latter grant is called a

letter of reprisal. Since 1856 most civilized nations have refrained from issuing letters of marque and reprisal. The practice of thus licensing private individuals to prey on the commerce of a foreign nation was known as privateering.

4. Treaties with foreign states

The states are forbidden absolutely to make treaties. But they may make compacts and agreements with foreign nations if Congress consents to them. The reason for inserting these provisions in the constitution is obvious. The framers of that instrument wanted to make certain that the states would not be able to enter into any kind of an agreement with a foreign state except with the consent of Congress.

States indirectly affect foreign relations by:

The states may still, however, seriously embarrass the central government in its relations with foreign nations. In some instances the action or inaction of the states has led to results serious enough to constitute a cause for war, had the foreign state whose interests were involved so chosen to consider them.

1. Failure to protect aliens

For example, aliens sometimes are mobbed and their property destroyed. The foreign state whose citizens have been the object of such outbreaks quite properly demands that the central government make amends and bring the offenders to justice. The central government then answers that it has no power to act in this situation and that the states alone have power to arrest, try, and punish persons committing such crimes. The complaining state is assured that the government at Washington will do its utmost to persuade the state in which the offense took place to mete out justice to the offenders. Naturally the foreign state is not satisfied with such an explanation and feels that this is a means of evading responsibility for acts committed against the injured aliens. The states sometimes refuse to act in such cases, and in a few instances Congress has felt that the position of the federal government was so weak that it made monetary amends to the families of the unfortunate aliens. It seems that Congress has the power to provide for the trial and punishment in the federal courts of persons who commit crimes against aliens resident in the United States, but so far, despite the requests of several Presidents, no action has been taken by that body to

remedy this rather serious defect in our governmental system by giving the federal courts jurisdiction over this class of cases.

2. Discriminatory legislation

In some states positive legislation has been enacted which discriminates against foreigners. Sometimes the discrimination occurs in the form of denying aliens the privilege of holding land, owning land, or engaging in certain occupations. At other times it appears in the form of segregation in separate schools. As a result of such discrimination, complaints are made to the national government, because in many cases the foreign state feels that treaties which it has made with our country have been violated. The states have caused the central government considerable embarrassment in this way at times. On the whole, however, despite the instances given in the preceding paragraphs, the states as such have comparatively little control of, or influence on, foreign relations.

States may not control currency

Before 1789, both the states and the central government had the power to issue paper money. The currency of the country was in hopeless confusion. Many varieties of paper money and innumerable foreign coins circulated as media of exchange. When the new central government was established it was given full control over the monetary system of the United States, and to make certain that this control would not be encroached upon by the states the latter were forbidden to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debt. The states have not attempted to coin money, but they have tried to circumvent the restriction on the issuance of paper money.

Bills of credit

A bill of credit is a written promise to pay a certain sum of money issued by a state on its own credit, designed to circulate as money and actually so circulating. This does not include ordinary bonds, and the states may issue them without violating the prohibition relative to bills of credit. The Supreme Court has been liberal in its interpretation of this restriction because of its desire not to restrict unduly the borrowing power of the states, and it has upheld state issues of paper whenever it was possible to regard them as purely borrowing transactions.

Paper money issued by a bank, all or most of the stock of which was owned by the state government, has been allowed under the liberal interpretation of this restriction made by the Supreme Court. It was said that such an issue was not contrary to the bill of credit restriction, because the general credit of the state was not pledged to redeem the issue. A 10 percent tax on state bank notes, the constitutionality of which was upheld and which resulted in driving out of circulation all state bank notes, was levied by Congress in 1866.

Restrictions on taxing power

Several restrictions on the states' power to tax are to be found explicitly stated or implied in the constitution. Those powers specifically prohibited relate to export and import and tonnage taxes.

1. Import and export taxes

The states may not tax imports or exports without the consent of Congress. They may collect fees to pay for inspections. Any surplus after defraying the cost of administering such laws is to be paid into the Treasury of the United States. To make sure that the states did not hamper foreign trade under the guise of inspection, the constitution authorized Congress to revise such state inspection laws. While states may not tax goods in foreign commerce, they may tax them when the goods become commingled with the goods of the state if the tax does not discriminate against them because of their foreign origin. The question is: When do the goods become commingled with the goods of the state? One test, the one suggested by Chief Justice Marshall, is: Imported goods become a part of the mass of property of the state when the original package in which they were imported is broken. This, the so-called *original-package* doctrine, has served since 1827 as a means of determining when the foreign journey of goods has ceased. Although it has not been wholly satisfactory as such a test, it is still used. But it has been wholly abandoned as a test to determine the end of the interstate journey of goods.

2. Tonnage taxes

The states are further prevented from interfering with interstate or foreign commerce by the prohibition on tonnage taxes. The internal capacity of a ship is measured by tons of one

hundred cubic feet each. To tax a vessel by the ton is, therefore, to tax its capacity as a carrier, and to prevent this was the reason for the prohibition. The states may tax ships as property, but not as instrumentalities of commerce. If Congress consents to allow the states to levy tonnage taxes, the latter may do so; but in recent years Congress has rarely given this consent, although in the early years of the government it was given in a number of instances. Since Congress has taken over the improvement of harbors, the states have little excuse for seeking Congressional permission to levy tonnage taxes.

3. Taxes on interstate commerce

We may turn now to the implied limits on state taxing power. The restriction of the states' power of taxation arising from Congressional control of interstate commerce is an example of an implied limitation. A state may not directly burden interstate commerce by taxation. Goods or persons in the course of transportation in interstate commerce may not be taxed by the state. The rule is: When interstate goods become commingled with the goods of the state so that taxes applied to them do not discriminate against them because of their out-of-state origin, they become subject to state taxation. In contrast to foreign goods, there is no handy formula like the original-package doctrine which can be used to determine the point at which goods lose their interstate character. It is, rather, a factual matter to be determined in light of the circumstances surrounding the commerce in a particular instance. It is true that a rule of a kind is followed. Goods which come to rest in a state at the discretion of the owner are usually considered to have lost their interstate character so far as the state's power to tax is concerned. However, the increasing need of the states for revenue has been reflected in Supreme Court decisions which tend to find goods losing their interstate character earlier than did goods in the same circumstances a century ago. One tax lawyer remarked—somewhat facetiously but with sufficient justification to make his observation a reasonable caricature—that we are rapidly reaching the condition in which there is no interstate commerce from the standpoint of the power of the states to tax.

The fact that property located within the state is used in doing interstate business does not of itself remove it from the state's power of taxation. Railroad cars and tracks may be taxed by the state as property, and taxes may also be levied on the earnings of railroads from business done inside the state. A railroad warehouse may be taxed the same as any other building in the state, despite the fact that it may be used only for the storage of goods which are destined to pass into interstate commerce. A factory may be taxed by the state even though its entire output is to be shipped to some other state. Manufacturing is not commerce and it is interstate *commerce* which may not be burdened by state taxes. The states are allowed to exact such inspection fees as may be necessary to cover the cost of inspecting goods or persons in interstate commerce, but the inspection must be reasonable and capable of justification under the police power of the state. The states' power of taxation is even more restricted with regard to foreign commerce than with respect to interstate commerce.

4. Taxes on federal instrumentalities

Another implied limitation on the taxing power of the states is one which inheres in the very nature of the Union. The states may not tax in such a way as to burden the national government or the exercise of its functions, as, for example, post offices and land in a military reservation. Nor may states tax activities of the United States, the operations of arsenals, the movement of a military force, or the collection of mail. What about property owned by private persons but used to carry on national functions? Formerly, all cases in which there was any doubt as to whether a state tax burdened the national government or interfered with its functions were resolved against the state power. But for some reason, probably state need for income, the Supreme Court reëxamined the assumptions out of which the line dividing permissable from prohibited state taxes had been marked out. And now many taxes are permissable which were formerly unconstitutional.

The application of the rule stated above—that the states may not burden the national government or its functions—may be

a. Congressional permission to tax

determined by Congress. In all cases in which it permits state taxation there is no constitutional objection. Examples of this are: An act of 1925 authorized the states to impose a franchise tax on national banking associations. In 1939 Congress permitted the states to levy a non-discriminatory tax on the salaries of federal officers or employees. And in 1947 Congress permitted state taxation of gasoline sold on military or other reservations to private persons, as well as collection by the states of sales, use, and income taxes from private persons located in such areas. Another procedure for achieving the same purpose is for Congress to require United States property, such as nationally owned housing or property owned by the Tennessee Valley Authority, to make what are called "in-lieu-of" tax payments. That is, the operators of such property are required to make payments to the state governments and their subsidiaries—such as counties and cities—equal to the amount which would be due if the property were privately owned.

b. Silence of Congress

When Congress is silent with respect to the taxing power of the states, it is difficult to apply the rule of "no tax" which burdens the national government. Taxes assessed against private income from lessees of oil wells or mines on restricted Indian lands, once held not taxable by the states, now are constitutional. State income tax on the income of a private contractor with the government or a sales tax on the purchase of materials by contractors for use in performing cost-plus contracts with the United States are proper. But an inspection fee on commercial fertilizer distributed by the United States under the soil conservation program is not. This was deemed to be a burden on a governmental function.

State control over commerce

The states still control the commerce which begins and ends within their borders, provided that at no time does the transportation of goods go beyond the borders of the state. The Supreme Court is constantly broadening the definition of interstate commerce and restricting that of intrastate commerce. The reason for this is the growing need for uniform commercial regulation, and the increasing volume of business which is being transacted

between the people of the several states. If the transaction at any time becomes interstate in character, it is treated as having been interstate from the very beginning. But it should not be imagined that the states may not make any rules or regulations which may affect interstate commerce. Mention has been made of the fact that Congress is given the power to control commerce with foreign nations and that this control is perhaps exclusive and can be supplemented but little, if at all, by the states.

The Congressional power to control interstate commerce is, however, not exclusive. There are numerous phases of interstate commerce which have not been regulated by Congressional statute. The states are allowed to regulate those phases of interstate commerce which are susceptible of local variation in treatment and do not require uniform regulation throughout the United States, provided that Congress has not covered the field by statutory enactments. For example, the states often require passenger trains to stop at towns of a certain size or of a particular character, such as county seats, and it is also sometimes required that towns of a certain size shall be entitled to a given number of train stops per day. If such state laws are reasonable, they are valid and binding on the railroad companies even though the train involved is one that runs through several states. The states may likewise fix the speed at which trains shall be run when passing through cities, regulate the heating of cars, and may in the interest of public safety provide for the inspection of dangerous materials destined to go into interstate commerce and require that the same be properly labeled. They may also require railroad engineers to pass tests for color blindness. The states may regulate all of these phases of interstate commerce until Congress enacts a statute which conflicts with the state regulations in question; but when Congress steps in, the states must step out unless the state laws do not conflict in any way with the federal laws. A difficult question sometimes arises when a purely intrastate transaction is of such a nature that it affects interstate commerce. The general rule is that Congress may not regulate intrastate commerce. That is reserved to the states. But the Su-

Police power and interstate commerce

preme Court has decided that Congress may remove state regulations of intrastate commerce which are of such a nature that they discriminate against interstate commerce. Intrastate rates have occasionally been prescribed by the states which discriminate against interstate rates fixed by Congress or the Interstate Commerce Commission. In such cases Congress or the Commission has been permitted to change the intrastate rates so as to eliminate the discrimination against interstate commerce. For purposes of regulation the commerce which is carried on with our insular possessions is treated as foreign commerce and is subject to the exclusive control of Congress.

Expansion of power

It must not be thought from what has been said in the foregoing paragraphs upon the power of the states to regulate commerce that the states are unaffected by the expansion of national regulation over interstate commerce. In two ways the expansion of national activity in this field has affected the states. In the first place, Congress by virtue of some of its enactments has stepped into a field and has regulated it. Prior to the time of this step the states had regulated it. Now the province of the states is narrowed considerably, because all that the states can do is to supplement Congressional action and at many points the old state law is superseded by the new national law. In the second place, the Supreme Court has interpreted national power in this field liberally. Hence, even though a transaction takes place wholly within a state, it may so affect similar transactions in other states that in order to protect the entire related commercial network that may be involved Congress may step in and regulate it under its power over interstate commerce. Thus, trade practices or labor practices in a state may be nationally regulated because of their immediate effect upon the national economic process. These two factors have tended to subordinate the states in the field of business regulation, but it should not be imagined that the states have withdrawn from this field entirely. In many cases both national and state activity have expanded. In some instances state activity has become less important because of the entrance into the field of the national government.

The national constitution contains several restrictions on state

powers which protect certain rights and privileges of the individual and his property against state action. These concern (1) persons accused of crime, (2) personal freedom, (3) the right of suffrage, (4) the privileges and immunities of citizens of the United States, (5) the life, liberty, and property (including contracts) of the individual.

Restrictions protecting:

Both Congress and the states are forbidden to pass *ex post facto* laws. All *ex post facto* laws are retroactive but not all retroactive laws are *ex post facto*. As that term is now understood it relates only to criminal laws, although there is some doubt whether the framers of the constitution intended it to be restricted to this meaning. *Ex post facto* laws are retroactive criminal laws which operate to the substantial disadvantage of persons accused of crime. If John Blank drove his automobile down a country road at the rate of fifty miles an hour in 1920 and if in 1925 the state legislature passed a law imposing a fine of twenty-five dollars upon every person convicted of having driven an automobile over thirty miles an hour on a country road since 1915, such a law would be *ex post facto* as applied to John Blank, and would be declared unconstitutional if he contested it. The same would be true if a state law imposed a greater punishment upon a person than that provided for when the act in question was alleged to have been committed. If the methods of trial are changed subsequent to the commission of a crime and such change operates to the substantial disadvantage of the accused person, it will be *ex post facto*. If the changes do not work a hardship on the accused person, they are not *ex post facto* and will be allowed. Changes in the law which lessen the rigor of the punishment to be imposed are permissible and are not *ex post facto*. Retroactive civil laws are not forbidden and are constitutional.

1. Persons accused of crime

a. Ex post facto laws

The states are forbidden to pass bills of attainder. A bill of attainder is a legislative conviction for crime. When the punishment prescribed is less than death, it is often called a bill of pains and penalties. An example of a bill of attainder is the following:[4]

b. Bills of attainder

[4] See 1 Watson, Constitution of the United States, 736, where the subject of bills of attainder is discussed in detail.

Be it therefore enacted by the General Assembly, That . . . said Josiah Philips . . . shall stand and be convicted of high treason, and shall suffer the pains of death. . . .

Such bills had been passed by Parliament in England in the seventeenth century usually involving a deprivation of all rights of property as well as capacity to transmit or inherit property. To make certain that bills of attainder would not be passed by either Congress or the state legislatures this restriction was placed in the Constitution of the United States.

2. Personal freedom

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This amendment seeks to abolish slavery in whatever form it may have existed in the United States. But it did no more. It did not give the colored race the right to vote nor did it give them any other privileges which they did not have before the amendment was passed. The Thirteenth Amendment did not adjust the social rights of the white and colored races, but only abolished the system of slavery. It relates to a condition or status of slavery and not to race, color, or class.

Not every form of involuntary servitude was abolished by the amendment, but only those forms that were customarily associated with slavery. Involuntary servitude as a punishment for crime is still permissible and military service is not included within the prohibitions of the amendment. Certain types of contracts are specifically enforceable by courts and some of these are personal-service contracts. Contracts of employment whereby a sailor agrees to make a voyage on a ship cannot be broken by the sailor, but must be kept until the voyage is at an end. Until recently courts would aid the officers of the ship by ordering sailors back to their duty if they had tried to escape when the ship touched at some port. The Thirteenth Amendment does not apply to this kind of involuntary servitude.

However, for fear of violating the amendment, courts will not compel specific performance of some personal-service contracts. For example, a singer or writer who has contracted to

work for a certain company may not be ordered to carry it out specifically, but courts of equity may prevent him from performing the same kind of service for any other. This means that the persons in question must work for the employer for whom they agreed to work or cease working altogether until the contract period has elapsed. Consequently, they will probably go back to work for the first employer, although they do not wish to do so. The terms slavery and involuntary servitude must be understood in the light of the situation which existed when the Thirteenth Amendment was added to the constitution. Peonage, that is, compulsory service or imprisonment based on debt, is included within the prohibitions of the amendment because it is essentially a form of slavery.

3. The right of suffrage

The Fifteenth Amendment forbids the states and the United States to deny to any person the right to vote because of race, color, or previous condition of servitude. This does not mean that the states may not fix qualifications for voting, but that they may not require as a qualification for the suffrage any test which falls within the words used above. Other tests than those of color or race may still be imposed, and indeed are imposed by many states in one form or another. One example is the educational test. The Southern states made various attempts to circumvent the Fifteenth Amendment during the years immediately following the Civil War, and not without some slight measure of success. One by one, however, the devices which were resorted to were assailed in the Supreme Court and were declared to be unconstitutional.

Fifteenth Amendment

One of the last and most ingenious means of evading the amendment was to prevent Negroes from voting in the Democratic primary. This was done first by barring them by statute. When this was declared to be unconstitutional, a statute was passed, authorizing the Democratic party to determine its own membership—which it then proceeded to do, excluding Negroes. When the Supreme Court declared this a violation of the Fifteenth Amendment, no other statutes were enacted, it being understood that the Democratic party would on its own

initiative bar Negroes from its own primary. This too was finally invalidated by the Supreme Court in 1944. This rule applies even when a state repeals all statutes relating to primary elections, as was done in South Carolina. It now appears that the Southern states have exhausted all legal means of singling out Negroes to prevent them from voting.

Nineteenth Amendment

The Nineteenth Amendment also imposes a restriction upon the states by forbidding them to deny the right to vote to any person on the basis of sex.

State representation in Congress reduced

In section 2 of the Fourteenth Amendment the three-fifths rule is abolished as the basis of apportionment for representatives in the lower house of Congress. It is further provided,

> 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.

From this it will be seen that the states may deny the right to vote to male citizens twenty-one years of age if they wish to do so, provided the denial is not on the ground of race, color, or previous condition of servitude. The Nineteenth Amendment adds another forbidden basis of discrimination—sex. But if the right to vote is denied, the state is liable to have its representation in the lower house of Congress reduced. This portion of the Constitution of the United States is perhaps violated by some state at every federal election, but no attempt is made to enforce the section. For many years the Republican party threatened to reduce the basis of representation of some of the Southern states, but nothing has ever been done in the matter. If the provision were to be strictly enforced, some of the Northern states also would be subject to a reduction of their representation.

4. The privileges of United States citizenship

Each person living in a state of the United States is subject to two governments, the government of the United States and the government of the state in which he lives. A person may be a citizen of a state and a citizen of the United States. The Fourteenth Amendment provides that a citizen of the United States is also a citizen of the state in which he lives by virtue of his residence therein. United States citizenship has become the more important of the two since the Civil War and little attention is now paid to state citizenship. In order to safeguard the privileges and immunities of United States citizenship, the first section of the Fourteenth Amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." To go to and come from the national capital without molestation by the states is one of the privileges of United States citizenship. The right of qualified persons to vote for members of Congress is another. The rights to use the navigable waters of the United States and to have the protection of the national government when abroad in a foreign country are other examples of the privileges derived from national citizenship. The privileges and immunities which a person receives because of his state citizenship will be considered in another connection.

5. Life, liberty, and property

Some of the most important safeguards to the person and property of the individual against action by the state government are to be found in the first section of the Fourteenth Amendment to the national constitution.

a. Due process of law

Restrains states only

That amendment provides that no state may deprive any person of life, liberty, or property without due process of law, and also that no person shall be deprived of the equal protection of the laws. This amendment is aimed only at *state* action and does not restrain the national government. Neither does it protect an individual against action by private persons who may injure him. It is the *state* and the state alone that is forbidden to deprive a person of his life, liberty, or property without due process of law. If a group of private individuals should conspire to deprive a person of his liberty by kidnaping him and keeping

him in confinement against his will, the Fourteenth Amendment would not afford redress to the injured person against the offenders. But if some of the officials of the state committed such an act, the person would be protected by the Fourteenth Amendment. The state and not the central government is the proper authority to inflict punishment for injuries committed by private individuals. The state alone is entrusted with the function of keeping local peace and order.

Who are persons?

Who is a person within the meaning of the Fourteenth Amendment? The term person is used in its broadest sense and refers to a legal person as well as a natural person, and is broader than the term citizen. Aliens as well as citizens of the United States are protected by the Fourteenth Amendment. So are corporations, for they are legal persons. The term life is also used in a very broad sense and refers not only to the bare existence of a human being, but includes much more than the right to live. The word liberty is a very vague one and the content of it is not easy to define. People do not have absolute and complete liberty, but the liberty to engage in an occupation whereby to earn a livelihood is included in the term as used in the first section of this amendment. From this it should not be inferred, however, that the states may not regulate occupations. The state may regulate and even prohibit certain occupations when their regulation or prohibition is deemed necessary for the welfare of the people. Property includes more than the mere rights which a person may have in a piece of ground or a building. It also includes the right to make contracts to sell one's services as well as contracts to sell material things.

Life

Liberty

Property

Due process and procedure

The requirement of "due process" is applicable with respect to matters both of procedure and of substantive right. The state may deprive a person of life or liberty or property in a great number of cases providing it does so with due process of law. For example, a murderer may have to pay the penalty of death in some states for the commission of his crime. The state may take his life but must do so with due process of law. The phrase "due process of law" is of English origin and in its earlier mean-

ing referred primarily to the method of trial which was to be provided for the settlement of criminal and civil cases. The jury was considered an indispensable part of the machinery of a fair trial. So too was the element of a fair hearing. The privilege of being confronted by one's accuser was thought to be very important. There were several elements similar to those just mentioned which were associated with a fair trial, and by custom a trial held in accordance with these requisites came to be regarded as due process of law. Due process meant fair process in the application of the law. It provided a standard to measure the fairness of any official application of the law to private persons. The procedural aspects of due process therefore appear as limitations on courts and executive officials.

Expanding procedure

In the early days people were concerned with methods of conducting trials and so it was natural that for many hundreds of years due process of law should be concerned mainly with procedure. The elements which compose due process of law at one time will be quite different from those thought necessary to constitute due process at another time. Ideas as to what is a fair trial change from one generation to the next. For many years people thought that a jury of twelve men was indispensable to a fair trial, but now the people of many states have decided that a trial by a jury of six men for petty cases is consistent with modern ideas of due process of law. Prosecution upon any information filed by the public prosecutor is now considered fair, although for several hundreds of years an indictment by a grand jury was thought to be necessary. Many states now permit persons to be tried for alleged crimes who have not been indicted by the grand jury. Changes in methods of trial are usually very slowly made, and properly so; but whenever the people and courts think that one of the elements formerly considered indispensable can now be dispensed with, the legislature of the state may make the change.

Judicial trial not always required

A judicial trial is not always required, and some types of cases are seldom brought before the courts for settlement. Tax-assessment disputes are usually settled by boards. The settlement of

such disputes by a non-judicial board is considered to be in accordance with the requirements of due process of law because this has been the accepted method of settling such disputes for hundreds of years and the propriety and fairness of it have seldom been questioned. From this it will be seen that custom and tradition are influential in determining what constitutes due process of law in any given case.

Due process expanded

Due process of law has now come to include more than a standard of procedure, however, and is also applied to rules of substantive law. Arbitrary laws are said to violate due process. Legislatures must not pass unreasonable or oppressive laws, and if they do pass such laws they should be declared unconstitutional by the courts because they are contrary to the due-process clause of the national constitution. The evil to be remedied, the method chosen for remedying it, the economic and social aspects of the question, are all taken into consideration in judging of the reasonableness of a law. What is reasonable in one case might not be so in another. Thus it will be seen that due process of law has become a standard of legislation as well as a standard for judicial procedure.

Eminent domain

The state has the power to take a person's property away from him if it wishes to use it for a governmental purpose. This power is called the power of *eminent domain*. But this power may not be exercised except on the condition that a reasonable price shall be paid for the property taken. Otherwise the seizure of the property is considered arbitrary and is held to be contrary to the due-process clause.

Police power

The due-process clause also operates as a limitation on the exercise of the police power of the state. Under its police power the state makes rules and regulations for the health, morals, and general welfare of the people.

Police-power regulations must, however, measure up to the test of reasonableness prescribed in the due-process clause. States may pass laws providing that miners must not work more than a fixed number of hours per day, as, for example, eight or ten hours. This is not considered arbitrary, although it limits the

length of time a miner may work as well as the length of time for which a mine owner may employ him each day, because the benefits derived from such limitations on personal freedom outweigh the resulting inconveniences. If it is shown that longer hours of work are injurious to the miners and that the health of persons engaged in this type of work suffers as a result of long hours of underground work, the benefit is sufficient to justify the law. But if the state should provide that miners could not work more than two hours each day, such a law might be unjustified and arbitrary, because there is no reasonable relation between such a reduction in hours and the health or welfare of the miners. An extreme application of the police power is illustrated in the power which the state has to blow up a building which is in the path of a rapidly spreading fire in order to prevent the further spread of the conflagration. This is justified by the extreme emergency which exists and no compensation need be made to the owner of the building.

b. Equal protection of laws

A person is also protected by the Fourteenth Amendment against state action which denies to him the equal protection of the laws. This does not mean that all people must be treated alike. Class legislation is not forbidden by this section of the constitution, nor, for that matter, by any other section. But such class legislation as may be passed must be reasonable and based upon some substantial difference between the classes created. A law prohibiting Irishmen from walking on the same side of the street as Englishmen would doubtless be unconstitutional on the ground that it denied to the Irishmen the equal protection of the laws. There is no good reason for separating these two groups of people in this manner. Therefore the state cannot keep them from walking together. If, however, experience had shown that the preservation of peace and order required that they must be kept separate, a law like the one referred to above would perhaps be constitutional. On this reasoning laws providing for separate coaches for different races have been held constitutional. Farmers may be treated differently from bankers because their needs are different in many instances. If there is

some reasonable basis for treating groups of people differently from others, then class legislation based upon this difference is perfectly constitutional.

Supreme Court and due process and equality

It must seem clear to the reader that the task of deciding whether a law complies with the vague requirements of due process and equal protection of the law is a very difficult one. The Supreme Court of the United States is the body to decide this question in each case wherein a state law is attacked on the ground that it violates the provisions of the first section of the Fourteenth Amendment. The court has allowed the state legislatures considerable latitude in the enactment of legislation touching matters similar to those mentioned above. But differences of opinion are almost certain to arise over the wisdom or unwisdom of many of these laws, and the judges of the Supreme Court are not without their own views on many of the questions presented in cases involving them, nor should they be. The court sometimes decides that a given statute is unconstitutional because it feels that the law is arbitrary and unreasonable and therefore is contrary to the due-process clause. The views of the justices on such questions as the reasonableness of a statute will quite naturally be affected by their age, training, and previous experience. On the whole, however, the United States Supreme Court has been conservative, although it has not been so conservative as many people would seem to believe. Any prolonged demand for social or economic legislation will be likely to result in a gradual change in the attitude of the justices toward the question of what constitutes due process of law and equal protection of the laws in that particular connection, and the legislation desired will eventually be upheld, although it may previously have been declared unconstitutional.

c. Obligation of contracts

"No State shall . . . pass any . . . law impairing the obligation of contracts." This provision of the national constitution was inserted for the protection of creditors because of early colonial and state laws designed to prevent creditors from bringing suit to collect debts. All sorts of contracts, except that of marriage, are included within this clause. Marriage is a contract,

but the legal incidents and results of it have long been fixed by the state and not alone by the wishes and intentions of the parties to the agreement.[5]

The contract itself is not protected, but the *obligation* of the contract is. What is meant by the obligation of a contract? It is the legal obligation under which people are placed who have become parties to a certain type of agreement, an agreement which the rules of law recognize and enforce. Agreements of this type are called contracts. It is the means by which this compulsive feature of a contract is enforced which is intended to be protected. The obligation is largely concerned with the remedy for enforcing the contract. If the remedy is entirely taken away, the obligation of the contract has been impaired. If contracts are broken, legal remedies are available to the injured party. These remedies are protected by this clause of the constitution. But not every change of remedy constitutes an impairment of the obligation of the contract. It is not always easy to tell whether a particular change in remedy falls within the protection of the so-called "contract clause." For example, suppose Smith makes a contract with Jones whereby Jones promises to pay to Smith a certain sum of money. The legal relation of debtor-creditor then exists between Jones and Smith. Under the rules of law which are applicable to this agreement and which fix the rights of the parties to it, let us suppose that one of the remedies which Smith has against Jones is to have the latter put in a debtors' prison for failure to pay Smith the money due him. Let us suppose further that Smith may also sue Jones in a court of law if Jones should fail to perform the contract. Smith then has two remedies. Suppose next that the state legislature passes a law abolishing imprisonment for debt. Would not that seem to deprive Smith of one of his remedies against Jones? It would seem so. But Smith would still have an adequate remedy left. He can still sue Jones as before. To have Jones thrown into jail would be a punishment to Jones, but would perhaps not aid Smith in getting his money. To make this change in remedies

Concerns remedies

[5] For further comment on the rules relating to marriage see pp. 71–72.

would not result in substantial injury to Smith, and only substantial deprivations of remedies are prohibited by the contract clause. The Supreme Court has had to decide in each case whether the particular change in remedy which is involved constituted enough of an impairment in the obligation of the contract as to make it unconstitutional. This has often been a difficult task.

Charters are contracts

Not only may the state not impair the obligation of contracts between individuals, but it may not impair the obligation of contracts between the state and an individual. If the state issues a charter to a group of people and authorizes them to form a corporation, that charter is a contract between the state and the corporation and may not later be impaired by the passage of state laws calculated to violate the terms of the charter. The reason for this is that the Supreme Court held in a famous case, Dartmouth College *v.* Woodward,[6] that corporate charters were to be considered on the same plane as private contracts for purposes of applying the contract clause of the constitution. Most states now provide either in their general laws or in their constitutions that all corporate charters shall be issued subject to the power of the state to change them by later legislation in case that seems desirable. Then these laws are read into each charter by implication, even though they are not repeated in the charter word for word. In this way the effect of the Dartmouth College case has been minimized to a large extent.

Exceptions

The Supreme Court has also decided that there are some types of contracts to which a state may be a party which do not bind the states completely, as would be the case if the state were a private party. For example, the state may not limit its power of eminent domain. Neither may it alienate its police power. Illustrations of this rule are to be found in the power of a state to prohibit the manufacture or sale of alcoholic beverages even though it has previously granted a license to engage in that business, or to prohibit the conduct of lotteries after it has

[6] 4 Wheaton 518 (1819).

previously permitted them for a period of years prior to the prohibition.

During the depression of the early thirties of this century, the states felt the pressure of debtors for legislation to aid them by deferring the time of collection of mortgage debts. In some states, laws were enacted which provided, under a court procedure, for postponing the payment of such debts, and the question arose as to whether a moratorium of this kind was valid under the contract clause. The Supreme Court decided that under the grave emergency that existed, and in view of the safeguards that the law had placed around the interests of the creditor, the state legislature was acting reasonably in delaying the date of payment. While this is exactly what the framers of the constitution were seeking to prevent, it illustrates the extent to which the concepts of police power have developed in recent years in connection with contracts.

Extra-Constitutional Relations

We may turn now to a description of extra-constitutional, often informal, relations between the national government and the states. To note only the relations explicitly provided for in the constitution would caricature actual governmental conditions, as would an attempt to describe American home life by merely setting forth the legal relationship of parent and child. Without regard to the order of the origin of these relations, we may collect them for purposes of description under four headings: grants-in-aid, research, general coöperation, and wartime coöperation.

Grants-in-aid

One of the older and most important of these relations concerns money subsidies given to the states by the national government. Grants of money have been made on such a large scale for so long that a special name has been given to them—grants-in-aid. By this term is meant the conditional grant of money by a central government to a local government.

The conditions are fixed by the national statute which makes

1. Conditions

the money available to the states. The one condition found more frequently than any other is the matching requirement. This means that if a state is to receive any money, it must appropriate from its resources a certain amount to match national funds. The ratio of state to national funds varies. In some cases the states are required to use very little of their own money, while in other cases they must appropriate a dollar for each dollar they receive. Other conditions may include standards for the selection and management of personnel who are to administer the program, provision for proper governmental organization, processes of administration, materials to be used, and reports to be made.

Grants-in-aid are often made on a permanent basis. Congress does this by establishing the conditions under which the states may receive money for carrying on a given program, and then it appropriates money to pay the national share of the cost. The states can make their plans for future years to carry out the project with a reasonable assurance that Congress will continue to make money available. Sometimes, as during the depression and war years, temporary emergency grants were made. The extent of the money granted during the period 1915–1947 inclusive, the increase in grants, and the proportion of permanent to emergency grants can be seen from Table 1.

TABLE 1.

Fiscal Year	Total Grants	% Emergency Grants to Total Grants
1915	5,488,000	0
1920	77,115,000	0
1925	114,478,000	0
1931	183,484,000	11
1935	2,161,054,000	98
1939	904,474,000	40
1943	986,188,000	37
1945	865,418,000	32
*1947	1,208,200,000	5

*Preliminary figures.
Source: *State Government*, XX (November, 1947), p. 297.

An impression of the variety of purposes for which money is granted to the states, and the amounts given can be seen from Table 2. This is for the year 1947. 2. Purposes

TABLE 2.

Program	Amount in Millions of Dollars
Regular Grants	
Highways	$ 180.9
Agriculture and forestry	47.6
Vocational education	20.5
Vocational rehabilitation	14.6
Public health	33.4
Old-age assistance	515.7
Aid to dependent children	113.4
Aid to the blind	14.9
Unemployment compensation administration	59.8
Employment service	42.5
Welfare services	20.2
School lunch	78.0
Airports	2.0
Hospitals	0.6
Other regular grants	9.1
Total regular	$1153.2
Emergency Grants	
Highways	$ 23.0
Maternity and infant care	11.0
Other emergency grants	21.0
Total emergency	$ 55.0
Total Grants	$1208.2

Source: *State Government*, XX (November, 1947), p. 297.

Many persons are alarmed at the growth of the grants-in-aid system and at the use to which it could be put to destroy the federal relationship. Certainly Congress can accomplish ends by this method which the constitution does not give it power to achieve directly. No man in 1789 could have conceived of the national government determining for a state the location of a roadbed, or the materials to be used in the construction of the road, or that it could require a state to set up a particular 3. Effect on federal system

kind of governmental organization to manage the building of the road—all of which it has done. It may be observed, however, that the standards set by the national government have in general not been oppressive or unreasonable. To require a state to use a merit system in the selection and management of employees who are to handle grants-in-aid funds and thus prevent them from being stolen or wasted by patronage appointees, may actually result in undergirding popular government rather than being an attack on it. It must also be remembered that Congress is composed of representatives chosen in the states.

4. Restrictions on grants

There is no legal way of restraining Congress from giving any amount of money to the states so long as acceptance of the grants is optional. The Supreme Court has denied the right of either a state or a taxpayer to challenge the constitutional power of Congress to grant such money.[7] The controls over the amounts of money given to the states and the conditions attached to the receipt of money are political in nature. Members of Congress are elected by the people; they vote grants-in-aid and set up conditions for their expenditure within the limits permitted by public opinion. The overall policy both as to amounts of money given to the states and as to its effect on the federal relation is subject to the public will. The controls over this whole field are therefore the ultimate controls which always guide the formation of policy in any democratic society.

5. State reaction to grants

There is much criticism of grants-in-aid among state officials. This is opposition in principle to the system. But in practice they are for it; that is, seldom does a state refuse to accept a proffered grant. Perhaps the best illustration of opposition in principle but avid eagerness for grants-in-aid in practice was the action of the Indiana legislature in 1947. It declared that Indiana needs no "guardian and intends to have none," that the dollar lifted from taxpayers by Washington and sent back to the states lost weight in the journey. Then followed the Hoosier declaration of independence: "We propose hencefor-

[7] Massachusetts *v.* Mellon, and Frothingham *v.* Mellon, 262 U.S. 447 (1923).

ward to tax ourselves and take care of ourselves. We are fed up with subsidies, doles and paternalism. We are no one's stepchild. We have grown up. We serve notice that we will resist Washington, D.C. adopting us."[8] Forty days later the same legislators had voted to authorize the state or any subdivision "to accept" any "benefits" which might be granted by the national government, and it authorized any official "to do any and all acts, and to make any rule . . . or finding that may be necessary to coöperate with the federal government" in the allocation of money to Indiana.[9]

6. Reasons for grants

There are many reasons why grants-in-aid have been used. Two may be mentioned. Some states have inadequate financial resources to meet the people's demands for services. The national government, with its greater taxing power and vast resources, is able then to establish a floor under services to insure a minimum nation-wide performance. This is a recognition of a basic principle of taxation—that taxes are to be levied on the basis of ability to pay. The second reason for grants-in-aid is the failure of the states to supply the services the people desire. This may appear to be paradoxical, inasmuch as the governors and the members of the legislatures are closer to the people in the state capitals than are the Congressmen at Washington, and therefore should be better able to understand their desires. But as James Madison argued in *The Federalist*,[10] a special interest is more likely to have its way in a small rather than in a large group. It is a matter of everyday observance that a person who is strong politically may be able to block action in his town or city with respect to a matter in which he has an interest, even though the majority is against him; but when the decision is to be made at the state level, his influence is diluted. Consequently, state governments faced with popular demands—sometimes unarticulate demands which exhibit themselves only in restlessness—find themselves powerless, in the face of well-organized and

[8] Acts of Indiana, 1947, chap. 377, p. 1509.
[9] Acts of Indiana, 1947, chap. 178, p. 605.
[10] No. 10.

articulate opposition, to deal effectively with the stirrings. But when the scene of struggle is transferred to the national level, opposition is scattered and reduced to its relative size.

Research

A second area of national-state extra-legal coöperation embraces a subject which for want of a better name may be designated "research," or "experimentation." The amount of work done by national officials in the search for new knowledge, the assembling of information, the origination of programs which become available to state governments and individual persons is prodigious. A few random examples may be given. A need had arisen for minimum standards for buildings to make them safe, fire-resistant, and not injurious to the health of the occupants. Herbert Hoover, then Secretary of Commerce, assembled a group of professionally trained persons to prepare such a set of standards. This code became the basis which groups all over the country used for the formulation of building codes. The United States Public Health Service made an intensive study of milk, the means of processing and distributing it, so that it, a most valuable but potentially dangerous food, might be reasonably free of bacteria and safe for human consumption. After prolonged investigation a model regulation was prepared and made available to state health authorities. These officials immediately sought the enactment of the federal model regulations as state laws and as municipal ordinances. Throughout the country, milk labeled Grade A is a continuing evidence of national research. The history of standards for drinking water is practically the same. The Public Health Service made the studies and set up standards for safe drinking water—and the states copied them. The contribution rendered by the Atomic Energy Commission, in making isotopes available—at small cost—to state as well as private institutions for the study and treatment of disease, is already significant and promises to be still more so. In one form or another this kind of national study and state adoption or use by private persons has happened in area after area. Some are: crime detection, traffic regulation, standards for the purchase of materials, practices for the recruitment and

management of personnel, methods for the conduct and content of courses in primary and secondary education, the breeding of kinds of plants and even animals, their care and utility, studies of natural resources—coal, metals, water—and their most effective utilization,[11] regulations for the extractive industries—the list appears as long as is the list of governmental activities.

General coöperation

In many fields of activity national and state officials carry on their official tasks in a way to assist each other, both being interested in effective and expeditious achievement. The relations of national law enforcement officials with the state and municipal police forces may be cited as an example of general cooperative effort. The Federal Bureau of Investigation maintains a fingerprint file in which there are now upwards of 21,000,000 prints. In most states when a person suspected of a serious crime is arrested, his fingerprints are taken by the arresting officer. These prints are sent to the the Federal Bureau of Investigation, where they are classified and filed. A coöperating police jurisdiction wishing custody of a person whose prints have been filed may request information from the FBI. If that person's prints are on file, a note is attached to his file card. If, at some other time, he runs afoul of the law and is arrested and his prints taken, the clerk who files the new prints will see that he is wanted and will notify the proper officials. Hundreds of local police officials, drawn from every state of the Union, have been trained in the FBI Police Academy, which conducts a school primarily for the training of its own agents. The national government taxes persons who handle narcotics. It maintains a corps of officials to enforce the tax law. These officials report violations of state laws to the proper state officials whose function it is to enforce the state narcotics laws. They also testify in court. Professor Fellman has quoted with approval the statement that "it would require a field personnel ten times as great as the present Secret Service force if it were to operate without the assistance rendered by local agencies."[12]

1. Law enforcement

[11] See pp. 508–513.

[12] David Fellman, *Journal of Criminal Law and Criminology*, XXXV (1944), p. 16.

2. Application of civil law

An interesting illustration of national-state coöperation in the application of civil law may be taken from the field of railroad regulation. The Interstate Commerce Commission is empowered by national statute to set rates for railroads engaged in interstate commerce. Sometimes the fixing of rates for a railroad spanning more than one state will have the effect of setting aside rates set by a state commission for traffic over the same railroad within that state. The national statute requires the ICC to notify the state commission when such an issue is to arise, and the ICC may confer with the state commission or hold joint hearings with it to determine the facts in the case. The ICC and state commissions sit together at the hearing and afterwards they confer privately and informally as to the disposition of the case. The fact that the ICC has actually by its own direct order set aside few rates is evidence that it permits the state commission to modify its own order to comport with the findings made in the joint hearings. What is done with rates is also done with other regulations of state commissions which may be inconsistent with the regulations of the national regulatory body. Enough has been said to show the nature of coöperation between national and state and local law enforcement officials.

3. Supply of personnel

In other fields there is also coöperation. It may or may not be of the same kind as in law enforcement. An example of a different kind is the loan, by the Public Health Service, of professionally trained personnel to state health agencies. A notable development has appeared in recent national legislation.

4. Consultation

Provision is made for national officials to consult with state officials. An example in the Full Employment Act of 1946, is the consultation by the Council of Economic Advisors with state and local government in the preparation of the national economic budget. And in the flood control bills, notably the flood control acts of 1944 and 1946, projects planned by federal agencies are to be referred to the states; and their comments are to accompany requests of Congress for appropriations. Special machinery for consultation was established in 1940.

A final illustration of coöperation between the national gov-

ernment and the states, is an agency composed of national and state officials. In order that there might be a balanced approach to the numerous problems, such as flood control, reclamation, water power, and navigation, in the Missouri River Basin project, the Missouri River Basin Inter-Agency Committee was set up in 1944. This committee is composed of the governors of the Missouri Basin states, together with representatives of the Federal Power Commission and the Departments of Agriculture, Army, Commerce, and Interior.

5. Joint agency cooperation

A popular impression is that national and state officials are jealous of their areas of activity. Sometimes this is true, but professionally trained men frequently are more interested in the accomplishment of work than in jurisdictional aggrandizement.

Wartime coöperation

During World War I and particularly during World War II, the extent and the nature of the coöperation between the national government and the states was so extraordinary as to require special notice. Many of these activities could be included in the categories discussed above, but to do so would prevent bringing them together as they were developed in an emergency. And it is only as they are viewed together that the almost unlimited capacity of the states and the national government to work harmoniously on the same team to achieve common objectives becomes clear. It will be impossible even to list all the instances of federal-state war coöperation; consequently, some representative ones will be mentioned.

1. Rationing

The rationing program provides one illustration of coöperation, and the initiation of the tire-rationing program is perhaps one of the most dramatic and speedy cases. In face of a threatened shortage of rubber, the national government prohibited the ordinary sale of new automobile tires on December 11, 1941. Between that date and January 4, 1942, county rationing boards were organized in every county of every state of the Union to begin the distribution of tires and tubes to users whose work was essential to defense, public health, protection, and to the welfare services. Existing organization was used; the Office of Price Administration, the national agency, formulated

the policy and developed the rules, regulations, and procedures. The respective state defense councils acted as coördinators within each state, and the local defense councils used their staffs to administer the tire-rationing program. No national funds were available, but the states and localities provided the necessary stenographic and clerical work out of their own departments and agencies. In addition to personnel to carry on tire rationing, office space and equipment were also borrowed from public and even private organizations. Later the rationing of consumers' goods was carried out by the same national-state-local coöperative process. Such goods included meats, shoes, gasoline, canned foods, and sugar.

2. Speed limit

As a safety measure and as a further means of conserving rubber, it was thought necessary some months after the beginning of tire rationing to reduce automobile speeds. This was accomplished in the following manner. First, a national committee under the leadership of Bernard Baruch made a study of the situation and its report of September 10, 1942, recommended a reduction of automobile speeds to 35 miles per hour in open country driving. The problem was then referred to the Council of State Governments.[13] On September 16, the President of the Council, Herbert O'Conor of Maryland, together with the executive director, Frank Bane, sent a telegram to each of the state governors asking that each one issue orders, proclamations, or statements as might be possible under the existing legal authority to limit speeds to 35 miles per hour. On September 27, eleven days after sending the original telegram, Bane telegraphed a national official that the 35-mile speed limit was already in effect in most states and that all of them would be coöperating by October 1. Later checks made by the Public Roads Administration, a national agency, showed a very substantial reduction of speed.[14] Rural driving had dropped from an average of 47 to 37 miles per hour.

[13] For a description of the Council of State Governments see pp. 84 f.

[14] Thomas H. MacDonald, "The American Motorist in Wartime," *State Government*, xvi (June, 1943), pp. 134, 140.

3. Selective service

The conscription of men for the armed services is another example of national-state coöperation. This involved a United States statute, a national agency, namely, the selective service system presided over by a director in Washington, D.C., state directors as the agents of the respective governors, and local boards. The personnel of these boards, except the clerical staff, was unpaid. In each state workers were nominated by the governor and appointed by the President. From the first call in 1940 until the draft was suspended in 1947, more than 10,000,000 men were inducted into the armed services through the selective service system.

4. Changing state laws

It was found during the course of the war that certain state statutes conflicted with the war effort. Special machinery was established for communication between the national government and the states with respect to necessary changes in state legislation. On the part of the states it was called the Drafting Committee of State Officials, established by the Council of State Governments;[15] on behalf of the national government it was a special division in the Department of Justice. Suggestions made by national agencies for changes in state laws were channeled through this special division which appraised them and conferred with respect to them with the Drafting Committee. Once proposed legislation was perfected by this process, the Drafting Committee then submitted it to the states. A partial list of changes in state law or regulations made by one method or the other as the result of requests by national war agencies includes: adopting uniform rules to permit trucks carrying war materials to cross state lines, reciprocal licensing of passenger vehicles to make it easier for war workers to travel across state lines, lifting loan restrictions on state banks to permit them to finance large war contracts, changing state housing laws and building codes to meet national regulations dictated by scarce materials, changing legal restrictions on prison labor to permit the production of war goods by prison inmates.

It may be said that once channels of communication between

[15] See p. 84.

the national government and the states are set up and begin to function and once customs of coöperation are accepted and satisfactory work is accomplished, it is to be expected that they will be continued after the immediate occasion for their creation has ceased to exist. And so it was. Director Frank Bane announced in 1946 that he expected the Council of State Governments "to revise and expand the Drafting Committee to make it even more effective in the future."[16]

Legal federalism

The assumptions underlying the relationship of the states and the national government have tended to change since 1789. Then the relationship was based upon legal precepts. To use Professor Fellman's apt characterization, the national government and the states were "antagonistic legal entities dealing with each other at arm's length across a no-man's land policed by the Supreme Court."[17] Here the emphasis was on power, prohibitions, and formal relations. Professor Anderson has referred to this as legal federalism.[18]

Functional federalism

Contrasted with legal federalism is what Professor Anderson called "functional federalism." Here the emphasis is on the governmental work to be done, wants to be satisfied, and problems to be solved. The underlying assumption is that governments at different levels should work together wherever necessary to perform any given function. The interest of the people is a common interest; the governments which the people have set up are to work together to serve that interest. For example, the health of the public is to be guarded. Individual persons need to be vaccinated. That is a job for a person in a particular place. But he cannot act unless he is empowered to do so by state law. Such efforts are undermined if disease-bearing foreigners pour into the ports. To regulate such matters is a task for the national government. The protection of the public health requires the coöperation of government at all levels, as does the service of the

[16] *State Government*, XX (January, 1947), p. 20.
[17] David Fellman, *Readings in American National Government* (New York, 1947), p. 38.
[18] William Anderson, "Federalism—Then and Now," *State Government*, XVI (May, 1943), p. 107.

people in many another field. The problem is not to restrict one government as against another, but to allot work among the governments as befits the convenience and needs of the people, and to gear these governments into a working unit. It is only by this means that the government can remain a government of the people.

We may then close this examination of the national-state relationship by observing that the people have, like the fathers of the country, insisted that the government be made to deal with the needs as they arise. And more successful than their fathers who were forced to revolution, they are managing to mold the government by gradual process, so that it is indeed an indestructible union composed of indestructible states.

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CHAPTER 3

INTERSTATE RELATIONS

States in legal order

The relationship between the nation-states of the world during most of their history has been based upon their relative war powers. It is only by slow degrees that a legal system is being built up in which there is hope that adjustments among them can be attained by pacific means without reference to their military power. In the case of the states in the American Union, a legal order was established by the constitution, and regardless of how different they may be in population, territorial extent, natural resources, or wealth, they possess certain legal rights and privileges with respect to each other because of their membership in the Union. Because of this legal order established by the constitution, disputes and maladjustments which develop can be dealt with on the basis of the merits of the case in each instance and without regard to the military or other strength of the parties concerned.

The constitution prescribes duties, obligations, and privileges for the national government and the states to follow in their relations with each other, but 160 years of life have developed, in addition, customs and procedures by which they deal with common problems. As we have divided national-state relations in the preceding chapter, we may divide the interrelations of the states into two parts for purposes of description; but again with the caution that such a division is useful only for the purpose of analysis, since the two parts are closely connected in the daily life of the states. The parts are: the relations prescribed in the constitution, and those which are extra-constitutional.

Relations Prescribed by the Constitution

The relations among the states prescribed in the constitution can be divided into two parts. First are those contacts which the states as corporate entities have with each other. Here the states are concerned with agreements among themselves or with disputes over boundaries or both. Second are the contacts which states have with each other in behalf of their citizens or residents. Here the main concern is first the application of the law of the states to persons outside their boundaries; second, the return of persons to a particular state so that it can apply its law to them; third, the treatment which states must accord to citizens of other states.

1. Disputes between states

That disputes between the states of the Union would arise was to be expected, and the task of providing a method of settling these disputes caused the framers of the present constitution no little difficulty. Finally, the Supreme Court of the United States was given original jurisdiction over cases involving controversies between states. This jurisdiction has been made exclusive in the Supreme Court by Congressional statute. Many of the controversies between states which have been settled in the Supreme Court of the United States have been concerned with boundary disputes. That the Supreme Court had jurisdiction over boundary disputes between states was settled by that court in the case of Rhode Island *v.* Massachusetts in 1838.[1] But not all suits between states have involved disputes over boundary lines. Sometimes one state sues another because the first state claims that the second owes it a sum of money. This usually happens when the plaintiff state has become the owner of bonds or other securities issued by the defendant state. If the plaintiff is the real owner of the bond, it can recover the money due from the state which issued the bond by means of a suit against the latter in the Supreme Court. But the Court will look into the case rather closely to make sure that some citizen has not procured the plaintiff state to sue for his benefit on a claim which he holds

a. Boundary disputes

b. State debts

[1] 12 Peters 657.

against the defendant. If the Court thinks that the plaintiff state is only trying to collect a claim for one of its citizens, the suit will be thrown out of Court. The reason for this is that a citizen of one state is not allowed to sue another state in the federal courts. If the Court allowed the citizen to turn over his claim to his state and then permitted the state to sue on it and recover the money, only to be handed over to the citizen, the restriction upon the right of the citizen to sue a state would be virtually nullified. The Eleventh Amendment to the federal constitution cannot be evaded in that way.

Virginia v. West Virginia

One of the most interesting debt disputes between two states to come before the Supreme Court was that of Virginia *v.* West Virginia. Virginia claimed that West Virginia should pay a portion of the debt of Virginia as it stood at the time of the admission of West Virginia to the Union, because the latter had received a part of the benefit of the money spent in incurring the debt. The Supreme Court of the United States agreed with this contention. West Virginia was finally ordered to pay the sum demanded, and after some delay took proper measures to raise the money needed to pay the amount of the judgment. If West Virginia had refused to pay, a very awkward situation would have arisen, although the Supreme Court said that methods could be devised to force the state to pay in case of such refusal. It is not likely that a state will refuse to abide by a decree of the Supreme Court. The people of the United States would disapprove of such action, and quite properly so. Thus far, states have usually acquiesced in the decision of the Court in disputes to which they have been parties.

c. Parens patriae doctrine

One other class of cases should also be mentioned in this connection. They are the cases in which one state has sued another to protect the citizens of the plaintiff state from conduct on the part of the other which is injurious to them. Thus if state X empties sewage into a river which flows into state Y to the damage of the citizens of the latter state, Y can go to the Supreme Court to have this objectionable practice stopped. So, too, if state X dams up the water in a river which runs into state Y so

that the river goes dry and the people in state Y who live along the river suffer from drought, state Y can bring a suit against state X in the Supreme Court to stop it from holding back the water in the river. The doctrine which allows one state to sue another in behalf of its citizens collectively is called the *parens patriae* doctrine.

The states are absolutely forbidden to enter into any treaty, alliance, or confederation. It makes no difference whether the treaty or alliance is with a foreign state or with another member-state of the Union. Both are forbidden. The states may, however, enter into compacts or agreements with one another. If such compacts are of a political nature they must, in order to be valid, receive the approval of Congress which may be secured either before or after the agreement is entered into. Non-political agreements may be entered into without the consent of Congress. Congress decides in the final instances whether or not an agreement is political, but has thus far never ventured to define clearly what constitutes a "political" agreement. The location of the line of division may be indicated in a general way by illustration. If the state of Washington owned a piece of land in Oregon and Oregon wanted to buy the land from Washington, an agreement might be made between the two states for the purchase and sale of the land without the consent of Congress. The reason why this could be done is that such an agreement would not be of a political nature nor would it disturb the political balance of the Union. So, too, if Missouri and Illinois had a mutual boundary line which was not well defined, they could arrange to have the true line surveyed without the consent of Congress to the arrangement. If the boundary line between the two states were to be changed, the consent of Congress might be necessary because a change in the territorial extent of a state might have a political effect, such as, for example, a change in population which might result in a different number of representatives in the lower house of Congress from one of the states. Another example of a non-political arrangement between states would be an arrangement to drain a marshy area which extended into

2. Agreements among states

a. Political, non-political compacts

the territory of two adjoining states. Such an area might be the cause of a local disease, and the states would be allowed to cooperate in the eradication of the disease and its causes without consulting Congress.

Interstate compacts may take the form of formal agreements officially entered into by legislative act or by administrative action, or they may consist of informal "gentlemen's agreements" between business or professional organizations and such officers. Early in the history of the country, compacts were chiefly used in the solution of disputes of one kind or another, such as those involving boundaries, or navigation on a river. In this century, however, there has been an increasing number of compacts to set up machinery for continuous operations. The New York Port Authority, established in 1921 to manage the facilities of the port, bridges, tunnels, and terminals, is an example.[2] The Ohio River Valley Water Sanitation Compact, which went into effect in 1948, is another example of an agency. It is charged with reducing the pollution of the Ohio River. Under the Interstate Crime Compact of 1935, more than 12,000 parolees and probationers were being supervised in 1948 in states other than those whose laws they had been convicted of violating. Forty-four states are now parties to this compact. Compacts for the conservation of oil have also been made. A number of compacts are in effect to provide for the conservation of water and its equitable distribution, as, for example, that of the Colorado River.

b. Increasing use of compacts

Where an activity stretches across state lines and the states involved can agree as to its conduct, the compact arrangement seems to be increasingly effective. It is to be expected that as the forms of organization and the practicable procedures are developed and become more familiar, interstate compacts will occupy a still more important role.

Relations affecting individuals

Nation-states, supremely conscious of their own sovereignty, had traditionally no obligation to give effect to the law of other sovereigns, within their respective jurisdictions. Two somewhat startling corollaries derived from this. First, individual persons

[2] See p. 502.

had no legal status in the relations among nation-states. If a subject of state A went into state B, his property and even his life were held at the mercy of state B. Whatever B might do with him, it was not accountable to him. A might intercede with B and even claim damages; and if damages were paid, A had no obligation to B to turn the amount over to the individual. In the second place, if a person violated the criminal law of one state and fled into a second state, the receiving state would not punish him; furthermore, it had no obligation to arrest him or to return him.

This mutual disregard of nation-states for the law of each other was modified somewhat in practice. As an act of courtesy, called *comity*, states permitted alien individuals within their jurisdiction to enjoy status and rights acquired under the law of other states. A marriage or a contract, for example, good in France was good, ordinarily, in Great Britain. And the sovereign states made extradition treaties which provided that each state would apprehend and return to a demanding state persons charged with crime.

Not the least of the revolutionary arrangements in the constitution were the provisions dealing with these matters. This was accomplished by what now seems the simple but then seemed the novel device of requiring each state to give effect to the laws of the other states wherever necessary to protect the rights and privileges of individual persons and to enforce their obligations. These provisions will be described under the headings of the full-faith-and-credit clause, the interstate rendition of criminals, and privileges and immunities.

1. Full-faith-and-credit clause

In Article IV, section 1, of the federal constitution it is provided that,

> 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.

The clause is restricted to the public acts, records, and judicial proceedings of the states. Congress has prescribed the method of

authenticating public acts and records; and when they are duly authenticated in the manner prescribed, they are evidence of laws, or of claims which have been settled by the courts of some other state or territory.

a. Public acts

The phrase "public acts" refers to the public statutes passed by a state legislature. For example, the courts of Massachusetts must recognize the validity and binding character of a Wisconsin statute upon any subject which may arise in the Massachusetts courts, the settlement of which depends upon the laws of Wisconsin.

b. Public records

The public records mentioned in this section include such records as mortgages and deeds which are recorded in some public office. A deed which is properly drawn up and recorded in Kentucky will be binding in an action which may be brought in the courts of Maine regarding any matter which may involve that deed. If two witnesses are required in Maine, and Kentucky requires only one, and there is only one witness to the deed, that will be considered sufficient in Maine also. The law of the place where a deed or contract is executed is the law that governs its validity and meaning. The same is true of a will made in Ohio, where the number of witnesses required is different from that required in Indiana. If the Ohio law has been complied with, the courts of Indiana must give effect to the will, although the requirements of the Indiana laws are different in this matter.

c. Judicial proceedings

The full-faith-and-credit clause also extends to judicial proceedings. If Smith sues Jones in Georgia and wins the case, he is said to get a judgment against Jones. Now suppose Jones moves out of the state of Georgia before Smith can stop him or attach his goods. Jones moves to Rhode Island and Smith finds out that he lives within that state. Smith can come to Rhode Island with a certified copy of the judgment which was given by the Georgia court and the Rhode Island courts will recognize the validity of the judgment and give Smith relief upon it without again trying the merits of the case. The fact that judgment was obtained on an obligation which arose out of a transaction which another state will not recognize does not justify that other state in denying full faith and credit to the judgment. For example, a

judgment may have been given upon a gambling debt in one state. The rule in another state might be that a judgment could not be given in suits to collect such debts. But that would not justify the second state in refusing to give recognition to the judgment granted on a gambling debt in the first state.

Jurisdiction

When a court in one state is asked to enforce the judgment of a court in another state, a question can be raised as to the validity of the judgment. Did the court rendering the decision have proper jurisdiction; that is, did it have the power to apply the law in the case? If the suit is against property, the question of jurisdiction is simple. The location of the property determines jurisdiction. If it is in the state, the court has jurisdiction. But if the suit is against a person, the question of jurisdiction may be very complicated because people move around freely. Usually, jurisdiction over a person is obtained by serving notice on him personally that suit has been started against him. This gives him an opportunity to prepare a defense.

Divorce

Questions of jurisdiction in divorce suits have been most complex, the results most confusing, and the cause of no little anguish. Since a court in one state might inquire into the circumstances and deny the jurisdiction of a court in another state when it granted a divorce, it also might deny the validity of the divorce—in which case the marriage was not dissolved but was still binding. A person assuming that he had been legally divorced might remarry, but later find himself being prosecuted for bigamy and find that the children of the second marriage were illegitimate. The passing of his property at his death might be subject to endless lawsuits because of the tangled skein of his marital relations.

Jurisdiction over both parties to a divorce suit in some circumstances may be difficult to determine, since one of the parties could leave the state. In order to prevent one of them from thus blocking the whole process, a method was hit upon of securing jurisdiction over the absent party through *constructive process*—the mailing of a notice of the suit to the absent individual or advertising it in the public press. But if this could

be done, then a person might leave the state and sue in another state (hoping that the notice would not come to the attention of his spouse), thus making divorce too easy. This problem was attacked by making jurisdiction depend upon domicile, the place where one intends to reside permanently. But since domicile is a matter of intent and intent is subject to change, other difficulties were introduced. It has come to be recognized generally, however, that if a person is domiciled in a state, he may sue in the courts of that state for a divorce. Different states have established different standards as to what constitutes domicile. A short residence in Nevada and meager evidence of intent to reside there permanently are sufficient to establish domicile in that state—hence the reputation of Reno, where one may stand on the banks of the Truckee River to see the "tide come in and the untied go out." Courts in other states refused to give full faith and credit to Reno divorces, partly because of objections to Nevada tests for domicile, and partly because aggrieved parties have carried appeals to the Supreme Court to see if the constitution was being observed. Contradictory decisions were handed down, but by a gradual process the law seems to be straightening out so that most of the migratory divorces are now recognized in all of the states.

Domicile

2. Interstate rendition of persons accused of crime

In Article IV, section 2, of the Constitution of the United States the following provision is found:

> 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.

The process by which a person who has committed a crime in one state is delivered over to that state by the officers of another in which the accused person may be found is called *extradition*. Provision for extradition of criminals between countries is made in treaties of extradition. The extradition of criminals by states

within the United States should perhaps be called interstate rendition, but popular usage has applied the term extradition to both the international and interstate processes.

This provision was necessary to the efficient enforcement of the criminal law of the various states of the Union and is perhaps more necessary now than it was when the constitution was framed.

Congress has passed several statutes in execution of this section of the constitution, and although the constitution does not provide for the extradition of a criminal to any of the territories of the United States, Congress has enacted that criminals shall be turned over by and to the territorial governments in the same manner as is followed by the states. Congress has also outlined the procedure which is to be followed in the extradition of criminals to the demanding state. The act of Congress has placed upon the governor of the state or territory the duty of arresting and delivering the criminal whose extradition is sought.

A person who is charged with crime and who is found in another state is extradited by proceedings between the governors of the two affected states, the state from which the person has fled and the state to which he has gone. If, for example, X has fled from Kentucky to Nebraska the governor of Kentucky will ask the governor of Nebraska to order X turned over to police officers who will be sent to bring him back.

The governor of Nebraska will examine the papers which have been sent to him, or will ask the advice of the attorney-general of Nebraska in the matter, and decide whether he thinks that X should be extradited to Kentucky. The governor must decide this for himself and his decision in the case is final. If the governor refuses to send X back to Kentucky, there is no way to compel him to do so. It may be that he thinks that X would not get a fair trial if he were sent back and this may cause him to refuse to turn X over to the Kentucky officer. Or he may feel that such a long time has elapsed since the crime was committed that it would not be in the interests of justice to send X back

for trial.[3] If the governor should decide for any reason not to surrender X, there would be no legal way for the state or the federal government to compel him to return X to Kentucky. But unless there were some very good reason for refusing the return of X, the governor of Nebraska would probably order that X be arrested and turned over to the Kentucky authorities. If X insisted that there was a good reason why he should not be returned, the governor would probably set a date for a hearing of the argument which X wished to make against extradition. If the governor were not satisfied that X had stated any sufficient reason why he should not be extradited, he would hand him over to the officer. A statute passed by Congress provides that the expenses of the arrest and transportation of fugitives from justice are to be paid by the demanding state, and also stipulates that unless an officer is sent to receive the accused person within six months, he shall be discharged. The states have in many cases passed laws governing the arrest and detention of fugitives from justice, and such laws are valid as long as they do not conflict with congressional laws which have been passed upon the same subject. An increasing number of states have by law given permission to officers from other states to continue their pursuit of criminals across the state border if they are hot on the trail of the accused person. Were it not for such laws the police would be unable to continue their chase across the state border.

When the person has been returned to the demanding state, he can be tried for the offense with which he was charged, as well as for any other offenses which he may have committed. In extradition between nations this rule does not apply, for in international extradition a person can be tried only for the particular crime with which he was charged when extradited. In an extradition proceeding the merits of the case which the demanding state has against the accused person are not settled. The only question which is investigated is whether he has been prop-

[3] For examples see the documents in R. L. Mott, *Materials Illustrative of American Government* (New York, 1925), p. 47, and C. A. Beard, *Readings in American Government and Politics*, rev. ed. (New York, 1909), p. 148.

erly charged with the crime for which he is sought to be extradited. No question of the guilt of the party is entered into by the state from which the person is demanded.

Privileges and immunities

The protection that is accorded to the privileges and immunities of United States citizenship has been considered in Chapter II. But there are other privileges and immunities which a person may have because of his state citizenship, and for the protection of these the framers of the constitution included a statement that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states." A state is hereby forbidden to discriminate against citizens of other states as compared with its own citizens. The citizens of one state are to be treated on the same terms as the citizens of every other state who may be residing in any particular state. Thus Minnesota must not discriminate against the citizens of Iowa as compared with the citizens of Wisconsin. Usually there is little difficulty about this, but some interesting cases have arisen over the treatment by one state of its own citizens as compared with its treatment of citizens of another state.

In the first place the question might be asked: Who are included within the term *citizens* as it is used here? The answer is that only natural persons, not artificial ones, are included. For this reason corporations are not citizens of a state within this clause of the constitution. The states may discriminate against foreign corporations which do business within the state and treat them differently from domestic corporations.[4] Of course, the state may not place prohibitory restrictions upon foreign corporations engaged in business transactions in interstate commerce, nor may the state so arbitrarily discriminate against foreign corporations as to deny them due process of law. But the state may nevertheless impose many restrictions upon foreign corporations which are not imposed upon domestic corporations.

What are the privileges and immunities of state citizenship

[4] Corporations incorporated in a state are called domestic. All others are usually referred to as "foreign" whether organized in another state or in a foreign country.

Privileges protected

which are protected by this clause? The Supreme Court has never given any comprehensive enumeration or definition of them. But several of those included are now known. One right of state citizenship is the freedom to enter the state for purposes of trade. Another is the right to sue in the courts of the state. The state of New York may, however, require that citizens of Arizona who wish to bring suit in the courts of New York post a bond to guarantee the payment of court costs, although citizens of New York are not required to post such a bond. Another privilege of state citizenship is that of being taxed at the same rate as other owners of property in the state, and of being assured that this rate shall not be higher for property owned by citizens of other states than it is for property owned by citizens of the taxing state, assuming the property to be in the same class. The privilege of acquiring property in another state is also a privilege which attaches to state citizenship.

Exceptions

This clause of the federal constitution does not mean that a person can take with him special privileges which he has in one state and force the state to which he moves to recognize them. The state of California may fix the requirements which a person who wishes to practice medicine in that state must meet. A person who has the right to practice medicine in some other state may not go to California and practice medicine without California's permission. The right to practice medicine in Nevada does not give that person the right to practice medicine in California. The same is true of lawyers. Under the police power the states may still regulate professions, and fix requirements for those who engage in them. Some years ago women were allowed to vote in only a few states of the Union. A woman who lived and voted in the state of Missouri could not move into the state of Minnesota, where women were not given the right to vote at the time, and force the state of Minnesota to allow her to vote there. Political privileges are not included within the privileges and immunities of state citizenship. For this reason a state may require that newcomers must reside in the state for six months or a year before they shall be allowed to vote.

Neither do the privileges and immunities of state citizenship

entitle a non-resident to share in the public property of a state. The oysters and fish in the bays, streams, or lakes of a state belong to the citizens of the state collectively, and the state may take measures to preserve them for the exclusive use of citizens of the state. For this reason many states have non-resident hunting license laws which impose much higher fees for non-resident licenses than for resident licenses. Such discrimination is allowed because the state can exclude non-residents altogether from hunting if it wishes to do so, and if the state can do that it can prescribe the terms on which the privilege which it does grant may be exercised. But the state may not require a ten-dollar license fee of a non-resident from one state and a fifteen-dollar license fee from a citizen of a different state. If the citizen of one outside state is allowed to hunt, so must the citizens of all the states be allowed to hunt on the same terms.

Extra-Constitutional Relations

Having observed the relations among the states which are permitted or required by the constitution, we may now turn to an examination of those which have developed outside the constitution. These relations, starting with the beginning of the nation, have been constantly intensified, particularly in the present century, with a climax having been reached during World War II. These closer contacts have revealed not only a lack of uniformity in the states' laws but frequently contradiction among them. The resultant confusion is detrimental to the welfare of the country. A simple illustration is the disconcerting effect on a person traveling across the country. "I challenge anyone," asserted Dean Harno of the University of Illinois, College of Law, "to drive across our land and not violate traffic regulations along his route. . . . If he is not arrested it is because benign Providence is guarding him, or . . . some considerate traffic officer . . . has sensed the difficulty (that he is driving as required by the traffic regulations in his home state . . .) and lets him off with a friendly warning."[5]

Conflicting law

[5] James P. Economos, "Uniform Traffic Laws," *State Government*, xxi (December, 1948), p. 248.

This confusion, discomforting enough to private persons, became a hazard to the war effort when, early in 1942, truckers hauling war matériel found themselves, among other things, having to buy special licenses to enter some states, and to reload their cargo in smaller or narrower or shorter trucks to enter other states. This confusion was not ended by the enforcing officials being willing, as some of them were, to wink at the law if the driver would say that he was transporting war materials when, to avert sabotage, he had been explicitly forbidden to reveal the nature of his cargo.

The nature, the extent, and the form of the coöperation among the states has been so multifarious as to prevent easy and wholly satisfactory classification. For our purposes, however, we may discuss these extra-constitutional relations under three heads: (1) decision law; (2) statutory law; (3) agreement among state officials.

Decision law

In the daily application of the law, it is frequently found that there is no specific rule laid down by a legislature to meet a particular set of facts. Frequently in such instances, a search will reveal that a similar set of facts has been presented to a court and that a decision has been made. A lawyer will advise his client in the light of such decisions. He will also seek to guide the courts before which he pleads cases by producing the holdings of other courts. All the decisions of all the higher courts in each of the states have been gathered so that they are available to lawyers. This has tended from the beginning to create general uniform principles in the great body of decisions, or, as it is ordinarily called, the *common law* of the states. However, despite the agreement thus hammered out on great principles, diversity developed within the outside limits. With hundreds of courts following the decisions of each other, the minor differences became major differences until main lines of agreement were in danger of being destroyed. This led to such confusion that a lawyer could not advise his client on specific matters with any certainty because he could not tell which state court might be followed if the point at issue were to be decided in a lawsuit.

American Law Institute

It was to pick out the central points of agreement and to clarify and simplify the law and to adapt it to the changing social needs of the time that the American Law Institute was established in 1923. The initiative for its incorporation in the District of Columbia was taken by a committee of the American Bar Association, under the chairmanship of Elihu Root, and the movement was supported by judges, lawyers, and legal scholars.[6]

In this manner, the *Restatement*, as the draft is called, is to state the existing common law, as developed by the courts, with such care and accuracy that courts and lawyers may rely upon it as a correct statement of the law as it now stands. The primary purpose of the *Restatement* is to express the principles of law with clarity and precision. Some states have published the *Restatement* of some branch of law, e.g., contracts, with local annotations—materials from the state statutes and court decisions —and these have become quite useful to the lawyers and judges. This is the kind of work which is never finished and is in need of constant revision. The work of the Institute is to bring the law up to date, so that its continued growth in the courts is based upon sound legal and social principles.

Statute law

The well-known practice of the states in borrowing parts of constitutions from other and older states[7] was also followed in borrowing statutes. In addition to this informal coöperation among the states—which has been going on since the beginning of the state legislatures—more formal means have been devised.

1. Conference on Uniform State Laws

The first was the Conference of Commissioners on Uniform State Laws, organized in 1892 by members of the American Bar Association. The Conference is composed of commissioners appointed by the governors of the several states. It appoints committees and authorizes them to draft model bills which, when completed, are available for enactment by state legislatures. It has approximately twenty-five committees currently engaged in this work.

[6] American Law Institute, *The Restatement in the Courts*, 4th ed.

[7] John D. Barnhart, "Sources of Indiana's First Constitution," *Indiana Magazine of History*, xxxix (March, 1943), p. 55.

It is in the field of commercial law that the Conference has had the most success. Two model acts proposed in this field which have been adopted by all the state legislatures are the Negotiable Instrument Law and the Warehouse Receipts Act. The Stock Transfer Act has been adopted by all the states except Delaware. Other bills adopted by thirty or more states concern: sales, bills-of-lading, limited partnership, declaratory judgments, veterans' guardianship, narcotics, drugs, criminal extradition, and an act to secure attendance of out-of-state witnesses. From this list it can be seen that model bills to regulate other than commercial activity have been prepared. But it is in this field that the most extensive influence has been exercised. Currently, the Conference is engaged in a most ambitious enterprise—the preparation of a commercial code. This project, in which the American Law Institute is collaborating, is estimated to cost $250,000.

2. Coöperating agencies

Other agencies interested in some particular function have sought to promote uniformity among the states in a specific field. In 1924 a National Conference on Street and Highway Safety was held. It adopted that name. In coöperation with the National Conference of Commissioners of Uniform State Laws, it finished drafting a code in 1926 to regulate motor vehicles. This code has gone through several revisions: 1930, 1934, 1938, 1944, and 1948. It is made up of five acts. They are concerned with (1) registration and prevention of theft; (2) the licensing of operators and chauffeurs; (3) civil liability for accidents; (4) responsibility for safety; (5) the regulation of highway safety. These acts have been adopted in part in many states and have had an immeasurable influence in many others. When World War II became imminent, a need was felt for a means of speedy preparation of bills for emergency defense legislation. The Council of State Governments in 1940 established a Drafting Committee composed of the attorneys general of the states and other state representatives. This committee, in coöperation with the National Conference of Commissioners on Uniform State Laws, was charged with preparing such legislation. It was so

successful during the war emergency that it has been continued since. During the first eight years it made 125 proposals.

3. Significance

The real significance of the work of the National Conference of Commissioners and the agencies coöperating with it lies not only in the trend toward uniformity in common matters but in the fact that the trend is developing and that higher standards for the drafting of legislation have been set.

Reciprocal and retaliatory legislation

Another method of achieving uniformity of action on the part of two or more states by legislative enactment is that of *reciprocal* and *retaliatory* legislation. This may or may not be brought about by conference and agreement arrived at by accredited legislative or administrative representatives of the states concerned. One state may enact a law providing that if another state accords certain privileges to citizens of the enacting state then the enacting state will accord the same privileges to the second state. Thus, a state may say that it will recognize a license to practice a profession granted in another state if that other state similarly recognizes permits to practice the profession granted by it. Thus uniformity is to that extent achieved. Furthermore, uniformity of action may be achieved by imposing burdens upon citizens from other states if those other states impose burdens upon the people of the first state. The state then is said to retaliate, and the legislation is called retaliatory legislation. Reciprocal and retaliatory legislation has been enacted in a number of different fields, particularly in the licensing of professions and in taxation. Another kind of reciprocity is being practiced among administrators of state retirement plans for teachers. All forty-eight states have some plan. To enable public schoolteachers to move across state lines as they ordinarily move from one school to another, some states offer reciprocity in a limited form for retirement allowances by giving a prior service credit for service in other states. Others engage in reciprocity by permitting teachers to purchase credit to a certain amount which, in the case of New Jersey, is matched by the state at retirement time.

Coöperation among officials

We may now turn to the coöperation among the states which arises out of the coöperation among state officials. The means whereby this is carried on range from informal personal agreements made by letter, telephone, and face-to-face meetings to the compacts which are enacted by state legislatures and approved by Congress. Provision is made for compacts in the constitution and they have been considered above.[8] Examples of the machinery for arranging all but the most informal agreements, and the extent of the coöperation resulting from them, may now be described.

Machinery for coöperation

The advantages to state officials of the exchange of information with officials in other states, of finding ways of coöperating when they have common problems, have long been obvious. Many of them found ways of doing it informally, but it was not until this century that machinery for coöperation was established.

1. Governors' Conference

Not the first attempt to create machinery for coöperation but the one launched with the greatest fanfare was the Governors' Conference called by President Theodore Roosevelt in 1908. Seldom, if ever, has a project begun with greater hope of success, but meetings to assess the basic problems of state government turned out to be maneuvers for advantage in the race for the White House.

More than one reason may be suggested as to why the Governors' Conference failed to achieve the high ends hoped for it. For one thing, as the years went on, its attendance fell off. A governor fearful lest he be nudged out of the pole position in the race for the Presidency may decide to stay away. Its failure to be more than a social gathering caused others to lose interest. Men accustomed to being first at home found themselves hardly noticed. The situation intensified their prima donna potentialities. Frequently, it appeared that the governors were unaware that they had common problems requiring their best energies for solution. And more important still, there was no machinery through which they could operate. This lack has been remedied

[8] See pp. 67–68.

by the formation of the Council of State Governments, which now provides a secretariat for it. It is always difficult for persons in positions of top responsibility to negotiate with each other about matters of vital importance. Preparatory work must be done carefully; the management of publicity with respect to the proceedings must be skillful, since room for compromise is necessary without loss of prestige to the participants, particularly with the people of their own states. Whether these obstacles to effective meetings of the governors can be overcome is a question for the future. It may be noted that the use of a secretariat has made possible continuing policy and advance planning for the meetings, and that, in recent years, when overwhelming problems of defense and postwar planning pressed upon them, the conferences have shown more promise of usefulness. In the light of this recent development, one may quote the description of the Governors' Conference in *The Book of States*: "[It] has been a dynamic force in the improvement of state government, the development of effective methods of interstate co-operation, and the furtherance of the ideals and purposes of the Union of the states."[9]

Meetings of governors representing smaller areas, two or three states, a river basin, or a region, have been more successful. This may be due to less publicity and to a mutual awareness of a common problem which affects the more restricted region.

Other organizations of the states' administrative officials and the dates of their organization are: the National Association of Attorneys General, 1907; the National Association of Secretaries of State, 1904; the Association of Administrators of the Interstate Compact for the Supervision of Parolees and Probationers, 1945; the National Association of State Budget Officers, 1945; the National Association of State Purchasing Officials, 1947; and the Legislative Service Conference, 1948.

American Legislators Association

In addition to associations of administrative officials the legislators founded an association for themselves. Legislators are proverbially poorly prepared for their duties; often election to

[9] Council of State Governments, *The Book of States* (1948–1949), p. 20.

the state legislature is their first service in public office. The disillusionment which comes from attendance at the first session frequently is so great as to discourage able men and the turnover among them is high, higher than the vicissitudes of politics would warrant. It was in awareness of this situation that Henry W. Toll, a Colorado legislator, conceived the idea of the American Legislators' Association in 1922 and by dint of persistence and energy brought it into existence in 1926 when the first meeting was held. It almost died later, but eventually he was able to attract funds from private foundations and get it established as a going concern. Its purpose was twofold: to improve standards of legislation, and to assist legislators by providing them with information and by teaching them skills. To provide information, it first began to distribute periodically a little paper, *The American Legislator.* Later, this became the very useful magazine, *State Government.* In the second place, the Association established a bureau to collect data. Any legislator faced with making a decision on a bill could inquire of this bureau what information was available: Had other states had experience in that field? What kind of law was used? What were the results or special problems arising from the treatment of the matter? This bureau, incidentally, provided information to other officials, national, state and local, and had many requests from them. In order to improve the skill of the legislators, presession regional and state meetings were held to acquaint legislators with legislative procedures.

Council of State Governments

These organizations of state officials were brought together by the creation of a new body in 1935, the Council of State Governments. The Council was established to be a liaison between them, to act as a secretariat for them, and to assist them in whatever way each desires, such as preparing agenda for their meetings. The Council is an official body, its members being states. In order for a state to be a member of the Council it must create a Commission on Interstate Coöperation, which forty-four states have done. These commissions are to have on them members of the state legislatures. These legislators are ex officio

members of the American Legislators' Association, thus integrating the two organizations.[10] The policy of the Council is established by a Board of Managers which is composed of one representative from each state, plus ten members at large and seventeen ex officio members. The work is carried on under the direction of an executive director, Frank Bane, who to many people is the Council of State Governments personified.

Functions

The functions of the Council are many. In addition to serving as a secretariat to various organizations of officials, it carries on research and collects data. Much of this is done as a result of the requests of state officials. Committees of state officials work with the research staff. Topics investigated in recent years include: conflicting taxation, fiscal policy, unemployment compensation, use of water resources, state-local relations, grants-in-aid, and legislative processes. It carries on an extensive publication program to provide full information in the field of state government. Its chief regular publications are: *The Book of States*, an encyclopedia of information which is brought out every two years; the monthly magazine, *State Government*, and the *Washington Legislative Bulletin*. During the war, it became the agency of communication between the national government and the states. It filled a long-felt need so successfully that this role is being continued. The increasing number of interstate compacts and their use for continuing operations as distinguished from their former use for the settlement of a dispute over such matters as state jurisdiction, as was mentioned earlier in this chapter, is in a large part due to the pervading influence of the Council.

Permanent services

Another function of the Council which is tacitly understood by all students of government, but not mentioned by the personnel of the Council, is the steadying influence it exerts over new state officials. The administrative structure of many states

[10] In one sense, the American Legislators' Association has ceased to exist, since it no longer has separate meetings. In another sense, it still exists, since the Council of State Governments is its expanded form. It has officers and, acting through the Council, it attempts to do for all state officials what it tried to do for legislators.

contains much that is still pre-1776, when a strong governor was the agent of a faraway, unfeeling monarch. And the mental set of many state officials is still Jacksonian, a period during which governmental procedures were simple and the surest way of keeping the machinery responsible to public feeling was to change the personnel at every opportunity. Consequently, there is a procession of new men in office who are expert interpreters of the public will but puzzled by the intricate services they are called upon to perform, and frustrated by the inadequacies of the machinery which was built to check and slow up men with a zeal for getting things done. By way of parenthesis, one may observe that the bitter attacks made on Washington by many a governor are but the verbal form of his exasperation at the failure of his own state machinery to respond to executive direction as does the comparably smooth-running machinery of the national government. It is the function of the personnel of the Council patiently to train and educate an ever-changing body of governors and politically selected administrative officials. It is a slow, often disheartening task, but its importance is entirely out of proportion to any public recognition which can be accorded to it.

Kinds and extent of coöperation

Coöperation among the states—which becomes possible because an agency like the Council of State Governments is present to provide a means of communication among them—is extensive. Some is dramatic, like the adoption of uniform standards for trucks during the war. Within ten days of the time when a set of standards for weight, length, and width of trucks was suggested, every state of the Union adopted it. Other kinds of coöperation, as well as improvement in their own domestic procedures, because they are slower in achievement, become significant in retrospect only when the cumulative effect can be seen. Some of the activities are summarized by the Ninth General Assembly, held in Detroit, Michigan, December, 1948:

> . . . there have been significant developments in many States leading to improved and strengthened legislative bodies and methods of operation.

. . . More than half of the States have taken action [in accordance with the recommendations of the Council to deal with the national government in the establishment of airports].

. . . The States increasingly are establishing joint co-operative programs for institutional care, educational facilities, water resources, pollution control, crime control, conservation of coastal fisheries, and forest fire protection.[11]

And the Council added in pride: "By such action, the States are demonstrating that they can, on their own initiative, effectively administer activities which concern large areas of the nation."

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CHAPTER 4

CONSTITUTIONS

Nature and Content of State Constitutions

In one sense the Constitution of the United States is also the constitution of all the forty-eight states. Its provisions apply not only to the people of the nation as a whole, but to the people organized as states as well. But, in addition, each state has its own constitution, and it is this constitution that provides for the organization of the government of each state, for its own internal administration.

The states have full power to make and change their own constitutions, subject to such restrictions as may be found in the federal constitution. The state constitution is the highest law of the state and it ranks above the statutes passed by the state legislature and ordinances passed by cities and other local governments within the state. The courts will enforce the limitations of the state constitution wherever these come into conflict with the statutes or ordinances in the state. But the state constitution is subject to the Constitution of the United States, and whenever it contains any provision contrary to the latter, the state and federal courts will declare the state constitutional provision in question invalid.

Nature of a constitution

Most Americans think of a constitution as a document, and of course the constitution of a state, just as that of the United States, is a document. But, as in the case of the national constitution, so in the case of the state constitution, the formal document is supplemented by custom or tradition. The states develop usages in the application of their constitutions, and these usages

are of great importance to one who wishes to understand the operation of state governments. From this broader point of view, therefore, a constitution is not only a document but it is the group of principles and rules in accordance with which governments are established and operated. These principles may or may not be recorded in a document. When they are written, for the most part in a connected and systematic way, we call the document itself a constitution. We usually refer to this document as a written constitution, which means, of course, that we have a written record of these principles and rules. When only a few of these principles and rules have been recorded in writing, it is customary to say that we have an unwritten constitution. There is no hard and fast line which separates written from unwritten constitutions. Neither the states nor the United States have entirely written records of their constitutions, but it is true that a large portion of the principles of government in each of the states, as well as in the United States, have been recorded, so that we are justified in referring to state constitutions as primarily written constitutions.

One factor which has perhaps contributed much to the present tendency to view the constitution as the written record of the principles which are followed in the conduct of the government is the idea that the courts enforce only the written constitution. It is true that courts usually enforce only that portion of the constitution which is written, and they are often careful to call attention to that fact. This has doubtless caused many people to think of the written portion of the constitution as the enforceable portion. But courts do sometimes enforce unwritten parts of constitutions. Judges have at times declared laws passed by the legislature to be unconstitutional even though they were not contrary to any particular clause of the written record of the constitution. Laws are sometimes held to be contrary to the spirit of the constitution, and the courts have declared that there are certain fundamental rights guaranteed to every person by the principles of free government wherever government is found, and that legislatures may not violate these rights. The

judges are doubtless thinking of certain unwritten principles of government which they consider as sacred and enforceable as though they were reduced to writing. An example of a court declaring a law unconstitutional though not contrary to any express provision of the constitution is that in which a state court held a law invalid because it violated the principle of majority rule when it required that 60 percent of the voters must agree to a proposition before it could be adopted.

Constitutions must be stable

A constitution to be successful must be stable and flexible. Both characteristics must be present if constitutions are to serve their purposes well. Unless the group of principles and rules which concern the operation of the government is somewhat stable, the government's relation to the individual, the relations of one part of the government to another part, and many other important political and legal relations cannot be known to any degree of certainty. As a consequence progress will be seriously impeded. Artistic, political, social, and economic development can take place only when there is peace and order within the state. The relations which depend upon the activity of the government must be quite definitely known and fixed, so that people can rely on their continuance for some time, if a real advance in civilization is to be made.

Constitutions must be flexible

The constitution must also be flexible. If the rules and principles of government were never changed, government would become an intolerable burden and strait jacket upon society. Changes must be made in order that the government may function effectively under different circumstances and changed conditions. It is clear upon the slightest reflection that this is true.

How, then, are these two necessary characteristics of any successful constitution to be reconciled? The proper balancing of these two factors in a constitution is a difficult task. That they be properly balanced is extremely important. One method of insuring their balance is properly to draft the constitution. The written record, if there is to be one (and there is one in every state), should deal only with the fundamentals of government and its functions. Only the fundamental intergovernmental rela-

tions should be included, and only the fundamental relations between the government and the individual should be cast into a somewhat permanent form. The constitution should be very short and phrased in terms which are precise without being impossible of elaboration by the process of interpretation. A second method is to provide suitable procedures for changing the constitution. It should be possible to amend the constitution so as to vary the principles and rules which are to be applied in a given period of time in order that the people of that time may be well governed according to their particular needs and standards. Provision should be made for changing portions of the constitution and also for revision of the entire set of principles and rules concerned with the conduct of government. When we come to examine the state constitutions we will test them by these general considerations which experience has shown to be applicable to any constitution anywhere and at any time.

Formulation of Constitutions

The formulation of a constitution is an act of sovereignty. In an autocratic government where sovereignty rests with the single ruler the constitution is created by act of the ruler. In an oligarchy the group of rulers formulates the constitution, while in a popular government the people formulate the rules and principles to which they wish the government to conform, because in a popular government the people are possessed of the powers of sovereignty. This sovereign power of establishing and changing governments and the principles governing their conduct is called a *constituent* power. The people in the states have delegated a portion of their constituent power to the state legislatures in so far as they allow the legislatures to participate in the amending of constitutions, while, on the other hand, they have granted some of the constituent power to conventions selected for the purpose of revising the constitution. But the people have usually reserved some of the constituent power to themselves, for the voters must generally ratify the proposals of legislatures or conventions in amending or revising constitutions. When the

legislature participates in the work of amending the constitution, it is said to be exercising a different power from the one it uses in passing ordinary laws which are rules of conduct for private individuals, or which create governmental machinery and direct its operation. In fact, as will be further explained later, in the chapter on state legislatures, the constituent and other legislative powers are essentially alike; but because of reasons of policy the making of ordinary laws is given to the legislature, while the making of the more fundamental law or the constitution is exercised in part by the people. The distinction which has been thought to exist between the constituent and other legislative powers has been practically effaced in those states where the popular initiative and referendum are used for purposes of ordinary legislation. For in those states the people make ordinary laws exactly as they amend the constitution, except for a few minor procedural differences.

First state constitutions

The provincial assemblies which had come into power in most of the states at the outbreak of the Revolution were the bodies which established the first state constitutions. In most cases the constitutions were not submitted to the people for approval, the Massachusetts constitution of 1780 being the first one to be ratified by the voters.

Characteristics:

These early state constitutions are marked by a number of characteristics which have exerted a profound influence upon state government and state constitutions to the present time.

1. Brevity

The early state constitutions were very brief, ranging in most instances from five to sixteen pages in length.

2. Consent of governed or popular sovereignty

All of the constitutions contained express statements of the belief that the consent of the governed was the basis of all governmental authority. This general statement was considerably qualified in actual practice, however. The belief was firmly cherished that the people had the right to make and change constitutions and governments at will.

3. Restricted suffrage

In the face of this profession of the doctrine of popular sovereignty all of the state constitutions contained provisions limiting the right of suffrage and of office-holding to persons

meeting either property or tax-paying qualifications on the one hand, or religious qualifications on the other. In most of the states a larger property or tax-paying qualification was imposed upon the right to hold office than upon the right to vote, and the higher the office the higher the qualification which had to be met. In a few states Catholics and Jews were excluded from the franchise, while in others belief in God or the Christian religion was required for voting or office-holding.

4. Supremacy of law

The supremacy of law was a theory which underlay all of the first state constitutions. This doctrine was interpreted to mean that every man should be under the law and have its protection, particularly that he should be punished only for acts which were contrary to law. But the doctrine also meant that governmental officials were to be subject to law and that the government was to be one of laws and not of men. Included in this concept of the supremacy of law was also the idea that there was a higher law than that of the legislature, namely the law of the constitution, and that the latter should be enforced by the courts. Back of all this was the belief that there was a law of nature upon which all human law must rest if it were to be just and permanent. This law of nature was to be invoked against governments that became tyrannical, and it was supposed to give the people the right to depose tyrannical government.

5. Separation of powers

According to the writings of Montesquieu, the French political writer, the ideal government was one of three departments with the powers of government apportioned among them. The founders of the first state governments believed that there should be an apportionment of the powers of government among the three departments, but that the legislative branch should receive the greatest share of these powers. Because of this belief the early state governments had legislative supremacy, instead of having the powers of government equally divided among the three departments. But the early constitutions did contain statements to the effect that no one department should exercise all the powers of government, and even the first state governments which were marked by legislative supremacy did observe to

some extent the doctrine of the separation of powers. The doctrine of the checks and balances of power did not obtain in the first state constitutions, but developed later when legislative supremacy gave way to an equalization of the powers of government among the three departments. The check-and-balance feature of state government consisted in the giving of some of the powers which logically belonged to one department to another department, in order that the second department might check the first one. Thus, for example, the power of veto is legislative and it was given to the governor in order that he might check the legislature.

6. Weak executive

The executive branch of the state government was entirely subordinated to the legislative branch and in several instances the governor was chosen by the legislature. The reason for the reduction of the status of the governor is to be found in the experiences which the colonists had had with the colonial governors and in the current belief in the efficacy of popularly elected representative bodies as instruments of government.

7. Short ballot

The early state governments were established in conformity with the principle of the short ballot. In no case did the people vote for more than a very few officers, often less than half a dozen in all.

8. No provision for amendment

Several of the early constitutions contained no provision for their amendment and most of the others contained unsatisfactory methods of amendment. This did not, however, restrain many of the legislatures from changing the constitutions when they thought change necessary.

Constitutions growing longer

Although the first state constitutions were brief, the tendency until very recently was to make constitutions longer and longer. In some instances constitutions written in the later years of the nineteenth, and earlier years of the twentieth, century were several times as long as the first state constitutions. The New Jersey constitution of 1947, only 10,500 words long, may set the model for a new trend toward shorter and simpler constitutions.

The reasons for the increasing length of state constitutions during the century elapsing since the adoption of the early state

constitutions seem to have been four in number: (1) a growing distrust of the legislature, resulting in increasing restrictions on legislative power both with respect to the content of statutes and legislative procedure; (2) the need for new governmental powers to deal adequately with new problems that have arisen in society because of industrial and technical changes that have taken place; (3) the need for more governmental machinery, provision for which unfortunately has sometimes been added to the constitution itself; and (4) the addition of more administrative details to the constitution. Provisions relating to the handling of public contracts and the management of public work are examples of this latter category.

Criticisms of long constitutions

Several criticisms have been made of lengthy constitutions. It is said that longer constitutions tend to: (1) break down the distinction between constituent and law-making functions; (2) include measures of temporary importance in permanent form; (3) require much time of voters and legislators for the change of constitutions whose specific lengthy provisions are too inflexible for the needs of a shifting economic and political order; (4) burden the courts unduly by the numerous lawsuits required by the detailed restrictions on legislative power and procedure. These restrictions lead to many challenges of legislation on grounds that are partially technical and frivolous. Finally, the lengthening list of specific powers and methods of exercising those powers with respect to enumerated subjects has led some courts to infer that the legislature may exercise only the power that is specifically granted in regard to that subject, and that in its regulation of the subject the precise method or procedure mentioned in the constitution must be followed. This doctrine of implied limitations has come to serve as a factor tending to narrow legislative power, and thus qualifies the full force of the doctrine that the states may exercise the reserved powers under the national constitution.

Contents of state constitutions

The contents of most state constitutions can be divided into five parts.

1. *The preamble.* This is a statement of the reasons which

impelled the creation of the constitution, and a general statement of its purpose. The preamble to the federal constitution is often copied with few or no modifications in the state constitutions which were adopted subsequent to 1787.

2. *The bill of rights.* This portion of state constitutions will be dealt with in more detail presently.

3. *Body of the constitution.* This contains sections outlining the framework of the three departments of government, and the powers of each, and the relation which each bears to the others. The officers of state government, their duties, the method of their election, and sometimes even their compensation are provided for in other sections of the main body of the constitution. The provisions on the suffrage are also included here. Several sections on state finances, debt limits, taxation, corporations, industrial relations, and business organization are likely to be found in succession, with varying degrees of detail depending upon the date at which the constitution was formulated. These subjects will be treated at length in several succeeding chapters.

4. *The amending clause.* This clause will be treated more fully somewhat later in this chapter.

5. *The schedule.* This provides the time, method, and place of inaugurating the new government which is to be established, and such temporary arrangements as are thought necessary.

Contents of bills of rights

1. Political theory

Many of the bills of rights, particularly the older ones, contain rather elaborate and general statements of political theory. These statements reflect the influence of the French and English philosophers of the eighteenth century and usually consist of somewhat vague generalities concerning the relation of government to the individual. High-sounding statements of the theory of popular sovereignty that the power of all government rests for its authority upon the consent of the governed, the declaration that justice and the law shall be equal for all, as well as many other similar doctrines, abound in the constitutions which were framed in the earlier years of our history; and such pronounce-

ments were still a powerful force in the middle period of the last century when many of the existing state constitutions were formulated. The doctrine of the natural and inalienable rights of man received considerable attention and many of these rights were enumerated at length. The traditional Anglo-Saxon doctrine that the military authority should be subordinate to the civil authority was also formulated in these early bills of rights. Montesquieu, Locke, Paine, and Jefferson are still important influences in state government.

2. Substantive rights

Bills of rights in state constitutions contain protections against state action depriving persons of their substantive, as contrasted with their procedural, rights. For many years freedom of speech and press, freedom of religion, and the rights of property were safeguarded against arbitrary state action by state bills of rights alone. This applied to such subjects as unreasonable searches and seizures, the quartering of troops in private homes, and eminent domain, with the requirement that private property could be taken only for a public purpose and with just compensation. The national bill of rights protected the individual only against adverse action by the national government. With the addition of the Fourteenth Amendment, however, and its provision that states are not to deny persons their life, liberty, or property without due process of law, the protection of persons against adverse state action in many fields has become a national, as well as a state, area of action. The full implications of the due process clause were not realized for many years following its adoption, but in recent years the United States Supreme Court has decided many cases involving conflicts between individuals and state governments, arising out of alleged violations by the governments of guarantees of rights that are included in state bills of rights. These have been examined in some detail in the second chapter of this book, and will not be reviewed here.

3. Procedural rights

The procedural rights which are commonly enumerated are those which were the subject of the long fight between English-

men and their monarchs. The memory of those struggles and the spirit of the Declaration of Independence were still strong in the minds of the framers of the first constitutions, and the formulators of later constitutions have either approved enthusiastically of the earlier enumerations or copied them *in toto*. The early American state constitutions included a bill of rights, and to include a bill of rights is now an American tradition. One of the more important particular rights commonly found will now be considered.

Protection to persons accused of crime

There are to be found in most state constitutions a considerable number of provisions protecting persons accused of crime. These provisions were included in the earlier constitutions because at that time the protection of the individual from arbitrary and cruel treatment by the government was believed to be a problem to be reckoned with. The experiences of the colonists and of Englishmen at home had brought to the minds of the founders of our state governments the necessity of curbing the government in these matters. For it must be remembered that government to them was visualized in the image of one person or a small group of persons and not in the image of popular control.

Thus we find statements that no cruel and unusual punishments shall be visited upon persons accused of crime; that reasonable bail shall be available to such persons; that the accused shall be confronted with his accusers and be privileged to call witnesses in his own behalf, and that he shall be informed of the cause of his detention. Further provisions deal with the form of the accusation, the mode of trial, the nature of evidence which shall be admitted, and sometimes the treatment of witnesses. Provisions forbidding bills of attainder and *ex post facto* laws are very common also. There is considerable variation in the constitutions as to the treatment of these different subjects, but there is a tendency everywhere to specify in detail many of the requirements and rules which must be observed by the state government in the conduct of criminal trials and in the general treatment of criminals.

Changing of Constitutions

The necessity for flexibility in a successful constitution has been touched upon previously. The problem of keeping state constitutions flexible is rendered doubly important at the present time because of their undue length. Early state constitutions were short but rigid, whereas many of the constitutions of today are long and rigid, thus failing to use either of the two methods whereby the characteristics of flexibility and stability may be properly balanced. Some, though not all, of the objectionable results of long constitutions can be obviated by an effective provision for amending the constitution.

Methods of change

There are at least four ways of changing constitutions.

1. *By custom and usage.* The written record of the constitution often fails to reveal what actually takes place in the process of government because usage and custom have in effect modified the written phrases, or, at least in many cases, supplemented them.

2. *By statutory elaboration.* The creation of much of the modern machinery of administration in state government has resulted in changing portions of the constitution through legislative interpretation and application. The changing views as to the functions of government are clearly reflected by this method.

3. *By judicial interpretation.* Almost every state constitution has been modified or elaborated by this process.

4. *By formal amendment.*

Of the four processes whereby constitutions may be changed, the fourth has hitherto been the only one considered in any detail in studying state constitutions. But all four methods are continually being used in almost all of the states. That we have paid little attention to the first three methods of changing constitutions and that the changes which they effect are not often recorded in the written document which we call the constitution have no doubt contributed much to the prevailing tendency to think of the constitution as the written record. This

has doubtless helped to perpetuate the idea that a constitution is a sort of sacred thing and that proposals of change in it are almost sacrilegious. When we come to a consideration of the fourth method, we find that there are three ways of formally amending constitutions in current use in the states.

The first method is to amend the constitution by a legislative proposal of the amendment and a popular ratification of the proposal by the voters. The second method is to let the people of the state sign a petition initiating an amendment and to submit this proposal to the voters for approval. This method is one application of the device called the initiative and referendum. These two methods are commonly used to change single portions of the constitution and are seldom used to make any widespread fundamental change in it. The third method of changing constitutions by formal means is by use of the constitutional convention. Except in New Hampshire, the convention is used only when a series of fundamental changes is contemplated and when the essential features of the governmental system are to be modified. When the change of the constitution is a relatively minor one, the process whereby that change is accomplished is called amendment; but when the changes are numerous and of a rather fundamental character and to be made at one time, the process is called a revision. Of course, it should be remembered that even in the case of a revision there are whole portions of the old constitution which are retained intact in the new one. For the amendment of a constitution, the two methods of legislative proposal with popular ratification, and the initiative and referendum are used. For the revision of state constitutions the constitutional convention is used.

Legislative proposal

The first of these methods, that of legislative proposal and ratification by popular vote, is the oldest and still the most widely used of any of the existing methods of changing state constitutions. Some of the early constitutions omitted the popular ratification feature of the amending process and tried to distinguish the process of amendment from that of enacting ordinary legislation by requiring that proposed amendments

should be passed by two succeeding legislatures. Another method of maintaining this distinction between legislation and constitutional amendment was to require an extraordinary majority vote in the legislature to propose an amendment. The tendency to dispense with the approval of the second legislature and to substitute for it the vote of the people grew in favor until now only fourteen states require two legislatures to participate in the amending process. The tendency is to allow amendments to the constitution by proposal by one legislature and ratification by popular vote.

Every state constitution can now be amended by legislative proposal and popular ratification, with the exception of Delaware and New Hampshire. In Delaware the constitution is amended by the action of two successive legislatures without any popular vote whatever, and in New Hampshire the constitution can be changed only by a constitutional convention. In South Carolina the constitution is amended by a proposal of one legislature, followed by popular ratification, and subsequent adoption by a second legislature. The majority of legislative votes required to propose an amendment varies in different states. In nineteen a bare majority vote of the legislature is sufficient to propose an amendment, while in eighteen states a two-thirds vote is required. Seven states require a three-fifths vote of the legislature for proposing an amendment.

Various limitations exist in some of the states which make it impossible to amend an article of the constitution more than once in five, six, or ten years, or which forbid the amendment of more than one article at any session of the legislature.

Ratification of proposed amendment

The majority of votes required in the different states for ratification of the proposed amendments by the people varies considerably. The states can be divided into three groups based on the number of votes required. (1) The states require a majority vote of the *electors* of the state. This makes it exceedingly difficult to amend the constitution because it is a very rare thing for all the people voting at an election to vote on a proposed amendment. The constitution of Indiana would seem to

contain a provision placing it in this group, but the Indiana Supreme Court has decided that "electors" means only those voting on the question. (2) Eight states require that a majority of those voting at the election must approve the amendment in order that it be ratified. This requirement is not quite so severe as the one just considered, because only those voting at the election are counted in the total, instead of all the electors, whether they voted in the election or not, and only a majority of those voting is required for ratification. But this is nevertheless a very high requirement because many more people vote for candidates than vote on proposed amendments. Candidates always arouse more enthusiasm than do abstract propositions of government such as are contained in many of the proposed amendments. It happens that proposed amendments are often defeated in these states which require a majority of all the votes cast at the election even when more people actually vote in favor of the amendment than against it. But everyone who fails to vote on the amendment really votes against it in the states where this majority is required. (3) Almost three-fourths of the states allow proposed amendments to be ratified by a majority of those voting on the question. Rhode Island requires three-fifths and New Hampshire requires two-thirds of the vote cast on the question to ratify proposed amendments.

Initiative and referendum

The initiative and referendum, as a method of amending constitutions, will be discussed in a later chapter and will not be analyzed in detail at this point. It should be noted, however, that this method of amending a constitution permits the people of a state to propose and ratify amendments which the legislature is, for one reason or another, unwilling to propose. Because of the defects that have arisen in the system of legislative apportionment, this problem has become increasingly acute, and it may be that in the future the initiative and referendum may again come to the fore in discussion of the problem of changing constitutions. Fourteen states make use of the initiative and referendum for this purpose, but no state has added this technique of change to its constitution for several years.

Amending process grows easier

The tendency has been to make the amending process easier in the states. This is shown by the decreasing number of states which require the action of two successive legislatures to propose an amendment, and in the action of many states in requiring only a majority of those voting on the question to ratify these proposed amendments. There are still, however, a few states in which the process of amendment is very difficult. If state constitutions were properly drafted, containing only very brief outlines of the government to be established and a few statements of the relation which the government is to bear to the individual, the process of amendment would not need to be easy. Properly drafted constitutions should not be changed often, nor would they need to be. But most state constitutions are not properly drafted and they do need continual and constant change. They have lost their character of fundamental law and can no longer be said to contain a formulation of the fundamental principles of government. It avails little to bemoan the fact that state constitutions as they now exist are not as they should be. The present problem is how best to arrange the process of amendment so that the evils which naturally flow from improperly drafted and lengthy constitutions can be mitigated to the greatest extent.

A few constitutions have been amended as many as two hundred or more times, and this would seem to be an unnecessary and unreasonable burden on the voters' time and judgment. It is not argued that a constitution can be so perfectly drafted that it will not need change with the passing of time and the changing conditions that come with basic economic and social developments. To hope that a document can be drafted so that it needs infrequent change is not to wish for the impossible, for a number of state constitutions have required only a few changes despite the fact that they have been in force for many years. Careful drafting and few and general categories can aid in accomplishing this end, and some of the recently adopted constitutions seem to have been formulated with this goal in view.

Revision of constitutions

The third method of formally modifying state constitutions is that of revision by constitutional convention. The fact that the first state constitutions were formulated by revolutionary bodies in most instances has been mentioned previously. The provincial assemblies not only carried on the ordinary work of government during the days of the Revolution, but also acted in the capacity of constitutional conventions. The people made no special grant of constituent power to these bodies, but someone had to take the affairs of government in hand, and it was not a time for quibbling over the niceties of procedure and the distinction between legislative and constituent functions. Furthermore, the difference between constituent and legislative functions had not yet been clearly perceived. It was not uncommon for these same assemblies which had formulated the first state constitutions to become the lower house of the legislature in the government subsequently established in accordance with the constitution. In only four of the original thirteen states were constitutions framed in which provision was made for revision by a convention. The fourteenth state, Vermont, provided for revision by means of a convention. Jefferson expressed the fear that the legislative bodies were about to usurp the constituent power which rightfully belonged to the people or representatives chosen by them for the sole purpose of exercising that power. But this fear was perhaps not well founded; and it is likely that the failure to provide for a method of changing these early constitutions was due to an oversight, a lack of consideration of this phase of the subject, more than to anything else. Two other explanations for this omission are also plausible. In the first place, the people of that day believed that it was the inherent right of the people to change the government and the principles in accordance with which it was established and operated, whenever they saw fit to do so. Why, they thought, make provision for something that everybody conceded to be true, namely, that the people could change the constitution at their own pleasure? In the second place, the notion was abroad in the Revolutionary period that constitutions could be made so

as to be very nearly perfect. The rights of man, the separation of powers, the checks and balances, and the reign of law, when combined in one system, were thought to be sufficient to the end of time. They were believed to be immutable and everlasting principles of government. A government established in accordance with them would not need to be changed for a long time to come.

Rise of constitutional convention

As time went on, however, it developed that these first constitutions needed change, and in the course of a very few years many of them had been changed not only once but two or three times. The application of the deep-seated doctrine of popular sovereignty naturally influenced legislatures to submit the constitutions which they framed to the people for ratification, a procedure not followed in the case of the first state constitutions. And finally, the distinction between legislative and constituent power made itself more evident in the calling together of separate bodies whose sole function was to be the formulation of a constitution. By the beginning of the nineteenth century the constitutional convention as a part of the machinery of state government had become well established. At the present time three-fourths of the state constitutions contain provisions for a constitutional convention. In all of the others, with the exception of Rhode Island, the legislature may call a convention if it is deemed advisable, although in Indiana such a call must have the approval of a majority of the voters who ballot at the election before the convention can be held.

Calling a convention

Many constitutions contain a provision which makes it necessary for the legislature to submit to the voters the question of whether a convention shall be called, before the call can be issued. This is not necessary in Georgia, however. It is sometimes required that the legislature pass the resolution, submitting the question to the voters, by more than a bare majority vote. And if this is coupled with the requirement of a majority of all those voting at the election, the process is made very difficult. A few states make use of the periodic submission plan. The legislature must submit the question more often if that is

thought desirable. The periods fixed in the constitutions range from seven to twenty years. New Hampshire uses the convention for amendment as well as for revision, and the question of calling a convention must be submitted once every seven years in that state. The executive is quite often entrusted with the submission of the question of calling a convention in states which use the periodic submission plan, and the submission is usually made at a state-wide election. The theory which underlies this plan is that every generation should have the opportunity to say what the fundamental law, under which it is to live, shall be.

A few states have inserted into the constitution rather detailed provisions for the calling of a convention and the way in which it shall do its work. There is a possible danger that the legislature may refuse to call a convention, even though there is a sincere demand on the part of many people for such a convention. This apparently happened in New York at one time due to a partisan conflict in the legislature, and when that New York constitution was framed it contained provisions regulating the call and the work of the convention so that legislative intervention is no longer needed. So long as state legislatures fail to reflect accurately the more fundamental currents of political thought in the state, the tendency to put into the constitution detailed provisions concerning constitutional conventions will probably continue to grow.

Pre-convention investgations

There is much preliminary work to be done before the convention assembles. The delegates will not always be thoroughly familiar with the existing state constitution, nor will they have the detailed information concerning other state constitutions which is so necessary, in order that pitfalls in constitution-making which have been encountered by conventions in other states may be avoided. The value of a comparative study of state constitutions is very great, because, when all due allowance has been made for the needs of the time and locality, there is little distinction to be made between the types of constitutions which are suitable to the various states. The constitutions of the states are surprisingly similar in most of their fundamental provisions.

The variations which are said to be necessary for local needs are seldom of a fundamental nature. The preliminary work of gathering the data which the members of the convention will need in their work must of necessity be entrusted to persons who are already familiar with the methods of gathering and arranging such material.

Recognizing the need of this preliminary work, several of the more recent constitutional conventions have been preceded by commissions appointed for this very purpose. Sometimes these preliminary investigations are also made before the legislature proposes important constitutional changes through the process of amendment. These commissions must of course be thoroughly impartial in character and be considered only in the capacity of technical advisors. In this role they can be of use in compiling data, lists of useful books, and bodies of specialized information on the subject of government. These men might well be designated technical advisors to the convention when it meets, to be at the service of committees or members in the drafting of proposals, and to supply information upon request. These preliminary investigating bodies were used as early as 1872 by New York, and 1873 by Michigan; and since 1900 they have been employed in Massachusetts, Ohio, Illinois, Nebraska, New Hampshire, and more recently in Missouri, New Jersey, and Minnesota. The bulletins which these commissions have published are some of the most valuable sources of information concerning the general subject of state government now available to the student.

Composition of convention

During the earlier years of our history, state constitutional conventions were composed of delegates chosen from the same districts as members of the lower house of the legislature. The widespread idea that effective representation consisted essentially in having many representatives, with each representing a small district, had its effect upon the composition of the constitutional convention. As time went on, however, the districts from which convention members were chosen were enlarged, and often the larger district consisted of the state senatorial

district, and in recent years the Congressional district has been used to some extent. The tendency to minimize the possibility of injecting local issues into state constitutional conventions has also led to the selection of delegates-at-large to be chosen by the people of the state as a whole, and it has been hoped that men of experience and ability in affairs of government would be attracted to the service of the state in this way. In modern conventions therefore, there are usually delegates from districts of various sizes and delegates-at-large; and the tendency is to make the districts from which delegates are chosen larger units. If there are no delegates-at-large, the likelihood is that there will be two sets of district delegates, each set representing districts of different sizes.

The tendency to reduce partisan factors in the convention is also reflected in the methods of choosing the delegates. In a few instances the delegates have been chosen on a nonpartisan ballot or by a system of limited voting. The method which is still most commonly used, however, is that of party nomination and election. There are, of course, some phases of constitution-revising which involve and should properly involve party issues, although they are very few in number; and it may be seriously questioned whether those issues are adequately reflected in the present basis of division between political parties in the states. But it is true that by far the greater part of the constitution should be framed without any reference to present party divisions, because there is not the remotest logical connection between those party divisions and the subject matter of the state constitution. The only place where party division comes to the forefront in present-day conventions is in the legislative apportionment clause, and the controversy over that clause usually resolves itself into a question of whether or not the party in power will be able to perpetuate its lease of power by means of the apportionment clause in the new constitution. The legislature occasionally includes the plan of composition and election of the convention in the call which is submitted to the voters,

but more usually these matters require additional legislation to supplement the provisions of the constitution.

Size of convention

The size of the convention varies. The Massachusetts convention of 1917 had 320 members, while that of Illinois in 1920 had 102. The Nebraska convention of 1919 numbered 100 members and the Missouri convention of 1943–1944 included 83 members. The membership should not be so large as to make deliberative work difficult; but it must, on the other hand, be large enough to satisfy the people that the various important interests in the state have been properly represented. The convention usually meets in the state capital at a time when the legislature is not in session.

The state constitutional convention is invariably a unicameral body. None of the reasons which prompted the founders of the early state governments to make the legislature a two-house body were applicable to the constitutional convention. Classes, as such, are not represented in the convention, or at least no conscious effort has been made to attain such representation, such as was the case in the first state legislatures. The convention has none of the ordinary powers of government, so there is no need to have one house to reflect the wishes of the great mass of the people and another one to act as a check on the first. Furthermore, when new constitutions are submitted to popular vote, the people serve as a check upon the convention so that there is no need of a second house to guard against hasty and ill-considered legislation.

A more recent innovation is the commission for the purpose of constitutional revision. In 1929 a commission of seven drafted a new constitution for Virginia. The Georgia constitution of 1945 was the work of a constitutional commission of twenty-five persons. The legislature of California created a commission of twenty to prepare a draft of a revised state constitution after defeating a resolution providing for a constitutional convention. Commissions may consist of legislators or non-legislators, or a combination of the two.

Ratification of constitutions

The first state constitutions were not submitted to the voters for approval, but it is now the practice in most states to submit the work of the convention to a popular vote. Not quite half of the constitutions contain a provision requiring ratification by the electorate. But it is the usual thing for the legislature to prescribe in the convention act that the proposals of the convention shall be voted on by the electorate before going into effect where no such constitutional provision exists. There have been some recent exceptions to this rule, for in the last half-century about half a dozen constitutions have been put into effect without popular ratification. With one exception, these have been in Southern states, and the explanation for their failure to submit the new constitutions to the electorate is to be found in the suffrage problem which exists in those states.

Methods of submission of proposed constitution

The convention may choose to submit the result of its work as a whole as an entire new constitution. This was the method followed uniformly during the greater part of the nineteenth century. The disadvantages of this method of submission are obvious. Any opponents or critics of any part of the proposed new constitution will vote against the whole proposal. All the critics are thus united in their opposition and strange enough bedfellows unite to defeat the recommendations of the convention. A very excellent constitution may go down to defeat because some minor controverted provisions may have built up a group of enemies for the entire constitution.

1. Submit as one unit

2. Submit disputed parts separately

Because of this a second method has sometimes been used, which is to submit the essential parts of the constitution as a whole and the controverted portions as separate amendments. In this way the voters may adopt the important parts of the proposed new system, and the portions which are adopted will be a logical and self-sufficient entity standing alone. On the other hand, it will enable the people to decide whether they also wish to adopt those recommendations of the convention which are the subject of more intense dispute. If they wish to adopt none of the proposed constitution, the whole may be rejected.

A third method of submitting the convention's work to the

electorate is to present it in the form of a series of separate amendments. The objection to this method is that the result of it may be a rather poorly balanced scheme of government. It does not, of course, attempt to do more than make some rather isolated, though fundamental, changes in the existing constitution. This is really a process of amendment on a large scale. In view of the fact that so many of the recent proposals of entire new constitutions have failed of ratification, some of the more recent conventions have felt that it was better to take half a loaf than none at all, and have therefore submitted their propositions in the form of a series of amendments. The conventions which have used this method have met with greater success for their products than those which have used either of the other two methods. Massachusetts, Nebraska, and Ohio have fundamentally changed their constitutions by this latter process. The use of this method puts a severe burden upon the voter, however, and to be used effectively presupposes a campaign of education among the electorate.

3. Submit each change separately

The proposed changes may be submitted at a general or special election. The item of expense and the doubtful practice of asking the voters to come to the polls often are factors to be considered in the choice of election. On the other hand, the adoption of a new constitution is an important event and would seem to merit very careful consideration by the voters. If the submission is at a special election, such consideration is more likely to be obtained. Some states require that a majority of all those voting at the election approve the proposal before it becomes effective; and if a special election is held, the likelihood of getting a majority of all those voting at the election is much better than if the submission is at a general election. It may not infrequently happen that, under existing local conditions in a state, the proposed new constitution may stand a better chance of being adopted at a general, than at a special, election. The method of submission, the nature of the proposals themselves, and many other factors must determine the procedure to be followed in this matter. When the people of a state have indi-

When submitted

cated a desire to have the constitution changed by calling a convention and that convention has done its work carefully and well, no opportunity to give the result of their work every advantage in the race against ignorance and lethargy should be overlooked.

Quality of convention's work

There is considerable difference of opinion over the relative effectiveness of the work of constitutional conventions and state legislatures. There seems, after all, little point in comparing the work of the two. They are not designed to accomplish similar kinds of work. They are organized for different purposes and that is as it should be. It is well known that the distinction between constituent and other legislative functions is not very clear; and it is doubtless true that both the conventions and the legislatures have contributed to blurring the already hazy dividing line between ordinary statutory and proper constitutional material. The conventions have often been shortsighted in placing in the constitution detailed provisions which are of only temporary importance. There has been little disposition on the part of conventions to grapple with the fundamental problems with which the people of a state are faced in the formulation of a new constitution, but to this generalization the conventions meeting after World War II seem to be hopeful exceptions.

The average convention is only occasionally a body of farsighted statesmen. If there has been an inequality in the representation in the state legislature under the existing system of state government, the convention will seldom be the body to remedy such a situation. The conventions have done their work with very ordinary skill. State constitutional conventions seemed to many people before World War II to have been doing rather mediocre work, but the work of several of the conventions that have met since that time has been of greatly improved quality. There is every reason to believe that during the next few years many of the states in which agitation for new constitutions is now taking place will be calling conventions, and there is every reason to expect that these conventions will do useful work in

adjusting the fundamental law of the states to the changing society of which the states are a part.

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CHAPTER 5

SUFFRAGE AND ELECTIONS

Suffrage

One of the first and most fundamental problems which must be determined in a representative government is that of suffrage. Who shall be allowed to vote? The so-called right to vote was looked upon by the founders of our government as a privilege, not as a right, and they believed that the privilege of voting should be restricted to a comparatively small group of persons. Religious and property-owning qualifications were not uncommon in colonial times, and were not eliminated entirely in the first state governments. The extent to which the suffrage shall be granted is settled largely by considerations of convenience and policy. The theory that there is an inherent "right to vote" never was applied in the United States and is now pretty thoroughly exploded elsewhere. For all practical purposes the people who vote are the people who exercise the sovereign power of control in a popular government. When we speak of sovereignty residing in the people in a popular government, therefore, we should distinguish the group in whom sovereignty rests from the group which, in the final analysis, actually exercises the powers of sovereignty. Of course, we naturally expect those who are allowed to vote to consider the interests of all those who cannot vote as well as their own interests.

The right to vote for national officers is granted by the national constitution, but the qualifications for those persons who vote for such officials are fixed by the states. The same qualifications are demanded of the electors in national elections as those required of voters for members of the lower house of the

state legislature. The states grant the right to vote for state and local officers and also fix the qualifications of voters for these officers, subject to certain express restrictions which are found in the federal constitution. These restrictions have been mentioned previously and are to be found in the Fourteenth, Fifteenth, and Nineteenth Amendments to the United States Constitution.[1] Discrimination by the states against voters on the basis of race, color, previous condition of servitude, or sex is forbidden by the national constitution.

There was a marked tendency during the nineteenth century to lower or abolish most of the qualifications required of persons who wished to vote. We have previously noticed the many qualifications for voting which were imposed in colonial times and under the first state governments. The coming of manhood suffrage, followed later by woman suffrage, tended to break down the many legal tests which had been required for voting in the early period.

Qualifications for voting

Qualifications for voting may be divided into two groups: those which are universally imposed in all states, and those which are in force in only some of the states. The requirements of age, residence, and citizenship fall within the first group, whereas taxpaying and educational qualifications are included within the second group.

1. Age

Forty-seven states require that a person be twenty-one years of age before he is allowed to vote. A few years ago Georgia lowered the voting age in that state to eighteen years. Twenty-five years is the age fixed by some foreign countries, but for several centuries the Anglo-American practice has been to specify twenty-one years as the minimum age at which one may become an elector.

2. Residence

Residence in the state for a fixed period of time is required by each of the states. The length of the period of residence demanded for participation in local and state elections varies, and it also varies considerably from state to state for the same elections. Residence of ten days to six months in the district, thirty

[1] See pp. 41–42.

days to one year in the county and six months to two years in the state is required of voters. During World War II special arrangements were made to allow the soldiers who were in the service to vote, except in those few states where the constitution expressly forbids this. Legal residence depends largely upon the intention of the person, although intention is not the sole test applied by the courts to determine whether a man is legally a resident within a ward, county, or state.

3. Citizenship

For many years citizenship in the United States was not necessary for voting in many of the states, but one by one the states have imposed the requirement of citizenship until now it is universal. Many states had previously allowed non-citizens to vote if they had declared their intention of becoming citizens; but following the opening of the present century a movement set in to bar such persons from voting, and all of the few states which did not require the voter to be a citizen at the outbreak of World War I abolished non-citizen voting during the war period, or during the decade following.

4. Educational tests

The tendency to require some sort of intelligence or literacy test for voting is becoming more pronounced. We are attempting to establish a selective process among prospective voters, and instead of making the holding of property or the paying of taxes the basis for selections, as was formerly the case, we are now making educational qualifications the basis. The first state to require an educational test was Connecticut. The test adopted in that state in 1855 required only ability to read. In 1922 New York adopted a test for the reading and writing of English. Almost half the states now have educational tests. The purposes and the requirements exacted by the tests differ, as do the methods by which they are administered. Many states merely demand that the applicant be able to write his own name; some request that he be able to read and write; while others require that specific documents be read and also that a reasonably intelligent interpretation be given of the material read. The administration of these tests is usually in the hands of government officers, and they are sometimes administered in a strictly

discriminatory manner. Some Southern states have excluded a substantial part of the Negro vote by the use of literacy or educational tests. The administration of educational and informational tests has been placed in the hands of the educational department in New York, and there an attempt at impartial certification and examination on a large scale is being made. It is easy to overestimate the value of educational tests because ability to read and write does not necessarily signify political intelligence or interest.

5. Poll tax

Seven Southern states require the payment of a $1.00 to $2.00 poll tax. There is much difference in the strictness with which the taxpaying qualification is applied; in some states it is only a formality, whereas in others it is used to accomplish the virtual disfranchisement of a large number of voters. When elections are hotly contested and when each party watches for the slightest opportunity on which to challenge votes of adherents of the other side, the party officials are often likely to see to it that the poll taxes are paid at the proper time. In some cases they even go so far as to pay the taxes for the voter, trusting that he will then respond to this favor by casting his vote for their party's candidates.

Other qualifications in Southern states

Some of the Southern states make use of educational, taxpaying, and residence qualifications to effect the disfranchisement of the Negro. These same qualifications may disfranchise many of the whites also, but the tests are so administered that the white voters are more likely to qualify for the suffrage. Sometimes the taxpaying and educational or literacy qualifications are put in the alternative in order to let the white voter through and eliminate the Negro voter. Northerners are usually quite vehement in their criticism of the Southern states because of the virtual disfranchisement of the Negro voter; but the problems involved in this question are not to be settled by a mere outburst of rhetoric or a resort to the general doctrines of the rights of man or universal suffrage. The economic and social forces involved in the situation are of as great or greater influence than are the more obvious political considerations. As a matter of

fact, inertia and perhaps the fear of disapproval, mild or violent, by the white people keep the number of Negro voters at a comparatively low figure.

From a distance it is easier to formulate a solution than it is to execute it near the scene of conflict. Some of the discriminations practiced in the Southern states are perhaps contrary to the second section of the Fourteenth Amendment that a state depriving persons of the right to vote shall have its representation in the national House of Representatives reduced proportionately. But how could this mandate be enforced? How could a determination be made of the number of persons deprived of the right to vote?

Certain classes or persons are generally disqualified from voting. Paupers, insane persons, wards, and in some cases criminals are not allowed to vote. Some states bar persons from voting who have committed election crimes and one-third of the states disqualify persons guilty of bribery. An act of the legislature usually is necessary to restore the right to vote to persons thus debarred.

It is very difficult to learn just what effect each one of these qualifications which have been placed upon the right to vote has upon the number of people who register and vote in elections.[2] We do not know just how many persons otherwise qualified to vote are denied that privilege because of inability or failure to pay the taxes required in some states. Nor do we have any reliable information as to how many persons are unable to vote because of educational or literacy qualifications. The effect of the residence requirement upon the number of people who are entitled to vote is only vaguely known. We do know that a combination of these tests serves to disfranchise many persons in some portions of the country, but we do not know the amount of decrease attributable to each. Every state in the union excludes some persons above the age of twenty-one from the polls.

[2] A. N. Holcombe, *State Government in the United States*, 3rd ed., chap. 6.

Elections

Registration of voters

For many years election officials have been supplied with lists of voters to serve as aids in checking up on the right of those presenting themselves at the polls to vote. Prepared by local officials, who constituted a registration board, these voters' lists were ineffective checks upon illegal voting, because it was too difficult to investigate voters whose names were illegally placed there. Voting in the name of a person who had long since moved out of the community, or who was deceased, was not infrequent in many of the larger cities under this system. Therefore most states now require that a person register as a voter in advance of the date fixed for the election.

As early as 1866 the movement was begun to require the voters to register personally at a certain fixed time prior to the date of the election in order to have their names entered upon the voting list. In some states two to four days are commonly set aside for registration. Registration may be permanent, it may be required before each election, or it may be required periodically ranging from one to six years. In other states registration books remain open through a period of several months. The full name, residence, occupation, and certain other information is required by some registration laws. This information, together with the names of voters listed alphabetically, is published and is furnished to the election officers at the primary or final election, as the case may be.

Representatives from both parties are usually members of registration boards and in this way it is intended that attempts at fraud shall be checked. The members of these boards are chosen in a variety of ways, but their duties are much the same in all states. The efficiency with which they perform their duties and the impartiality with which they administer the registration laws will influence materially the utility of registration prior to election. Of course, it is practically impossible to make a registration complete; and provision almost always is made for excepting those who are unable to enroll because of illness or for

other good reasons. While it is impossible to register all otherwise qualified potential voters, it is nevertheless true that registration laws have prevented many of the illegal voting practices which were so prevalent prior to this enactment. Laws of this kind do not insure pure elections, but they aid in securing them. They accomplish something worth while on this score, even though they keep some voters from the polls because of timidity, inability to take time off to register, and indifference. Political party organizations and well-organized machines spend much time, money, and effort in getting voters of their groups to register because many voters need to be reminded of the registration date.

The election

The preliminary preparations for an election, such as the selection of polling places, the preparation of ballots, the furnishing of voting places with booths and the numerous supplies which are needed, the distribution of copies of instructions and election laws, sample ballots, the regular ballots, etc., are duties usually performed by county officials or some special local election board.

The ballot

One of the last phases of election procedure to come under comprehensive legal regulation was that of the ballot.

Voting in public

During the colonial period, and for several years under the early state governments, *viva voce* voting was common. Albert J. Beveridge tells in a very interesting way of the methods used in the early elections in this country. The following is a description of the procedure in a Congressional election held in Virginia in which John Marshall, later famous Chief Justice of the United States Supreme Court, was one of the candidates.[8]

> Late in April the election was held. . . . A long, broad table or bench was placed on the Court-House Green, and upon it the local magistrates, acting as election judges, took their seats, their clerks before them. By the side of the judges sat the two candidates for Congress; and when an elector declared his preference for either, the favored one rose bowing, and thanked his supporter. . . . The voter did not cast a printed or written ballot, but merely stated, in

[8] A. J. Beveridge, *Life of John Marshall*, vol. II, pp. 413–414.

the presence of the two candidates, the election officials, and the assembled gathering, the name of the candidate of his preference. There was no specified form for this announcement.

"I vote for John Marshall."

"Thank you, sir," said the lank, easy-mannered Federalist candidate.

"Hurrah for Marshall!" shouted the compact band of Federalists.

"And I vote for Clopton," cried another freeholder.

"May you live a thousand years, my friend," said Marshall's competitor. And the boosters for a particular candidate would enthusiastically receive the voter into their ranks and the keg of liquor which was near by would again be tapped. The polls were often kept open for several days in the early years of our history in order that all persons in the district might be enabled to vote. This method of voting had many defects, and the purity of elections was not always easy to maintain. Before many years of the nineteenth century had passed, the demand for election ballots became pronounced.

In some states *viva voce* voting was replaced by the ballot at a very early date, and by the middle of the nineteenth century the *viva voce* method had been discontinued, except for certain local elections, in all of the states. The first ballots were printed privately, usually by the candidates for office, and these ballots were distributed by faithful party workers immediately outside the polling place. They were often distinguished by color, shape, or the texture of the paper, so that it was not difficult to know how a man voted. If a person wished to do so, he might bring his own slip of paper with him and write upon it the names of the candidates for whom he wished to vote, and deposit it in the ballot box. Fraud was not difficult of perpetration under such conditions, and election frauds, such as stuffed ballot boxes and the like, were not uncommon.

Australian ballot

The lack of secrecy in elections and the opportunity for election frauds finally resulted in more minute legal regulation of ballots and voting procedure. Beginning with 1888, the Australian ballot was introduced in the states and is now the prevailing system of voting in this country. The Australian ballot refers not only to the ballot itself, but includes much more; it is a system of conducting elections. Under this system

the ballots are printed by the state or under state supervision and are distributed at the polling place at the time of election. Each voter is given one set of ballots and may not get another one except in cases of spoiled ballots and then only if he hands back the one he has spoiled. As soon as the voter gets the ballot he may go into a booth, which is curtained off, and mark his ballot in secret. Attempts to stuff the ballot box and to vote several times instead of once have given rise to a number of protective devices, such as a detachable numbered coupon, which is deposited in a separate box at the same time that the ballot is placed in the ballot box. After a ballot is marked and folded, an officer deposits it in the ballot box, or else the voter himself deposits the ballot in the box, in full view of the several officers. The voter puts a cross mark opposite the candidate or list of candidates for whom he wishes to vote. Sometimes the voter is allowed to write in the name of a candidate for whom he wishes to vote in case the name of that candidate does not appear on the ballot. Provision for giving assistance to those who are unable to read or write because of physical or other handicap is also made in the laws regulating election.

Kinds of ballots

The names of the candidates of one party for all of the designated offices to be filled at the election may be printed in one column on the ballot. Such a ballot is called a party-column ballot. In several states there is a circle at the top of the column, and in the circle there is a party emblem, such as a Bull Moose, a Donkey, or an Elephant. This is sometimes called the Indiana ballot. The voter may place an "X" in this circle, thereby indicating that he casts his vote for the candidates of that party for the various offices to be filled. This is what is meant by the expression "voting the straight ticket."

1. Party column

2. Office column

Another type of ballot is the office-column ballot. In this ballot the names of the different candidates for an office, let us say, for example, governor, are listed under the office. The Republican candidate is named, and after his name is printed the party designation—*Republican*. The voter places an X-mark

opposite the candidate he wishes to vote for. This is often called the Massachusetts ballot. There are various modifications of these two principal types of ballots, but fundamentally all ballots are prepared with either the office- or the party-column principle in mind.

The advantage claimed for the party-column ballot, especially when it is accompanied by the party emblem in the circle, is that it encourages straight-party voting and also that it lightens the burden of the voter. Illiterate voters are not confused, and if they cannot read, they can at least make an X-mark in the emblem circle. Those who criticize straight-party voting naturally oppose the use of the party-column ballot. The office-column ballot requires more discrimination on the part of the voter, for he must read over the list of candidates for each office, see which one represents his party, and then vote for him. Or, if the voter does not know which candidate he wishes to vote for on the basis of party lines, he must, in the office-column ballot, look over the names of candidates to locate the one for whom he wishes to vote.

3. Non-partisan ballot

The non-partisan ballot is used by many states for local, school, and judicial elections. This type of ballot carries no party designation whatever, the voter being required to select the name of the candidate he prefers from among the names listed under a particular office. When ballots are used which have no party designation, some device for rotating the names is frequently adopted; experience has shown that if names are listed in the same order on all ballots, the person whose name is at the top of the list for an office is likely to obtain some additional votes because of his position on the ballot.

Voting machines

Voting machines are used to some extent in about half the states. The use of machines tends to expedite the process of voting to a marked degree, and also prevents the casting of defective ballots. They have now been simplified to the point where almost any person can vote on them without difficulty, and many of the arguments which were previously available

against them have now disappeared. One of their greatest advantages is that they reduce recounts, and, as a result, contested elections.

Absent-voters laws

One of the more recent devices designated to reduce the number of non-voters in elections is the absent-voter's ballot. Beginning with Vermont in 1896, the movement in favor of absent-voting laws swept over the country, and now more than five-sixths of the states have made provision for absent voting.

The early laws of this kind did not allow ballots to be furnished the absent voter prior to election day; but the tendency in recent legislation has been to allow this, as is the case under the North Dakota and Minnesota laws. There are certain dangers in issuing ballots prior to election day, but a variety of safeguards have been introduced which are aimed to curb any attempts at fraud. The choice between secret voting and the adoption of precautions against fraud has to be made in the formulation of absent-voting laws, and of the two dangers many states are choosing to let the absent-voter's ballot be distinguishable from other ballots in order that fraud may not creep in. If the absent-voter's ballot is clearly marked, the danger that any endless chain schemes will be started is very small. Sometimes a small fee is charged for sending out an absent-voter's ballot, elaborate rules are prescribed for preserving the purity of the election process, and due certification of all the steps in the process by a proper public officer is usually required. The statutes often require that the ballot be marked in the presence of an officer, but in a manner so that he may not see how it is marked. Some states require that when the time comes to count the votes cast in the election, the absent-voter's envelope be opened, the signature be compared with his signature on the registration book, and the ballot then be deposited in the box with the other ballots.

Some states permit absent voting in primaries as well as in the regular elections, and a few states allow registration *in absentia.* Some states confine absent voting to voters who are outside the

state at the time of election. But in others there has been a tendency to extend the privilege of voting *in absentia* to persons inside the state. Some states permit persons who are unable to attend the election because of illness, or other physical disability, to vote by absent-voter's ballot. Where this is allowed, provision is usually made for a physician's certificate of disability. Thus far the number of people who avail themselves of absent-voting laws does not seem to be very large; but as voters become more familiar with these laws and the technique of voting thereunder, the number of persons who use this kind of ballot may be expected to increase. But the abuses possible under some absent-voting laws have led to their abolition in a few states.

Election officials

Election officials are usually appointed and often selected so as to give bipartisan representation on the board. There are usually present at the polls judges, inspectors, clerks, and watchers conducting the work of checking on the registration lists when the voters apply for ballots, handing ballots to the voters, placing the ballots in the boxes or detaching coupons if that system is used, and aiding illiterate voters in the preparation of their ballots. These positions on election boards are seldom filled on the basis of merit or fitness for the work, but upon the nomination of party officials. Challengers from each party are often found at the place of election, or at least during the counting of the ballots, and are sometimes provided for by law.

Counting votes

When the voting has ceased and the polls have been closed, the ballots are counted by the regular election board, or they are sealed in packages and sent to some central body, perhaps a county canvassing board. In many states a state canvassing board checks up on the results of the count by local boards and if the defeated candidate wishes to contest the election he may usually do so in the courts. If the winner is determined upon by the central board and the result is quite clear, no contest will occur, and a certificate of election will be issued to the successful candidate by the state or county officer with whom the

election report is filed. Legislatures are usually constituted the judges of their own elections and contested legislative elections are therefore usually not settled in the courts.

Plurality elects

A majority of the votes cast is seldom necessary to elect. A plurality is usually sufficient. This has caused much adverse criticism of prevailing election methods, but no very satisfactory solution of the difficulty has as yet been presented. In municipal elections an attempt has been made to introduce preferential voting, whereby the voter is given an opportunity to indicate his first, second, and third choices. It is believed that this method reflects the will of the voters more accurately than does the present system of plurality election under the single-vote system. Over fifty cities now use the preferential ballot, but it has not yet been adopted in state or national elections.

Non-voting and its causes

There are over 75,000,000 people in the United States who are eligible to vote. Less than two-thirds of this number participate in Presidential elections, and in state elections slightly more than half of the eligible voters go to the polls. Some states average as high as 60 or 70 percent, but many others average less than 50 percent. Some of the causes for non-voting are perfectly legitimate and excusable, such as illness or loss of the voting privilege through change of residence. Some persons do not "believe in politics" and stay away from the polls for that reason. Others feel that their vote counts for so little that they do not think it worth while to vote. A few think that they are too busy to take the time to go to the polls. There are always some who fail to register and do not wish to take the trouble to swear in their vote, or who find it inconvenient to produce witnesses, as required by some statutes, and therefore do not vote in the election. Others are too timid to vote. But after due allowance is made for these cases there still remain from 25 to 30 percent of the eligible voters who do not participate in elections for no reason except their disinclination to do so. Sometimes the predominance of one party makes it almost useless for persons of the opposite party, or even for all of the members of the predominant party, to go to the polls. This is particularly true in

some of the Southern states, such as South Carolina, Louisiana, Mississippi, and to a somewhat lesser degree in the Northern state of Vermont. But even in the states where party lines are very closely drawn and where elections are hotly contested, there is noticeable the same indifference on the part of many voters.

Compulsory voting

Occasionally the proposal is advanced that some form of compulsory voting should be adopted in the states, and that a penalty should be visited upon persons who do not exercise their right to vote. A few foreign countries have compulsory voting laws. The cost and effort of enforcing such laws would perhaps be greater than the ultimate benefit to be derived from them. Civic interest cannot be forced in this way; and even if it could be forced it is questionable whether it would be desirable to do so. The assumption is commonly made that the minority rule resulting from non-voting in the United States is inherently vicious. This is no more than an assumption, however, and many careful students of government believe that the evils of minority rule are easily overemphasized. It is asked: Is it not proper that those who are interested enough to vote should direct the policies of government? Certain it is that berating the voters for their lack of interest will not create an interest on their part in problems of government.

Woman suffrage

Woman suffrage now has been in effect long enough for us to know that its introduction made no startling changes in the outcome of elections. In some specific instances, particularly involving civic improvement, the votes of the women have been influential and it now is customary for candidates to pay some attention to those appeals which are designed to be of interest especially to women voters. But in general about the same proportion of women as men vote, and they vote in the same way. Some observers have thought that women voters have taken more definite stands than men on emotional or moral issues, and have had a tendency to purify politics to some extent; but such conclusions are based upon opinion only, and little data can be adduced in support of them.

Election laws

The conduct of elections has been subjected to minute regulation in most of the states. Each has a great mass of legislation covering every phase of the nomination and election of officers. Many states issue compilations of statutes dealing with parties and elections, ranging in size from one to three hundred closely printed pages of the size of an ordinary college textbook. Two hundred pages is perhaps the typical size of these compilations. Herein will usually be found a registration law, an absent-voting law, a law regulating general elections—often containing over one hundred paragraphs and dealing with all conceivable phases of their conduct—a primary law, a statute governing township and other local elections, statutes regulating the counting and recounting of votes and providing for contesting elections, an elaborate corrupt practices act, and often, in addition to these, statutes governing certain phases of federal elections. Finally, a statute on special elections is usually included.

These election laws are not always strictly enforced. They are often hastily drawn and cover some phases of elections very well and others very poorly. They are difficult to understand and the state authorities charged with the compilation of such laws usually find it necessary to insert long and detailed explanations and interpretations of the statutes in order that the election officers may have some safe guide in applying them. Many of these compilations furnish evidence that the legislators have not given the problems of elections, primaries, and the legal control of parties careful thought or attention. The law-making bodies have usually been content to pass an act regulating some specific phase of elections, or eradicating some specific evil practice which has caused a popular protest or demand, without much thought of how it will fit in with existing provisions of the election laws. A few states have excellent election laws, but they are very few indeed.

Enforcement

One of the main reasons why election laws are not strictly enforced in most states is that public opinion does not demand their enforcement. The great detail with which election procedure has been regulated does not always represent standards

which the community wishes enforced. Political party organizations do not object to laxity in enforcing these laws unless they have something to gain by so doing; and if the minority party criticizes the party in power too vigorously, the critical party itself may be subjected to the same unpleasant criticism when it comes into power. It sometimes happens that the two major parties combine to down a third party, and when this is the case election-law violations occasionally result without any punishment to the offenders. Elections are doubtless more honestly conducted now than they were before legal regulation became common. The wholesale election frauds of a generation ago are not so common as they used to be. But if election laws were more brief and more strictly enforced and if more adequate penalties were attached to their violation, the conduct of elections could doubtless be considerably improved in many states.

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CHAPTER 6

POLITICAL PARTIES

Party Principles

Nature of parties

What is a political party and what is the role which it plays in the process of government? A political party has been defined as an organization of individuals or groups of individuals advocating certain principles and policies for the general conduct of the government, and designating and supporting candidates for public office to carry out these principles and policies. From the standpoint of function primarily, a party may be thought of as an organized group that seeks to control both the policies and personnel of government.[1]

The services of political parties have been said to be: (1) the unification of those persons who have similar beliefs concerning governmental policies, so that their beliefs may be realized in action; (2) the nomination of candidates for office in such a way that the voters may choose among the various aspirants for public office with some knowledge of their sponsorship and program; (3) the education of the voters as to the issues and policies that are to be determined or partially determined by them when they vote for candidates for office; (4) the supplying of agencies through which public opinion may be expressed as to the manner in which government is being conducted; (5) the unification of the policy of government by selecting for the legislative and executive branches of government officers who have the same point of view.

[1] For further discussion see Robert C. Brooks, *Political Parties and Electoral Problems;* Harold R. Bruce, *American Parties and Politics;* Edward M. Sait, *American Parties and Elections.*

Parties are a relatively modern agency of government and their variety and characteristics have been affected by economic, religious, social, and racial influences. In the United States there have been two large parties, nearly equally balanced in the number of their adherents, for upwards of one hundred years. From time to time there have been movements to establish third parties, but they have usually failed. The causes for these movements have been many and varied, and the same is true of the causes for their failures.

The Progressives of Wisconsin and the Farmer-Laborites of Minnesota are examples of state political parties in the contemporary political scene which thus far have been almost entirely local in their operations. Minor political parties of this kind often elect some members of Congress both in the upper and lower houses, but in the past the tendency has been for their representatives to align themselves with one or the other of the major political parties for purposes of national politics.

Much dispute exists as to the true bases of political parties. Some believe that the bases are primarily economic. Others believe that they are largely sectional. It may well be that there is no necessary conflict between these two views because sectional factors may reflect economic considerations. On the other hand, social and religious factors at times seem to have their force in determining party allegiances and it also is likely that any large party has in it many people who come into it from birth; others find their economic interests reflected in it and join for that reason; still others belong to it because of social advantages and prestige inherent in membership; and some groups are in the party at one time and out of it at another, depending upon transient considerations.

Until quite recently parties had no legal status and were not recognized by state law, but in late years an elaborate system of legal regulation of party organizations and methods of work has developed. Some states classify parties on the basis of the number of votes cast by their members at the last election and establish procedures and privileges for the different classes thus

set up. By this method one state provides for three classes of parties: first, those receiving more than 10 percent of the total vote cast in the last election for a specified state office; second, those receiving between 1½ and 10 percent; third, those receiving fewer votes than the second class. The obstacles which some laws place in the way of the formation of new parties—through the device of requiring that a variety of conditions be met before the names of its candidates may be placed on the ballot —present a serious problem in the eyes of those interested in new political movements. But in general it should be said that in most states it is possible for a new party to gain recognition if it can obtain any really substantial support from voters.

Parties in the states

The operation and the work of American state government cannot be comprehended adequately without a knowledge of the place which parties and party organizations hold in our political life. It is true, perhaps, that the need for party organization in the state and local government is somewhat less urgent than it is in the national government. It should be remembered, however, that there is need of some arrangement which will enable the state government to operate as a harmonious whole, and that this is made the more necessary because of the application of the separation-of-powers theory in state government. What the critics of party influence in state government usually object to is that political parties as now organized in this country do not reflect fundamental divisions of opinion on matters of state and local government. Much of this criticism would be appeased if party lines were drawn on different, more basic, more permanent issues.

There are several explanations for the continued influence of political parties in state affairs, despite the fact that present party divisions have little relation to problems of local government. (1) The attachment which a person forms for a political party in national campaigns becomes somewhat permanent, and for that reason party organizations and influence tend to persist in local government, although there may be no very logical reason for it. However, one would hardly expect a group of voters to

unite in a national campaign and then turn about to fight each other in different groups in state and local campaigns. Adherence to political parties is not wholly a matter of reason, but is probably as much emotional as intellectual. (2) The effectiveness of the national party organization and the extent of its influence depend largely upon the maintenance of local party divisions and the spirit of party loyalty. If parties were to disintegrate in the states, counties, and cities, the task of preserving present national party organizations would be virtually impossible. Many of the problems of local government cannot be dealt with adequately except in coöperation with the state and national governments; and because of this, many questions which at first thought seem purely local are not divorced entirely from national policies and issues. If political parties could really take sides on, and formulate their policies regarding, the solution of current state and local problems, they might be of more value in state and local government. Thus far there has been little of this in evidence.

Structures and Procedures

Party organization in states

Party organization usually is based upon the same units as those used for governmental purposes—nation, state, county, city, ward, and precinct, with special organizations for Congressional purposes. The machinery of party organization may be permanent, such as the committees which exist for each of the units in the organization, or temporary, such as conventions and primaries.

Committees

Party committees are an important feature of party organization because they are the administrative bodies and usually are composed of experienced and influential politicians. At the bottom of the committee organization in each state is the precinct committee, and so important is it that it has been called the "unit cell" of party organization. Sometimes one man constitutes the committee. He usually is given the aid of several others during campaigns. Some states are absolutely controlled by one party, and sometimes the minority party in such states has no precinct

1. Precinct committees

committee organization. Its precincts are called unorganized. This situation occurs most often in the Southern states. In most states, the majority of the precincts are organized. Precincts are of various sizes, ranging from about 200 to 500 voters on the average and depending on distances which voters must travel to reach the polls and on the number of votes which can be cast conveniently in one day. Precinct committeemen usually are chosen in the primary or by local mass meetings of party members, and their offices are unsalaried. Their duties are multifarious, and range from assisting in rounding up slow registrants and helping get out the vote, to watching the polls and providing watchers at the elections. Theirs is the task of keeping up party *esprit de corps* during the interval between campaigns. The precinct committeeman sometimes receives a portion of the party funds to use for campaign purposes in his district. His wishes are given preference in granting certain favors, such as passing out various local political jobs of one sort or another. The work of the committeeman also leads him into the social life of many of the voters, especially among the lower social strata, and he is expected to be of aid and assistance to the voters of his precinct in numerous petty personal matters.

2. Ward committees

Many cities do not have precincts. In such cases the ward is the smallest unit of party organization, and the committee in charge of political work there is called a ward committee. Township and sometimes city committees are next in rank above the precinct committee. They are intermediaries between the precinct and county organizations. Township and city committees are often of little importance, but the county committee is very powerful in most states—it is the committee standing between the state and local organizations. It is not unusual to find a rather influential local organization, of which some of the county officers are important members, centered in the county courthouse. Members of the county committee are chosen at the primaries or in local mass meetings of party members, but in some states, where each precinct has only one

3. County committees

committeeman, the county committee is composed of the precinct committeemen.

Congressional district committees which aid local and state committees in Congressional campaigns are also found in some states. The chairmen of the county committees often comprise the district committee.

4. State central committee

At the top of the party committee organization is the state central committee. Its influence in the conduct of state campaigns and in the subsequent distribution of political plums is extremely great. There are from thirty to forty members on these committees in most states, although great variation in the size of these bodies exists. The members are often chosen by convention or primary from county or district units. Where the committee is small it is not infrequently composed of the chairmen of the several Congressional district committees, acting ex officio. In a few instances the state convention selects the committee, delegates from each county balloting for their own representatives. In some states the committee is chosen by the successful candidates for nomination for state office in the primary. Quite commonly one person is chosen by the committee to take personal charge of managing the campaign, and not infrequently he is the choice of the candidate for the office of governor. The terms of office range from two to four years, with a tendency toward the four-year term. The members of party committees are seldom salaried, and membership on a committee often demands a small outlay of money as well as a considerable sacrifice of time. Party loyalty, the influence which comes with party victory, personal gain, and the sport or the game of an election are among the various motives which cause people to serve on committees. Party rules govern the committee organization in the few states still remaining where statutes have not been enacted regulating the subject. The committee elects a treasurer, secretary, and chairman, and these often comprise an executive committee. The real authority in the party usually rests with this small group. The state central

committee directs in general the party workers in state and local campaigns, aids the national committee in the conduct of national campaigns, and dispenses the funds at the disposal of the party. The committees, particularly the state committees, often possess broad rule-making powers on party matters not covered by statute. One of the chief functions of the state committee is to maintain party harmony in the state. Factional strife within the party may easily endanger the chances for party victory, and the maintenance of harmony is an important and difficult task. The state committee is also authorized to fill vacancies on the state ticket in a number of cases.

Committees in state and local party organizations are sometimes composed exclusively of men and at other times of both men and women. There is no uniformity in practice in allowing women to hold party office. Some states have formed auxiliary committees for women—and the arrangement has not been wholly satisfactory—whereas others have allowed an equal number of women and men. A third group of states has doubled the number of committee members to give places to women. The party organization outlined in the preceding paragraphs is that of the two major parties. The minor parties have varying types of organization, and sometimes, as is the case of the Socialist party, the organization is very cohesive and effective. This at times has been true of local or sectional political parties such as the Farmer-Labor party. Some of these parties have made use of dues and assessments as a regular part of their organizational technique.

Conventions and primaries

The temporary organization of parties consists of conventions and primaries. These are concerned almost wholly with the task of nominating candidates for office. Formerly, conventions were extremely important organizations and performed significant functions in addition to the nomination of candidates. The formulation of the constitution of the party and the adoption of rules of procedure for it so far as not covered by state law were among the more significant actions performed by the convention. The state convention was the most important of the

various party conventions in the state and, in addition to the functions mentioned above, it framed the party platform. Some states still retain the convention for this purpose as well as for the purpose of making nominations for a few offices. There has been a revival of the convention in some states after several years of experience with the primary—not to replace it but to supplement it. In a number of states the convention is really a pre-primary institution, serving to put the stamp of its approval upon certain candidates and giving them the approval of the party organization in control of the convention. Such a convention has no legal status but it may be of considerable political influence. Formerly, the selection of permanent party officers was often left to this body but this is now generally done in primaries. The party convention is of little importance in the majority of states at the present time. The place of conventions in making nominations will be considered presently. Primaries are also temporary party organizations and will be discussed in connection with the nominating process.

Nomination, a party function

There is usually an abundance of men who are quite willing to sacrifice themselves to the cause of the party in order that it may be able at election time to present to the voters a candidate for each office. Because of the need for concentrating the support of the party upon one candidate for each office, the party is required to decide which one of the several aspirants for office shall receive its united support. The process whereby party members select the person they wish to bear the party emblem in the race for a given office is called *nomination.* The exercise of the function of nominating candidates for office is no small service to the state. The work of nominating may often be poorly done under the present system. Still, it must be done by someone, and the political party seems to be the only agency fitted to do it at the present time.

Methods of nomination: 1. Caucus

Three principal methods of nomination have been used in American political history. They are: (1) the caucus, (2) the convention, (3) the direct-primary system. The caucus is still used to a considerable extent for making nominations for local

offices. The objections to the caucus have been that it is a secret body and that it does not reflect the will of the party as a whole. But in some instances elections would be little more than a farce if some small group of leaders did not take the process of nomination into their own hands. It should also be remembered that in some sections of the country the caucus was and is a general mass meeting of the members of a party in the particular village or area, and its work is not secret at all. The caucus still has a place in local politics, although it might be much improved in many ways. One of the purposes of the caucus, as it functions at present, is to select delegates to conventions which are held for the purpose of nominating candidates for the higher offices. This formerly was a very important function, but since the decline of the convention it has become less important.

2. Convention

The convention is a body of persons chosen by the members of the party in caucus or primary to make nominations for offices in the area which it represents. A state convention which represents the entire party in the state may make nominations for state offices. In addition to making nominations conventions also draft platforms.

Representation in conventions is apportioned to districts or counties upon the basis of the party vote in the unit. Conventions are temporary bodies and their work lasts only for a few days. Many abuses grew up in the convention and caucus system, and their perpetrators were not only quite unrepresentative of the party in many instances but were even rascals and criminals. Snap caucuses, packed caucuses, the use of illegitimate influences in conventions, prepared slates, and the like caused the more respectable members of the party to absent themselves from political caucuses or conventions and to hold aloof from political activity. The result of this was that the reputation of conventions became worse, not better; and finally such a hue and cry went up concerning the abuses of the convention system that it was totally abolished in many states. The party caucuses were unregulated by law as were the conventions; and the result was that no effective restraints existed upon their

action. The caucus and the convention system as they did exist probably could have been saved by introducing some legal regulation—as was done later with respect to direct primaries—and they might then have been retained as effective agencies for the making of nominations. The evils of the convention system doubtless have been exaggerated, and even if the worst pictures were admitted to be true they would not be descriptive of the situation which existed in the rural sections of the country.

3. Direct primary

The direct primary "is a system for making nominations by popular elections within a party normally held under state management." It is called "direct" because it allows the voters to make nominations instead of having their representative do so for them. The primary is also official, established and regulated by law. There are wide differences in the details of the system as used in about forty states. In a few states the primary is used to nominate all except state officers, while in the others it is used to nominate all elective officers, state and local. Where the latter system is used, the ballots tend to become lengthy and serve to confuse the voter.

In order that a political party may achieve a status which will permit it to place candidates in nomination in the primary, it must meet certain tests. These tests usually take the form of a requirement that it shall have cast either a specified number of votes or a given percentage of the total vote at the last election, ranging from 2 to 25 percent. Provision for the recognition of new parties is made by allowing petitions to be filed bearing a stated number of signatures. Nominees of these organizations may then have a place on the ballot. The primaries of each party are usually held on the same day and are conducted in the same manner as regular elections, with secret voting, the customary election officials, and ballots provided by the state or under state supervision. They are to all intents and purposes regular elections within the party for determining its candidates. Except in the Southern states a majority is not required to nominate and this often results in minority nominations.

The filing of a petition signed by a designated number of

voters is generally a condition precedent to having one's name placed on the primary ballot, and this has presented a number of problems in the handling of petitions, not all of which have been satisfactorily settled as yet. Such problems involve forged signatures, verification of signatures, and "petition pushers." More extended experience with them is still necessary before the merits of the various methods now in use can be determined.

a. Open primary

There are two general types of the direct primary: the open and the closed. It is impossible to have a completely closed primary, but for many purposes there is sufficient difference between the two to warrant their separate classification. The open primary is one in which no test of party allegiance is required. The names of the candidates of all parties are printed on one ballot or on separate ballots, and the voter is given all of them to take into the voting booth. When he is in the booth, he may select the ballot of the party of his choice, vote on it, separate the ballots, and deposit them all in the boxes provided for marked and unmarked ballots. This promotes secrecy of party affiliation, and to some extent this is desirable. On the other hand, the open primary permits the adherents of one party to switch votes in order to nominate a weak candidate for the other party so that he can be more easily defeated in the election.

b. Closed primary

Closed primaries are preferred by party leaders because in them the voter must indicate his party affiliation before he is given a primary ballot. By virtue of preference, the closed primary is in general use. Tests of party affiliation are not uniform but vary from a mere oath of party allegiance to a requirement of past voting of the party ballot. A few states make provision for dropping out of one primary in case of changing party affiliation. This works a hardship on the voter, however, in that he is deprived of his vote in one primary merely because he wishes to change from one party to another. Most states allow voters to change their party affiliation by taking an oath, or by merely asking for the ballot of another party. The primary is closed only to the extent that political honesty prevails

among voters, and this varies considerably in sections of the country. It is impossible to check up on whether a person who makes a declaration of past party voting tells the truth, because the voting is done in secret.

c. Non-partisan primary

In addition to the partisan primary there are in many states non-partisan primary ballots, which are used in the nomination of certain officers, usually school and judicial officers. Only three states, Minnesota, Nebraska, and North Dakota, have thus far extended the non-partisan system of nomination to the legislative body.

Results of primary

The direct-primary method of making nominations has resulted in bringing forward a much larger number of candidates than did the old system, and the task of the voter has been made greater. The primary system sometimes results in a victory over bossism and the machine; but more often the bosses and machines, where they exist at all, are still able, by various methods, to maintain effective control over nominations. Active canvass in favor of certain candidates, and the influence of a strong and closely knit political organization still count for much even in the direct primary. The primaries do not insure well-balanced tickets, and to that extent they are not effective agencies for nominating candidates. The convention usually puts forward fairly well-balanced tickets—out of self-interest, if for no other reason. Each candidate in the direct primary is left to manage and conduct his own campaign, since the organization cannot openly espouse the cause of any candidate. The tendency is for the party-platform phase of the campaign to drop out of view. Because of this, the convention has been retained in some states to formulate a platform. The direct primary tends to disintegrate the party organization, and to the extent that parties are believed desirable, that must be reckoned as an objectionable result. The cost to the public of conducting these elections is great, and the cost to the individual candidate is much greater than under the old system, because he now has to make two campaigns if he obtains the nomination. This means that candidates with financial backing are still favored, other things

being equal, just as they were under the old system. There is much diversity of opinion regarding the quality of candidates chosen under the two systems, but arguments on this score are usually inconclusive either way.

The primary does have some desirable features and it seems to be a well-established political institution in this country. Objection is sometimes made to the lack of interest of the voter in primary elections, but there was perhaps even less interest in the convention system. Many of the political tricks possible under the old system are now impossible. Much improvement will have to be made in the primary before it becomes nearly as effective as its proponents claimed it would be, and more careful and scientific study of its workings is needed. Several of the Southern states require a majority vote for nomination, and in cases of failure to secure a majority, a second primary is held. The system of nomination used is very important in the Southern states because as a result of the predominant strength of one party, nomination is usually equivalent to election.

When party nominations have been made, the opposing nominees inaugurate a campaign among the voters in an effort to secure election to the office. The elaborate system of machinery which has been developed for carrying on a campaign preceding an election must be studied next.

Campaign methods

Some campaign methods are calculated to reach the voter as an individual, whereas others aim to reach the voters *en masse*, or at least in large groups. The methods used to reach the voters individually have been enumerated by Professor Brooks in his book *Political Parties and Electoral Problems* and may be summarized as follows:

1. *Canvassing.* (a) Personal interviews or (b) correspondence addressed to the voter personally may be effective in some cases. Personal interviews are more likely to be widely used in the rural sections of a state than in urban centers. The cost of large-scale personal solicitation is one of the serious items of expense in the larger cities. The same is true of post cards or personal letters. Handbills are costly and have not proved very effective.

2. *Methods of reaching the voters as a group.* (a) General political meetings. These are sometimes very formal and large-scale affairs, but at other times they are informal street-corner meetings. Occasionally they consist of small groups of persons gathered in some private home or in some small private hall. These meetings vary in effectiveness and costliness but some of them are useful in part for the publicity that attends them. However, few converts are made at political meetings of this type because usually only members of the party attend. Only one side of the questions discussed is presented. Joint debates are held but they are not very common. (b) Picnics and public celebrations. These public occasions sometimes afford an opportunity to address a large group of people, which is eagerly taken advantage of by each candidate. (c) Newspapers. In some important campaigns newspapers are purchased outright with a view to molding public opinion, though this is not often done because of the expense involved. Large numbers of newspapers support either side in a campaign, and for widely varying reasons. In the writing of editorials, in the juggling of headlines, and in the write-ups of current campaign questions or opposition meetings, these papers may exert a powerful influence over a large number of people. "Boiler plate" is often furnished to the rural press, some of whom are glad to print it to fill up space. Paid advertisements also are used in some instances, in addition to the regular campaign advertisements of the individual candidates. (d) Billboards and moving pictures, recorded speeches and the radio. All these are recent devices in political campaigning. (e) General campaign literature. Pamphlets and books of instruction for field workers, as well as party platforms, usually are given widespread circulation among party workers. Printed biographies of candidates often are distributed widely among the public. Privately printed cards with the photograph of the candidate and a pithy statement of his particular political hobby are much used in local campaigns.

The most notable development in campaign techniques in recent years is the use of radio and television as a method of

reaching the mass of voters individually. State and local campaigns employ increasing numbers of radio speeches both by the candidates themselves and their supporters. Radio stations are not permitted to assume responsibility for candidates but sell time to all. In addition to the methods mentioned above, there are the usual straw votes and house-to-house canvasses. The poll books, which are lists of the voters in the district used for purposes of checking up on voters who come to the polls, are of great help to the party workers. There is the usual amount of heat incident to making charges and countercharges against parties and candidates. The more demonstrative torchlight procession is used much less now than formerly. Provision must be made also for getting the sick, the lethargic, and others to the polls on election days.

For the conduct of all these activities a great deal of money is required. The methods by which it is raised and expended will be noted shortly. Many persons doubt the value and justification of campaigns; but admitting that much time, money, and energy are expended in the effort to rouse the voters, it is difficult to see how they could be roused from their usual political lethargy in any other way under present conditions. Even so, scarcely more than 50 percent of all the eligible voters are likely to be induced to go to the polls.

Party finance

Tremendous amounts of money are spent in each state election, and to this must be added the money which is spent in national and municipal elections. The raising and spending of these huge sums of money have only recently been regulated by law, but the most skillfully drafted laws cannot prevent the misuse of money by politicians. The sources of party funds are many and various. Many party followers voluntarily contribute funds to the campaign for a variety of reasons. They may contribute because they believe in party principles and wish to aid in putting them into effect. Or they may think their business or profession will benefit by the inauguration of a particular party policy. Again, candidates for office contribute because they feel it incumbent upon them to support the party campaign

Sources of party funds

chest. Donors may hope to secure a place, an appointment, or some remunerative favor of one sort or another from the government if the particular party wins the election. Then, too, involuntary contributions are exacted in return for promises of favors or protection at the hands of the government if the party wins. Owners of illegal businesses sometimes are called on to contribute to a party in consideration of their being allowed to continue their businesses unmolested if it obtains control of the government.

Corrupt practices acts

Half a century ago public opinion tolerated many practices in the raising of party funds which are no longer countenanced. Because of the tendency on the part of the public to examine more strictly the methods for raising party funds, a great many laws have been enacted regulating this phase of party activity. These laws usually are called corrupt practices acts. The four main purposes discernible in these acts have been enumerated by Brooks as follows:[2]

Purposes

Publicity of campaign contributions and expenditures
Prohibition or limitation of campaign contributions
Definition of legitimate and illegitimate forms of expenditure
Limitation of the total amount to be expended

1. Publicity

Publicity of campaign contributions and expenditures is sought. This is done by requiring party officials to report to a designated public official the contributions made to the party funds, the donors, and the amounts given. These reports are made periodically either before or after the election. Sometimes the reports include personal service contributions as well as money.

2. Prohibited sources

Contributions by corporations often are prohibited, as are contributions from anonymous sources, and in some cases from officeholders as well. Assessments on civil servants and holders of office were very common until quite recently; and despite laws prohibiting them, they have not been entirely eradicated. The size of contributions is regulated by many states, and the

[2] Robert C. Brooks, *Political Parties and Electoral Problems*, p. 335.

amounts which may be contributed by candidates often are limited. The sums which candidates may spend personally are limited also by at least half the states, but it is still possible for friends to spend money in behalf of the candidate in ways not easily detected by officers engaged in enforcing these laws.

3. Use of money

In the further regulation of party finances, long enumerations of legitimate objects of expenditure are often to be found, and also long lists of prohibited objects of expenditure. There is no unanimity of opinion as to the particular items which should be included in each list, and they vary greatly from state to state. Expenditures of some kinds on election day are prohibited. Numerous regulations on the use of newspaper publicity are to be found, and attempts have been made in some states to curb the influence which employers sometimes exert on their employees.

4. Total expenditure

Limitations on the total amounts to be expended are found in only five states.

Defects in acts

The corrupt practices acts, which have been passed in most of the states, represent mere gestures rather than deliberate or well-planned attempts to regulate effectively the entire problem of the use of money by political parties. They are still defective in many respects, and under present conditions will continue to remain so for some time to come. They are particularly lacking in "teeth" in many instances to make them serious deterrents to dishonest practices. The problem of administering these acts has proved very difficult also. There can be little doubt, however, that they do reflect a growing tendency in the public mind to disapprove of so-called shady methods of party financing.

Machines and bosses

A machine is a small group within the party which has for its main purpose the private benefits obtainable through the medium of a party. Parties are usually considered as agencies for more effectively registering the will of the people in a representative government. But sometimes this view is lost sight of, and the powers of a political party are turned to serve private ends solely. A machine differs from a party organization in that it seeks primarily to serve the ends of a person or of a limited

group rather than the public. The machine should not be confused with what is often called "the organization." The latter usually refers to a group of elected party leaders and does not carry with it the odium which customarily attaches to the term "machine." Every party must have a group of leaders, men who devote considerable time to party affairs, who are known as politicians, and who may make a legitimate profession of being party leaders. The "organization" is legitimate if parties themselves are useful and desirable. But "machines" may be vicious and dangerous, even though parties are conceded to be useful in the process of popular self-government. The boss is the person who directs and controls the actions and policies of the group known as the machine. Machines and bosses are typically American institutions and seem not to be found in foreign countries to the same extent to which they exist in this country, perhaps because parties are less highly organized in those countries, and perhaps because the opportunities for financial gain in politics are fewer.

New York City

Machines and bosses seldom dominate the national parties, but they have held sway for long periods of time in states and localities. The most famous of these machines have flourished in the larger cities of the United States. Bosses may be found quite as well entrenched in rural as in urban localities, although the term is more often associated with city government than with county or state government. The famous Tammany Hall machine within the Democratic party in New York is well known to every reader. This organization had its beginnings in a small club named after a legendary Indian chief. It did not become a strictly political organization until the end of the first quarter of the last century and it still retains many of its early social features, though these are incidental to the political functions of the society. The club is now organized on a very elaborate basis, with squads of twenty-five voters forming the smallest units, with precinct captains and assembly district committees, culminating in a general committee of forty-six members from the assembly district. This committee of forty-six

is too large to work effectively without the aid of subcommittees, and these small committees are the ones which really direct the work of the soceity. The leader of Tammany Hall may or may not be a member of this committee, but he seldom holds office. He directs the work and policies of the society largely through agents and through the force of his personal strength as a political leader.

Philadelphia and Chicago

Philadelphia has had its rings or machines at various times, one of the more famous being the machine headed by the Vare brothers in the last quarter of the nineteenth century. Chicago has had considerable experience with bosses and machines, but no single machine has been able to retain its hold on the government of that city for any great length of time.

It is almost impossible to give a comprehensive account of bosses and machines and their work, for each boss works in his own way, and each machine is organized on its own plan. Bosses are sometimes unscrupulous and selfish individuals, but usually they have been very likable human beings, with considerable natural leadership ability; and at times they have given the cities which they have dominated fairly efficient, though somewhat costly, government. The boss has gained in power from the long ballot. When the ballot is long and the voter does not know the various candidates or their respective qualifications, the boss can be of aid in suggesting candidates for whom electors may vote. Machines disseminate information and propaganda in favor of certain measures and candidates. This is a service to the voter, regardless of the objections that may be advanced against it. A machine would have much greater difficulty in maintaining its hold upon the people in a government which operated on the short-ballot principle. The application of the short ballot would drive bosses into the open, and that is usually the one thing that they do not wish. Their success in directing the voters lies largely in the deviousness and secrecy of the methods which they use and the influences which they bring to bear to attain their ends.

Machines sometimes control both the executive and the legislative branches of government. At times they have even controlled the courts. The fuel with which the boss furnishes energy to run the organization consists of "rake-offs" from illicit business activities of one sort or another in return for protection against prosecution, and of contributions from special interests desiring other forms of special favors. Contracts for public work also afford financial fuel.

It is easy to denounce machine rule, but it is difficult to eradicate it. The machine is usually well organized and is able to defeat the reformers at their own game, either by stealing some of their thunder or temporarily releasing its hold upon the party and the government. That machine rule is not desirable is conceded by most people. That it is a natural result of present political conditions few people recognize and fewer are willing to admit.

Parties and public opinion

In addition to making nominations and conducting campaigns for election of the candidates nominated for office, political parties play an important role in molding public opinion, particularly as it is related to the conduct of government. Committees or conventions are constantly at work attempting to mold opinion on political questions. Elaborate platforms are formulated and promulgated, and speakers, pamphlets, and other propagandist materials sent out to convert the public to the point of view advocated by the particular party. Then there are the elaborate campaign textbooks which contain an enormous amount of more or less accurate information about the party and its activities. All told, these activities of parties in trying to influence and reflect public opinion and make it an operative factor in the conduct of government represent a significant service to society. Some may think that public education could be done better, but no organized agency exists at present which could do it at all on the scale attempted by party organizations. Political parties, therefore, constitute a very important factor in the formulation and reflection of public opinion.

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CHAPTER 7

THE POPULAR CONTROL OF GOVERNMENT

Such activities as voting and participating in party functions may be considered as means of popular control of government. The voter does not go to the polls or participate in party activities merely for the purpose of electing public officials. He may vote also for the purpose of passing upon proposed constitutional amendments or ordinary statutes which the legislature has referred to him under the statutory referendum which obtains in some states; or he may be asked to vote upon the recall of a public official. Furthermore a voter may act alone, or as a member of a citizen group or organization he may seek to influence governmental policies in various ways. These more direct as well as other indirect types of political action will be considered in this chapter.

Direct Controls

The initiative, referendum, and recall

The government of the United States was classified as a representative government in Chapter 1. There are, however, certain modifications of the representative principle which have been made in the last half-century and which tend to make for direct popular participation in some phases of state and local government. These modifications do not seriously impair the representative feature of our government. They do indicate, nevertheless, that there has been some dissatisfaction with the operation of representative government in some of the states, and the recent modifications alluded to are by way of supplement rather than by way of displacement. These political devices, whereby the operation of government is controlled more

directly by the voters, are the initiative, referendum, and recall. The initiative is a means whereby the voters may propose constitutional amendments or statutes instead of waiting for the representative body to do so. The referendum is a device whereby the voters may pass upon an initiated measure or upon a measure proposed or enacted by the representative body and submitted to the voters: (1) because of a legal requirement that this be done; (2) as a result of the action of the assembly proposing or enacting it; or finally (3) at the option of a group of voters submitting a petition to the secretary of state or other designated official.

The recall is a method whereby voters in an election decide whether an officer shall be superseded in office before the regular term for which he was elected expires. This action is initiated through a voter petition as will be explained later.

The initiative and referendum though different are usually parts of one system of popular control and therefore should be described together. The system may be used for two distinct purposes—changing the fundamental law through constitutional amendments, and enacting or repealing ordinary legislation. This distinction is not always made by those who write on or discuss the subject. The result is that arguments pro and con may be different depending upon whether they are to be used with respect to constitutional amendments or ordinary legislation.

The petition

The questions of who shall circulate the petition on which the proposed initiative measure is printed and how to insure against fraudulent signatures are difficult to answer. Most states using the initiative and referendum provide that only qualified voters may circulate petitions, and several states prohibit the giving of compensation for their circulation. In a very few states petitions are not ordinarily circulated, but the voters who wish to sign them are required to go to certain designated places to do so. The registration lists are used as check lists in the state of Washington to make sure that the persons who sign the petition are qualified voters. Prohibiting the circulation of petitions is

perhaps objectionable on the ground that it makes the use of the initiative and referendum very difficult. It has, however, the advantage of preventing fraudulent signatures. Many states using the initiative and referendum require that the signer take an oath that he is a qualified voter in the state, or that the persons circulating the petition swear that the names on the petition are the signatures of persons who are to the best of their knowledge qualified voters. Such requirements as these are usually futile, since the task of checking up on the signers, even when they are required to give their addresses, is expensive, tedious, and, in general, unsatisfactory.

Number of signers

The number of signatures which should be required for an initiative petition raises a question which has not received any uniform or satisfactory answer. There is a tendency to require a larger number of signers for the constitutional initiative than for the statutory initiative. This is in keeping with an attempt to maintain a distinction between the constitutent and legislative functions. But some states require a higher number of signers for the statutory initiative than others do for the constitutional initiative, and the variation in the requirements for either one of the two is bewildering. The requirement for either should be sufficiently high to discourage its use by every small group of persons who has some pet or local proposal which it wishes to refer to the voters of the state. On the other hand, the requirement should not be so high that the initiative and referendum cannot be used except under extraordinary circumstances. When this much has been stated it is difficult to proceed further, unless one enters into a detailed discussion of the ends of government and the means for carrying out those ends. Much more experimentation will be necessary before we can tell whether 5 or 15 percent of the voters should be the required number of signers of the petition for initiating a constitutional amendment, or for a referendum on a legislative enactment. There is discernible a tendency to require a certain degree of geographical distribution of the signers also, in an effort to avoid too many proposals of only local importance.

Effect on parties

One of the objections raised against the introduction of the initiative and referendum as a general device of direct government was that political parties would be weakened. It was feared that they would lose their sense of responsibility and cease to be effective agencies for the expression of public opinion. Straight-party voting is not so common in state affairs as it is in national affairs, and so far as that is true the initiative and referendum have not seriously affected the party—or even the machine, where machines exist. Political parties are more interested in the selection of candidates in the states than they are in general programs of legislation. The initiative and referendum are usually invoked in dealing with the more general phases of state policy, and parties often are not interested in one side or the other in initiated or referred measures, as such. In the states having the initiative and referendum the unorganized voter may, of course, force consideration of measures which the party has refused to sponsor for one reason or another.

The use of the initiative and referendum has not eliminated the machine from politics. They have been used at times to break the power of machines, but machines are sometimes in a better position to make use of the initiative to accomplish their ends than are other less well-organized groups of voters. For this reason the political boss has not been hampered seriously in his work by the introduction of these instruments of direct government. The machine can usually manipulate the mechanism of government and the public opinion behind it more adroitly than can the average group of unorganized voters outside of the machine.

Effect on legislatures

The initiative and referendum seem to have had little effect on the legislatures of the states wherein they are used. These bodies still continue to make laws and to make them upon the same great variety of subjects as formerly. The fear which was voiced to the effect that legislatures would deteriorate as a result of the introduction of these tools of direct legislation has not been justified.

The effect which the initiative and referendum, especially

statutory referendum, would have upon the electorate was an argument which was used by both sides in the controversy preceding the introduction of these devices. Their advocates contended that the interests of the voter would be stimulated by their introduction and use. Their opponents argued that the voters were already overburdened and would take no more interest in measures proposed by the initiative or referred by the legislature or voter-petition than they did in other governmental matters. Effect on voters

The compulsory referendum—referendum by which the representative body *must* submit an enactment to the voters for approval—does not operate differently now from the way it has almost from the beginning of our national existence, and there is usually less interest on the part of the electorate in the compulsory than in the optional referendum, or referendum at the option of the representative body or voters through petition. This is natural, for the optional referendum will not be invoked in most instances unless there is some difference of opinion in the state over the wisdom of the measure under review. The voters are not interested in technical subjects nearly so much as they are in proposals which involve broad moral, economic, or social issues. The voter turnout on such questions under the initiative and the optional referendum has usually been very satisfactory when compared with the vote cast at elections for candidates for office.

The effect which the initiative and referendum have had on the ballot is not so bad as was anticipated, but it is, nevertheless, unfortunate. The burden of electing large numbers of officers in state and local government was too great as it was. To add to this the many initiated and referred measures, many of which require considerable study before they can be understood adequately, was to ask the voter to do something which he had neither the time nor the inclination to do. It may be that if the short ballot were introduced, the initiative and referendum could be used to a limited extent in an effective way; but as it is, they lose much of their merit because of the effect they have Effect on ballot

on the ballot. It is not sufficient that the voter be interested in measures proposed by these methods; he must also be informed.

Recall petitions

Under the recall laws petitions are circulated just as they are in case of the initiative and referendum, and on these petitions the reasons for the proposed recall of the official are briefly stated. The recall is usually applicable only to elective officials, but in one state it is made applicable to appointive officers as well. It may not be instituted before a certain fixed period has elapsed after the officer has entered upon his duties. This period varies from a few days after the opening of the legislature in the case of legislators, to six months in the case of other elective officials. There is a wide variation in the number of signatures required, ranging from 10 to 35 percent of the voters at the last election. Twenty-five percent is not an uncommon requirement. The number of required signatures also often varies within a state, depending upon whether the recall of state or local officers *is to be voted on. Provision for resignation before the election* which takes place as part of the recall procedure is usually made, and if the officer does not resign, the election is held within thirty, sixty, or ninety days; or, if a general election is not too far distant, the recall election will be held at that time.

Recall ballots

The first question which appears on recall ballots in several states is: "Shall _____ be recalled from _____ office?" Then follows a list of the candidates who are running for the office in case the present incumbent is recalled. The recall of the present incumbent and the election to fill the vacancy thereby created are held at the same time and both choices are indicated on the same ballot. Sometimes the reasons for the recall are printed on the ballot. Some states place the name of the officer who is to be recalled in the list of candidates to be voted on, although others do not.

Use of recall

Experience with the recall in the states where it has been used indicates that it is better adapted to local than to state officers. The people are better acquainted with the acts of local officers and can be much more easily interested in recalling inefficient or corrupt local officers than state officers. The state officer is

more distant from the locality, and his acts do not so often touch the individual closely. Recall elections usually bring out a large vote and arouse a very considerable interest on the part of the public. It is impossible to say as yet whether or not this device is a very effective instrument of popular control of government. If the recall proved to be effective, it might be one factor which would tend to allow the lengthening of terms of office for public officers; and if this should happen, the work of government might be improved. As yet it has not been used often, and its use has, with few exceptions, been confined to local officers. If the recall were used frequently, it would be open to serious objection because of the burden it would place upon the voter. As yet, however, it has not burdened the voter to any great extent. It may be that the recall can be relied upon to preserve in the hands of the people an effective control of government in the movements for centralizing authority now discernible in state government. This might be particularly true in case the short-ballot principle were introduced.

Short ballot in early state governments

One hundred and fifty years ago the mass of people began clamoring for an opportunity to participate in the work of government. What they wished primarily was the right to vote. Little by little they secured the right to vote for officers of government until now universal suffrage has almost been realized, and the many electors at present have the right to vote for large numbers of the officers of state and local government. It is curious that now that the people have this right to vote for a large number of officers, and upon many questions of policy which are submitted to them at every election, they do not avail themselves of the opportunity for which they struggled so desperately only a century and a half ago! Why is it so?

The coming of the long ballot

At the time when universal manhood suffrage became the rule in the states, there were comparatively few elective officers in state and local government. The average voter knew many of the candidates personally; the country was essentially rural; the work of government was relatively simple and of a nature

that permitted anyone to perform the duties of most offices. If the duties of an office were so complicated that the average man could not perform them satisfactorily, the occupant of that office was to be distrusted. The voter could perform the task of selecting these few officers intelligently and honestly. But all this has been changed in many parts of the United States. The work of government has expanded greatly and has become infinitely more complex. The governmental machine is now manned by hundreds of officers in the states, counties, and cities. Almost half of the people live in cities and few voters are personally acquainted with many of the candidates for offices.

The result of long ballot

When the voter goes to the polls, he is presented with an armful of long strips of paper bearing a bewildering array of names of candidates for the many offices. He walks to the election booth, lays these ballots out on the board before him, looks over the names of the candidates for President, Vice-President, governor, attorney general, secretary of state, justices of the Supreme Court, and such others as may be included, and makes an X-mark after the names of those for whom he wishes to vote. He then proceeds to consider candidates for numerous other offices—the county court, the municipal court, the county administrative offices, the city offices, candidates for the public service commission, and from ten to forty others. The voters are few indeed who vote intelligently and independently for candidates for each of these offices. When they come to the twentieth or thirtieth office, the voters must resort to party designation, or the fascination of a name or its racial significance. They may easily have no more to rely on than the suggestion that a certain candidate is a "good man," and so on to the end of the list. Sometimes the voter resorts to an X-mark in the circle as a means of escape if he is voting the Indiana type of ballot. The voter may next proceed to the consideration of from one to twenty constitutional amendments or legislative enactments which have been submitted for his approval.

It is physically and mentally impossible for most voters to

vote intelligently for all of the officers who are to be elected in many states. The longer the list of candidates, the more the voter has to rely on outside sources of information and help. The political party, the boss, and the machine, all thrive on the long ballot. The party would and should thrive without the long ballot; but the other two would find it more difficult, although they would not be stamped out entirely merely by the introduction of the short ballot.

Return to short ballot urged

Because of the absurd lengths to which the system of elective officers has been carried in this country, there are many thinking people who are advocating a return to the short ballot of earlier days. The ballots of early state governments were short, and that principle still prevails in the national government. The introduction of the short ballot means an increase in the appointive power of the elected officers. The people are slow to grant this power because of the fear that their selection may not have been wise. This is but a confession of the weakness of representative government as it now exists. However, if the voter has to vote for but a few officers, it may well be that he can choose those few so intelligently that the persons so chosen can be trusted with an extensive power of appointment. If the recall be coupled with the short ballot so as to enable the voters to remove officials who abuse their increased powers, the burden of the voters will be lightened materially and the government will work at least as efficiently as it now does. The probability is that it will work more efficiently than it does at present. The people cannot choose many officers and do it well, and they are not doing it as well as it could and should be done. Until they are content to choose only a few, they cannot hope to select candidates who can be entrusted with considerable power as the representatives of the people. With the adoption of the short ballot should also come longer terms of office, which can be introduced without any danger to representative government. Thus the character of the work of the government, much of which is technical, could be improved. In so far as that is true, the appointive principle should be given broader applica-

tion, and the terms of office should be lengthened where the elective principle is still applied.

Indirect Controls

Interest or pressure groups

People have secured the right to vote; they have brought about an enormous increase in the number of elective offices; they have secured the power in many states to act directly in legislative and constitutional matters; and yet they find it necessary or desirable to organize themselves into interest or pressure groups in order to exercise the control which they are supposed to possess.

A pressure group is a body of individuals which seeks to influence political activity in a way to promote the special interests of the group or to promote what the group considers to be the general interest. There are, it may be seen, two somewhat distinct kinds of pressure groups. One might be called the special interest group. This type is chiefly interested only in matters which concern its members immediately and directly. An example is the sheep raiser who telegraphed his Congressman protesting a proposal to lift the tariff on wool, only to withdraw his objection at a later time when he had gone out of the sheep-raising business. In one state an association of chain stores reportedly spent over $1,000,000 in one election to defeat anti-chain-store legislation. No one expects such an association to spend money in an election when only matters of general interest are at issue. One could probably guess how much this organization would spend to promote a better public health program in the state.

A pressure group without special interests would be, for example, the League of Women Voters. This organization seeks to exert political influence for what it believes to be the general good. It is therefore called a reform group. The League has waged long-term battles for voter registration and the merit system in government. There are people who contend that both of these "reforms" would be bad for the country, but the majority of thinking and unselfish people believe that both

would be forward steps. No one expects members of the League to receive any more direct benefits from such policies that are adopted than do people generally. Most of the powerful pressure groups, however, are interested primarily in advancing the welfare of their own members.

Extent of pressure group activities

It seems unfortunate that there are not more of the unselfish or general interest pressure groups active in politics. The activities of the special interest groups are notorious at all levels of government. If the town board in a town of a few hundred inhabitants proposes a general ordinance, the chances are good that the spokesman for at least one interest group will be on hand to oppose it. The average citizen would probably be surprised to learn that in our cities pressure groups, of the special interest type, may actually sponsor or introduce a majority of the ordinances or laws enacted by the city councils. In the state legislature or in Congress not one insignificant piece of legislation escapes the eagle eyes of the paid representatives of the interest groups. The individual agent is, of course, not interested in all proposed legislation but he must "screen" all of it in order to detect any that may be inimical to the interests of his clients. In many states perhaps the best record of the proceedings on bills is one kept by one of the pressure group representatives. His memorandum or notebook will tell a much more complete story than will the journals of the clerks.

Activities before administrative bodies

Not only do the pressure groups seek to influence the formulation of policies but they also seek to influence the way policies are administered. It would probably be revealing to some people to discover how much building practices in their cities are at variance with the provisions of the building code. Building supervisors or inspectors are often convinced by contractors, material men, or tradesmen, that certain provisions of the code are outmoded and should be discarded or ignored. This procedure may be simpler than getting the building code amended or redrafted. It is often said we are now governed by commissions. Boards and commissions, especially at the

state and national levels, play an increasing role in political affairs. Whether it is a tax commission, public service commission, railroad commission, interstate commerce commission, or any one of many others, the activities are of such nature that the interests of many groups may be involved. Group interests may be opposed to each other or the interest of any group may be opposed to the general interest. When a tobacco company coined the slogan "Reach for a Lucky instead of a sweet," and directed it especially to those inclined to be overweight, the manufacturers of candy had a "case" before the Federal Trade Commission. In our complex society acts of one group are almost certain to affect the interests of another group or of society as a whole. Commissions which attempt to administer laws applying to certain areas of social activities are bound to find themselves beset with the fulminations of conflicting interest groups.

Activities in popular elections

Interest groups are not as a rule thought of as taking active parts in the nomination and election of officials. Some groups may be very active in such functions, however, whereas others never participate in such matters. Certain labor groups were active in the Presidential election in 1936 in behalf of the Democratic party. But as a rule a pressure group prefers not to choose between parties. Some of the strong national groups like the Farm Bureau or certain labor unions attempt to influence nominations rather than elections. The advantage of this kind of procedure is that if a good Farm Bureau man, for example, is nominated by both major parties, then there is no need for Farm Bureau activity during the campaign; whichever way the election goes the Bureau candidate will be elected! Pressure groups are likely also to be interested in making party platforms. Here again the pressure group would be quite well pleased to have both major parties adopt identical planks on matters in which it is interested. The pressure boys like to be able to say to the legislator, "Your party is on record in favor of it." In local and state elections where policy measures are referred to the voters for acceptance or rejection, pressure

groups are likely to be definitely active. In those states having the initiative and referendum, pressure before legislative bodies is not sufficient. The groups find that they have to lobby with "all the people." One would expect, therefore, to find any attempt to adopt the initiative and referendum to be desperately fought by certain interest groups.

Examples of pressure groups

Mention has been made of the American Farm Bureau and labor unions as pressure groups. The Grange and the Farmers Union are other farmer groups. Labor has two principle groups, the American Federation of Labor (AF of L), and the Congress of Industrial Organizations (CIO). Each of these may have subdivisions which in particular situations act independently as pressure groups. The two best known business pressure groups are the United States Chamber of Commerce and the National Association of Manufactures. The American Bankers Association is also well known. There would be no end to the list of the different business and trade groups. Wholesalers, brewers, druggists, retailers, restaurant operators, hotel operators, electric power companies, electric appliance dealers, and so on, have their separate trade organizations. "Political activity" is probably not mentioned in the charters or bylaws of one of these organizations. They are created to promote the interest of the members through the exchange of ideas and other means. It usually will be discovered, however, that a good method to promote their mutual interests is to engage in politics.

1. Industry, agriculture, and labor

2. Professional groups

Professional associations and societies also play the political game to promote the interests of their members. The American Medical Association, the American Bar Association, the National Education Association, all with their state and local counterparts, are very well known to those public officials who have to formulate public policy. The bar associations often take a hand in judicial elections, at least to the extent of endorsing or withholding endorsement from candidates for judicial office. A common method of promoting the general welfare by the teachers' group is to foster bills providing for increasing teachers' salaries! The medical association and druggists would even

forbid the sale except in drug stores of such commonly packaged or bottled medicines as aspirin, turpentine, iodine, and Mercurochrome. One wonders how the general welfare will be impaired by permitting a person to buy a box of aspirin tablets even at a hot dog stand.

3. Public officials

Public officials themselves organize associations which are sometimes no more than pressure groups. Leagues of municipal officers, county sheriffs' associations, county clerks' associations, firemen's associations, policemen's orders or associations, and at the national level, the Conference of Mayors, International Association of Chiefs of Police, and Tax Administrators' Association, are only some examples. Studies have shown rather conclusively that a very large percentage of legislation at any level of government is sponsored by government officials outside the legislative department. Much of the legislation is like any other pressure-group legislation in that the motive of the sponsors is purely a selfish one; the general interest is of no moment to them. If one studies the legislative program of any local officers' association for the last few years, one will find that increased compensation for the officer-members has been the most common way these persons have found of "promoting the efficiency of government."

4. Miscellaneous

Some pressure groups might be classed as miscellaneous. They cut across occupational lines. Examples of powerful groups are the veterans' organizations. The American Legion is perhaps one of the most powerful pressure groups in America today. Its membership, of course, is made up of a cross-section of America. The common bond is previous military service. Some organizations that pose as political parties are really no more than pressure groups. The most sanguine leaders of the Prohibition Party probably do not expect to control the personnel of government by winning elections. The party is often in a position to influence policies, especially locally, but it has never been considered a serious threat in contests for offices generally. The so-called American Labor Party, as it has operated in New York in particular, has been little more than

a substantial pressure group concentrating on elections rather than on programs of legislation or administration.

If one would study the accomplishments of some of the most powerful pressure groups mentioned above, one would find that a group may have great influence on the policies of government without attempting to influence the selection of the personnel of government. Some pressure groups, of course, try to accomplish both; some, on the other hand, take no part in election campaigns. They prefer to enjoy their "right of suffrage" where policies are determined. The political party in America seeks to dominate both in the selection of personnel and in the formulation of policies. The party that gains control of the government by electing executive and legislative officers becomes responsible to the voters for the way in which the government is operated and for the policies that are put into effect. Small groups of voters, pressure groups, may be able to get through a program to promote their own interests. The group is for practical purposes irresponsible. If what has been done is displeasing to the voters, their recourse is to the ballot box. In this recourse the voters in general act through political parties. Hence responsibility for good government rests, in the final analysis, upon the political parties and not upon pressure groups.

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CHAPTER 8

THE LEGISLATURE: STRUCTURE AND ORGANIZATION

Structure of the Legislature

Nature of the legislative function

It was pointed out in the introductory chapter of this book that the fundamental process in government is that of determining the policies of the state. Since the state exists to perform certain services for its citizens, the first step in fulfilling its functions is to decide what services are to be undertaken by government and how they are to be accomplished. This function of determining policies, as was then suggested, is performed primarily by the legislative branch of the government.

The development of legislation

In early days, when autocratic governments prevailed in Europe, the policy of the state was the will of the autocrat, and the power that determined policies was identical with that which carried them into effect. The early assemblies of the people or their representatives in England, which contained the germ of our modern legislatures, did not consciously determine policies, but met to express their opinions upon policies inaugurated by the king and to petition for the recognition of popular rights. The resulting legislation, if any was forthcoming, took the form of a royal act known variously as an edict, constitution, charter, or statute, sometimes drawn up after the assembly had dissolved. Such statutes usually were in the form of confirmations of rights presumed already to be in existence. As time went on, expressions of criticism and of positive proposal of measures became more numerous, and the voice of Parliament assumed a more authoritative tone. It was not until modern times, however, that Parliament actually legislated in our present

meaning of the term. Indeed, a reminder of the historic origins of legislation is preserved in the enacting clause prefixed to every act of Parliament which reads:

> Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

In spite of this formula, legislation today in England, as well as in other countries under popular government, rests upon the authority of the people as expressed through their elected representatives.

In modern parliamentary governments all important measures of policy are still proposed by the executive branch of government to the parliament. It is the function of the legislative body to criticize and ultimately to approve or reject the measures thus proposed. Besides legislation thus enacted, the executive branch issues, under the authority conferred by the parliament, supplementary legislation under the name of orders-in-council. It must be remembered, however, that the executive which now proposes legislation is not an autocratic monarch but a ministry made up of leaders of the legislative body itself.

If the doctrine of the separation of powers were followed to its logical conclusion, the legislative function would be performed exclusively by the legislature, and in turn, that body would perform no other function. In the United States where the attempt has been made to adhere more strictly than in other countries to the doctrine of the separation of powers, a greater proportion of the work of policy-determining, or legislation, has been left to the legislature than is true elsewhere. But, nevertheless, there has been in state as well as in national government a considerable departure from the logical demands of the doctrine. The application of the theory of checks and balances and the exigencies of the actual operation of government have resulted in giving to other departments and agencies some participation in what may properly be called the legislative

function. It may be of interest to observe the extent to which this participation is carried.

The legislative function distributed

In the first place, it has been discovered in the chapter upon state constitutions that the electorate itself at the ballot box, and with the assistance of the constitutional convention, exercises, in making constitutions, what is called the constituent function. The making of constitutions is policy-forming of a very fundamental kind, since it expresses policy with respect to the basic institutions of government and is therefore a kind of legislation. In the second place, it will be found in a subsequent chapter that officers of the executive branch, acting under what is technically known as the "ordinance power" and laying down what are known as administrative "rules and regulations," perform a work which is essentially legislative in character. Finally, in examining the work of the courts, it will be found that under certain circumstances the judges actually make law, although they sometimes protest that they do not do so. So, then, it appears that the electorate, the executive branch, and the courts sometimes participate in performing the legislative function. Nevertheless, it may still be said that the legislative function is, in the commonwealths of the United States, chiefly performed by the legislative branch of government, the legislature.

Work of legislatures analyzed

If we turn to this chief policy-forming branch of government and analyze its activities, we will find that they fall into a few rather clearly distinguishable categories. These may be designated as:

1. Constituent
2. Lawmaking
3. Directoral
4. Non-legislative

1. Constituent function

The constituent function may be defined as that of making and altering the constitution. The role which the legislature may play in the process of constitution revision and amendment has been described in Chapter 4 and needs no further elaboration at this point.

2. Law-making function

A second function of the legislature is that of lawmaking. This statement suggests the question: What is law? To answer briefly, and for our present purpose, sufficiently, it may be said that law is that body of rules and principles prescribing the rights and duties of individuals in their relations with one another and with the government, which the courts will recognize and enforce.

If these rules and principles are examined with respect to the sources from which they are derived, it will be found that the chief source throughout our legal history has been judicial decisions and precedents. From the slow process of deciding concrete cases as they arise in the life of the people, in the light of precedents furnished by other cases already decided, there has been gradually built up a body of rules and principles known as the *common law*. It is not with this body of law that we are now concerned, since that will be considered in connection with the courts through whose activities it has been developed. We are here concerned with a second source of law, the statutes enacted by legislative bodies. The term *statute* is the generic name applied to all acts of legislation.

Law has been defined as a body of rules and principles. It is customary among students of jurisprudence to distinguish between legal principles themselves and the sources, whether judicial precedent or statute, wherein the principle is laid down. They distinguish between "law" and "sources of law." Statutes, then, as well as judicial precedents, are sources of law. We may, however, for the sake of convenience, abandon the strictly scientific and technical distinction between law and sources of law and conform to a more popular usage, by speaking of the statutes which prescribe rights and duties of individuals as law.

3. Directoral function

If the acts at any session of a legislature are examined with respect to their subject matter, it will be discovered that a considerable proportion of them do not conform at all to the definition of law as above laid down. Among them will be found acts determining what services shall be undertaken by the state, what

shall be the structure of the governmental machinery to be used in performing these services, the methods which shall be employed, what amounts of money shall be appropriated for the purposes, and how such funds shall be procured.

In fact it will be discovered that by far the greater part of the legislation enacted is of "directoral" rather than "lawmaking" character. In performing this kind of work the legislature is acting very like the board of directors of a business corporation. Hence the name—"directoral."

Pursuing this analogy further, we may liken the citizens to the stockholders of a corporation for whom the directors serve as representatives in making plans and taking measures to see that the plans thus formulated are put into execution. It will be perceived at once that this is something quite different from the task of defining the rights and duties of individuals in their relations with each other and with the government. It may be observed in passing that the work of prescribing the organization of the police and of the courts, and the rules of procedure for the enforcement of these rights and duties would, however, be directoral rather than lawmaking in character.

Statutes v. laws

Like other acts of legislation, these directoral acts are statutes; but they are not laws. It is unfortunate that the term "laws" has been used synonymously with "statutes" and employed to designate all acts of legislation, since this tends to confuse distinctly different ideas. One characteristic of laws is that they are general; that is, they are intended to apply to all cases or all of a given class to which they can be made to apply. They are likewise intended to apply to a succession of events over a period of time. Directoral statutes, on the other hand, may be either of general or specific application, but are more often intended to apply only to a particular case or to a single act. It will be found that directoral acts of legislation relating to specific cases, such, for example, as prescribing the particular material to be used in the construction of a bridge, or legalizing some act of an officer, sometimes approach the character of acts of administration

rather than of legislation. Indeed, the border line between legislation and administration at such points becomes very shadowy and indistinct.

Organ of public opinion

Closely connected with both the lawmaking and the directoral work of legislatures, but especially with the latter, is a phase of legislative activity which is considered by some writers as a distinct function of the legislature: that of acting as an organ for the expression of public opinion. The development of legislatures in this country has not been such as to emphasize this work and to elevate it to a place of prominence. In the earlier years of Parliament, as has been suggested, this serving as a mouthpiece for the expression of public opinion was the sole function of the assembly, since the monarch was free to disregard its suggestions. It has been pointed out above that the function of the ordinary member of Parliament today is not to propose legislation but to voice public opinion upon measures introduced by the ministry.

Subjecting the proposals of the ministry to merciless criticism and possible defeat is a most effective way of bringing the force of public opinion to bear upon those entrusted with the powers of government. Another method of creating, formulating, and giving voice to public opinion is the practice of permitting members to ask questions calculated either to compel the majority to declare its policy on questions of the day, or to make clear to the country the weakness of the position of the majority. The answer of the majority, if not satisfactory, gives ammunition for attack in debate and may lead to the offering of resolutions of criticism, or of want of confidence in the ministry. Under the parliamentary system, a vote adverse to the ministry on such an occasion results in its resignation and the accession of the opposite party to power. A general election may even be called to give an opportunity for the voters to impress upon Parliament their views on the question at issue.

In governments constituted as are those of the United States and the several states where those entrusted with public power are chosen for a fixed term, criticism by the minority cannot

have such instant and perhaps fatal effect upon the tenure of those in office. Consequently, the function of the legislature as an organ of public opinion as distinguished from that of lawmaking and of direction has never attained robust proportions.

4. Non-legislative functions

Lastly, legislative bodies are called upon to perform certain functions of a non-legislative character. Chief among these are the duties: first, of acting in the capacity of an executive council to confirm executive appointments and removals; and second, of acting in a judicial capacity in impeachment proceedings.

a. Executive

In a considerable number of states appointments by the governor must receive the approval of the senate. In some of these states removals must likewise be approved by the same body.

b. Judicial

Another non-legislative function, and one of a judicial character which the legislature is occasionally called upon to perform, is that of impeachment. Impeachment is a process whereby civil officers, either of the executive or judicial branches of government, may be removed from office for criminal or other serious misconduct in office after formal charges have been preferred and hearing given. Throughout the English-speaking world it is the privilege of the lower house of the legislature to institute impeachment proceedings.

If a member of the lower house believes that some officer of the state has misconducted himself in office, he may introduce a resolution in the house directing that a committee be appointed to investigate the conduct of the official involved. If the resolution is approved, the investigating committee thus created proceeds to gather information regarding the conduct of the person in question. When the committee has completed its investigation, it may recommend in its report to the house either that the official should be prosecuted in an impeachment trial or that sufficient grounds do not appear for proceeding further. If the house accepts the report, formal charges of crime, misconduct, or neglect of duty, known as "articles of impeachment," are prepared and adopted. These are sent to the senate, together with

a request that that body sitting as a court proceed to try the accused upon the charges contained in the articles of impeachment.

The senate then fixes a date for the trial and gives notice to the accused, informing him of the charges preferred against him and commanding him to appear for trial at the time fixed. The lower house ordinarily chooses a committee of managers who conduct the prosecution of the trial for it. The proceedings before the two houses are in their nature judicial and not legislative, and may be compared, in a general way, to indictment by grand jury and trial before a court as practiced in ordinary criminal cases. The accused person may bring witnesses, employ lawyers, and prepare a defense in the same way as if he were being tried in an ordinary court.

It is the rule that a two-thirds majority of the senate is necessary to convict. In New York the justices of the Court of Appeals, the state's highest court, sit with the senate in hearing impeachment cases. In several states the chief justice presides over the senate in such trials and in Nebraska and Missouri trials are held before the supreme court. Except that in the latter state if the governor or a member of the supreme court is impeached, a commission of seven appointed by the senate tries the case. No impeachment of officials is provided for in Oregon, but it is prescribed that incompetence, corruption, malfeasance, or delinquency in office shall be dealt with through the courts in the same way as criminal offenses.

Punishment following impeachment ordinarily consists in removal from office only, though disqualification from holding further office is sometimes added. The guilty party is, however, still subject to arrest, trial and punishment according to law if the offense be a criminal one.

Impeachment has been pointed to with some satisfaction by many writers, but as a practical means of ridding the state of an unworthy officer it has been found to be an ineffective weapon. It is too slow to set in motion and too clumsy in operation to be of much practical service. Only under extraordinary cir-

cumstances would a special session be called to consider charges, and, hence, impeachment proceedings are not likely to be instituted except during a regular session of the legislature. In fact, the process is resorted to only occasionally and usually in aggravated cases. Few impeachment trials are held and still fewer convictions secured.

Having analyzed the nature of the tasks which legislative bodies in general, and the legislatures of the states in particular, are called upon to perform, a study of the legislature itself may next be undertaken.

Study of legislatures analyzed

This may be conveniently accomplished by considering: first, its structure and organization; second, the scope of its powers; and third, the procedure under which it operates. To the study of these three aspects of legislatures and their work this and the two succeeding chapters of this text will be devoted. First, then, the structure and organization may be examined.

Structure and organization of the legislature

In somewhat less than a majority of the states, the legislature is legally known as the "general assembly." In Montana, North Dakota, and Oregon, the term "legislative assembly" is substituted, and in Massachusetts and New Hampshire the two houses collectively retain the colonial designation, "general court."

In every state save Nebraska the legislature consists of two houses. Everywhere the upper house is known as the Senate, but there is some variety as to the designation of the lower house. In most cases it is known as the House of Representatives. In four states, including New York, Wisconsin, and California, this body is known as the Assembly, while in New Jersey the longer designation General Assembly is used. Maryland and Virginia use the historic title of House of Delegates.

Bicameral legislature

The bicameral plan was adopted generally for several reasons, the first among which is historical. Those who framed the first state constitutions had before them examples of legislative bodies thus constituted in most of the colonies, and in the background the historic example of the two houses of Parliament in England.

1. Historical precedent

In the second place, the presence of two bodies gave play to

2. Class distinctions

the conviction prevailing even in the states that class distinctions should be reflected in legislative bodies. In England the distinction between classes found expression in the separation into two houses: the House of Lords and the House of Commons. In the absence of such social classes in America, distinctions of property were substituted as a basis for distinguishing between the two houses.

South Carolina furnishes an example of a distinction based on property. There it was provided in the constitution of 1790 that the Senate should be composed of thirty-seven members holding office for four years. Each member must, if a resident of the district, be an owner of land of the value of 300 pounds, or, if a non-resident, of the value of 1,000 pounds. The House of Representatives was composed of 121 members elected for two years; and each member, if a resident of the district, was required to possess real estate of the value of 500 acres and ten Negroes, or if a non-resident, to own real estate of the value of 500 pounds.

During the first half of the nineteenth century that wave of democratic sentiment which led to the general adoption of manhood suffrage swept away the last vestiges of distinction between the two houses based upon property.

3. Federal analogy

In the third place, after 1787, the bicameral arrangement found additional support from the analogy of the federal constitution, where the bicameral plan had been finally decided upon as a means of securing representation based upon both states and population.

Acting under these several influences both British and American, all but three of the earlier states, Georgia, Pennsylvania, and Vermont, organized their legislatures in bicameral form. The two former quickly fell in line with the majority, and Vermont established a second house in 1836. For a century, then, the legislature of every state was bicameral in form.

Thus the only distinctions between the two houses came to consist in differences in the age requirements, size, and powers withheld, and the longer and overlapping terms of senators in a

number of states. It is a fact, however, that on account of these distinctions which favor the upper house, as well as for historic reasons, greater honor and prestige attach everywhere to seats in the Senate.

With the lapse of time the bicameral form became so firmly rooted in the political thinking of the public that it was accepted without question that such an arrangement was necessary to the process of legislation.

Within the present century, however, there has appeared a disposition to question the efficacy of having a legislature composed of two houses. In the period 1911–1915 proposals to adopt the unicameral form were offered in fifteen states. The question was submitted to popular referendum in Arizona, Oklahoma, and Oregon, and although the proposal did not command a majority, the size of the affirmative vote indicated an active interest in the matter. Quiescent for a time, the question was revived by Nebraska and in 1934 a constitutional amendment decreed the change to a single-house legislature. In 1937, the year in which the Nebraska innovation became operative, proposals for similar action or for the creation of study commissions on the subject were offered in no less than twenty-two states. Steps toward the proposal of constitutional amendments to this end by initiative petition have been taken in several states, but the two-house tradition has proved too strong for any general breaking away.

The Nebraska legislature consists of forty-three members elected by districts upon non-partisan nomination. The effectiveness of the non-partisan provision is proved by the fact that while in the last session under the bicameral form the dominant party had thirty-one of the thirty-two senators and eighty of the one hundred representatives, the first unicameral body elected in the year of a landslide resulted in the selection of twenty-one Republicans and twenty-two Democrats.

Arguments for the bicameral plan

Arguments for the bicameral organization have commonly been based, in the first place, upon the opportunity which it affords for representation of both territorial areas and population. The influence of the federal analogy is, of course, especially

in evidence here. This federal idea is carried out in New Jersey, Maryland, South Carolina, and Montana, by giving each county equal representation in the Senate, and in Rhode Island by giving equal representation in the same body to townships. In each of these states representation in the lower house is based upon considerations of population, although a strict adherence to a population ratio gives way in some cases to territorial considerations, and in others is affected by rural jealousy of growing urban centers. In Connecticut conditions are reversed, the Senate being constituted according to population while the lower house is constituted on a territorial basis. Such arrangements can be justified only on the assumption that counties or townships have such an equality of status and, at the same time, divergence of interests as to demand special representation. Neither an investigation of actual conditions in these subdivisions nor a study of the acts of legislatures will tend to support any such assumption. The fact is that only on very rare occasions does a matter come up for legislative consideration which involves conflicting interests of neighboring counties or townships.

A second argument for the bicameral system, stated negatively and in terms of the doctrine of checks and balances, is that under this plan each house constitutes a check upon the other to prevent hasty and ill-considered legislation. Stated in positive terms it is said that by requiring that every bill secure the assent of two houses there is assured greater care and deliberation in its consideration, and hence a higher standard of legislation. This argument, however, does not appear to be supported by the facts of the matter.

It must be borne in mind that delay of final action upon bills does not necessarily imply careful consideration. Such delay usually means slight consideration until the last moment, followed by hasty action and a repetition of the same in the second house. Nor does consideration by two houses necessarily mean double consideration. It has been discovered upon investigation that a decided tendency exists for bills which have passed one house to pass the second as a matter of course with little or no

change. The extent to which this is true depends upon the political methods employed in the particular state. In a study made some years since in New York of the effects of the bicameral system upon legislation, it was found that in the period under consideration, less than 20 percent of the bills which passed one house were defeated in the second. It was further found that of all bills passing one house, only 15 percent were amended in the second. It is perhaps true that the course of legislation is more completely dominated by the majority leaders of the two houses working in unison in New York than is the case in most states. In the legislative session of 1910 in the same state, out of 2156 bills passed by one or other of the houses, 230, or less than 11 percent of the total number, were defeated in the second house.

In Illinois, where party leaders exercise a somewhat smaller degree of control over legislation than in New York, it was found that over a period covering four successive legislative sessions, as many as 20 percent of the bills passing one house did not pass the second. It was found, however, that the failure of a considerable proportion was due to failure to take any action whatever rather than to a negative vote by the second house.

More recent studies in California, Wisconsin, Georgia, Iowa, and other states indicate that the earlier findings in New York and Illinois are still probably typical of results in bicameral state legislatures.[1]

It is further contended by opponents of the bicameral system that any advantages gained by consideration in a second house are overcome by the delays ensuing, by the failure to pass desired acts, and by the opportunity offered for evasion of responsibility for the results.

Arguments for the unicameral plan

Those who have suggested the desirability of unicameral legislatures base their advocacy upon the advantages offered by the greater simplicity of organization and definiteness of fixing re-

[1] See Commonwealth Club of California, C. C. Young, Director, *The Legislature of California*, pp. 96 ff; and Dorothy Schaffter, *The Bicameral System in Practice*, pp. 69 ff.

sponsibility. They point out the fact that under the present arrangement it is difficult and sometimes impossible for the public to follow the progress of measures through the mazes of procedure and to fix responsibility for results. The complexity and number of steps necessarily slows down the legislative process without corresponding advantage. Investigation has corroborated the impression of observers that slowness in reaching a legislative decision usually does not indicate deliberate consideration so much as procrastination. Evasion of responsibility for action or inaction is made easy in a sort of legislative shell game in which a measure is passed rapidly back and forth between the houses under pretense of minor amendments, until the interested citizen is quite unable to locate it, when, perhaps, it has come quietly to rest in the pigeonholes of a committee. The result is that a meritorious bill is delayed, whether by deliberate intention or otherwise, and fails to reach final vote. It is not uncommon for one house to pass a popular but unwise measure, leaving to the second house the dilemma of passing an undesirable act or of incurring popular disapproval. By disagreeing upon some minor point in a bill it is possible to have it sent to conference committee. There behind closed doors the bill may be altered in a material way and reported back and passed without due consideration in the confusion of the closing hours of the session.

To the foregoing arguments are now to be added those of the friends of the Nebraska experiment. It is pointed out that the number of bills introduced in the session of 1937 was approximately one-half of the number in the previous session and that the expense of the session was reduced by 25 percent. The criticism that the smaller body would be more easily influenced by lobbyists and that more hasty legislation would result are met by the advocates of the unicameral plan by the assertion that both objections are met and overcome by the additional publicity provided and by changes in procedure compelling greater deliberation.

In addition to these arguments and the experience in Nebraska,

it is pointed out that unicameral legislatures are in existence in all but two of the Canadian provinces; that the legislatures of Norway and of all the cantons of Switzerland are unicameral in organization. Likewise nearly all of the largest cities of the United States, some having a population larger than several of the states, have substituted the single for the double-chambered council. It may safely be said, then, that some points of distinct advantage exist in the unicameral plan and that some time-honored claims of superiority for the bicameral plan have been shown by scientific investigation to be unfounded. But notwithstanding all this, the public is so lethargic with respect to the fundamental issues involved that any general abandonment of the bicameral system need not be looked for in the immediate future. Simplification of the structure of legislative bodies in the states must be sought within the houses themselves.

Distinctions between the houses

Distinctions exist in legislatures between upper and lower houses, with respect to both size and term of office. The number of members composing these bodies varies widely, but in every bicameral legislature the senate is a smaller body than the lower house. In many cases the exact number of members is determined in the constitution. On the other hand, in several states a maximum to which the legislature may increase its own number is fixed, and in a few cases a minimum number is fixed. The senate varies from seventeen in Delaware and Nevada to sixty-seven in Minnesota, and the lower house from thirty-five in Delaware and Arizona to 399 in New Hampshire. The average number in the state senates is approximately forty and in the lower house about one hundred. It will be found that the lower house rises to the largest proportions in the Northeastern states, and especially in New England where the basis of representation is the town. Pennsylvania, Massachusetts, Vermont, Connecticut, New Hampshire, and Georgia have the largest lower houses, having respectively 208, 240, 246, 272, 399, and 205 members. Aside from Delaware and New Jersey, the smallest of the lower houses are found in the more sparsely populated Far Western states.

1. Size

It is believed by many that even in the states having the

smaller legislatures the size of the houses is entirely too great and that it should be reduced. It is probably true that a house of more than a hundred members is unduly large, and that in a majority of the states membership of the larger house might advantageously be reduced below that number. It must be borne in mind, however, that the function of a legislature is representative and that the number must therefore be large enough to reflect a wide variety of interests and viewpoints.

The suggestion of a governor of Kansas, made some years ago, was an extreme proposal for the reduction of legislative size. Inspired no doubt by the then current popularity of the commission form of government for cities, he proposed that the work of legislation be turned over to a small single chamber consisting of one or two members from each Congressional district elected for a long term and devoting their whole time to their task. It is evident that by such a plan the representative character of the body is sacrificed and an effort is made to attain standards of efficiency of an administrative rather than a legislative character.

2. Term

At the time of the Revolution annual elections were the rule, and this was adhered to for selecting members of the lower house in all of the original states except South Carolina, where a two-year term was provided for from the beginning. In earlier times when the number of voters was small and the electoral process simple, it was easy to adhere to the more democratic practice of annual elections; but later with a much larger and less homogeneous population and with a complicated system of primaries and elections, annual elections became a burden. The last state to abolish annual elections for legislative members was New Jersey in 1947. Alabama, Louisiana, Maryland, and Mississippi elect their representatives for a four-year term, while in the remaining forty-four states a two-year term prevails. There seems to be a growing sentiment for the lengthening and staggering of legislative terms.[2]

[2] This was recommended by the Committee on Legislative Processes and Procedures of the Council of State Governments, *Our State Legislature*, rev. ed., p. 6.

From the beginning in certain states there was accorded to the senate the distinction of a longer term. The original constitutions of New York and Virginia created a senate elected for four years. In thirty-two states the senatorial term is now four years and in fifteen states the term is two years. Nebraska has a two-year term for all its legislators.

3. Continuous character

Another distinction between senate and house in some states is that the former is a continuing body. The early constitutions of New York and Virginia above referred to provided that one-fourth of the senators should retire each year. Delaware, in 1792, upon introducing a senatorial term of three years, stipulated that the terms of one-third of the senators should expire annually; and Maryland, in 1837, provided for the expiration of the terms of one-third of the senators every two years. At the present time a large proportion of the states having the four-year term provide for partial renewal every two years.

An actual comparison of legislative chambers has convinced observers that there is generally found in state senates, if not greater ability, at least a poise and saneness of view and a grasp of legislative problems which distinguish their sessions from those of the lower house, and which may be ascribed in some measure at least to the longer term and the continuing character of the body.

Compensation of members

The subject of legislative pay is one of interest to the individual member, though not of great moment to the citizens in general, since its total does not bulk large in the cost of government. The early idea that legislative service, being not only a duty but an honor, should be without remuneration long since gave way to the practice of paid service. Unfortunately, there is no evidence to indicate that the giving of compensation has improved the quality of the bodies. The rate of pay has not been sufficient to attract the most desirable class of citizens, so that that class is secured, if at all, only by its sense of duty or as a preliminary step to political advancement to some higher goal.

1. Per term

The states are almost equally divided between two plans of remuneration. In more than half the states members are paid a

fixed sum per month, year, session, or biennium. These sums range from $200 a term in New Hampshire to $5000 a year in New York. In New Jersey the salary is $3000 a year and in Illinois $6000 for the two-year term. In several cases some additional compensation is allowed for extra sessions. It should be remarked that the larger compensation is usually allowed in the states where there is no limit on the length of the session. The second method of fixing legislative compensation is to pay a *per diem* allowance for actual attendance, which ranges from $3 in Kansas and Michigan to $20 per day in Louisiana.

2. Per diem

Frequency of sessions

Not far removed from the question of compensation are the questions of both the frequency and the length of sessions. In the earlier days annual sessions were assumed as a matter of course, but with the lapse of years regular sessions have come to be held only biennially in all but six states. In California,[3] Rhode Island, South Carolina, New York, and New Jersey annual sessions are still held. It should be observed that in these states, in spite of the fact that sessions are held annually, elections are held biennially. Thus each legislator is assured of participation in at least two regular sessions and a senator in California or New Jersey is assured of four sessions.

Special sessions

It is true, however, that in every state special sessions may be called, and though public opinion is as a rule averse to the holding of such sessions save in emergencies, they are of rather frequent occurrence. During the years of economic stress, from 1930 to 1937, special sessions were held in greater number than ever before. During those years inclusive no less than 216 such sessions were held. In 1933 alone special sessions were held in thirty-five states. In 1946 special sessions were held in seventeen states and one of these, Ohio, held four special sessions during that year.

Length of sessions

Not only has there been a trend in the direction of biennial rather than annual sessions, but there has likewise been a tend-

[3] In California, however, the session held in even numbered years is a so-called "budget session." Only an annual budget and emergency measures requiring two-thirds vote for passage can be enacted at this session.

ency to place a limit on the duration of legislative sessions. In this respect the major differentiation among states is one between the states where there is and where there is not a limit fixed by the constitution upon the duration of sessions. In twenty-five states no limit whatever is placed upon the length of sessions, although in Tennessee, Rhode Island, and Oregon the *per diem* ceases after seventy-five, sixty, and fifty days, respectively. Elsewhere there is a limit ranging from thirty-six legislative days in Alabama to ninety days in Maryland and Minnesota, the prevailing limit being sixty days. It will also be found that, except in three or four cases, the *per diem* plan is in force in the states where there is some limit placed on the length of sessions, and that in these the rate *per diem* is not of an amount to encourage prolonged sessions.

In most of the states where there is a time limit upon sessions the command to cease is peremptory, but in a few cases it is conditional. In Virginia, a sixty-day session may be prolonged thirty days by a three-fifths vote of the members. In Texas, if a maximum length of 120 days is exceeded, the *per diem* for overtime is reduced 50 percent, whereas in certain others mentioned above the compensation ceases altogether at the end of the prescribed period. In such cases it has been found unnecessary to resort to an absolute time limit to secure the desired result.

Split sessions

In at least three states—California, New Mexico, and West Virginia—the split or bifurcated session has been tried. Under this system the legislature meets for a period usually of thirty days, during which time bills may be introduced and made available to members. The legislature then recesses for a month, after which it returns for deliberation on the bills. During the latter period new bills can be introduced only under special rules or circumstances. In theory the plan seems to have much to recommend it, but in practice results have not been too satisfactory.

In Georgia a regular "special" session of ten days is provided for in January of the odd-numbered years for purposes of in-

auguration of state officers, legislative organization, the introduction and first reading of bills, and the trial of impeachments. The Committee on Legislative Processes and Procedures of the Council on State Governments, in its report in 1949, recommended that restrictions upon the length of regular sessions be removed but felt that annual sessions are not necessary if the governor or a majority of the legislature may call an unrestricted special session.

Date of sessions

In all states having biennial or quadrennial sessions except four —Virginia, Kentucky, Mississippi, and Louisiana—the legislature convenes in the odd-numbered years and except in the states of Alabama, Florida, and Louisiana all regular sessions in whatever years and of whatever frequency begin in the month of January. The result is that in the months of January and February of every odd-numbered year legislatures are in session at the capitals of no less than forty-two states. At the same time special sessions may be occurring in some of the other states. In the even years legislative activity is normally restricted to the four states mentioned above, plus the six having annual sessions.

Legislative apportionment
1. Bases

The apportionment of members of legislative bodies in a modern complex civilization presents a perplexing problem. In the distribution of members of state legislatures the two factors, territory and population, were originally taken as the basis of apportionment. The ideal of popular government is that when a representative assembly is substituted for direct democracy, the representative body should be a perfect mirror of the various shades of interest and opinion existent in the community. In a simple homogeneous society such as existed in the American colonies and in the earlier days of the Middle West, the chief differences in group interests were as between localities. Apportionment of members upon a territorial basis, then, according to population, gave an almost ideal result. With the development of a complex social system of varying and conflicting interests—industrial, commercial, capitalistic, racial, and religious, as well

as agricultural—territorial apportionment became a system which was far from the ideal of perfect representation.

In such a society a farmer elected to the legislature from county A more truly represents by word and vote the interests of the farmer in county B than does the manager of a public utility plant elected in county B. Furthermore, the farmer, if he prospers, may become interested in a local canning factory which cans his vegetables; a stockholder in the local bank which makes loans to local farmers; and perhaps a bondholder of the railroad which hauls his cattle to market. Again, the labor organization to which an artisan belongs may join in the organization of a labor bank and the mechanic may become a stockholder and a depositor. Thereby he becomes a capitalist. Thus, for either the farmer or the mechanic a situation may easily arise in connection with some question of public policy wherein he may find himself torn by a conflict of his several interests. Hence attempts to solve the problem of representation by interests have been faced by the fact that individuals cannot in such a society be assigned offhand to particular interest groups.

Attempts have been made to work out schemes of representation which will more perfectly reflect the opinions of interest groups. Systems of cumulative voting, such as exist in the triple-member districts in Illinois, proportional representation, and likewise the soviet system of Russia based on occupation groups, seek by very different means to mitigate or avoid the inequities of the prevailing system of representation. Practical difficulties growing out of the complexities of the remedies proposed and lack of popular appreciation of the problem have thus far prevented wide adoption of any of these plans. The result is that territory and population remain in the American states the basis of legislative apportionment, on the assumption that in the long run minorities will, under this plan, secure representation in a sufficient number of districts to protect their interests.

It is quite natural that the most important area of local government should be widely employed as the basis of apportionment

of members of the legislature. In New England where the town (township) was coexistent with the colony, if not actually of earlier origin, and still remains the principal unit of local government, that area is commonly adopted as the basis for one or both of the two houses.

In the apportionment of the membership of the lower house in New England both Rhode Island and Connecticut assure to each town (township) at least one representative, while Vermont carries the principle of town equality to its logical conclusion by giving to every town in the state one and only one representative. In New Hampshire the smaller towns are grouped into representative districts, but with the curious provision that the representative from the district shall be assigned to the several towns in rotation. In Maine and Massachusetts towns are grouped into representative districts on a simple basis of population.

Elsewhere the county is generally the unit of representation in the lower house. In a considerable number of states county autonomy is recognized to the extent of assigning to each at least one representative. Additional members in these states, and all representatives in other states, are apportioned to counties or other representative districts according to population. It is commonly provided that where a county has more than a single representative, that area shall be divided into representative districts; but in certain cases, notably in Iowa, New Jersey, and Ohio, the county representation is elected on a general ticket. In certain states where there is great variation in population among counties it has been found necessary, in order to avoid the alternative evils of too large a body or too great inequality of representation, to group the smaller counties for purposes of representation. In perhaps a dozen cases the whole state is divided into representative districts rather strictly upon a basis of population, but even in such cases it is almost always stipulated that counties, or in New England, towns, shall not be divided.

In certain states including Maryland and South Carolina each county, whatever its population, is assured one senator. Elsewhere throughout the country it is customary to adhere as closely as practicable to county lines in laying out senatorial districts.

In the earlier days the apportionment of members was sometimes fixed in the constitution and hence was comparatively inflexible. Where population is made the principal basis of distribution, the apportionment is more commonly left to the legislature. Sometimes the injunction is added that the districts shall be composed of "contiguous territory" and that they shall be as "compact as practicable." In a number of states the constitution requires a reapportionment at prescribed intervals.

2. Discriminations

A feature of legislative apportionment is the frequent tendency to discriminate against cities and in favor of rural districts. The rural population was originally in a majority in all states, and has watched with jealousy the increasing wealth and economic power of the cities. While still in the majority the country areas have sought to perpetuate their domination in the legislature by inserting in the constitution provisions limiting the representation of the cities or by refusing to obey constitutional injunctions regarding redistricting. The reasons advanced in justification of such discriminations, when any justification is attempted, are the alleged corruption or radicalism of the cities as compared with the sober and virtuous rural population. It is contended that populations which have made such conspicuous failures of their local government in many cases should not be allowed to dominate the political affairs of the state. The injustice of such sweeping conclusions has been demonstrated, but the rural forces in many cases continue to hold the field.

It may be asserted that throughout the United States the senate is, on the whole, apportioned more strictly on a basis of population than is the lower house. It will be found that the widest departures from a strict basis of population occur in the older states where historic forces are most strongly operative.

In Rhode Island until 1928 all towns and cities had equal representation in the senate, while in New Jersey the counties are still equally represented in this body.

Although it is the whole population which is usually made one of the bases of apportionment, in certain states either the white population, the number of citizens, or the number of legal voters is substituted as the basis. These substitutions ordinarily work to the disadvantage of the cities, since it is there that aliens and other non-voters are most numerous.

Discriminations against cities

Inequalities with respect to population are most glaring where a single city includes a large proportion of a state's total population. Such states are New York, Illinois, Maryland, Delaware, and Rhode Island. In New York, with a fixed total membership for the assembly, a provision of the constitution gives to each county in the state, save one, at least one representative, and stipulates that no county shall have more than one-third and that no two contiguous counties shall have more than one-half of the membership of the senate. These prescriptions are, of course, aimed at the city of New York which includes over one-half of the state's population. Illinois discriminates against Cook County, which is virtually coterminous with Chicago to the extent that it is allowed but fifty-seven representatives, whereas its population entitles it to not less than seventy-seven. In Maryland and Rhode Island, the cities of Baltimore and Providence are the victims of discrimination. The former city is entitled to nearly 50 percent of the membership of the senate and 25 percent of the house. Providence, with approximately 35 percent of the population of the state, besides having utterly inadequate representation in the senate, has but one-fourth of the total membership of the house. In New Jersey, the provision giving to the counties equal representation in the senate discriminates greatly against the larger cities of the state.

Often the discriminations result from failure to redistrict the state rather than from any provision in the constitution. In Illinois, for example, Chicago would have its share of senators and

representatives if the general assembly would obey the constitutional mandate regarding decennial redistricting. Some states remedy this by providing for a redistricting or reapportionment by administrative officials either in the first instance, or in case the legislature fails to do its duty in connection therewith. The constitution of Missouri provides that the senatorial redistricting and reapportionment shall be done by a commission of ten appointed for the purpose by the governor, and that representatives shall be reapportioned among the counties by the secretary of state according to a formula set up in the constitution.

The gerrymander

The chief reason for vesting the power of apportionment in the legislature has been to facilitate the process of reapportionment to correspond with the shifting of population. This power has been notoriously abused to secure an advantage in representation to the majority party. It was discovered early in our history that by the process known as "gerrymandering" it is possible to establish districts from which members of legislative bodies are elected to discriminate greatly against a minority, and to secure to a dominant party representation quite disproportionate to its voting strength.

The normal apportionment of members should not only result in the creation of districts which are approximately equal in population but at the same time constitute as compact areas as practicable. The gerrymander is based on the fact that the carrying of a district by a large majority is no more advantageous to the winners than is the carrying of it by a mere "safe" majority.

To perpetrate a gerrymander in the regions where the minority party is in a strong majority, districts are so laid out as to make the inevitable majority in each as large as possible. In the remaining portions of the state, districts are laid out so as to make them "safe" for the majority party without wasting strength in excessive majorities which do not affect the distribution of members. Sometimes the same result is effected by dividing the minority region and attaching the portions each to

a different district wherein in each case the dominant party vote will outweigh the minority even after these portions have been added.

The result of this practice is that today in many states the dominant party is grossly overrepresented in one or both branches of the legislature. A glance at a map on which the legislative districts are indicated will reveal districts of such fantastic outlines that it is evident that such areas can have no possible community of interest which distinguishes them from the surrounding districts with which their boundaries are intertwined.

Nomination

The method of nomination of legislators usually follows that employed in the nomination of local officers. Mass meetings of the voters of township or county, dominated usually by local political leaders, were long the favorite method of nomination in rural districts. In districts of greater population density or greater territorial extent, delegate conventions were in course of time substituted for the more direct method. With the coming of the direct primary in the early years of the present century, this new system spread rapidly, until at present it prevails in all but one state of the Union. As long as United States Senators were elected by the legislatures, the control of nominating conventions in the several legislative districts constituted the first objective of aspirants for senatorial honors. The result was that at no point did the old nominating convention descend to greater depths of corruption and abuse than in its application to the nomination of members of legislatures. It is perhaps an open question since the removal of the election of Senators from the legislative halls, whether the direct primary is the system best suited to secure legislators who will reflect the views of their constituents and at the same time bring to problems of state-wide interest a breadth of vision and soundness of judgment which such larger questions deserve.

Cumulative voting

To remedy that effect of the system of plurality election which tends to give to a dominant party disproportionate power even in the absence of a gerrymander, the system known as

cumulative voting has been devised in Illinois. Under this plan the state is divided into a number of legislative districts equal to the number of senators; and in each of these is elected, besides a senator, three representatives. Each voter is allowed three votes for representative. These he may cast for three candidates in the ordinary manner. He may however, give to two candidates one and one-half votes each; or he may, if he so desires, concentrate all his votes upon one candidate.

A half-century ago this system was introduced into Illinois to meet a local condition under which the northern part of the state returned a solid Republican delegation, while the south sent an equally solid Democratic delegation. Thus was produced a condition where a minority party was unrepresented in a whole section of the state and an undesirable sectionalism was created in the legislature. Under the present system it has been found that a majority party, unless it numbers more than three-fourths of the total vote, is unable to elect all the members from the district, and any minority party which can muster more than one-third of the vote of the district can elect a representative. The majority party, estimating its strength in advance, will, if it cannot safely count upon more than three-fourths of the total vote, nominate but two candidates in the district and concentrate its vote upon these. In such cases the minority nominates but one and by concentrating its vote upon him secures his election. Or more realistically, the two major parties have an understanding beforehand, and in many districts a total of only three candidates are nominated by both parties. This has been true in one election in as many as thirty-six of the fifty-one districts. Under the cumulative voting system it appears that while representation is roughly proportional as between the two major parties, third parties have slight chance of securing representation.

Proportional representation

The more elaborate system of proportional representation, which has for its object not only the representation of the minority party but of all the larger interest groups in the community, has not been employed in this country as yet in the

selection of state legislators, although it is used in a number of European countries and in Australia. In America its use has so far been restricted to the selection of city councils. It is employed for that purpose in Toledo and Cincinnati (Ohio), Cambridge (Massachusetts), and Winnipeg, Calgary, and Edmonton (Canada). The model state constitution proposed by the National Municipal League proposes the use of proportional representation in the choice of the legislature. Proportional representation presupposes election districts large enough to insure the existence of several groups, each of which demands separate representation. The number of seats to be filled from the district will therefore be fairly large, so that the larger groups within the area may secure the number of seats to which their numbers entitle them and so that the smaller groups may center their attention upon one candidate each in order that he may be elected. It is assumed that self-interest will prevent the scattering of votes by the smaller groups.

Proportional representation has the advantage of giving representation to more than the members of the two major parties, and also of giving an opportunity for representation upon the basis of race, religion, social and economic factors, if the people wish to group themselves along these lines. This very possibility that the system may serve to accentuate undesirable group differences has been one of the strongest arguments urged against the introduction of the system in the United States. So long as the two major parties continue to reflect, to a reasonable degree at least, the demands of the great majority of people, there is little likelihood that any system of proportional representation will be tried on a large scale in any of the states. If the process of industrialization proceeds for many more decades at the rate it has progressed in the past four, it may be that some system of cumulative voting or proportional representation will be introduced. A failure to mold the many races in our population into one might also bring about the same result. The idea that this system of representation is an experiment is, however, quite unfounded, because several countries have tried it for many years with a considerable degree of apparent success.

In 1912, Minnesota sought to escape from the difficulties of unrepresented minorities by the introduction of non-partisan nomination and election of candidates for the legislature. The North Dakota legislature adopted the same plan in 1923, but it was defeated in a referendum. As noted above, the Nebraska legislators are elected on a non-partisan basis.

Organization of the Legislature

Organization

State constitutions place few restrictions upon the organization of the two houses of the legislature. Each house is made the judge of the elections and qualifications of its own members. This means that in case any controversy arises concerning the validity of an election to a seat in either house, the house involved may investigate the case and by majority vote decide between the rival claimants. Likewise, if any question is raised involving the qualifications of a person elected to either house, that body may investigate and determine the eligibility of the individual. The lieutenant governor, in the states where that office exists, is designated as the presiding officer in the senate, and the house of representatives (assembly) is authorized to select its own speaker. Other officers are chosen by the two houses respectively. Beyond these provisions each house is ordinarily empowered to complete its own organization.

Speaker

The presiding officer in the house of representatives (assembly) is the speaker, who is nominally elected by the house, though in reality he is selected by the caucus of the majority faction or party. He is chosen from among the most experienced members of the majority, since he must not only stand high in the councils of the party, but should be familiar with the intricacies of parliamentary procedure. The speaker's chief duties and powers are five in number: to appoint committees, to refer bills, to recognize members desiring to speak, to rule upon questions of parliamentary order, and to direct to a considerable degree the order of consideration of bills.

Powers

1. To appoint committees

He is accorded the power, at least formally, of naming the members of the committees, although his choice may be to some degree dictated by the majority caucus and by various prac-

tical and extra-legal considerations. The speaker must be careful, in the first place, to distribute appointments with reference to sections of the state. It would be poor strategy indeed for him to appoint all of the members of a committee from any one part of the state. The seniority rule, since it is still adhered to in many legislatures, also limits the speaker's power of appointment; and committee chairmanships are normally, in the absence of unusual circumstances, awarded on that basis. Then, in the third place, there are some committees to which only persons particularly fitted can be appointed. The committee on judiciary would normally contain several members from the legal profession. So also, one would expect to find some farmers on a committee on agriculture.

These three factors: geographical considerations, the seniority rule, and the need of peculiar experience or fitness for membership on the committee, tend to restrict the speaker's power of appointment somewhat; but even after these factors are allowed for, his power is very great. Through the use of these powers he is enabled to reward his friends and factional adherents by assigning them to committee chairmanships and to positions on committees of strategic importance. Thus, also, he may render his enemies impotent by assigning them to places on unimportant committees which seldom meet and seldom, if ever, have any bill of importance referred to them. By this power of committee selection, coupled with his power to refer bills to particular committees, the speaker can to a large extent predetermine the fate of any bill. In cases where it is known in advance of the opening of a session that a certain important measure is to come before the legislature, the speaker has been known to select the membership of the committee to which the impending measure will be referred with especial reference to their views on this particular subject. Obviously such elaborate plans will be resorted to only in connection with an occasional and especially significant matter. This possibility, however, always makes the speaker a force to be reckoned with at this stage of procedure.

As has been suggested above, the speaker may use his discre-

tion to a very wide extent as to the committee to which a bill shall be referred. The house has it within its power to order a bill sent to any particular committee, though this power is rarely made use of.

2. To refer bills

The power to recognize or to refuse to recognize a member wishing to speak gives to the speaker a large degree of control over the course of debate. He may use this to give advantage to those of the same opinion as himself by according to them recognition, and may punish a refractory member by persistently refusing to recognize him and thereby deny him the privilege of speaking or of offering motions. In some states the practice prevails, as in Congress, of recognizing in debate only those who have previously secured the speaker's consent. This is not, however, widely practiced in state legislatures.

3. To recognize members

A fourth source of influence of the speaker is his authority to make rulings on motions and other points of parliamentary procedure. This gives him further opportunity to govern the course of debate and to make rulings which will redound to the advantage of his party or friends. The power serves a good purpose at times when a minority is attempting to block the action of the majority by resorting to dilatory tactics or by breaking a quorum. Appeal may be taken by the minority from a ruling of the speaker, but since he is the choice of the majority he can depend upon them to sustain his position.

4. To rule on points of order

Finally, the speaker exercises an influence which often becomes a dominant one over the order in which bills come up for consideration. In some states, where the organization of the legislature for carrying on business resembles that in the national House, control over the actual order in which bills shall be taken up rests with the committee on rules. In those states the speaker is usually the moving spirit on the rules committee, and in matters of giving precedence to bills the committee is all-powerful. In some other states where legislative procedure is still in a somewhat rudimentary stage of development, bills are handed down for action by the speaker in the order which he sees fit to adopt. Under such an arrangement, though theoretically the house may

5. To control the order of bills

call down any bill as it wishes, the majority will be slow as in all other instances to exert any compulsion over the speaker.

Lieutenant governor

In the upper house, the lieutenant governor stands in a wholly different position from that of the speaker. Like the Vice-President in the United States Senate, he is not a member of the body over which he presides, and it may easily happen that he is not of the same political party as the majority of the body. Consequently, he is not accorded a vote upon any question except in case of a tie, nor is he usually granted the privilege of naming the members of the committees. In some states he is accorded the right, at least when he is of the majority party, of appointing committees and of assuming something of a position of leadership. The senate at the opening of its session elects from among its own number a president *pro tempore* whose duty it is to preside in the absence of the lieutenant governor or in case the latter becomes governor. In twelve states the office of lieutenant governor does not exist. In such states the senate chooses its president, who still retains all his rights of speaking and voting as a member of the body. Under such circumstances his position is not materially different from that of the speaker of the House of Representatives. Where there is no lieutenant governor, the president of the senate usually succeeds to the office of governor in case of vacancy.

President pro tempore

Minor officers

Besides the presiding officer there is in each house a large number of minor officers and employees. Chief among these are several clerks, including a journal clerk, a bill clerk and a reading clerk. There is in each house, ordinarily, a sergeant at arms, and a chief doorkeeper, who have the status of officers. Below these there is a large number of assistant doorkeepers, clerks of committees, stenographers, pages, and other miscellaneous employees. The clerks, sergeant at arms, and chief doorkeeper are usually selected by the majority caucus. The minor employees are chosen nominally in a variety of ways, but these positions are in reality looked upon as spoils to be distributed at the will of members of the majority. The demands of members for a share in such spoils become so loud and insistent that in many states

Employees

the number of doorkeepers, messengers, janitors, and others, has become so great as to constitute a scandal. It is reported that in Illinois in the session of 1903, the legislature had 393 employees, of whom 92 were janitors. In Kansas, at a special session in 1908, after some agitation against the creation of such unnecessary positions, the lower house by an act of strenuous self-denial reduced the number employed by it to 71, dispensing, along with the rest, with the services of a "superintendent of ventilation" and a "superintendent of acoustics." The sums thus wasted, though not large in the aggregate, are sufficient to give a tone of insincerity to legislative protestations in favor of economy in other directions. In Wisconsin the legislative employees are under civil service regulation and for the whole legislature are kept within a hundred in number.

The caucus

As is true in Congress, the party caucus is a meeting of the members of one of the houses, belonging to a political party. Some misunderstanding concerning the nature of the legislative caucus is occasionally encountered, arising from the use made of the term "caucus" in earlier American history. At that time the caucus was a secret meeting of a small group of self-appointed leaders held for the purpose of controlling the selection of party candidates. The legislative caucus is still a private meeting, but every member of the party is not only entitled to be present but is urged to do so. The caucus does not assume the prominent place in state legislatures that it does in Congress, because in most states party organization in the legislature is not so fully developed and party lines not so closely drawn in voting as in the national body. New York is an example of a state in which party organization is highly developed in the legislature and party lines strictly drawn, and where, as a result, the caucus exercises a constant influence over members.

It is customary for the caucus of each party in each house, previous to the opening of a session, to meet to select the candidates whom it will support for the various legislative offices. The speaker, president of the senate, if any, president *pro tem.* of the senate, floor leader, and sometimes other minor officers are

thus selected by the majority caucus. It is the custom of the minority party to content itself with nominating a candidate for presiding officer only. The caucus usually delegates to the speaker or to a committee the distribution of the minor offices and posts within the gift of the house.

From time to time the caucus is called together when it appears to the leaders that party expediency demands a united party stand upon some bill. Seldom, however, is the party lash cracked about the heads of members, or party discipline inflicted upon recalcitrant members, as is done in Congress.

Floor leaders

In most legislatures the floor leaders of the two parties play a rather prominent part, in spite of the disregard of party lines on most bills. When administration bills, or those in which it is sought to redeem party pledges, or "caucus measures" are up, the leaders assume important roles.

Since it is understood that the minority cannot elect its candidate for the speakership, it is customary for the person who receives that complimentary vote to be made minority floor leader. Frequently, too, the defeated candidate for the speakership before the caucus of the majority is by common consent made their floor leader. Toward the close of the session, if not before, there is sometimes created a steering committee whose members are selected by the caucus or by the speaker. Its duties are to select the bills which shall be given precedence, and further to see that these are pushed through to final passage.

Steering committee

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CHAPTER 9

THE LEGISLATURE: POWERS AND LIMITATIONS

When one thinks of the powers of the federal government, one usually thinks primarily of those powers set out in Article I, section 8, of the national constitution and the several amendments in which powers are conferred upon Congress rather than upon the government as a whole. In like manner powers of the states are associated in our thinking, and to a large degree in reality, with powers of state legislatures. Hence it is important to give attention to the powers of and limitations on state legislative bodies.

State legislative powers

The general theory underlying our governmental system is that while the powers of the national government are enumerated, those possessed by the states are general in scope. This finds expression in the Tenth Amendment to the national constitution which says that all powers of government which have not been delegated to the United States or specifically denied to the states are retained by the states or the people. The statement that the states are bodies having general powers means that the states may perform every act of government which has not been denied them expressly by national constitutional injunction or impliedly by delegation to the national government. It is true that under this broad authority the states perform a much greater range of functions than does the central government.

Limitations on legislative power

Within the range of state activity it will be found that the executive and judicial branches, like the whole federal government, are possessed of enumerated powers only. The effect of this is, therefore, that the great reservoir of power, which is not distributed to the national government or to the other branches

of the state government or withheld from government altogether by the state constitution, is vested in the representatives of the people—the legislature. From the point of view of the legislature the powers which it may exercise are bounded in two directions: (1) on one hand by the definite assignment of specific powers and functions to other agencies of government, national or state; and (2) on the other hand by specific limitations placed in the constitutions of the state and of the United States. The specific limitations thus imposed may be distinguished as being with respect (1) to scope of action, and (2) to procedure.

Historical Perspective

The position assumed by the colonial assemblies determined the part which was to be assigned to the legislatures in the governments of the states. In all the provincial and proprietary colonies the governor was appointed by and represented the interests of an external authority, and not those of the people. These external interests were viewed by the colonists as being opposed to their own, and the governors came to be thought of as the embodiment of all that was obnoxious and oppressive in government. In all these same colonies, save Massachusetts, the council, although recruited from within the colony, stood in the minds of the people as being identified with those same outside interests. So it came about that the assemblies, although chosen by a highly restricted electorate, were looked upon as the champions of local rights and popular liberty against executive oppression. The colonists compared their assemblies thus engaged in these struggles to the House of Commons in its contests to secure the rights of Englishmen in the old country in an earlier day. From this it was but a step to think of the same assemblies as being vested with the same supreme authority with respect to their local affairs as was wielded by the Commons in England. When the troublous days of the Revolution came, these assemblies led the struggle and assumed the position of temporary governments until state constitutions were adopted.

Early confidence in legislatures

Under such circumstances it was quite natural that legislative bodies should view with distrust every personification of executive authority, even though its power was derived from their own hands. It was natural, too, when the states became independent, that they should accept the theory that the whole of the sovereignty wrested from king and Parliament should, unless otherwise specifically provided for, be vested in the legislature. It will be noticed also that when the time came to frame the first permanent constitutions of government for the states, the legislative assemblies formulated and promulgated those documents. Although the work of several of these constitution-making bodies was informally submitted to the judgment of the electorate, in the states of Massachusetts and New Hampshire alone did the idea at first prevail that ordinary legislatures were not the bodies to be entrusted with this constituent task.

The implicit confidence at first reposed in legislatures is witnessed by the fact that there are in the earlier constitutions practically no limitations on the scope of legislative activity, and comparatively few directions as to their organization and procedure. Moreover, the legislatures were, in a majority of the states, given authority to elect the governor and other general state officers, and in an even greater number of cases to elect the judges of the higher courts.

Emerging from the Revolutionary struggle enjoying the confidence of the people, the state legislatures have had a history of steadily diminishing prestige and power. The narrow provincial spirit so frequently displayed by these bodies during the Revolution, which often seriously hampered the prosecution of the war, seemed in some instances but to have endeared the legislatures to the people, since they reflected so perfectly sentiments which were widespread. It was not long, however, before the conviction began to assert itself that these bodies were using their broad powers unwisely, and that in some cases they were induced by corrupt influences to enact legislation which was not so much for the benefit of the public as for the advantage of special interests.

Loss of prestige due to:

The specific factors which contributed most potently to produce this increasing sentiment of distrust of legislatures may be grouped in two main categories: first, their questionable relations with private and special interests, and, second, their mismanagement of the fiscal affairs of the states. These two causes of popular distrust and disappointment may next be examined.

1. Favors shown to special interests

In the first place, it soon became apparent that legislatures would be confronted by a serious problem in meeting the pressure of economic groups desirous of securing special favors. At an early date these most powerful special interests assumed corporate form. It was then and for many years thereafter the practice to create corporations by special acts of legislation, which acts became in each case the charter of the corporation, defining its powers and privileges. The number thus created was at first small and the aggregations of capital resulting relatively moderate in amount, but the steady increase in the amount of capital seeking investment and the ever-broadening opportunities for the creation of new wealth by such investment led to a constantly increasing number of new corporations, seeking broad powers and favorable privileges. Two economic interests which thus assumed corporate form developed pressure groups which the legislatures frequently found themselves unable to resist. These were the banking and the land speculating interests.

a. Banking interests

The revival of business activity after the adoption of the national constitution and the opening of the new country lying to the westward created a great demand for credit both in the older centers and in the new states. Lesgislation creating banks and extending banking privileges was freely dispensed to groups of irresponsible promoters whose subsequent operations were subject to no adequate supervision. Through the granting of such legislative favors the way was opened for corrupt relations between unscrupulous bankers and legislators sometimes perhaps as unscrupulous, which in time came to the knowledge of the public. Everywhere the public was suffering in some measure from the operations of "wildcat" banks, the responsibility for which was brought ultimately to the door of the legislatures.

b. Land interests

One of the greatest and most immediately available potential sources of wealth which offered itself for exploitation was the great area of undeveloped public land. The title to vast tracts was still vested in some of the states and the disposal of the lands rested ultimately in the hands of the legislatures. The conjunction of these economic forces proved to be a combination which some legislatures were unable to resist.

Even before the Revolution companies had been formed to speculate in or to develop western lands, and after the return of peace their number multiplied. The lands were in many cases disposed of in large tracts at nominal prices to speculators who believed that they saw possibilities of great wealth in the resale or development of their holdings. The activities of these speculators in seeking favorable grants furnished opportunities and incentives for corrupt relations with venal legislators. In several states there came to light scandals similar in some respects to the great Yazoo land affair in Georgia which involved land speculators and legislators. A little later, and especially after the War of 1812, the demand for improved means of communication, particularly with the West, led to the incorporation of a host of turnpike, canal, and, later, railroad companies. Sweeping corporate powers of a virtually monopolistic character and vast grants of land were bestowed with prodigality, to the detriment of the public interest and the personal enrichment of individual members of state legislatures. It has been estimated that in the Middle West and South, not less than 31 million acres of land were donated before 1860 to aid various undertakings of public improvement. The revelations of intrigue and venality shook the confidence of the public in their legislative bodies, and furnished the incentive for placing limitations upon legislative power which were in some cases drastic.

2. Financial operations

A second cause of the decline in legislative prestige was the unwise and often reckless management of the finances of the states. As long as the states' activities were confined to the ordinary police functions of government, their finances offered no serious problems. It was not long before there came insistent

demands that the states lend assistance, not only with grants of land and of corporate privileges but with their money and their credit, to the great work of economic expansion which was in progress. Credit and means of transportation were the elements urgently called for, and it was not long before the credit of the states was being freely used in banking and in ambitious projects of internal improvements. The fact that these projects were undertaken at the insistent demand of their constituents did not lessen the condemnation visited upon the legislature when the enterprises failed.

a. Banking operations

In addition to their liberality in granting banking privileges to private corporations, the several states had, by 1837 when the great financial panic took place, incurred pecuniary obligations to the amount of more than $50,000,000 for the purpose of engaging in banking themselves or of supporting by loan of their credit the operations of private banking corporations.

b. Internal improvements

Impelled by the importunities of the land speculators and settlers, as well as by the rivalries engendered by state pride, the states quite generally embarked upon undertakings for internal improvement, which took the form successively of roads, canals, and railroads.

Roads

The building of the Cumberland Road, begun in 1811 and finally completed to Vandalia, Illinois, in 1852, offered the first great stimulus to road-building. Both federal and state governments undertook these projects, but the veto of the Maysville Road Bill by Jackson in 1830 resulted in the turning over of road-building activities to the states and to localities. State road-building projects were undertaken in many places, especially as feeders to waterways, natural or artificial; and several millions of dollars were spent before the panic of 1837 in these undertakings.

Canals

In 1817, the state of New York began the construction of the Erie Canal, which was completed in 1825. The success of this public work, both in building up the country through which it passed and in its contribution to the development of the West, gave an impulse to canal-building in all parts of the country.

Rivalry for commercial supremacy between New York and Philadelphia led the state of Pennsylvania to undertake an elaborate system of canals and railroads to connect Philadelphia with Pittsburgh and with the anthracite fields of northern Pennsylvania. The excessive cost of the system in that state due to the natural physical obstacles to be overcome made it financially unprofitable, and after a burden of $16,000,000 had been imposed upon the state, the system was turned over to a private company. Maryland contributed $7,000,000 to another unsuccessful enterprise, the Chesapeake and Ohio Canal. Ohio, Indiana, Illinois, and Michigan embarked upon extensive projects of canal-building which contributed little to the wealth of the states but left a serious burden upon the taxpayers. Canal mileage in the country, which in 1830 had reached 1200 miles, increased to 3700 miles by 1850. Most of this mileage had been constructed as state undertakings or with state aid. Debts to the extent of not less than $60,000,000 were incurred by the states for canal-building before 1837.

Railroads

While the era of canal-building was still at its height, railroad projects became active rivals of the canals in their bids for financial support. As has been said, the Pennsylvania system was a combination of canal and railroad. Pennsylvania, Michigan, South Carolina, and Georgia undertook as state enterprises the first railroad development within their boundaries. Several states, including Massachusetts, Maryland, and Illinois, loaned money or took stock to aid railroad construction, while others loaned their credit for the same purpose. Indiana allowed railroads to issue paper money to meet the cost of construction, and Ohio offered to loan its credit to the extent of one-third of the amount of stock of any railroad built in the state. It has been computed that in addition to other forms of financial encouragement given to internal improvements, bonds to the extent of at least $170,000,000 were issued or authorized by states in aid of banks, roads, canals, railroads, and other miscellaneous undertakings of similar character before the close of 1837. All but seven of the states incurred debts of this character. When the panic of 1837 came,

some were unable to meet their interest payments; and not less than six states repudiated at least a part of their debts incurred as a result of their adventures in the fields of banking and internal improvements.

Indirect Limitations

Resulting limitations on legislative power secured:

The loss of prestige of legislatures which results from their failure to measure up to the standards of wisdom and disinterestedness set for them by the public, began by the middle of the nineteenth century to show itself in the form of steps taken to circumscribe their powers. There was, as was suggested at the beginning of this chapter, in the first place, a well-marked tendency to strengthen the powers and expand the functions of other branches of the government at the expense of the legislature. In the second place, there was an equally marked tendency to restrict their freedom of action with respect to their organization and procedure, and to limit the scope of their activities.

1. By strengthcning other organs

Turning first to consider the diminutions which have come to legislative power through the strengthening of other branches of government, we shall find that this has come about by transfers of power to each of the other branches: executive, judicial, and electoral.

a. Executive organs

One of the most striking developments which has taken place in state government is the notable increase in powers and duties conferred upon the executive branch. Since the more important of these had previously been assigned to the legislature, the net effect has been to limit to a marked degree the power of the legislature. This tendency of the executive power to increase at the expense of the legislature shows itself not only in the legal powers transferred from the one to the other, but also in the increase in extra-legal influence which the executive wields in the molding of public opinion and in the shaping of state policy. This shift is most notable in the transfers, legal and extra-legal, which have been made to the governor.

Veto

In but two states did the original constitution provide for the executive veto of legislative acts. In Massachusetts this power

was bestowed upon the governor alone; whereas in New York it was conferred upon a council of revision consisting of the governor, the chancellor, and the judges of the supreme court. Within two decades, however, four more states gave the veto power to the governor. This change was probably due in part to the example furnished by the national constitution and to the more general acceptance of the doctrine of checks and balances. There is reason to believe that at the same time there was also a deliberate intention of setting up a safeguard against vagaries of legislation. As the nineteenth century progressed, the idea of the executive veto came to be accepted generally in the old as well as in the new states, until at the present time the legislature of North Carolina alone is free from this limitation.

Special sessions

From the beginning the governor had the power to call the legislature in special session. When at a later date constitution-makers began to set limits to the duration of legislative sessions, it was found desirable to give consideration likewise to specially called sessions. It was perceived that the attempt to limit regular sessions might be circumvented by the device of special sessions. To preserve the possibility of such meetings in time of real need and at the same time to hold them within limits, a stipulation was frequently made that at a special session there could be considered only those matters which were specified in the governor's call or which were presented to it subsequently in an executive message.

Executive budget

The introduction of budget systems throughout the country has, in recent years, transferred the center of gravity in financial planning from legislative committees to the executive branch and in the greater number of states to the governor himself. In most states the legislature retains the right to depart from the executive proposals though in practice these proposals are likely in the main to be somewhat closely adhered to. In Maryland, Nevada, New York, and West Virginia the legislature may reduce any item in the general appropriation bill or budget submitted by the governor but may not increase any, except that in West Virginia items for judicial and legislative branches may be in-

creased. After a general appropriation bill has been passed, the legislature may make additional appropriations, but there are usually limits on this power. In Maryland, for example, no additional appropriation is in order unless additional revenue is provided at the same time.

Appointment

In a small number of states the legislature retains the power of selecting certain administrative and judicial officers. Save in these few instances the power of the senate in some states to confirm executive appointments is the remaining vestige of the wide power of selection left to the legislature. The power of appointment has passed definitely to the executive branch.

Extra-legal developments

Besides these formal and legal innovations which have had the effect of limitations upon the freedom of action of the legislature in favor of the executive, there has also come about at the same time a certain amount of informal or extra-legal transfer of influence. As will be indicated at greater length in a subsequent chapter, there has been perceptible in recent times a strong development of the influence of the governor as a legislative leader. There has appeared a popular disposition to rely on him to outline a program of legislation, and, by the exercise of a variety of devices of political leadership, to secure the enactment of that program into statute. In so far as developments have gone in this direction, they have done much to depose the legislature from its original position of leadership in policy-forming and to reduce it to a factor of secondary importance.

b. Judicial organs

The development of a more complete judicial organization and a clearer demarcation of the judicial from the legislative function took from the legislature a range of activity which, though judicial rather than legislative, had from time immemorial been exercised by legislative bodies. It must be said, however, that this change was brought about quite as much because of a clearer perception of the essential difference between legislative and judicial functions, as because of any criticism of specific acts of the legislature in this field. In England, the House of Lords exercised the function of a court of last resort, and a variety of acts of a judicial character were accomplished by means of acts

of Parliament. The colonial legislatures, as a matter of course, conceived themselves as vested with similar authority and exercised judicial power in a wide range of cases. In a number of the colonies, too, the governor and council constituted the supreme court to which appeals lay from the regular courts of law. It was not surprising, then, that even after the ostensible separation of the judicial from the legislative function, by the creation of separate supreme courts in the states, the legislatures should continue to perform judicial functions. Legislative acts setting aside verdicts, granting new trials, granting divorces and rendering decisions of a distinctly judicial character, were not uncommon in some of the states. Although the authority of legislatures to perform such functions was questioned in some quarters from an early day, it was not until after the middle of the nineteenth century that the last state legislature ceased to exercise judicial authority in cases at private law.

Judicial review of legislation

A more far-reaching restraint upon legislative omnipotence, due to the expansion of the range of judicial activity, came about through the development of the doctrine of judicial review. By judicial review of legislative action is meant the function of the court in determining whether a certain act, though clearly legislative in character, happens to fall within the limits of the authority of the law-making body as circumscribed in the constitution.

One of the most highly prized possessions of the English people is the body of civil liberties won through centuries of struggle, popularly known as the "rights of Englishmen." These rights constituted a bulwark of defense against the acts of the king and of his ministers. Ever since the independence of the judiciary had become an established fact in England, it had been the privilege of the humblest citizen, whenever he felt that his constitutional rights as an Englishman had been violated, to appeal to the courts to secure redress. These liberties had been won under the leadership of the House of Commons, and the idea had never been entertained that such guaranties were to be effective against acts of Parliament. So it became a well-established principle that

whatever Parliament enacts is constitutional, and that the courts have no power to question the validity of an act of that politically omnipotent body. The remedy against an unjust act of Parliament is not judicial but political, and redress must be sought not through the courts but from Parliament itself or at the ballot box. It seems to have been taken for granted at the outset that the state legislatures succeeded to the same high privilege.

It was admitted on all hands that the colonists, in emigrating to America, brought with them the "rights of Englishmen," to be enjoyed as completely as in the homeland. On this side of the ocean these liberties came to be embodied in formal bills of rights and finally incorporated in state constitutions.

It was not long before it was perceived that if the acts of legislatures could not be questioned in the courts, then guaranties of liberty appearing in the constitutions were of no avail against the legislature. On the other hand, it followed that if the liberties thus guaranteed in bills of rights were to be enforced by the courts against infringement by the law-makers, then the supremacy of the legislature was at an end. When a case, arising under a statute which was in conflict with some provision of the constitution, came before the court, that body found itself confronted by two contending principles, one laid down in the statute and the other in the constitution. In such a situation the courts found themselves obliged, since, except for the supremacy of the national constitution and laws, the constitution is the supreme law of the state, to adhere to and apply the principle laid down in that document and to refuse to enforce the inconsistent terms of the statute. It is this refusal to enforce a statute because of its inconsistency with the constitution that is spoken of as declaring a statute unconstitutional.

Gradually this doctrine of judicial review came to be generally accepted and, as early as 1798, was clearly stated by a justice of the Supreme Court of the United States.

The advocates of legislative supremacy were not disposed to yield without a struggle. In Rhode Island the highest court was elected annually and could be removed by the legislature. When

that court declined to enforce a statute compelling citizens to accept a depreciated paper currency at par, steps were undertaken by the legislature to remove the judges. This effort did not succeed, but the next year all the recalcitrant judges failed of reëlection by the legislature. In North Carolina, in 1794, the supreme court said of the provisions of the bill of rights that they were "declarations the people thought proper to make of their rights, not against a power they supposed their own representatives might usurp, but against oppression and usurpation in general."[1] They said that a certain section "could not be intended as a restraint upon the legislature." Rather it was declared that such guaranties were intended to assert the rights of the people "against the power of the British king and Parliament and all other foreign powers who might claim a right of interfering with the affairs of this government."

As late as 1817, in New Hampshire, the courts, in commenting upon a section of the bill of rights which declared that no citizen should be "deprived of his life, liberty, or estate but by the judgment of his peers, or by the law of the land," said: "We think that the 15th article in our bill of rights was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by law."[2]

c. The electorate

Finally, the legislature's position in the state has been weakened by the increased direct participation of the voters in the processes of government. The election of the governor, which was at first vested in the legislature in more than half of the states, began as early as 1790 to pass to the people; and by the middle of the nineteenth century legislative election of the governor was a thing of the past. This change was due, however, to the rising tide of democratic sentiment rather than to legislative incapacity. The election of lesser executive officers remained longer with the legislature, but ultimately was transferred to the voters or to the governor. Instances of the selection of such

Election of officers

[1] State *v.* ——, 1 Hay. (N. Car.) 29 (1794).
[2] Mayo *v.* Wilson, 1 N.H. 58 (1817).

officers by the legislature survive at the present time in but few states, notably in some of the older ones, including Rhode Island and Virginia. During the earlier half of the nineteenth century the same enthusiasm for popular election which had affected the selection of executive officers spread to the choice of judges. Election of judges by the legislature, once common, lingers now only in the states of Vermont, Rhode Island, Virginia, and South Carolina.

Initiative and referendum

The introduction of the initiative and referendum when applied to state statutes constitutes perhaps the most emphatic manifestation of the popular distrust of legislatures. It is an attempt to give to the voters themselves a greater share in the process of legislation, and thereby place a potential limitation upon the actions of their representatives. The use of the referendum as applied to constitutional amendments began as early as the Revolutionary period and has become universal; the principle of the initiative, for the same purpose, has been used since 1902. The use of these devices, with respect to statutes, is but an extension of the application of the same principle to a new purpose.

Direct Limitations

Limitations on legislative power secured:

As has been suggested earlier, two further forms of limitation upon the powers of legislatures have been placed in constitutions. These are with respect to their scope of action and to their methods of procedure.

2. By limitations on scope of action:

Specific limitations with respect to scope of action which have been placed upon state legislatures take the form sometimes of positive directions and sometimes of prohibitions. Such limitations, though varying widely in detail, fall easily into two well-defined groups having to do for the most part with the subjects of finance and of special legislation.

a. With respect to finance

Limitations with respect to matters of finance may first be considered. The unfortunate experiences of the states arising from the financial experiments of the first half of the nineteenth century already alluded to led to the placing of some rather

Taxation

strict limitations upon legislative discretion in matters of taxation, appropriation, and the creation of indebtedness. With respect to taxes, the most widespread mandate is that they shall be uniform and equal upon all property; and to this end legislatures are charged especially to provide for the just valuation of all property, real and personal. This is occasionally supplemented by specific instructions as to the valuation of mines, livestock, land, and improvements, as well as corporate property of all kinds. It is true that many of the tax provisions more recently introduced, such as those permitting the classification of property for purposes of taxation, and the income tax, have had the effect of modifying the earlier sweeping attempts to secure equality in taxation. Sometimes a mere gesture is made by directing that taxes laid shall be sufficient for "the economical administration of the government" or "to defray the necessary expenses of the state government." Likewise, it is sometimes prescribed that the rate of taxation, either for all taxes or for special forms of taxation, shall not exceed a fixed rate; that persons, corporations, and localities shall not be exempted from taxation, or that only specified exemptions shall be made.

Appropriations

With respect to appropriations, it is quite generally stipulated that they may be made only by bill, and not by resolution or otherwise; and that they shall be only for public purposes. In a number of instances, power of the legislature to make appropriation is limited to the amount of estimated revenues, except in cases of dire emergency such as invasion or insurrection. Again, specific objects for which appropriation cannot be made are sometimes indicated, including the support of sectarian schools or of private or corporate enterprises, or grants to local areas of government. It is frequently required that the general appropriation bill shall provide only for ordinary expenses of government and that bills making appropriations for salaries shall not contain other matters. In a few instances it is even decreed that the legislature may decrease, but may not increase, items in the general appropriation bill. In bills other than this one, appropriations

must be for specific purposes; and the specific sums in each case must be mentioned.

Debts

In most states there are very definite limitations upon the power of the legislature to incur debts, either by borrowing or by the loan of the credit of the state to support debts incurred by persons, corporations, or localities. In some instances there is an absolute prohibition upon the creating of a debt save for specific purposes mentioned. The purposes most commonly thus specified are to repel invasion, suppress insurrection, and to pay the interest on or to refund existing debt. Sometimes debt for other unspecified purposes is permitted, but to a very limited amount. The maximum of indebtedness which the legislature is thus permitted to incur may be expressed either as a fixed amount, ranging from fifty thousand dollars in some of the older states, to as much as two millions in the Far West, or it may be determined as being a certain percent of the total valuation of the state.

In perhaps a third of the states, these limits upon borrowing may be exceeded with the consent of the voters obtained through a referendum. Still other limitations upon the debt-incurring power are requirements that the act of authorization shall specify distinctly the object of the debt, and shall be passed with certain unusual formalities or by an unusual majority. To prevent the accumulation of arrearages of interest and delay in the payment of the principal, the duty of making specific provisions for meeting both are imposed on the legislatures. Not only is the power to create and to perpetuate debts by direct means thus closely restrained, but the power to create them indirectly is still more strictly limited. The disastrous consequences of the liberal and even reckless policy pursued in aid of internal improvements led the people to specify in no uncertain terms that the credit of the state shall not be given or loaned to any political subdivision or to any private individual or corporation. Neither can any local or private debt be assumed or paid by act of the legislature. The budget system, when incorporated in state constitutions, has for

its purpose the limitation of the power of the legislature to continue the haphazard methods which they had hitherto pursued in making appropriations and levying taxes.

b. With respect to special legislation

The other principal field in which the scope of legislative action has been curtailed is that of special legislation. With respect to the breadth of their application, statutes may be classified as being either general or special. General legislation is that which applies to all places and to all persons within the state, or to all places or persons within the same class. If applicable to a class only, the basis of classification must be one which is appropriate to the purpose of the act. Thus a statute requiring that all persons practicing medicine must secure a license certifying medical proficiency is a general law, although it applies only to a single class of persons, because the classification is pertinent to the requirement imposed, viz., a knowledge of medicine.

Special legislation, on the other hand, is that which applies to less than all the state, or to an individual, or some number of individuals less than a class. An act conferring the right on a certain county to levy a special tax to build a courthouse would be an example of special legislation. Likewise acts bestowing a pension upon an individual, granting a divorce, or exempting a corporation from taxation, are acts of special legislation. Sometimes a distinction is made between special legislation which is local, i.e., relating to a particular subdivision of the state, and that which is private, i.e., relating to some person, group, or private corporation, but this distinction is not a material one.

The practice of creating corporations by the grant of a special charter to each, instead of requiring them to incorporate under a general law applicable to all alike as is now the prevailing method in most states, has already been referred to. This was the procedure formerly followed both in the creation of private corporations and in the incorporation of towns and cities. As has been suggested, corporations were at first few in number; hence they presented no serious problems in legislation, until at a later date when they became a favorite form of organization for not only large but small aggregations of capital.

Since the powers conferred upon corporations both public and private were to be strictly enumerated and narrowly construed, it followed that when any corporation found it desirable to exercise new powers it was necessary to go back to the legislature for amendments to the original act of incorporation.

Under such circumstances, as business expanded and towns and cities became more numerous, the demands, not only for new charters, but for amendments to charters already granted, were multiplied; and this sort of legislation came to consume more and more time of the legislature. Thus matters affecting the welfare of the whole state were subordinated to the claims of private and local interests. The securing of charters conferring peculiar privileges and powers not granted to all gave usually to the recipients such personal advantages that representatives of special interests besieged the legislative halls in droves in quest of special acts. Not only was the time of the legislature consumed, but the power resting in the legislature, thus to confer pecuniary advantages, opened the way to endless trading and logrolling, and to not a little corruption. The banking and land scandals already alluded to were the outgrowth of special legislation. Obscure phrases, innocent in appearance, often conveyed grants of great financial value to a recipient who would generously share his advantage with those who had been responsible for placing it in his hands.

The volume of special legislation swelled as the years advanced. In 1850, the year before special legislation was restricted in Ohio, the legislature of that state passed 545 special acts. The Illinois constitution of 1848 forbade special legislation upon certain subjects; but, nothwithstanding this, the legislature of that state, in 1869, the year before such legislation was finally and completely prohibited, passed special acts covering 3435 printed pages, as compared with 442 pages devoted to public acts. In North Carolina, in a single year, 2277 pages of special legislation were produced, as compared with 457 pages of a general nature. In 1943, Tennessee furnished 1650 pages of special, as against 458 pages of general, acts.

The possibilities for evil lurking in the practice of special legislation were perceived very early. In 1798, Georgia, in revising its constitution, decreed that the legislature should no longer have power to change names, legitimatize persons, make or change precincts, or establish bridges or ferries. The alternative method then provided was to transfer authority in these matters to the courts. By the time of the opening of the War Between the States a number of states had sought to stem the ever-rising tide of special legislation. A favorite method employed was to insert in the constitution a provision that the legislature should not have power to enact "private, special or local" acts with respect to certain enumerated subjects. The enumerated cases included vacating roads or public grounds, regulating the internal affairs of towns or counties, selecting jurors, changing the law of descent, granting franchises to railroads, changing of venue in civil or criminal cases, and providing for the management or support of free schools, as well as certain other matters; nor should there be granted "to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever."

The enumeration thus set down indicates the subjects chiefly responsible for the evil that had made itself felt. The prohibition of the grant of corporate power by special act was widely imitated, until at the present time it exists in as many as four-fifths of the states. Likewise, the prohibition of forms of special legislation other than the conferring of corporate powers spread generally through the country, and the enumeration gradually became longer. The constitution of Alabama enumerates no less than thirty-one prohibited subjects. The inclusion of a prohibited list of twenty-three subjects in the Illinois constitution of 1870 at once reduced the volume of special legislation produced in a single session from 3435 pages to 228 pages.

Besides the prohibited lists of subjects, there came to be included in constitutions a clause providing that in "all cases where a general law can be made applicable," laws should be general rather than special. The appearance of this somewhat vague

statement straightway gave rise to a question as to who should determine when a general law would apply. When, in 1872, in Missouri, the contention was raised that a certain special act was void because a general law could have been made to apply, the supreme court of the state took the ground that this section of the constitution was merely a rule for the guidance of the legislature, and that that body was the sole judge of the necessity for special legislation. The judgment of the Missouri court has since been widely followed in other states.

Where such a construction is put upon this provision, the effect is virtually to nullify the section. The legislature under such a construction, in order to disregard the direction, has merely to declare that a special act is necessary. In some states, however, the courts have taken the opposite view, and in a few cases the constitutions declare specifically that the applicability of a general law in a given situation is a question for the courts and not for the legislature to decide.

Thus, the wide recognition of the undesirability of the unlimited practice of special legislation is evidenced by the fact that at the present time everywhere, save in a very few states, some steps have been taken to check the flow of special laws. Very little valid argument can be advanced for special legislation having as its object the benefit of private individuals or corporations. Some reasons having weight have been offered, however, with respect to municipal corporations. It is a fact easily demonstrable that the needs of towns, cities, and counties may differ on account of variations in size and local conditions. The new constitution of Missouri authorizes the legislature to classify counties into four groups with respect to powers and duties, thus allowing for variations in the needs of these units.

To avoid impracticable uniformity without, at the same time throwing down completely the barriers to indiscriminate special legislation, various constitutional devices have been set up which act as distinct limitations on legislative power. It is true that such constitutional provisions apply also to counties, townships, and minor municipal areas, but they are of chief interest in their ap-

plication to cities. For this reason more detailed consideration of this phase of special legislation will be reserved for discussion in the chapter on city government.

3. By limitations on procedure

Various and sometimes numerous limitations upon the legislature with reference to procedure occur in the several state constitutions, taking the form of provisions designed to secure publicity and deliberation in action to protect the minority, and to prevent action except by the will of the majority. These provisions sometimes assume the positive form of requirements laid down, and in other cases the negative form of limitations imposed. Those stipulations with respect to procedure which are most commonly found in constitutions can be enumerated briefly.

Constitutional restrictions

A majority of the members shall be necessary to constitute a quorum; bills for appropriating money and for raising revenue shall originate in the lower house; no bill shall embrace more than a single subject and that subject must be clearly indicated in its title; every bill shall be read three times and on separate days; bills may be recalled from a committee by vote of the house; bills must secure the affirmative vote of a majority of all the members of each house to secure passage; the yeas and nays of the members must be recorded on the final passage of a bill, and upon any other vote at the request of a small specified number of members; and the sessions of both houses shall be open to the public except in case of emergency.

Rules

Beyond the limits of the provisions of the constitution with respect to organization and procedure, each house is free to adopt such rules as it sees fit. At the opening of the session each house formally adopts a code of rules. On these occasions it is customary to take over *in toto* the rules of the preceding session. No legislature in the limited time at its disposal wants to undertake a revision of the rules, so it happens that any modifications made from session to session are likely to be effected, not at the opening of the session with the definite purpose of improvement, but later, from time to time, as the direct result of some parliamentary squabble involving organization or procedure. The re-

sult has been that, except in a few states, the legislative rules have persisted for many years without much revision and are now hopelessly antiquated and inadequate for modern needs. In some legislatures where the rules are in this unreformed condition, substantial progress in the work of the house can be made only under suspension of the rules. Even when not formally suspended, rules are frequently ignored by common consent. In the closing days of a session when the pressure of business is great and the time growing short, it is regularly the custom in many states to suspend the rules. Unfortunately, too often those members whose measures will not bear the scrutiny of careful deliberation wait until the safeguards of the rules have been suspended before bringing forth their proposals. They hope then in the rush of closing hours to slip their measures stealthily through to a favorable vote. The states of Massachusetts, Wisconsin, Nebraska, and to some extent California and Virginia, offer exceptions to the generally unsatisfactory condition of legislative rules. Massachusetts has long worked under a simple but efficient code. More recently the other states mentioned have simplified and modernized their rules to make them workable instruments in the business of legislation.

Privileges of members

From time immemorial, the representatives of the people have enjoyed certain "legislative privileges," including freedom from arrest and freedom of speech, and these have found place in our constitutions. Freedom from arrest, except for treason, felony, or breach of the peace, is guaranteed during the actual sitting of the legislature as well as while going to and returning from its sessions. Members are, however, liable to arrest and punishment for the commission of any except petty crimes, even though the legislature is in session, but in most states do not have to respond to civil process. Immunity from arrest was originally set up as a protection against the king's agents, and has been perpetuated as a matter of form long after that danger was removed. Sometimes the privileged period is extended to include ten or fifteen days before and after the session.

A second immunity conferred is that a member shall not be

questioned outside the chamber for anything said upon the floor in debate. This ancient right still has practical value. It enables any member to present to the house freely his beliefs and convictions, even though mistaken, without subjecting himself to the dangers of suit for slander or defamation of character. This privilege is sometimes, though seldom, abused by members.

Legislatures are empowered to insist upon respectful and orderly behavior and civil speech by their members, as well as by others, in their presence. So, though a member be safe from question outside for the words uttered from the floor of the house, any disorderly conduct or statements unbecoming a member may be dealt with by the house itself either by censure, or, usually on vote of two-thirds of the members, by expulsion. Likewise, any act of disorder by any other person in the presence of the house, or any act in contempt of its dignity or authority is punishable by the house. A refusal to appear, to bring books and papers, or to testify before the house or one of its committees, has been held to constitute contempt.

For references see list at the end of Chapter 8.

CHAPTER 10

THE LEGISLATURE: PROCEDURE

The legislative process

Legislation is usually accomplished through the enactment or passage of bills and resolutions. The process, which is long and somewhat complicated, may be summarized at this point, while the details of the several steps may be reserved for later consideration, one by one. The important stages in the enactment of a legislative measure are: (1) preparation; (2) introduction; (3) first reading and reference; (4) committee consideration and report; (5) second reading, with debate and possible amendment; (6) engrossment; (7) third reading and final vote; (8) repetition of the same steps in the second house; (9) reference to conference committee if necessary; (10) enrollment, signature by the presiding officers, and presentation to the governor; and (11) action by the governor. Although there are variations in detail from the above routine, there is nowhere a material departure.

One is accustomed to think of the history of a legislative measure as beginning when it makes its appearance as a bill introduced in one of the houses of the legislature. The fact is, however, that the measure may have experienced many vicissitudes before appearing in legislative halls.

1. Preparation

Before a measure reaches the stage of introduction it must first have passed through the stage of preparation. During this preparation three steps are taken. There is first the determination of the object or purpose to be attained by the act; second, the selection of the particular means by which that end is to be attained; and, third, the framing of the language of the act.

In the first step, there must be born somewhere the idea that

a. The idea

there exists some public need, real or fancied, to be met by legislative action. This may be a social need discovered by some worker in the practical field of sociology; an economic need perceived by the commercial or financial interests of the state; a need for improvement in the administrative machinery of the state growing out of the experience of some department of government; or it may be a need for a better adjustment of personal or property rights growing out of weaknesses discovered in the common law. It is possible, of course, that its source may be the selfish desire of some individual or group to promote a personal advantage under the guise of a public benefit.

The suggestion is put forth by someone that "there should be a law" to attain a certain proposed end. Perhaps the idea is next taken up by one of the numerous voluntary organizations which exist to promote every imaginable sort of cause or to serve every conceivable end. Through the press, the platform, and even the pulpit in some cases, the suggestion is put before the public and a body of opinion created that "there should be a law." Gradually the idea crystallizes and the general object or end to be attained takes more definite form.

b. The means

The second step, the selection of the means by which the end is to be attained, is, if the promoters of the cause are wise, reached only after careful investigation. There should be a marshaling of the pertinent facts pertaining to the situation to be affected by the proposed act. There must be a study of the laws of other states and countries on the subject, of the experience gained from the results of the administration of such acts, and of judicial decisions bearing on the interpretation and constitutionality of these laws. Many investigations of this sort are undertaken by voluntary organizations interested in particular reforms. Others have been inaugurated by the chief executive of the state or the head of an administrative department.

Within recent years the increasingly technical character of the problems pressing for solution has called for more elaborate preliminary investigation before legislative action is taken To

perform this duty special investigating committees and commissions composed of legislators or experts or both have been created by legislative bodies. It is as a result of such inquiries, sometimes involving very exhaustive study and the expenditure of large sums of money, that many of the most important pieces of legislation have taken form. Such bodies have been employed also to consolidate in a single comprehensive bill the substance of a whole series of detached acts already on the statute book concerning a particular subject. Unfortunately, the statute books are replete with acts of an important character representing the crystallization of an idea into a policy which has proved futile and unworkable because it was based upon faulty information due to inadequate investigation. The Council of State Governments described in Chapter 3, also provides much technical assistance to legislatures.

c. The expression

With the general purpose defined, and the best means of attaining it decided upon, the third preliminary step, the formulation of the bill in statutory language, is in order. The drafting of a bill is a task of precision calling for the exercise of considerable technical skill. It has been pointed out by Coode, an early master of the art of bill-drafting, that through defective drafting "a law good in its substance is rendered confused in its form, proportionally difficult to be understood and applied, and sometimes is even made inoperative, or, what is worse, a delusion and a snare."[1] No other piece of literary composition, unless perhaps Holy Scripture, is liable to more searching analysis and criticism than are statutes. It is, therefore, necessary that a bill be drafted in such language that it shall express neither more nor less than is intended, and that it be so drawn not only that its meaning may be understood, but that it cannot be misunderstood.

Examples are furnished in the acts of every legislature wherein verbosity and looseness of expression cloud the meaning of the statute or render it so meaningless as to make it ineffectual. Numerous examples of the absurdities which creep into statutes are quoted in the books. A statute passed in Ohio in 1919 speaks

[1] George Coode, *On Legislative Expression* (ed. 1848), p. 6.

of "Major surgery, which shall be defined to mean the performance of those surgical operations attended by mortality from the use of the knife or other surgical instruments." In 1913, the legislature of Tennessee decreed that "It shall be unlawful for the owner or keeper of horses, mules, cattle, sheep, goats and hogs to run at large." One of the textbooks quotes from a statute of a state: "No one shall carry any dangerous weapon upon the public highway except for the purpose of killing a noxious animal, or a police officer in the discharge of his duty." Perhaps the most famous legislative product of this nature is the one which decrees that "When two trains approach each other at a crossing they shall both come to a full stop and neither shall start up until the other has gone."

Bills drafted by:

No legislator, unless he be one of long and active legislative experience, undertakes to draft his own bills. Not infrequently it is a lawyer constituent of the member who is relied upon to put the measure into statutory language. In every state there has developed a group of attorneys, most of whom have seen service in the legislature, who have acquired skill and reputation as draftsmen and whose services are in demand for that purpose.

1. Attorneys

2. Lobbyists

Among the legislative agents employed by the larger special interests to represent them about the legislative halls are those who are skilled in the framing of bills, and who are eager to accommodate members by assisting them in the preparation of bills. Some of the most beneficent pieces of legislation on the statute books owe much to the skill in drafting of representatives of organizations promoting public welfare legislation. But on the other hand, the member who avails himself of this volunteer and irresponsible source of aid cannot well complain if he finds that these friends have taken good care of the interests of those whom they are paid to represent.

3. Public bill-drafting agencies

In 1901, there was established in Wisconsin a legislative reference library in which it was undertaken to gather all available information upon a wide variety of subjects which might come before the legislature, for the use of members of the two houses. It was found that merely to place the information within the

reach of the legislator was not sufficient, since he was scarcely more familiar with the methods of research than with the art of bill-drafting. To meet this further need, members were invited to bring to the library their ideas and projects. The members of the library staff were able in the light of the information assembled to develop the ideas of the legislator, acquaint him with experience elsewhere, warn him of the pitfalls to be avoided, and finally to cast his proposals into correct language for introduction as a bill. This plan proved so popular that legislative reference libraries or bureaus and bill-drafting agencies have been set up in more than two-thirds of the states. Sometimes this work is performed within the state library and sometimes in an independent bureau. In one-half the states year-round bill-drafting service is provided for legislators.

2. Introduction

Legislative bills may be introduced by any member usually without limit as to number. In several states there are constitutional limitations or limitations under the rules of the houses, as to the time of introducing bills. Pre-session filing or introduction is permitted in Massachusetts, New Hampshire, Vermont, Nebraska, and Connecticut. In North Dakota, state administrative agencies submitting bills or resolutions to the legislative research committee for consideration must submit them at least sixty days prior to any regular session. In some cases no bill can be introduced after a certain number of days of the session have elapsed, and in others, within a prescribed number of days before the end of the session. In certain states no bill except a general appropriation bill may be introduced after a specified number of days of the session have elapsed, unless it is upon a subject brought to the attention of the legislature by the governor in a special message. When such restrictions are not constitutional in origin, they are frequently nullified by the houses themselves by suspension of the rules.

Introduction takes place in several ways. A member may, when the proper order of business is reached, rise in his place and offer his bill and ask that it be referred to a certain committee; or, in many states, a bill may be introduced more informally

by placing it in the clerk's hands. In Massachusetts an ancient practice is preserved by which a bill is introduced by presenting a petition with the bill attached.

Number of bills introduced

The number of bills introduced in each house runs into the hundreds, and sometimes reaches as many as several thousand, in a single session. In New York in 1941, 4381 bills were presented, while in the same year 3039 were offered in Massachusetts; California and Connecticut had 4012 and 5517, respectively. A study of the legislature of North Carolina revealed that over a period of thirty years the average number of bills introduced at regular sessions was more than 2200. In forty states in 1941 over 60,000 bills were introduced in the state legislatures and over 1800 became law.

The bills are upon every conceivable subject and of all degrees of importance or triviality, bounded only by the imagination of the members or of their constituents. Since no responsibility attaches to the introduction of a bill nor any obligation to support it after it is before the legislature, members are usually willing to accommodate any citizen by introducing any measure handed them. If the bill is one in which the member is not interested or to which he is personally opposed, it is sometimes announced as being introduced "by request." There seems to be a feeling widespread in some regions that the right of citizens to propose legislation should be coextensive with the right of petition. The freedom to introduce bills of all kinds and in any number enjoyed by members not only of state legislatures but of Congress, strikes the foreign observer as a peculiar feature of our system. A glance at the practices in countries working under the parliamentary system may render clearer by contrast the difficulties under which our legislatures labor with respect to leadership and to the mass of legislation with which they are called upon to deal.

Although the number of bills introduced in our legislatures is excessive, and the number enacted into law is large, it is easy to overestimate the seriousness of the evil. It must be remembered that while a certain number of acts in each state do affect the

substantive law relating to persons and property, these constitute but a small proportion of the whole. Many acts passed are merely of an administrative character and concern minor details of governmental structure and operation. Many more are special in character and affect individuals or small groups only. Another large number are not in reality new acts, but virtually amendments to former acts, designed to cure defects in their form or substance. Although the problem presented by the excessive number of bills introduced is a serious one, the true state of affairs with respect to the volume of legislation is by no means what sensational writers have pictured.

Legislative leadership

The problem presented by the multiplicity of bills introduced is intimately connected with the question of legislative leadership. In countries under parliamentary government this question of leadership is a comparatively simple one. A leader is officially selected by the political party from among the members of the legislature to become the head of the party both within and outside the legislature. Upon the accession of that party to power the leader becomes also the working executive head of the government. Thus this chief may be said to combine leadership of a threefold kind: partisan, executive, and legislative. There can be no doubt of the location of either leadership or responsibility. Responsibility for the preparation of the legislative program, for putting the program into statute and, finally, for its administration when enacted into law is definitely fixed in a small group, the ministry, of which the premier is the acknowledged head.

In governments organized upon the principle of the separation of powers, the problem of responsible leadership presents various aspects of greater difficulty. This function in the three fields of activity—partisan, legislative, and executive—is normally found in separate hands. Moreover, in too many cases leadership in each field is not clearly identified and hence cannot be held responsible for results. It is a fact that real legislative leadership is sometimes not found within the houses at all, but, if it exists anywhere, will be found entirely outside that body.

Legislative leadership under any system of government in-

volves both the preparation and presentation of a program, and the securing of its enactment into law. Under our own system the party platform might be expected to present a program of legislation, but it has failed to perform that service. From early days the governor's messages have embodied suggestions for legislative consideration, but they were for more than a century uttered in such a tentative fashion that they attracted little attention either within or without the legislature, and carried little weight. But as no formally recognized leadership developed within the legislature, the governor came to be relied on more and more generally to act in that capacity. In a majority of the states today it has become a recognized practice for the governor to offer a concrete program of action for that body. The measures thus proposed by him are spoken of collectively as the "administration program" and individually as "administration bills."

The speaker, the floor leader, and the caucus have developed as instruments of leadership for the majority within the house itself, but the span of their life is brief and their prestige outside the house is negligible. Under these circumstances the governor's budget authority and his veto power, reinforced by his executive powers of appointment and removal, and supplemented by the party prestige of his office, have united to make him the most influential single individual both in the preparation of legislation and in shaping its course through the two houses.

Legislative council

In a government organized upon the system of separation of powers and checks and balances the development of legislative leadership by the governor is bound in the long run to be viewed with some jealousy by the members of the legislature. To develop and retain legislative leadership within its own membership there has come into being within the last twenty years in no less than twenty-three states an institution—the legislative council—composed of a group of members selected by the two houses, whose function it is to develop a program for the consideration of the legislature. In the interval between legislative sessions it selects subjects likely to command the attention

of the legislature; entertains proposals of topics from legislators, the governor, and the public; gathers information, suggests alternatives, and points out probable effects. It does not promote or oppose measures, and bills which it prepares are not urged as ultimate solutions but rather as starting points for subsequent discussion. The membership is composed of legislators, ranging in number from four to thirty-four, selected by the houses or by their respective presiding officers. In a few states representatives of the executive branch of the government or private citizens are included on the councils.

"Sifting" of legislative proposals in parliamentary countries

The recognition of an official legislative leadership in parliamentary countries has brought about a clear distinction between "government bills" and "private members' bills." The ministry, i.e., the executive branch under the leadership of the prime minister, is expected to introduce all important measures. As leaders of the majority party, they prepare a program of legislation to carry through, which includes the preëlection pledges of the party as well as a limited number of other measures which they wish to enact. These measures constitute a program on which the ministry stakes its political life. If these are not accepted by the legislature substantially as offered, the ministry must either resign office or appeal to the voters for support in the form of new members sufficient to constitute a majority in favor of their program. If the voters do not return such a majority, there then remains no alternative to resignation.

The "government bills" which constitute the program of the majority party, though few in number, are very important. Since the consequences of mistake are so grave for the party, they are prepared only after careful investigation and are drawn by skilled draftsmen. Upon these few bills and these alone is public interest focused.

Private members, i.e., those not of the ministerial group, may introduce bills either of a general or special character but they are seldom on subjects of great general interest. They are not often accorded more than a small portion of legislative time,

and, if they presume to deal with problems of general concern, they are given scant consideration. The theory is that since the ministry represents the majority of the legislature which has undertaken the responsibility of conducting the government, it should be given the right to determine what measures shall be presented for consideration. The ministry refuses to embarrass the success of its administration by the injection of other matters by irresponsible persons. The result of this system is that the number of bills, other than of a purely local or special nature, to come before any session of the legislature is comparatively small. The few bills presented to that body for consideration, are, however, of great importance.

The mass of legislation presented in those countries is further diminished by the fact that the executive, through what in this country are called administrative rules and regulations, is authorized by statute to dispose of many matters which here would be made the subject of legislative action. A net result of their legislative methods is to avoid the flood of irresponsible bills with which our legislatures are burdened, and to permit the body to devote its time to the rather careful consideration of a program which has been worked out coherently and for which a definite group stands responsible.

Thus it appears that the recognition of an official legislative leadership in parliamentary countries has led to the more systematic preparation of a definite legislative program than is the case in the American states, and has had the secondary effect of limiting the gross amount of legislation demanding consideration.

Sifting of bills in the states

There are evidences of an awareness in this country of the need of a process whereby some measure of responsibility for a legislative program may be fixed, and whereby legislative grain may be separated from the chaff. Certain legislative practices now widely accepted serve this end. One reason why the pigeonholing of many bills in committee is tolerated without protest is that, crude and irresponsible as the device is, it serves as a

a. "Pigeonholing"

means of weeding out and disposing of a mass of legislation which should never have been introduced.

b. "Caucus measures"

Again, the growing disposition of the majority caucus to give preëminence to certain bills by declaring them to be "caucus measures," to cause the preparation and introduction of bills, and to direct committee action with respect to bills of political significance, is all an indication of a developing sense of the need of a coherent legislative program for which responsibility can be fixed.

c. "Administration bills"

In the third place, there is a tendency, without formal action, to arrive at the same result through recognition of the governor as a leader in legislation. Within the present century it has become the custom of the governor, both in his campaign addresses and in his inaugural message, to declare a program of legislation, known as the "administration program," to which he stands committed and to which he in a measure commits the party. These declarations by the governor are ordinarily followed by the introduction in the legislature of a series of bills which have come to be known as "administration bills."

Some years ago the legislature of Illinois gave formal recognition to the governor's program by adopting a rule providing for the recognition of certain measures proposed by the governor as "administration bills" and giving these precedence in the order of business.

The introduction of the executive budget has helped to accentuate the importance of the governor and of his program in legislation. When there is a close party organization in the legislature and when the governor is of the majority party, this program of the executive is likely to be enacted into statutes. The assumption by the governor, then, of this position of leadership is not, as is often so forcefully declared, a presumptuous encroachment on the functions of the legislature but a necessary step if a coherent legislative program is to be developed at all.

Whether by constitutional mandate or by legislative rule, the early practice of three readings of every bill upon separate days

3. First reading and reference

is adhered to, at least in form. The first "reading" takes place upon the introduction of the bill and is accomplished by reading the title only. This rule was introduced long ago as a means of publicity and to give members information concerning the provisions of bills. With the present facilities for printing, the reading of bills aloud for information is a useless expenditure of time. The common practice, though not everywhere observed, is that upon first reading, all bills are printed so that not only the legislator but any citizen who may possibly be affected may have opportunity to examine the measure for himself.

The futility of retaining procedural stipulations in constitutions when they no longer serve any useful purpose, and the absurdities which may ensue, are well illustrated in the case of the three readings. It is sometimes stipulated that on its final passage a bill shall be read in full; but in spite of this, in the rush of the last legislative days it is not uncommon for the presiding officer to interrupt the clerk after a few sentences have been read and to put the question forthwith. It has happened when there was a desire to comply with the letter of the constitution, that several clerks have been set to reading at different points in a bill simultaneously.

The term "reading" as employed in legislative procedure has, therefore, come to have a merely technical meaning, indicating certain stages at which the bill comes before the whole house for consideration and appropriate action.

The requirement that the three readings shall be upon separate days is commendable, since it serves the purposes not only of information but of deliberation, and prevents "snap" legislation. The value of the rule is evidenced by what sometimes takes place near the close of a session when the rules are suspended and constitutional mandates ignored. At such times sinister and selfish interests bring forth measures which they have kept under cover awaiting a favorable moment, and are able frequently in the confusion of the hour to secure their rapid advancement through the legislative stages to final passage before their significance is grasped.

A part of the first-reading stage is the reference of the bill to the committee either automatically under the rules, at the request of the member introducing it, or at the will of the speaker. With the introduction of hundreds or even thousands of bills in each house, any real consideration by the whole house of more than a few important measures would be manifestly impossible. Hence division of labor suggests itself. The committee system makes this possible. Bills dealing with like categories of subject matter can be referred to the same committee. Two ends are secured thereby: economy of time and at least concentrated attention which may lead to specialized knowledge. This specialization is contributed to by placing men on committees who are known to possess information on, or taste for, the subject covered by the committee. The committee system has thus become the central feature of legislative organization for the transaction of business, as is shown by studies in several states. More than half of the bills introduced in state legislatures fail to get beyond the respective committee to which they are referred; and further, in two states at least, the final action of the committee on the bill became the final action of the house in a preponderant majority of the cases.

4. Committee consideration

Committees may be classified as select or standing, each playing a distinct and important role in the legislative process.

Committees classified

Select committees, found less frequently, are designed for special purposes. They are created at any time when a particular duty is to be performed or a specific problem investigated. A select committee is sometimes appointed to represent the house in attendance on some formal ceremonial occasion. One or more select committees are created at almost every session in some states to investigate some administrative department or institution, and to report their findings, or to investigate some problem demanding intensive study with a view to recommending legislation.

a. Select committees

Standing committees are those, already referred to, to which bills or resolutions are assigned, and which have been called into being under the application of the principle of the division of

b. Standing committees

labor. They are provided for in the rules, are filled at the opening of the session, and continue throughout its duration. With respect to the nature of their work, standing committees are either procedural or substantive. The chief procedural committee is that on rules. Its function is primarily to recommend at the opening of the session a code of rules to govern the procedure of the house and, from time to time, such modifications of these as may seem desirable. Since it is customary to adopt substantially without change the rules of the previous session, its work in this connection is not burdensome. Because it is in some states a "privileged" committee, i.e., having power to report at any time and to demand immediate action upon its report, it has been made use of by the majority leaders in those states, just as in Congress, to control the course of legislation. Other procedural committees found in some states are those on engrossed bills, enrolled acts, and elections.

Because of the vital part played by committees in the practical work of legislation, a somewhat detailed consideration of their structure and work may properly be indulged in.

Number

The number of legislative committees varies widely from state to state, and to some degree from year to year in the same state. In Wisconsin there were recently nine in the senate and twenty-two in the house, and in Rhode Island twelve in the senate and fifteen in the house. At the other extreme are such states as South Dakota with a membership in the senate of thirty-five and fifty-one committees, and Kentucky with a membership of one hundred in the house and fifty-eight committees. In North Carolina there were, in 1948, fifty-two committees in the senate and forty-nine in the house. Although Massachusetts has but four committees in the senate and six in the house, it has thirty-one joint committees which perform the greater part of the committee work. On the average the number of committees in the lower house will approximate thirty-six and in the senate twenty-nine. A comparison of recent and earlier years of this century reveals a moderate tendency to curtail the number of standing committees. The unicameral legislature of Nebraska

has fourteen committees with an average of eight members on each.

Likewise, the number of members on committees varies. In the Wisconsin senate each committee has either five or seven members, and in the house, nine or eleven. On the other hand, it is not uncommon elsewhere to find committees of from twenty-five to thirty members, and running occasionally as high as forty. The combination of an excessive number of committees and of large membership results, of necessity, in most members being placed upon several committees. In the Georgia senate, in 1945, the average number of committee assignments per member was eighteen and in the North Carolina senate the average was fifteen. These are, however, extreme cases, and the number of committee assignments for each member does not in most states exceed from four to seven. **Members**

But even under the average conditions a committee system thus constituted could not be otherwise than ineffective. While it is desirable that committees should represent some variety of viewpoint, it is a fact that careful consideration of details by a large group is impracticable. If frequent sessions of committees are to be held, conflicts in time of meeting are inevitable and to secure full attendance at protracted sessions becomes impossible. Under such conditions it is impossible to build up in a committee an *esprit de corps* which will result in careful and systematic work. Nor will the individual member under such circumstances feel the proper sense of personal responsibility for the recommendations of his committee.

In Maine, Massachusetts, and Connecticut, most of the work is done through a system of joint committees composed of members of both houses. In Massachusetts, where the system is most highly developed, there are in the two houses a few separate committees; but there are thirty-one joint committees, to which all important matters are referred. In other states a certain number of such committees is found but their action is confined usually to somewhat formal matters and is likely to be of a perfunctory sort. By the joint-committee system there is ef- **Joint committees**

fected a considerable saving of time for both the houses and the persons having an interest in the measure in question; and consideration in this manner, once for all, is likely to prove more careful than two separate considerations. Bills are taken up in joint committee when referred from the first house, and a report is made to both houses. When the measure reaches the second house the report of the joint committee is before that body and the bill can pass directly from first to second reading without reference. In Rhode Island, although separate committees are maintained, it is the custom on important bills, and especially when public hearings are to be conducted, to hold joint meetings of the corresponding committees of the two houses. In some other states the custom prevails of holding joint sessions upon the general appropriation bill.

Membership of committees

As has been stated in another connection, assignment to committees is made by the speaker, although in Oklahoma assignments must be confirmed by the house. In the senate, the lieutenant governor appoints committees in about one-fourth of the states. Elsewhere appointments are made by the president *pro tempore* of the senate, a committee on committees, or by the senate itself.

Whatever the number of committees, it will be found that the majority party consistently reserves to itself a safe working majority upon each, although it is customary to accord to the minority certain representation in every instance. Upon matters of party significance, the views of the minority members upon the committee are given scant consideration. Examination of the membership roll of committees discloses the fact that the names of a small group of majority leaders reappear on a number of the most important of these. The committees which ordinarily are considered to be among the most important are those on ways and means (or finance), appropriations, judiciary, rules, municipalities (or cities or local affairs), education, public utilities, public institutions, and highways. An enumeration of such committees would vary considerably with time and place.

In most instances the name of the committee is a sufficient

index of the nature of the bills sent to it for consideration. Of the more important among them, perhaps the work of the judiciary committee alone demands explanation. Its function was originally to consider bills which would modify the rules of the common law or which involved the question of constitutionality. It has gradually come about that its field of action is much broader than was originally contemplated. Because of the nature of the matters sent to that committee, it was appropriate that it should be composed of lawyers; and the importance of these questions caused the leaders of the majority, who are not unlikely for the most part to be lawyers, to desire place on this committee. The judiciary committee thus in time gained a special prcëminence and came to be looked upon as a dominating group. This favored status served in turn to draw to that committee rather than to the one indicated by the subject matter of the bill an increasing number of the more important bills to which this little group of leaders wished to give their personal attention.

The ways and means committee, usually known in the senate as the finance committee, and also the committee on appropriations, since it is concerned with problems of finance which touch every branch of government, hold high rank in relative importance. Hence it is but natural that places upon these, too, should be eagerly sought after. Other committees, such as those on public utilities, municipal corporations, and the others above mentioned as important because of the magnitude of the interests involved, afford places of great power. As in the case of the judiciary committee, the leaders of the majority reserve for themselves places upon these most powerful committees, and are inclined to enlarge the scope of activities of these bodies beyond their normal boundaries.

So far have these influences for the concentration of business into a few committees proceeded that it has served to fortify greatly the control of a small group of leaders over the more important business before the legislature. In one year in the Pennsylvania house in which there were forty-four committees,

about 49 percent of all bills introduced were sent to one or the other of five committees. It seems likely that investigations in many other states would show a like condition.

In states where the committee system has been brought to greater perfection and the number of committees is not excessive, each of them is furnished with a room and a clerk. Elsewhere there is no clerk and meetings are held wherever space for the particular meeting can be secured. Bills referred to a committee are in the custody of the clerk if there be one; otherwise, the chairman of the committee is responsible for the bills while they are in the hands of his group. Everywhere there is a tendency for the chairman to dominate the deliberations of the committee, and he frequently determines in large degree the fate of each bill which comes before it.

Work of committees

When bills reach the committee the theoretical rule of procedure demands that each bill shall be taken up in the order in which it comes to it, and discussed with reference to both form and substance; that hearings shall be held when found desirable; and that reports shall be made to the house recommending the disposal to be made of the bills. The actual procedure commonly departs from this order, the degree of the departure depending upon the extent to which the formal rules purport to control committee procedure and the spirit in which the rules are observed.

If the several state legislatures are studied with respect to variations in this direction, there will be found at one extreme a small group, including notably Nebraska and Massachusetts, where the committees are closely controlled by rule and the rules strictly enforced. In Nebraska, even before the adoption of the unicameral system, the rules prescribed that regular committee meetings should be held within certain specified hours of the day, that printed schedules of the time and place of all such meetings should be published, and that final action on any bill should be taken only at a regular meeting. In the present unicameral legislature of Nebraska, committee hearings are open to the public and all bills must be reported by the committees.

In Massachusetts the limitations placed on the proceedings of committees while bills are in their hands are less strict than in Nebraska, but no bill affecting the rights of private individuals or private or municipal corporations can be acted upon until notice shall have been given of its pendency. Committees are required before a fixed day to report all bills referred to them. Furthermore, bills must be taken up for consideration in the order in which they are reported, and no bill can be made a special order except by a vote of four-fifths of the members present. Thus it will be seen that in these states the committees are distinctly the servants of the houses, and the destiny of any bill can be affected by a committee only through its report thereon to the house.

In most states, when a bill reaches a committee, it is considered, not in the order of reference, but at the will of the majority of the committee, or perhaps more often at the will of the chairman. If the majority are opposed to the bill or if they think it of too trivial a nature to deserve attention, they may never take it up or, if they do consider it, they make take no final action and make no report. Only about a third of the states require committees to report back all bills. Under such circumstances the bill is said to have been "pigeonholed," and its further progress is effectually blocked.

It is always within the power of the house when a committee refrains from reporting back a bill, to "discharge the committee from further consideration" of the bill, i.e., to recall the bill from the committee. But since the important committees to which the great mass of bills are referred are controlled by the leaders of the dominant majority group, the probability of such action is negligible.

When a bill is taken up in committee it may, if of special importance, be handed to a subcommittee for more careful and extended study which may even include consideration by experts retained by that body for the occasion. If the bill be one of general public interest or if there be a reasonable demand, a public hearing may be held at which interested parties may ap-

pear and be heard. In Connecticut, Massachusetts, Nebraska, Wisconsin, and in the Illinois senate, it is customary to give opportunity for public hearing on all bills. Students of the subject believe strongly that public hearings should be required on all major bills and that advance notice of hearings be given of all such hearings, so that any person interested can inform himself of the matter.

Little progress has been made in a century in developing the internal organization and methods of state legislatures to adapt them to the increasing burden laid upon them. The organization and procedure now in force are in most cases archaic, excessively clumsy and ill-adapted to their function. Perhaps no one thing would contribute more to relieve this situation than a reform of the committee system as it now exists in a vast majority of the states.

The way to a solution of the problem has been offered by a few states such as Massachusetts, Wisconsin, and Connecticut. The reduction of both the size and number of committees, and the employment of joint committees in those states, as well as the introduction of devices to systematize their procedure, have transformed them into efficient engines for performing their work. Rules adopted to prevent the bunching of great numbers of bills in the hands of a few committees and requiring committees to report on all bills within a fixed time, would serve to distribute the work more evenly and assist in reducing the congestion in the last days of the session.

The lobby

It is proper and highly desirable that every citizen, if he believes that some project of legislation which is pending would be of advantage to his legitimate interests and not injurious to the public, should have the privilege of making his views known and of supporting them before the members of the legislature by facts and arguments. In like manner, he should have the liberty to present his case concerning any measure which he believes to be undesirable. Any such activity may properly be referred to as lobbying. Taken in its broadest sense, the lobby comprises all those persons outside the legislature who under-

take to influence the course of legislation by presenting facts or arguments bearing upon proposed measures.

Popular usage, however, has given to the word a somewhat sinister meaning by restricting its application to those persons who are impelled by some selfish motive, and even more especially to those who represent the selfish interests of others for pay. There is the further implication that not only does the lobby serve an interest which is selfish, but one which runs counter to the best interests of the public. It is true no doubt that persons who fall within this opprobrious meaning of the word are present at every session of the legislature; and unfortunately it is not unlikely that they are more numerous and sometimes more effective than those having a more commendable purpose.

The application of the term "lobby" to this group of persons arose from the fact that they are usually conspicuously active in the public lobbies and corridors just outside the legislative chambers, through which members must pass in going to and from the sessions. However, much of the most effective lobbying goes on in committee rooms, over the dinner table, or in quiet talks behind the closed doors of hotel rooms.

As a matter of fact, not all to whom the name "lobbyist" is often applied are actuated by sinister or even selfish motives. Their purpose may be of the highest order, and they may place before the members information or viewpoints of real service to the public which might otherwise be overlooked or misunderstood. Public-spirited or disinterested citizens may appear, representing what they believe to be the public interests, to urge or oppose legislation. Organizations created to promote charitable, educational, or social reforms; bodies representing economic groups such as labor organizations, boards of trade, and professional societies, appear to represent interests which can scarcely be branded as selfish under any ordinary meaning of the term. The organized facilities of the legislature for fact-finding are so ill-developed that it may be that only through the presentation of facts unearthed and presented through the zeal of these or-

ganizations will the legislature come into possession of the information necessary to a wise conclusion.

The group of lobbyists includes persons, both men and women, from all stations of life, working for every sort of legislative project, good and bad. The paid professionals are frequently politician-lawyers and ordinarily include some ex-members of the legislature who, by their wide acquaintance in political circles and their knowledge of legislative methods, have developed skill in the arts of legislative persuasion.

The methods employed by lobbyists are various and sometimes devious. They include, among the more obvious, the sending of personal letters, distribution of printed matter, appearance at public committee hearings, enlisting the influence of influential constituents of individual members, and, especially, personal contact with members.

It is natural that the persons working disinterestedly in worthy public causes should usually be persons of high character whose methods are at least not open to charges of corruption, even though their zeal sometimes carries them beyond the bounds of good taste. The paid professional lobbyists, representing interests playing for high financial stakes, have liberal funds at their command. Investigations have revealed instances where, when the members who are susceptible to such influence have been discovered, large sums of money have been spent for entertainment, personal loans, retaining fees, and less skillfully camouflaged forms of corruption. Such revelations appeal to the imagination of the public and gain great publicity through the press; but fortunately extreme examples of this kind are less numerous than is popularly supposed. The great majority of lobbyists rely upon established friendships and their own arts of personal persuasion to obtain their ends.

The evils involved in the practice of lobbying, using the word in its narrower sense, have been clearly enough perceived for a long time; but they have been difficult to control. The legislatures of Georgia and Arizona are directed by their constitutions to legislate to suppress lobbying, and many other

legislatures have passed laws to the same end. To devise laws which shall curb the activities of the pernicious representatives of special and antisocial interests, and at the same time permit those who have an honest purpose in presenting their facts and ideas to their representatives, has taxed the ingenuity of lawmakers.

The form of legislation most commonly adopted requires that any person who for compensation attempts directly or indirectly to promote or oppose any bill during its consideration by the legislature shall register as a lobbyist in some office, usually that of the secretary of state, stating the name of his employer and specifying the legislation with which he is concerned. Within a specified time after the adjournment of the legislature the lobbyist must file a sworn statement of money received and disbursed by him in connection with his employment. New York, Massachusetts, Wisconsin, and Maryland, as well as others, have adopted variants of this general plan of control. Thus far such laws have proved difficult of application in the few localities where enforcement has been seriously attempted.

Committee action on bills

After the bill has been considered the committee may dispose of it in one of several ways. It may report, recommending that the bill pass; that it pass with amendments proposed by the committee; that a bill offered by the committee be substituted for the original, and that the substitute pass and the original be "indefinitely postponed"; or, finally, that the bill be indefinitely postponed. Instead of any of these dispositions, the bill may be pigeonholed as described above, or the bill may be reported back "without recommendation." Since it is not considered parliamentary courtesy to move that a bill be not passed, the more euphemistic phraseology, "indefinitely postponed," is usually substituted, though the ultimate result is the same. The minority of the committee may at any time present a minority report making recommendations at variance with those of the majority. This ordinarily happens only in case of bills of some importance; or it is sometimes resorted to when some political advantage is sought thereby.

The influence of the speaker over the fate of bills, through the power which he exercises in some states over their reference to a particular committee, has already been alluded to. This power, when coördinated with the freedom of committees to pigeonhole bills, offers the favorite means, without a direct negative vote, of disposing of proposals of legislation which are unacceptable to the majority. In some legislatures these tactics have become so noticeable that certain committees become popularly known as "graveyard" committees. They are selected with a view to the possible kinds of bills which it shall be their duty to put to sleep. An example of this existed in an Eastern industrial state some years ago when there were many labor bills coming before the legislature. Since the majority party was dominated by employers of labor, a committee to pigeonhole such bills was especially "handpicked" from among the members from exclusively rural districts. These members could perform their allotted function in this respect without resulting embarrassment to them at the next election.

Evaluation of committee system

One must conclude that the committee system is in most of the states seriously in need of overhauling. The weakness due to structural defects has already been pointed out. The undue number and size of committees, with the consequent overlapping of membership, create a situation which, if bills were distributed according to any rational principle, would be intolerable. The custom of concentrating the great mass of bills in the hands of a few committees lessens this evil but creates one perhaps even greater. Certain committees are thus so overloaded that they cannot give adequate attention to any save a few of the more important bills. An inevitable further result is that the individual member in either case ceases to feel the proper degree of personal responsibility for committee action. The overlapping, together with the inadequate physical accommodations, such as committee rooms, produces haphazard practice in holding committee meetings. The committee files are sometimes the pockets of the chairman, and committee action on

bills sometimes takes the form of a poll of the members by the chairman.

Another criticism which applies perhaps to some degree in almost every state is that although the real decision of the fate of a bill is determined in the committee room, what goes on there is secret, and the forces which there determine final action remain unknown to the public. The answer, which is not without some weight, is that some degree of privacy is necessary, since the free and informal interchange of opinion among members needed for a thorough discussion of a measure could not be had in the presence of spectators.

Not the least among the defects of the present system, but one for which the remedy is clearly indicated, is the tendency to delay the reporting of bills until the time remaining for discussion on the floor of the house is inadequate. This is in large measure due to political reasons. If the members have not yet taken definite action, there is always the possibility of shaping the action to be taken to new developments of political expediency. Then, too, to hold a bill in committee with its recommendation yet uncertain gives to the members of that group a leverage upon which to secure from friends of the pending bill favorable consideration for bills in which they themselves are interested. In other words, so long as a bill is in committee it may be made a basis for legislative trading. A rule such as that in Massachusetts requiring a report on every bill by a certain day would, if strictly enforced, offer a means of escape from this evil.

When a committee reports a bill and the report is taken up by the house, if there be a minority report, the question is first upon the substitution of the minority for the majority report. If the result be in the negative, or if there is no minority report, the question is: "Shall the report be accepted and the bill advanced to second reading?" If the vote is favorable the bill goes to the calendar. The calendar is merely a list or docket of bills awaiting action. Bills are entered on the calendar in the order

Calendar

in which they are reported, which is also supposed to be the order in which they are to be taken up for second reading.

5. Second reading

When in the regular order of business the house proceeds to consider bills upon second reading, according to the better practice, the first bill upon the calendar is called up for action. The bill is regularly read, perhaps only by title of sections, and if there is debate on the bill it takes place at this point. This procedure is varied in some states by reading by title only at this stage and reserving debate until the third reading. The bill may be read and considered either as a whole or section by section; and any member may speak upon it, amendments may be offered, and obstructive tactics may be resorted to by the opposition in an effort to defeat the measure. Motions may be offered to lay on the table, to postpone indefinitely, to amend by striking out the enacting clause, and by demanding a roll call at every opportunity. These are but a few of the dilatory parliamentary moves known to experienced members.

The report of a committee does not inevitably determine the fate of a bill; but a recommendation of indefinite postponement is usually as effective in killing it as is pigeonholing in committee. In the one case it may be passed in spite of the adverse report, and in the other it may be recalled by vote of the house from the hands of the committee; but in practice neither of these steps is often taken. Somewhat rarely a favorable minority report is accepted in place of an adverse majority report and the bill is advanced. In case the report of the committee is favorable, no corresponding presumption of passage is warranted. A favorable report may be said only to create a certain probability in its favor.

Committee of the whole

When considering bills upon second reading, especially revenue and appropriation bills, it is customary in some states for the house to resolve itself into a committee of the whole. By this device the more formal rules which govern the deliberation of the house are laid aside and debate becomes more general and informal. When sitting in committee of the whole no difference from the regular session is apparent to the spectator, except

that the regular presiding officer has been replaced by a "chairman of the committee," and that restraints on debate are somewhat relaxed. Votes taken in the committee are of the nature of recommendations and do not bind the house.

At the close of the discussion it is voted that the committee "rise and report." The presiding officer resumes the chair and the chairman of the committee of the whole makes formal report of its recommendations. The vote then is: "Shall the report of the committee of the whole be made the vote of the house?" or its equivalent. The adoption of this motion constitutes passage upon second reading and the bill then goes to be engrossed.

The procedure above described for bills upon second reading constitutes what may be called the normal procedure, but it is one that is frequently departed from, especially with respect to the order in which bills are considered. As the session progresses and committees report bills with increasing frequency, the calendars become longer and longer. Bills cannot be discussed and disposed of with sufficient rapidity to keep the calendars reasonably clear, and congestion results. If, under such circumstances, the rule of taking up bills in the order of their appearance on the calendar were strictly adhered to, it might happen that an inordinate portion of the legislative time would be consumed in the consideration of minor matters. Bills of importance, appropriations, administration matters, and measures of wide public interest might be reached only at a date too late to permit adequate or even any deliberation. As a means of insuring to these more pressing matters prompt attention, it is customary to provide in the rules that any bill may be made a "special order" for a certain time. The effect of such a vote is that when that certain time arrives, whatever matter is then before the house is laid aside and the one which has been favored as a special order is taken up and disposed of. The majority, unless it is exceptionally strong, may find itself prevented from employing this procedure since, under the rules of many legislative bodies, a special order may be secured only by an extraordinary majority. This embarrassment is relieved in a number of states,

Special orders

among which New York is notable, through reliance upon the rules committee to put through the majority program.

Influence of the committee on rules

The committee on rules is a procedural rather than a substantive committee. It deals not with the subject matter of bills but with procedure. Its normal duty at the beginning of the session is to recommend a body of rules, and at any time subsequently to offer amendments to these rules. It is, in the states referred to, a small committee composed of the majority leaders, including the speaker and the floor leader. It is a privileged committee with power to sit at will, to report at any moment, and to demand for its report immediate consideration. When the leaders desire to advance their program over other bills the rules committee, taking advantage of its composition and its privileges, brings in a special "rule." The rule may make the desired bill a special order for a certain time, limit time for debate, or fix the time for a final vote on the bill, and the committee may demand an immediate vote upon the rule thus proposed. Since a proposal to change the rules requires merely a majority vote, the leaders are enabled to attain their end when the necessary two-thirds cannot be secured for a "special order." By this means the minority is ridden over roughshod and the rank and file of the majority party secure only such consideration as their subservience to the leaders may secure for them. Those not in the favor of the inner group are compelled to sit by and see their own bills sidetracked like slow freights, while measures favored by the members of the rules committee go whizzing by one after another like express trains, to a destination which their own may never be permitted to reach. Thus a device born of necessity due to the lack of formal responsibility for a legislative program may become the instrument of a legislative oligarchy. It is obvious that such a situation could develop only where, as in New York, party lines are closely drawn and the majority thoroughly organized.

6. Engrossment

It is probable that during the discussion of a bill amendments will be adopted which either add or strike out some word or words. It may happen that many such changes are made to a

single bill. The next step, then, after the bill has passed second reading, is to send it to the engrossing room where it is engrossed. Engrossing of the bill consists in redrafting it to incorporate the changes effected by amendment during debate. If it is an important one and the changes extensive, the bill is reprinted. In reprinting, it is customary to include both the matter in the original draft and that inserted by amendment, indicating each in the reprint by the use of different type or some other obvious device. Thus one is enabled to see at a glance just what changes have been made. In some legislatures there is provided a committee on engrossed bills on whom rests the responsibility of making sure that the changes ordered and no others are included, either by accident or intention, in the new draft.

7. Third reading and final vote

After being engrossed, bills are placed on the calendar for third reading. When taken up for third reading they are again considered in the order of their appearance unless favored by being made special orders. If debate and an opportunity for amendment has been afforded on second reading, debate on third reading is confined to the merits of the bill as a whole, and amendment can be made only by unanimous consent. Such consent is likely to be given only for the purpose of correcting some obvious clerical error which effects no change in the substance of the bill. If, however, some serious defect or some new phase of the subject be injected into the discussion, the bill may be sent back to the second reading stage for further consideration, though this seldom occurs. To accept amendments to a bill in debate on third reading is a dangerous practice. No further opportunity is allowed for mature consideration, and hence this is a favorite occasion for efforts to be made to tamper with a bill by securing the introduction of "jokers." Jokers are words or even phrases effecting changes which are seemingly simple and innocent upon their face, but which in reality materially modify the substance of the measure.

After the debate on third reading is closed, the question is upon the final passage of the bill. This is usually, and in some

states always, by constitutional mandates, by taking the yeas and nays, which are entered on the journal as a permanent record of the action of each member.

8. Repetition of procedure in second house

Having passed one house, the bill, with the action of the first house endorsed thereon, is then formally communicated to the other, where the procedure followed is practically a repetition of that in the first house. Where the joint-committee system is in vogue, reference to committee is not necessary in the second house except under unusual circumstances.

9. Conference committee

If amendments to the bill are adopted in the second house, it must be returned to the first house for concurrence in the amendments. If concurrence is refused, the only recourse to save the bill from failure is to send it to a conference committee. The conference committee consists of a small group appointed from the two houses to consider the points on which these bodies have failed to agree, and to work out and suggest a compromise. This may include any changes which the committee may see fit to suggest, even to the inclusion of matter which did not appear in the bill as passed in either house. This conference stage of the bill is fraught with possibilities. The conference committee is selected by the majority leaders in both houses, who are thus in a position to dictate the compromises offered by the committee. This opportunity has been taken advantage of occasionally to insert provisions for which their sponsors could not hope to secure a favorable vote under any other circumstances. Conference is usually resorted to only at the end of the session, and only bills of considerable interest to the majority or to the public are thus dealt with. When the conference committee reports, its report must be accepted or the bill must fail. Under these circumstances the report is usually adopted and in the closing hours of the session the bill is passed without close scrutiny.

10. Enrollment, signature, and presentation to the governor

After the bill has been passed in identical form by both houses, it is sent to be enrolled. Enrollment consists of making a new copy of the bill as passed, ordinarily with a somewhat more formal appearance than is true either of the original or

the engrossed copy. Appropriate places are provided for the signatures of the presiding officer in each house and of the governor. The affixing of the signatures of the presiding officers has the effect of a certification that the bill as enrolled has passed the two houses.

Occasionally an attempt is made by a litigant in some case to secure the setting aside of a statute on the ground that the steps in its passage were irregular. In deciding this question, the rulings of courts have not been uniform. In some states it has been held that the signatures of the presiding officers attached to an act are conclusive evidence that it was duly passed in the form appearing in the enrolled copy. The court thus refuses to take cognizance of the alleged irregularities in the process. In other states the courts will go behind the official signatures and take cognizance of any irregularity if it can be discovered from an examination of the journal of the house or of the bill itself.

11. Action by the governor

Upon its signature by the presiding officers of the two houses or by some other certifying authority, the bill, which has now become an "act," is sent to the governor. When the bill is presented to him the governor may do any one of three things. He may approve and sign it, disapprove or veto it, or he may leave it untouched. In thirty-eight states the governor may veto any item or items of an appropriation bill without vetoing the entire bill, and in one state items of any bill may be likewise vetoed. In North Carolina the governor does not have the veto power over acts.

The governor has granted to him a certain definite number of days varying from three to thirty in which to consider a bill. If he approves the bill and signs it within the prescribed number of days it thereupon becomes law, under conditions to be described in a later paragraph. If he does not approve the bill he may veto it, and in that case he must return it with a message stating his objections to the house in which it orginated. The requirement that he approve or disapprove as a whole a long bill containing a number of items sometimes places the governor in an awkward position. In order to secure some de-

sirable legislation, he finds himself obliged to approve some portion of the bill which he believes highly undesirable. On the other hand, to prevent the enactment of some undesirable section he finds himself obliged to veto an act which he thinks on the whole to be highly desirable.

The governor may, on the other hand, take no action at all. If at the expiration of the time in which the governor may approve or disapprove bills, he has not done so, the measure automatically becomes law as if he had approved it. If, however, the legislature has adjourned within this period, some of these conditions are modified. The governor still has the same number of days for consideration and in some cases is given additional days—thirty days after adjournment in New York, for example, and forty-five days in New Jersey. The extension of time is designed to allow for the legislative habit of withholding final action on bills until the last day of the session and then passing a great number. The result of this practice where it is still permitted is to overwhelm the governor with bills demanding his consideration within a brief time. In one state at least, Indiana, the governor may refuse to receive bills which are presented to him within a certain number of days of the end of the session. This acts as an absolute veto, since the bills thus refused cannot be reconsidered by the legislature. Generally, if a bill is vetoed after adjournment it is likewise lost; but in a few states such bills are retained by the secretary of state and presented to the legislature at its next session for reconsideration, or the legislature may be required to reconvene to dispose of vetoed bills.

Vetoed bills

When an act has been vetoed by the governor, it is returned by him to the house in which it originated, accompanied by a message in which he states his reasons for declining to approve the measure. When the act is thus returned to the legislature, it may be allowed to remain without further action or it may be called up for reconsideration. If the forces advocating the bill are earnest in their purpose to secure its passage and believe that it can command a sufficient vote in both houses, it is called up and a

vote taken. The vote required to pass an act over the governor's veto is sometimes a bare majority, but in most cases a two-thirds majority in each house is necessary. If the governor stands well with the legislature and the public, the presumption against the measure raised by the executive veto is so great that no attempt is made to repass the act. But if, on the other hand, there is an overwhelming sentiment in its favor in the legislature and the members feel that no strong public opinion is behind the governor's attitude, the act is likely to be taken up and passed in spite of the veto.

Taking effect and publication of acts

Great variety exists as to the time an act takes effect after it has been signed by the governor or otherwise becomes law. Three different rules are observed in connection with this matter. In a number of states it is provided that acts shall take effect when published or when promulgated, or both. Publication is accomplished by printing either in an official newspaper or in pamphlet or book form. Whether or not first printed in some temporary form as in a newspaper or pamphlet, they are always ultimately issued in book form. The volume is entitled *Laws* or *Acts* of the particular year, and this volume is usually spoken of as the "Session Laws." Sometimes after the printing of the acts there is made necessary by the constitution a formal proclamation by the governor declaring that the laws are in force. This entire process is called promulgation of the acts.

In other states, the laws take effect either upon a fixed date or at the end of a certain number of days after passage, or after adjournment. Whether acts ordinarily take effect upon publication or upon a fixed day, it is sometimes desirable, if not absolutely necessary, that "emergency measures" shall take effect immediately upon passage. An emergency measure is in some cases defined as one "necessary for the preservation of the public peace, health, or safety." Various safeguards have been set up to prevent abuse of the emergency privilege. In all cases, a statement of the existence of emergency must appear in the act, and sometimes an extraordinary majority, ordinarily two-thirds, is required to effect this purpose. Since the legislature itself is the

sole judge of the existence of the emergency, a mere statement in the act that an emergency exists is sufficient to give it immediate effect. In some states the emergency clause is used so freely that a majority of all the acts at any session are made effective at once.

From time to time all of the acts of a state legislature, which have not expired by limitations stated in the acts themselves, or have not been repealed, are brought together and arranged by topic in a single collection sometimes filling several volumes. When this work is done by the state, reënacted as a whole by the legislature, and given the force of law, the collection is properly called the "revised statutes." In a considerable number of cases, the work is merely a compilation of existing law arranged topically without being reënacted by the legislature. In such cases it is usually, but not always, a commercial venture undertaken by private parties, and is properly spoken of as "compiled statutes." A "code" is a complete systematic statement of the whole body of both the statutes and common law, authorized by the legislature and enacted by them into law.

Quality of legislative members

It is not an uncommon thing to hear the assertion that our legislatures constitute the epitome of mediocrity or worse, and that they are lacking in experience, independence, character, and intelligence. That the American voters should year after year in any large proportion of the states continue to select as their representatives persons who justify such sweeping condemnation seems scarcely possible. If these charges are true to anything like the degree suggested, they constitute an indictment of the voters quite as much as of the legislators, and a sad commentary upon popular government. It may be appropriate, then, to inquire into the characteristics of our legislative personnel with special reference to some of the qualities above mentioned.

A criticism frequently uttered, and with reason, is that legislators are inefficient. Efficiency, the capacity to produce desired results promptly and with a minimum waste of energy, is a matter of both personnel and method. In evaluating our legislatures and their work, both factors must be taken into account.

Considered in its personnel aspects, the efficiency to be desired in a legislator is quite different from that required of the administrative officer. In the latter case, it is the result of professional training and experience in the technique of his subject. It was this difference between legislative and administrative efficiency which Governor Hodges of Kansas failed to appreciate when he proposed a small legislature composed of members who should devote their whole time to the work with a view to attaining proficiency in the art of legislation. Such a body might gain an intimate knowledge of the public business and a high degree of skill in the technique of legislative expression, but it would scarcely serve as a reasonably accurate reflection of the views and wishes of the electorate.

The efficiency demanded of the legislator is of quite a different kind. The technique of gathering information upon matters of legislative concern and of expressing legislative purpose in proper statutory form, is not essential to a good legislator. This can be, and in many states is, supplied by legislative bureaus. The efficiency which is demanded of a legislator beyond the cardinal essentials of mental capacity and personal character, consist in a proper social outlook, sound judgment, and breadth of mental horizon. A flexibility of mind is here called for which enables him to accommodate his own views to reasonable compromises in non-essentials while holding fast to the fundamentals of a wise and beneficent public policy.

As bearing upon their personal qualifications for performing their legislative task, it is interesting as well as pertinent to inquire into the walks of life from which legislators are drawn. Investigation reveals great diversity of occupation among the members of our legislative bodies.

Vocations of legislators

As a rule lawyers are the largest single occupation group, although in the agricultural states farmers sometimes predominate. The extremes in this respect in the period, 1931–1937, were North Dakota, with 65.8 percent farmer members and 7 percent lawyers and New Jersey with 49.7 percent lawyers and only 1.9 percent farmers. In Indiana in 1945, the farmers numbered

thirty-one, or nearly one-third of the lower house, whereas lawyers and those listed as skilled or unskilled workers numbered sixteen each. California in 1941 had forty-two lawyers and twenty-two farmers in a total legislative membership of 118. The smaller groups represented in the average state include most frequently merchants, professional men other than lawyers, real estate dealers, insurance agents, manufacturers, contractors, and publishers. To these are added an increasing number of representatives of organized labor. Occasionally a legislator admits his membership in the leisure class under the designation "retired." In a Middle Western state one legislator recently confessed unusual versatility when subscribing himself as "lumberman and undertaker."

One of the factors which goes far in determining the efficiency of the individual member of a legislature is his length of service. One of the products of the efforts made to realize political democracy in the earlier years of the nineteenth century was the doctrine of rotation in office. According to this theory, since all men are politically equal, it follows that every citizen is competent to perform any function of government, and is entitled to be given an opportunity to do so. A result of the application of this doctrine has been what, in the language of the industrial world, would be called a heavy legislative "turnover."

Length of service of members

It is true, of course, that a first necessity is that the views of the member on questions of public policy be in substantial accord with those of a majority of his constituents. When this is no longer true, the member should retire and give place to one who is in such accord. But within these limits, permanency of legislative tenure is a matter of importance, not only to the member, but to the constituency which he represents.

It is true that long continuous service does not weigh so heavily in state legislatures as in Congress, because legislative organization and procedure in the state body are less complicated, and seniority in rank does not count to the same degree as in Washington. Nevertheless it is conspicuously true that the mem-

bers who assume positions of leadership and exercise the greatest influence in the legislature are those who have seen long service.

It must be borne in mind that a process as complicated as that of legislation can be mastered only after long experience. To a familiarity with the intricacies of parliamentary procedure and the traditions of the body, the successful member must add a wide acquaintance with his fellow members. If he is personally acceptable and reasonably diligent, he acquires an acquaintance and a standing which win for him desirable committee assignments and influence both in the committee room and upon the floor. It is in this way that opportunity is gained to be of the greatest service to his constituents and to the state. Too often the constituencies fail to realize the advantages of retaining in the legislature representatives who have given satisfactory service. Local political leaders, and especially those who hope ultimately in their turn to inherit legislative seats, carefully refrain from bringing this bit of political wisdom to the attention of the voters.

Investigations of the tenure of legislative members have been made in several states. In Michigan a study showed that of the 3000 persons who were members of the house of representatives between 1835 and 1921, about 50 percent sat in more than one session, but only 15 percent sat in more than two sessions. A similar study of the Indiana legislature covering membership of six sessions, 1925–1935 inclusive, revealed that of the 314 different persons who served in the lower house the range of sessions of service was from one to ten sessions; 59.6 percent served one session only, 40 percent served two sessions, 6 percent served as many as four sessions, and 1.6 percent served six sessions or more. In the 1949 session 61 percent of the members of the house had had no previous legislative experience. In the senate the record was slightly better. Of 102 members 57.8 percent served but a single term and 11.8 percent served as many as three terms. A study in 1937 of the legislative experience of legislators in all states showed that in state senates the range was from 100 percent with previous experience in Maryland to 35

percent in Georgia and a national average of 70. In the lower houses the range was from 93 percent in Maryland to 14 in Delaware; the national average was 50 percent.

It is sometimes assumed that a major cause of the short period of service of members is due to frequent party turnovers. The Indiana study, however, shows that of the members who retired during the period investigated, only from one-fifth to one-fourth did so because of party defeat. It appears that the chief causes of the presence of inexperienced members is the popular ignorance of the importance of continuity of membership, coupled with the still more popular notion that there is merit in the principle of rotation in office, or perhaps that one term is all the member wants or can afford in view of the low salaries paid.

Independence of members

The charges sometimes uttered, that the members of our legislature display a decided lack of independence of action, are perhaps in general true, in spite of the fact that, except in a few states and notably in New York, the number of roll calls upon which the members align themselves by party is surprisingly small. So far as there is lack of real independence of action, it may to a great extent be attributable to the fact that with respect to most matters upon which he is asked to express a conclusion, the legislator has no previous knowledge upon which to base judgment. In such cases, caution may constitute a badge of merit. But quite aside from this reason, two facts tend to curb any inclination to display independence of judgment, which gains for the ordinary rank and file of members disapprobation from the men who have power to dispense legislative favors. The new member soon learns that the surest way to forward the measures which his constituents are demanding is to display a proper consideration for the suggestions of the leaders. It may be added that the slight honor attaching to the position and the sacrifice of both time and money involved in securing the nomination, as well as the general failure of constituencies to reward conspicuous services by spontaneous reëlection, have deterred

men who might prove most valuable to their constituencies and to the state from seeking or even accepting nomination.

Delegate or representative?

A second factor bearing upon the independence of the individual member grows out of the relation which he bears to his constituency. Two widely divergent views have been held as to the proper relation which should exist between them. One view, and that held by political scientists and the ablest statesmen, is that the apportionment of representatives by districts is primarily for convenience in election and only secondarily to secure representation of local interests. This view is that, once selected, the member becomes one of the group of representatives of the whole state clothed with full liberty to act and vote, as his conscience and his judgment may dictate, for the common good. According to this view, he is bound by no instructions from his district, and if it should happen that the known desires of his constituents were that he vote "yes" upon a question when his matured judgment tells him to vote "no," his duty is to vote "no."

The opposite view, and that commonly held by the mass of voters, is that the member is a delegate whose duty is solely to act as the representative of the interests of the constituency subject to their instructions, and who is in duty bound to vote as the constituency dictates. This he must do without regard to his own information or convictions to the contrary. If this view is correct, it would appear that the committee deliberations and the debates upon the floor which go further than to confine themselves to mere details are unnecessary and presumptuous. Members acting upon this theory have been heard to say upon the conclusion of a debate: "I believe that this bill should not pass, but since my constituents desire it, I shall vote for it."

The better view of the true function of a representative in any legislative body has perhaps never been stated more clearly than by Edmund Burke in his address to the electors of Bristol, in 1780. He said: "The Parliament is not a congress of ambassadors from different and hostile interests, which interests each

must maintain as an agent and advocate against other agents and advocates. But Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole. You choose a member, indeed, but when you have chosen him, he is not a member of Bristol, but he is a member of Parliament."

That there have been grave and ample reasons for the widespread decline in legislative prestige there can be no doubt; that scandals have arisen again and again involving the integrity of legislators is unfortunately true; and that innumerable acts unwise in conception, faulty in phraseology, and positively mischievous in effect have been passed, these can be demonstrated by reference to the printed session laws of almost any state.

Nevertheless, it may safely be asserted, on the whole, that state legislatures constitute typical cross-sections of the great middle ranges of American society. Seldom are the lowest or the highest levels of intellect, culture, or substance reached by the occupants of legislative seats; but it appears that the average of legislative merit with respect to all the essential qualities is above that of the community at large.

When the conditions under which it is produced are considered, one is led to wonder that the legislative product has been as good as it has. It must be borne in mind that the members are ordinary citizens, drawn from all walks of life, usually having had little previous experience in matters of government beyond the boundaries of their own country. These men are brought together among unfamiliar surroundings and confronted with the task of considering a great variety of problems with which they have little or no familiarity. They are asked to work under procedure which is both strange and complicated, often without effective leadership, and to accomplish their task within a space of time so short that even the experienced members can find time to give serious thought to no more than a fraction of the measures presented. Under such conditions, they are asked to enact from three hundred to a thousand stat-

utes, which shall stand the tests of practical application and the technical scrutiny of the courts. That the results of their labors have sometimes failed to stand such tests of wisdom, of practicality, or of technical correctness, is truly not surprising.

For references see list at the end of Chapter 8.

CHAPTER 11

THE GOVERNOR

Office of governor

The chief executive in state government is the governor. In the scale of political prestige, the governor is sometimes outranked by United States Senators from the state, but most governors are better known to the citizens of their state than any other officer except the President of the United States.

Toward the governor, the public feels as it feels toward executives in general. They expect him to be the head of his political party; they impose on him innumerable duties as the ceremonial head of the state. By law, he is becoming increasingly the head of the state administrative system. The legal basis on which his administrative headship rests will be described later in this chapter. At this point, however, we will observe his political and ceremonial leadership.

Leadership

1. Political

As head of the political party which endorsed him for the office and carried on a campaign for his election, the governor has an important and sometimes difficult political position, not only in the state and in the localities of the state but in the national political arena as well. If he is the leader of the party, he must be careful to hold his party together. If he is the head of a large faction in his party, he is expected either to conciliate the opposition faction or factions, or to reduce their influence to the point where they are unable to interfere with his program as governor. He is often consulted by local politicians and must heed their advice and warnings if he can possibly do so. He is often important in the system of national distribution of patronage, and his ambitions may lie in the direction of national office after he leaves his governorship so that he must be considered

by national party officials and by the President himself in political decisions made by the latter as head of the national party.

The close relationship between politics and administration is more easily perceived by the general observer, but the manner in which it works out in the daily routine often escapes notice. Appointments are often thought of as an illustration of this relationship, and of course they are, because the governor is often forced to appoint a person who is not of his personal choice.

In the formulation of policies the governor must also take account of his headship of his party, and in his legislative program, he is almost always faced with numerous problems of enlisting support for measures endorsed by him. He may find it necessary to promise patronage to one man, to use his influence to get some public improvement for a particular locality to obtain the support of a legislator, and to remove a minor officer to make way for another if the vote is crucial and a legislator refuses support except on this condition. Even the more formal phases of the duties of the governor as chief of state in a representative capacity at conferences of governors, or meetings with national officers, may have mingled with them a light touch of the political. These three types of functions are reasonably distinct, but the political character of the chief executive's position tends to mingle with the social or ceremonial phases of his work so as to blur the distinction in many instances.

2. Social

It is not possible to separate completely the functions performed by a governor as head of his political party in the state from his other functions, and this is most clearly illustrated in connection with the ceremonial duties that are imposed on the governor. The governor as head of the state is often called on to represent the state formally. This aspect will be discussed more fully later. But in addition to appearing as head of the state in a formal or legal sense, the governor performs many functions that are social in nature. On his desk, as he comes into his office for the day's work, the governor may find an invitation to attend a conference of regional party leaders, another

to speak at the Piqueville County Fair, still another to give an address before the state bankers' association, and three notes begging him to come to three different banquets, all of which are to be given by benevolent organizations, and all of which meet at the same hour on the same evening. This is in no sense an exaggeration; the actual situation is sometimes infinitely more complicated. For instance, the most important director of the county fair board may be an important political figure in his section of the state and it may be a tradition of long standing that the governor appear as a speaker at that particular fair. To complicate matters, he may have promised weeks before this to attend the regional political meeting and may be forced to take a plane to make the appointment that he had made to dedicate the new home for veterans in another city, the latter being at two o'clock in the afternoon. What at first glance seems to be merely a social nicety turns out to be a difficult political problem.

Historical origins

The American public did not, however, always hold its governors in such high esteem. The office has undergone several changes during its long history in the colonies and in the states. Historically, the state governor is the lineal descendant of the colonial governor. It was, however, not the governors of the eleven so-called "royal" and "proprietary" colonies, but rather those of the two "charter" colonies of Rhode Island and Connecticut, that served as the prototypes of the state governor. In these colonies, the governor was a citizen of the colony, chosen by the colony itself, and directly responsible to it. He served for a short term and was without power of appointment or removal. He could neither adjourn nor dissolve the colonial assembly, nor could he veto the acts of that body. At every point his powers were closely circumscribed. The model furnished by these governors was faithfully followed by the framers of the state constitutions.

The governor of the royal and the proprietary colonies was a figure of quite a different sort. He was appointed by an outside authority, king or proprietor, and usually had little knowledge

of, or sympathy with, colonial problems. He was vested with power to appoint and to remove all colonial officers. He could summon the legislature and adjourn or dissolve it, and had an absolute veto over its acts.

Though the governor created by the states was endowed with no such extensive powers, the recollection of these royal governors and their attitude toward the colonies was fresh and uppermost in the minds of the people. The effect was to inspire in them an intense suspicion of the office and a keen hostility to executive authority in general. These sentiments expressed themselves very clearly in the narrow range of authority given to the state governors. It is a survival of the same sentiments which explains the failure in more recent times to give to the governor that place at the head of the administrative system of the state which is accorded to the chief executive in the federal government and in most foreign countries.

Early characteristics

Under the early constitutions the governor was elected by one of two methods. In New England, where the habits of direct democracy were most firmly fixed, and in New York, which was influenced by New England traditions, the method of direct popular election was employed. In New Jersey and Pennsylvania, and in all the states to the south of these, election was by the legislature.

The usual length of term was one year, though in a few states it was two years. In New York the term was fixed at three years.

The powers of the colonial governors, as they had existed in most of the colonies, were diminished in the states in at least three important particulars. First, in the beginning the governor in a few instances retained some shreds of the power of appointment. In place of this, however, was soon substituted election, either by the people or by the legislature. Second, the power to prorogue and dissolve the legislature disappeared, and in almost every case the power to veto was also lost. Third, in the colonies the governor in many instances had added to his other functions that of head of the highest court. This judicial function was

taken away from him in practically every case. Further than these, in a number of states, the remnants of power which he was allowed to retain were exercised only with the consent of an executive council. Within a short time the election of the governor directly by the voters became the rule. The term of office, too, was in course of time increased in most states to two years and ultimately to four years in many.

The nineteenth century witnessed a gradual but steady increase in the power vested in the governor. This movement kept even pace with the waning prestige of the legislature. In the first place, the veto power was generally, though not in all cases, restored. After the Civil War, there was a rapid growth in the number of state functions, and this in turn called for the selection of many new administrative officers. Under the influence of the democratic sentiment then prevailing, the first impulse was to select these at the ballot box. It soon appeared, even to the most confirmed democrat, that this was impracticable, and the choice of administrative officers was then reposed in the governor. Thus, before the close of the nineteenth century, the power of appointment had become very extensive. Gradually, though more sparingly and reluctantly than in the case of appointment, he was given the power to remove those whom he had appointed. Thus, through the powers of appointment and removal, the governor came also to gain a considerable degree of control over the state administrative system.

Qualifications

Turning now from the successive steps by which the position of the governor has been strengthened, we may inquire into the structure of the office as it exists today. In the earlier years not every voter might become a candidate for the office of governor. A property qualification somewhat higher than that required for voting was the general rule. When property qualifications for the suffrage were abolished, requirements of like character for holding this office, as well as all other offices, were generally done away with. At the present time, it is stipulated that, besides being a citizen of the United States, he must have attained a certain age, commonly fixed at thirty years, and

have been a citizen of the state for a specified time. Such age and residence requirements are of little real importance since it would be unusual that a person not having these qualifications would be seriously considered for the office. For instance, in 1941 three-fourths of the governors were between the ages of forty-four and fifty-six years. Although all of the governors in that year were residents of the states in which they served as governor, seventeen of them had been born outside the state.

Nomination

Until recent years the governor, along with the other elective state officers, was nominated in the state convention of his party. At the present time, the direct primary has been substituted for the convention in a considerable majority of the states. In New York the direct primary was made use of for a number of years for the nomination of governor, but more recently there has been a return to the convention system. The use of the direct primary for the nomination of candidates for local offices appears to be firmly established, but there has been widespread agitation for its discontinuance in the case of the governor and other state officers. New York and Indiana have taken this step with respect to the governor. A result of the introduction of the primary has been to multiply candidates, but the quality of the candidates nominated has not seemed to have improved materially. Indeed, it has been urged that in the case of the governor and of the other general officers the expenditure, both of money and time, incident to nomination in a state-wide primary is so great as to deter many desirable men from entering the race. It is probably true that the introduction of the primary has made control by the party organization less secure. If this be held desirable by some persons, others may urge in reply that party responsibility is likewise weakened thereby.

Election

The election of the governor is by popular vote in all states except Mississippi, where a rather intricate combination of popular and electoral votes is employed. A plurality vote is sufficient to elect except in Georgia, Maine, Mississippi, and Vermont, where a majority is required. In cases where the requirement of a majority to elect sometimes results in no choice by the people,

the election is thrown into the legislature. To avoid the delays and uncertainties incident to election, when a majority is required, the tendency everywhere is toward deciding all elections by plurality vote. The date of the election of governor and other state officers is usually fixed in November of the even-numbered years to correspond with the election of the members of Congress and of the members of the legislature. In New Jersey, Kentucky, Louisiana, Maryland, Mississippi, and Virginia the election is held in the odd-numbered years.

Term

Under the earlier constitutions, as has been suggested above, state officers were for the most part chosen annually, although it was customary to reëlect them for a second or even a greater number of terms. Before the middle of the nineteenth century, there was a distinct tendency toward a longer term for the governor. Two influences seem to have been at work to bring about this extension of official terms. In the first place, the growth of population and business made the cost and inconvenience of annual elections an increasing burden on the community. In the second place, the practice of rotation in office, when applied annually, resulted in too great instability. The result of these and perhaps other considerations has been that the governor's term has been extended, and today is two years in twenty-one states and four years in twenty-seven.

The two-year term is somewhat more prevalent in the Northeastern and Northern states, while the four-year term is more common in the Southern and Western states. However, Pennsylvania, Indiana, and Illinois have a term of four years, whereas in South Carolina, Georgia, Arizona, and New Mexico, as well as in others in the same regions, the term is two years. Fear that the governor might use his power to secure his own renomination and election has led Pennsylvania and Indiana to stipulate in the constitution that that officer may not immediately succeed himself. Equal weight seems not to have been given to the opposing argument that by denying him reëlection there has been taken from him the strong incentive to good service afforded by the possibility of reward through a second term.

Where not thus forbidden, it is not uncommon for a governor to be reëlected for a second term, while a third term, though by no means unknown, has been much less frequent. In one of the Eastern states, a governor has been elected in recent years for as many as seven terms within a period of twenty years.

The governor's office has in a few notable instances, including in recent times the cases of the two Roosevelts, Wilson, and Coolidge, served as a stepping stone to the Presidency. On more frequent occasions, governors have found the United States Senate the next step upward on the political ladder. The prevalence of this particular aspiration among governors is recognized in Utah, where the constitution specifically prohibits the election of the governor to the Senate.

Compensation

The prevailing suspicion of executive authority led in the earlier days to the fixing of the salary of the governor in some constitutions. In more recent times, the wiser course has been pursued of leaving the matter of salaries to be determined entirely by the legislature. Following the trend in other public offices as well as in private employment, the governor's salary has been gradually increased. Since the office of governor has always been regarded as the highest honor within the gift of the people with the exception, perhaps, of the office of Senator at Washington, the salary paid has been looked upon as an honorarium rather than as compensation commensurate with services performed. The dignity, social prestige, and political influence which the office carries have been such that candidates have not been lacking despite the moderate salary.

Until recently the salary of the governor was in some of the older states very low. At the present time, about one-fourth receive $10,000; twenty receive between $4,500 and $10,000, and the remainder range upward to a maximum of $25,000 paid in New York and California. Sometimes an executive mansion is provided and maintained by the state, and in some instances an allowance is made for defraying other expenses of a semi-public nature. To maintain the independence of the chief executive from pressure by the legislature, it is not uncommon to find

provision made that the salary of the governor shall not be diminished during his term of office.

Removal by: 1. Impeachment

The governor may be removed from office either by impeachment or recall. In cases of impeachment, charges are preferred by the lower house of the legislature and tried by the senate. Since conviction of the governor would result in the elevation of the lieutenant governor to the office in question, that officer does not preside over the senate in the trial of the governor. It is frequently prescribed that upon such occasions, the chief justice of the highest state court shall preside.

Thus far in our history only ten governors have been impeached. Five of these cases may be considered as somewhat abnormal, since they grew out of the troubles of the Reconstruction days in the South. The more recent cases are those of Sulzer of New York in 1913, Ferguson of Texas in 1917, and Walton of Oklahoma in 1923. In a few instances, governors have anticipated trial upon impeachment by resignation while under fire. As a means of removing a governor, impeachment is an even less effective instrument than when applied to other offices.

In most states, a special session of the legislature can be called only by the governor. It, therefore, is virtually a fact that impeachment of a governor can take place only within the limited period of a regular legislative session, which is held in most states once in two years. Furthermore, in the case of a governor, holding office for two years, the only regular legislative session during his term of office occurs immediately upon his induction into office and has adjourned before he has much opportunity to display his unfitness. In the case of the four-year governor, the second session occurs at the middle of his term and, therefore, in most states impeachment holds no terrors for him during his last two years in office.

2. Recall

In eleven states the governor, like other executive officers, may be removed by recall. Thus far, only one governor, Frazier of North Dakota, has been removed by this method. This furnishes a means of removal for reasons which might not be grounds for impeachment. Such might be cases of gross misuse of official

discretion where no specific violation of ministerial duty could be alleged. Recall may be employed, too, as an alternative in cases of impeachable offenses. With the drift to longer terms of office, there came a demand for a method whereby the citizens themselves might secure relief from an undesirable officer. The recall is the solution which has been adopted.

Succession

Succession to the office of governor is in most instances vested in the lieutenant governor. In the states where there is no lieutenant governor, the president of the senate or the speaker of the house of representatives succeeds to the vacant office. The valid objection may be offered to this arrangement that neither the president pro tem nor the speaker is a proper successor to the office. Either of these persons may at any time happen to be of the opposite political party from the person whom they are to succeed. Thus the expressed will of the voters as between parties would be defeated. Furthermore, neither of these officers is the choice of the people of the whole state, but of a district only. When the governor is the real head of the administration, as is the case in the states having a unified administration, the problem of succession takes on new importance. Under such conditions, the question might be raised as to whether the succession ought not to pass to the head of some designated administrative department. Thus it would be assured that the policies inaugurated by the administration would be carried forward, although the heads of state departments, being elective, occasionally come from the opposite political party.

Powers of Governor

Powers

Under our federal system of government, the states are bodies of general powers. Consequently their governments may legally exercise all authority which has not been denied to them. This general and residual power possessed by the states is, however, vested in the legislature, except as otherwise provided for in the state constitutions. As a result of this, the governor possesses only those powers which have been specifically conferred upon him. Even these enumerated powers are construed narrowly by

General character

the courts; i.e., in case of doubt whether or not a certain power rests in the governor, the presumption is that it does not. There occurs in most constitutions the statement that "the executive power" or "the supreme executive power" shall be vested in the governor. To this is added the statement that it shall be his duty "to see that the laws are faithfully executed." It has been decided by the courts, with some exceptions which will be commented on below, that neither of these provisions is to be construed to confer upon the governor any specific power in itself. The words are said to be employed merely as descriptive of the general nature of the governor's powers, or as, at most, imposing a general duty of supervision.

Powers or functions, classification:

The governor's powers or functions may be classified in various ways, especially either according to their source or according to their character. In the first place, according to the source from which derived, the governor's powers may be legal or extra-legal.

1. According to source

The legal powers are those which are imposed expressly or impliedly by the constitution and statutes of the state. As has been indicated in the opening paragraphs of this chapter, the extra-legal powers are those derived from his position in the partisan political system, and from his personal political influence. It might, then, be more appropriate to speak of this extra-legal force in terms of "influence" rather than of "power."

Much of his political influence, however, comes as a result of his legal powers. If he has authority to fill a large number of positions by appointment, his influence with those who desire positions for themselves or their friends will be great. If he has power to recommend measures and appropriations to the legislature for enactment and to veto acts when passed, his influence with those desiring legislation or appropriations will be profound. Furthermore, there exists that clear and growing tendency on the part of the public, already referred to in connection with the legislature, to look to the governor for leadership in the formulation of state policies, and in securing their realization

when enacted into law. Acting in this role of popular leader, the governor has, by the creation or crystallization of a public opinion, been able to exert an authority which reaches far beyond the powers conferred upon him by law. Since these powers or influences are nowhere formally set down, they are elusive. They vary with the personality of the individual, are difficult to evaluate, and defy complete enumeration. But any person who has observed closely the practical working of state government will concede that they may constitute a very real force, and in the hands of a strong personality may assume large proportions.

2. According to character

In the second place, according to their character, the governor's powers or functions may be classified as executive and legislative.

His executive functions are those which he exercises as head of the state, as the representative of it as a whole in its corporate capacity, as well as in the administrative supervision of the execution of policies formulated and enacted by the legislative branch of government.

His legislative functions are those which he performs when participating in the determination and formulation of the policies of the state.

It should be clearly perceived that the line of division is not the same under the two methods of classification herein suggested. Some legal powers are executive and others are legislative. For example, the legal power to appoint is executive in character, whereas the power to veto is legislative. In the same way, some extra-legal powers are executive, whereas others are legislative. For example, the extra-legal influence which the governor exerts to secure the coöperation of administrative officers over whom the law gives him no power of direction is executive, while the influence exerted to secure from a legislator consideration for his proposals is of a legislative character. In this connection it should be noted, too, that he often makes use of his unenumerated and undefined extra-legal influence to support

and reinforce his legal power. Thus it comes about that the actual influence which the governor exerts in the state is due to a constant mingling of legal and extra-legal forces.

Executive functions subdivided

The functions which the governor performs as chief executive may be subdivided. There may be distinguished those which he exercises as head of the state and those which he exercises as supervisor of the administrative work of the state.

1. As head of the state

The functions which the governor performs as head of the state are somewhat miscellaneous, but they all arise from the fact that in certain situations it is highly convenient, if not absolutely necessary, to have some one individual who may personify the power, the dignity, the unity, and, if one pleases, the personality of the state. Such a head is especially desirable upon ceremonial occasions at home and in maintaining contacts with individuals and public authorities outside the state.

a. Formal

First among the functions performed as head of the state may be grouped a number of duties of a somewhat formal nature. One of them is that of accepting the service of legal papers issued against the state. An example of this would be when a summons is issued for the state to appear in the Supreme Court of the United States to answer any suit begun against it by another state. Again, it is the function of the governor to represent the state on ceremonial occasions within its limits, such as public dedications, the welcoming of distinguished public visitors, or on occasions when the state is to be officially represented outside its borders, such as at the inauguration of a President. Yet again, the governor serves as the official channel of communication between the states and the federal government or other states. A familiar example of this is to be found in the formalities connected with the extradition of persons accused of crime.

b. Military

In the second place, the governor is the military head of the state. Under most of the constitutions the governor is made the commander in chief of the armed forces of the state, except when they are called into the service of the United States. As such, he may appoint and commission military officers, make rules for the government and discipline of the forces, review

findings of general courts-martial, and call out the national guard as a state militia to suppress insurrection or to repel invasion. Since the organization of the militia as a "national guard" under the National Defense Act of 1916, the organization and discipline of forces have been so fully prescribed by federal statutes and military regulations that the governor's powers in these directions are seriously diminished.

In time of war, however, and in times of serious civil unrest, the power of the governor as head of the military forces of the state becomes of importance, and at times takes on considerable political significance. The governor may be faced with a serious problem of maintaining domestic peace and safety when most of the men in the state's military establishment have been called into active service in the armed forces of the nation. Emergencies, such as floods and hurricanes, often create situations that are beyond the power of local, or even state, police forces to handle. The provision for "home guard" contingents in a state must be made by the legislature, but it is the governor who must estimate the need for and recommend the type of organization that should be established. The problem of strikes by workers in industry often creates much political apprehension on the part of the chief executive of a state. Merchants, local police heads, factory owners, and other groups may plead for a company of militia, while at the same time, delegations from labor organizations may be calling on the governor to refrain from "interfering" in the situation by the use of military force. Each side pleads its cause before the public and before the governor, and the governor often finds that a decision of the controversy has grave political consequences. What is usually regarded as a nominal or ceremonial type of duty, that of head of the military forces of the state, may turn out to be a heavy executive responsibility.

It is not customary for the governor, in his capacity as commander in chief of the military forces of the state, to take any active part in military affairs further than to designate the occasions when troops are to be called into active service. The actual

command in the field is vested either in the adjutant general or in some other commissioned officer. In a considerable number of states, especially among the older ones, the governor maintains a personal military staff composed of certain of the higher officers of the militia and a number of civilians upon whom have been bestowed honorary commissions. The activities of the governor's staff are confined to military parades and other ceremonial occasions.

These functions as head of the state are interesting historically, though, with the exception of the control over the militia, no longer of first importance. The function of personifying the power and dignity of the state is a last remnant of the ancient prerogative of the sovereign. This function has descended to the state governor through the colonial governor who was vested with vice-regal character. In the older states, in this connection, many quaint ceremonies and customs survive to remind the observer of these origins. An interesting topic for reflection is the possible connection between the disappearance of these symbols of the dignity and authority of the state and the marked decrease in the respect shown for law among the citizens.

c. Judicial

The power to grant reprieves, commutations of sentence, and often pardons is vested in the governor. This function is, perhaps, more judicial than executive in character. It may be mentioned at this point, since it, too, is a survival prerogative to dispense justice and mercy. The power of pardon is discussed in more detail in a later chapter.

The second subdivision of the executive function of the governor is that of supervising the administrative work of the state.

2. As head of the administration

During the first years of the nineteenth century the remnants of the old power of appointment, which had persisted from colonial days, slipped from the hands of the governor. Although some of this power was given to the legislature, popular election of all officers became the rule everywhere. Soon after the middle of the century, however, there began a perceptible

swing in the direction of increasing the governor's power to appoint minor officials. The revival of this element of administrative authority was due to a number of reasons.

a. Power of appointment

The practice of filling administrative places through selection by the legislature violated the generally accepted doctrine of the separation of powers. Moreover, legislative selection fell under the influence of spoils methods with the usual unsatisfactory results. Under these circumstances, the abiding faith of that generation in the ballot box led it to resort first to popular election for the selection of all officials. But at the same time, the number of services undertaken by the state, and consequently the number of new officials, was increasing rapidly. The result, if all of these were elected, would be to increase the length of the ballot until it became unwieldy. Then, too, it was perceived by some that whatever theories may be held concerning democracy and the ballot, popular election is not a method suited to the selection of those officials who must possess technical or professional qualifications. All these considerations led during the latter half of the century to a great extension of the governor's power to appoint administrative officers. Still more recently, the evolution of the idea of securing efficiency through a centralized administrative control has resulted in the transfer of still other offices to the list of those filled by the chief executive. It still remains true in all but a few states that the incumbents of the older state offices, such as secretary of state, treasurer, auditor, and attorney general, are elected by the voters, or in certain instances by the legislature. With these exceptions, it is now the general practice for the governor to appoint the administrative officers of the state. It should, then, be noted that the state officers above mentioned appear on the state ballot along with the governor and lieutenant governor, not because they are of a different character or of greater importance than others, but merely because they are of earlier creation.

The power to appoint is sometimes derived from constitutional provision, but more often from statute. The constitution

specifies certain offices which are to be filled by election and others perhaps by appointment; but there usually appears also a general statement that the appointment of all officers not otherwise provided for in the constitution shall be by the governor. As a consequence of the present wide range of state activity, the number of appointments now made by the governor is in most states very large.

Limitations on power of appointment

The power of appointment is, however, in many states subject to very real limitations. First, it may be limited by an executive council. This is true only in the states of Maine, New Hampshire, and Massachusetts where, alone, the council has been retained from colonial times. Second, this power may be limited by confirmation by the senate. In about half of the states it is required that the governor submit his appointments to the senate for confirmation. In one state, Pennsylvania, with respect to certain of the highest officers, confirmation must be by a two-thirds vote of the senate.

The practice of subjecting the appointments of a chief executive to confirmation by some independent body, such as a senate, seems seldom to have served any useful purpose. It was doubtless adopted out of deference to the theory of checks and balances. It has been defended on the grounds that it serves to "check" unfit appointments of the governor, and that since the governor cannot know personally the character and fitness of candidates for appointment from all parts of the state, that knowledge will be supplied by the senators from the particular neighborhood from which the candidate comes. The gradually increasing body of opinion opposed to senatorial confirmation is based, in the first place, upon the contention that appointees in those states where confirmation is required present no outstanding superiority over those selected by uncontrolled appointment. Moreover, it serves to destroy the personal responsibility of the governor for appointments. Since the governor is actually held responsible by the public for the success or failure of an administration, he should have a free hand in the selection of those officers who exercise discretionary powers. Senatorial

confirmation in the states has not thus far led to the development of the practice of senatorial courtesy, as has been the case at Washington. But it may easily serve as a means of the political bludgeoning of the governor, which may be worse in its effects than the evil which it was created to prevent.

The appointing power of the governor is limited, in the third place, by civil service laws. These laws in their actual application serve for the most part to restrict the power of department heads rather than that of the governor, since they apply chiefly to the selection of minor officers not chosen by the governor. The laws do, however, serve to lessen the influence which the governor might otherwise exert through his political domination over department heads.

b. Removal

Whereas it has now been definitely settled in the national government that the power to appoint carries with it the power to remove officers, no such rule—with an exception to be noted in a later paragraph—has been established in the states. The governor possesses only such power of removal as is expressly conferred upon him by the constitution and by statute. As a matter of fact, the power to remove officers seems in all states to have been conferred only with great reluctance. In certain of the older states at an early day, and especially in New York under the council of appointment, the power to remove was at first made coextensive with the power to appoint. With the swing of sentiment to favor the popular election of all public officers, the executive power of removal fell into disfavor. It came to be thought a most undemocratic proceeding to permit those who had been chosen by the sovereign people to be removed by another elected officer.

But along with the more recent development of the power to appoint, there has come also a considerable power of removal. In most states the governor may remove many, and in some states all, of those whom he appoints. But contrary to the rule in the national government, wherever confirmation by the Senate is required for appointment, it is usual to require a similar approval for removal. In the states which have within recent

years undergone administrative reorganization, the governor has been given power to remove all department heads at will, except those otherwise provided for in the constitution.

The rule is that officers elected by the people can be removed only by impeachment. Nevertheless, in Michigan the governor may, during the recess of the legislature, remove any public officer; and in New York he may suspend the elected state treasurer. Again, the rule is that locally elected officers cannot be removed by the head of the state, although New York, Michigan, and Wisconsin comprise a small group where the governor may remove certain local officers whose duty it is to assist in the enforcement of state law. Among such local officers are the sheriff and the district attorney. In a few states, certain elective officers, especially judges, may be removed by the governor upon "address," i.e., formal recommendation made by both houses of the legislature. In all cases, unless it is specifically provided that the incumbent holds office during the pleasure of the governor, removal must be for cause, and the person accused is entitled to have notice of the charges against him and an opportunity to be heard. The grounds on which removal is permitted are usually prescribed as "incompetency, neglect of duty, or misconduct in office."

Indiana rule

In Indiana, however, the foregoing paragraphs do not apply. The supreme court of that state decided, in 1941,[1] that the governor, being vested with "the executive power," could not be stripped of his power to appoint and remove officers in the executive and administrative department of the state. The court also inferred that the powers to appoint and to remove were inherent in the executive power. Indiana, therefore, follows the same rule that is applied in the national government, so far as legal rules are concerned. It should be noted, however, that the governor of Indiana has not seen fit to exercise fully the large grant of power thus conferred on him by the state constitution as interpreted by the supreme court, but has tended to temper his legal power for managerial purposes over the state

[1] Tucker *v.* State, 218 Indiana 614 (1941).

administration with political caution. This caution has arisen, no doubt, because of the feeling on the part of the executive that public opinion in the state abhors the idea of highly concentrated power in the executive. It is possible that the Indiana rule may come to be the rule in the states, but at the present time the governor, while growing in prestige, still lacks power, or political support for the power when it does exist, to justify his exertion of the leadership which the office should embody. The administrative implications of this development will be noted in the chapter concerning administrative organization.

c. Direction

To an increasing degree the governor is now being held responsible by public opinion for any failure to secure satisfactory results in any branch of the state service, although, as pointed out above, the governor's power of direction is not always satisfactorily established in the constitution. State legislation has, however, tended to increase his power of direction over the administrative affairs of the state.

The powers of the governor over the administration are of two kinds. They are partly legal and partly extra-legal. His legal power to control the acts of administrative officers is derived from his powers to appoint, to remove, to require from administrative officers information concerning their departments, and to investigate the work of public officers. His extra-legal powers over them are derived from his partisan political position. It is assumed that the governor will appoint persons over whom he can exert a considerable degree of control during their term of office. On account of his general political influence, this is likely to be true, but only within limits. Control through appointment alone is bound to be uncertain because there is no means of enforcing compliance. It is the power to remove, and especially to remove at will, that gives to a chief administrator real control over his subordinates. Since his power to remove at will is in most states still narrow, so is his control based upon this power likewise narrow.

Again, it should be pointed out that a most important result

of the recent reorganization of the machinery and the centralization of administrative authority in the hands of the chief executive, which has taken place in a large number of states, has been to build up a strong power of direction in the hands of the governor.

Through the power to require information and to investigate the conduct of officers, the governor gains a considerable leverage of control. Upon the basis of information thus gained, he may institute proceedings against an officer for positive misconduct, even though the power of removal has not been given to him. Through the power to make public the information gained, he may exert a considerable influence over the discretionary acts of officers.

On account of his influence with the party organization, his power as representative of the whole people to create public opinion, and his power to approve warrants, together with his share in the making of the budget and in the enactment of laws, there is created a control of a political nature which no administrative officer, however independent legally, can lightly disregard.

d. Financial

Until a very recent date, any control of the governor over the financial administration of the state was quite indirect and shadowy. Through the financial recommendations contained in his message, and his power to veto appropriations, an indirect control was exercised over the general course of financial affairs. The time-honored theory was that each official is responsible to the law for the expenditure of funds in accordance with the terms of the appropriation act. It was, and still is, the duty of the auditor to see that such expenditures are made in accordance with law. Through the power to investigate and to suspend or remove, there was established, it is true, in the hands of the governor a sort of control which might extend to matters of finance. In many states, the governor has been charged with the duty of approving or rejecting the vouchers of various officers. Such supervision is directed toward determining the legality of expenditures and the fidelity of officials to their financial trust,

rather than toward the wisdom of expenditures made. With the inadequate machinery of administration at his disposal, the governor's actions in this direction could amount to nothing more than a duplication of the work of the state auditor.

The introduction of budget systems and the reorganization of state administration in a number of states have opened the way to a more real control by the chief executive over finance. His power in preparing the budget and recommending specific items therein gave him a more constructive influence over appropriations than was secured merely through the veto. But it was not until the reorganization of state administration in several states that an effective step was taken to establish a real executive control over expenditures. Power has been vested in the administration under many of these newer arrangements to examine in advance expenditures with respect not merely to their legality, but to their wisdom. Authority has been conferred on the governor or on some official responsible to him to examine contracts for the purpose of determining whether they are properly made, and to inspect materials for the purpose of discovering whether or not they comply with specifications laid down. Likewise, results may be investigated to determine whether work has been efficiently performed and contracts carried out as entered into. This supervision, though usually exercised directly through the head of a finance department, places in the hands of the governor himself a very real and tangible control over the financial affairs of the state. Many states are watching with interest the experiment being tried in Minnesota, in which a business manager for the state has been provided to assist the governor in carrying out his duties as manager of the state's business affairs.

e. Police

The police function is that of regulating the acts of persons and the use of property in the interests of the public safety, health, morals, and welfare. The historic method in English-speaking countries of exercising this function has been through officials locally elected. In the United States, the police, sheriffs, and prosecuting attorneys are the accustomed agencies through

which the police power has been exercised. As has been already pointed out, the governor rarely has any control over such locally elected officers. In comparatively recent times, whenever police statutes have been enacted to deal with certain large subjects, such as health, factory conditions, housing, and fish and game preservation, special officers have been provided for their enforcement. Since these are usually state officers, the governor has gained a considerable control over their acts through the power to appoint and remove them.

One purpose of a state militia or national guard is to serve as a police force on extraordinary occasions. Without specific authorization the governor, under his general power to see that the laws are executed and as chief executive, has made use of the militia for police duty in times of great emergency due to fire, flood, tornado, or riot. On such occasions they have served a useful purpose in the absence of a better agency. But since they are composed of private citizens withdrawn temporarily from the usual callings of private life, and without police training, they are neither available for continuous service nor adapted to general police duties.

In recent years, the desirability of a permanently established and professionally trained police force with general powers of law enforcement throughout the state has become widely recognized in many parts of the country. The dwellers in the isolated country neighborhood and the banker in the crowded city street have both come to realize the inability of the local police to cope with criminal gangs operating with the aid of the automobile and under the protection of automatic firearms. This need has led, in three-fourths of the states, to the creation of a state police force, with full police authority, organized upon a semi-military basis, and generally under the control of the governor.[2] Thus the governor has for the first time been given adequate means under his own control of protecting citizens in their persons and property from violence. With an efficient state police at his disposal, and with an adequate con-

[2] See pp. 412–414.

trol yet to be established over local police through the power of removal, the governor may in time be enabled in reality to "see that the laws are faithfully executed."

Legislative powers of the governor

The legislative functions of the governor are those which he exercises when participating with the legislature in the determination and formulation of the policies of the state. These functions are to call the legislature into special session, in some cases to adjourn it, to send messages to it at will, to approve or to veto acts, and to influence the course of legislative events by political means. The first four of these are secured through the grant of legal power set forth in the state constitution; the last is of extra-legal origin and is political in character.

1. To call special sessions

The governor is empowered in every state to call the legislature in special session whenever, in his discretion, the public interest demands it. In several states he may convene the senate alone on "executive business" which includes the business of acting upon appointments or removals, or of considering questions of impeachment. Ordinarily the official initiative in calling a special session is taken by the governor himself; but in Virginia he is required to issue a call upon the request of two-thirds of the members of both houses, and in West Virginia, upon the application of three-fifths of the members. When annual sessions were the prevailing rule, the number of special sessions was not great; but with biennial meetings prevailing, the number of special sessions has materially increased. At the present time, scarcely a year passes without such a session in at least one state. One effect of the prevailing lack of popular confidence in legislatures is a general aversion on the part of the public to special sessions. Objection is offered, too, on the score of expense. Consequently, governors are reluctant to call them together unless there is some widely felt and urgent need.

In about half of the states, the legislature may, in special session, legislate upon no subjects other than those specified in the call, though in a few instances the governor is permitted to present additional subjects for consideration during the session. It was the lack of such a provision as the latter that caused the

absurd situation in Illinois in 1912, of having two special sessions in progress simultaneously. After such a session had convened, it became desirable to consider some other matters not included in the original call. Whereupon, to make the consideration of these matters constitutional, a second call was sent out, and two sessions were set in motion at the same time.

In New York in 1913, the question was raised whether for this reason the action of the legislature in impeaching Governor Sulzer at a special session called for another purpose was valid. It was held by the courts that impeachment was a judicial and not a legislative matter, and so was not affected by this limitation.

The power to call a special session has occasionally been made use of by a governor to force upon the attention of an unwilling legislature some measure favored by him, and at the same time to give emphasis to the subject in order to create a public opinion in its support.

2. To adjourn the legislature

The power of dissolution of the legislature at will possessed by the colonial governor has disappeared; but in case of disagreement between the two houses as to the time of adjournment, the governor usually may adjourn them. In such a case, the time of adjournment must be not later than the date of assembling of the next regular session. In cases of emergency, such as at time of public danger, the governor may adjourn the legislature or call it in session at some other than the regular place of meeting.

3. To send messages

In every state, the governor, by constitutional mandate or by custom, sends messages to the legislature. In many states he is directed to communicate by message "the condition of the state and recommend such measures as he may deem expedient." His messages may be said to be of three kinds: first, a formal opening message; second, special messages; third, the final or valedictory message upon retirement.

a. Regular messages

In general it may be said that the formal message delivered at the opening of the legislative session consists of two parts. First, it contains a general review of the state of public affairs, including any conditions, economic or social, which may affect

the course of the public business or the public welfare. This presentation varies widely with the inclination and the character of the governor. It sometimes is a carefully prepared and business-like survey of conditions in the state; at other times, it degenerates into a stump speech, rhetorical and platitudinous. Its second part consists of recommendations of various subjects for the consideration of the legislature and for possible enactment. In earlier days, specific suggestions of legislation by a governor were viewed with jealousy by legislatures, but as the governor has come to be looked to by everyone as a leader of the legislature, such recommendations now have great significance and attract a large measure of public interest. In the message are likely to be mentioned the various constructive measures advocated in the party platform, but especially those which the governor himself has adopted as his own personal platform in the campaign. Sometimes some of the latter are merely mentioned in the regular message, more comprehensive treatment being reserved for a special message later.

A feature of the better type of messages, especially in recent years, has been a discussion of the finances of the state. In several states the governor is required to account to the legislature for money received and paid out under his authority. The accounting for this sometimes appears as a sort of appendix to the regular message. This requirement seems to be an outgrowth of the custom of placing at his disposal an "emergency fund" to be expended by him at his discretion for extraordinary purposes not to be anticipated by the legislature. Where the executive budget has been introduced, matters of finance are now reserved for presentation in the "budget message" at a later date in the session. This becomes, then, in effect, a second regular message.

b. Special messages

From time to time during the legislative session, the governor may send special messages. These may be suggested by some unforeseen circumstance, or, as has been suggested above, when some subject of paramount importance has been reserved from the regular message for more extensive discussion. The special

messages sent to the legislatures of the states of the Ohio Valley then in session on the occasion of the great flood of 1937 are examples of special messages arising from emergency. Special messages frequently deal with topics which the governor has stressed in his campaign and upon which he has to a certain degree staked his official record. In such cases there is frequently at the same time introduced by a close supporter of the governor, a bill embodying the governor's policy on the subject, which thereupon takes on special legislative importance as an "administration measure." Such special messages on administration measures were infrequent before the latter years of the nineteenth century, but are today very common.

4. To veto bills

In every state except North Carolina, the governor has the power of veto, though the occasions and the conditions on which it may be applied vary from state to state. Where the power to veto exists, every bill which passes the two houses must be presented to the governor. This requirement is usually, even when not specifically stated, construed to extend as well to joint resolutions, except such as relate to matters of legislative procedure, to the sending of messages, to a popular referendum, and to constitutional amendments. In many states the governor may veto items in an appropriation bill. The new constitutions of Georgia, 1945, and of New Jersey, 1947, provide for this type of veto in addition to the general veto.

5. Political influence on legislation

Thus far, only the legal powers of the governor over legislation have been considered. In addition, he possesses political influence which, though not set down in formal statement, is quite as real and sometimes more effective than his legal powers. The governor does not, except in the case of the appropriation bill accompanying the budget, regularly present bills, and even those mentioned are introduced by a member. It is, however, not uncommon, as has already been said, for some of the most important measures before the legislature to be presented by a spokesman of the governor, and to be known to have been prepared for the governor. These "administration

bills," as has been indicated, occupy a prominent place in the course of legislation.

For the political purpose of securing support for a measure, the governor sometimes employs his legal powers of budget-making and veto as well as his power of appointment and removal. The use of these, or a hint of their possible use made as a skillful politician well knows how, are very powerful in winning support for the governor's measures. Added to these is the purely political influence which the governor exerts as a popular leader. Through speeches, interviews for the press, and conferences with local leaders, he can mold public opinion in favor of a measure to such an extent that legislators will hesitate to risk popular as well as executive disapproval by voting against it.

All of these powers and influences—message, appointment, threat of veto, and the various means of stirring public opinion—may be used with equal vigor and effect in opposition to any measure of which the governor disapproves.

The steady stream of people—legislators and citizens—which is constantly passing between the two houses and the executive chamber during the session, is an indication of the power which the governor exercises over legislation between the delivering of his message and the time when the bills reach his desk for approval or veto. This influence is sometimes deplored by writers as an encroachment by the executive on the province of the legislature. It is, however, but the natural result of a demand on the part of both the public and the members of the legislature for a leadership in policy-forming which, under our political system, no member of either house is in a position to assume.

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CHAPTER 12

THE ADMINISTRATIVE SYSTEM

In this chapter the history, the structure and organization, and the procedure used in the management of the administrative system of the American state will be discussed. The role of the governor in relation to the administrative system has been touched upon in the preceding chapter, and will be alluded to again in the section on managerial procedures and techniques. The fiscal aspects of management will be found in the chapter on finance, but the procurement of personnel and materials, along with the function of long-range planning, will be dealt with in the chapter that follows our discussion of the administrative system. Finally, the subject of administrative services will be treated in some detail in succeeding chapters.

Policy formation

It will be remembered that in discussing the separation of powers in an earlier chapter the point was made that formulation of policy was primarily a legislative function. The governor, however, by constitutional provision participates in policy formulation. He not only gives the legislature information on the general and specific needs of the state as a whole, exerts pressure in favor of certain bills and against others, but also exercises the power of veto.

Even after the bills are enacted by the legislature the governor, as head of the administrative system, engages in a certain amount of policy-forming work, because the laws almost invariably leave to him some discretion as to the methods to be used in executing the laws or in supervising their administration. The statutes may even grant the governor broad powers of control over the entire administrative system, although in this respect,

as will be noted later, the general state practice is not to give him as broad control over administration within the state as is given the President in the national administration.

Not only does the legislature give to the governor the power to make rules to fill in details which the lawmakers feel they do not have the technical information to formulate, but this power is often given to heads of bureaus, departments, or administrative commissions and boards within the administrative system. In a very real sense, therefore, it may be said that the executive and the higher administrative officers participate in the formulation of basic legal policy in state government.

The point was made in the discussion of lawmaking that administrators also assist legislative bodies in the legislative process itself. With respect to many technical subjects it is usual for legislators to consult heads of administrative agencies, and in numerous instances these agencies are responsible for the preparation of bills that are introduced by members of the two houses relating to subjects of special interest to the legislator himself and to the agency which is to be charged with the function of administering the particular policy once it is enacted into law. The interaction between administration and legislation, therefore, is a continuing process, and when we are dealing with one branch of the government we must always bear in mind that we do so assuming that full credit is to be given to the other branches for the part they play in the total process of government. It is with this in mind that we say that the process of applying the law or enforcing a policy is primarily an administrative function.

History

Early beginnings

Early American administration was influenced partly by its English antecedents and partly by the conditions in the American society of colonial times. It was only natural that the colonists should develop a sense of independence of authority at an early stage in our history. Not only did the colonial governments escape effective supervision for many years, but they

developed in a pioneer society in the new world. The administrative system included a very simple administrative organization because government at that time performed only a few functions. Many of the services now performed by government and taken for granted in our day were unheard of two centuries ago in the American colonies. For example, neither colonial nor early state governments engaged in extensive road-building, nor did they provide an elaborate system for the protection of public health. The tax collector, the pound keeper, the sheriff and constable, a treasurer, and a prosecuting attorney in addition to a clerical officer to register titles to land, composed the nucleus of the administration system in early colonial times. People did not expect their government to perform many functions, and only a few officers were required to perform the elementary functions that were assigned to government.

Characteristics

Not only was the administrative organization simple and the functions to be performed by it limited, but it was also largely local. The manner in which the colonies were settled meant that a large amount of autonomy had to be left to each locality. This resulted in a series of local administrations which were not very closely supervised by the higher colonial authorities. The prevailing attitude toward all political authority, whether local or imperial, was one of suspicion and resentment. This was not minimized by the fact that many of the higher offices in colonial administration were held by persons of higher education who were members of leading families in the community. For these reasons we usually characterize early American administration as: (1) simple, (2) largely local, (3) created to perform a few elementary functions of government, (4) subject to grave distrust by the pioneers of the new world, and (5) having in the more important positions persons of influence and wealth in the community.

Changes

With the passage of time, however, administration in state government underwent great changes. The beginnings of change were evident even in late colonial and early state gov-

ernments. Population grew steadily along the Atlantic seaboard, and the settlement of Western lands went on apace. Cities began to develop; with the growth of lumbering, shipbuilding, iron working, and commercial fishing, small villages soon became considerable centers of population. With the growth of industry and the concentration of population in cities came a specialization in function. Specialization brings with it dependence upon one's neighbors and fellow workmen, as well as upon the surrounding rural communities, so that no longer is each person or family a self-sufficient unit. Even such a simple product as milk becomes a food of great concern to public health. No longer does each family have its own cow. Hundreds and even thousands of families buy their milk from producers whose cattle they never see. Children and adults alike are completely at the mercy of the farmers as to the wholesomeness and purity of their milk. For many years it was not known that milk and water were media for the bacteria which cause tuberculosis, dysentery, and typhoid fever, merely a few examples of deadly scourges that decimated the population from time to time during the earlier years of our nation's history. Countless thousands of Americans needlessly met their death even after the discovery of the measures that could be taken to prevent the dissemination of these filth-borne diseases. But even after the germ theory of disease had been clearly established, and after germ transmission by such common means as impure milk and water was known, public opinion in some parts of the country was slow to demand governmental action to insure purity of potential germ carriers.

Even now some persons, otherwise well informed, seem unaware of the public significance of pure milk, but happily their number is steadily decreasing, and pure supplies and protected distribution of this commonly used food is taken for granted by most informed persons. Similarly, water supply, formerly a matter of the family well, also became a matter of great concern to public health.

With the growth of the large-scale industrial establishments the personal relation of employer to employee gave way to

formal organizational relations, often with the diminishing sense of personal loyalty on the part of the employee, and the decreased sense of personal responsibility on the part of the employer for the welfare of his workers. This remoteness of relations, arising from size of organization, in itself created problems unknown to the simpler forms of societal and governmental organization. Soon labor relations became a concern of state legislation and state administration.

As the conditions of the social and economic life of the people changed, so, too, forms of administrative action changed. Under the simpler forms of earlier local administration court action could be relied upon for most law enforcement. In the typical situation of a violation of an ordinance or statute, the prosecuting attorney would bring a criminal action against the offender. With the aid of a jury and with the help or hindrance of the defending and prosecuting attorneys, the court would adjudge the accused person innocent or guilty. A fine, a short term in the workhouse, or even a longer term in prison might be in order. With the growth of regulation of industry and of many other types of social activity, however, came the need for more effective methods of detecting and preventing violations of statutes and administrative regulations. A system of inspection might be established, with a corps of inspectors. Supervisors would be required to direct the work of these inspectors. When an inspector found that some dangerous condition forbidden by law existed in a factory, he could order an immediate change in the condition. Ordinary criminal and civil procedures would not protect the workmen who were thus endangered. In this way a new system of administrative enforcement came into use as a supplement to, and even in some instances as a substitute for, the older method of enforcing the law by court process. Appeal to court from the inspector's order might be permitted, but in the great majority of cases the employer would not avail himself of this right because the duty to make the change usually was clear, once it had been explained to him.

Another factor giving rise to an increase in administration was the slow development of inequality which accompanied the rise of modern industry. Great fortunes were made by some, small fortunes by others, and no fortunes by many more. Large concentrations of factory workers who were thrown into mass unemployment by financial and economic depressions came to demand that government do something to alleviate their condition. Aged persons who, for one reason or another, found themselves unable to support themselves or unwilling to impose upon their children asked that they be recognized as having legitimate claims upon the public treasury. As each of the increasing number of claims upon society was recognized, new agencies of administration were created. Each new agency constituted an administrative organization. Taxation to defray the expenses of new services in turn required an expanded administrative organization for the collection and custody of public moneys. All in all, basic social changes bring with them basic political changes, and if these political changes include a greater role for government in society, they result in the enlargement of the administrative system. Not the least important in the development of public administration during a change of this kind is the shift that comes in the public attitude toward both public administration and government. Instead of regarding government and administration as interlopers in private affairs, the prevailing thought came to regard them with a friendly feeling. This, in the long run, created an intellectual climate favorable to the growth of public administration. It was to government that the people turned more and more for aid in the solution of these vexing questions.

Growth of administrative services

In the preceding paragraphs the need for administration in the states and in local governments has been described as resulting from the rise of demands for regulation and protection, but the rise of administrative organization was also caused by the increase in the performance of numerous services by government. The earliest of the newer services to arouse general interest was education. By the middle of the nineteenth century

there were in full process of development state systems of public schools at the head of which was either a state superintendent or a state board of education.

It has already been noted that early administration was largely local. There were many reasons why the local system of administration did not satisfy the new demands and would have to be supplemented by state administrative agencies. The performance of the new functions which were being demanded—the giving of aid, the operative activities, and later conservatory functions—required managerial ability. The work of officials with respect to them could not be specifically detailed by law, nor could responsibility so easily be exacted in courts of law. Activities of this kind can be carried on successfully only under the active and positive supervision of a manager. The work to be done frequently extended over a wider area than that over which local officials had jurisdiction. The amount of money required was greater than the local community could afford. When local officials attempted to manage the growing administrative units, their inadequate experience in this field often yielded poor results. The public, that section sensitive to the stirrings of change, was often too impatient to wait for the slow community-to-community solution of the problems. The effect on the administrative system was to set up administrative machinery at the state level. One example of this state activity is the protection of the public health. The Massachusetts Board of Health was created in 1869 and in 1881 Indiana's board was established. As a matter of fact, functions of government have expanded not only from the local government to the state government but from the state government to the national government as well. State and local governments attempted to regulate transportation long before Congress entered the field by the creation of the Interstate Commerce Commission in 1887, when the national government began to regulate the railroads.

The structure of the state administrative system that had grown up particularly between 1850 and 1915 had been modeled

largely after the local administrative structures of earlier years. Duties were established by law and conferred on agencies which were created to carry them out. The tendency had been to create a new agency each time a new activity was undertaken. This resulted in the creation of a great many agencies. It was said that in New York, there were more than 184 offices, departments, boards, and agencies. A report on the state of Illinois, prepared under the direction of the late Professor John A. Fairlie of the University of Illinois, said: "There are half a dozen boards dealing with agriculture interests and about a score of separate labor agencies, including four boards dealing with mining problems, and eight free employment offices. . . . State finance administration is distributed between a number of elective and appointive officials and boards. . . . The supervision of corporations and of banks, insurance companies and public utilities is exercised by a series of distinct departments. State control of public health is divided between various boards. . . ."[1]

This creation of administrative machinery at the state level was not caused simply by transfer of local functions to the state. It should not be assumed that local administration had been entirely supplanted by the creation of new machinery at the state level. The new functions, particularly those which the states were undertaking to perform directly, were often of a different character from those formerly delegated to local government. The old functions had been coercive. The new functions included the regulation of business, the performance of services, and the operation of enterprises. They were not chiefly coercive; instead they were mainly managerial in character.

Administrative systems in 1915

The state administrative systems as they existed in 1915 had so many different agencies, the duties of these agencies were so overlapping, and the plural-headed agencies were so often slow and unwieldy that it was difficult to enforce political responsibility. Legal responsibility through court action was unsuited

[1] *Report of the Efficiency and Economy Commission*, Forty-Eighth General Assembly, State of Illinois (1915), p. 19.

to control effectively the newer bureaus and departments because of the nature of their work, involving, as it often did, much discretionary power. Not only were there numerous agencies of state administration in the typical administrative system of an American state in 1915, but many of these agencies had been given overlapping powers. To make matters worse, many of the boards and commissions, bureaus and divisions, and departments of state administration, had been granted their powers by statute, and no provision had been made by law for effective executive coördination of their work. The governor, as has been noted in the preceding chapter, had no power to supervise them unless he had been specifically granted the power to do so. In one extreme situation, a private citizen was informed by a governor that nothing could be done to relieve him of his inconsistent duties to tear down his hotel—because it had been condemned by one inspector—and to repair it—as was ordered by another.

Reorganization

It was not until the rising costs of government began to be felt seriously and widely in the earlier years of the present century that the disorganized and inefficient condition of state administration attracted much attention. It was then perceived that the chaos of disorganization was an important factor in the financial situation.

By the end of the first decade of the century the existing situation had been widely discussed unofficially, and since 1911 the subject has been one of official investigation in half of the states of the Union. Such investigations have been made by bodies bearing various names; but they have come to be spoken of in general as "efficiency and economy commissions."

The first such investigating commission was the Board of Public Affairs of Wisconsin, created in 1911. The year 1913 saw bodies with a like purpose created in New York, New Jersey, Massachusetts, Iowa, Illinois, Pennsylvania, and Minnesota; and succeeding years witnessed the creation of similar bodies elsewhere. These commissions sometimes took the form of legislative committees, and sometimes they were composed wholly,

or in part, of citizen members. The actual work of investigation has been done by political scientists from the universities, by private or semi-private investigating bureaus, or by firms of efficiency engineers. The scope of the inquiries has ranged from the financial irregularities of individual officials, or the organization of specific departments, on the one hand, to broad, comprehensive studies of the whole financial and administrative system of a state, on the other hand.

Though these commissions vary in their composition and functions, their findings and conclusions have nevertheless been of the same general tenor. They have disclosed a lack of organization and a decentralization of power and responsibility. Their recommendations can be summarized in one sentence: The administrative system should be organized so that administrative control could be exercised by the chief executive officer. This was not a complete break with the earlier principle that administrative officials should find their duties completely set forth in the statutes and that they could be held responsible by any aggrieved persons through suits in the courts. It was a recognition that government had taken on, in addition to its long-time negative, coercive functions, new functions which were of a service nature, and which required effective administrative control for their performance. There was no intention to relieve administrative officials of their responsibility to the law through the courts in so far as that method was successful. But within the limits set by the law the intention was to establish a supervisory authority over the administrative systems, particularly over the rapidly increasing body of officers exercising administrative discretion.

Recommended changes

The recommendations for changes in the structural forms to achieve the goal of responsible management were of many kinds but the changes which were made in years following 1915 tended to fall into five categories.

1. Functional integration

In the first place, there was a functional integration, or, as it was sometimes called, departmentalization. The various functions which the government performed were analyzed. Those having

a common object or aim were grouped together in one department. All activities which were designed to protect the public health, such as the control of contagious diseases, the prevention of stream pollution, the regulation of food preparation, the policing of the manufacture and sale of narcotic drugs, and the education of the public in the use of vaccines, were all placed together in a department of health.

The reduction of the number of separate agencies which resulted from functional integration was somewhat startling. In 1917 Illinois consolidated the work of more than one hundred offices, departments, boards, and agencies into nine departments. New York in 1927 found that eighteen departments were sufficient to do the work formerly parceled out to 180 offices, boards and commissions. The number of operating units in Tennessee was reduced from forty-nine to eight in 1923, while in Idaho more than fifty were consolidated into nine in 1919.

In addition to the economy that was hoped for, the purposes sought in the reduction of the number of agencies were to eliminate duplication and to integrate administrative organization so that it could be made subject to executive supervision. Lines of authority could be established so that directions could flow down from officials to persons charged with the performance of specific tasks and so that each person in the organization could be held responsible for the task assigned to him. The lines of communication in the department ran in a perpendicular direction, so that the direction of the flow of authority was from the top down and the direction of the flow of responsibility was from the bottom up.

2. Structural changes

The structural changes resulting from the recommendations of the efficiency and economy commissions tended in the second place toward placing responsibility in a series of single persons. Boards and commissions were often eliminated as the executive heads of agencies and in their stead were placed single executives. An executive might be given a board which would advise him or which would perform quasi-judicial or quasi-

legislative functions for him, but he was charged with directing the work in his department and the persons in the department were responsible to him. This principle was adopted throughout the administrative structure. At the top, the governor, whose chief duties had formerly been largely ceremonial and to some degree legislative, in the new administrative system had opened up for him the means whereby he could become the chief manager. At the head of each department a chief was installed, and at the head of each subdivision within the department a subhead was placed. The whole administrative structure began to assume the form of a pyramid with the governor at the top, the heads of departments ranging in number from eight to twenty, spreading out beneath, and so on down to the bottom of the organization.

3. Executive control

A third result of the recommendations by the study commissions was the strengthening of the management function.

A number of agencies were established to assist the governor in performing the functions of management. To a lesser degree the executives lower in the administrative system have also been given similar assistance. These aids to management are called staff agencies. They are tools of the chief executive to assist him in making decisions which will appear in the form of directions to the executive heads responsible to him. An illustration of such a power and the machinery for its exercise is the control over finance and the agency sometimes called the finance or budget department. The old adage that "he who pays the fiddler calls the tune" explains a most fundamental relation in governmental affairs. It takes money to make every governmental wheel turn. If the governor has the power to require all department heads to submit their plans to him and the estimates of the cost for carrying the plans into effect, and if he can watch the day-to-day expenditures to see if money is being spent as planned and stop the expenditures if he disapproves, his power of supervision is very great. In nearly half of the states, special machinery was established to accomplish part or all of this purpose. The structure and procedures of

financial management will be discussed more fully in Chapter 14.

The governor's power to appoint and remove subordinate administrators was also broadened and strengthened. It is a commonplace of human relations that a supervisor with power to remove an unwilling subordinate and to replace him with one willing to perform the required service can exercise more effective control. Beginning with Illinois in 1917 when the governor was given authority by statute to appoint the heads of departments this power to control has been developing. It reached its climax in Indiana, as was noted in Chapter 11, when the Indiana Supreme Court held that the grant of executive power to the governor conferred on him the power to appoint since the power to appoint is a necessary incident of the executive power.[2] Thus the power of the governor to appoint and to remove is established by the constitution in at least one state. The machinery and status of personnel control, purchasing, and planning, will be described more fully in the next chapter. The other staff agencies perform functions related to law, budgeting, among others, and some of them also serve as devices for management; but enough has been said here to show the nature of changes in structure effected by reorganization.

4. Governor's cabinet

A fourth development in the structure of the administrative system is the creation of the governor's cabinet. New York, under the leadership of Alfred Smith, introduced the cabinet. Other states, such as California, Connecticut, Kentucky, have also used the cabinet. This is a further step toward coördinating executive leadership.

5. Audit

The provision for a post-audit is a fifth development in state administration. The responsibility for its origin rests more with the framers of the model constitution of the National Municipal League and with the students of public administration in the universities than it does with recommendations of the efficiency and economy commissions. A post-audit is an examination of expenditures after they have been made to determine whether

[2] Tucker *v.* State, 218 Indiana 614 (1941).

legislative functions for him, but he was charged with directing the work in his department and the persons in the department were responsible to him. This principle was adopted throughout the administrative structure. At the top, the governor, whose chief duties had formerly been largely ceremonial and to some degree legislative, in the new administrative system had opened up for him the means whereby he could become the chief manager. At the head of each department a chief was installed, and at the head of each subdivision within the department a subhead was placed. The whole administrative structure began to assume the form of a pyramid with the governor at the top, the heads of departments ranging in number from eight to twenty, spreading out beneath, and so on down to the bottom of the organization.

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[2] Tucker *v.* State, 218 Indiana 614 (1941).

the intention of the legislature in appropriating money was complied with when it was expended by administrative officials. During the period under consideration, 1915–1938, four states, Massachusetts, Virginia, Maine, and Tennessee, adopted post-audit procedure in some degree at least.

Methods of reorganization

The method of achieving reorganization for most of the states during the 1915–1938 period was by statute. Only three states—New York (1925), Virginia (1928), and Massachusetts (1919)—effected administrative organization through constitutional amendment. There were offices created by the constitution whose status could not be altered, and they could not be brought into a streamlined organization. A way was found in Indiana in 1933 of bringing them into the reorganized structure. The governor was empowered to appoint a board to serve with each of the elected officials. Presumably, the governor could control his appointees and thus indirectly the elected officials who serve on the board. In the second place, the governor was given authority to transfer functions from one department to another, thus providing an additional method of securing compliance with his policies. Usually, however, most of the states failed to solve the problem of bringing elected officials into the organizational pyramid.

In the period during World War II and since, the problems of organization of the administrative system have continued to occupy the attention of state governments. In the decade 1939–1949, more than one-third of the states have attacked the problem by one means or another. Three states, Missouri, Georgia, and New Jersey, used constitutional revision. And the question of extensive constitutional revision is being considered seriously in other states. It may be, therefore, that a trend toward more extensive reorganization is setting in. There is also an increasing trend toward making post-audit a function of an agency completely independent of the executive (Colorado, Rhode Island, and Minnesota). Statutes have often prescribed administrative pre-audit as one method of executive control in reorganizations. The trend toward functional inte-

gration or departmentalization has continued, as has also the trend toward substituting single for plural heads. Utah, however, in 1941 consolidated some fifty-odd agencies into thirteen departments, but eleven of them were placed under the control of bipartisan commissions.

Appraisal of reorganization

Whether or not reorganizations of state administrations have produced an administrative system which performs governmental functions more economically and more satisfactorily than the old forms would have done is a question which has given rise to some difference of opinion. Some have doubted that the concentration of power in the governor was the best method of securing the best administration of public health or educational policies.[3] Others have contended that the claimed economies are not real[4] and that the reorganization is little more than a paper reorganization.[5]

Professor Francis W. Coker's criticism, made in 1922, may have been rendered less serious by the growth of personnel systems which foster the development of a body of government employees imbued with a loyalty to public service, and by the growth of a public opinion which regards public office not only as a reward for political success but as requiring many persons with technical and professional qualifications.

On the other hand, the agreement among students of government as to the advantages to be derived from the reorganized state administrative system is almost unanimous. Their complaint is that the leading principles which have been used in administrative organization have been applied too sketchily in some of the states and that some states have not reorganized their administrative systems at all. Professor Lloyd M. Short

[3] Francis W. Coker, "Dogmas of Administrative Reform," *American Political Science Review*, xvi (1922), p. 399.

[4] J. Mark Jacobson, "Evaluating State Administrative Structure—The Fallacy of the Statistical Approach," *American Political Science Review*, xxii (1928), p. 928.

[5] W. H. Edwards, "Has State Reorganization Succeeded?" *State Government*, xi (1938), p. 183; and "A Factual Summary of State Administrative Reorganization," *Southwestern Social Science Quarterly*, vol. xix (1938), p. 61.

summarized the predominant view growing out of the experience with the partially integrated system when he observed: ". . . there are relatively few instances, and those mainly tinged with a party slant, where a reorganization program soundly planned and effectively executed, has been discarded in favor of a return to a disintegrated type of administration. Each year, additional surveys and reports, whether made by citizens' groups, legislative committees, or expert consultants, point generally in the direction of more extensive integration."[6]

It is easy to become overoccupied with the forms of government and to forget that the persons who operate the forms and the climate of opinion in which they operate are the basic factors of good government. One of the most efficiently administered highway systems in the United States has been managed by a board. But in this instance the success of operation had been due in large part to one member of the board who, for a twenty-year period by force of superior insight, by ability at handling people, and because of technical information, had been the moving spirit of the commission. Able and devoted men and women often achieve surprising results in spite of poor organization; but, of course, it is easier for them to achieve their results in a soundly organized administrative system.

The problem of adjusting governmental organization to the needs of the time is a difficult one, because on the one hand it is necessary to have administrative work so organized that it can handle the increased functions of government adequately, while, on the other hand, it is not desirable to endanger the individual and his liberty. The task of devising a system which will harmonize these two requirements in state government is not the only task confronting those who are entrusted with responsibility for governmental affairs. Once the formula is discovered, it remains to convince the public that it should support a movement to adopt it. The public is naturally slow

[6] Lloyd M. Short, "State Administrative Reorganization," *The Book of the States* (1945–1946), p. 141.

to trust its liberties to new and untried devices, but in addition to the natural hesitancy on the part of the public to enter upon new types of governmental organization are the vested interests of those who either profit by the existing system or who have a feeling of security under it which they fear they may lose under a proposed reorganization. In general, however, the public is giving its support to the improvement of local and national administration. That the public moves, even though slowly, in this direction should hearten those who are interested in democracy and in effective administration.

Structure and Organization

The structure and organization of the administrative system of an American state is the product partly of statute and partly of constitutional provision. In general, however, it should be pointed out that by far the greater part of administrative organization in state government is the creation of statute. Only a few officers are specifically mentioned in state constitutions, and only a few provisions in the fundamental document of the state relate to the administrative system. Except for the few officers traditionally mentioned in American state constitutions, therefore, state administrative organization can be discussed in large part with respect to considerations other than those relating to the source of legal authority for its form of organization.

As has been noted earlier, the governor is the chief executive officer in each state. It has also been noted that one phase of the governor's office is that which is concerned with the headship of civil as well as military administration. The particular methods whereby the governor exercises his control over the administrative system of which he is the head will be discussed in the next section. At this point the primary reason for mentioning the office of governor is to indicate that it is the seat of the highest managerial authority in state administration.

Forms of organization

The administrative system under the governor is organized in several different forms: (1) departments, (2) boards and com-

missions, (3) government corporations. Although there is always a certain amount of experimentation in adapting organization to function, it is now fairly well settled that certain types of administrative organization are best suited to the performance of certain types of functions. In deciding what form of organization shall be used in a particular function, consideration must be given to several factors. For example, if the work to be done is of a nature requiring immediate decision, quick action, and close and continuing supervision, it would be a mistake to organize the agency to carry on the work in the form of a board or commission. The department, with a single head, with authority vested in the head, and with the head accountable directly to the governor, is much better adapted to achieve satisfactory results in an action type of program than any other form of organization.

Factors in choice

If action is of secondary importance, however, and if deliberation and the representation of several different interests or regions are more important than action, the board or commission form of organization for the program is likely to be more satisfactory than the single-headed department. For the execution of a financial program, such as that involved in banking operations, the credit agency is likely to achieve its goal more satisfactorily and more efficiently if the agency is organized in the form of a governmental corporation. Each type of administrative organization has its own advantages, and those charged with the task of adapting organization to functions and programs must always weigh carefully the advantages and limitations of any form of organization when making a choice of organization for a new program.

Departmental

The departmental form of administrative organization is common in state government. A department is a single-headed administrative agency, usually arranged so that there are subordinate divisions, offices, or bureaus within it. Authority is granted to the head of the department and, in turn, is delegated to subordinate administrators in charge of each of the subdivisions with each accountable to a superior administrator.

Authority in a departmental form of organization is usually spoken of as hierarchical. In some instances, statutes grant powers directly to subordinate bureaus or divisions, but this is now regarded as a serious obstacle to effective management. The bureaus or divisions may be subdivided into still smaller units. At the head of each of these units there are junior administrators who correspond to foremen in industry, heads or chairmen of departments in colleges or universities.

Departments are usually organized to carry out a program of work that is concerned with a single subject or function. The scope of the function may be narrow or it may be quite broad. The names of departments often suggest the fields of activities with which they are concerned. But the nomenclature of state administrative organization is not as precise or as well settled in usage as in the national government, so that it is not always possible to tell from a name or title what the subject is with which the agency deals. Sometimes departments are called offices, as in the case of the attorney general or treasurer. At other times the title may be that of a division. If, however, the organization is headed by a single officer, and if this officer is vested with general power of direction and supervision, the form of organization is called departmental. Thus, a department of rural rehabilitation may be headed by a single director in whom authority is vested. A division may be organized into subordinate units, and the organization of both authority and work may be as in a departmental organization. In such a case we speak of the agency as being organized as a department.

Bureaus

Subordinate divisions of a larger organization, often called bureaus, divisions, or offices, are usually organized with respect to a single function. Thus, a bureau of engineering may be found in a department of highways. A bureau of plant diseases may be located in a department of agriculture. In these instances the subdivision is engaged in an activity which is specialized as to function. Another basis of bureau organization may be geographical. A state may be divided into regions for a particular type of work, and one part of the state may be referred to as

the name of a particular district. Still another basis of organization for a subordinate unit is a special clientele. For instance, a children's bureau is organized with respect to the particular type of people with whom it deals. A maternity division is another illustration of the same practice. Sometimes the basis of organization is the use of a special procedure, such as that of mediation in the settlement of labor disputes. The department in which the subdivision is located will usually be called the department of labor, which is based on a functional concept, but the office or division of mediation is based on the particular type of procedure that is used in the settlement of labor disputes. Other divisions may be vested with authority to deal with other aspects of labor and its problems, even involving some aspects of labor disputes. The performance of a special type of service for a group of offices or divisions may also be the basis upon which a unit is organized. For instance, a unit may be devoted wholly to the performance of a stenographic or typing service for several divisions in a single building. Likewise, the unit may be organized to do only mimeographing for a number of divisions or bureaus.

It is never possible to arrange administrative organizations so that no duplication or overlapping occurs, because whether the basis of organization be a function or an area, a special clientele or a special service, it will always merge at the periphery into another basis of organization with which it comes into conflict. Shall the bear in a state forest come under the jurisdiction of the division of state forests or under the division of wild animals? Shall the program of publicizing the recreational and vacation attractions of the state be the special province of the department of commerce or that of conservation? No perfect answer is available to such questions as these. What is needed is to study continuously the total administrative organization of the state with a view to rearranging functions and organizations from time to time in order that the several bases of organization be taken account of and balanced in the entire system to the end that, for the time being, the most effective system of ad-

ministration may be achieved. Administrative organization is always in a state of tentative stability. It is inevitable that it should be so. The price of effective administrative organization is eternal vigilance.

Constitutional departments

In the opening paragraphs of this chapter, mention was made of the fact that a few administrative agencies or their official heads are specifically provided for in the state constitution. The number of these officers varies from state to state, but certain of them appear so generally that it is usual to think of them as the "constitutional offices" of the state administration. In the paragraphs that immediately follow, the more usual of these administrative departments will be described. Those described below all fall within the category of departmental agencies, so far as the form of their administrative organization is concerned, and for that reason their treatment will be included at this point.

1. Secretary of state

The office of secretary of state may be said to have been inherited by the original state governments from the corporate colonies. The secretary was at the outset secretary to the governor and to the legislature, and was custodian of the records of the state. He is in all but five states elected by popular vote, and usually for the same term as the governor. The custom of popular election and the position of the office on the ballot just below that of the governor and the lieutenant governor, have served to exaggerate its importance in the public mind.

The duties of the office, though miscellaneous and mainly of a ministerial character, are quite numerous. Some of these bear witness to the corporate origins of state government. In one state at least the secretary is still clerk of the upper house of the legislature. As the state's secretary he attests the signature of the governor and attaches the great seal to formal documents such as proclamations and commissions. He authenticates copies of acts and other records; he is custodian of the original acts of the legislature and publishes and distributes the printed laws; and he sometimes publishes also the reports of the various departments. He has certain duties in connection with elections

which may include the issuing of election supplies, receiving and publishing returns, and serving ex officio on the state election board to canvass returns and declare the results.

To these corporate duties which may be classed as duties of general administration, have been added some of a service character. Certain of these are perhaps logical outgrowths of the original secretarial character of the office, whereas others have been assigned without logical reason. Because commissions and authenticated copies of legislative acts were sent out from his office, and because corporate charters were originally special acts of the legislature, it was appropriate that certificates of incorporation of domestic companies, and licenses to foreign corporations which had been admitted to do business in the state, should issue from the same office. Later it was but an extension of the same function to place in the hands of the secretary of state the enforcement of the so-called "blue-sky" laws regulating the sale of the securities of corporations. In like manner, when automobiles came to be regulated through the issue of licenses and certificates of title, this was accomplished through the same licensing and certifying office. In all states the secretary of state registers trademarks.

2. Attorney general

Each state has an attorney general. His duties are twofold, staff and line. His staff duties consist of acting as counsel to state officials. In many states, he also gives legal advice to local officials, but inasmuch as these frequently have their own legal advisers, the main staff duty of the attorney general is to counsel state agencies on legal questions. He often acts as adviser to the legislature, particularly with reference to the form of bills being considered by it. In all states, the attorney general gives legal advice to the officials in the executive departments. He assists with the preparation of contracts and legal documents and he interprets statutes defining the powers and duties of administrative officials. His advice with respect to power and duties is given either informally or formally. In many of the states, the formal opinions are published periodically so that

they become available for the guidance of others interested in the point ruled on by him.

In a time when the activities of state governments are being expanded rapidly, the role of the attorney general in the development of state administrative law can hardly be overemphasized. The statutes which provide for the performance of services cannot be made sufficiently detailed to guide administrative officers in all instances. New situations arise for which the law does not provide; the law is left vague at places because the legislators could not agree; the method of procedure thought proper when the statute was drafted proves to be unworkable in practice; or in any number of cases the administrator is not sure what he may or may not do. If he misjudges his powers, he may be personally liable for damages because he acted beyond his authority, so he must obtain the opinion of the attorney general in order to safeguard himself as much as possible. This brings a stream of opinions from the attorney general; for example, in one year in Ohio, there were 1200 opinions covering 2000 pages. Once a point is ruled on by the attorney general, it then becomes a precedent and unless set aside in a court, it becomes the law of the state. Said one observer: "It is a safe estimate that 90% of the administrative law of a state like Ohio finds its source in the written opinions of the Attorney General. Only a small percentage of the questions raised ever reach the courts."[7] An opportunity for strengthening the opinions of attorneys general is afforded by the weekly *Digest of Opinions* published under the auspices of the Council of State Governments. This digest contains the opinions of attorneys general on problems of general interest.

In the performance of his line function, the attorney general represents the state in civil suits and defends state officers when they are sued in their official capacity. Prosecutions of those

[7] Alfred Bettman, *Report of the Attorney Generals' Conference on Crime* (1935), p. 164. Quoted in *State Government*, xiv (October, 1941), p. 251.

accused of violations of the criminal laws are ordinarily conducted through the local prosecuting attorney, but the attorney general usually takes charge of such prosecutions if they are appealed to the higher courts. It is sometimes provided that on request of the local prosecutor, or even on his own initiative if he becomes satisfied that the prosecutor is remiss in his duty, the attorney general may undertake criminal prosecutions in the lower courts.

It becomes apparent, then, that the legal department of state government is in a highly decentralized condition. In the first place, the attorney general has little or no control over the local prosecutors. Furthermore, although the governor is held responsible under the constitution for the faithful execution of the laws, he has no power to direct or compel action by either the local prosecutor or the attorney general, upon whose activities prosecutions to enforce law must depend. It is highly desirable that the relations between the governor and heads of departments, on the one hand, and their legal counsel, on the other, should be marked by confidence and unity of purpose.

In order to give the governor power to carry out his constitutional duty to enforce the law, and to open the way for confidence to develop between the chief law office and the executive officials whom he serves, the attorney general should be appointed by the governor. Most of them (in forty-one states), however, are elected. The terms of all elected attorneys general are either two or four years, there being an approximately equal number of two- and four-year terms. In Tennessee the attorney general is appointed by the supreme court and has a term of eight years; in two states he is appointed by the governor for a five-year term.

3. Treasurer

Three other officers are sometimes provided for in a state constitution. They are: (1) treasurer, (2) auditor of state, and (3) superintendent of public instruction. The first two of these officers are concerned with public funds. The treasurer is the head of a large clerical and accounting department which is charged with the custody of money that comes to the state

through taxes, fees, and the other sources of revenue that will be listed in Chapter 14. He is under heavy bond for the safe-keeping of funds, and is subject to minute statutory regulations as to the rate of interest to be charged on deposits, the standards to be met by banks in which funds are deposited, and the manner in which public funds are invested. He is often the ex officio member of many boards relating to the management of special funds of the state that are created either by the constitution or by statute. He is elected in the majority of states, and with the auditor is an example of an officer who, though deemed important in earlier years, now does so much routine financial work that he might much better be appointed on the basis of merit than elected on the basis of the current political trend. It is no better to have him elected by a legislative body than by the voters at large.

4. Auditor

The auditor's office is also largely a clerical and accounting office, being devoted primarily to the keeping of financial records. This is the office that must pass on the legality of expenditures before the warrants are drawn on the treasurer to pay for the services or goods that have been purchased by the government. It is audit, after the transaction of purchase has been made (post-audit), that is the principal concern of the auditor, and he is not usually given the power to engage in pre-audit work. To permit him to do this would be unwise, owing to the fact that the auditor, often being elective, might be of a different political party from that of the governor or other state officers.

5. Superintendent of public instruction

The superintendent of public instruction, while still popularly elected in a number of states, is generally believed to be an example of a professional type of officer whose selection might better be left to a board of education. As a matter of fact, as will be explained in a later chapter, boards of education exist even in many of the states having the elective superintendent, and the functions of controlling and formulating policy for the educational system of the state is divided, with results that are often unfortunate. The caliber of state superintendents of

public instruction has varied a great deal, but in a few instances truly distinguished men have served in this office.

Field office problems

One of the difficult problems faced by organizers of departments, commissions, or government corporations is the need for decentralizing a certain amount of work to field offices that must be located in different parts of the state. The need for the recognition of territorial factors in administrative organization is more acute in some types of functions than in others. A highway department, to take an illustration, would find it extremely difficult to manage all of the work of the department from one central office located in the state capital. Thousands of employees engaged in a great variety of tasks ranging from the most highly technical and specialized to the most simple and unskilled, scattered over the entire area of a large state, could not be administered efficiently under any form of central office management. Consequently, most state highway departments divide the state into districts or regions. Conservation departments often do the same, and state police boards and state fire marshals' offices have often found it necessary to follow the same pattern of field organization.

In agencies having field offices, the division of authority between the central office and the field office presents a difficult administrative problem. The field office must have enough authority to solve minor problems that flow into it for decision, while at the same time it must not have so much discretion that central offices find themselves unable to coördinate area divisions into a common program. Different attitudes tend to develop among central office and district office workers to cause a further complication in the relations between the two. A great deal of experimentation is taking place in this subject at the present time, and already improvements are being made in the allocation of authority from field to district or regional offices.

Commissions

Boards and commissions, or as they are often called, "plural-headed" agencies, are now used a great deal in state administration. Before they were made use of as a form of administrative organization in state government they were common in city and

other local governmental units. Local boards of education were in vogue for a long time before they were created at the state level. Water commissions were similarly common in cities before public utility commissions came into state government. As we noted earlier, many agencies that are often called departments in state administration are really not departmental in their form of organization, but are plural-headed agencies, whether they are called boards, commissions, or departments. We are discussing a form of organization rather than the formal name of an agency.

The subordinate organization of larger commissions and government corporations is much like that of departments. Bureaus and divisions, and still smaller units below these, are to be found in a large public utility commission or a state health board. Here, too, the same bases of organization apply for these units just as they apply in the case of the department and its subdivisions. Authority may be delegated down along the line in the same manner as in a department, but responsibility rises to the office of director or manager, who in turn is responsible to the board or commission. It is true, of course, that many government corporations or boards are so small that they do not need as elaborate a system of subordinate units as the larger departments, and even in some departmental forms of organization the subdivisional organization is only rudimentary. What we have said with respect to the elaborate arrangement of subdivisions in departments and other types of agencies applies primarily to the larger agencies, and is only partly applicable to smaller organizations.

Plural-headed agencies possess several advantages, but they are also subject to certain limitations. It has been noted previously that officials often are granted authority to make rules and regulations, since their subject matter is so intricate and technical that the legislature cannot deal with its details in a statute. Formulating rules is a task of a semi-legislative nature, involving the making of plans, the weighing of interests, and the exercising of a choice of methods. The administrative decisions to be made are semi-judicial in character, affecting private rights and involving the hearing and weighing of evidence. For these quasi-

legislative and quasi-judicial purposes, the determination of a group was considered to be more dependable than that of a single individual. For this reason, commissions or boards were established to administer some of the new regulatory laws. The commission also made it possible to represent different economic and social interests, and to give different localities representation in the administrative machinery of government. This was an advantage in some of the newer regulatory functions, such as public utility commissions and securities commissions.

Finally, the continuing board, with overlapping terms of members, has been resorted to in order to "take a department out of politics," that is, to avoid the worst evils of the spoils system. In such cases, the continuing board, which is sometimes made bipartisan by law, stands between the subordinate officials and the political effects of changes of administration. The board form, then, becomes a partial substitute for a civil service law. As such, it has sometimes proved very successful in protecting the scientific and professional interests in states where public opinion has not yet reached the stage under which a general civil service law could be enacted or enforced. The plural-headed department came to be used quite generally in the management of many of the state institutions, schools, places of correction, and hospitals, when the control of property or a considerable sum of money was involved.

On the other hand, serious defects of plural heads have been pointed out. First, the work of most departments is chiefly administrative, and such work requires energy and promptness of decision which cannot be depended on from a board. Second, responsibility for specific acts cannot be located or accountability enforced in case of a board. In the third place, the continuing character of a board may be a weakness when, in response to public demand, it becomes desirable to bring about a prompt change of policy in the department.

Again, it is objected that plural heads are uneconomical. If the several members of a board are required to devote all their time to their duties, as is usually the case with a tax or a public utilities

commission, the system becomes expensive through the multiplication of salaries. On the other hand, if they meet only occasionally, as is usually the case with a state board of health, the real guidance of the work is left with a permanent subordinate, and the board itself is not sufficiently in touch with the work of the department to exercise actual and intelligent direction. In such cases, the real work is entrusted to a subordinate secretary or director who exerts the authority of a head without direct responsibility. This condition is especially true when, as is too often the case, the board is composed of the heads of other departments acting in an ex officio capacity with respect to the department in question, and devoting their major efforts elsewhere. It is no unusual situation to find the governor serving ex officio on from five to fifteen administrative boards, and to find associated with him in each case the auditor, treasurer, secretary of state, or other department heads whose time and energies are chiefly devoted to the performance of other duties for which they are especially chosen.

To secure the advantages of both single and plural heads, the plan has been worked out in some states of vesting responsibility for a department in a single head, with an advisory board which must be consulted by the head in quasi-legislative and quasi-judicial matters. This device has been employed with apparent advantage in some of the states whose administrative systems have been recently reorganized. The advisory committee or board may be a difficult administrative device unless it is used with care, because there is a tendency either for the administrator to ignore the advisory group or for the advisers to dominate the administrator. A skillful administrator can make use of an advisory agency for checking his own judgment and for sampling different types of reactions to a proposed course of action, and if he uses his advisers for really advisory purposes, the committee device can be very helpful.

Government corporations

The government corporation, as a form of administrative organization, has not been used as widely in state administration as in the national government, but in earlier years its use was much

more widespread in state government than has usually been supposed. One need only to call to mind the numerous state banks, such as the Bank of Kentucky and the Bank of Indiana, to realize that the corporate form of organization is not entirely new in state administration. During the depression years of the early 1930's a number of states, following the lead of the national government, made temporary use of the corporate device for handling the distribution of feed stock in rural areas and food to needy townspeople as part of the relief program. At the present time the Bank of North Dakota and the several state port authorities are examples of the use of the government corporation in state administration.

For a time many students of public administration thought that the government corporation might be the solution to numerous problems of administrative organization, but experience has demonstrated that this is not true. The government corporation is best suited to types of programs calling for the transaction of much ordinary business in the course of the program. If the activity is one of lending money and managing large property holdings, the government corporation is well adapted to carry on the work. A board of directors is usually composed of selected officers of state government, in addition to representatives of affected interests, such as those of agriculture or banking, and is vested with the power of general control. The board appoints a manager or president or director who is charged with the duty of supervising the operation of the organization. In many respects the operations of a government corporation are indistinguishable from those of a private corporation, except that the board is a public board and the work being carried on is public work. The normal rules of governmental accounting, and in some instances even those affecting personnel, often do not apply to government corporations. This gives a flexibility to their operations which makes it easier for them to adapt their practices to the needs of the particular situation with which the organization is confronted. The government corporation has come to stay, but its place is somewhat more

restricted than was once thought to be the case. Within its limited sphere of operations, however, the government corporation is a superior type of administrative organization.

Procedures

Executive control

When we turn to the administrative procedures that are available to supervise and direct the large administrative system found in the typical American state, we come to one of the weakest links in the entire system of state government. Much improvement, however, has taken place in this field during the last few years, and it is hoped that in the near future the chief executive and his administrative aides, such as heads of departments, will be granted both sufficient staffs and sufficient power to enable them to manage more effectively the state's administrative business.

As has been stated repeatedly in previous sections, it is the governor who is charged with the duty of top management in state administration. But in many states the governor, as chief of a large and complicated administrative organization, has an office staff better suited to direct the work of a small distributing plant in industry than to the direction of a force of thousands of public employees engaged in one of the most important concerns in modern society.

The long movement for reorganizing state administration that was described in the first section of this chapter had as one of its chief goals the strengthening of the office of governor as the head of the administrative system. With this in mind several states gave to the governor increased powers not only over personnel and budget matters but also over the process of spending public money by the administration that was supposed to be under his control.

Staff aides

To achieve this control commissions on administration and finance were established in some states, budget and accounting bureaus were created in others, and executive control was given over personnel systems in a few states. Through the power of appointment and removal, the governor was supposed to be

able to control the work of these agencies in such a manner that through them he could influence the administrative action of all agencies in the state administrative system. A novel experiment with the machinery of management is the commissioner of administration established in Minnesota in 1939. This official, subject to gubernatorial control, among other things, is charged with duties of budget preparation and execution, purchasing, maintenance and operation of public buildings, and public reporting. This kind of agency could open the way for raising the level of state administration higher than could be achieved by centering the managerial power directly in the governor, since, in such a case, management could be no better than the particular governor of the time. With such an arrangement as that in Minnesota, the momentum of affairs of the state might carry over the interim of weak leadership, on the assumption that the commissioner would remain an able administrator.

Methods of control

The governor, as chief executive of the state administrative system, has the powers and procedures of control that are usual in chief executives. As we have seen in the chapter on the governor, his powers of control are broader than a reading of the constitution and statutes might lead one to believe, because he is the head of his party as well as of the state administrative system.

1. The governor is the officer in state government who formulates the general principles of administration that are to be followed during his term in office. Many of the campaign promises made by most candidates for governor require legislative action before they can be fulfilled, but often a successful candidate for governor has made promises concerning law enforcement and administrative policies to be applied. For example, he may have promised to enforce the liquor laws. He may have promised to strengthen the work of the conservation division. He may have promised to abide faithfully by and give his unstinted support to the merit laws of the state. Both by public pronouncements in the press and over the radio and by directives sent to heads

of agencies, he may indicate the general lines of the administrative policies that he intends to follow.

2. As chief executive the governor often gives commands to subordinate administrative officers, and these may be specific or general in nature. He may find it necessary to correct some specific situation that has come to his attention, or he may wish to change a practice that has been followed in many different agencies. In times of financial emergency he may issue orders to subordinate officials that great care is to be taken to save money, and he may even indicate by what specific methods he thinks savings can be effected. This power of general direction, supplemented by the practice of giving specific suggestions or commands, is a very important power and procedure in the hands of the managerial head of any system. It must be used with tact and caution, but it must be used when and where it is needed.

3. The power to create positions and offices rests with the legislature in state government, and there has been much less tendency in state government for the legislative body to authorize the chief executive to establish administrative organizations, change them, create positions, or assign duties to positions than there has been in the national government. In a few states small beginnings have been made in this direction, but in general it must be said that the governor possesses this power to a very limited degree, and often not at all.

4. The power to request information from heads of agencies is a power that is both legal and political in its implications. As has been noted, some officers are practically independent of the governor because they are provided for in the constitution and elected by popular vote. By means of the request for information a governor may occasionally bring to light a very bad situation in one of these constitutionally independent offices, and even when, as is usual although not universal, he has no power to remove one of these officers, he may focus public attention upon the office to such an extent that the incumbent will find it necessary not only to correct the situation but to coöperate

with the policies of the governor as well. In the normal course of administration the governor need not depend on his legal or political powers to obtain information, because in the ordinary day-to-day performance of administrative work it is so generally customary to prepare reports to one's superiors that requests of this kind are taken as a matter of course.

5. The power of the governor to appoint officers of state administration has been discussed in the preceding chapter, but reference to it will be made at this point to indicate that the power has been greatly extended by statute. The ordinary procedure is for the legislature, when it creates a new office, to give to the governor the power to fill it by appointment. Many governors are not as greedy about the right to make appointments as the public might think, because the task of filling hundreds of offices by appointment is not without its drawbacks. It is an old maxim of politics that for every satisfied man, three others are rendered enemies by each new appointment. The governor often makes use of political advisers and party machinery to assist him in making political appointments. This is not only legitimate in filling political positions, but often there is little choice in the matter. There is no way in which he can personally sift the claims and qualifications of all the claimants to political preference. Civil service laws sometimes relieve the governor of some of the tedium and responsibility in determining qualifications, although usually these laws do not apply to most of the positions to be filled by the chief executive. By wise appointments to the higher administrative positions the governor can do much to control the general policy of administration, and at the same time gain real assistance in the execution of his administrative policies.

6. The power to remove officers is now a very broad power of the governor, although here again his power is largely derived from statute rather than from the constitution. The reverse is true in Indiana, as we noted in the chapter on the governor, for in that state the governor has powers of removal as broad as those possessed by the President in the national government.

Members of commissions are often practically immune to executive removal in state government just as they are in the national government. The power of removal has even been extended in a few states to certain important local government officials whose work consists partly of the enforcement of state laws. The existence of the power to remove is usually sufficient to achieve control over subordinates, but the threat of its use and its actual use now and then do much to establish the governor as head of the administrative system. Merit laws which often restrict the power of removal both by prohibiting removal for certain causes, such as race, religion, and political allegiance, and by prescribing hearings or other procedures to be followed usually do not apply to the governor, because so few of the positions filled by him fall within the class covered by these statutes.

7. One of the most important of all the administrative functions of the head of an administrative system is that of coördinating the work of the several departments and agencies that are concerned with various phases of a general program. The newspaper-reading public is often treated to lurid stories of acrid and persistent internal administrative warfare between agencies which should be working together on a common program. It is the task of the governor to iron out differences, to allocate to each of the divisions the portion or phase of the work that it should undertake, and it is his duty to see to it that the laws be not only faithfully executed but that they be executed with a certain amount of harmony among administrative agencies. Personality and administrative skill are significant factors in determining the success of a governor in this field, and the importance of coördination is so great that failure to discharge this duty with a high degree of skill is likely to bring political as well as administrative repercussions.

Departmental controls

Needless to say, the governor cannot do all the work of administrative supervision in state government. In fact, most of it must be done in the normal course of administration by the heads of the agencies themselves. The head of a large bureau, division, department, or the manager of a government corpora-

tion, or the director of the administrative branches of a commission must perform a great deal of top management work. To be able to rely on the discretion and tact of an experienced and able head of one of these administrative agencies is for the governor to be able properly to discharge many of the other duties of his office which press on him for attention.

The managerial head of a large department performs some of the same type of work that is performed by the chief executive himself, though in a more restricted manner and within a more limited area. He may have power to appoint minor officers, may be given broad powers to employ suitable help of all types, subject to merit systems if they exist, and often remove those whom he appoints, subject again to civil service laws, if these are in force in his state or division.

The head of a department ordinarily allocates the work to be done by the several divisions under his supervision, receives reports on the progress of long-range projects, holds staff conferences with subordinate administrators, and issues general orders relating to office practices and financial operations within his agency. In general he keeps the agency operating in an efficient manner, and not the least of his functions in this respect is the building of a loyal group of workers who know the significance of what they are doing and feel that they are recognized as parts of an important agency in carrying out their program. The fine line between high and ordinary morale is often the best measure of the administrative skill with which administrators at all levels carry on their management of men and materials.

Conclusion

State administrative systems have been changed as the role of government has been increased, but there is always a lag between the needs of the moment and the state of the operation of the existing system. Much remains to be done in adapting administrative organization in the states to the needs of the times, and it may be expected that greater improvement will take place in the years to come than has taken place during the earlier phases of reorganization. The realization that statutory reorganization alone is insufficient is slowly gaining more widespread attention.

In future revisions of state constitutions we may expect to see basic changes in the constitutional provisions relating to administrative organization. Greater integration of the administrative system must await these revisions of the constitutions of the states, but at the present time there is a quickening interest in both administrative reorganization and constitutional revision.

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CHAPTER 13

PERSONNEL, PURCHASING, AND PLANNING

In this chapter the personnel, purchasing, and planning aspects of state administration will be considered. These are not new phases of state administration, but in recent years they have become of such paramount importance that special attention has been given to them.

Personnel, planning, and purchasing are at different stages of evolution in state government, not only in the concepts relating to their organization and operation but among the several states themselves. In the paragraphs that follow a sketch will be given of the major points on which theory and practice seem agreed, so that an understanding of the ends to be realized and the moves to be followed in each of these three fields may be clearly understood.

Personnel

Early practice

The means of obtaining properly trained and competent personnel has always been a problem for government, and in state government it has been no less a problem than for government in general. In early state governments personnel procurement was not so difficult, however, because of two factors. In the first place, government performed only a few functions, so that only a few officers and employees were required. Many of the state and local positions were filled by election or by political appointment. In the second place, there was a prestige that attached to governmental employment or to official status that made it relatively easy to attract trained and competent men for the positions that were to be filled.

The upper classes were still influenced by British tradition, and in that tradition it was customary for some of the sons of the leading families not only to enter politics but to engage in administrative work in the higher levels.

The older practices changed, however, with the rapid settlement of the West, and with its attendant formation of numerous new governmental units, both state and local.

Spoils system

Early state practice made use of political appointment or of election to fill offices and positions, but appointment, though political, had been based primarily on merit; that is to say, men were appointed because they were qualified by training and experience for the work of the position they filled. This practice broke down in the states before it broke down in the national government, despite the mistaken idea that President Andrew Jackson was responsible for introducing the "spoils system." "To the victors belong the spoils," was a slogan not of Jacksonian origin; it owed its origin to state politicians. It arose not only from the pioneer influence in state and local government, but also from the factionalism that had been developed during the years of the "era of good feeling" under the Presidencies of Madison, Monroe, and John Quincy Adams. The innovation of the spoils system no doubt had its connection with the rising tide of materialism which swept the nation during the first great wave of westward expansion, following the close of the War of 1812.

Even the worst spoilsman, however, could not insist that the position of engineer or physician be filled by a farmer without any technical or professional education or training, and there were throughout the period some offices which required of their incumbents at least a formal showing of qualifications. It is true, nevertheless, that public service fell to a low point in prestige, and that for many years during the succeeding decades partisanship "ran wild" in the filling of public positions. Unfortunately, despite the fact that many of the appointees were honest and public-spirited officeholders and employees, the temptation to surrender to forces of corruption was too great to be resisted by any except the strong-minded.

To make matters worse, the period of low prestige for government personnel corresponded with the period of disintegrated administrative organization.

At the very time when the power to control and supervise administration was of the most urgent type the governor was almost powerless to control administration. The only factor which made the situation tolerable was the political control exercised by the governor, as head of his party, over his subordinates who were politically, if not always legally, subordinate office-holders or administrators.

The low level of administrative performance which is so often associated with this period in our history at the national as well as at the local level of government is owing to the facts that the administration was both partisan and irresponsible. Obviously, this situation could not prevail indefinitely.

The growth of the spoils system was accelerated by the prevalence of two ideas, outgrowths of the crude conceptions of democracy existing at that time. The overemphasis of partisan struggles which grew out of the general agreement of the times that popular election was the only democratic means of selection of public officers. This led political leaders to seize upon office as a means of political inducement or reward. It was believed that not only was every citizen competent to hold any office, but that he should be given the opportunity to do so. This led to rapid rotation in office as an expression of equality and as a safeguard against the formation of an officeholding class.

So long as the duties of state administration were non-technical, the immediate effects of the spoils system were not seriously harmful; but it had the effect of creating an attitude on the part of the public toward public employment which was later to prove a serious obstacle to efficient government. When, after the Civil War, the states began to be called upon to perform functions of a technical nature, necessitating scientific or other specialized knowledge and requiring large staffs of employees, the inherent evils of the system were revealed. It became apparent to observant persons that the system was most in-

efficient. Moreover, it was seen to be highly unfair, not only to the faithful employee but to the taxpayer whose money was being used for the paying of political debts rather than for the rendering of public service.

It would be well if the taxpayer, while not accepting fully all the implications of the benefit theory of taxation, could be made to feel that when he pays his taxes he is purchasing services. He might then come to realize that under the spoils system he is likely to be securing, in return, something less in quality of service rendered than he would if public employees were selected on ability and retained on account of merit. He usually fails to connect in his thinking taxes paid and service rendered, and consequently steps to remedy the evil have been slow and halting.

Civil service

The year 1883 marked a turning point and opened what may be called the "civil service" period in the history of personnel administration in the United States. Not only did Congress enact the Federal Civil Service Act in that year, but New York passed the first state civil service statute. Massachusetts followed the next year. More than twenty years later, in 1905, Illinois and Wisconsin passed similar acts. Subsequently others followed until, down to the year 1948 similar statutes applicable to state employees have been enacted in twenty-two states. Other states, as will be described in a later paragraph, have by law or by departmental practice introduced features of the system applicable to certain groups of employees.

The character of the earlier civil service laws was determined by the greater evils observed in the operation of the spoils system. Consequently the system inaugurated by them was chiefly negative in character. They sought, first, to prevent incompetent persons from entering the service, and, second, to prevent the removal of persons in the service for political reasons. Though originally thus narrow in their scope, the later laws, as well as the earlier ones by amendment, have been broadened to include various other elements appropriate to a complete personnel program.

While merit systems, or as they were formerly called, civil service systems, are established by statute in the states having them, a few states have given a more solid legal foundation to their merit systems by adopting constitutional amendments in which the main principles to be followed by the legislature in establishing and maintaining the system are outlined. Michigan and New York are examples of states in which statutory provisions are supplemented by constitutional provisions.

The New York provision, Article v, section 6, reads as follows: "Appointments and promotions in the civil service of the state and all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive. . . ." The exception following after the rule thus stated provides for the appointment of veterans in preference to any others.

The merit provision of the Michigan constitution, Article vi, section 22, adopted in 1940, was an attempt to make the state personnel service immune from all possible attacks by the spoilsmen. An independent commission with long staggered terms is established by the provision, and all positions in the state service with the exception of a few which are specifically enumerated are placed under the merit principle. The appropriation to operate the personnel office is made mandatory, and all provisions of the section may be enforced by injunctive or mandamus proceedings. Because of the far-reaching character of this amendment, all of its relevant clauses are set out in full:

> The state civil service shall consist of all positions in the state service except those filled by popular election, heads of departments, members of boards and commissions, employees of courts of record, of the legislature, of the higher educational institutions recognized by the state constitution, all persons in the military and naval forces of the state, and not to exceed two other exempt positions for each elected administrative officer, and each department, board and commission.
>
> There is hereby created a non-salaried civil service commission to consist of four persons, not more than two of whom shall be mem-

bers of the same political party, appointed by the governor for eight-year, over-lapping terms, the four original appointments to be for two, four, six and eight years, respectively. This commission shall supersede all existing state personnel agencies and succeed to their appropriations, records, supplies, equipment, and other property.

The commission shall classify all positions in the state civil service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the state civil service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the state civil service. No person shall be appointed to or promoted in the state civil service who has not been certified as so qualified for such appointment or promotion by the commission. No removals from or demotions in the state civil service shall be made for partisan, racial, or religious considerations.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the state civil service and who shall be responsible to and selected by the commission after open competitive examination.

To enable the commission to execute these powers, the legislature shall appropriate for the six months' period ending June 30, 1941, a sum not less than one-half of one per cent, and for each and every subsequent fiscal year, a sum not less than one per cent, of the aggregate annual payroll of the state service for the preceding fiscal year as certified to by the commission.

After August 1, 1941, no payment for personal services shall be made or authorized until the provisions of this amendment have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

Installing a merit system

When a merit law is adopted, two of the most difficult problems that must be settled are: (1) How shall the new statute affect persons who are now in office or position? (2) How many of them shall be included under the merit system?

Several different methods can be used in providing for the introduction of the merit system. The new law may provide that everyone in the service at the time, or within a certain period

following the adoption of the statute, shall take an examination. This examination may be open to everyone on a competitive basis, or it may be open only to those then in the service. The rule may be that if the person already in the position passes the examination he may retain his position, or it may be only that he is eligible to appointment to it. All positions may be declared vacant, and then of course new appointments must be made after the examination to fill them. Usually an attempt is made to stagger the work so that one group after another is dealt with, in order to avoid too great congestion in the personnel office. This office itself must be organized, and for this reason it is necessary to give some time to those in charge of inaugurating the new system for organizing and planning the details and procedure to be followed in making the change.

In many ways, one of the most effective methods of inaugurating the merit system is to provide that after a certain date all new appointments must be made on the basis of merit, thus making it possible to introduce the system gradually, meantime perfecting organization of personnel agencies and working procedures. But to this method many reformers object seriously, because they feel that it is too slow in "ousting the partisans."

Scope of merit system

The scope of merit laws formerly differed greatly, but now it is usual for a state, when it adopts the system, to apply it to all employees in the state system, except for a few positions involving primarily discretionary or political types of work. There is a tendency also to make the state system flexible, in the sense that if not all of the agencies are included or "covered in" at the time of the adoption of the law, they may be included later. Missouri and Indiana do not include all agencies, but in Missouri the door is left open for extending the system to other agencies. Under the Social Security Act the national government now requires all state agencies receiving national subsidies for carrying on work authorized under that law to provide for merit systems in the agencies dealing with this work. In the states not having general merit laws for their agencies it has been necessary to establish personnel councils or agencies or offices to

handle the application of the merit principle for the boards or departments administering welfare work. New York, as was noted above, and some other states also provide for the application of the merit system to municipalities, or authorize local governments to request assistance of a technical character if they wish to establish a local service.

State merit laws have certain points in common, but with respect to other subjects they differ a good deal. The following paragraph is a summary of the more usual subjects dealt with in these laws.

> Civil service laws in the various states, while having much in common in the way of general principles, differ from one another in many respects on matters of policy and procedure. The general subjects found in the majority of state civil service laws include the establishment of position-classification and pay plans, the preparation and administration of employment lists of persons who have been examined and found qualified for employment, the regulation of transfer and promotion, the provision of machinery for hearing employee grievances, and the certification of pay rolls for compliance with the merit system law.[1]

Classification

Preliminary to the process of intelligent selection and promotion there is a "duty" or "job" classification, under which the duties of the position and the qualifications to be demanded are set out. The positions are arranged in ascending scale according to the degree of skill or responsibility involved. On the basis of these data selection is made and the salary scale built up. By such a classification it is possible to make intelligent selection and to provide equal pay for equal work. In some states much has already been done to place the service on a sound basis of job analysis and classification.

When a merit law is superimposed upon an existing administrative system, the task of position-classifying is an important one to execute, and a trained corps of workers is required to perform it. A close study of the actual duties performed and the responsibilities discharged by each worker in the administrative

[1] "Personnel Administration," *The Book of the States* (1948–1949), p. 195.

organization is made. Positions with like duties and responsibilities are grouped together into classes. Then they are ranked in grades on the basis of the difficulty of the tasks performed. Specifications are written for the classes of positions and for the different grades, and these specifications are of great aid in personnel administration. Tact is required in carrying on a classification of positions, because employees often fear that if their duties are not given sufficient importance the positions they hold are likely to be graded below their true importance. Once the employees realize the true nature of classification, however, they usually can be counted on to coöperate in the task.

Recruitment

The problem of persuading people to take examinations for positions in the state service is not a difficult one when the merit system is first applied to the service. Those who are in the service at the time are usually willing to compete or to take examinations to retain their positions. But after the merit system has been adopted and the first problems of position retention have been settled, the task of obtaining well-qualified and competent applicants for examinations becomes more serious.

In a state service there are several hundreds of different types of positions to be filled, ranging from strictly professional positions to jobs that require almost no training or experience. The greater the variety of technical and professional positions to be found in the service and the greater the variety of highly skilled jobs there are to be filled, the more important it becomes to persuade well-trained and competent persons to take the examinations for these positions. For many years no attempt was made by personnel offices to attract able applicants for examinations, but more recently much attention has been paid to this aspect of the government service. Publicity by newspaper, by poster, by radio, and by conferences at training schools is now regularly employed, in addition to numerous other means, to make known to promising personnel that there are positions to be filled and that examinations are to be given to interested persons.

One phase of this process—known as recruitment—of attract-

ing competent applicants to apply for permission to take examinations for the public service should be mentioned particularly, because it relates to future developments of interest to college students. Some of the state services have begun programs for interesting the most able college students for work in general administration, just as the national government has done for several years. Students in professional and technical schools naturally apply for the examinations in their specialties, such as medicine, engineering, accounting, and others, but in recent years a feeling has developed among personnel officers that students with a knowledge of personnel, budget procedures, and the principles of general administration or management should be recruited for junior positions in this general field.

A number of colleges and universities have inaugurated programs of study preparing for this type of career, and several of the state merit systems are integrating their recruitment more closely with the training programs of these educational institutions. On the other hand, academic programs have been greatly benefited by the suggestions of administrators with respect to the kind of training best suited to prepare young men and young women for a career in public service.

Examinations

Qualifications, of course, must be fixed for those who are to be permitted to take examinations; otherwise, personnel agencies would find themselves burdened with hundreds and even thousands of applicants who would take examinations without any chance of success. This would create a large body of disaffected persons who, in many instances, would be unable to understand why they should not have passed the examination, and who might even find it difficult to understand why they should not be appointed despite failure to pass. Usual qualifications for admission to examination concern age, residence, educational preparation, citizenship, and, in some instances, sex. The requirements of age and citizenship are self-explanatory for many types of positions, but the deeply rooted prejudice against "outsiders" has given rise to some difficulty in recent years. In most states there exist a few technical and unusual positions for which

only a few qualified persons are to be found in the entire nation. Recently, exceptions to, or relaxations of, the residence requirements have made it easier to deal with this problem. The residence rule, however, is still adhered to rather strictly in most jurisdictions. Experience constitutes another requirement which is still given great weight in many positions, and is, therefore, still used as a qualification for admission to examination.

Experience often conflicts with educational preparation as a qualification, and there is a tendency now evident to substitute as an alternative to experience educational preparation for certain types of positions. The problem is not a simple one, because people with applicable experience often insist with reason that they are well fitted to perform the duties of the position that is being filled or for which an examination is being held. But in answer to this insistence, college and training institutions often argue that the career aspects of service are not given sufficient emphasis if the possibilities of future promotion and leadership are ignored. Experience as a qualification does not necessarily ignore these considerations, but it is true that it sometimes tends to minimize the long-range view which is so important in educational preparation for administration.

State merit laws and constitutional provisions tend to favor, and even to require, that examinations be practical. That is to say, examinations must be practical in the sense that they test for the duties of particular types of positions. In recent years, however, personnel agencies have so improved examining techniques that it has been possible to test not only for a knowledge of the practical aspects of the positions themselves, but also for general intellectual ability. The large number of positions that have to be examined for in many of the state services, in addition to the large number of applicants for these examinations, has made the use of short-answer questions on examinations a necessity. These examinations, if carefully made, can easily be adapted to include tests for both qualities. For most positions the written examination is all that can be given, but in the higher positions the written examinations are often supplemented with oral examinations

or interviews. In connection with the oral examination great care must be taken to see to it that the grading system is based on objective principles, and that the qualities to be scored are susceptible to relatively objective scoring.

The typical personnel agency maintains persons on its staff who give their full time to formulating and administering examinations. Their work is of the greatest importance in personnel administration.

Eligible list

The names of the persons who pass the examination for a class of positions are arranged on a list in the order of their rank on the examination. This list is called the eligible list. The civil service commission or the personnel administrator, as the case may be, is usually empowered to determine the period of time during which an eligible list is to be effective. After the expiration of this period, which may be a few months or a few years, depending upon the factors to be considered in each situation, the list is said to expire. Those whose names still remain on the eligible list at the time of its expiration as a rule must take a new examination if they wish to be considered again for appointment.

Certification

When a position is vacant or whenever a new position is created, the officer who is charged with the duty to appoint a person to fill the vacancy notifies the personnel agency that he wishes to make the appointment. The statutes usually state that the three persons whose names stand at the top of the list shall be certified to the appointing officer. In a few jurisdictions in states and cities, the highest person must be certified. Various formulae are worked out to govern the number of names to be certified from the list when several positions are to be filled at the same time. In some states the certifying officer must send twice the number of names for the total number of positions to be filled.

The process of certification is often a routine matter, but it may involve a number of difficulties in some instances. There is a rule in some jurisdictions that if a person's name has been certified three times and returned, his name need not be certified again. Also, veterans, disabled veterans particularly, are entitled

to special preference. In some instances these preferences operate to qualify a veteran for examination despite lack of normal requirements of age or formal preparation, but at other times the preference is for certification from the eligible list. Some state laws require that veterans must be certified from the list as though they were at the top no matter how far down the list they may be. Other laws give the veterans a bonus of grades, such as a certain number of points, and this places them higher on the list than their true grades would otherwise entitle them to be. In still other instances, veterans are preferred in appointment, the rule being that the appointing officer must appoint a veteran when one is certified to him, if the other two are non-veterans.

Appointment

The merit laws or, as they were formerly called, civil service statutes, do not change the location of the power of appointment. If the head of a department had the power to fill a position before the enactment of a merit law, he still retains it. All that merit laws do is to provide a system for making certain that the names sent to the appointing officer are the names of reasonably competent persons. The officer who makes the appointment usually may exercise some judgment in his selection, so that he may choose any one of three names sent to him, unless the veterans rule applies, and in this way factors of personality, sex, and experience can be taken into account by him. This is as it should be. Merit laws are not to replace the judgment of an appointing officer; they are merely to insure a minimum degree of competency, and a harmless amount of partisanship in appointment to public employment. Thus, it is perfectly proper for a Democrat to appoint a member of his own party if the latter has a high grade. The public service is not damaged by this kind of partisanship.

Promotion and efficiency ratings

Some intelligent system of promotion on a basis of merit is a necessity to a career system. In-service training may be adapted to preparation for promotion. To make promotion more than a result of chance or favoritism, and hence to make advancement a real reward of merit, systems of service ratings such as have

been worked out in private enterprise have been taken over into public personnel administration, although much remains to be done in the development of rating scales which are in every respect satisfactory. On such ratings are made to depend salary raises, promotions, transfers, demotions, and removals.

In some jurisdictions examinations must be given for many promotions, as though promotions were just like original appointments, and therefore to be made primarily on the basis of examination. It is usual, however, in the case of promotions, to give greater weight to experience than is likely to be true in original appointments to lower positions. The weighing of factors for promotion, such as education, length of experience in *the service, experience in similar positions outside the service,* and examination grades, often turns out to be one of the most vexing problems faced by personnel administrators. Also persons who are already in the service in positions subordinate to the one to be filled by promotion are always certain that the examination should be restricted to persons in their group, whereas there are situations in which the higher administrators feel that the time has come in the particular bureau to draw in "new blood" from the outside, and therefore decide to admit both insiders and outsiders to the examination. Veterans' preference often extends to promotion in the same manner that it extends to original appointment; however, this is not an invariable rule.

Removal

The older laws are content with forbidding removals for political reasons. Later laws have placed additional restrictions upon removal until there is now criticism, even from friends of the merit system, that the process has been made so difficult as to hamper the department head in controlling the work of his department. In most states the person removed has notice and opportunity to be heard in reply to charges. A copy of the charges must ordinarily be filed with the commission, and in Illinois appeal from the order of removal is heard by the commission and it may reinstate the person removed. In Massachusetts and New York appeal is to the courts.

Removal of persons who are no longer competent, or who

have otherwise become unfitted for their positions, is a difficult problem in modern civil services. The merit principle really includes not only appointment on the basis of merit but also retention on the basis of merit. The tendency of modern labor organization, however, is to make it difficult for supervisory personnel to remove subordinate personnel, and the natural tendency on the part of the public is to sympathize with the person who is about to be discharged from his position. It is often possible to stir up sufficient pressure on the removing officer to dissuade him from making a removal, even though it would actually be good for the service. The needs of management and the needs of employee security and morale are not easily balanced in the particular case, and the hearing of removal cases often embroils the civil service commission in unfortunate squabbles with subordinates. New York has gone almost to the extreme in using court review of removal proceedings, thus relieving the personnel agencies of much of the odium that attaches to this type of work.

Retirement

No civil service system is complete without adequate provision for retirement of disabled or superannuated employees with suitable allowances or pensions. Salaries in the state service are usually insufficient to permit employees to make provision for old age or permanent disability. The result is that without such provisions there is a tendency, due to the soft-heartedness of department heads, for the service to become clogged with persons who are incapacitated for efficient service.

Pension funds have long been provided in some places for police, firemen, and teachers; but it was not until 1921, when New Jersey passed such a law, that a retirement system was provided for a general state service. Under this law, employees at the age of sixty years, or earlier if incapacitated, receive an annuity from a fund created by contributions from those in the service supplemented by pensions supplied by the state. Statewide systems of retiring allowances have been inaugurated in two-thirds of the states.

Pension systems in state governments are tending to be com-

pulsory, although several are still voluntary. Some state systems permit elective officials to be covered if they wish. Contributions by both the state government and by the employee are usual, but disability provisions are included in only a few of the existing laws. Recently, more attention has been paid to the actuarial soundness of the systems than was done in earlier years, with the result that technical consulting services are obtained to assist the board of trustees charged with the administration of the retirement program. Social security laws in the national government have done much to make pensions popular, and it is now generally realized that the beneficiaries of a pension system should not be limited to employees on a merit system. The increase in morale and efficiency resulting from the organization of a sound system of pensions has been so noticeable that it is believed to be only a matter of a few years until all public employees of a career type will be covered by systems of this nature.

The administration of personnel in the state administrative system is of prime importance to the chief executive. In the first civil service laws the attempt was made to insulate the civil service commissions from partisan control and this meant, specifically, from control by the governor. It was not possible, of course, to achieve perfectly this separation of the merit system from administrative supervision on the part of the chief executive of the state, nor should it have been possible to do so. In more recent years it has been realized that what is of the greatest importance is not that partisanship be entirely eliminated from appointment, but that competency be insured. In addition, it has been found that a more positive approach to personnel is required, with emphasis among other things upon career, conditions of work, prestige, and morale.

For this reason there has been a tendency to utilize the advantages of the single personnel administrator in a few states, such as Connecticut and Maryland, and to integrate control over personnel policies more closely with the office of governor. With the passage of time it may be expected that this trend will

be accelerated, so that personnel will become a phase of administrative management.

Purchasing

The procurement of supplies and the making of contracts for services is another phase of public administration that has undergone marked change during the last few years. Originally, whenever an agency of the state government needed a piece of equipment it would handle the purchase itself. It would make the purchase under whatever rules were laid down by state law, and very often these rules were either non-existent or they were so strict that it was difficult for agencies to comply with them. The reason for this situation was that purchasing was left largely unregulated until some notorious scandal occurred, as a result of which there were likely to be sensational newspaper publicity, court proceedings, and sometimes prison terms. The next session of the legislature would attempt to enact legislation to prevent the recurrence of practices leading to such a scandal. In its anxiety to purify the system the legislature would often make impractical rules and place the agency in a purchasing strait jacket. This extreme created a problem that was almost as bad as the original difficulty.

Wasteful methods

Purchasing of supplies and equipment was handled originally by each agency and institution individually, as we noted in the preceding paragraph, and this resulted in a wasteful method of procurement. There was no uniform method of determining the quality of goods required for particular agency uses, or any attempt to standardize quality. Purchases might be made just at the season when private commercial demand for the same supplies was at its height. One agency might do its buying carefully, planning far ahead so as to insure the best qualities when money could be saved in that way. But usually one agency could not buy in sufficient quantities to make substantial savings, either because it had inadequate storage space or could not use such large quantities of the goods.

Wasteful also was the influence of politics in contracting and

supplying government with its needed merchandise and services. It was not unusual to find that a political favorite had the business of supplying a particular type of equipment to all the state agencies using it. And the price might be far above the market price, but in the absence of pitiless publicity and in the absence of a centralized system of purchases, this might easily escape attention. Competitors might not complain, because they might be obtaining the same preferment in some other line in the same or in some other state.

Inferior quality often characterized the goods sold to state institutions under these conditions. Deliveries were frequently sporadic and inconvenient. The vendors had no real incentive to perform a satisfactory job of supplying the material wants of the service. When the election went the other way they would lose their market anyway, they reasoned, and acted accordingly.

Extent of centralized purchasing

Centralized purchasing at the state level began in Iowa in 1897, when that state required state institutions to make use of a centralized state purchasing service. Now forty-two states have centralized purchasing offices, divisions, or agencies. Some of them are parts of a general fiscal agency, while others are organized separately under a committee or commission. Fifteen states have made the purchasing office an independent office or agency, subject only to the control of the governor.

Purchasing divisions do not control all purchases made by state administrative agencies or all state institutions, nor do they control the purchases of all goods. But, it is true that in an increasing number of states the exempt list of institutions and agencies is growing steadily smaller, and that the exempt list of articles that can be purchased independently is also growing shorter. It is necessary, of course, to have some flexibility in purchasing. For example, most purchasing laws recognize that small items can best be purchased by the individual agency and that the procedure to be applied in these instances may be very simple. Also, contracts that involve small outlays and no deviation from settled policy may safely be left to individual agencies. The problem arises over the point at which the line should be

drawn between those matters to be left to agency discretion and those which should be subjected to centralized control.

The process

Not infrequently, for example, contracts for supplies involving less than one thousand, five hundred, or two thousand dollars may be left to informal procedures. For the larger purchases or contracts sealed competitive bids may be required. The usual procedure is to advertise for bids. This is done by placing in trade magazines or elsewhere an advertisement which contains a description of the goods wanted, quality, quantity, and other specific information needed by vendors of the goods. A date is indicated when the bids must be submitted. At a time stated, the bids are opened and the contract is awarded to the lowest responsible bidder. Competitive bidding is almost the uniform rule on larger purchases. But even here it must be recognized that emergencies do arise when it is necessary to depend upon the purchasing agent to proceed immediately to the open market to make the purchase.

The typical purchasing procedure, where centralized purchasing is utilized, is for the agency to initiate its purchases in accordance with a previous estimate of needs which it is required to file periodically. From time to time amendments to the original estimate may be filled. The requisitions, or requests, for the purchase of supplies are signed by the officer or employee who is the head of the particular bureau in which the article is to be used. This requisition is then sent to the superior officer, who may be a departmental head. If the department is a large one, it may even have a purchasing department of its own. The requisition will in that case be sent to that office for action. From this office it will, after the department head has approved the purchase, be forwarded to the central purchasing office. There the request will be studied. It may be that the purchasing division already has a large stock of supplies which can be used for this purpose but which do not meet the exact specifications of the requisition. The purchasing division may contact the bureau to see whether or not it would be willing to take one of these articles as a substitute. In many of these instances, of course, the

purchasing division has been able to make a large-scale purchase at a bargain price. In many cases it makes no difference to the bureau whether it takes one or another of two articles that serve the same purpose. At other times, of course, the bureau may insist upon a particular article, and in that case it is entitled to do so if it can show that it really makes some difference whether or not it is permitted to use the particular article it requested.

Purchasing, even though centralized, is still far from a perfected technique in state government. Much work remains to be done to improve standards, specifications, and alternative uses of many products or supplies. Coördination of agency purchasing so as to take advantage of seasonal gluts of the market, and similar methods to plan buying, still remains to be perfected in many jurisdictions. Politics have not been entirely eliminated from contracts and purchases, although much has been accomplished along this line. In a few instances local preferences still cost the state both in quality and price. Nevertheless, a good beginning has been made in the technique of purchasing and in the supervision of large-scale purchases by individual branches of the state administrative system. **Future**

Planning

The word "planning" has come to have an unsavory meaning for some Americans. In their minds it is associated with concepts like "the planned society," or "the planned economy," or other forms of national political, economic, and social organization often thought of as authoritarian.

Planning, however, is a function that is always being carried on in any society, although we do not always think of it as one of the necessary functions of society. **Universality**

When a railroad located its main lines and feeder lines along a certain route it, in fact, planned the future development of the adjacent lands just as certainly as though a governmental agency had told the people who were to come into the region that they should devote themselves to certain types of economic activity. Even the location of cities and villages is affected by railroad

location. So too, in more recent years, numerous examples of the effects of highway location, whereby one village is virtually doomed and another practically insured of long-time success, are known to all persons old enough to have followed the era of trunk highway building between World Wars I and II. A lumber company may effectually plan for a locality by its timber-cutting policies. We seldom think of these operations as planning, but in effect they are just that. The fact that planning has had results does not mean that it is not planning. The important fact to keep in mind is that planning is going on continuously in society, carried on by private business, by public agencies, or by combinations of the two. An early and the most far-reaching plan of American history is the United States Constitution. In it the fathers set the pattern for the political development of a great nation. Their plan promises to be a plan beyond the farthest horizon of the future.

National resources

Perhaps the most widespread interest in economic planning, so far as the states are concerned, came in connection with the conservation of national resources, such as fish and game, forests, water resources, and in some instances oil and mineral resources. The rapid exploitation and waste of some of these natural resources early gave rise to the idea that government, particularly the state governments, should take some action to preserve the resources of nature. At first, much of the work was of an educational nature. Later, regulatory powers were sometimes utilized, and finally, in a few instances, such as forestry, private ownership was supplemented by government ownership, and to an increasing extent was even supplanted by it. The nature of the work that is carried on in the field of conservation will be deferred to a later chapter. At this time it is sufficient to point out that one of the first problems to be raised in connection with conservation is, of course, resources planning. Which lakes shall be stocked with fish? Which forests shall be restored? Which lands shall be allowed to revert to buffalo grass?

The answers to questions such as these eventually require that a survey be made of the entire subject of which they are a part,

and when answers are given in the light of knowledge thus acquired, the answers are likely to be planned answers.

Planning, as most Americans think of it, is often associated with cities and their development. Zoning, which is the districting of a city for purposes of deciding what types of buildings, business activities, and, to some extent, social conditions, shall prevail in each section, is now an established phase of urban government. Nearly every city, even a small city, has its city planning commission or, as it was formerly called, zoning commission.

It is only natural, therefore, that most writers think of the first instance of formal state planning as that which occurred in the state of New York in 1923, when a commission was established to study housing and regional development growing out of the conditions that had developed as a result of World War I. Within a few years the depression of the thirties came, and with it an interest in public works. With the planning of public works and with the growing interest in conservation, came an increased interest in planning. One state after another created some type of planning committee or economic council until nearly every state (in 1947, the number was forty-five) has some kind of an agency. Their titles differ from state to state, but their functions are much alike.

Planning agencies

The numerous boards, commissions, and committees that were established by law or by executive proclamation or order during the period 1929–1941, usually included the power to make surveys relating to natural resources, to make recommendations concerning land utilization in rural areas, to plan methods of developing a sound state economy, and, in some instances, to devise methods of defeating the business cycle by arranging for a planned system of public construction of highway, public buildings, recreational facilities, and public housing units connected with slum clearance. In a few instances, especially following World War II, these functions included the task of planning for the smooth reabsorption into the economy of soldiers and sailors who had been in the national military service

during World War II. Also in coöperation with national agencies and partly subsidized by national grants-in-aid, a large part of public works has been planned so that should the threat of another depression appear, these works could be launched to take up the slack in employment.

With the coming of World War II and with the growth of the feeling on the part of the public that the depression had really receded into the background, interest in long-range resources planning has tended to abate, and many of the economic councils, development agencies, and other similar agencies have deteriorated into bureaus for the attraction of industries to the state. Recommendations are made to the legislature to grant favors of various kinds to industries that locate within the state. The success of these bodies is believed to be indicated by the number of new businesses that do locate in the state within the biennium. Many state planning agencies are now only adjuncts to state chambers of commerce and the several headquarters of organized labor, in carrying out this work.

A few resources-development agencies are doing serious work for their states, however, and it is to be hoped that their examples may prove to be useful, not only to those states themselves but also in keeping alive for the remaining states the idea that planning means something more than inviting both good and bad industries to locate within the borders of the state. For the time being, the few planning agencies that do serious work have a high mission to perform.

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CHAPTER 14

FINANCE

The subject of state finance is one of prime importance, because without funds to meet expenses the processes of government must of necessity soon cease. Not only must funds be available to carry on the services of the state, but the cost of providing them must be made as light a burden upon the taxpayer as is consistent with securing their adequate support. The process of transmuting money into service to the people, too, must be so performed as to secure for expenditures made the greatest possible degree of well-being for the state. To accomplish these results there is demanded both a wise legislature for planning and an efficient staff for administration.

Public and private finance distinguished

It is sometimes said that, after all, government is merely a business enterprise of all the people. It is true that in some respects, especially in the realm of finance, there is an analogy between private and public business. To press this analogy too far, however, is to overlook certain vital points of difference, and it leads to some erroneous conclusions. Public finance differs from private finance in certain important particulars.

In the first place it must be observed that while in private finance expenditures must, in general, be measured by income, in public finance income must, subject to broad limitations, be governed by expenditures. That is to say, the amount of income obtained by the government, within the limits of what the economic condition of the people can bear, is measured by what the people demand in the way of services.

In the second place, the goal of private business is profit, whereas the goal of public finance is good government. The

success or failure of private business in attaining its objective can be very clearly determined, since it is shown in terms of dollars and cents on the balance sheet. The success of government can be tested by no such clear and objective indications but is expressed in the general well-being of the community. Well-being is a condition dependent upon a multitude of considerations, material and spiritual, economic and social, tangible and intangible, which themselves have widely differing values for different persons.

Furthermore, and in the third place, state government is, in certain other respects, not comparable to private business. The state possesses the power of taxation, it has immunity in turn from taxation, and it is immune from suits at law, both upon its debts and for injuries committed by its officers in the regular course of their duty. Were private business thus favored, the situation would be quite different from that in which it finds itself. But in spite of these differences it is true that government should be conducted in a business-like manner. By this it is meant that the citizen has the right to demand that in the performance of its work, the government shall observe those fundamental principles of efficiency and economy which have been found necessary to the successful prosecution of private enterprise.

The subject of finance may be conveniently studied under three main heads: expenditures; income, including loans; and financial administration.

Expenditures

A most casual review of the governmental history of the states reveals the fact that the services rendered by the states to their citizens have, especially in the present century, expanded rapidly. In the period 1915–1931, the total annual cost of state government rose from $494,907,084 to $2,508,743,486, an increase of 406.9 percent. This involved an increase in per capita cost for operation and maintenance from $3.85 in 1915 to $11.75 in 1931. This rose in 1947 to $8,153,332,000, or $58.65 per capita.

Thus in a thirty-two year period, per capita costs of state government increased over 1300 percent.

Causes of growth

Although the overall increase is due in some measure to the increase in population and to the fluctuating purchasing power of the dollar, it is chiefly due to the expansion of services alluded to above. Whether or not the undertaking of these services was wise and whether or not they might have been accomplished at more moderate costs are questions upon which opinion may differ. When this expansion in services is analyzed, it may be shown to include some old ones which recently have been broadened, some new services formerly not rendered at all, and still others hitherto rendered by the local governments but lately assumed by the states. To these must be added services which are supported by grants-in-aid by the states to local governments.

Before 1880, state expenditures were chiefly for the maintenance of the state government, for the protection of life and property, and for education. Between the years 1880 and 1900 came a period of great extension of state activity. This was a period marked by rapid expansion of manufacturing industry and consequent growth of urban population, and by the centralization of business in large organizations with a widening of the gulf between employers and employees. It was in this period that many new problems, including those of health, sanitation, utility control, and labor and factory regulation, began to require state action. Furthermore, these social and economic changes complicated the problem presented by the defective and dependent classes and made desirable the substitution of state for local administration of these subjects. More recently, as a consequence of the prolonged economic depression, the states were called upon to participate in public relief and in the development of a social security program.

Analysis of expenditures

As a result of these developments certain changes took place both in the degree and in the placing of emphasis among state activities. First, while the expenditures for general government and for the older services of protection of life and property and

of education have increased in amount, at the same time the relative amount thus spent has declined. Second, expenditures in certain other fields have greatly increased, both absolutely and proportionally. Prominent among the newer activities which have been demanding an increasing measure of support is that of public welfare. This field has expanded to include not only the care of the delinquent and defective classes but also a share in the dispensing of direct relief and the providing of unemployment and old-age pensions. To these have been added a wider range of activities in public health and sanitation and services in the fields of regulative and promotive action. Within the latter group are included public utilities, corporation finance, labor conditions, agriculture, and the conservation of natural resources. An examination of the tables shown on pages 360 and 361 will make more clear the trends in state expenditures in recent years.

1. According to function

Table 3 reveals the fact that in absolute amounts paid out in operating costs, charities, hospitals, and corrections and education—for a long time objects of state expenditure—hold first and second places both in 1915 and in 1947; although the order was reversed. The figure for charities, hospitals, and corrections is abnormally high since the item of public welfare expenditures has been placed in it. These expenditures began in 1936, hence they did not appear in earlier tables. Actually more than 60 percent of the amount listed for charities, hospitals, and corrections in 1947 was for public welfare. General government which held third place in 1915 had, by 1931, yielded that position to highways. Highways were, until the present century, thought of as a matter of purely local concern, but by 1931 they had become a state charge, exceeding in cost even charities and corrections. During the later 1930's charities, hospitals, and corrections regained second place and then took first place which this item of expenditure had in 1947, even if public welfare costs are excluded. The item for schools dropped materially between 1931 and 1946. This is partly accounted for by the fact that some costs formerly incurred directly by the state are now

TABLE 3. Analysis of the Operating Expenses of States According to Functions

General Departments	1915	1931	Increase	% of Increase 1915–1931	1947	Increase	% of Increase 1931–1947
Total	$379,030,000	$1,447,285,000	$1,068,255,000	281.8	$3,317,174,000	$1,869,888,000	129.2
General government	44,208,000	126,637,000	82,129,000	184.5	233,297,000	106,660,000	84.2
Protection to persons and property	26,294,000	84,117,000	57,823,000	219.9	171,114,000	86,997,000	103.4
Health and safety	16,559,000	36,894,000	20,335,000	122.8	107,296,000	70,402,000	190.8
Development and conservation of natural resources	9,453,000	74,539,000	65,086,000	688.5	206,699,000	132,160,000	177.3
Highways	22,767,000	239,873,000	217,106,000	953.5	423,689,000	183,816,000	76.6
Charities, hospitals, and corrections	89,189,000	230,206,000	141,017,000	158.1	1,348,018,000	1,117,812,000	485.6
Schools	145,832,000	589,112,000	443,280,000	303.9	506,446,000	−82,666,000	−14.0
Libraries	1,331,000	2,442,000	1,111,000	83.4	3,762,000	1,320,000	54.1
Recreation	878,000	6,350,000	5,472,000	623.2	15,208,000	8,858,000	139.5
Miscellaneous	22,215,000	57,116,000	34,901,000	157.1	301,145,000	244,029,000	427.3

Compounded from Bureau of the Census, Department of Commerce, *Financial Statistics of States*, 1915, 1931; *Compendium of State Finances*, 1947.

charged against local units even though states may contribute indirectly to them through grants. In 1947 the states spent $506,000,000 for schools, reflecting the postwar increase in college enrollments and inflated prices.

2. According to character

If expenditures, classified according to their nature or "character" as shown in Table 4, are scrutinized, certain definite trends are perceptible. During the period 1915–1931, expenditures for operation and maintenance increased nearly fourfold, while capital expenditures increased almost or approximately three times as rapidly. On the other hand, from 1931 to 1947, operating expenses increased by 129.2 percent, whereas expenditures for capital outlays showed an increase of only 8.6 percent. Capital outlays are generally financed largely from borrowing. This is indicated somewhat by the trend in interest payments. There was a sixfold increase in interest payments between 1915 and 1931, but interest payments by state governments decreased 43.1 percent between 1931 and 1947.

TABLE 4. Expenditures Classified According to Their Nature, 1915–1947

	1915	1931	Increase	% of Increase 1915–1931
Operating expenses	$379,030,000	$1,447,285,822	$1,068,255,822	281.8
Outlays	95,193,000	941,840,000	846,647,000	889.4
Interest	18,546,000	110,821,000	92,275,000	497.5

	1947	Increase	% of Increase 1931–1947
Operating expenses	$3,317,174,000	$1,869,888,178	129.2
Outlays	948,959,000	7,119,000	8.6
Interest	63,047,000	−47,774,000	−43.1

The period from 1931 to 1947 was one of low interest rates. But during the early part of the period, the depression and New Deal relief and public works program brought about an almost complete stoppage of state borrowing for capital outlays. The defense and war measures in 1940 and after made it difficult for states to expand their building programs; but by 1947 they were again spending heavily for capital outlays. During the fiscal year, 1946–1947, the gross debts of states increased by over $580,000,000 or about 25 percent. This, of course, was not all, but perhaps mostly a reflection of capital outlay borrowing.

State Income

Development of revenues

In medieval times, when it was said that the normal state of society was one of war, the expenditures of the state were met in considerable part by the proceeds of war in the form of plunder. Other revenues took the form of tribute levied on conquered and subject peoples, or of ransoms extorted from those taken prisoners. In the older autocracies the purposes of the state were the personal ends sought by the ruler, and the resources of the state were indistinguishable from those of the prince. As a feudal lord, the ruler received payments in services or in kind which may be considered as part of the revenue of the state. With the growth of industry and trade, the people of the towns secured commutation of the various payments and services required of them into the form of money payments; and now, with the lapse of time and the development of civilization, money payments in the form of taxes have become the chief support of government.

With the advance of popular control of government there came a separation of the property and purse of the state from those of the monarch. Certain estates were recognized as being the private possessions of the ruler, whereas other properties were sold or retained as property of the state. In place of the properties thus taken over by the state, a fixed sum of money, sometimes called the civil list, was set aside for the use of the sovereign. In the United States, in spite of the existence until

recent times of vast areas of public lands owned by the federal government and by some of the states, taxation has always been the chief source of governmental income.

Receipts and revenues

Not all the receipts of the state, from whatever source derived, during any given period are, properly speaking, "revenues" of that period. In the accounts and reports of most financial officers of the states this distinction between "receipts" and "revenues" is not maintained. As a result, much misunderstanding has arisen and sometimes political deception as to the true state of the finances has been practiced.

Let us suppose that the state were to start the year with no funds in the treasury, with all bills for the preceding year paid, and no taxes or payments which were due it for the preceding year remaining unpaid. Let us suppose, further, that all payments of whatever sort due during the current year were paid before the end of the year, and that no money due in years following was to be paid during the current year. Then *receipts* and *revenues* for the year would coincide. In practice, however, this is never the case. Payments which have accrued, i.e., fallen due, in past years are constantly being paid during the current year. Delinquent taxes are a common example of such payments which, though receipts, are not properly revenues of the current year. Likewise, taxes and other payments falling due during the current year are constantly remaining unpaid at the close of the year. These sums due are revenues of the current year, though they are not receipts.

Receipts, then, for a given period, may be said to be money received by the state during that period without regard to the time due. Revenues may be defined as sums due and payable during the given period, without regard to the time of actual payment.

Certain moneys taken by the state for the use of various subdivisions of the state and paid over to them, although they are among the receipts, are not properly revenues since they do not increase the assets of the state. Money received from the sale of bonds and other securities is not technically included in the

revenues of the state because, while it increases the assets, it also increases correspondingly the liabilities of the state. But since, at the present time, funds for so many important undertakings of a permanent nature by the state are secured by borrowing, a more faithful picture of the financial operations of the state is presented by treating these borrowings as revenues.

On the other hand, certain forms of revenues are not usually included among the receipts and are lost sight of. This happens either because they are not in the form of money or because they do not pass through the hands of the state financial officers. Products of state institutions when consumed by the state are not usually included in state revenues. Fees collected and retained by the department for its support are revenues, though they seldom find their way into statements of receipts.

Sources of income classified:

The income of the state, whatever its total amount may be, is derived from a considerable number of sources which may be grouped into the five following classes:

1. Commercial revenues
2. Administrative revenues
3. Taxes
4. Loans
5. Transfers

1. Commercial revenues

Under the head of commercial revenues are included those which arise from operations in which the state stands in the position of a proprietor. Here the state is in much the same position as a private individual or corporation rather than in that of a government, and these revenues are sometimes spoken of as proprietary revenues. Among the most important are those derived from the public domain and from public industries.

a. The public domain

Practically every state has owned at some time or still owns land or natural resources which are not used in carrying out the ordinary functions of government. Neither does it employ these in conducting any commercial undertaking operated by the state. Such lands and resources are spoken of as the public domain. The federal government also owns an extensive public domain. The two should not be confused. In the public domain

of the states would be included agricultural lands, both undeveloped land destined to be disposed of to settlers and developed lands leased to private individuals—forests, mines, water supplies, and shore rights. This domain of the states is today made up, for the most part, of remnants of land granted by the federal government in aid of education, and of swamp lands granted to the states for development and sale. The total grants to the states have aggregated approximately 200,000,000 acres.

In this country the policy of the federal government has been to distribute vacant agricultural land widely at a low price to *bona fide* settlers so as to gain a social rather than a fiscal advantage therefrom. Within the present century there has appeared a disposition to conserve forest and mineral lands with a view to receiving from them a continuing public benefit. The states have, for the most part, failed either to derive any great social or financial advantage, or to develop any definite policy as to their public domain. While they were still almost a drug on the market, land and resources were hastily disposed of at low prices. Too often the funds derived from such sales were so unwisely administered that the public received a minimum of benefit from this generous patrimony. It is only recently that a more intelligent policy, such as is exemplified in the land settlement policy of California, has been adopted by a few states. Alabama, Minnesota, Texas, and Washington are examples of states that have accumulated large sums of money from natural resources.

b. Public industries

The states have not engaged lately in the ownership and operation of public industries to an extent at all comparable to the activities of cities and the federal government in that direction. Just before the middle of the nineteenth century they undertook extensive schemes of canal-building and some engaged in banking. The financial results of these undertakings were generally so calamitous that several states have specific constitutional limitations on the power of the state government to embark on public industrial enterprises or to lend the credit of the state to such enterprises under private management.

More recently there has been renewed interest in state industrial undertakings. North Dakota, in 1919, entered the banking business and also became interested in grain elevators and mills, in home-building associations, and in an electric railway. A number of states, including some of the New England states, Alabama, Louisiana, and California, have developed docks and terminals which yield some revenue. North Carolina has derived income from tobacco warehouses; Kansas from schoolbook publication; Oregon from an irrigation system and a lime plant; and South Dakota from a cement plant. After the repeal of the national prohibition amendment, sixteen states made the sale of intoxicating liquors a state-owned monopoly from the operation of which net revenues of $140,236,000 were received in 1947, from gross sales of $882,453,000.

2. Administrative revenues

Thus far we have been concerned with revenues which are derived from commercial rather than governmental activities of the state. Next may be considered a group which, though not taxes, are the outcome of governmental activities. These include fines, fees, and special assessments, and may be grouped under the general name of administrative revenues. The name administrative revenues is applied because while differing widely from one another in some ways, they have the common characteristic of being incidental to the routine process of governmental administration.

a. Fines

A fine is a charge levied upon an individual as a punishment for the violation of the criminal law. The measure of the fine is in a general way the seriousness of the offense, taking into account the attendant circumstances, but without regard to ability to pay. Fines are not imposed for the sake of the money collected, and the revenue derived from them is negligible. Indeed, it is socially desirable that no occasion for assessing fines should arise and that hence the revenue should disappear. The end sought is the security of persons and property, the protection of public morals, and the comfort and well-being of the community.

b. Fees

A fee is a charge made for a special service rendered or a

privilege granted to the individual by the government. Here, as in the case of fines, no account is taken of ability to pay. There may be distinguished two varieties: service fees and license fees.

Service fees are, as the name suggests, charges made for service rendered to the individual against whom the charge is made. Familiar examples of such fees are those paid for recording deeds and other legal papers, the taking of acknowledgments of signatures by a notary, the making of certified copies of official records, the service of legal papers, and the inspections made under various safety and health laws. The amount of the service fee was originally supposed to be based on the cost of service rendered, but in the course of time the amount of the fees became fixed without regard to cost, so that now no connection can be traced between the fee and cost of service.

In earlier days it was a common custom to allow the official collecting fees of this class to retain the sums collected as his compensation in place of a salary. Even in rural communities where the total amount collected was small, the fee system tended to demoralize the public service, since it often caused official activity to be measured by the size of the fee. As population and business increased, the incomes of some officials, notably sheriffs, under the fee system became so great that they exceeded the salaries paid to even the highest officers of the state. These excessive incomes from fees made certain offices the objective of political manipulators, and officers receiving them were levied on heavily to secure funds for the party treasury. Of recent years the tendency has been to put offices upon a salary basis. But the fee system still obtains as to certain offices in quite a large number of the states. In some states where fee-collecting officials have been placed upon a salary basis, the office has been allowed to retain the fees for its support, turning into the treasury only such amounts as are in excess of departmental needs. It is needless to say that such a practice has placed a premium upon extravagance and the state treasury has seldom profited greatly. It is now the prevailing

rule to have all collected fees paid directly to the public treasury.

The license fee, instead of being a payment for a service, is levied for a privilege or permission granted to the party paying the fee. Persons wishing to engage in certain lines of business or in certain practices are required to secure a license; and for one to engage in such business or practice without a license is made illegal and punishable. The original purpose of the license was regulation. It was recognized that certain kinds of business, such as liquor saloons, pool rooms, theaters, dance halls, hotels, and restaurants, required supervision and regulation. The same was true of the practice of certain professions such as medicine, dentistry, and pharmacy. More recently the use of motor vehicles on the highways has called for the same treatment. Today a wide range of activities is regulated through the issue of licenses for which a fee is paid. The government sets certain standards of conduct, service, or quality which must be maintained by the licensee, and failure to conform to the standard results in suspension or revocation of the license and sometimes some further penalty as well.

Originally the amount of the fee seems to have been based on the cost of supervision, but since the granting of the license confers on the recipient in some cases special opportunity for financial gain, the tendency has been to make certain kinds of licenses a source of revenue to the state. Consequently, scales of license fees have been elaborated for revenue purposes, based on the principle of payment for benefits conferred. The automobile license fee is an instance where to the original purpose of regulation has been added that of compelling the automobilist to make a special contribution to the construction and maintenance of the highways. The revenues derived from automobile license registration fees, in 1923, were $139,900,000. In 1947, over $505,000,000 was derived from the same source.

c. Special assessments

The third form of administrative revenues, the special assessment, is a proportional contribution levied upon land to defray the cost of a public improvement which is assumed to confer a special benefit upon the property assessed.

The improvement must confer a public benefit, but it must at the same time confer a private benefit to the property assessed, equal at least to the amount of the assessment. This method of securing funds was once a favorite one for financing municipal improvement of streets, boulevards, and parks, street-widening, sewer construction and waterfront improvements, but it has not thus far been used extensively for state purposes. The states showing the largest returns from special assessments are Louisiana, Michigan, Kentucky, and Oklahoma. In some instances these revenues are derived from payments by minor divisions on whose behalf the state has undertaken public improvements.

3. Taxes

Modern governments without exception find their principal source of revenue in taxation. All other sources are but supplementary to this.

Nature and definition

In the course of the long development which has produced our modern systems of taxation, a first step away from the arbitrary levies made under various names and guises by autocracy, and in the direction of popular government, was the general acceptance of the principle that no tax should be levied except by the representatives of those who were to pay it. With this principle established the next problem was that of determining how the burden of the cost of government should be distributed in the community.

It has been held by some that taxes are a payment for benefits received by the taxpayer from government and that hence they should be distributed on that basis. It has been found impracticable to arrive at any just estimate of the relative benefits conferred upon individuals, and this has led to the general abandonment of the benefit theory. The underlying theory upon which tax systems are constructed today is that government renders an indispensable service to the community, and that since it is impossible to determine the benefits conferred upon individuals, the most equitable solution is that each should pay in proportion to ability, without regard to benefits. The various forms of taxation in force today are the results of efforts to find a fair measure of ability.

In accordance with this theory, a tax is defined as a compul-

sory contribution from the individual to the government to defray the expenses incurred in the interest of all, without reference to benefits.

It will be observed that a tax differs from a fee in that the fee is not compulsory, and from the assessment in that the assessment is imposed to pay for special benefits conferred.

Essentials of a tax system

Whatever the basis of taxation, certain essential characteristics have come to be generally agreed upon with respect to it.

The tax must, first of all, be *adequate* to provide—along with other sources of income—sufficient funds for the support of government. It must be *equitable* in its distribution of the burden through the community. It must be *economical* in that it takes from the taxpayer no more than is required for the needs of government economically administered—and that at a low cost of collection. It must be *elastic* so that it may be capable of expansion and contraction to meet the varying needs of the treasury. It must be *flexible* so that if changed conditions make changes desirable in the system they can readily be made. Finally, it must be *simple* both in structure and in administration so that it may be easily understood and grievances readily adjusted.

Under the complicated economic conditions of recent times no one form can satisfy all the essentials of equitable taxation. Consequently, many different taxes are imposed, forming together a system and designed to supplement one another. The tax systems in operation in the several states today include some or all of the following forms: general property tax, income tax, corporation tax, business tax, inheritance tax, and gasoline tax.

a. The general property tax

The oldest form of taxation in this country and the one most universally levied is the general property tax. This is a tax upon all forms of property, real and personal, tangible and intangible, levied according to the value of the property at a uniform rate. Originating as a local tax, its use was gradually extended until it became the cornerstone of the state tax structure. So thoroughly has the principle of this tax been accepted that the

constitutions of half of the states make its use imperative. As late as 1931 approximately one-fifth of the total revenues of all the states and a larger portion of the revenues of the local governments were derived from this form of taxation. Two states, Pennsylvania and North Carolina, in that year obtained no revenue for state purposes from the general property tax. At the present time states obtain less than 5 percent of their revenues from property taxes. Although the general property tax is of decreasing importance as a source of state income, the problem of equitable assessment of property and efficient collection of the tax continues to be one of state concern, and therefore merits examination at this point.

Defects in the general property tax

In the pioneer stage of society, such as existed in this country when the general property tax was established, this form of taxation was reasonably just and practicable for enforcement, but with the change to a complex industrial civilization the time long since arrived when it became neither just nor practicable. Defects which have gradually made their appearance and which today render it totally unsuitable as a basis of taxation exist both in principle and in administration.

In principle this tax is defective in at least three respects: first, it assumes that the value of property owned is an accurate measure of ability to pay taxes. Under the present organization of economic life various forms of property having equal value produce widely varying income, and hence represent varying ability to pay taxes.

Second, taxation based upon property fails to reach those whose income is derived from salaries. The man who saves a portion of his salary and invests it in a home pays a tax on the home. The man escapes taxation who receives, perhaps, a larger salary, but who saves nothing and has no property when the assessor appears. This form of taxation thus imposes a penalty upon thrift and an added burden on the farmer and the home owner.

Third, the property tax results in double taxation. Corporate stock usually represents merely the right to share in the income

or proceeds from certain corporate property. Under the general property tax, corporations must pay taxes on property owned by them and, at the same time, the shares of stock of these corporations are taxed as property of the stockholder. Thus the income from the same property is taxed twice.

Furthermore, the general property tax is defective in its administration. When the tax was first put in effect, property consisted mostly of land and improvements, and of tangible personal property such as stock, tools, crops, and a little household furniture. All these were visible and could not easily be concealed. The assessor, a neighbor possessed of similar property, could easily arrive at a just estimate of their value. Intangibles scarcely existed and little property could escape taxation. Changed conditions have been fatal to the effective administration of this tax in two respects.

First of all, the system of assessment has become entirely inadequate. The assessor is ordinarily a person elected by the voters of the locality, having no training or special qualifications for his task and receiving a compensation too small to attract competent persons. He is wholly unfamiliar with the value of much of the great variety of tangibles which he is called upon to assess, and as a result he must fix an arbitrary valuation or accept the misleading suggestions of the owner. The result is that great inequalities in assessment occur, and it is the more valuable kinds of property usually held by the more well-to-do classes which most completely escape their just share of taxation.

In the second place, this tax results, too, in a still greater inequality through other forms of evasion. Whereas, in former days, property was chiefly in tangible form, large amounts of intangible property have come into existence in the form of stocks, bonds, notes, and mortgages which far exceed in total amount the value of tangible property and are easily concealed. The general fact that much of this intangible property is concealed and thus escapes taxation is indicated by what has been

found to be true in New York and Ohio, where it is a matter of common knowledge that intangible wealth abounds.

When concealment is not resorted to, evasion of taxation often takes the form of investment in tax-exempt securities. Others evade by establishing a legal residence in jurisdictions where the rate of taxation is very low.

Remedies introduced

The net result with respect to the general property tax is that it has become, as someone has said, "neither uniform, nor general, nor equitable." Widespread conviction as to the failure of this tax has led to efforts along at least three lines to remedy the situation. These are: first, the introduction of reforms in the administration of the existing tax; second, the classification of property for purposes of taxation; and third, the introduction of special taxes. The steps taken in each of these directions may next be examined.

(1) Administrative reforms

In some localities, especially in cities, it is now recognized that the work of assessment is of a technical character, demanding both knowledge and experience. Consequently, in those places the office has been made a full-time one, and assessors are selected by appointment, given a long term, and paid an adequate salary. Assessors thus secured have prepared land-value maps, and keep a check on sales of property as an index of values to furnish the basis for more just assessments. In many states the local assessors are held to a more thorough performance of their work through the supervision of a county assessor and by a state tax commission.

(2) Classification of property

Observers have discovered that one reason for the deficiency of the general property tax arises from a failure to recognize that property is of widely differing sorts, and that principles and methods of taxation applicable to some classes are quite unsuited and even unjust when applied to others. For example, it is well known that tax rates are generally fixed with respect to their application to real estate and tangible personalty which are usually undervalued. When such rates are applied to bonds, stocks, and notes whose value is fixed and cannot well be under-

valued, the effect is to take from the owners a half or even two-thirds of the income from such property.

A remedy adopted in a number of states, among them Indiana, Kentucky, Maryland, Minnesota, Rhode Island, and Virginia, is to retain the principle of the property tax, but to recognize by law different classes of property. To each class of property is applied a different rate with a view to securing an equitable distribution between classes and between individuals in the same class, and at the same time to derive as great a net total of revenue as possible.

The simplest form of this procedure is to recognize intangibles as a separate class and tax them at a low rate as compared with that imposed upon tangibles. The theory is that since intangibles are so easily concealed, the owners will hide them rather than pay the heavier tax, but if a more moderate rate were charged, the owner would declare his property for assessment. Experience has proved that this assumption is correct, and that the smaller rates upon intangibles result in greater returns. In some states the idea of classification has been carried further by recognizing from four to seven classes of property, with a different percentage of the true value fixed as the base of taxation in each class.

(3) Special taxes

A third remedy for the inequities of the general property tax lies in the development and application of a series of taxes which may be used either to supplement the general property tax or to supersede it altogether. Among the newer and supplementary forms of taxation thus introduced are the income tax, the corporation tax, the business tax, various special consumption taxes, and the inheritance tax.

b. The income tax

Among the special forms of taxation which have grown in favor in recent years is the income tax, which has been adopted upon the assumption that income is the best index of ability to pay. This tax, which has become familiar through its use by the federal government, was for many years experimented with by certain states, notably Massachusetts; but on account of weakness in administration it was not a success. Since 1911, however,

when it was first introduced in Wisconsin and administered with success, this tax has become a part of the revenue system in forty states.

It consists of a levy placed usually upon the total income of the individual or corporation from whatever source derived, though in some laws it is restricted to particular classes of income. The original example of the income tax in this country—that of Massachusetts which has been on the statute books since colonial days—was a levy upon professional incomes only. When laid upon all incomes, the levy is by no means always uniform. It is a fact which is evident to all upon reflection that as incomes become larger, ability to pay increases faster than the income. So, to equalize the burden, the rate is usually made progressive, i.e., larger as the income becomes larger, care being taken not to make the contributions from large incomes so great as to encourage attempts at evasion. The rate imposed by state laws rarely rises above 6 percent for the largest incomes. Small incomes up to a certain limit are usually exempt from the tax, and the exemption varies with the size of the family dependent upon the income. Various methods of assessment have been tried, but it has been found most efficient to require the taxpayer to declare his income and the source from which it is derived. The tendency to file untrue statements is checked by information secured from employers, corporations, and other sources of income. This form of tax requires an efficient taxing machinery, but where such apparatus is supplied, the evasions are believed to be less than under most forms of taxation.

c. Business taxes: on corporations

The more elaborate tax systems include a considerable variety of taxes upon business, among which the most important are corporation taxes. These include levies upon the physical property, the capital stock, and the franchises of the corporation, all of which are usually administered by the state tax authorities rather than by the local taxing machinery. Two chief motives seem to have actuated the state in imposing special taxes on corporations.

1. Many corporations hold both highly specialized tangible property and also complex forms of intangibles. Both forms of property give rise to problems of valuation beyond the ability of the ordinary local assessor.
2. There has frequently existed a definite conviction that by various means and devices corporations manage to escape their just share of taxation.

The need for special forms of taxation has seemed to exist especially in the case of public utility and financial corporations, but not to the same extent with respect to mercantile and manufacturing corporations. The corporation taxes, though varying widely in detail, are essentially taxes either on the value of the property, or upon the earning power of the corporation. Sometimes they are laid in addition to the ordinary property taxes and in other cases they are substituted for the older form of taxation.

In either case, it is comparatively easy to assess the value of the tangible property of the utility or financial corporation, including the land, tracks, and buildings of the railroad, and even its rolling stock; the generating stations, pipes, and lines of gas and electric companies; the lines and exchanges of the telephone company; and the mains, reservoirs, and pumping stations of the water company. Utility corporations, both by the nature of their business and the special privileges granted to them by law, become monopolistic and enjoy special advantages in earning power. Their valuable franchise rights are property, and it is the valuation of these as well as of their intangibles which present puzzling assessment problems which have never yet been settled to any considerable degree of satisfaction.

In some cases the franchise is assessed as property at a valuation somewhat arbitrarily determined, but more commonly there is substituted a tax upon earning power. Taxation on earning power, which most often takes the form of a tax on gross earnings, presents difficulties with respect to both the fixing of the rate and to valuation.

Besides the special taxes upon corporations, a considerable variety of other taxes has been levied upon business irrespective of whether it is conducted under corporate form. In Pennsylvania, Delaware, and quite generally throughout the Southern states, there have developed whole series of taxes levied upon different professions and occupations. Particularly in the Southern states are these "business" taxes an important source of revenue. In West Virginia a sales tax is levied upon coal and other natural resources produced, upon merchants' sales and upon manufacturers. Pennsylvania levies a tonnage tax upon anthracite coal produced, and Minnesota a tax upon the value of all ores mined. In Louisiana, Arkansas, and Mississippi a special "severance" tax is laid upon the value of natural resources, including oil, gas, lumber, sulphur, and phosphate, derived or severed from the soil. A total of twenty-three states have some type of severance tax. **Business taxes: miscellaneous**

Every state in the union has one or more types of sales taxes. Selective sales taxes, like those on gasoline, insurance, and certain forms of amusements, are relatively old types. More recently states have levied taxes on alcoholic beverages, tobacco products, and other selected commodities. The general sales or gross receipts tax came into somewhat general use during the depression period of the 1930's. No less than twenty-five states have had in recent years some form of general sales or gross receipts tax. In some cases it is a retail sales tax of one, two, or three cents on each dollar of receipts, to be collected by the retailer and paid to the state at periodic intervals. Some commodities, such as food, may be exempted from the tax. Indiana has a gross income or receipts tax with variable rates of from one-fourth to 1 percent on taxable income. On a retailer, for example, the tax is at the rate of one-half of 1 percent on all income above $3000 a year, whereas on salaries and wages it is 1 percent of all income above $1000. Manufacturers, wholesalers, and farmers pay at the rate of one-fourth of 1 percent. These rates are exclusive of a special surtax for a soldiers' bonus enacted in 1949. **d. Sales taxes**

Total revenue in all states from sales and gross receipts taxes in 1947 was $3,441,999,000.

e. Inheritance taxes

In 1885 New York introduced an inheritance tax law which imposed a levy upon the transfer of property of deceased persons to the heirs or the beneficiaries under the will. So fruitful was this tax and so simple its administration that it soon found wide favor, and at the present time all states except Nevada use the tax in some form. Not only have the rates been gradually increased, but the tax which at first applied only to collateral inheritances has been extended to apply to direct inheritances as well. It is a fact, however, that the rates upon direct inheritances are less than those applying to collateral inheritances of like amount. There was early introduced the feature of making the rate progressive when applied to larger inheritances, and in proportion to the remoteness of the relationship of the beneficiary.

Constitutional limitations on taxation

Since the power to tax is such a high exercise of sovereign authority, it is customary in state governments to hedge about its exercise with careful restrictions concerning purpose, amount, and methods of administration, in order to protect the citizen from arbitrary and unnecessary demands upon his resources. Under our system of government such restrictions take the form of limitations embodied in both the federal and state constitutions.

One of the serious defects of the Articles of Confederation was the impediment to commerce growing out of the power of the states to set up customs houses and to impose restrictions on trade between the states and with foreign countries whenever such regulations did not conflict with treaty obligations. To obviate state interference with commerce, three provisions were inserted in the federal constitution, and other restrictions have been developed by judicial interpretation.

In the federal constitution

In the first place, it is stipulated that no state shall, without the consent of Congress, levy any duty on imports or exports, except such charges as may be necessary to carry out the state's inspection laws for police purposes.

In the second place, no state is permitted to levy any tonnage duty upon vessels entering its ports.

The grant to the federal government of exclusive control over interstate commerce is a third restraint on the taxing power of the states.

A fourth restriction on the right of the state to tax is one which has been worked out by the courts, and is the rule that neither the property nor agencies of the United States are subject to state taxation. These questions were discussed in Chapter 2, and will not be examined in detail at this point.

It is necessary that taxes be levied in conformity with the state and federal Bill of Rights; that taxes be for a public purpose; that the property or the owner be within the taxing area; that public notice be given of the tax; and that taxes be uniform under similar conditions and circumstances.

4. Loans

The expenditures for the legislative and judicial departments have never been large. Hence, so long as the executive branch was chiefly concerned with the protection of life and property, it was quite possible to meet the resulting demands upon the treasury from the proceeds of taxation and other ordinary sources of public income. From time to time war imposed an extraordinary financial burden upon the state. Within recent times the public has been demanding more and more that the state perform a wider range of services which call for other extraordinary expenditures, such as for lands, buildings, and public improvements in great variety. To attempt to meet such extraordinary charges from the proceeds of current taxation has been found impracticable, and public borrowing has been the result.

Occasions for public borrowing

Justification of public borrowing

There are those who contend that public borrowing, except under the stress of war, is unjustifiable. These persons call attention to the fact that borrowing discharges no debt, that it is unfair to shift burdens onto the future which will have its own extraordinary demands to meet, and that it is more expensive than the pay-as-you-go policy. In reply it is said that a policy of pay-as-you-go would produce wide fluctuations in

taxes from year to year which would introduce an element of uncertainty undesirable in business; that by borrowing it is possible to secure immediately the benefits of an improvement while the cost may be spread over a series of years; also that since future years are to be served by the expenditure, it is but fair for the income of future years to bear a part of the cost.

Although there is some controversy as to which of these policies is in the long run most expedient, the following rules have been generally accepted for guidance in the creation of public debts:

First, borrowing should not be employed to meet current expenses, except in anticipation of revenues, but should be resorted to only to pay for improvements of a permanent character or for emergencies such as a war or public calamity.

Second, when borrowing is resorted to, the period allowed for the discharging of the debt should not be longer than the life of the object for which the debt is incurred.

Classification and form of debts

Debts of the states or of other public bodies are usually distinguished, rather loosely perhaps, with respect to their time of maturity and the form of the certificate or evidence of the debt, as funded, floating, and current. The funded debt which has a long but definite period to run is evidenced by bonds or serial notes. Such debts are usually created as a result of some great emergency such as a war or flood, or of some expensive and permanent public improvement such as the erection of a state capitol or the construction of a system of highways.

The designation floating debt is usually applied to indebtedness which has no fixed time to run, and for the payment of which often no definite provision has been made. Although its period is expected to be short, this form of debt is not directly chargeable to the operations of the current year. Evidences of floating debt, when they exist, frequently take the form of "treasury notes" or "treasury warrants."

Current debts are those which are contracted in the course of the current operations of government and are presumed to be

payable from the revenues of the current year. Such indebtedness is evidenced by book accounts, or by short-term papers variously known as "revenue loans," "tax warrants," or "auditor's warrants."

When through bad financial management current debts are not met from the revenues of the year, they become a part of the floating debt. When the state is so unfortunate as to have allowed a large floating debt to accumulate, it is sometimes funded, i.e., the miscellaneous evidences issued from time to time are called in and replaced by a uniform series of bonds or serial notes. The transfer of current indebtedness to the class of floating indebtedness and the funding of floating debts not incurred for permanent improvements are indications of bad financial policy and will, if persisted in, lead to an impairment of the state's credit.

Debt redemption

It was said above that long-term or funded debts are represented by sinking-fund bonds or serial bonds. The former are virtually a series of promissory notes of like form bearing the same interest, the same date of issue, and the same date of maturity. The method of payment is by the accumulation of a sinking fund. This is a fund into which is to be paid periodically by the state a sum such as will, with accumulated interest, at the date of maturity suffice to redeem or pay off the bonds. Until recently the sinking-fund method of meeting long-term debts was almost universal but was open to certain objections. It sometimes happened that the annual contributions to the fund were not regularly made and sometimes the accumulations of money thus made were impaired by unwise or perhaps corrupt management, so that at the date of maturity the fund was insufficient to meet the obligation.

The frequency with which these mishaps occurred was a reason why serial bonds have to a large extent superseded sinking-fund bonds as evidences of indebtedness of this kind. By the serial-bond plan the securities have a common date of issue as before, but are divided into a number of groups equal to the number of years allowed for payment of the whole debt.

The several groups are arranged to mature in succession at intervals of one year until the debt is paid. Many arguments have been put forward for each of these plans of financing, the general conclusion being that while there is no material difference in the ultimate cost, the serial plan avoids the uncertainties attendant upon the accumulation and preservation of large sinking funds and has the advantage of compelling the government to provide in its budget for both the interest charges and the redemptions falling due each year. This method is meeting with particular favor in local areas where special assessments are permitted to be paid in annual installments.

Limitations upon borrowing

In public, even more perhaps than in private, finance there is strong temptation to pay for present enjoyments with promises for the future rather than with cash. Those charged with the work of government for the moment like to be able to point to improvements made during their administration, but shun the opprobrium attaching to those who are responsible for tax increases. Hence there is ever present temptation to substitute for the rigorous methods of taxation the easier way of borrowing and leaving to succeeding administrations the unwelcome but inevitable task of repayment. The result of this tendency has been the imposition of constitutional restraints upon public borrowing. Besides the stringent limitations which have been imposed on the borrowing powers of local governments, limitations on state debts began to appear before the middle of the nineteenth century, primarily induced by the financial dissipations attendant upon the era of internal improvements. At the present time all but three states place restrictions upon state borrowing, either as to amount or purpose or both, or require special authorization from the people before debt may be incurred. States imposing the most stringent limitations permit the creation of debt for the suppression of insurrection and for the repelling of invasion. In many cases borrowing to meet casual deficits or to refund old debts is permitted. In a large number of states the government is forbidden to pledge the credit of the state for the benefit of private undertakings, or to assume their

obligations. Likewise subscription to stock of any private corporation is forbidden. In the states where the limitations are placed upon the basis of the amount borrowed, the maximum allowed varies from $50,000 in Maryland and Rhode Island to $2,000,000 in Idaho. Utah fixes the limit at 1½ percent of the assessed valuation of the state. In several of the older constitutions the limit fixed is so low as to prove a serious handicap in performing the services which are today demanded of state governments. This embarrassment is relieved in a number of states by the provision that the amount of indebtedness to be incurred and the range of purposes to be permitted may be enlarged by popular referendum. In some states the difficulty has been met by constitutional amendments which modify the narrow limitations. In some states methods of evading the most rigorous limitations have been employed. Revenue bonds or bonds of a state agency may be permitted even though full-faith and credit bonds may not be sold by the state.

The history of the public debt at any level of government—national, state, or local—has been one to attract more and more citizen interest. In recent years much has been said of the huge national debt and its rapid growth in the decade following 1930 and phenomenal growth during the war years. The history of state debts has been radically different. While the national government was reducing its debt during the 1920's, the states were more than tripling theirs. With the onset of the depression the national government debts rose rapidly but state debts showed only a moderate increase. During World War II state debts declined substantially while the national debt reached astronomical proportions. Time will tell whether the states will launch into another debt-making program in the decade following the close of the war.

Table 5 gives total and per capita state gross debts for selected years between 1915 and 1947. States with highest per capita debts are Arkansas, Louisiana, New Mexico, and New York. The states of Florida, Indiana, Nebraska, and Wisconsin have no direct debts, according to the United States Census

Bureau, although some auxiliary or dependent agencies of these states have outstanding debts. Nevada has no direct or indirect debt.

TABLE 5. Total and per Capita State Gross Debts, 1915–1947

Year	Gross State Debt (in thousands)	Per Capita
1915	$ 532,713	$ 5.41
1919	693,623	6.60
1925	1,745,651	15.50
1930	2,444,122	20.03
1932	2,907,495	23.45
1937	3,275,677	25.53
1940	3,642,378	27.87
1944	2,792,468	22.08
1946	2,366,959	18.07
1947	2,956,433	21.26

5. Transfers, gifts, and grants

As used here the term transfer is broad enough to include gifts and grants. A transfer may come to the state in the form of a grant by a local unit of government or the federal government. The distribution of the United States Treasury surplus in 1835 to the states constituted the first big grant of money by the national government to the states. Other kinds of grants have been made from time to time, but since 1915 the policy of granting money to the states for aid for specified functions has greatly expanded. In 1915 federal grants-in-aid amounted to less than $5,500,000. By 1932 the item had grown to more than $217,000,000 and ten years later, even while it was financing a war for its survival, the federal government made grants to states in the amount of $786,000,000. The total climbed somewhat higher for later war years but was down to $743,000,000 in 1946. The current trends in Washington indicate that states will continue to receive substantial revenues through federal grants.

State governments do not receive a large percentage of their revenues from local governments or gifts from private persons. In the aggregate, however, a good many millions of dollars are received annually by the states from these two sources.

Financial Administration

The financial cycle

The administration of the state's financial affairs may be thought of as a cycle of operations following one another in endless succession. These operations include planning, appropriation, tax-levying, collection, control, disbursement, reporting, and auditing, and so on around to planning again. Of these steps in the financial cycle, appropriation, tax-levying, and auditing should be taken by the legislature. Collection, control, disbursement, and reporting are properly functions of the administration. Planning is most satisfactorily performed by cooperative consideration by both the legislature and the administration. Some of the conspicuous mistakes made in the conduct of government in the United States have arisen from a failure to preserve this distribution of functions.

Although it is true that were it not for expenditures made, government would not be under the necessity of planning, appropriating, or taxing, it is equally true that the planning and appropriating must precede and collection proceed at least concurrently, with expenditures. Hence in a study of financial administration it is proper that attention be first directed to financial planning and the appropriating of funds.

Distribution of financial functions

Although the legislature should determine policies in their larger aspects, set the bounds of expenditures for various services, and take measures through audit to satisfy itself that funds have been expanded legally and wisely, it cannot advantageously go farther alone. It cannot successfully make detailed plans. It lacks the information, the means of securing it, and the time to devote to it. For this it should have the assistance of the administration. But any attempt of the legislature to exert financial control over the discretion of administrative officers in the daily performance of their share of the financial operations leads but to delay and confusion. Control for securing of efficiency can be performed satisfactorily only by administrative officers in daily contact with the law-enforcing and service-performing agencies of that branch of government.

The legislature, as the policy-determining and fund-granting branch of government, must be able, before it can act wisely, to answer for itself these questions: Has each of the present activities of the government proved of such value that it should be continued? What new activities, if any, shall be undertaken by the state? What sums shall be expended for the support of each activity? How shall the costs of government be met? The purpose of the budget is to assist in answering these questions.

The importance of a properly constructed budget may best be made evident after a brief glance at the lack of planning and the haphazard method of making appropriations before it was developed in the states.

Early appropriation methods

In early days, when state activities were few and expenditures small, the methods of dealing with financial problems in the legislature were simple. The head of each spending agency placed before the committee in charge of appropriations his estimates of financial needs. Since the problems involved were few and the matters dealt with were those of common knowledge, the committee could from its general knowledge reach a fairly accurate judgment as to the relative needs of various administrative services. With the multiplication of such services and their growth in complexity and technical character, the preparation of an appropriation bill by such methods became impracticable.

Every department head was likely, as a result of his experience, to become impressed with the opportunities for greater service to the public which might be rendered by his department if funds were available. These he made the basis of earnest requests for increased appropriations. Thus, the committee without special and definite knowledge of real needs found itself subjected to importunities from every side. The inevitable consequence was that those who were most insistent in their demands and were able to bring the greatest political pressure to bear secured the largest appropriations. Not only before the committee but among legislators generally, lobbying for appropriations was widely indulged in. The result was a tendency to an ever-increasing total of appropriations. When the committee

became aware that retrenchment was necessary, departmental estimates were pared without much discrimination and to the serious weakening of many worth-while services. Occasional demands for economy on the part of the public would result in general and unintelligent slashing of appropriations with equally disastrous results. In anticipation of such occasions, department heads were accustomed to increase their estimates beyond actual needs or what they might reasonably expect to secure. In addition to the appropriations recommended by the committee and embodied in the general appropriation bill, literally hundreds of measures carrying appropriations from the state treasury were introduced by individual members on their own initiative or at the request of various interested groups and passed by the dozen without thought of their effect on the finances of the state.

Throughout it all there was lacking anything approaching a general financial plan for the state which envisaged the relative needs and merits of various state undertakings, and, at the same time, the sources of state revenues and their productivity. So long as the results of such methods were not recognized as a burden upon the taxpayers, no popular interest could be aroused in financial methods; but ultimately the increasing cost of government and the decreasing purchasing power of the dollar directed public attention to the financial chaos and led to demands for improvement. The exigencies of World War I gave impulse to the movement for economy, with the result that the federal government and practically all of the states have undertaken financial reforms which have been collectively spoken of as "the budget movement."

Nature of a budget

The term "budget" has come rapidly into the popular vocabulary and is frequently applied to procedures which fall far short of a true budget. Properly defined, the term "budget" means a comprehensive financial plan for a definite period, based on careful estimates of expenditure needs and probable income of government. It is not an estimate of expenditures alone, however carefully prepared and elaborately set forth, though estimates are one element in a budget. Neither is it an appropriation act

merely, as it is often assumed to be, since this act is but an instrument for carrying the budget plan into effect. Besides being a presentation of estimates of expenditure and of probable revenue, the term budget properly presupposes an intelligent consideration by some central authority of the various services to be performed, their relation to one another and to the welfare of the state as a whole, and the wisest distribution of available funds among these services. It implies further the consideration of revenues—whether they shall be diminished or increased, and, if either, at what point and to what extent. All these elements are necessary to an effective budget.

A common defect in budgets as they have developed in this country is the failure to give adequate information concerning, or consideration of, the revenue side of the picture. Budgets are too often merely expenditure plans. This has resulted from the popular habit of thinking of the budget as merely a consolidated appropriation bill, and from the practice of maintaining taxes, when once established, at a fixed rate over a period of years. A proper budget gives information concerning and embodies proposals relating to both the expenditures and the income of government. The goal of good budget-making is to present a plan whereby expenditures and income are in substantial balance.

As an expression of financial policy, the budget must be formulated in the light of past budgets and the obligations incurred under them, as well as with a view to the obligations upon future years which the adoption of the current budget may entail. Public undertakings, such as extensive public works begun in the past and as yet incomplete, place an obligation upon the current budget which cannot wisely be ignored. Likewise, present extraordinary expenditures not of the nature of permanent improvements may be met by borrowing and thus relieve present tax burdens. Those whose duty it is to formulate the budget must face the fact, however, that such methods will entail upon future budgets a heavy and perhaps embarrassing burden of debt liquidation. Few, if any, of the budgets now prepared in the states measure up to the full stature of the ideal budget, but all

constitute at least a step away from the old condition of chaos and in the direction of creating a more effective instrument of financial control for popular government.

Steps in budget-making

The first step in the formulation of the budget is the gathering of information. This is secured, in the first place, from the several departments, institutions, and branches of the state government upon uniform estimate blanks. Upon these are shown in considerable detail the amounts expended for various purposes during the financial period just closing, together with estimates of the needs of the departments and institutions for the approaching financial period as seen by their respective heads. In some states this information is supplemented by investigations conducted through visits to institutions, and studies of the administrative methods of the several departments. With such information in hand and after hearings granted to representatives of departments and institutions, the budget authority proceeds to prepare a financial plan which, in view of the general welfare, shall make the most advantageous distribution of the state's revenues. If in the judgment of the budget-making authority, the anticipated revenues will not be sufficient to meet such expenditures, there should be included, along with the rest, proposals as to the means of meeting this deficit, whether by increase in taxation or by borrowing. Accompanying the above plans, a complete budget should carry a statement of anticipated revenues, a debt statement, and balance sheet for the period just closing.

Budget-making authority

The proper location of the budget-making function has been a much controverted question, and three different answers to the question have been enacted into law. First: In New York, in what has been called the legislative budget, an attempt was made to leave the preparation of the budget, as well as the framing of the appropriation bill, in the hands of a legislative committee. This solution has found favor elsewhere only in Arkansas and has been abandoned in the state of its origin. Second: Somewhat more than half of the states have adopted the executive budget, an arrangement whereby the budget is formulated by an immediate agent of the governor and is placed before the legislature

as the proposal of the governor himself. Third: Following the example of Wisconsin—the first state to institute a budget system—about one-fourth of the states now entrust the task to a budget board, although Wisconsin now has a single director who prepares the budget. Varying in their composition, these boards are made up of administrative officers serving ex officio, of members appointed by the governor, of a combination of ex officio and appointed members, and of both administrative officers and members of the legislature.

1. Legislative budget

The legislative budget is open to some of the same objections as those which applied to the old method of framing the appropriation bill before budgets were introduced. The most valid objection is that it places the task in the hands of persons who are not in touch with the work and needs of the departments and institutions, and who are not responsible for the success or failure of the plan if adopted.

2. Executive budget

The executive budget, on the other hand, suffers from certain disadvantages which arise from our adherence to the doctrine of the separation of powers. In the first place, it is the work of an authority outside the legislature and one which is traditionally viewed with some jealousy by that body. In the second place, there is no direct representative of the governor present in the legislature to explain and defend the proposals. Furthermore, in the states where the governor is not the real head of the administration, representatives of the various administrative departments feel free to use their influence in the lobby in their own behalf to secure larger appropriations, thus defeating some of the purposes of a budget.

It is to anticipate the last weakness that the Maryland and Utah constitutions forbid the legislature to increase the appropriations for the administrative services proposed by the governor. To make the executive budget fully effective certain other changes have been proposed.

1. The administrative branch should be reorganized into a centralized system with the governor as the real head.

2. Power should be given to the governor to veto items in the appropriation bill.
3. The governor or his authorized representative should have a place on the floor of the legislature with power to participate in debate.
4. The governor should be given sufficient control over expenditures after appropriations are made, so that he may reasonably be held responsible for the results of the administration.

Nowhere among the states have all these steps been taken as yet.

3. Administrative budget

The various types of budget boards which have been set up have been devised with the foregoing limitations in mind. There has been an attempt to secure a combination of the benefits of the intimate knowledge and experience of the administrative officer, and some centralization of responsibility which would otherwise be looked upon with suspicion in some quarters. Likewise, this plan seeks to secure a degree of harmony between executive and legislative departments which is highly desirable but sometimes sadly lacking under the executive type. This is done by including on the board, along with administrative officers, certain members of the legislature.

It is not customary in this country to give administrative officers a place in legislative debate, as is the case in countries under parliamentary government. The inclusion of legislative members on the budget board insures the presence on the floor of the legislature, when the budget is under discussion, of a few persons who participated in its preparation and who can discuss it with intelligence and offer the necessary explanations.

Budget message

The budget having been prepared, it is presented to the legislature accompanied, if an executive budget, by a "budget message" from the governor. When it is properly drawn up, the message reviews the financial situation of the state and explains and discusses the budget proposals, especially such as suggest new expenditures or taxes. Too often the message degenerates

into a brief and uninforming letter of transmittal. There is usually introduced at the same time a general appropriation bill. This bill embodies the budget proposals, varying from state to state in the degree of detail in which they are presented. If any change in the system or the rate of taxation is contemplated, there appears also one or more tax bills although they are not usually accompanying the budget.

Bills in the legislature

For historic reasons, either by constitutional mandate or by custom, both appropriation and tax bills are introduced in the lower house. The bills are referred to the proper committees which proceed to discuss and to hold hearings on them. At these hearings interested parties both within and without the government may present their views. In a few states, immediately after the election of legislative members, a special committee of the two houses is appointed to make its own independent investigation—of necessity not exhaustive—of financial needs.

In four states the legislature is permitted to decrease but not to increase appropriations proposed by the budget authority.[1] In some others no bill carrying an appropriation can be passed until after the regular general appropriation bill has been enacted. In these states, in order that the budget balance may not be disturbed, every such additional bill involving an expenditure must contain also provision for raising the money thus appropriated.

Should the legislature decide that new agencies of administration or new services are to be undertaken, provision for financing them may either be introduced into the general appropriation bill, or included in the act initiating the new undertaking.

Having passed through the regular legislative stages, the bills are sent to the governor for approval or veto. In thirty-nine states the governor is permitted to veto individual items in appropriation bills.

The stream divides

From this point the course of financial operations divides and flows in two streams, one directed toward assessing and collect-

[1] Except that in one of the four states items for the judiciary and legislature may be increased.

ing the revenues as provided by law; the other toward the disbursement of money from the treasury to meet obligations incurred as authorized in the appropriation act in the performance of administrative services to the public or for the maintenance of the machinery of government. It is next in order to follow each of these streams of operations until they are reunited in the accounts and reports of the finance officers. The stream of income operations may first claim attention.

The stream of income

Although all taxes must be imposed by the legislature, the actual fixing of the rate of levy is sometimes left to be determined by some administrative authority, usually the tax commission, after some computations as to the approximate sum necessary to be raised.

Assessment of property

The assessment of the value of all property, unless provision is made for certain special forms of property, is in most states made by assessors locally elected. Their duty is to list all property of every individual and to determine its value for purposes of taxation. Real estate is usually actually viewed by the assessor but personal property is listed by the owner under oath. If the assessor chooses, he may demand a view of the personalty.

It was found at an early date that the assessment of certain forms of highly specialized property such as that of public utilities, and property extending through several taxing jurisdictions such as that of railroads, could not be equitably assessed by the local officers. Consequently, such property, including that of corporations, is now quite generally assessed by the state tax commission. The tax lists thus prepared are made the basis for all property taxes both state and local. The tendency today is to make intangible personalty the subject of a special tax, and to make no attempt to include it on the general property assessment roll.

When the assessment roll has been completed and laid open for public inspection the next step is that of review and equalization. This is usually taken by a county assessor or board of review, or, in New England, by some town authority. The function of these officers is in the first place to correct errors or

omissions in the tax rolls. The taxpayer may appear, present his grievance, and, if he is found to have been assessed too highly, secure relief. A second duty of the officers is to equalize assessments within the district as between assessment areas. When the county valuation is thus determined, the tax roll is certified to the state tax commission. The commission makes an equalization between counties so that an equitable distribution of the burden of state taxation on property may be secured. The board may, in some states, order a reassessment in certain areas or a reassessment of particular properties.

The tax rate

With the total valuation of the state determined, the burden equalized, and the estimates of probable revenues to be derived from other sources in hand, the tax commission or other proper authority may now proceed to compute the rate of the state tax levy. Unless a deficit is to result, this rate, when applied to the total valuation of property in the state subject to the general property tax, must produce a sum which, when added to the other revenues of the state, will equal the expenditures authorized by the legislature. Actually the general property tax plays a minor role in balancing the state budget. Only about 4 percent of state revenues comes from this source. The state rate thus determined is communicated to the local authorities to be added by them to the various local rates to make up the total rate of levy. This total rate is made the basis of computing the contributions which are to be paid by individual taxpayers.

Collection

Aside from the special taxes and those assessed by the state authorities, taxes are collected locally at the office of the treasurer or sometimes at local banks, though in certain states the collector visits each resident taxpayer at his home or place of business. When the taxes are collected, the state's share is turned over to the state treasurer or deposited to the credit of the state in some public depository bank.

The administration of the various forms of special taxes, such as those levied upon corporations, inheritances, and incomes, and more recently upon intangible personal property, has been withheld from the local authorities and placed in the hands of a state

authority, either the tax commission or some other agency. There has been a tendency in recent years to centralize state tax collection in one agency—commonly called a department of revenue. Kentucky, New Jersey, and Indiana are examples of states having central revenue collecting agencies. Gasoline taxes, motor-vehicle license taxes, income taxes, and general and selective sales taxes make the activities of state revenue departments look like big business.

For more than half a century the state exercised no administrative control over the assessment and collection of taxes, but merely received its share of the income from taxes assessed and collected by the local tax authorities. The local areas soon discovered that by making their own assessed valuations low they could provide for the needs of the local treasury by raising correspondingly the local tax rate, and at the same time shirk their just share of state taxes. As a result local valuations sank lower and lower, but with great inequality as between different districts. To remedy this condition a measure of state control was introduced by the creation of the state boards of equalization, whose function has been pointed out above.

The introduction of various special taxes and the development of more complex and specialized forms of property demonstrated the need of still further measures of state action. The result has been the creation in a large majority of the states of a tax commission, or, in two states, a single tax commissioner. Beginning in several instances as a temporary commission to investigate a concrete existing situation and report proposals of legislation, they became permanent bodies, usually superseding boards of equalization and vested in some cases with very broad powers.

The functions of the stronger commissions may be described as:

1. To instruct, advise, and prescribe forms for local assessors
2. To equalize assessments between local areas
3. To hear appeals from local assessments and, if necessary, to make or order reassessments

4. To assess certain forms of property
5. To administer directly certain forms of taxes
6. To make investigations and to recommend measures of legislation
7. To these may be added, in a few instances where the highest degree of centralization has been attained, to remove local assessors and to appoint county assessors.

The result of the creation of these central bodies has been the injection of new vigor and greater uniformity into the whole taxing system of the state.

Custody Except in the case of sinking funds, which are administered by special boards in most cases, the treasurer is the legal custodian of state funds, although, as has been mentioned, sometimes departments or institutions are permitted to retain and administer their own incomes without their passing through the treasury. Originally the somewhat primitive practice prevailed of keeping the funds in the vaults of the treasurer's office, but since this deprived the state of the interest which might otherwise accrue and since the expense of safeguarding the money was considerable, funds are now in all but a few states deposited in depository banks scattered about the state.

Funds In a large number of states where the fund system of finance prevails, the revenues in the state treasury are not all available for general state purposes. In these states, besides the "general fund" which is made available for such general purposes, there have been created certain "special funds." The legislature fixes by law certain specific purposes, and such proceeds cannot be drawn upon for other purposes. Where they exist, these special levies must be taken into account and added to the rate levied for the general fund when the total state rate is made up. Among such special funds may be found in many instances a highway, an institutional, a university, and a health fund, as well as several others. Sinking funds and various trust funds such as teachers' retirement funds are sometimes made the objects of special levies. These special funds have been created to make more secure the financing of the objects thus provided for, but they have con-

stituted a serious handicap to the development of an effective budget system. Under the fund system it may easily happen that very desirable work in one department has to be stopped for lack of money, while at the same time a considerable surplus is lying unused in another fund.

The stream of expenditure

Fiscal control

Let us return now to trace the second stream of operations which flows from the financial acts of the legislature. Here we are concerned with the subject of fiscal control. Such control is necessary to the end that the funds granted by appropriation shall be properly expended and that expenditures shall not exceed appropriations. It is in this matter of control that financial administration in the United States is generally most defective.

The historic method used in this country was to make lump-sum appropriations to be used by departments and institutions, leaving to the several heads thereof entire discretion as to their expenditure. It was soon discovered that under this plan funds were frequently used in a way quite different from that intended by the legislature. At other times, although they were expended within the law, they were injudiciously used. In still other instances money was used so injudiciously as to exhaust the appropriation before the end of the year, and thus, in order to carry on some necessary expenditure such as the feeding of inmates of institutions, unauthorized debt would be created. It was believed when this abuse became evident that it could be avoided and a proper control secured by a detailed itemization of appropriations in the act, supplemented by watchfulness on the part of the auditor to see that these detailed requirements were complied with. By this method legality of expenditures can be secured, but the matter of a wise discretion in their use is not assured. Moreover, it has been found that so high a degree of itemization hampers the judgment of administrative officers and hinders efficient operation. To secure a proper degree of control combined with an opportunity for a reasonable degree of discretion, new methods have been devised in a considerable number of states.

To create a more effective check on expenditures and at the same time to provide an opportunity for the exercise of a reason-

able degree of discretion, a system of pre-audit similar to those in use in large private business concerns has been set up in some states. By pre-audit is meant the examination of a proposed expenditure before it is incurred. On the ground that an audit at this point by an independent auditor, as in the past has been customary, serves but to divide responsibility and to harass the administration without increasing the security of funds, the pre-audit should be placed in the hands of a comptroller or budget director appointed by the governor. Thus the responsibility for expenditures is placed squarely upon the shoulders of the governor who is directly responsible to the people.

The pre-audit officer requires the spending departments to prepare a work or expenditure plan for each month or quarter of the year at the opening of the fiscal period. When this is approved by the pre-audit officer, it becomes a limit beyond which the department may not incur obligations. Transfers from one appropriation head to another may, however, be made with the consent of that officer. Under some systems pay rolls and requisitions for purchases must be examined by that officer to answer three questions: Is the expenditure for a legal purpose? Is there an available balance in the appropriation for the purpose? Is it a judicious use of funds? Until the officer gives his approval the obligation cannot be incurred.

Accounting

To make this system of control effective, a central set of accounts is maintained in the office of the controlling officer, both of expenditures and of income. Two systems of accounts are in use in the states. When accounts are kept to show merely the amounts of money received and paid out during a given fiscal period, and when reports are made out in the same way, they are said to be on a *cash* basis. When they are kept to show the money due and chargeable during the period without regard to the actual time of payment, they are said to be kept on an *accrual* basis. Unfortunately, the accounts of most states are kept on the former plan only. This makes it impossible to form a true picture of the financial operations of the state and to compare

them intelligently from year to year. Moreover, it opens the way to the juggling of reports for political effect.

When reports are made on this cash basis, it is easy to call attention to the balance on hand at the beginning of a period or administration and to compare it with the balance on hand at the close. From such comparisons unwarranted conclusions as to the financial success of the administration may be suggested. By including collections of delinquent payments or the proceeds of bond issues for permanent improvements and by postponing the payment of obligations due, a desirable, favorable balance may be shown at the close of the period or administration. This may conceal bad financing and may create an entirely false impression among the taxpayers. When accounts are kept and reports made strictly on an accrual basis, the opportunity for such political manipulation and popular misunderstanding is greatly reduced.

Consequently, some states are now keeping their accounts on an accrual basis. This makes it possible at any time to prepare a balance sheet reflecting current operations in the manner which has been found necessary in well-conducted private business.

Disbursement

Ignoring the manifold differences in detail, it is possible to trace what may be called the typical method by which state funds are disbursed. It must be remembered that an appropriation is merely a permission from the legislature to some spending agency to spend a certain amount of money for a specific purpose if such amount is in the treasury unencumbered, and to the treasury to pay that amount from any funds available upon presentation of proper vouchers. Special appropriations may become effective immediately upon passage, but the general appropriation act ordinarily becomes effective at the beginning of the next fiscal year after date of passage. This may occur almost immediately, but is frequently some months in the future. Since biennial sessions are the general rule among the states, regular appropriations are made for each of the two following years separately.

After the appropriation act has become law, the auditor opens

accounts with each of the spending departments and credits to each the amounts appropriated to it under the proper heads. When an obligation is incurred by a department, the bill or memorandum is certified by the department and presented to the auditor. If the latter finds that the expenditure is authorized by law, that there remains unexpended a balance to the credit of that particular heading of appropriation, and that there are funds available in the treasury, he draws a warrant, or check, on the treasurer and sends to that officer a memorandum of the fact. This auditor's warrant may be presented directly to the treasurer for payment, but in practice it is customary for the creditor to deposit the warrant in his own bank, as he would do with any other check. From the bank of deposit it goes through the clearinghouse to a state depository bank and thence ultimately to the treasurer, to be retained by him as his voucher.

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CHAPTER 15

ADMINISTRATIVE SERVICES: LAW ENFORCEMENT AND PUBLIC HEALTH

In the chapters immediately preceding, the structure, powers, and procedures of state governments and the means of financing them have been described. It is now time to study the work which these governments perform. This can be accomplished in the space available only by grouping the various kinds of services and selecting typical examples for comment. Any attempt at classification of these services will fail to draw lines which sharply divide activities of one character from all others, but for purposes of convenience this may be attempted under the following headings: law enforcement, health, public welfare, veterans' welfare, labor, education, highways, business regulation, agriculture, and conservation of natural resources.

Law Enforcement

It will be recalled that in the introductory paragraphs of the first chapter on the legislature law was defined as "that body of rules and principles which prescribes the rights and duties of individuals in their relations with each other and with the government, which the courts recognize and enforce." It is the enforcement of the body of rules and principles which we know as "the law" with which we are at present concerned.

Enforcement of law dependent upon:

The effectiveness with which any law may be enforced depends upon the character and opinion of the public, upon the substance of the rule to be enforced, and upon the machinery of enforcement set up in the state. First of all, the character and opinions of the public have a powerful influence on the problem

of enforcing the law. In rural communities law enforcement has not until quite recently presented a serious problem. The closer contacts between individuals, and the complexities of the social structure attendant upon the concentration of population in cities, make necessary there an extension of the field of public control over private action. Since in a heterogeneous population the impulses to law observance are weakened, the task of enforcing the law upon the statute books becomes under such circumstances one of greater difficulty.

1. Character and opinion of the public

The substance of the statute itself reacts upon public opinion to affect vitally the problems of enforcement. Indeed, the attitude of the public toward the substance of a particular law has what is virtually a determining influence on the practicability of its enforcement. If a law sets up standards of conduct which are approved by the public opinion of the community, and if those who do not approve are disposed to accept the will of the public and observe the law, enforcement presents no difficulty. The law against murder in most civilized communities receives the unquestioned support of virtually the whole community and hence its enforcement is relatively a simple matter.

2. Substance of the law

But if, on the other hand, a law sets standards of conduct which are not approved by an overwhelming majority of the people, but which are definitely disapproved of by a considerable number of persons, then the problem of law enforcement becomes difficult, if not well-nigh impossible. Some of the more extreme Sunday observance laws now upon the statute books illustrate this situation. In certain states it is unlawful to sell anything on Sunday except medicines and cooked foods. In some states no public amusements except sacred, charity, or open-air concerts are legal on Sunday. Such laws, when not supported by the sentiments of a substantial majority of the public, are virtually impossible of enforcement. Traffic legislation in some communities likewise is generally disregarded because the public believes that it is not founded upon reasonable bases.

The American people display an unbounded faith in legislation as a panacea for social ills. Whenever a group of citizens be-

comes convinced that an evil exists, the impulse is to seek to remove it through the enactment of law. Since this law is the result of no general public opinion or demand, the public is indifferent if not openly hostile to it, and its enforcement is therefore difficult, if not actually impracticable. The passage of such statutes setting new and stricter standards of conduct is justified by many persons as an educative force in the community; but whether this argument is valid under such circumstances is a matter of opinion upon which people differ. It should be clearly realized, however, that such a process of education involves very definite costs to society. In the first place it subjects the law-enforcing machinery to a serious strain which it may not be constituted to withstand, and in the second place, the spectacle of a law being ignored or openly flouted induces a disrespect for all law imperiling the whole fabric of law and order in the community.

3. Machinery of enforcement

Again, the effectiveness of law enforcement depends in large measure upon the machinery of enforcement set up in the state. If the machinery of law enforcement is cumbersome and decentralized it may be much more difficult to obtain that speedy action which the public associates with effective justice. If no central directing agency exists for correlating the work of any of the large divisions of government engaged in law enforcement, that will have its effects not only upon crime but upon the attitude of the public toward the effectiveness of governmental action. If high standards of performance are characteristic of the agencies engaged in law enforcement work, the public will respect the personnel and machinery of government in so far as it deals with law enforcement. If the machinery is responsive to public demands for action, that also is important. Organization after all is an important element in governmental operation. It should exist to facilitate action and not to make it difficult when action is to be desired. Action is not to be thought of as the only goal in law enforcement, of course, but it is one of the goals to be sought.

The process of law enforcement when viewed broadly in-

volves two stages. The first consists of the setting in motion and carrying out of the processes by which the infraction of law is brought before the courts. The second stage includes those proceedings which are had after the case reaches the court. The nature of the steps taken before the court and the conditions necessary to effective judicial action are considered in the chapter devoted to the judicial branch of government. Here may appropriately be considered only the first of these stages, viz., that of initial steps in law enforcement.

Initiative in enforcement

When a particular violation of law involves the invasion of the private rights of a citizen, the injured party may be relied on to set the machinery of the law in motion. Sometimes, likewise, when it is a case of an offense against the public, a private citizen may take the initiative. This is illustrated by taxpayers' suits to restrain public officers from illegally paying out public money, or by suits for an injunction to restrain a public nuisance declared to be such by law. In these cases the courts act upon motion of the individual.

1. By individual citizens

In the case of crimes we do not rely upon the individual or upon groups of individuals to carry the main burden of initiating law enforcement proceedings. But there are cases when individuals may do so and statutes may even recognize actions by them as in the nature of private prosecution of crimes which especially affect them as well as the public. Private persons do not bear the brunt of the burden of prosecuting criminal offenders in this country as they do in England, however. Nevertheless they do participate to some extent in this function.

2. By voluntary organizations

There exist in every state and in many local communities voluntary organizations of citizens, each formed to promote some particular phase of public welfare. These include such organizations as the Izaak Walton League which has among its objects the protection of fish and game, and the National Consumers' League, which seeks to promote the welfare of women and children wage earners. Such organizations are active in setting in motion the appropriate agencies of law enforcement.

Many statutes of a regulatory nature are enforced through

3. By special administrative agencies

administrative agencies created especially for the particular purpose. State departments of banking, insurance, labor, public utilities, and health, as well as some others, are charged with the duty of securing the enforcement of the law in their particular fields. These agencies may coöperate with official prosecutors by giving them facts on which to act or they may act on their own initiative.

4. By general police

Notwithstanding the activities of individuals in this direction and the existence of special governmental agencies for setting in motion the machinery of the law, it still remains true that the great body of law established for the preservation of the safety of persons and property, the protection of the public morals, and the promotion of the public convenience is enforced by the police officers who have conferred upon them general police authority. Included in this group are sheriffs, constables, municipal and state police. Their work is supplemented by the action of the prosecutor. It is a well-known fact that it is in the enforcement of these laws of a general police nature that our governments, both state and local, have most conspicuously failed.

The traditions of local self-government which have prevailed in this country have demanded that law enforcement shall be left in the hands of officers of the locality chosen by the people themselves or by their immediate representatives. Consequently, the creation of special state agencies to enforce regulatory laws has been watched with jealousy, and the creation of a state police strenuously opposed in many states by champions of "home rule."

Conflict of state and local opinion

Much of the failure of law enforcement arises from conflicts between local and state-wide sentiment with respect to the particular subject involved. The police laws are, except for local ordinances passed by city councils, enacted by the legislature and embody its judgment of what is desirable for the welfare of the whole state. The local officers, sheriffs, police, prosecutors, and courts, whose duty it is to enforce these laws, are then legally serving two masters, the state which enacts the law and the

local community to which they owe their office. If it happens that a particular statute enacted by the legislature is not in accord with popular sentiment in the locality, the enforcing officers are placed in a dilemma. Shall they do their duty as agents of the state and enforce the statute or act in accordance with local sentiment and refrain from its enforcement?

Under such circumstances the decision is usually in favor of those to whom they owe their office and upon whose approval their continuance in office depends. The effect is a nullification of the particular statute so far as that community is concerned. Ordinarily such nullification arises from the failure on the part of the police authorities or the prosecutor to act; but in some instances even magistrates locally elected for brief terms have succumbed to the same local influences.

The legislatures themselves are responsible in no small degree for this condition of non-enforcement of law. The people of the whole state are interested in having certain laws uniformly and effectively administered throughout the state. The strict enforcement of statutes for the eradication of contagious disease is of great importance to every citizen for his own security. Public convenience demands that a uniform law governing weights and measures shall be strictly applied throughout the state. The inconvenience experienced by travelers due to the lack of uniformity of traffic regulation in different cities is well known. Upon these and on many other subjects of general concern the legislature should enact uniform laws. But, on the other hand, there are many matters of a purely local nature concerning which there is no need for a uniform rule, and upon which different localities have divergent needs and opinions. To insist upon uniformity in the law on such matters is to invite disregard of them in many communities. The situation is sometimes aggravated by the proneness of legislatures to enact statutes to satisfy the demands of small but insistent groups of citizens, even when the legislators believe when they place the acts upon the statute books that no serious effort will be made to enforce them.

Possible remedies

In attempting to solve the unhealthy condition brought about by this dual but conflicting allegiance of local officials, several measures suggest themselves.

1. Fewer or optional statutes

In the first place, the legislature might refrain from enacting general laws which are obnoxious to a considerable number of communities, or it might make such laws optional, applying only to such localities as might formally adopt them. In the second place, if the general welfare demands the enactment of a law of state-wide application, then either a sufficient control over the local officers by the state administration should be established, or an adequate state law-enforcing machinery should be set up to supersede the locally selected officials for this purpose.

2. State control of local officers

The constitutions of the states usually stipulate that the governor shall "see that the laws are faithfully executed," but in most states no adequate means have been provided him for performing this duty. When a sheriff, police officer, or prosecutor fails to perform his duty, the governor has no means of compulsion; nor does he have the means of punishing the officer for his dereliction. In a few states only, including Massachusetts, New York, and Ohio, the governor has the power to remove certain local law-enforcing officers under such circumstances.

This unfortunate lack of a state control is increased by the fact that the attorney general, the state's chief prosecuting officer, has in most states little or no control over the local prosecutors. No state has attempted to create a department of justice comparable to that under the direction of the federal Attorney General, although slight beginnings in that direction have been made in Louisiana, Idaho, and Wyoming. These have not gone to the lengths necessary to insure an effective supervision of local law enforcement. A remedy for the existing lack of centralization might be secured, first, by placing in the hands of the governor the appointment of the attorney general; second, by making local prosecuting attorneys responsible to the attorney general; and, third, the governor might be given the power, after hearing, to remove any sheriff, chief of police, or prosecutor for failure faithfully to perform his duty. Such changes from the

existing system would give strength to the arm of the governor in performing his constitutional duty and give a sadly-needed higher tone to local law enforcement.

3. Enforcement by state officers

An alternative to the system of relying upon local officers to enforce the state laws is that of undertaking their enforcement directly through the state's own officers. This is exactly what has been done in the case of certain subjects such as banking, public utilities, labor and some others, as already mentioned above.

General police agencies

One of the oldest agencies of law enforcement is the state militia, which has now been consolidated into the national guard of the United States. It is composed of all able-bodied male citizens, as well as such persons who have declared their intention of becoming citizens, between the ages of eighteen and forty-five years, save certain specified classes who are specifically exempted by law. The exempt classes include the executive and judicial officers of the United States and of the states, certain subordinate employees of the federal government, and mariners.

1. The militia

The militia is divided into three classes: the national guard, the naval militia, and the unorganized militia. The national guard includes those members of the militia who are enlisted in organized units for drill and instruction for land service under the terms of the National Defense Act of 1916. The naval militia is made up of members of the militia similarly organized in training for service upon the high seas and the navigable waters of the United States. Only a small part of the militia, however, is thus organized and trained for service on land or sea. Besides these two comparatively small groups, all other members as defined above compose the unorganized militia, a body of men who are not regularly under militia instruction but who may in time of emergency be called out to augment the organized national guard. In time of peace, control is divided between the federal and state governments. All members of the militia, both organized and unorganized, may be called into the service of the United States whenever Congress shall have authorized the use of armed forces beyond the existing strength of the regular army. When "federalized," the militia comes entirely under the

control of the federal government and becomes to all intents and purposes a part of the regular army. When the national guard is not in the service of the United States, Congress still has control over its organization, arming, and discipline; but the states are entrusted with the duty of training it and of appointing its officers, subject to periodic inspection by officers of the regular army. The federal government supplies the uniforms and equipment, and gives to each state an annual grant-in-aid for the maintenance of the militia. The appointment of officers is usually vested by the legislature in the governor, although the qualifications and compensation of the officers are determined by the federal government.

In each state there is a military department of which the adjutant general, appointed by the governor, is the administrative head, subject to the authority of the governor as commander in chief.

When not engaged in the service of the United States, the national guard, and even the unorganized militia, may be employed by the governor to aid in the enforcement of state law. This the governor may ordinarily do upon his own initiative or upon the request of a sheriff, mayor, or other local officers. The national guard is not thus used for the routine work of law enforcement but only in case of emergency, when serious disturbances occur or when resistance to law on a large scale is present or threatened.

The militia is from its very nature unsuited to perform ordinary police duty. It is in a mobilized state only during a brief period in training camp each year, so that its use as a permanent police force is impracticable. Moreover, it is composed of citizens drawn from all walks of life, whose chief interests are in civil rather than in military life. To withdraw them from their private affairs to perform frequent or long-continued military service would impose a hardship and create a greater unwillingness, than now too often exists among citizens, to enroll for military training. The policy of frequently calling out a group of private citizens to coerce another group of their neighbors tends to produce hostility among groups and inflames class prejudices.

This is well illustrated when the militia is called out to perform police duty in cases of disorder accompanying labor disputes. The parties to the controversy resent the use of the militia, and the militia dislikes being called upon to perform a distasteful duty which they feel is outside that for which they enrolled. The governor, as commander in chief of the militia has found that his military position is not the least troublesome of his political powers because in case of disorder he may find that he will antagonize one group if he calls out the militia while if he does not call it out he may antagonize another group. Also, the militia may be used for a variety of purposes. It may be used, instead of a regular police organization, practically to patrol the area or to displace the ordinary functions and officers of government in the area. It may be used either to prevent or to compel the operation of business. With it labor may be supported or the employer may be supported in a strike. In recent years, the use of the militia has come to be regarded more often as a matter of political significance and less a matter of merely preserving order. In general, the weaker a police system is the more the militia will have to be used, but the better the police system, the less the militia will be necessary merely for the prevention or suppression of disorders. Contrary to popular impression, military authority is not suited to the preservation of order among civilians. The military method of dealing with disorder is through the ready use of arms, and the effect upon a group of rioters of a threatening show of arms is usually to incense them to violence. Thus the primary purpose of the display is defeated. A small group of trained police without a display of arms is much more effective in quelling a spirit of mob violence than is a military force of much greater numbers.

During World War II when the militia or national guard forces were all in the national service, frequently at battlefronts overseas, state governors were apprehensive of disorders which they might be powerless to cope with. Consequently, many states established substitute military organizations which were called state guards. As it developed, however, there was little occasion

for the use of these newly formed units, as existing police forces, particularly the state police, proved equal to general law-enforcement demands.

2. State police

In keeping with the trend toward superimposing state administrative machinery over local machinery, noted in Chapter 12, all forty-eight states have established state police forces. This movement began in 1865 when Massachusetts created a general state police for the purpose of combating commercialized vice. In 1903 a small force was established in Connecticut with certain inspectional duties in addition to the enforcement of gambling and liquor laws. Neither of these forces was large enough to enable it to maintain daily statewide patrol. Passing over certain temporary and special police, such as the Arizona Rangers of 1901, the first regular state police force in the United States was that of Pennsylvania and was established in 1905. This body, known as the "State Constabulary," was an innovation in the enforcement of state law in this country. It was organized on a scale sufficiently elaborate to admit of a daily state-wide patrol, and was made responsible to the governor alone. New York followed with a similar force in 1917, Michigan and West Virginia in 1919, and New Jersey and Massachusetts in 1921.

a. Functions

The development of automobiles and road systems accelerated the creation of state police forces. Many of them were established after 1920 to patrol highways, enforce traffic regulations and other laws related to automobiles such as registration and theft. Usually, after a few years, general police powers were conferred on the agencies. Washington established a state highway patrol in 1921, and in 1933, full police powers were conferred upon it. By 1947, only eleven states confined their state police to highway patrol activities. The typical rural police official, the sheriff, is still existent, but his enforcement work is being done in some states by the better-trained official on the state police force.

b. Relations with local police

The overlapping of state police jurisdiction on that of other police officials may result in jealousy and bad feeling between the two. To avoid this, various arrangements are made. Some-

times, state police are limited in the exercise of their authority to rural areas. In other cases informal arrangements are agreed upon. State police may notify local rural officers when they enter their jurisdiction for purposes of making arrests, and may ask the local officers to assist. Urban police have a dual function: the enforcement of the regulations of their own city, and the enforcement of state law. If some tact is used, usually a working arrangement can be arrived at whereby these two sets of officers can supplement each other and work harmoniously together. Rural police officials enforce the same law as the state police, and the opportunity for misunderstanding is consequently increased.

c. Organization

Ordinarily, state police organization tends to be military in form. A single officer with a title such as superintendent, director, commander, or chief commands the force. Subdivisions are headed by persons with titles of captain, lieutenant, or sergeant. The line of authority and responsibility usually is clearly established. There are exceptions to this kind of organization, particularly at the top, since some states have a board of control. Boards are not uncommon, but they usually are not in direct command. Their function normally is to advise the officer in command or exercise the command through him. During the earlier years of these police forces, they built up a reputation for efficiency. A leading student of police activity observes that merit systems for recruiting and managing personnel freed many forces from the machinations of partisan politics.[1] But in more recent years, there has been complaint that the heads of the organization have been changed with the shift in parties and that there has been a failure to extend the merit system (now in force in eleven states) so that partisan influences in recruitment and promotion have taken their toll of efficiency.

During World War II times were difficult for state police forces. Approximately 40 percent of the personnel was changed in the early years of the war. Most of the loss was to the armed forces, but some of it was to better-paying jobs. Great difficulty was experienced in finding replacements who were mentally and

[1] Bruce Smith, *The State Police*, p. 22.

physically qualified. Difficulties with equipment were equally trying. At the war's end, the forces in most states were restored to normal strength and, in many cases, expanded. Against the approximately 11,000 total police personnel in 1941, there were, as of July, 1947, about 14,000. Notable improvements with respect to the training of state troopers and with respect to physical equipment have been made in the last few years. These were begun before the war and have been carried on at a more rapid pace since. Studies in police functions have developed a body of knowledge which now is being made the subject of university and college courses. Northwestern, Iowa, California (at Berkeley), and Indiana universities, among others, have provided courses. The Federal Bureau of Investigation and several states have arranged special training for new recruits and also for refresher courses for those in service. The technical improvements are related chiefly to transportation and communication. The trend is for motor cars to replace motorcycles for regular patrol operations. All the cars in twenty-nine states are radio-equipped. Radios may be of three kinds: one-way (station to car); two-way (station to car and car to station); and three-way (two-way plus car to car). Nearly half of all the cars in use by state police are equipped with a three-way radio.

A state police system, free from partisan manipulation both in recruitment and in its management, well trained, organized, and commanded can be one of the most effective police forces. For this purpose, it has supplanted armed forces such as state militia, and it is rapidly preëmpting the function of the untrained, politically-selected rural police forces.

Bureaus of criminal investigation

A large number of states have created, either within the state police department or as a separate division in the state government or some department thereof such as the office of attorney general, a bureau of criminal investigation and apprehension. In some of the states in which it has not been possible to inaugurate a general state police system a beginning was made in that direction by the establishment of such a bureau. These bureaus usually have as their main functions the gathering of records both of

persons with criminal careers and of law enforcement in general, so that they may be of aid to law enforcement officers in their work of apprehension and detection and may inform the public as to the general state of crime prevention and detection. One of their most important functions is to furnish upon request expert aid to local police in both detection and apprehension. It usually has been necessary to exercise great care not to create the impression that these bureaus are to give local police directions as to how to perform their duties. But in many states tact and practical help given in time of need have resulted in a friendly attitude on the part of local police departments toward such bureaus. Through the gradual expansion of the personnel of these agencies and through the slow but steady extension of their work many states are beginning to see a very real improvement in the standards of apprehension and detection work in the law-enforcement field. These bureaus coöperate not only with one another in the exchange of records and identifications but with the Bureau of the Census of the United States and with other national agencies which now operate in the criminal field.

3. Rural police

In the various units of local government such as the counties, townships, cities and villages, a great and diversified number of police organizations are to be found. Something is said concerning each of them in subsequent chapters dealing with local government, but their relationship to the main problems of law enforcement should be noted here. In the counties the chief law-enforcing officer on the apprehension side is the sheriff. As is indicated later this is only one phase of the work of this office, although its usual organization is not sufficiently elaborate to enable it to participate very effectively in the detection and apprehension of crime. Only in the larger counties with quite dense populations are there to be found sufficient staffs of detectives, experts in identification, and police forces in the form of deputies to make of the office of sheriff a truly effective law-enforcement agency. Sheriffs are popularly elected for relatively short terms, and there is little relationship between the types of men recruited for the office and the duties of the office. Sheriffs' of-

fices are under the general supervision of the governor in some states in the sense that sheriffs may be removed from office for serious breaches of duty. The sheriff is, however, not under the direction of either the bureau of criminal apprehension, the state police, or the attorney general in most states. The power which the governor has over him is not really a power of administrative supervision, and the power of removal is seldom used. The sheriff normally is responsible to the local electorate and, as is to be presumed, this is an important factor in the degree of effectiveness with which law is enforced, particularly in connection with laws which do not command the whole-hearted support of the community. Sheriffs sometimes have state associations but they seldom have any really professional coöperation on a large scale in the conduct of their offices. The changing personnel makes it difficult to correlate the work of the sheriffs in the typical state.

In the townships the constables, of which there are more than one usually, are locally elected and they are lay officers with general law-enforcing powers which occasionally are used. More often the constable picks up speeders and persons suspected of intoxication, and although the quality of the work varies greatly, it is fair to say that constabulary services are confined to the field of petty crimes. In this field constables occasionally discharge their functions with ability and effectiveness. The lack of career, the lack of salary, and the lack of public esteem makes the office a somewhat unimportant one from the standpoint of general law enforcement.

Smaller municipalities, such as villages and boroughs, are likely to have small police forces, ranging from one to several members. In the larger villages the police organizations are identical with those of the cities. The village marshal or policeman often is chosen by the council or by the mayor with the confirmation of the council and his duties are those of general prevention, detection, and apprehension. These officers usually are salaried, but of course it is not customary to require any particular qualifications of a professional nature from applicants for the positions.

4. City police

In the larger cities the police forces are organized very elaborately with hundreds and even thousands of men. The chief of police is the technical head of the police department in most cities, although on very rare occasions a layman is the directing head of the department. Usually the chief is a man who has had many years of experience as a member of the police force and therefore is familiar with the routine work of the department. He sometimes is limited by this experience so that he does not see the broader problems of policy that are involved in law enforcement in general. The cities differ greatly in the extent to which they treat the position of chief of police as a career position. Some cities retain the same chief from one election to the next and from one administration to the next. This is more likely to be the case where the department is not directly under the mayor, as often is the case in cities of the weak-mayor type. In others the position of chief is regarded primarily as a political one, and when that is the case the turnover is frequent and the caliber of men drawn into the position varies greatly. In some cities the chief is appointed by the mayor and council and is directly responsible to the mayor; in others he is appointed by a board or a police commissioner and is not responsible to the mayor directly. The chief is the directing head of the police force on all technical matters, but in some cities the general policies of the department are laid down by a police commissioner or board of commissioners who in most instances are laymen.

Under the board and chief come the various officers, such as captains, lieutenants, sergeants, detectives, and patrolmen. The city may be divided into areas with a station in each area or it may be administered as a unit. Police are recruited and advanced partly on merit and partly on other bases. The greatest of variation exists between cities and between administrations within cities with respect to the methods of personnel management which are utilized in the police departments. In general it should be said that there is a rather noticeable tendency to raise the standards of police departments, both with respect to methods and personnel. Some departments are so badly organized and

managed that the only distinction between a detective and a patrolman is the type of clothing worn by the two. But the tendency is to fix higher standards both of education and personal fitness for entrants into the service. An increasing number of police forces are governed in the spirit as well as in the technicality of the civil service laws which so often apply to them.

From the standpoint of law enforcement the most serious problem exists with relation to the public estimation in which police departments are held and this is inextricably bound up with the close connections occasionally existent between police departments and politics. If the public believes that police enforce or fail to enforce laws on the basis of politics, favoritism, bribery, racketeering, and the like, then it is very difficult to obtain effective police operation. This is due to the great dependence which all law enforcement agencies must place upon public coöperation. It is true that at the worst the situation is very bad. At the best it is very good. But usually the actual situation is neither so good as the people think it nor so bad as they believe it to be. Primarily, of course, the factor of public demand for standards and enforcement is reflected in the long run in the work of any police department. But many individuals when faced with a parking tag or other police summons think first of "fixing" the case and then of stopping on the way home to berate the police for their connection with politics.

It should be noted that the city police normally do not carry on the work of crime prevention and detection outside the city limits, and that their work often is entirely uncoördinated with that either of township, county, or state law-enforcement officers. This creates a serious situation, particularly where no state police systems exist. No single officer or board has general power to direct and coördinate the law-enforcement work of the apprehending officers in the state.

Improving personnel

In recent years there has developed a movement for training police personnel. This has taken several forms and it is to be found in all levels of police systems, state as well as local. Training schools through which entrants must pass before assuming

regular duty now are becoming more common. These courses of study and practice are to be found in some of the state police systems, in special groups such as highway police, and in city police systems. Then there are courses of training, short courses, and institutes, to which selected members of the force may go for work while in service. Sometimes these are of importance in promotional practices. In other instances courses of lectures or conferences upon special subjects are sponsored by associations of cities, called leagues of municipalities, or by university extension divisions. Thus by departmental and by extra-departmental agencies various training programs are being developed. In the total these tend to raise the standards of police work and to create a morale and self-respect which are of real importance.

The prosecutor

In addition to the apprehending agencies of government those concerned with prosecution must be considered if the law enforcement machinery from the administrative point of view is to be viewed as a whole. Men who violate the laws must not only be arrested, but when brought before the courts they must be prosecuted. In fact they must be brought before the courts by the prosecutors. The prosecutor steps in when the arrest has been made and coöperates with the police and the courts.

As is the case with arresting officers, prosecuting officers operate in the states and in the localities without any central coördination or direction. In a sense the highest prosecuting authority in a state is the attorney general. But his work is not primarily in this field, as was pointed out in the discussion of that office in an earlier chapter. He is sometimes charged with the prosecution of specified offenses, such as antitrust laws, but in general he enters criminal cases only upon appeal to the supreme courts or under unusual circumstances when the local prosecutor seems unable to handle the situation or has called upon his office for aid.

The prosecuting function rests primarily, therefore, with the prosecutor, as he is called in some states such as Indiana, or the county attorney, as he is called in other states such as Minnesota. In the typical instance this officer is popularly elected and serves

for a two- or a four-year term. The office is not regarded as a career office but rather as a stepping stone either to a political career or to a private practice in law. The young law-school graduate often runs for the office because it is an easy method of getting his name before the public, and if elected the office offers numerous opportunities for publicity. In this manner the position is filled, only to be left vacant when the ends to be desired have been achieved. Now and then an exception to the rule can be found, but as so often is the case, the exception serves to prove the rule. This all helps to keep the office fairly close to political movements and dealings, and tends to make of the business of prosecution a somewhat secondary phase of the office. There is some incentive to make a good record of law enforcement but this sometimes leads to harsh as well as to lenient handling of cases. If by harsh dealing with certain types of cases public favor can be won the temptation is to be harsh. If being lenient will curry favor with groups whose support is important for later ambitions, the temptation is to be too lenient.

The district attorney or prosecutor in the larger cities has a large staff of assistants and sometimes a department of investigation besides. The prosecutor himself or his assistants take active part in a criminal case after the arrest has been made in some instances but in others at the earlier stage of investigation. If the crime is very serious an indictment usually is required by a grand jury before the person can be brought to trial. The prosecutor frequently aids the grand jury by presenting evidence that his office has gathered. At other times he practically dominates the grand jury, and that body acts to bring in indictments which he asks for, while not acting in cases not brought to them by him. In some cases of political significance the grand jury is used as a buffer for the prosecutor, who may persuade them to indict a man or a group of persons so as to avoid the political consequences which may be involved in the case.

In the preliminary hearing, attendant upon habeas corpus proceedings in a lower court, such as a district, municipal, or justice

court, the work of the prosecutor is most important. This hearing is merely for the purpose of listening to the evidence of the police and prosecutor to see if there is a reasonable ground for holding pending further investigation. If in the preliminary hearing the prosecutor carefully sifts the evidence, if he questions officers and suspects alike, and if he carefully probes into all angles of the case, he may be able to do a great deal toward having those who are likely to be guilty held for further investigation. If he is careless, takes the work casually, and has an eye only to the more spectacular cases, then he may let many a criminal slip out of the custody of the law. This is because if the judge is not satisfied that there is a fairly good case against the man, he will order him discharged. If the case looks strong, the judge will order the accused released on bail or will commit him to jail pending further developments.

Over the decisions of the prosecuting attorney in bringing a man to trial, in dismissing the case, or in failing to prosecute the case effectively, there is no supervision. It is in this work that the activity of the prosecutor is a completely closed book to the public. A prosecutor's office may make a very good showing to the public and at the same time be doing very poor work. On the other hand, the office may be doing very good work. Usually there is no public reporting nor any inspection of the office. Much depends upon the character and ability of the prosecutor and upon the political, economic, and social background in which he chooses or is forced to do his duty. There probably is as much need in the field of law enforcement for improving the personnel and conditions of work of the average prosecutor's department in a typical state and locality as there is for improving the forces of apprehension.

The procedure that is followed in a criminal trial and the measures that may be taken after the trial are dealt with elsewhere in this book. Corrective and welfare institutions which work closely with the courts and with law enforcement agencies will be discussed in a later section.

Public Health

Definition

One of the most important administrative services performed by governments in modern times is the protection of public health. As distinguished from private medicine, public health has been thought of as preventive rather than curative, as concerned with the group rather than with the individual and as including the environment, whereas private medicine is concerned with persons only. Although these contrasts are helpful to indicate what each tends to be, in a majority of instances, they do not draw a line between public health and private medicine. For our purpose, public health is any activity which is paid for from tax sources and is administered by public officials. What is private and what is public has changed from time to time, and where the line should be which divides the two remains a matter of controversy. In general, it may be said that what is public health, or is paid for by the public at any given time, are those health-maintaining, disease-preventing programs which the public has decided can best be carried on through community action.[2]

Development of state activity

Almost from the beginning of the government under the constitution, health has been recognized as a public concern. Baltimore, in 1793, and Philadelphia, in 1794, took steps to prevent the spread of yellow fever. In 1797, Massachusetts passed a law providing for the creation of local boards of health and was followed by Connecticut in 1805. These two examples were followed but slowly, and at the opening of the Civil War only seven states had made provision for local boards of health. The slight supervision or control which was exercised over the condition of the public health by any authority in the early days centered around the abatement of nuisances and the imposition of quarantines on contagious diseases. Private initiative was relied upon to a great extent to deal with the first of these, although public officers could and sometimes did take sporadic

[2] For an excellent summary statement, see John D. Porterfield, "Public Health in State Government," *State Government*, xxii (February, 1949), p. 36.

action in this direction. As a matter of fact, public health administration has been influenced even to the present time in its scope and methods by these two early phases of its activity. The terrible cholera epidemic of 1848 and 1849, followed by the yellow-fever epidemic of 1853, gave rise to a wave of popular interest in developing some measure of public control over major health problems, and particularly those connected with sanitation and the spread of infectious diseases. An exhaustive report made by a commission in Massachusetts after the cholera epidemic, and a continued agitation of the subject led to the creation in that state of a state board of health in 1869. Within a decade, no less than sixteen states had followed the lead of Massachusetts in the creation of such boards, and soon every state in the union had set up an agency devoted to the public health. During the first third of the twentieth century, there was a steady growth in health activity. An impetus to quickening activity was the enactment of the Social Security Act of 1935, when large amounts of federal money were made available for health work. Another fillip was given by World War II when public health became a vital factor in national strength. The momentum of recent years seems not to have spent itself and still more public concern with the improvement of health may be anticipated.

As the discovery that microscopic organisms were the cause and carriers of disease occasioned heightened concern and increased governmental activity in health matters in the last century, so the diffusion of knowledge about health, the improvements in medical technology and the discovery of antitoxin, and more recently the so-called "miracle drugs" have been factors in stirring the public to make still more use of its government in the age old quest for robust health and long life. The result has been a revolution in the administration of public health.

Local vs. state administration

The first machinery established to perform health activity was at the local level, since measures were needed to remedy specific situations, a local epidemic, or the stench of a slaughterhouse. Because the people of the whole state did not smell the

foul odors, they were content for the neighbors in the slaughter-house community to deal with it. The creation of state health agencies did not transfer health administration to state agencies. Rather, these new agencies represented new tasks undertaken. And while there is much application of the law by state health officials, there has been no diminution of health activity by local agencies. On the contrary, it appears the trend is to shift more and more of the actual work of performing health services to local units.

"It is necessary to bear in mind," observed Professor Mustard, "that the vast majority of routine health service received by the people of the United States is delivered by local agencies. The Federal Government may subsidize and indirectly shape local health departments, the state health department may determine major policies for local agencies, set their standards, promulgate regulations and even directly supervise them, but the final determining factor in the effectiveness of a public health program rests with the workers in the locality where the problems are occurring."[3]

Structure of health organization

The typical state health organization is a board of health, a state health officer, and administrative departments. The board is composed of from three to fourteen members (usually five or seven), and in most states members are appointed by the governor. The state health officer, usually a physician, has in practice become the executive officer of the state organization. In about half of the states, he is appointed by the governor and in most of the rest by the board. The board possesses powers which range from complete dominance to that in which it is merely an advisory body to the health officer. Considerable power to issue regulations having the force of law, perhaps more authority than has been conferred on any other state agency, has been given to the boards of health. Frequently, they also have been given quasi-judicial powers to conduct hearings and render decisions which are second in authority only to the decisions of the courts. The departments are established accord-

[3] Harry S. Mustard, *Government in Public Health*, p. 114.

ing to major purpose, ordinarily, one for each of the chief functions. Representative ones are known by the function they are concerned with, such as communicable diseases, public health education, public health nursing, sanitation—which includes water supply, camp sites, sewerage, and sewage treatment—public building construction, venereal diseases, tuberculosis, laboratories, and research.

Local organization

Local health organization tends to fall into two classes, rural and municipal. Rural health departments in all the states in which counties are a basic unit for the administration of local government ordinarily are county agencies. Sometimes there is a county board of health, though the trend is to abandon such boards, and there is a county health officer. Usually he is a physician and he devotes only a part of his time to public health functions. In urban communities, there is a health officer; in the larger community, there is less likely to be a board of health and it is more likely that the health officer will be a full-time physician with some full-time staff.

Recent trend

In recent years, a strong movement has developed to establish full-time health departments administered by a staff of specially-trained professional personnel. According to the United States Public Health Service, nearly 60 percent of the counties in the United States were being served by full-time health personnel in 1945 (1841 of the 3070 counties).[4] Public health authorities are agreed that such local units should cover the country. To be successful, there should be at least 50,000 people serviced by each unit. A physician with additional public health training should be the director. Other staff members should include one sanitary officer per 25,000 people in the area. There should be one public health nurse per 5000 population, one laboratory technician, and sufficient clerical force to service the staff.[5]

National-state-local relations

How the agencies at the national, state, and local level may

[4] Council of State Governments, *The Book of the States* (1948–1949), p. 343.

[5] For an excellent discussion of local health organization, see Martha Luginbuhl, "Health Security Begins at the Local Level," *State Government*, xix (January, 1946), p. 34.

fit together with respect to the services performed by each will be described next. The state-local relation will be examined first, and the national will be explained in terms of the state-local relation.

1. Administrative activities

It is the responsibility of the state health organization to provide first for coördination between local units so that operations with respect to common problems will not be at cross-purposes. Second, the state should serve as a clearing house for information to the local units both as between them and to them from all other sources of information. A person suspected of being a carrier of disease moving from the territory of one local unit into another is a matter which should be channeled to the proper health officials. Whenever information of any kind accumulates which could be of use to the health worker in the field, it becomes the duty of the state health officers to see that it becomes available to the local workers. Third, the state should have on tap specialists who can give advisory service to local officials. Fourth, sufficient personnel should be available at state headquarters for temporary assignment to local units to help train new personnel, or in emergencies, such as an epidemic, or disasters attending floods and storms, to help perform direct health services. A fifth service is in the area of authority. In cases in which the problem to be dealt with goes beyond the territorial jurisdiction of the local unit, it may be that coördinated activity of neighboring local units will not be sufficient. It is at this point that the state organization can exercise power covering the area of the state. In the sixth place, the state should itself perform a number of services. These include the operation of a laboratory for the purpose of making tests for local units. Blood, bacteriological, water, and rabies tests are examples. The conduct of research can be carried on better at the state level. Tabulation of statistics of birth, death, and disease, should be done by the state. And lastly, the state organization should have money to allocate to local units for the purpose of assisting communities in emergency situations or those unable financially to meet minimum standards.

2. Power

The power of the state health organization over local health

officials varies from practically complete control to the opposite extreme. Appointment of local officers by the state health authority is practiced in some states; in others, the officer is locally appointed but only after state approval. The opposite is seen in the cities of New York and Baltimore where the city charters make the health officials virtually independent of state health organizations. In general, local health organizations are given power to make rules and regulations which have the force of law in the jurisdiction of the local health unit. These may not set aside the health requirements established by the state legislature or the state health organization. Such local rules may raise standards above those set by the state.

3. U.S. Public Health Service

The relation of the United States Public Health Service to the states may be summarized in one sentence: It is to constitute health defense in depth behind the state organizations. It does not have the power in relation to the states that they have over local units, but, with that exception, its relation to the states is roughly the same as is theirs to local units. It serves as a clearing house for information; it provides expert counseling service; it loans personnel and even equipment to states which, in turn, may reloan them to local units; it performs research, however, without running a central laboratory, since the states can do that for themselves; and it allocates large sums of money to the states for educational purposes and for raising minimum standards.

Public health function

The functions performed by public health organizations vary from state to state, although there are a number of activities which are so essentially connected with health that they nearly always belong to health. These activities will be described first.

1. Vital statistics

The data concerning births, deaths, marriages, kinds, location, and numbers of cases of diseases (usually called morbidity statistics) constitute the factual grist, or vital statistics, which health departments must have in order to act intelligently. These data are sometimes collected locally—often practicing physicians assist by making out reports—and then statistics for the whole state are assembled by the state organization.

The prevention of communicable diseases is a major activity

2. Communicable diseases

of every health organization. These are ailments which can be "caught." The fight against them is waged on many fronts. Programs of immunization are carried on for those diseases for which there are proved vaccines. Health authorities have standards for various diseases as to the number of persons in a given community who must be immune if the danger of epidemics is to be prevented. For other diseases, cure, isolation, and hospitalization are procedures used. Persons infected with venereal diseases are ferreted out and given treatments either with the long-used drugs based on arsenic or with the new so-called "miracle drugs." Persons with open cases of tuberculosis are hospitalized to prevent the spread of the disease and to save the lives of the infected individuals.

3. Environment sanitation

A third major function is that carried on by engineers, the adjustment of man's environment to his physiology. A large number of activities can be included in this classification. Plans for schoolhouses and other public or semi-public buildings frequently must be submitted to the health authorities to be approved with respect to lighting, heating, ventilating, and sanitary arrangements. Provision for industrial wastes, sanitation of tourist camps and public places are other duties of engineers.

Sewage and water supply

Two closely allied problems are those of sewage treatment and the purity of water supplies. The effective disposal of sewage waste and the providing of an ample supply of potable water are questions of vital importance in any community. Both these problems are primarily municipal in character, and so far as practicable are left for local solution. There arise situations, however, which demand state action in these matters. Cities usually draw their water supply from sources outside their own boundaries, which are frequently rivers, lakes, or the impounded waters of small streams, in each case using more or less extensive watersheds. To preserve over such areas conditions which shall insure wholesomeness of the supply is quite beyond the ability of the city itself.

The most inexpensive method of disposing of sewage is to discharge it into a convenient stream, in spite of the fact that

it may endanger the health of the population along the banks. To preserve the health both of the consumers of water and of the residents along the stream, the state departments of health in most states have been given some measure of authority over water supply, drainage, and sewage treatment. In general it may be said that the inspection of watersheds and harbors, the making of tests for noxious substances in waters, the inspection of sewage treatment plans and systems, and the furnishing of technical advice in these matters are included in the functions of most departments of health.

4. Adult hygiene

Another health function is the protection against ills that are not "caught." Cancer and heart disease are illustrative of this kind of disease. Here the health program is to assist in early detection and treatment. It is largely an educational function, to cause the public to seek competent medical care at the earliest signs of disorder.

5. Maternal and child hygiene

Still another health function which is also largely educational is a program emphasizing the health of mothers and the care, nutrition, and development of the child from its prenatal stages through school age.

6. Laboratory

Making of laboratory tests is a sixth function which is admitted by all to be essential to public health programs. These tests include service to waterworks, sewage treatment plants, private physicians, and the examination of foods, drugs, and animals suspected of being infected with rabies. State laboratories also serve to recheck local, private laboratories to determine their accuracy in the examination of blood and in the performance of other testing functions.

7. Health education

The ultimate solution of the problem of health protection cannot be secured by government action alone, but intelligent coöperation of the individual must also be assured to produce the desired results. Consequently, perhaps the most fundamental of all the functions of health authorities is the education of the public in health matters. To instruct the people in the importance of personal and public hygiene and in the means by which it may be maintained, leaflets, posters, bulletins, and reports are

widely distributed and lectures are delivered. Lantern slides and films are supplied for instruction in schools and elsewhere. Much has been done in coöperation with the schools in instructing young people and, through them, their parents in the elementary principles of hygiene and disease prevention. Public health authorities seem almost obsessed with the idea that their function is primarily educational. Despite the extensive powers which have been granted to them, and despite the usual willingness of the courts to sustain their actions, they are loath indeed to use forceful legal means in carrying out their duties. Hence the approach to health problems via the informative route—by gentle persuasion and avoidance of compulsory procedure—is typical of the usual health official.

8. Miscellaneous

There are many other activities that are performed by some health organizations and not by others. An example of recent origin in the area of psychiatrics is usually referred to as mental hygiene. This includes guidance for children to help them make adjustment, psychiatric treatment of adults, and, of course, public education as to the nature of mental ills.

The care and disposition of the bodies of deceased persons for whom no burial provisions have been made for one reason or another is usually under the control of health officers, and the same is true of the transportation of such bodies, if that be necessary. Food and drug inspection and even the control over the keeping and distribution of explosives are sometimes entrusted to public health authorities. Other duties have to do with weights and measures, hospital planning, licensing of certain professions, such as those of physician, dentist, druggist, nurse, chiropodist, and embalmer.

Hospital expansion

The American public has become health conscious in recent years to a degree not known before. Many proposals for the extension of health programs are being made. One of these was for an extension of hospital construction. In 1946, Congress provided in the Hospital Survey and Construction Act for a systematic survey of state needs for the expansion of hospital and related facilities, and for federal aid for their construction.

It is said that as a result of this bill and the subsequent surveys which were made by all the states, "For the first time, a policy has been established whereby hospitals and health centers are to be planned, located, and operated in relation to the over-all health requirements of the people."[9]

Health insurance

The proposal of President Truman that the "workers of the Nation and their families should be protected against loss of earnings because of illness" has been the occasion of bitter controversy. The partisans of this recommendation of the President refer to it as health insurance, whereas the opponents call it socialized medicine. The ultimate decision on this point has not been made; it appears clear, however, that barring catastrophe such as war, this issue will be much in the public mind, the subject of searching, and perhaps acrimonious, debate for some time.

The future

The increase in scientific information about disease, its incidence, prevention, and cure, the eager interest of the public on the subject, and its willingness to use tax moneys to support public health programs, and the public education program of health agencies all work together to insure a continual and perhaps more rapid expansion in public health functions. What form this expansion will take is for the future, but the yearning of men that their years may be long provides a motive force not easily checked.

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CHAPTER 16

ADMINISTRATIVE SERVICES: WELFARE, VETERANS, AND LABOR

The latter part of the last chapter depicted the procedures for public ministration to the health of the whole people. Certain groups of persons because of their unique status require special treatment from the government. Three groups of these may be singled out for special attention in this chapter. First are those who, for one reason or another, depend on the government for support. Under the term public welfare administration are included the services rendered to these persons. Second are those men and women who have themselves rendered special services to the public. They are commonly referred to as veterans because of their former membership in the armed forces of their country. Third are the laborers who because of their unequal economic condition and because of the hazards of their employment are given special treatment. This chapter is to be devoted to the descriptions of these classes of persons and the organization and procedures whereby their needs are served.

Special groups

Public Welfare Administration

Public welfare administration is concerned with the dependent, defective, and delinquent classes of society. Public care for these persons has been designated by different titles. In Great Britain, the term Poor Laws and later, in the United States, the terms charities and corrections were names given to care of such persons. Opprobrium came to be attached to the names given to activities connected with the poor and delinquent because of the idea rooted in religion and in the mores of society that evil acts of individuals exact a toll from them and

Terms

from their children through poverty, illness, and crime. It seemed necessary, therefore, when large numbers of workers were thrown out of employment due to fluctuations characteristic of the business cycle, the miscalculations of the captains of industry, and the mistakes of political leaders, to find another term to designate their public care. Hence during the period of the depression in the thirties, governmental activities concerned with succoring the dependent, the defective, and the delinquent came to be known as public welfare services.

Trends

1. Private to public aid

Attention may be called to four trends in welfare work. A trend which began long ago and which still continues is for the public to assume more and more of the burden for the care of dependent persons. First the family carried the responsibility. The church then began to shoulder some of it. This reached its highest state of development when the monastic orders became the great agencies for dispensing charity. Early in the history of the United States, local government assumed part of the burden. But the great increase in the numbers of unemployed required more aid than any private sources could muster, and the burden shifted to the public purse.

2. Spreading cost of welfare

A second trend has been the spreading of the burden of welfare costs to higher levels of government. During the depression of the thirties, particularly, the local units of government, such as the county, township, and city, found themselves unable to carry the financial load. The states and then the national government made larger and larger contributions. The greater ability of the national government to tax new sources of revenue has resulted in its sharing a large part of the cost of welfare.

3. Indoor to outdoor

A third trend is from indoor to outdoor welfare or relief. Outdoor welfare is that which, either in the form of money or supplies, is administered in the home of the recipient. This may be afforded either without consideration in the form of services or work on the part of the recipient, or it may be in the guise of wages for work performed. In emergencies there tends to be a great extension of the latter in the form of work-relief projects, such as the construction of buildings, highways, and parks. The

wages paid usually are somewhat higher than the sums involved in direct grants to the individual would be, and somewhat smaller than the wages prevailing in the particular trade, profession, or community would be. Employment upon public works has come to be one of the major policies to maintain employment.

Indoor relief, frequently referred to as institutional, is that administered in public institutions. On account of the greater economy and because the recipients are frequently in need of personal care, it has been customary to give institutional relief to all those who were permanently dependent, leaving outdoor relief to be administered only in cases of immediate and temporary need. More recently there has been a swing in the opposite direction. The development of the system of home-finding for orphaned dependent children, the initiation of a system of "mothers' pensions" in most of the states, and the introduction of old-age pensions on a national scale have all contributed to cut down the proportion of dependents who are receiving institutional care.

4. Classification of persons

A fourth trend in welfare work is the classification of persons according to the kinds of needs which they have and the provision of treatment to fit the need. The classification of persons may be subdivided into three parts: the treatment of various (a) defective, (b) delinquent, and (c) dependent persons.

a. Defective persons

We may first note the trend toward the classification of defective persons: those who are ill, injured, or handicapped. During the first half of the nineteenth century it was common to find herded together in the poorhouses all classes of public dependents: the old and the young, the able-bodied and the diseased, the morally depraved and the virtuous, the mentally sound and the insane, the epileptic and the idiot. The evils growing out of such conditions became intolerable in a civilized society, and some measure of segregation was early demanded.

The mentally ill

One of the first steps taken was the segregation of the mentally ill. Although the harmless ones were kept in the poor-

houses, those whose maladjustment had assumed a violent form were thrown in jail. This disposition of such cases was at first due in part, no doubt, to the belief, not so long since current, that the disoriented person was possessed of a devil.

To give to each of those dependents in the ordinary poor-house who was especially afflicted the care which his condition demanded was impracticable. In consequence, the state began to take over the care of such cases. When more enlightened counsels began to prevail, these unfortunates were sent to private institutions already established, to which state subsidies were thereupon granted. Although this practice is still followed with respect to certain classes of cases in a few states, the general custom has been to establish institutions maintained by the state.

As early as 1830, Massachusetts had an asylum for the mentally ill, where proper care could be afforded and remedial treatment applied to curable cases. The alarming increase in mental diseases has made this the most numerous group of defectives in the care of the public. Every state has established at least one hospital, and each of the more populous states now maintains several hospitals for the mentally ill.

Physically ill and injured

The demand for general hospital facilities, especially for persons living beyond easy access to those provided by cities, has resulted, in a considerable number of states, in the establishment of state hospitals for the general treatment of accidents and diseases. These are in some cases maintained in connection with a state school of medicine under the control of the state university. In certain cases the facilities of this kind are differentiated, and special hospitals are maintained for women and for children. Such excellence has been attained by many of these state hospitals for the treatment of diseases of both the body and the mind that they are freely resorted to by the well-to-do as well as by those who are unable to bear the cost of treatment elsewhere. In most of these institutions those who are financially able are expected to pay a fee, though those who cannot are

treated free by the state, or the cost charged to the locality from which they come.

Hospitalization

While hospitalization at public expense has been provided to some extent by the states, this is a service that usually has been limited to special cases or has been carried on by the local governments primarily. Some counties have established hospitals but they, too, are more likely to be for special diseases, such as tuberculosis. Municipalities, especially the larger cities, however, have entered the field of both general and special hospitalization on a very extensive scale. The investment on the part of all cities in hospitals runs into hundreds of millions of dollars, and in some communities the number of beds maintained by public hospitals far exceeds the number to be found in private institutions. As was pointed out in Chapter 15, all the states have now surveyed their needs for hospitals, and a program of hospital construction, subsidized in part by the national government, has now been undertaken.

Administration

These institutions take not only those who are unable to pay for their own hospital care but also accept cases on a payment basis. The general hospital of a large city may have wards for those with contagious diseases, or there may be a special institution to handle cases of this kind. But in any event the institution often is governed by a lay board. This group may be a special board for the hospital or it may be one having under its jurisdiction many other welfare and correctional institutions. Great diversity of practice is to be found in the realm of municipal organization in this field. But there usually is a technical head of the hospital who is a physician and who is called the superintendent. He is charged with the professional direction of the hospital. The practice varies in different cities with respect to the extent of the political controversies centering about this position, but some cities have been so unfortunate as to have had their hospitals made the subject of political dispute.

The number of patients cared for in public hospitals is very

large and the services performed are classified into two types. In the first place, these institutions do regular hospital work, accepting persons who are so ill that they require the treatment which hospitals alone can give, with nursing staffs and various types of mechanical and therapeutic equipment. The treatment of ambulatory cases constitutes a substantial portion of the work done in many of these institutions. In the second place, they often maintain large clinics to which persons may come for casual treatment and for diagnosis.

Handicapped persons

Other classes of unfortunates which early claimed the attention of the state were the deaf, the mute, and the blind. The care of the state extended to these classes is a form of special education designed both for general culture and for vocational training. Early in the nineteenth century some of the New England states were providing for the education of the deaf, dumb, and blind in privately conducted institutions. Now most states have established institutions for the education of these classes of defectives.

Since 1840, when Indiana first made contributions to them, blind persons have received public assistance. It was not until 1903, however, that a system of regular public contributions was established by Illinois for their welfare. Since that time, the practice of giving relief to the blind has become general, and the cost was extended upward in 1935 when the Social Security Act provided for grants to the states on a matching basis. All of the states except three—Missouri, Nevada, and Pennsylvania—now participate in this program. The maximum which may now be paid to a person because of blindness is $50 per month.

Trends illustrated

Trends noted above have applied especially to handicapped persons. The public has assumed increasingly wider responsibilities, not only for deaf, mute, and blind persons but for those with other kinds of handicaps, both physical and mental. Among others included are persons injured by disease or accident, and children who failed to mature mentally. Public costs of service to these people are now borne about equally by the state and national governments. The trend from indoor to outdoor relief

has gone so far as to transfer the assistance given groups from the category of welfare to another—education. The service to the physically handicapped is normally called vocational rehabilitation, because the aim of the program is directed toward training the handicapped person in a skill so that he can support himself, or at least contribute to his own support. This vocational rehabilitation program will be described further in Chapter 17, which is concerned in part with educational matters.

b. Delinquent persons

Delinquent persons are those with antisocial attitudes whom society restrains. The penal and reform work of the states with these people usually is called corrective.

Development of corrections

At the close of the Revolution no less than eighteen crimes were punishable by death in Pennsylvania, and the degree of punishment meted out for lesser offenses was correspondingly severe. The sole object beyond that of safeguarding the public against further criminal activities of the prisoner was that of punishment. The end of the eighteenth century found all classes of criminals confined together in the jails of the country, without distinction between old and confirmed criminals and young first offenders, or between offenses of a serious and those of a more trivial nature. The prisons were almost without exception dark, filthy, and generally unsanitary. The confining of the violently insane along with other classes made conditions still more wretched.

Early in the nineteenth century, through the activities of a few humanitarians, the public conscience was somewhat aroused and prison reforms were undertaken. The penal laws were made less barbarous, and, one after another, most of the states took measures to improve their prisons. Those persons serving longer terms and for the more serious offenses were removed from the jails and placed in state prisons, and new and much improved types of prisons were erected. Before the Civil War the segregation of various classes of misdemeanants had begun. The idea expressed by William Penn at the close of the seventeenth century, that the reformation of the offender should be a chief purpose of imprisonment, began to find practical application. Be-

fore 1850, Massachusetts had removed juvenile offenders from the demoralizing influence of jails and prisons and placed them in a "reform school" where the reformation and education of the inmates were the double purpose. In the decade following the Civil War, this movement bore fruit in most states and went one step further in some through the establishment of separate institutions for boys and girls. The same idea of reformation through education and training in some useful trade was extended to the younger and less confirmed adult prisoners, and the year 1876 saw the first "state reformatory" in operation at Elmira, New York. Women's prisons, too, were established during the later decades of the nineteenth century in many states.

Treatment of prisoners

Much thought and effort has gone into the problems related to the treatment of persons in the penitentiaries. Most students of the problem advocate employment of prisoners at useful work in order to reduce the cost of their custody, to contribute to the support of their families, and to assist in the rehabilitation of the prisoners themselves. There was, however, much opposition to selling in the open market the products manufactured by them. Competition from prison labor became a rallying point for legislation to prohibit such sales. In 1929, the national government began to enact restrictive legislation, so that states could prevent prison-made goods from entering their borders through interstate commerce. By 1940, every state had enacted legislation to limit or prohibit the sale of such goods. But the beginning of the war opened new markets for prison-made goods. The Army and Navy and other government agencies purchased goods and services totaling more than $138,000,000, from prison authorities. Other productive activity of prisoners has been directed toward supplying goods and services to other state institutions; prisoners also supply such items as automobile license tags. Despite these improvements, chain gangs are still used in at least two states.

More satisfactory gain in the treatment of prisoners has been achieved in other areas. In a considerable number of states, penal farms have been developed where persons convicted of minor

offenses and serving short sentences are placed. Here they may live something approaching a normal life, working to some extent in the open air, and, under some systems, earning wages which are applied to the support of their families. An effort at supplying an educational program is made in many places, the purpose being to teach the prisoners a useful skill so that when they are restored to society they may become self-supporting and therefore self-respecting citizens.

Indefinite terms

Current theory with respect to delinquent persons is that more emphasis should be placed on reformation and less on punishment. The length of prison terms then becomes a measure of time necessary to restore acceptable attitudes and less a measure of the enormity of the antisocial deeds committed. The approach to the treatment of delinquent persons is given effect in Washington in this manner. Judges sentence persons to a maximum term. After all pertinent data have been collected concerning a person, his minimum term is fixed by the Board of Prison Terms and Paroles. He may get this sentence reduced through good behavior.

Paroles

Another way in which the rehabilitation theory is put into effect is through the parole system, the service of part of the sentence in a free community under the supervision of an official. In some states, no prisoner will be released when he becomes eligible for parole until a job has been found for him. All the states have parole laws of some kind, although some of them do not provide for adequate supervision and aid for the released prisoners, and forty-one states are members of the interstate compact providing for reciprocal supervision of parolees.

Probation

Probation, the substitution of supervised living in the free community for imprisonment, has been an increasing practice in the last quarter of a century. Where it is administered most successfully, an exhaustive study of the case is made to determine if the offender should be admitted to probation. This involves a collection of all relevant data which can be obtained from relatives, employers, police, and other private and public sources of information. On the basis of careful analysis by a

trained worker, a recommendation is then made to the judge as to whether the person should be put on probation. Supervision of probationers must be done by skilled persons who can be strict and helpful. This involves frequent visits of the offender to his supervisor and vice versa, inspection of the place of employment, and relaxation of constant vigilance only when the probationer demonstrates his capacity for useful participation in the community. As with interstate parole arrangements, the same states also have a mutual arrangement of reciprocal supervision of probationers.

c. Dependent persons

Dependent persons may be regarded as all those who are neither defective nor delinquent and who must have public assistance to subsist on a level acceptable to the community in which they live. The trend noted above—the classification of persons according to their need—is also to be noted with respect to dependent persons. Practically all defective persons were at one time included in the dependent group. This classification has lost persons in two directions, those who became eligible for welfare in some other classification and those who were moved entirely out of the welfare classification such as disabled persons who participate in vocational rehabilitation programs or unemployed welfare aid because of a social security program such as unemployment insurance.

Classification of dependents

Dependent persons are now classified under three headings: aged, dependent children, and all others. This classification arises from the Social Security Act passed by Congress in 1935. This act provides for grants to the states to assist in the care of dependent children, the aged, and the blind. The case of the blind has been described above.[1]

Amounts of assistance

For the first decade (1936–1946) in which national aid was available for the aged, $2,700,000,000 was contributed by the national government. All the states participate in the national program. In July, 1948 there were 2,407,283 individuals receiving old-age assistance. The average monthly payments ranged from $15.74 in Mississippi to $78.51 in Colorado. Aid to

[1] See p. 438.

dependent children is less. During the first decade, the amount of $487,000,000 was granted to the states for this purpose. One state, Nevada, does not participate in this program. In July, 1948, there were 1,145,323 children receiving aid. Contributions to both programs by the national government are made contingent upon satisfactory state administration of and contribution to the payments.

Administrative organization

The organization of public welfare administration in the states and in the localities is still confused. The main types of organization that are to be found will be described in the paragraphs which follow. It should be noted at this point, however, that there is a steady trend in the direction of more and more integration in the field of public welfare organization. Increasingly, one or more agencies are taking over the greater part of public welfare work, and increasingly the state is influencing local administration through grants-in-aid and through the fixing of standards. Where possible, it has been the aim of many of those controlling these matters to reorganize local administration so as to centralize it more completely in the hands of a board which either directly supervises the institutions and activities involved or coördinates the work of the several affected agencies.

Indoor care

The structural organization for the administration of public welfare may be treated under two heads: the management of the institutions in which indoor relief is administered; and the administration of outdoor relief. The administration of institutions tends to be divided into two classes: a board for each institution, and a single board of control for all institutions concerned with the same function.

Indiana type

The separate board arrangement is older and is sometimes called the Indiana type. Between the separate boards of trustees for each institution there is no necessary and official connection whatever.

The boards are composed of from four to nine public-spirited citizens who consent to give their services to the public without financial compensation, save for their actual expenses. They

are usually appointed by the governor and serve for periods of from four to six years. The terms of the several members expire in different years so that a continuity of policy is secured. Since the positions are without salary, they offer no attraction to the spoilsmen; but citizens of high character have always been found willing to give their services to the state. Thus constituted, the boards are responsible for the management of the physical property of the institutions, for the purchase of supplies and disposal of the products thereof, if any, and for the care of the inmates. Although the boards retain financial matters and the formulation of policies in their own hands, the administration of the institution is vested by them in a superintendent. This officer possesses professional knowledge and training in the particular field of welfare work involved and is in immediate charge of the care and treatment of the inmates.

Iowa type

The single board of control administration, sometimes called the Iowa type, is a later development than the multiple-board plan and presents a sharp contrast to it. Under this system, which was first adopted in Iowa, the various institutions are in the immediate care of a superintendent whose position is not unlike that of the superintendent under the Indiana system. The board has authority over all the institutions concerned with the same function with respect to financial management and care of the inmates. The trend is toward this kind of organization.

A refinement of the single-board type is the California unified State Department of Corrections established in 1944. The administrative head of all correctional institutions is the Director of Corrections. An advisory board for the women's prison and one for the other prisons assist him. Functional programs for the work of classification and the performance of the quasi-judicial activities related to parolees are performed by agencies established for those purposes. The policy-forming body for the institutions of correction is composed of the director and members of the advisory and functional bodies.

Outdoor care

The agencies for the administration of outdoor relief to dependent persons can be divided into two groups: those con-

cerned with aid to the aged, blind, and dependent children; and those established for the assistance of other dependents. A pattern can be observed for the distribution of assistance to the aged, the blind, and dependent children, since national grants operate to draw state and local agencies into a system. At the national level, the Social Security Administration, operating through the Bureau of Public Assistance, approves state plans, certifies grants to the states, and reviews state administration of grants to see that there is compliance with national standards. Every state which participates in the program is required by national law to administer these national grants through a single agency. These usually are called state departments of public welfare. These departments typically are composed of boards, although six states have departments headed by a single director. The distribution of money to the aged, blind, and dependent children ordinarily is done by local agencies. The jurisdiction of these agencies may be a township, city, county, or some other district, but the majority of states use the county as the basic welfare administrative unit. The requirements of the national law with respect to the type of personnel who may participate in the administration of these nationally supported aids insures a minimum competency and basic standards.

Special classes

The agencies for distribution of general relief to dependents not included in any special class are many and varied indeed. It is estimated that in 1940 more than 10,000 separate agencies were engaged in this work. Before 1931 the care of dependents was almost, if not totally, the responsibility of local units of government. Under the impact of the depression, first the states then the national government came to the rescue of local governments with programs of general relief which were administered chiefly through the Federal Emergency Relief Administration. After the lifting of the crisis, general relief was turned back to the states, the national government continuing grants only for the special classes of dependents. The states having begun during the depths of the depression to make relief grants to local governments have continued to do so until it is now

Other dependents

estimated that about three-fourths make grants of some kind at least. In a substantial number of states, general relief is administered by the same agencies which serve the aged, the blind, and dependent children. There is, however, less state supervision over the distribution of general relief than over relief to the special classes. In the remainder of the states, many kinds of agencies still acting under authority of the poor laws of ancient date, give aid, sometimes in cash, often in goods, and sometimes in accordance with the particular humor of the official.

Veterans

". . . . to care for him who shall have borne the battle and for his widow and his orphan. . . ." expresses a predominant feeling today as well as when Lincoln was pledging the reunion of a divided people in his second inaugural address. From the Revolutionary War on, it has been the policy of the national government, and to some extent of the state governments, to make special arrangements for the care of the former members of the armed services of the United States, ordinarily styled veterans. Although veterans' programs are primarily the responsibility of the national government, state participation in giving aid, preference or favored position to them is of sufficent magnitude to merit a brief description.

Institutional care

A familiar manner of caring for ex-servicemen since the Civil War is the maintenance of homes by state governments for the dependent, aged, or disabled veteran. Thirty-five states in 1945 had such homes. It is interesting to note that nine states permitted Confederate veterans only to enter their homes at that time. Also, there are schools for the education and care of the children of veterans.

Nature of services

The close of World War I saw a notable expansion of state services to veterans. Most of the services have been extended to veterans of World War II. It has been the declared purpose of the state programs to supplement generally the services of the national government to this group of citizens, but it may be added that there are duplications. The general assumption un-

derlying all aid to former armed services personnel is that his losses should be negated or minimized, "not by purely monetary gifts alone, but also by means of services designed to bridge the gap between his former status in the community and that status he might have attained but for the interruption of his civilian life."[2]

Jobs

In recognition of the singular importance of jobs, the states have taken measures to assist their veterans in securing work opportunities. One such measure is veterans' preference in public employment. In some jurisdictions points are added to examination grades to give veterans higher civil service ratings and therefore priority in appointment, while in others veterans must be appointed in preference to any other eligible person when a veteran's name appears on a list of eligibles. Waiving certain physical requirements for appointments to state positions and counting military service in computing time to determine promotion rights are other devices. Nearly all of the states established apprenticeship training—or on-the-job training. This program had a considerable vogue, and as many as 18,000 veterans participated in some of the larger states.

The educational benefits which were provided by the national government were supplemented by some of the states. California provided that up to $1000 might be spent to further or complete the education of any individual veteran. Maine and Michigan made money available to assist them in school, and Louisiana made special provision for the education of the children of deceased veterans; Massachusetts and New York established new institutions of higher learning which were to be devoted in whole or in part to veterans. And most of the states made some arrangements for either temporary or permanent housing at the colleges and universities.

Bonus

By January, 1949, at least ten states had authorized the payment of bonuses to former military personnel. Twenty-odd more states had the matter in various stages of legislative en-

[2] Jack H. Stipe, "Veterans Benefits and Services," *Social Work Year Book* (1949), p. 521.

actment, while only two had considered the project and definitely turned it down. It appears likely that most of them will make some kind of so-called adjusted cash settlement. Those which have already settled upon a plan usually set a top limit to the total amount of money one person may receive, the amounts being calculated upon the basis of the number of months in the service. A popular payment has been $10 for each month in the service with a maximum not to exceed $500. After World War I, twenty states made bonus payments totaling nearly $400,000,000,000. The first eight states to make plans for such benefits after World War II already have voted funds totaling $1,600,000,000. It may be suggested that the totals which will be voted will be substantial. The number of living veterans of World War II as of June, 1948, was 14,914,000 as against 3,846,000 of World War I.

Miscellaneous aids

One function which state veterans' organizations have undertaken is to represent their own state veterans before the national Veterans Administration. The national law limits very strictly the fees which private persons may charge for representing a former serviceman before officials of the Veterans Administration. This function has been assumed by the veterans' organizations and by the state agencies. A large variety of tax preferences have been accorded to veterans by the states. Included in these are property tax exemptions in one form or another, exemptions from licenses, such as operators and hunting licenses. Among other services or aids are: hospital care, rehabilitation, guardianship for incompetent veterans, and free recording of discharge certificates.

Labor or Industrial Relations

The third group of persons for whose benefit special regulations are established is composed of laborers. This area of activity is known as industrial relations. With the growth of industrialism in the last half of the century, it came to pass that a very considerable number of the inhabitants of many states spent a goodly proportion of their waking hours within the

walls of industrial and commercial establishments. Under these circumstances the physical working conditions surrounding so large a number of citizens, and the relations which existed between them and their employers, were subjects to which the general public could not remain indifferent. In spite of the prevailing individualism, from time to time specific industrial evils became the subject of ameliorative and regulatory legislation, until at present there exists in every state a large body of law on the subject and an organization, more or less elaborate, for its enforcement.

Development of labor legislation

A marked characteristic of labor regulations of the states is their unsymmetrical development and their heterogeneous as well as fragmentary nature. This applies not only to the substantive provisions of the laws but to the means provided for their enforcement. This situation grows from the fact that the laws as they stand today are monuments marking the successive steps in advance made by a developing social conscience against the stubborn resistance of a strongly entrenched individualism. The rapid progress in technological changes and the response of public opinion with devices for the benefit of workingmen result in a seesaw position for the states. One state may regulate one aspect of labor welfare which marks it as alert and progressive. Subsequently, another, benefiting from the experience of the first and other states, enacts legislation—and shortly the first state is among the most backward.

Scope of legislation

Labor regulations include a large number of subjects so that this field, like the others in this chapter, may be made the object of special study. Within the limits of space permitted but without particular reference to the order of their development, we may bring the many topics together for our purposes under eight heads: (1) safety, comfort and health, (2) workmen's compensation, (3) insurance against sickness, (4) hours of labor, (5) minimum wages, (6) collective bargaining, (7) unemployment insurance, and (8) job security.

Early laws seeking to promote the safety, health, and comfort of workers in factories attempted to safeguard against danger-

1. Safety, comfort, and health

ous machinery, elevator shafts, and stairways; to require adequate light and air; and to eliminate noxious gases, fumes, dust, and filth. Later acts to promote the comfort of employees required the employer to furnish suitable toilets, washrooms, lunchrooms, and adequate lunch periods, wholesome drinking water and, where practicable, seats for workers. These laws, commonly spoken of as factory acts, were later extended to apply to department stores and other places of employment. In like manner laws have been enacted to secure the protection of workers in hazardous employments. Included among these are acts applying to mining, to afford protection from falling rock, to secure ventilation, the proper equipment and operation of hoists, the use of safety lamps, and the storing and use of explosives. In the field of railroad operation, laws have been placed on the books to protect both the employee and the public through the use of safety devices such as air brakes, automatic couplers and signals, tests for eyesight and color blindness, and of standard construction for cabooses, baggage cars, and coaches. In building construction, statutes require temporary floors during building operations, railings upon scaffolds, and safeguards for hoisting apparatus.

A comparatively recent development in the field of safety and health is the trend toward providing general standards by legislation. An administrative board is then established with the quasi-legislative power to issue rules and regulations of a detailed character. More than twenty states have adopted this procedure. The necessity for this kind of an approach is based upon the twin facts that legislatures have neither the facts nor the time to make detailed rules. New industrial processes involving the production of new materials are being used. Some of these materials cause illness. Study of their effects and means of handling, and the almost day-to-day formulation of rules for the protection of the worker must be undertaken. This is all possible only by the administrative procedure in which essentials of time, expertness, and flexibility can be combined.

2. Workmen's compensation

a. Payment follows responsibility

Despite the precaution against accidents, they do occur. Who is to bear the loss has been a grievous question. Tendencies to answer it in two completely opposite ways are observable in the history of the industrial age. The first was to let him who was responsible for the accident bear the cost, and the responsibility, in case of dispute, was determined by the courts. The injured worker could present his claim for injury to his employer, and, failing compensation, he could bring suit to recover. Three defenses were developed in the common law by which the employer could escape payment. The first defense —contributory negligence—consisted of the employer's showing that the workman had been negligent and therefore had himself contributed to the accident. The second—the fellow servant doctrine—placed the blame on a fellow worker. He had been responsible for the accident; he, not the employer, was the one who should be sued for damages. The third defense—the assumption of risk doctrine—dodged the direct placing of responsibility. Some occupations were inherently dangerous and such was common knowledge. A workman knowing this when he contracted to work had taken the risk into consideration and, therefore, had assumed the risk when he agreed to the wage. A part of the wage was meant to compensate for risks. Two major criticisms were made of this system of compensation for accidents. The worker, unequal in financial power to the employer, could not contest with him equally in the courts. Therefore, his compensation, if any, would be used up in legal fees. The second major criticism rested upon the nature of the worker's relation to society and on the effect of the injury on the worker. Society needs the goods produced by workers; accidents are unavoidable; therefore, society should bear the cost of injuries regardless of responsibility in any particular case.

b. Administration of social payments

This last criticism states the basis for the present answer as to who should bear the cost of industrial accidents. Society should bear a part of the cost and, in most cases, it is also to bear the cost of administering compensation for injuries. New York, in 1910, was the first state to enact a comprehensive compensa-

tion statute. Today all of the states have workmen's compensation laws. These statutes have taken a great variety of forms. Sometimes the employer is simply deprived of the common law defenses, the assumption being that he will then provide some kind of insurance against accident for his employees. Sometimes, the hazardous occupations only are covered. Ordinarily, a board is established to which an injured workman can make his appeal for compensation, although a few states still leave this for the courts to administer. Usually the worker may do this himself without the aid of high-priced legal counsel. The accepted practice is that injuries have been classified and a scale of the amounts to be paid for various kinds of injuries has been established. When the workman appears, his request for compensation is granted. Should his employer wish to contest the case—for example, that the injury was not job-connected—then the board will hold a hearing. Ordinarily, its determination of facts is final, although there may be appeals from its decisions on points of law. Early in the history of workmen's compensation, there was much criticism of the restrictive attitudes of the courts. As the procedures of the administrative boards have become regularized and as criticism of the courts began to take effect, there has been less judicial interference.

c. Second injury

A recent development in the field of workmen's compensation is the establishment of the so-called second injury fund. Its purpose is to aid persons handicapped by one injury to secure employment. If such a person meets with a second accident and is permanently incapacitated as a result of injuries sustained in both of the accidents, the fund is to be drawn on to compensate him in part rather than to assess all the damages against the insurance available from his employment before the second injury. By use of the second injury fund, an employer is not penalized for hiring a handicapped person. Some thirty states have provided for second injury funds, six of them in 1947.

The most recent development has been the adoption of temporary disability insurance to provide compensation for wage

losses due to unemployment caused by illness. Compensation for illness of an occupational nature was an integral part of workmen's compensation, but insurance against loss of employment as a result of non-job-connected illness is new. Four states (California, New Jersey, Rhode Island, and New York) only are attempting it. This kind of insurance is being administered by the state agencies which dispense unemployment insurance payments. These agencies will be described in a later paragraph. The programs are being financed by contributions by employers and employees.

3. Sickness insurance

A storm center of labor legislation has been the struggle to establish maximum hours of labor. The first statute in this field was an act in Massachusetts in 1842 which prohibited children under twelve years of age from working more than ten hours a day. This statute, however, set up no minimum age for child workers. Now, nearly all of the states have some kind of maximum hours for women and children. The standard maximum for children is eight hours, and for women it is either eight or ten; sometimes there is also a maximum number of hours for the work week, such as forty-eight or fifty-four. There are also prohibitions against the employment of women at night and immediately before and after childbirth. Maximum hours of work for men have been established in a few scattered industries which are hazardous in themselves, or in which there is danger to the public, such as the operation of railroad trains or motor vehicles on the public highways. The limits on the number of hours for male workers have been established chiefly by the unions through collective bargaining. Legislation in general has had only an indirect effect by providing for overtime pay for more than the standard eight hours per day or forty hours of work per week.

4. Hours of labor

The struggle to establish minimum wages was long, hard-fought, and of doubtful issue. The battle was first joined to set minimum wages for women and children. In 1923, the United States Supreme Court declared that setting a minimum wage for which women could contract was a denial of constitutionally

5. Minimum wages

guaranteed liberties.[3] Later, in 1937, the Supreme Court approved the setting of minimum wages.[4] The next year Congress passed the Fair Labor Standards Act which, among other things, established a base under the wages of workers engaged in the production of goods for interstate commerce. More than half the states have followed the national example by establishing a floor under the wages of women and minors, while a few have set a minimum rate for men. The fact that there has been a general high level of employment and a great demand for workers has no doubt shifted attention away from such matters. States having such minimum wage standards usually have boards—made up of representatives of labor, employers, and the public—empowered to issue wage orders in specific industries.

6. Collective bargaining

During the past century and a quarter, the public attitude which sets the limits within which the labor contract between the employer and his employee is made has undergone revolutionary changes. For laborers to confer together with respect to their bargain with their employer was criminal conspiracy until 1842.[5] The National Labor Relations Act of 1935 (Wagner) made it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees."[6]

About one-fourth of the states enacted "little Wagner acts," the earlier ones being modeled after the national act. Although, beginning in 1939, the tendency has become quite pronounced for the states to enact legislation which is restrictive of labor unions—such as limiting picketing and to permit a limited use of injunctions—the right of workers to bargain collectively with their employers seems to be permanently established. During the period 1939–1947, forty states enacted some kind of restrictive legislation.

Wisconsin was the first state to undertake the provision of

[3] Adkins *v.* Children's Hospital, 261 U.S. 525 (1923).
[4] West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (1937).
[5] Commonwealth *v.* Hunt IV Metcalf, 45 Massachusetts (1842).
[6] 49 *Statutes at Large* 449, U.S. Code, title 158, sects. 8, 29.

7. Unemployment insurance

insurance for unemployment. A bill for this purpose was introduced in its legislature in 1921, but it was not until 1932 that a bill was actually passed. A half dozen states were seriously investigating the problem by that time, and a considerable number of bills had been introduced in the legislatures. It remained, however, for the national government to provide leadership in the field, which it did in 1935 in the Social Security Act. Within two years, every state in the Union had provided a program of insurance for certain unemployed persons. By 1947, more than 37,000,000 workers were covered by these laws.

a. Social Security Act

The Social Security Act provides, among other things, for a pay-roll tax assessed against the employers of eight or more laborers. The tax started at 1 percent but increased in successive years to 3 percent. Certain groups are excluded from coverage by the act: workers in private homes, agriculture, government service, and employees of non-profit associations devoted to religious, educational, or charitable purposes. Ninety percent of the funds collected from the employers of a state is to be credited to that state in the event that it establishes its own unemployment insurance plan. Part of the remainder is to be returned to the state to assist in paying for the administration of the plan if the administrative procedures are approved by the national government. In order to be eligible for these funds, a state is required to provide: (1) for the distribution of benefits to unemployed workers through public employment offices or other agencies approved by the Federal Security Administrator; (2) that all moneys collected for the purpose are to be paid into the United States Treasury; (3) that all moneys withdrawn from the fund are to be used exclusively as benefits for the unemployed; and (4) that benefits are not to be denied to otherwise eligible persons who refuse to accept work because of conditions connected with labor disputes, or because wages, hours, or other working conditions on the proffered job are substantially worse than those prevailing for similar work in the same community.

b. State plans

All of the states have complied with the minimum standards of the Social Security Act and more than half of them have gone beyond. For example, some states have extended the coverage under their systems to include such persons as domestics, state employees, and those of nonprofit associations. Another kind of extension is to cover workers when less than eight are employed by one employer. Twenty-nine states have done this as of July, 1948, whereas sixteen have extended the coverage to include those having only one employee. Most of the states have followed the national lead in levying the tax against employers only, although some have experimented with taxing employees also. Two states (Alabama and New Jersey) still tax the workers for unemployment benefits; funds for illness insurance, referred to above, also are usually contributed to by the worker. A reciprocal arrangement has been devised whereby the wages of workers who travel from state to state may be used as a basis for determining unemployment benefits. Forty-five states are parties to this arrangement.

c. Benefits

The states have various plans for determining eligibility, amount of benefits to be paid to unemployed persons, and the length of time for which the payment of benefits may be continued. Some general principles emerge, however, from an examination of the many plans. An employee covered in the insurance, to be eligible, must have registered with the employment service, have waited some time (usually one week), and have been unable to find suitable work. The minimum payment which any state will make is $3 and the maximum is $28 per week. The maximum number of weeks during which any state will continue to make payments is twenty-six. The amount of benefits per week and the number of weeks it can be continued up to the maximum length, provided no job can be found in the meantime, usually is determined by a formula based upon a ratio between weeks of employment or earnings within the year and weeks of benefits. For example, many states pay one week's benefits for three weeks of unemployment.

Unemployment insurance was developed in depression times.

There was much doubt as to whether sufficient funds could be collected to meet the demands. Consequently, actuaries made their calculations in view of such circumstances. The result was the overestimation of the amounts of money needed. Shortly after the inauguration of the program, the country entered a long period of extraordinarily high employment. The consequent accumulation of reserves, according to William Wandel of the Federal Security Agency, seems adequate to meet any contingency.[7]

8. Employment service

The problem of matching the employer's need for a worker with the worker's need for a job has been attacked for many years in many different ways, both by private and public agencies. The Social Security Act coupled unemployment insurance and job placement. An unemployed person, to be eligible for insurance, must register for a job with the employment service. His skills and capacities, as far as such are reducible to paper, are noted and filed. Employers needing labor apply to the employment office with a description of the skills required. The employment office selects from its files the names of qualified persons and notifies them of the vacancies. The worker must then present himself and make application for employment if it is suitable for him in terms of skills, hours, and wages. The services of employment agencies are free, however, to any person seeking a job, regardless of whether or not he is eligible for insurance if he fails to find a job.

The number of persons placed through the employment service shows its utility.[8] No doubt these figures show the shifting re-

Year	Number of Persons Placed
1942	10,221,000
1943	12,253,000
1944	12,219,000
1945	10,811,000
1946	7,140,000
1947	6,328,000

[7] William H. Wandel, "Unemployment Insurance," *Social Work Year Book* (1949), p. 512.

[8] Meredith B. Givens, "Employment Services," *Social Work Year Book* (1949), p. 184.

quired of workers by the war effort and their relocation with the close of active hostilities; but after discounting that, the work of the employment service is seen to be substantial.

During the height of the war effort, the administration of the employment service was taken over, against the angry protests of state officials, by the national government. This occurred soon after the beginning of the shooting war for the United States—January 1, 1942. At the continued insistence of the states, it was returned to them in November, 1946.

Administrative structure

By and large, the administrative structure for the application of labor law is state machinery—not local. Agencies first established to collect and distribute statistical information have been given administrative and law-enforcing powers. In the fields of safety and health, minimum wages, and the employment of women and minors, the agencies have been given power to issue rules and regulations. In Wisconsin and New York, for example, this rule-making power is so extensive that the collection of rules is called the "industrial code." In many states, the state agency concerned with industrial matters, called the labor department, administers all the labor laws. In others, separate agencies have been established to administer workmen's compensation laws, unemployment insurance, and employment security.

A characteristic of the agencies responsible for administering unemployment compensation and the job-placement service is that branch offices are distributed over the state. This becomes necessary for the convenience of workers who must register with the employment office for a job when involuntarily unemployed in order to establish eligibility for unemployment benefits. For example, Indiana has twenty-four full-time, four part-time, and three branch employment offices located with reference to worker population.

Extensive, even revolutionary, changes have been occurring in the last two decades in the field of labor relations. The increasing industrialization of the country, with its consequent intensification of social interdependence, is one of the factors

which has concentrated attention on labor problems. Always when new groups of people begin to be aware of a community of interest and start to cast about for ways of expressing their wants, false starts are made, ill-considered methods are used, and uncomprehending leaders grasp power. Groups accustomed to influence and prestige become aroused and they strike out, sometimes irrationally, failing to distinguish between genuine movements arising out of real human needs and the excesses of the new stirrings, lead by new leaders unaccustomed to the manners of power. It is under such conditions that bloody revolution is bred and matured. That the new elite have come this far and that the old elite have been able to share power and prestige with the new without a violent test of physical strength is a happy commentary on the good humor, the insight, and the belief in the value of individual human beings of the American people. Further, this adjustment constitutes a tribute to the adjustive capacity and vitality of American political institutions.

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CHAPTER 17

ADMINISTRATIVE SERVICES: EDUCATION, HIGHWAYS, AND ECONOMIC REGULATION

EDUCATION

The maintenance of public education is today of all the functions of state government the one which receives the most whole-hearted approval from all classes of society. No more interesting illustration of the gradual change of opinion on the part of the public with respect to the proper functions of government can be found than in connection with the subject of education in the United States. During most of the colonial period there was no general recognition of education as a governmental function. The medieval view that this matter was primarily a concern of the church and that its ultimate aim was to provide an educated clergy, was shared by the New England theocrats. When, in 1647, Massachusetts enacted a law requiring every township of more than fifty families to maintain a schoolmaster, it was acting in harmony with this view; for since under the Calvinistic polity the state was but an arm of the church, the Massachusetts statute did no violence to the accepted doctrine. It was not until church and state were separated that elementary education there became truly a governmental function. Secondary education as well was dominated by ecclesiastical influences. Institutions of higher learning had as their confessed aim the preparation of men for the ministry.

A private interest

In the middle colonies, too, education was viewed as a function of the church or of the family, and state interference was sometimes resented. When it was provided outside the home, it

was through the parochial school supplemented by private schools patronized by the well-to-do.

In the South, no general provision for education was made. The families of means brought in from England the system of private tutors for their children, while the older sons were sent to private institutions like the College of William and Mary, or to England. Educational development has been steadily away from the ideals of that day and in the direction of education at public expense and under secular control, first in the field of elementary education and ultimately in secondary and higher education as well.

A public interest

The establishment and maintenance of public education, first in elementary, and at a later date in secondary schools, when ultimately it was accepted as a proper subject of public undertaking, was looked upon as primarily a matter for local action. But that it was a subject of state as well as of local concern was early appreciated in many quarters, even in the South where a distinct preference for private schools was observable. The constitution of North Carolina, adopted in 1776, declared: "That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted in one or more universities."

By the year 1800 at least seven state constitutions made some reference to education. Massachusetts, New York, New Jersey, Maryland, Virginia, and Georgia had by that year enacted legislation dealing with the subject. In accordance with the spirit of the ordinance for the government of the Northwest Territory declaring that "Schools and the means of education shall forever be encouraged," the frontier states of that region made early provision for public education. Despite the evidences that the states were accepting this burden of public education, the tradition of dependence upon religious, private, and philanthropic agencies continued. Professor Edwards says that it was 1860

before the principle of state responsibility was established.[1]

Public school attendance

The great growth in school attendance did not begin until 1890. It increased in two ways in the next half century. A greater proportion of children of school age attended school and they attended more days in the year. In 1890, 44 percent in the age group 5–17 were going to school, whereas, in 1940, 74 percent of the same group were in school 129 days as against 59 in 1890. The great increase in numbers of children attending secondary schools began in 1890. Between that date and 1930, the enrollment in secondary schools increased at least 100 percent in each decade except one. This increase in enrollment extended through the colleges. In 1890, about 3 percent of the young people in the 18- to 21-year age group were in college of one kind or another against 16 percent in 1942. After the close of World War II, the number attending institutions of higher learning was doubled.

Compulsory attendance

A factor in the large numbers of children enrolled in the elementary and secondary school is the tendency to set a minimum school age and to require attendance at school. All but two states now have compulsory attendance laws to age 16 or beyond. It it true that many exceptions are made, and it is likewise a fact that the enforcement of such laws varies with the states and with localities within the states. These statutes, however, are indicative of the public attitude toward education.

Financial support

At the present time and during the whole of the last fifty years, education has been the largest single object of public expenditure by the state and subdivisions in the United States. For the year 1946, their total expenditures were $2,638,665,908. The subject of support for public schools may be considered from three points of view: land grants, local support, and recent trends.

1. Land grants

Although the federal government does not itself engage in general public education directly, it has contributed to it largely

[1] Newton Edwards, "Our Recent Educational Achievement," *State Government*, xxi (January, 1948), p. 3.

in the form of grants of both land and money. Thirty states have received a total of approximately 145,000,000 acres of land from the central government in aid of education. Land to the extent of one-half the combined area of New Hampshire and Vermont has been given to the states by the federal government in support of agricultural and industrial education alone. Although these lands were badly administered in many cases and frequently sold at nominal prices, over $250,000,000 have already been realized from their sale. If the portion still in the hands of the states is well administered, it should yield from two to three times that amount. In addition to these enormous grants of land, the federal government has given, and still continues to give, millions of dollars annually in aid and encouragement of education by the states.

a. By the federal government

b. By the states

The states themselves have set aside not less than 78,000,000 acres of land, the proceeds from which are devoted to school purposes. In some of the older states special school funds were early created and have been augmented from time to time by the addition of the income from various specially designated sources. At the present time some of these funds have grown to large proportions.

2. Local support

The major support of schools for a long period came from local sources, particularly property taxes. This was the practice in every state in the Union. About half of the states have used the poll tax to supplement school revenues, and most of the states also have some permanent school funds, the income from which is available for the schools. Some of these funds are state administered, but in several states local sources contribute directly to local school units.

3. Recent trends

The need for a wider financial base for public elementary and secondary schools has been recognized in two ways: first, by the movement for grants by the national government; and second, by the states' assumption of more of the cost. Assistance from the national government has been chiefly in the form of grants for special purposes—school lunch programs and vocational education. But there is an insistent and growing demand

a. National aid

for aid for ordinary school purposes. One of the chief arguments rests upon the desire for a minimum educational opportunity for all children in the United States. The mobility of the population brings persons from states where $25 per year has been spent on their grade- and high-school education together with persons from states where more than five times that much has been spent per year on their schooling.[2]

b. State aid

The trend for more state support for the public schools has taken several forms. All but a few of the states have so-called equalization plans; that is, a minimum standard is set and localities which cannot raise sufficient funds to meet this standard receive state aid. Another form of state support is the level grant of money. This is a general practice among the states. Sources of money for these grants include, among others, income from state-levied property taxes, income taxes, and sales taxes. The number using property taxes for this purpose is declining. There is also a tendency away from earmarking a certain proportion of a particular tax as revenue for school purposes. Rather, outright appropriations of definite amounts are made. Despite the increasing amounts of money given to the schools by the state governments, something more than 50 percent of the total revenue still is raised in local jurisdictions.

Educational personnel

The trend toward higher qualifications for teachers was interrupted by World War II but has since been resumed. Low salaries, high level of income in other occupations, and the demands of the military services worked together to create an acute teacher shortage. The public response has been a series of measures to improve teacher status. However most of these measures carry forward programs which have been long in the making. More than half of the states have established minimum salaries either by statute or by administrative procedure. Though teachers' salaries for the whole country are still low, the movement to increase them has gone on during the period

[2] Frank N. Freeman, "For Federal Aid to Education," *State Government*, xxi (January, 1948), p. 14.

of rising prices from state to state whenever the legislatures have met. Some of these advances have been relatively handsome from a percentage standpoint. For example, the average salary for all the instructional staff in Indiana for 1946–1947 was $2150. For 1947–1948, it was $2950. Compared to the lowest salary paid to teachers, some school jurisdictions had raised their average level considerably. In the District of Columbia, for example, it was $3800, the highest in the country for 1947–1948. Other jurisdictions with high average salaries were: California, $3600; New York, $3500; Connecticut, $3300; and Maryland, $4300.[3]

Many states have established tenure for teachers. When Idaho enacted a retirement law in 1946, every state in the Union had some kind of retirement or pension arrangement. Other statutes have liberalized sick leave provisions and provided for protection of teachers who served in the armed forces.

Dual system of administration

The development of state administrative organization has kept pace with the expansion of the educational system and with the increasing degree of control exercised by the state. A unique feature of this development has been the evolution in a majority of the states of a dual system of administrative control consisting of a superintendent of public instruction and a board of education. The specific partitioning of the work of administration between these two authorities, as well as the relation which each bears to the other, vary greatly from state to state; but at the present time, taken together, they exert a powerful guiding and controlling influence of the states' educational system from top to bottom.

State superintendent

Chronologically the state superintendent precedes the board of education. Almost coincident with the first efforts of the state in the interests of public education there appeared the state superintendent. In some cases the secretary of state or some other state officer acting ex officio performed such rudimentary functions as had earlier developed. Soon, however, the duties of the office were dissociated from those of any other, and the superintendent took his place as the first addition to that

[3] *State Government*, xxi (January, 1948), p. 23.

earliest group of administrative officers to be found in the original states. By the middle of the nineteenth century all of the Northern and some of the Southern states had provided for a superintendent acting either ex officio or an as independent officer, and at the present time every state has such an official.

Although in most of the states the superintendent is chosen by popular state-wide election, a trend since World War II is developing for the state board to select the chief school executive official. As a rule, especially in the states where the office is elective, the salary is entirely inadquate. The superintendents in the larger cities of the state ordinarily command a higher salary than does their superior officer at the head of the state school system. The development of the office from one of a clerical nature to one of an important professional character has, moreover, too often not been accompanied by a corresponding advance in the attitude and the ability of the incumbent. The unwillingness on the part of the people of the state to pay a salary commensurate with the importance of the office has contributed to this unfortunate result, so that the best educational administrative talent is usually not found in the office of the state superintendent. This condition of affairs is further due to the fact that the office is filled by popular election. This practice illustrates very well the intense conservatism of the American people with respect to political institutions. The office was established at a period when supreme confidence was reposed in the ballot box as the best means of choosing public servants. The office continues to be elective despite the fact that the position is one essentially professional and not political in its nature, and ignoring the further fact that attempts to fill positions of a technical character by popular election are foredoomed to failure. If the position of nominal head of the state's educational system is to be made one of real leadership, it can be accomplished only by giving to that official an indefinite term and placing his selection and removal in the hands of a properly constituted board of education.

In forty-six states there exists, in addition to the superintend-

Board of education

ent of public instruction, a board of education. The membership varies from three to fifteen members. The terms of office vary widely but are usually overlapping so that no sudden reversal of policy is likely to occur. The functions first assigned to these boards were chiefly investigative and advisory to the superintendent where such officer existed, but to these were sometimes added the duty of administering the state school lands and funds. With the progress of time their functions expanded beyond the advisory stage, and they are found prescribing courses of study and qualifications of teachers, and making rules for the guidance of school officers—all matters of a quasi-legislative or policy-forming character.

Classification of boards of education

With respect to composition, boards of education fall into three fairly distinct categories.

1. Ex officio

First there are boards made up of state officers acting ex officio. These usually include some of the elective officers, such as the governor and secretary of state, along with the superintendent of public instruction. Boards thus constituted are open to the objections attaching to ex officio boards wherever found if they are to perform duties beyond those of a most formal character. They can render but slight service to the cause of education, since the holding of another state office is no indication either of knowledge of, or interest in, the problems arising in this field. Moreover, such persons are likely to be fully occupied with their regular duties and unwilling or unable to give the attention which is desirable. Then, too, such officers are political, and there is the constant danger that political considerations and spoils practices may enter to affect their action.

2. Professional

A second type of ex officio board is that made up wholly or predominantly of professional educators. Boards of this type sometimes include also ex officio members or laymen appointed by the governor. Such bodies usually include the heads of the state's institutions of higher learning: universities and normal schools, and administrators or teachers selected from the public school system. Like the state officers referred to above, these men are immersed in the work attaching to their regular posi-

tions and cannot devote continuous thought to this important duty. Sometimes school politics and petty rivalries between institutions have crept in, to the detriment of their service as board members. The most serious defects of bodies thus constituted are those inherent in professional boards. Their duty is not to administer but to advise and to deliberate upon and determine policies. What is called for from these bodies is not to give the advice or the conclusions of technical men upon technical problems of administration, but to act as intelligent and interested laymen. They are to bring to their task the viewpoint of the citizen who has some vision of the aims of education, and who will apply his judgment and experience in affairs to developing educational policies. The necessary technical knowledge and skill will be better contributed by the superintendent, provided his selection is upon a proper basis. In certain instances a board made up of school men has been devised to compensate for the lack of technical qualifications often found in the superintendent who is popularly elected.

3. Non-professional

The third type is found in states where both ex officio and professional members are dispensed with and the board is made up of laymen, usually appointed by the governor but sometimes elected by the legislature, and in Michigan elected by the voters.

It is generally conceded by students of the subject that this form, when the appointment is vested in the governor and when the superintendent is elected by the board, is the most desirable type of organization since it avoids the defects inherent in the former types and concentrates responsibility for selection in a single responsible officer. When the selection is in the hands of the legislature it is found that since responsibility for the selection is diffused political considerations are peculiarly likely to exert an influence. Selection by the people, in spite of notable exceptions on record, is likely to be guided by purely partisan considerations.

Wide differences are to be found in the relations between the state superintendent and the board of education in the various states where they exist side by side. In some instances there is

Relations between superintendent and board

little or no official connection and occasionally, it is to be feared, little attempt at coöperation between them. In some cases the superintendent is the responsible head and the board acts only in an advisory capacity. In other instances a confused situation exists in which the superintendent has his independent duties and powers but is at the same time an ex officio member of the board and its executive officer acting under its orders. In still other cases, as, for example, in the three southern states of New England, Minnesota, and a few others, the board is the responsible head of the department while the superintendent is appointed by the board and acts as its executive agent. Where the latter relation exists the title of this executive officer is more frequently secretary of the board of education or commissioner, rather than superintendent.

Functions of the department

The functions of a state department of education are everywhere substantially the same whether administered by a board of education or a superintendent or both combined. The task is especially to exercise supervision, direction, and control over the system of elementary and secondary education. In a few instances the department includes among its functions that of managing the state's institutions of higher education, including the university, the normal, and other technical schools. More frequently, however, these institutions are under separate control, either by a single group of regents or trustees, or by boards for each institution. In certain instances, too, special boards have been created to administer teachers' retirement funds, and in about a third of the states to distribute the federal grants-in-aid for vocational education.

As in the case of other administrative departments, its earliest functions were confined to the gathering of information, statistical and otherwise, and seeking to stimulate public interest in matters of education. It has been pointed out above that another early duty was the administration of school lands or of the funds derived from such lands. In course of time appeared as important duties the visiting of schools and examining of local school conditions, advising with local school authorities, issuing forms

and blanks for the keeping of records and the making of reports, and holding of institutes and conferences to promote the professional excellence of teachers. Later came the examining and licensing of teachers, prescribing courses of study, both in the common schools and in the normal schools, and training of teachers. In the state of New York, the department of education sets uniform examinations for the students in both elementary and secondary schools. In recent years the scope of state educational activities has broadened; and now in a number of instances the department is concerned with such matters as the construction and sanitation of school buildings and general child welfare, including child hygiene. In some states officers of the department sit as an administrative tribunal with extensive power to hear and determine disputes in educational matters arising in the local school systems. By no means the least of the functions of the department is the duty of supervising the local schools to determine whether there is compliance with the state school laws. The extensive system of grants-in-aid from the federal government and, in some cases, by the states, with their accompanying conditions has given to the state departments extensive additional duties of supervision and, incidentally, a powerful leverage of control over local school conditions.

Local organization

The counties quite generally have a superintendent of education who in most states is popularly elected and who, subject to general state supervision, exercises some control over the rural schools in the county. The educational organization in cities varies somewhat. In some cities the school district, which is the unit charged with the educational function, is an independent district, having its own powers to levy taxes and make expenditures. In other instances it is identical with the city, the educational function being merely one of the many governmental services carried on by the municipality. Even where the district is independent, there has been a tendency to subject its financial policy to some restriction, such as having its budget and tax levy passed upon by a city-wide board such as a board of estimate and taxation.

The schools in the local units of government almost invariably are placed under the government of a board of education, popularly elected, and varying in size but usually numbering from five to eleven members. The board of education in the larger centers is unable to pay detailed attention to the administration of the schools and confines itself to the broader matters of policy and politics touching the school system as a whole. The technical administration of the system is then left to a superintendent of schools who is elected either for a definite or indefinite term by the board. In the smaller municipalities it likewise is customary to have such a technical head of the schools, but the smaller the place the more intimate is the relationship between the board members and the school itself likely to be.

School districts

The problem of the size of the rural school unit has been a continuing one. Schoolmen are practically unanimous in their advocacy of larger units. Small schools are notorious for the high per capita cost and the poverty of their course offering. Partly as a means of improving educational standards and partly as a economy measure, the states with the largest number of school districts—and therefore with the smallest school units—are in the midst of local reorganization. Illinois, with 11,998 districts, has a program in progress which, if carried to completion, will reduce the number to 864. Washington already has reduced its districts by 49 percent. Other states in the process of doing so are California, Iowa, Indiana, Minnesota, Missouri, North Dakota, and Wisconsin.

The concept of the function of public education in a democracy has been enlarged in the last quarter of a century. Illustrative of the public assumption of a greater burden for the general welfare is the activity in vocational rehabilitation, adult education, and so-called higher education.

Vocational rehabilitation

The beginning of the vocational rehabilitation program on a large scale was the result of an act of Congress passed in 1920 which provided for grants to the states. From year to year, Congress renewed the appropriations until 1935 when they were made permanent. Following this, all the states set up programs of

training. In 1943, Congress liberalized the grants considerably. Among other things, the program was extended to cover the mentally disabled, the blind, and all persons disabled as a result of war activities. Veterans therefore qualify for training as private persons, notwithstanding the special rehabilitation program which is open only to former members of the armed services. Its chief purpose is to make handicapped persons employable. Nearly any person who will have his handicap eliminated or substantially reduced by this program is eligible. In addition to training, such persons are given examinations to discover hidden abilities, and medical, surgical, or psychiatric treatment are provided to eliminate or reduce disability. Also they are supplied with artificial devices—such as limbs, braces, hearing aids—and with counsel, tools and equipment, and other aids to finding and holding a job.

1. Economic benefits

The economic benefits resulting from this program are startling. Reports show that $24,600,000 were spent by the national and state governments in the vocational rehabilitation program for one year. It was estimated that persons who had been trained under the program earned $69,000,000 more during that year (1948) than they would have earned without the training, and that they actually paid income taxes to the national government amounting to more than one-fifth of the total cost of the program.[4]

2. Administrative machinery

The organization through which vocational rehabilitation is carried on at the national level is the Office of Vocational Rehabilitation, which is a unit of the Federal Security Agency. Its functions are: (1) to coördinate the programs and activities for the civilian disabled; (2) to establish standards in the various areas of the service; and (3) to certify funds under the grants-in-aid program to the states when the states submit satisfactory plans for the performance of service to the disabled within their jurisdiction. The states have corresponding units charged with formulating plans for national approval and with the ad-

[4] Michael J. Shortley, "Vocational Rehabilitation," *Social Work Year Book* (1949), p. 528.

ministration of the program. These agencies are called Divisions of Vocational Rehabilitation, or Boards of Vocational Rehabilitation.

Adult education

The emphasis in adult education has undergone a drastic shift in recent years. Formerly it carried a stigma of incompetence. Adults returned to school for remedial purposes or to make up deficiencies. A typical example was the immigrant conning the constitution, or trying to learn enough English to be naturalized. But in government service and elsewhere adults became interested in better fitting themselves for their jobs and for promotions, and ordinary citizens, moved by curiosity, wanted to understand better the society about them. Consequently, for both formal and informal groups procedures sprang up to aid persons in the diagnosis and solution of vocational, avocational, personal, family, and civic problems.

An example of non-public procedure is the "Great Books" groups, most of which received their original stimulus from Robert Maynard Hutchins, adventurous president of the University of Chicago. The public agencies which are largely responsible for carrying on adult education are the state universities and the public schools. Museums and public libraries also should be listed among the agencies of adult education. Libraries will be discussed in a later paragraph.

In some states, the program of adult education is under the direction of a division of the state department of education. This movement is probably still in its infancy. It is one of the means by which intellectual, moral, and spiritual progress can be made to parallel scientific progress symbolized by nuclear fission. In the future, which promises to be more marvelous than the past, James Truslow Adams predicts that "prep-school and college will no longer suffice. Adjustments and learning will not be just for juveniles and adolescents, but a life-long job. How great, how successful, and how satisfying that world of the future shall prove may largely depend on how adequate adult education may prove."[5]

[5] James Truslow Adams, *Frontiers of American Culture: A Study of Adult Education in a Democracy;* also see Mary L. Ely (ed.), *Handbook of Adult Education in the United States.*

Higher education

Although the states were somewhat slower in assuming responsibility for education beyond the secondary level, the central government early set an example in the Ordinance of 1787 which put aside lands for each state to be carved out of the Northwest Territory, with which to found and support a "seminary" or state university. Despite this early singling out of the responsibility, the states have continued to be slow in assuming it fully. It is only within the last few years that the number of students attending state-supported institutions has exceeded the number attending privately-supported colleges and universities. But the proportion of students in tax-supported institutions is increasing from year to year. This is likely to continue as the number of students increases.

1. Public support

2. Enrollment

Since 1900, there has been, with the exception of short periods during World Wars I and II, a relatively constant increase in the number of persons attending college. Shortly after World War II, more than two million students were enrolled in all of the colleges of the country, or over 50 percent more than in the year immediately preceding the outbreak of the war. But despite this increase, all young people who are as well qualified as those already attending, still do not get to go to college. Evidence of this comes from two sources. It has been noted by college administrators that the presence of a college, or an extension division of a state university, in a community does not reduce the number of students going to the main campus of the state university from that community. Secondly, studies in Milwaukee high schools of 1937 and 1938 of the students in the upper 10 percent of the graduating classes showed that 100 percent of the graduates whose parents had incomes of $8000 per year went to college, whereas only 25 percent of those whose parents had incomes of under $1500 went on to school. Other studies in other parts of the country have corroborated this evidence. Professor Havighurst concludes from this evidence that ". . . for every boy or girl of higher ability who finishes high school, [and] goes to college . . . there is another boy or girl of equally high ability who quits at high school graduation or earlier, and consequently loses in competition for the most

desirable prizes of life in America."[6] It bodes ill for a society which does not permit large numbers of its most desirable persons to find stations in life equal to their capacities. Frustrated, unhappy, but able people may, in times of stress, take what they want without regard to the amenities of social and political usuage.

3. Scholarships

Suggestions to remedy the situation include the giving of scholarships to enable the intellectually qualified, regardless of economic status, to go to college. These scholarships could be given by cities, states, or the national government. It seems probable that the national government, with its greater tax-collecting power, may be more likely than any other to adopt such a program. The educational benefits given to former members of the armed services have demonstrated how such a program can be administered without dictating to students the schools they shall attend or determining for the institutions of higher learning the content of their courses or the procedures they shall follow.

4. Administration

Public control over tax support of college and universities ordinarily is exerted through: (1) a board of trustees to whom an administrative hierarchy in the institution, headed by a chief executive usually called a president, is responsible; and (2) through approval by the legislature of the program prepared in the institution and approved by the trustees when appropriations are made to the institution. Sometimes a single board of trustees is set up for each institution of higher learning in the state, and sometimes there is a consolidation of boards. Ten states have a single board of trustees for institutions of higher learning. A more popular method is to establish a single board for each of the several types of institutions. For example, separate boards would be established for teachers' colleges and for universities. Twenty-four states have adopted this arrangement.

State libraries

All of the states have some provision for libraries. Two

[6] Robert J. Havighurst, "Education and the American Ideal of Opportunity," *State Government*, xxi (January, 1948), p. 16; also see Algo D. Henderson, "New York's State University System," *State Government*, xxii (February, 1949), p. 39.

major purposes are served—to supply books to public officials and professional groups and to supply books to the general public. In some states separate specialized libraries are maintained for the use of the courts, the bar, and for the members of the legislature. For example, in Wisconsin, the state library is primarily for the use of the supreme court. Other state-maintained libraries located in Madison serve other single purposes. In other states the central library serves specialized purposes in addition to circulating books to the reading public. Private individuals may withdraw books directly, or local libraries may draw on the resources of the central library. As a rule when a state reorganizes its library system, there is partial or complete unification.

Local libraries

Local libraries are primarily for the use of the general public. In company with other local units of government, these libraries have been hard put to it to find money to support their programs. Two methods of easing their financial problems are being used—raising the tax limits to permit them to levy higher rates and granting state aid to them. Despite the large number of local libraries, a substantial segment of the population (estimated at 35,000,000, chiefly in rural areas) does not have library service. An attack on this deficiency is being made through enlarging library units, by establishing county or regional libraries, distributing books by automobile (bookmobile) and by arranging an extensive inter-library-loan service. Many states (seventeen) have attempted to improve library personnel by requiring legal certification of municipal and county librarians.

Highways

Development of highways

The building and maintenance of highways has been looked upon since colonial times as primarily a function of local government. Although, as will be seen from later paragraphs, there was once a short-lived, and now a revived, tendency, based upon the demands for a wider financial base and for linking highways together to form a national system, to look to the states and to the national government for assistance. Until long

after the Revolution, the main thoroughfares were execrable and the byroads impossible. Growth of population and the accumulation of wealth brought about improvement in the local highway systems, although there was great variation in their excellence in the several states and localities. With the opening of new lands in the interior, there was a general demand for better roads to supplement the inadequate waterways. As the localities were unwilling or unable to supply roads further than to meet in an indifferent way their local needs, other means were sought for providing arterial roads and highways. The cost of construction and of maintenance of these "turnpikes" was met with tolls collected from those traveling upon them. Many of the larger bridges were in like manner built and maintained by private companies.

1. Early development

As a part of the program of internal improvements embarked upon by the states in the first quarter of the nineteenth century, elaborate projects of highway construction were conceived and certain state highways built. The federal government, too, was prevailed upon to enter the road-building field. The most famous example of this federal policy was the Cumberland Road, forming that part of what was known as the National Old Trails highway, extending from Cumberland, Maryland, west to Vandalia, Illinois. It is now known to the automobilist as part of the transcontinental highway, U.S. route 40.[7]

Two causes combined to put an end, temporarily, it now appears, to state and federal participation in road-building. The collapse of the financial structure upon which the program of internal improvements was erected brought that program to an abrupt close. Furthermore, the appearance and rapid development of the steam railway made obsolete that particular portion of the highway system which the states and the federal government had been called in to supply, viz., the main highways for long-distance transportation.

So, then, the work of road-building and maintenance was

[7] For an interesting "biography" of a highway, see Philip D. Jordan, *The National Road* (1948).

thrown back upon the local areas and upon private initiative. The custom of paying tolls on highways and bridges began, however, even before the Civil War, to fall into popular disfavor in many parts of the country, and the last quarter of the nineteenth century witnessed a general disappearance of the tollgate. Turnpikes either were abandoned or were taken over by the local authorities as public highways.

2. State participation

One of the oustanding facts of the development of transportation within recent years is the reëntry of the states and of the United States into the field of road-building. As late as 1890 no state possessed any administrative agency which concerned itself with highways, and virtually no state funds were devoted to highway construction or maintenance. The present state activity in this direction may be said to have begun with the inauguration in New Jersey, in 1891, of the policy of extending state aid to highway-building.

By the year 1900 a similar policy had been adopted in Massachusetts, New York, Connecticut, and California.

The introduction of the automobile and the bringing of it within the reach of the average farmer and craftsman created everywhere a demand for better roads, which resulted in an expansion of highway-building undreamed of a generation ago. Of the nearly three million miles of public roads in the United States in 1926, over 270,000 miles have undergone some form of improvement by the states.

3. Federal participation

Beginning in 1916, the federal government adopted a policy of subsidizing state road-building on a large scale, inaugurating its policy with a grant of $5,000,000. The amount granted has gradually been increased until in 1944, Congress provided for an annual grant of $500 million to the states to be spent on a matching basis. This proved to be slightly more than a later Congress thought necessary, so in 1948, the amount appropriated for the years 1950 and 1951 was reduced to $450 million annually but still on a 50–50 matching basis.

When the federal government adopted the policy of grants-in-aid to state highways, sixteen states had as yet no administra-

tive organization to deal with problems of road construction and maintenance. But immediately upon the inauguration of the new federal policy, such departments were created in every state, but with varying names, powers, and forms of organization. The sums of money spent and the technical character of the work call for a somewhat elaborate organization with a high degree of centralization of responsibility. Some of these departments are headed by a commission, the members of which are usually appointed by the governor, whereas others are under the control of a single commissioner, chief engineer, director, or superintendent. In a few states public works departments are maintained and the highway organization, headed by a highway engineer or superintendent, constitutes a bureau under this department. However the department may be constituted, there are usually to be found several technical divisions or subdivisions. In New York one of these divisions deals with local roads, while two others are concerned with state roads. The Texas Highway Department has four technical bureaus: design, testing, bridge-engineering, and road-engineering, and two non-technical bureaus—motor-vehicle registration and auditing—subordinated to a state highway engineer appointed by the highway commission. Under the state highway engineer in that state, as in a number of others, there are division engineers in charge of construction and maintenance in the several highway districts. In the state of Vermont where the highway organization is very simple, there are no bureaus at all, but there are district highway commissioners for various sections of the state.

The necessity for continuity of policy is perhaps more strikingly apparent, if not actually more to be desired, in highway affairs than in most other branches of administration. The question of vast economic as well as technical importance with which the department deals cannot safely be subjected to the chance of shifting political majorities. Hence it is essential that the commission or other responsible head of the department should be given stability in its composition. That body should

have broad powers over the highway policy; but when it attempts to concern itself with the personnel or the technical aspects of the work, the results are inevitably far from satisfactory. Whatever the form of the department head and whatever the term of office, it is preëminently necessary that the technical personnel should enjoy permanence of tenure and freedom from political pressure of all kinds.

Personnel

The whole problem of recruiting the staff of highway departments has proved a serious one. The number of positions at its disposition, as well as the large contracts made by it, has caused the department to be viewed with longing by the spoilsmen in most states. The technical nature of much of the work makes the introduction of spoils methods particularly disastrous in highway administration. Twenty-two states have merit systems which cover all state employees. Others, although they must use merit personnel principles in the administration of such services as unemployment insurance, have not yet seen the advantage of extending the merit system to highway departments. As the public becomes aware of the waste which the spoils system entails, it is to be expected that there will be a more general application of the merit system. If the states do not see fit to take such action, Congress might provide an incentive by making the grant of highway funds dependent upon the extension of merit to all state highway employees.

In a few states the highway authorities have advisory powers only, though in most instances they exercise a real control over the state's system of highways.

Departmental functions

The functions of the technical and clerical personnel of state highway departments are numerous. All state departments must supervise the improvement and maintenance of those highways on which federal aid money is expended. The functions performed in connection with this work include the preparation of statements concerning projects for which federal aid is requested, making surveys and plans of construction for proposed roads and bridges, preparing specifications and contracts in accordance with the federal standards, testing the materials

used in this construction work, and inspecting the work in its various stages. In addition to the supervision of federal highways, the state department is also entrusted with the supervision and maintenance of the state's own trunk-line road system. In some instances the state department does not itself carry out the work of construction or of maintenance but merely exercises general supervision over the county authorities who do the actual routine work involved. More often, however, the department itself is in direct charge of the work. Sometimes the work of maintenance is entrusted to the county highway organization which is in some respects better suited to undertake that duty than to engage in technical work and to inspect construction. Many states have what are known as state-aid roads. These are designated roads which are under local control but toward the improvement of which the state is willing, on account of their importance, to grant aid. State inspection and approval accompany such grants, and state standards are usually imposed upon the local units in this work.

The laws creating the several state highway departments impose upon them a great variety of functions, but perhaps the more important can be classified under seven different headings. These have been enumerated in a standard work on the subject as follows:[8]

Functions summarized

1. To provide or to assist in providing a system of adequately surfaced state trunk-line highways.
2. To maintain or to direct the maintenance of the state trunk-line highways.
3. To devise a financial plan for constructing and maintaining the state highways and to assist legislators in making such a plan effective.
4. To cooperate with the federal government in the expenditure of federal aid for highways.
5. To promulgate regulations relative to the use of public highways and to assist in the enforcement of the laws embodying those regulations.

[8] Thomas R. Agg and John E. Brindley, *Highway Administration and Finance*, p. 59.

6. To furnish technical advisory service to the officials of the smaller political units of the state, when such assistance is desired, and sometimes to supervise more or less in detail the work of the county and township highway officials.
7. To disseminate general information relative to highway matters in the form of general reports and particularly in the form of non-technical publicity.

To these should be added, for a number of states, the extraneous though related function of collecting motor-license fees.

Effects of grants-in-aid

Besides the direct financial assistance brought by federal grants-in-aid to highways, other administrative benefits scarcely less important have resulted. "Standardization of highway plans, specifications, methods of testing, more uniform standards of design for roads and bridges, the pooling of information with reference to construction methods, general improvement in organization methods, and a better correlation of different phases of highway work, all developed in the wake of federal aid."[9]

The granting of federal aid is conditioned upon the acceptance by the state of a degree of supervision by the federal authorities over both the plans for each particular project undertaken and the quality of construction which is calculated to enforce high standards of engineering for all roads which are the beneficiaries of such aid.

A purpose of federal aid has been to knit together into a single national system the highways of the several states. To further that end, in 1926 the Secretary of Agriculture appointed a board to designate as federal highways certain roads which have been given continuous route numbers throughout their entire length and for which a uniform system of road markers has been adopted. Roads have been added to this system from time to time until the national-aid network now totals more than 235,000 miles.

Highway costs

In connection with the construction and maintenance of highways as a state service, the means of defraying their cost has come to be one of the most serious problems. Gasoline taxes

[9] *Ibid.*

and borrowings thus far have furnished most of the funds for highway construction and maintenance. The states have commonly returned to the localities a portion of the proceeds of such a tax. The total amounts of money expended on roads during a twenty-year period are substantial. For five four-year periods beginning with 1923 they are:

1923–1926	$5,900,000,000
1927–1930	8,000,000,000
1931–1934	6,600,000,000
1935–1938	7,500,000,000
1939–1942	7,400,000,000

Source: Council of State Governments, *The Book of the States* (1948–1949), p. 337.

Local roads

A second problem, that of the local roads which formerly were taken care of by the townships and counties, is thus presented. The tendency of late has been for the townships to wish to have the county either take over the highway problem or pay for the township work if it is left with the township. In turn the counties have sought to obtain state aid in maintaining the county highways. The result has been that to an increasing extent the problem of financing roads has become a state problem, whether the roads be state or local in character. This in turn has led to the imposition of certain standards upon the communities in their highway work. One method of solving this problem of the state relation to highway finance and control is that first used by North Carolina (1931)—the assumption by the state of full responsibility for the construction and maintenance of all its roads. Although some other states (Virginia, West Virginia, and Delaware) have followed this example, it has not been widely adopted.

Public works potential

The decline in expenditures, coupled with the 20 to 45 percent increase in the use of the highway system, depending on the section of the country where counts have been made, plus the necessary neglect of roads during the war years causd by the lack of materials and man power, made road-building a promising field for employment should depression threaten. To

take advantage of this great potential reservoir of employment for the benefit of a uniform highway system, Congress (1944) authorized the preparation of plans for two highway systems.

1. Interstate system

The first is to be called the national system of interstate highways. The roads to compose it are to connect the principal metropolitan areas, cities, and industrial areas and to connect at suitable border points with routes of a continental importance in Canada and Mexico. This system which is not to be more than 40,000 miles in total length has been almost completely laid out by state and national officials working together. Minimum standards for urban and rural sections have been developed. Wherever traffic and economic conditions warrant, express highways with a center dividing strip will be constructed. Although this system comprises only about 1 percent of all roads and streets, it is anticipated that it will carry 20 percent of all motor travel. All cities of over 100,000 will be serviced by it.

2. Farm-to-market roads

The second system is to be comprised of the principal secondary roads. These are feeder roads, farm-to-market roads, rural free delivery mail routes, and public-school bus routes. These roads, selected by local highway officials, state officials, and the U.S. Commissioner of Public Roads, will be of lighter construction than the great thoroughfares in the interstate system, but they are to be made suitable for year-round service. All of the roads in both systems as well as those in the present grant-in-aid system will be the objects of financial grants from the national government.

Regulation of Business

History

An illusion current with each generation is that governmental regulation of economic life is an invention of the party in power; or at least it is of recent origin; at any rate it certainly played no part in the early history of the country. But government regulation of economic life is as ancient as government. As a comparatively early illustration the provision in the Code of Hammurabi (about 2250 B.C.) may be cited. It required that the builder of a house be paid a stipulated sum on its completion

and as a means of reminding the builder that he should keep his part of the contract to erect a safe structure, it was further provided that if he did ". . . not make its construction firm, and the house . . . collapse[d] and cause[d] the death of the owner of the house, [and] that [the] builder . . . [should] be put to death." And in America many of the colonies had their beginnings in trading grants which developed into something like a corporation. We shall see later, in Chapter 20, how the regulation of economic life—even the public ownership of land—were functions of the early New England town.[10] The current illusion of the novelty of regulation in each generation may be accounted for in part by the announced political theory and by the great increases in regulation which have occurred in the last half-century. When men pretend a belief in individualism, new controls attract so much attention that they forget about accustomed ones and proclaim that government has slipped from its old moorings and is drifting into an uncharted sea of regulations.[11]

Classification of controls

The contacts of government with economic life are omnipresent in multifarious forms and constitute a subject by themselves for extended study. For our purposes illustrative examples will have to suffice. These may be collected without regard to the order of their origin, under five familiar heads: (1) chartering of corporations; (2) regulations under the police power; (3) controls over that group of businesses said to be affected with public interest; (4) government ownership and operation; (5) miscellaneous regulations such as licensing, aid and protection to business, conservation of natural resources. There is some overlapping in these categories. They are neither sharply definitive nor exclusive. Their main advantage is their familiarity.

1. Regulation of corporations

Corporations owe their existence to the government and are formed under either general or special laws. In the earlier

[10] See pp. 613–617.

[11] See F. A. Hayek, *The Road to Serfdom* (Chicago, 1944). In the case of Mr. Hayek, he claims it is not an uncharted sea, since his agonized cries are to point out the breakers of despotism.

decades of the nineteenth century, they were usually authorized by special statutes enacted by the legislature. This soon gave way to the practice of creation by general incorporation laws, and at the present time most corporations are created under authority of such general statutes. Certain procedure is prescribed by these statutes and when this is complied with by any group of persons a corporation may be formed. The document or statute in which the powers of the corporation are set forth, the organization of the corporate government provided for, the methods of conducting business outlined, and the rights of stockholders stated is called the charter. The charter of a corporation is a contract, and the state government may not change any of its provisions without the consent of the incorporators. Two exceptions to this rule are: The charter itself may contain a provision permitting the state to alter it at will, and its provisions may be modified by the exercise of police powers. Most corporation laws at present, in compliance with specific directions in the state constitutions, contain a provision that corporate charters are granted subject to repeal or amendment by the legislature.

a. Incorporation

State governments now attempt to exercise some degree of control over the formation of corporations. To this end the secretary of state, or in a few states a corporation commission, is entrusted with the duty of issuing charters or articles of incorporation in accordance with the general corporation law of the state. The duty of such officers is to inquire into the purpose for which incorporation is desired and to scrutinize closely the various statements set forth on the application blanks presented by applicants in order to make sure that all statutory requirements have been met. A fee based upon capitalization is charged for the issue of certificates of incorporation. Corporations created in one state are ordinarily authorized to do business in other states. In the state of their origin corporations are known as "domestic," while in other states they are designated as "foreign" corporations. It is a common practice to exact from a foreign corporation desiring to do business in the state a

higher fee than is required of a similar domestic corporation. Some states have lowered to such an extent their requirements for the granting of incorporation that outside persons are attracted to them to secure incorporation although their purpose is to do business in a distant state. The state granting such favorable terms secures thereby substantial revenues from the fees collected.

In recent years several states have adopted new corporation statutes and some of the inconsistencies and objectionable features of incorporation practices have been removed in those states as a result. California, Indiana, and Minnesota are among those taking steps to improve their laws with respect to private corporations.

b. Business transactions

The need for state supervision does not end with the issue of the charter or certificate of incorporation, but continues as long as the corporation remains in active existence. Reports with statements concerning the amount of business done, the value of its property within the state, net profits, gross profits, and a multitude of details are filed at stated periods with the department supervising corporations. These reports are examined to determine whether the laws have been complied with; and when serious violations are detected the corporation, if a foreign one, may have its permit to do business in the state annulled or, if domestic, may have its articles of incorporation or charter revoked.

c. Blue-sky laws

Since fraud has often been perpetrated upon prospective investors by the issuance of worthless stocks and bonds, all of the states now, except Nevada, have securities laws, popularly known as "blue-sky laws," to prevent exploitation through "speculative schemes which have no more basis than so many feet of blue sky."[12] These laws provide for "full disclosure" of facts so that a wise investor can have sufficient information to evaluate the risk of a given stock security. Kansas led the way with such regulation in 1911, but it was some time (1917) before the courts approved the constitutionality of this kind of

[12] Hall *v.* Geiger-Jones Co., 242 U.S. 539 (1917).

control. Public opinion mistook the permission of the state for a corporation to issue stocks as state approval of the soundness of the stocks. The law was then made to conform (unfortunately), so that many states require their approving agencies not only to watch to see that true data are published on proposed stock issues but to pass judgment on the soundness of the issue. In addition, two other enforcement procedures are used. Criminal or injunctive action may be brought by public officials to prevent fraud. Brokers and other vendors are licensed before they may sell securities, and fair standards are established for the conduct of their business.

National control

Despite the almost total unanimity of the states in setting up regulations over stock and bond issues, and despite some progress in applying the law, many fraudulent securities as well as highly speculative issues were being sold in the twenties. Part of the fault was then and still is failure on the part of the states to provide adequate power to and definite standards for regulative agencies or to provide for sufficient personnel capable of operating them; in the second place, the interstate character of many corporations and their securities transactions render state regulation difficult. Consequently, when the depression accentuated securities losses, the time became opportune to attempt national control. The Securities and Exchange Commission was established in 1934. Its regulation of securities marketed by mail and in interstate commerce has implemented state regulation. State and national officials have developed means of working together to solve mutual problems. They exchange information and they maintain a file in which is listed the names of persons and corporations who violate securities laws.

Interstate coöperation

The state agencies which administer blue-sky laws have formed an organization called the National Association of Securities Administrators. One of its achievements, which is indicative of the contribution it is making and may make toward solving some of the complex problems of securities regulation, is the promulgation of a uniform application blank to be used when securities are submitted for regulation. Twelve states have

adopted this form. Two others have modified it slightly. This makes it possible for an issuer to qualify securities in these fourteen states with a minimum of effort.

2. Police power regulation

The states, because they possess a great amount of residual governmental power, are primarily responsible for the preservation of order and the provision of a climate in which men may develop their capacities and pursue happiness. In the discharge of this responsibility many restrictions are imposed upon the

a. Scope

economic activity of individuals and their use of property. The power to impose these restrictions is called police power. Examples of these restrictions are speed limits, regulations over foods and drugs, building standards, fire zones, mine inspection laws, the requirements to cut weeds and remove trash, vaccination and quarantine laws, prohibitions against obscenity—the list is endless, but all of them in one way or another set limits upon human activity. Professor Graves discusses governmental police activities under six headings: the protection of public health, safety, morals, and convenience, the prevention of fraud, and the suppression of public nuisances.[18] All businesses are subject to restrictions which the legislature may impose under its general police power. Therefore this category of controls overlaps the others under which the contacts of government with economic life are being described, but this one or something like it is convenient since controls are exercised under the police power which do not fall under any of the other headings.

b. Restrictions

Although the scope of the police power is as broad as man's economic life, there is a strict limit on how far each regulation can go. This is provided by the due process of law clause in the Fourteenth Amendment. The courts have hammered out a standard by which, through the process of inclusion and exclusion, every regulation may be tested. Some businesses, however, require more regulation than others. How can they be treated differently? Is not each business entitled to the same freedom from governmental control as all other business?

The answer to this question was suggested by the United

[18] W. Brooke Graves, *American State Government*, 3rd ed., p. 777.

States Supreme Court when it referred to certain businesses as being affected with public interest.[14] This means that such enterprises can be regulated much more rigorously with respect to many of their activities than can other businesses, without violating the due process of law clause of the constitution. Examples of regulations which may be applied to businesses in the affected-with-public-interest category are: controls over entry into business; abandonment of part or all of the activity; quality and quantity of service; price or rates; financial policy; accounting. In private enterprises—businesses not affected with public interest—controls over such matters as are included in the above list are supposed to be determined by the free play of economic forces. You may open a grocery store any time you desire, charge any prices you wish, keep the place open for business as many or as few hours a day as you desire, keep any kind of accounts you please, and borrow money from anyone who will lend it. The attempt of the state government to regulate any of these things would be violating your rights guaranteed by the due process of law clause of the Fourteenth Amendment. But if you want to establish a business affected with public interest, the state may regulate any and all of these activities. The due process of law still protects you, but not so quickly as before.[15]

3. Business affected with public interest

A list of businesses affected with public interest includes the following: companies manufacturing or distributing electricity, gas, or water; providing transportation, including railroads, street railways, motor vehicles, pipe lines, and air lines; providing means of communication, such as telephone and telegraph; or operating banks, insurance companies, or other financial institutions. There is no hard-and-fast line between businesses affected with public interest and others, except as the courts will permit state legislatures to impose restrictions applicable to businesses in the affected-with-public-interest cate-

Representative examples

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

[15] The student may avoid confusion by recalling that wartime price-fixing and other such controls were exercised by the national government under its wartime powers.

gory. We may now examine a few of these in more detail.

1. Banking institutions

State statutes fix certain requirements as to the organization and capitalization of banks, the liability of stockholders, forms of investment permitted, and the nature and amount of loans to be made. Examiners are sent out by the state department of banking who without warning appear and make examination of the books and accounts of banks, trust companies, and building and loan associations. Their mission is to determine whether business is conducted and records kept in accordance with law. If a bank is found to have been guilty of irregular practices it is called to account or even under certain circumstances closed.

If upon examination it appears that the institution is insolvent, not only may it be closed but a receiver may be appointed either to reorganize it or to wind up its affairs.

During the years from 1932 to 1935, state banking officers were granted much broader powers with respect to the supervision and reorganization of banks than they had exercised prior to that time. This was because of the large number of bank failures during the period from 1921 to 1934. The state of course does not have any power over national banks, but many state banks have come under a certain amount of national regulation because of membership in the federal reserve system or in the national guarantee of bank deposits system. Nevertheless, the function of the states in this field still is very important, although here also there has been a trend toward supplementing and even replacing state action with national action.

2. Insurance companies

Privately-owned insurance companies, like banks, are subject to extensive public control. Regulations over them have been exercised exclusively by the states. In 1944, the United States Supreme Court overturned a precedent which had stood for seventy-five years, when it held that insurance companies were engaged in interstate commerce.[16] As a result of this decision insurance became subject to the national antitrust acts or other

[16] The early case is Paul *v.* Virginia, 8 Wall. 168 (1869); the one which reversed the precedent is U.S. *v.* South Eastern Underwriters Association, 322 U.S. 533 (1944).

regulations which Congress might see fit to impose. Congress, however, postponed the application of any national restrictions to the business of insurance until July 1, 1948, in order to give the states time to provide for its regulation. After that date insurance became subject to national antitrust legislation only to the extent that the states have failed to regulate it. Nearly all of the states (forty-five) now have laws on the subject. As the law now stands, the national government may regulate insurance only to the extent and in the areas where the states have not regulated it.

State insurance regulations are applicable at many different points. There is regulation of entry into business. This is applied at the time a company wishes to incorporate. Examination is made to see if it is fit to do business. Or if a company has been incorporated in one state and wishes to do business in another state, the control over entry into business occurs at the time petition is made for permission to enter that state. It is not without significance that in the states which have the most stringent regulations—Connecticut, Massachusetts, New Jersey, New York—are some of the largest and most reputable of all the insurance companies. Many states also license agents and brokers who sell insurance in order to weed out incompetent and dishonest persons. The financial operations of insurance companies are carefully regulated, reserves are required so that insured losses may be paid for quickly, the procedures for the valuation of assets are detailed, and control over investments to safeguard the continued financial soundness of the company is exercised. Other types of control include: regulations which detail the policy forms which may be sold, provisions for the settlement of claims, and provision for examinations of records by public officials and reports to the proper public agencies. The control over rates which insurance companies may charge is interesting because although it is done in response to public authority, it is accomplished through the use of rating bureaus which insurance companies themselves set up and maintain.

The administrative machinery for the control of banking and

insurance is varied. Many states have established banking departments. As a rule, the application of insurance regulations is entrusted to a department headed by one person. A number of states have placed these functions in the same department.

3. Public utilities

A number of businesses affected with public interest, called public utilities, can be treated as a group. The generation and distribution of electric power; the supply of water; transportation by train, streetcar, motorbus, and pipe line; and communication by telephone, and telegraph are the chief public utilities. Water supply can be largely omitted from this discussion, since it is about 85 percent publicly owned and operated. Radio does not enter into our discussion, since it is regulated by the national government.

Public utility commissions

Public utility regulation was first attempted through the medium of the courts, but this proved ineffective. Shortly after the Civil War the states began establishing commissions to investigate and make reports on the business and practices of railroads, but gave to such bodies no regulatory power. With the growth of public utilities, not only railroads but water, gas, and electric companies and, more recently, motorbus companies and others were brought under state supervision. In the place of the railroad commissions there were created bodies known as "public utility" or "public service" commissions, exercising much broader functions than did their predecessors. At the present time the commissions are authorized not only to investigate and report upon conditions but to hear and determine controversies, issue orders and regulations, and to enforce the state statutes as well as the rules and regulations made by the commission itself. In some states their supervisory power is extended to include municipally-owned as well as privately-owned plants.

Functions of public utility commissions

The functions exercised by the commissions having most comprehensive powers may be grouped as relating to the following subjects: the issue of securities, accounts, and reports; permission to operate; valuation; rates; service; consolidation; and abandonment.

Somewhat as has been indicated above in the cases of corpora-

tions in general, the commissions exercise rather strict control over the issue of stock, bonds, and other obligations which might place a future burden upon the public. To facilitate the supervisory work of the commission and to keep the public informed concerning enterprises in whose operations they have a special interest, forms of accounting and reporting are prescribed for the utilities. On account of the great economic wastes involved in the unnecessary duplication of plants and in attempts at competition in enterprises which are natural monopolies, it is not unusual to require utility corporations to secure "certificates of convenience and necessity." This must be done in each case before they are authorized to begin construction or extensions of their plant, or to undertake new services. It was formerly necessary, before actual construction could be started or service offered, to enter into a contract known as a "franchise," with the authorities of the local area to be served. The franchise takes the form of an agreement whereby in consideration of a certain service—water, light, transportation, or what not—the local authorities permit the utility to occupy public property with its plant or appurtenances. More recently in a number of states, there has been substituted for the franchise an "indeterminate permit" granted by the public utility commission, giving the corporation permission to enter, install its plant, and render service under responsibility to the state directly. An indeterminate permit is virtually a permission during good behavior, i.e., so long as unlawful practices are not indulged in and satisfactory service is rendered at reasonable rates. So long as this is done, the utility company is given assurance that no permit will be granted to a competitor.

It is not uncommon for commissions not only to declare particular charges unreasonable but to fix schedules of rates to be charged for services. To this end commissions are usually empowered to make valuation of plants and the property of the corporation. Sometimes the law permits the utility company to fix its own rates, and the commission interferes only when it appears that the rates so fixed are unreasonable.

The tasks of valuation and rate-making are arduous and highly technical, and for such purposes a staff of engineers and other trained assistants is maintained.

It is the duty of the commission, further, to see that proper service is rendered to the community. This duty of deciding what constitutes reasonable service frequently taxes the best judgment of a commission. Public utility companies are permitted neither to merge their properties nor to abandon a service, except with the consent of the commission. Detailed rules are sometimes issued by the commission dealing with quality of service, adequacy of facilities, and other matters concerning the relations of the utility to the consumer.

Criticisms of public utility commissions

Members of the public utility and railroad commissions are chosen by popular election in a few states, but in most cases are appointed by the governor, with or without the consent of the senate. Few states prescribe any special qualifications for membership on the commission, although their work calls for a display of talent of a high order. The position in which the commission finds itself, as is the case of some other administrative commissions, is difficult since it has a double duty to perform. As an administrative body vested with wide powers of discretion it must enforce the regulatory statutes and supervise the activities of the utilities in such a way as to safeguard the interests of the public. It must, at the same time, act in a judicial capacity by holding hearings at which citizens appear to make complaint as to rates or service, while the utility defends its position; or the utility appears to ask for a modification of rate or of service, the citizens opposing such changes. It is the duty of the commission in such cases to make a finding of fact and enter an order in the premises.

Thus the commission in its judicial capacity is called upon to sit in judgment on matters in which, in its administrative capacity, it should stand as the advocate of the public's cause. The solution adopted by most commissions has been to assume a strictly judicial attitude, allowing the complainant and the defendant to present their cases, basing their decision on the evi-

dence introduced by either side. In the course of time, formalities of procedure have been developed, which, although more simple, remind one of those observed in the law courts.

Because of the impartial attitude assumed by the commission in such controversies, the utility, by the aid of the superior legal talent at its command, is placed in a position of distinct advantage over the citizen or the municipality making complaint.

Commissions were created at a time when there existed a strong popular sentiment against all utilities because of the policies adopted by certain unscrupulous companies, and it was anticipated and desired that the commissions should adopt an aggressive attitude as champions of the public in their controversies with the utility corporations. Sweeping reductions of rates and greatly improved service were confidently looked for by the public as a result of commission activities. Consequently, when these bodies assumed a judicial air and sometimes even consented to an increase in rates, there was keen resentment everywhere and charges of corruption were freely made against members of the commission in some states. While there have doubtless been instances of improper influence exerted, the great majority of the commissions have been composed of men who sought to be entirely fair and honest in their dealings, both with the utilities and with the public. The real sources of the difficulty seem to have been, in the first place, in the policy generally adopted in the selection of commissioners, and, in the second place, in the dual position of advocate and judge in which they have found themselves. Much of the grounds for criticism might be avoided if those in whom the power of selection is vested could be made to realize that the work of public utility supervision is a highly professional task, demanding the services not of persons appointed primarily for political reasons but of trained men of vision, experience, and judgment. Moreover, an illogical situation would be terminated if the regulative and other administrative functions of the commissions could be divorced from the judicial, and the two classes of duties vested in two distinct authorities.

Sources of defects of commissions

In spite of the defects of this method of public utility control, much real progress has been made by the commissioners in the solution of many vexing problems arising from the relations of the utilities and the public.

One of the grave problems arising from commission control has been the attitude assumed by the courts in many jurisdictions. In their judicial work the commissions have brushed aside the more formal procedure of the courts and legal rules of evidence and have adopted more summary methods. These innovations have been viewed by many courts with professional disfavor, if not with positive hostility. The findings of fact by the commissions are by statute in many states made final, but appeals upon points of law are everywhere permitted. During the earlier years of commission activity appeals were frequent, delays ensued, and many of their determinations were set aside. In more recent times mutual distrust has abated, and the work of commissions has become generally respected by the utilities and viewed with some degree of complacency by the courts.

Local control

The cities vary greatly with respect to the role they play in the field of public utilities and their regulation or operation. Most cities own certain public utilities outright, especially their water systems. A number own and operate other types of utilities, such as gas, light, and electrical energy, and transportation service. The privately-owned utilities remain at the present time the most numerous at the municipal level, however, and the problem of the relationship of the city to these private utilities is the cause of much friction and difference of opinion.

In general the situation can be divided into two types: first, that in which the cities share in or wholly engage in the regulation of the public utilities in the city; second, that in which the state through a commission, rather than the city, regulates the utilities, whether they operate within one or many cities. In general there has been considerable dissatisfaction with municipal regulation, on the part of both the companies and the public, though particularly on the part of the former. The tendency

perhaps has been toward state intervention to an increasing extent and in the direction of taking out of the city's hands the power to regulate utilities.

When the state commission is the primary agency for regulating private utilities, the question often arises as to whether those cities which own and operate their own utilities should come under state regulation just as the private companies do. The states divide on the question, some subjecting the municipally owned plants to regulation along with the private utilities. This leads naturally to the subject of the position and arguments concerning public ownership of utilities.

Two types of utilities—railroads and motor transportation—need to be singled out for special comment. Although the states continue to control railroads, it is in a diminishing degree since Congress has authorized the Interstate Commerce Commission to control them with respect to much of their interstate activity. The chief exception is the adequacy of passenger service which, except in wartime, has been left to the control of the states. The result is that national regulation has tended to push state regulation into the background.

The national government began regulating motor transportation more recently (1935) than it did the railroads (1887). The states, however, have continued to exercise most of the controls. The emphasis in motor transport regulation is somewhat different from that in the case of the railroads, where rate controls and the prevention of discrimination receive most attention. With motor transportation much emphasis is put on control over entry into business. The amount of capital needed to launch a new motor line (passenger or freight) is relatively small, and strict controls are vital to keep the number down. The failure to limit the number would result in damage to publicly maintained roadways and would endanger other users of the highway. Another emphasis is on the requirement for means of indemnifying persons for loss or injury connected with motor transportation. Losses to shippers or injuries to

passengers or to other users of the highways could easily exceed the capacity of a motor transportation company to make good, unless there were requirements for bonds or insurance.

4. Government ownership and operation
a. Municipal

It has been noted that a large proportion (85 percent) of the water supply systems of the country are publicly owned. This ownership is exercised in behalf of the states by their municipalities. A much smaller but substantial part of the electric power, gas, and transportation systems is also owned and operated by cities. The proportion is estimated to be 15 to 20 percent of the total. The practice of public ownership and operation has solved some of the problems of regulation and introduced others. It is the preponderant judgment of political scientists that with respect to the merits of public ownership and operation as against private ownership with public regulation there is no one best way to handle public utilities. Both ways have been used successfully and both have failed dismally. It sometimes happens that when one is failing, a shift to the other succeeds. Frequently in such an instance the key to success is not in the general virtue of the one over the other, but in the improved management which results from the examination made of the enterprise during the process of making the change.

b. State ownership

There are also a number of instances in which states have undertaken programs of ownership and operation of business enterprises. Three illustrations may be noted: business operations of the state of North Dakota, port or dock authorities in various states, and state-owned liquor stores.

The state of North Dakota has itself engaged in four business enterprises—mill and elevator operation, banking, insurance, and land operations. The buying, storage, and milling of grain was begun in 1922. The mill was designed to process 4000 barrels of grain per day and the terminal elevator to store 2,000,000 bushels. Branch warehouses were provided in addition. There has been some enlargement since, and there has been some tax support for this enterprise. The Bank of North Dakota was established by a statute enacted in 1919. It has weathered economic and political storms and has had a substantial growth.

The mill and elevator and the bank are each operated by a general manager who is responsible to the Industrial Commission.

North Dakota operates three insurance enterprises. The first, the State Fire and Tornado Fund, is to provide insurance for public buildings (state, county, city, township, school) and their contents against the common losses, such as those from fire and storm. Rates charged are based upon those promulgated by the Fire Underwriters Inspection Bureau. The law provides that when the reserve fund has accumulated $1,500,000, insurance is to be given without cost. Since the fund has exceeded that amount, free insurance has been provided for some years. A manager under the general direction of the Insurance Commissioner operates the program. The second is the state bonding fund. This is to provide surety for public officials required by law to post bond. This program is also under the direction of the Insurance Commissioner. Crop insurance against losses from hail is the third insurance program operated under the general direction of the Insurance Commissioner, and under the immediate control of a manager. Other states have also engaged in the insurance business in one form or another. For example, Wisconsin has operated a life insurance program, and South Dakota and Oklahoma each has state hail insurance for crops.

The largest of North Dakota's business enterprises is the management of lands and of the moneys collected from the sale of lands, all of which were granted to the state when admitted into the Union and which were to be held by it in perpetual trust for the common schools. The state's land holdings amount to nearly 3,000,000 acres. Its management and the moneys derived from the sale of land which may be invested in, among other things, first mortgages on real estate, is under the general direction of the Board of University and School Lands which acts through a general manager. He is the director of a division called the State Land Department. It is subdivided into bureaus to carry on the functions of the agency.

Another illustration of state ownership of business enterprises is ownership and operation of port facilities through the agen-

cies of port authorities. The chief of these is the New York Port Authority which was established in 1921 by an interstate compact. It has built and is operating tunnels, bridges, railroad, bus and freight terminals, grain terminals, and airports. It provides freight-counseling service and makes representations before the Interstate Commerce Commission in the interest of railroads and motor carriers, before the Maritime Commission, with respect to steamship routes and rates, and to the Corps of Engineers, with respect to channels, anchorages, and pier lines. It has no authority to levy taxes or to mortgage the credit of either New Jersey or New York. Its only source of finance to construct and operate the gigantic enterprises under its management is borrowing on its own credit and the revenue it collects on its operations. That its financial operations are respected by investors is attested to by the interest rate of 1.358 on more than an $18,000,000 issue in 1946.

The oldest state port authority is the Port Authority of New Orleans. It was established in 1896. Its operations, though extensive, are not as diversified as those of the New York authority, although in addition to its maintenance of piers, storage, loading and handling equipment, and fire-fighting facilities, it built the Inner-Harbor Navigation Canal. This project was financed by a $19,500,000 bond issue. It was originally the intention to make New Orleans a free port. Later a compromise was arrived at whereby operating and construction costs were paid for in part from fees collected for use of the port facilities and in part from taxes. In 1931, the legislature earmarked 9/10 of 1 percent of the state gasoline tax for the port authority. Other states having port authorities are New Jersey, Maine, South Carolina, Virginia, and Alabama.

The typical administrative machinery for the management of state ports is a non-salaried commission.

A third example of state operation is the distribution of liquor. All states either license liquor retailers or themselves operate retail stores; some use both methods. Seventeen states have established monopolies in distribution. Ohio's system may be used

as an example of the management of this enterprise. The law permits a maximum of five liquor stores per county. In very populous counties an additional one for each 30,000 persons may be permitted. The liquor commission may authorize private persons to retail liquor where the population does not justify the establishment of a state store. The only other exception to retail by public stores is sale by the drink or glass in hotels and restaurants. This exception prevails throughout the states owning their own retail stores. The membership of the Ohio Liquor Control Board is appointed by the governor for a four-year term and is subject to removal for cause by him.

5. Miscellaneous regulations

There are many other relations between government and economic life. Sometimes the relation is one of regulation, or of aid, or of protection, and sometimes a combination of these. Representative instances of these relations are licensing, regulation and support of aviation, fire protection, aid to agriculture and conservation.

a. Licensing

One important type of regulation for the control of economic life is licensing. It may be used in a great variety of circumstances to accomplish any one of several purposes. Some of these purposes are: to raise money, retail store licenses; to register, marriage licenses; to control entry into business, liquor licenses; and to permit the exercise of a profession, engineers' and architects' licenses. A license may be defined as an administrative lifting of a legislative prohibition; that is, a statute has forbidden a certain act which may be done only after some administrative official in compliance with law has issued a permit to a person which removes the legislative prohibition as related to that person.

The use of licenses to keep unqualified persons from the practice of a profession is a most familiar procedure and one which appears to be growing at a rapid rate. The licensing of teachers, lawyers, physicians, and people in other established, well-recognized professions has been practiced for a long time. These groups tend to split up into new professions. Among those practicing the healing arts are: osteopaths, chiropractors, dentists,

c. Fire protection

fire marshal. It is the duty of this officer and his deputies to inspect, with regard to fire hazards, buildings where the public congregates in large numbers, such as theaters, hotels, and assembly halls. Statutes or departmental rules prescribe safeguards such as fire doors and walls, fire escapes, outward-swinging doors, and sometimes fire drills by the regular occupants. In case of fires of unknown but suspicious origin, the fire marshal conducts investigations as to the cause, and if the fire is of incendiary origin seeks to detect and prosecute the offender. With the increase in the public taste for outdoor life the loss from forest and grass fires has become very great. To combat this loss there has been developed an extensive system of forest patrols by fire wardens. In some instances watch towers have been set up and a constant lookout maintained to discover forest fires in their earliest stages. Airplanes are now being used for the same purpose and as a means of hastening fire-fighters to the scene where fire breaks out. The forest fire service is variously placed, sometimes as an independent agency, and in other instances under the forest service or in the fire marshal's office.

d. Agriculture

During the first half of the nineteenth century the promotion of the agricultural interests of the state was in the hands of voluntary societies, either local or state-wide, or both. At an early date the custom originated of granting public funds in aid of these societies. About the middle of the century there were created by law state boards of agriculture made up of representatives of the local agricultural societies throughout the state. As early as 1853 in Massachusetts, certain state officers were made ex officio members of the board, and soon afterward a considerable number of Midwestern states adopted the policy of subsidizing these semi-public boards.

The purpose of the societies and the earlier boards was, primarily, to foster interest in agriculture, to encourage the breeding of better animals, and to promote the introduction of better seeds as well as improved methods of culture. The financial burden imposed by experimentation and demonstration was already becoming too great to be carried by private societies,

when the passage of various regulatory laws made it imperative that the whole burden be assumed by the state.[18]

Forms of administrative organization

Beginning with these voluntary or semi-public institutions, the tendency has been to create a more elaborate organization and to make it a distinctly governmental authority. In some states agricultural work has become highly centralized while elsewhere it is still in a marked decentralized condition. No less than three distinct forms of organization may be found among the states.

Disintegrated and decentralized

Connecticut exemplifies those states which have an extremely disintegrated administration. There is a state board of agriculture including, besides the governor who is a member ex officio, thirteen other members appointed in part by the governor and in part elected by the legislators from the several counties. The board appoints its own treasurer and a secretary who is its executive officer. This board disburses the state funds distributed to local agricultural societies, and one of its chief functions is to promote state and local agricultural fairs.

Besides the board of agriculture, and entirely independent of it, is a commissioner of domestic animals in charge of the work of preventing and eradicating diseases among animals. An independent dairy and food commissioner enforces the pure food laws. This latter officer, together with the attorney general, the commissioner of health, the secretaries of the board of agriculture, and the state dairymen's association, constitutes a milk regulation board. Other independent officers who exercise regulatory as well as promotive functions are the state forester, state entomologist, and an inspector of fertilizers.

Integrated and decentralized

In New York, which exemplifies a second type, the situation is organically not different from that in Connecticut except that all agricultural activities are consolidated in a single department. The responsible head of the department is a Council of Farms and Markets elected by the legislature and hence beyond the control of the governor. A commissioner of agriculture is

[18] Edward Weist, *Agricultural Organization in the United States* (Lexington, Kentucky, 1923), chap. xiv.

appointed by the council to hold office during its pleasure. As the executive officer of the department, he appoints his subordinates and is in direct charge of administration but must submit all matters of policy to the council for its approval. The internal organization of the department suggests the wide scope of its activities. There are included bureaus of farm settlement, statistics, dairy products, plant industry, animal industry, institution farms, markets, coöperative associations, licenses, weights and measures, food products, and standardization.

Integrated and centralized

In the third or Pennsylvania type, there is the same integration of work as is found in New York, but here the board or council has been dispensed with and a thoroughly centralized system instituted. The responsible head of the department is a secretary of agriculture appointed and removable by the governor. He not only appoints and directs his subordinates, but is himself responsible to the governor for the policies instituted.

Whatever the form of organization, the mission of the department is always the same. It is a fact, however, that neither the same energy nor effectiveness in results can be secured under the Connecticut form as under the New York or Pennsylvania plan.

Research

Agricultural experiment stations ordinarily associated with the state college of agriculture are engaged in experiments of many kinds for the benefit of the farmer. Hybrid seed corn which has contributed uncounted millions of dollars of added value to corn crops in the Middle West is one dramatic example of the application of research to farm problems. Constant research into agricultural products of all kinds is being carried on. Use of fertilizers; building of soils; control of erosion; feeding and care of animals; development of rust resistant grains and drought-resistant plants; programs for reseeding the desert; control of insects, plant, and animal diseases; reforestation and the care of trees and the use of lumber; improvement of citrus fruits, their care, shipping, and marketing; management of bees, the prevention of their diseases, and the care and marketing of honey; the construction and care of farm buildings; the selec-

tion, repair, and management of farm machinery are but a few sporadic examples of studies being conducted by experiment stations. This work is carried on in the states in coöperation with the national government partly under a grant-in-aid program.

County agent system

Under national leadership a program has been developed for taking the facts learned in the agricultural research program to the farmers. This is done through the agricultural extension service. In all of the rural counties in all of the states are three kinds of persons to explain, demonstrate, and interpret the stream of information coming from the experiment stations and agricultural colleges. These are county agents for the farm, home demonstration agents for the farm home, and agents for boys' and girls' club work, usually known as 4-H Clubs. As of December 1, 1946, there were approximately 9000 persons engaged in this work. Another group of persons (about 1800 in number), known as subject-matter specialists, are concerned with helping to put the results of scientific investigation into forms that county agents can explain and demonstrate intelligibly to the farmers.

In many respects the county agent system is one of the most remarkable social inventions of our times. It is a nationally instigated program, with national minimum standards. The personnel is composed mostly of college-trained persons. They are selected by a state official—the director of agricultural extension—who is attached to the state college of agriculture. They are approved by the United States Secretary of Agriculture—and they ordinarily receive their appointments from county officials. Their function is to channel the newest in scientific findings to persons who in urban circles are reputed to be the least amenable to new knowledge of all the population. The result is that the production of fibers and foods has been increasing at a faster and faster pace with the labor of fewer and fewer people. The success of the system raises the question as to whether it might be possible to apply principles discovered in its use to other sectors of our society where there is a greater

lag between invention and improved processes, on the one hand, and their application, on the other.

Marketing One of the most recent developments in many states is the work in marketing. Market and crop conditions, not only at home but in surrounding states, are observed, markets and marketing methods studied and reported, and assistance given in the development of coöperative marketing organizations. State activities along this line were given impetus in 1946, when Congress provided for a stepped-up research program into marketing and related problems. Starting in 1947, with $2,500,000 per year to be matched by state funds, the amount of national money to be available for market research could be increased up to $20,000,000 per year in a five-year period.

Loans Some of the states have gone into quite elaborate programs of lending money to farmers. The difficulty experienced in obtaining repayment, because of the agricultural depression, has resulted in the establishment of special divisions or departments under the title of Rural Credit Department. These are engaged in managing the farms which are taken by them in default of repayment of the loans, in renting the farms, and in selling them. This task has become a major administrative problem in some of the states, particularly those in the upper Mississippi valley region. As of June, 1944, North Dakota had more than one million acres of land acquired in this fashion.

e. Conservation of natural resources Under the head of conservation of natural resources may be grouped a number of related agencies and functions, although one looks in vain for such an administrative department in most states. Usually these functions are assigned to a number of separate departments, among them some of those already mentioned. In a few states some, at least, of these matters have been grouped in a department of conservation under a single or

Functions plural head. These fields of action, whether organically grouped or administered otherwise, include geology, mining, forestry, public lands, water supply, and fish and game. In each of these fields the work may include both investigative and regulatory duties.

Forests

The protection, maintenance, and redevelopment of forests is of constantly increasing interest. Nearly all of the states have forestry administrative organizations. These agencies in about one-third of the states are concerned with forestry matters alone, or this and the administration of state parks. In most of the other states, forestry functions are carried on in connection with other related activities. The chief function of forestry administrations is fire protection. For many years it was estimated that fire destroyed as much lumber in Oregon as was sawed in the mills. A second function is to provide advice and assistance to timberland owners with respect to cutting policies and management of growing trees. Forty-two states produce young trees which are to be planted on state-owned lands and sold or given for planting on private lands.

Wildlife

Widespread interest attaches to the efforts for the propagation, protection, and the proper conditions for taking game animals, birds, and fish. The conservation of fish and wildlife has developed into a state-national coöperative activity. The agency at the national level since 1940 is the Fish and Wildlife Service of the Department of the Interior. The functions of the national and state authorities are many and varied. Under national initiative a program of wildlife restoration has been undertaken. This is chiefly concerned with purchase of land, the development of areas to make them more productive of wildlife, and the conduct of research in wildlife management. All of the states except Nevada participate in this program. Another function is the control of predatory animals and rodents. Coyotes, of which nearly 2,000,000 have been killed since 1915, and rats are principal objects of this program. The propagation and distribution of food fish is a third major function. Fish are distributed by both national and state agencies to public waters and to privately-owned ponds. A fourth function is research into all aspects of fish and wildlife.

Coöperation between state and national officials in law enforcement is exceptionally close in this field. There are about seventy United States game wardens. The close relation be-

tween state and national officials is illustrated by the fact that many of the latter are salaried, state game-enforcement officers. Persons arrested by officials of one level of government may be turned over to the officers of the other level for prosecution.

Land use

The badly planned settlement of public lands during the first century and a quarter of our national existence and the agricultural overproduction after World War I, in conjunction with still other factors such as the destruction of much of our forest and grazing lands, has led in recent years to a careful consideration of the problem of land use and the conservation of soil. Several elaborate surveys of the problem by commissions, both national and state, aided in many instances by the National Resources Board, have brought to public notice the essential economic, social, and administrative problems involved.

The first serious effect of misuse of land and its consequent exhaustion is felt in the tax field. Revenues fall off. Population tends to dwindle in these areas. The community affected is unable to maintain its schools or highways. It goes badly into debt. The forest has been exhausted and the land either was originally poor or has become so through failure to replenish it with the proper ingredients by crop rotation or the use of fertilizers—or the failure to prevent erosion. A report in 1935 showed that 282,000,000 acres of land had become unfit, by reason of erosion, for the purpose for which it had been used, whether this was for tillage, pasture, range, or other uses. What shall be done with such land? Shall the population be moved off land which will no longer support it?

In 1935, Congress suggested by the passage of the Soil Conservation Act, that the answer to this question should be soil conservation. Under this statute a coöperative program involving the local community, the state, and the national government was established. The local unit is a soil conservation district. It is established when a number of farmers, or other landowners in a community, agree to the formation of such a district. Officers of the district are selected and empowered to represent it in its relations with other governmental agencies. Surveys of

the land are made, and the United States Department of Agriculture agrees to provide technical assistance both in making these plans and in determining the conservation measures to be taken. The district makes agreements with individual landowners to adjust farm operation to conservation needs. The individual agrees to follow a long-time plan, and to furnish certain equipment and materials.

Between 1935, when this program was first inaugurated, and 1946, every state in the Union adopted legislation authorizing the creation of local conservation districts. The Department of Agriculture drafted a model law and circulated it among the states. The result was that practically all of the states adopted the same procedures. There have been few instances of greater celerity in the adoption of a program which involves no compulsion and in which there was no financial inducement to comply. In a decade soil conservation districts (more than 1700) were organized which involved more than two-thirds of all the farmers in the Union, and which embodied nearly a billion acres of land.

More than a century ago (1847) the Mormons began to supply water by artificial means to the soil to sustain plant growth. Now irrigation is carried on extensively in seventeen Great Plains and Western states, plus Louisiana and Arkansas. More than 28,000,000 acres of land are thus artificially supplied with water. The prospect for the increase of irrigation may be seen when it is noted that nearly one-half of the total land area of the United States is either arid or semi-arid. A major problem in this vast space is adequate water supply.

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CHAPTER 18

THE COURTS

Functions of the judicial branch

The judicial branch of government is distinguished from the executive and legislative branches by the relation it bears to law. The legislative branch is said to make the law, the executive is said to enforce the law, and finally the judicial branch is said to apply the law. As has already been indicated in discussing the legislative and executive branches, this is stating the work of the various departments of government too simply. The functions of the judicial branch include several others besides that of applying the law. These may be classified under the following headings.

1. To determine facts

The cases which come before courts or other judicial bodies are usually of such a nature that the law which is to be applied is perfectly clear if the facts are definitely ascertained. Certain facts which may be involved are so well known that the court does not require them to be proved, but most facts to be presented must be supported by evidence. Hence the first task is to determine the facts in the case. This is done by letting the parties to the dispute state them, and also by allowing them to bring in witnesses to state facts. In most instances the courts do not attempt to determine which of the supposed facts stated in the course of the trial are the true ones, but make use of a body of men called a jury for the purpose. Their version of the facts is usually final. In cases involving a branch of law called *equity* the jury with rare exceptions is dispensed with, and the judge himself or a person appointed by him called a *master* attempts to find out what the true facts are in a particular case.

The second function of the court is to decide what is the law

2. To decide what the law is

which applies to the facts in the case. Sometimes it happens that there is doubt as to the rule of law which is to be applied. Perhaps several rules of law and even whole statutes seem to apply to the facts, and these several rules may not be in harmony with each other. The legislative body may enact one law and custom may have established another, and the courts must decide which shall be applied. Or the state constitution and a statute passed by the legislature may not be in agreement with each other and the question of which of them shall be enforced must be settled. Those rules which have been established by custom and enforced by the courts in certain types of cases are collectively known as the *common law*. The court will usually look to see whether any case similar to the one before it has ever been before the courts of that state previously. It will follow a previous decision on the question unless the facts of the present case are so different that the application of another rule is warranted. Sometimes the court will refuse to follow the former decision because conditions have changed so much since the earlier case was decided that to apply the earlier rule would work hardship and injustice in this and other similar cases which might arise in the future. The doctrine that the court will usually follow the decision of previous similar or analogous cases is called the doctrine of *stare decisis*.

Making new law

Still other cases arise for which there is neither a statute nor a previous decision directly in point. In such cases the court is left to decide the case, within certain limitations, on its own merits as the court sees them. The judge must, however, make a decision which will not be inconsistent with previous decisions in cases generally similar but not identical with the one before him. He must bear in mind, too, that his decision will stand as a precedent for the decision of other cases in the future. That is, the court must keep in mind existing rules of law as well as the ideals of justice. The public, thinking only of the one case, frequently blames the court for decisions which the judge could not avoid making. There is constantly going on a struggle between the necessity for reasonably fixed predictable rules of law

and the desire for sufficient elasticity to permit an approximation of justice in each individual case.

3. To apply the law to facts

The third function of the court is to apply the appropriate law to the facts in the case before it, thereby reaching its decision. Contrary to popular conception, the first duty of the court is not to do justice in the moral sense of the word but to apply the law to the facts as they have been proven in the particular case. It is believed, however, that as it has been worked out the law will, in most cases, result in substantial justice in the moral sense. But the courts are not entirely unmindful of the moral aspects of the situation. Their conclusion as to the moral worth of a rule will to a certain degree influence them in deciding whether or not the rule shall be construed to apply to the case in hand.

4. To prevent violation of private rights

Much of the work of the so-called courts of equity is concerned with granting orders, known as injunctions, and forbidding the threatened violation of some law or private right. The development of this phase of judicial work is comparatively recent. The early English courts had no power to prevent violations of either positive law or of private rights.

5. To administer property

In certain types of cases involving disputes over estates of deceased persons or the disposition of property belonging to a bankrupt person or business corporation, the judicial department administers the property until the dispute is finally settled. *Receivers*, *trustees*, *guardians*, and *administrators* are appointed to administer property under the direction of the court.

The first four of the above named functions of courts are usually performed in connection with the settlement of disputes, and the fifth one may also be performed as the result of a controversy, although this is not necessarily true. There would ordinarily be no dispute in the case of administering an infant's property nor in the settlement of an estate.

The function of the judicial department is sometimes said to be that of settling disputes between private individuals. This is, of course, one of its most important tasks. But in the United States this does not fully describe the various types of disputes settled by the state judiciary. It not only settles certain types of

disputes between private individuals but it also, in the second place, settles disputes between the government and private individuals. And in the third place, to these two types of disputes must be added those which arise between the various departments of the state government itself. The judicial branch of state government reviews the validity of statutes enacted by the state legislature. The constitution, by which the validity of legislation is to be measured, is sometimes vague and uncertain in its meaning. By choosing one of several different interpretations the court may exercise great political influence in the state. The need for some administrative supervision over subordinate officers of state government, and the lack of power in the executive department to afford such supervision, has caused the courts to perform a portion of this work also.

State and federal courts

The many cases which come before the courts in the routine of judicial work are brought into the courts of the state instead of into those of the federal government. The jurisdiction of the federal courts is quite narrowly defined by the federal constitution or by Congressional statute in most instances, and the types of cases which may come before them are rather limited in number compared with those which may be adjudicated in state courts. There are a number of cases over which state and federal courts have concurrent jurisdiction; and unless the case is removed from the state to the federal court before trial, it is disposed of in the state court. Those cases which may be appealed to the federal courts on the grounds of some federal question being involved—that is, that some law of Congress, some treaty, or the Constitution of the United States is involved in the case—are of course excepted from this group. The United States courts usually follow the state court's interpretation of the laws of the state in which the particular case arises. The large majority of cases tried in state courts are finally settled there without reaching the federal courts at all. It should be remembered, however, that there are one or more federal district courts in each state, and that both federal and state courts operate upon the same people. The Fourteenth Amendment has greatly increased the

number of state cases that are appealed to the federal courts, but of these many more are affirmed by the federal Supreme Court than are reversed. Since 1916, it has been possible for the state to appeal a case to the federal Supreme Court when a state law is declared by a state court to be contrary to the federal constitution. Prior to that time the decision of the state court that a state law was contrary to the Constitution of the United States was final and could not be appealed from the state tribunal.

The courts have become of increasing importance in the conduct of state government and in the life of the individual, because of the growing demand that they join hands with the governor in keeping state legislatures within the bounds of the constitution, and because of the growing complexity of industrial and commercial life which has necessitated a more elaborate system of law for this complicated state of society.

Courts and enforcement of state policy

The courts are agencies of the state government for the enforcement of state policy as laid down by the legislature, although they are not directly concerned with the administration of the laws in the same way as are officers in the administrative branch. It is the function of the courts to enforce the policy of the state through the application of the criminal law to persons brought before them and accused of violating the law. In a somewhat different sense the courts are engaged in the carrying out of state policy when they adjudicate private disputes, because state policy is concerned in part at least with the problem of fixing the scope and extent of the rights of private litigants, and it varies from time to time in the treatment accorded these persons and their rights. Two factors contribute to make the courts figure to a greater or less extent in the enforcement of state policy. First, the judges are locally elected and are naturally influenced to some extent by the interests and views of that community. Second, juries are the judges of the facts and, in a few states, even of the law. These juries are locally chosen and are very likely to reflect in their verdicts the attitudes of the community toward any particular policy which the state attempts to enforce. The cases are legion in which palpable violations of

statutes embodying the policy of the state go unpunished because of the unwillingness of local juries to enforce that policy.

Organization of State Courts

The constitutions of many states contain detailed provisions for the organization of the courts. The tendency to include more detailed provisions regarding court organization has been only one phase of the general movement, to which allusion has previously been made, of placing in the constitution the provisions for the organization of governmental machinery, instead of leaving the creation of such machinery as seems necessary from time to time to the legislature. The determined effort launched some years ago to amend the judiciary articles of state constitutions to permit state legislatures to mold judicial organization to the needs of the courts has begun to bear fruit as, for example, in the New Jersey Constitution of 1947. The legislature was not only given considerable power with respect to such matters, but the supreme court and its chief justice also were given administrative power. Likewise the Missouri Constitution of 1945 gave the supreme court rule-making functions.

As organized in most states, the judicial system consists of courts arranged upon three levels one above another, although in some states there are four levels instead of three.

Justice-of-the-peace courts

At the base of the court system is the justice of the peace, an office of very ancient English ancestry. These justices are usually elected by the people in the towns or townships, or in special districts created for that purpose in the county. In a few states they are appointed by the governor.[1] They are not usually required to have any professional training and generally they have none. They are not always well-educated men or even men of any too high reputation in the community. As a rule they are dependent upon fees collected from parties and cases coming before them. In misdemeanor cases, the justice of the peace

[1] Chester H. Smith, "The Justice of the Peace System in the United States," 15 *California Law Review* 118. On the method of selecting justices of the peace see note 18, p. 121 of this article.

receives a fee out of the fine which he assesses against an accused whom he finds guilty. This violation of the ancient Anglo-American rule that the judge shall be impartial is so shocking to the popular sense of justice that a trend has developed to abolish the fee system and to pay justices of the peace fixed salaries. The United States Supreme Court has condemned the fee system. Its use, however, has been continued.

1. Jurisdiction

The jurisdiction of these justice courts is fixed by statute in most states and is very limited. They are not courts of record, and, except where a jury is demanded, no jury trial is given. In many states no jury is provided for at all in these courts. The justice of the peace usually has jurisdiction in both criminal and civil cases. His criminal jurisdiction extends only to cases involving misdemeanors punishable by small fines or short terms of confinement. He is also empowered to issue warrants of arrest, and he may sometimes be called upon to decide whether a person accused of a serious criminal offense shall be "bound over" to the court of general trial jurisdiction, that is, held for trial in the circuit or county court. The civil jurisdiction of the justice of the peace usually extends to cases in actions in contract or tort involving small amounts of money or property. The jurisdiction of justices of the peace normally extends over the whole county. Cases which have been decided in the justice court may be appealed to those of the next higher grade. When the case is tried in these latter courts, the proceedings which were had in the justice court are entirely ignored and the trial is held anew.

2. Administrative functions

In addition to their strictly judicial duties, the justices are entrusted with certain administrative functions, particularly in connection with local government. This is especially true in the Southern states. Justices are customarily authorized to solemnize marriages and to attest formal documents.

3. Importance of justice-of-the-peace courts

The justice courts handle a large number of cases each year. They come in contact especially with the poor, the weak, and the ignorant; and many thousands of such persons form their opinions of law and of the judicial branch of government on the basis of their own or their neighbors' experiences with these

courts. For this reason the justice courts are among the most important of all the cogs in the judicial organization of the state, and it is of the highest importance that justices of the peace be honest, intelligent, capable officers of the law. They should be legally trained, but it is of much greater importance that they settle the cases which come before them with more regard to the merits and sense of the situation than to the technical rule of law. They have, however, until very recently been uniformly neglected in any consideration of the judicial system of the state. There has been less change in the office and work of justice of the peace from colonial to modern times than in almost any other state office.

4. Quality of work done by justice-of-the-peace courts

The manner in which the justices of the peace have performed their work has been anything but satisfactory. Much of the laxity in law enforcement can be traced to the favoritism which is often practiced by local justices. They have, as has been indicated, jurisdiction over the whole county and there are several justices in each community, all of them bidding for business. As a result of the fee system of compensation, they are sometimes willing to make concessions to those who bring them business, and persons accused of petty crime brought before a particular justice are often convicted without regard to the merits of the case. The fine is usually small, and rather than engage in an expensive and slow procedure, the accused person pays the fine and costs and goes his way. There is a temptation for the justices to make agreements with officers of the law to bring offenders to their court for trial, with the result that the costs are split with the officer. The plaintiff in a civil suit is likely to win a case brought in the justice court because the latter is grateful for the selection of his court as the one in which to bring the suit. The justices are not immune to local political pressure, and miscarriages of justice due to such pressure are not infrequent. Because of this situation justice courts are held in low esteem in many communities. This in turn reflects upon the higher courts and the latter sometimes become the object of popular suspicion no

matter how efficient, able, or honorable the judges who compose them may be.

General trial courts

Above the justice of the peace and municipal courts there are to be found in every state courts of general trial jurisdiction. They are called variously district, county, circuit, superior, or common pleas courts. If a court is not created for each county, several counties are consolidated into one circuit, and the judge of the circuit holds court in each county at fixed intervals. When a county is large there may be more than one judge to take care of the work therein. These courts have been important units in our judicial organization ever since colonial times, and their organization and methods of work have changed very little since that time. In most states changes, if made at all, have been very recent.

1. Jurisdiction

The jurisdiction of the general trial courts is both appellate and original. The appellate jurisdiction attaches to cases, both civil and criminal, which have been tried in the municipal or justice-of-the-peace courts, and, as has been pointed out previously, an entirely new trial is held in the county court in cases that are appealed from those of first instance. The original jurisdiction is usually very broad if not unlimited. With the exception of those cases which involve such small sums of money that they are tried in the justice or municipal courts, there is no limitation on the jurisdiction of the court based on the amount which may be involved in the cases. Cases of claims in contract, or tort, property disputes, and usually also cases in which redress by way of equity is sought, are heard by these district or county courts. On the criminal side, they try all criminal cases in the first instance which are beyond the jurisdiction of the lower courts in the community. The district courts make use of the petit jury to decide on the facts of the case and the grand jury to present indictments to the court for violations of the criminal law. They are presided over by a regular judge who is either elected from the county or some larger district, or appointed by the governor; and they are called courts of record because a clerk is attached

to each to keep the records of the proceedings and orders of the court. Judges of the general trial courts hold office for terms varying from four to six years ordinarily, although their terms of office are considerably longer in some states.

2. Administrative duties of general trial courts

These general trial courts perform probate functions (acceptance of proof of wills of deceased persons) in addition to their other work in those states where no separate probate court is provided for. In earlier days the court of quarter sessions, composed of the justices of the peace in the county, found in many of the Southern states, performed a number of administrative duties in addition to its judicial work. Many of the states have separated judicial from administrative duties and have now placed the latter type with boards or commissions. There are still, however, a few administrative duties quite commonly performed by judges of county or district courts. They are often charged with the task of receiving and acting upon petitions for the building of roads, the inauguration of drainage projects, the erection of county buildings, and the like. Some states formerly used these judges to supervise the administration of poor relief, and other states still give them some share in the creation of corporations and in the supervision of elections. A few states have given them the power of appointing certain local officers and in a few others they are given authority to remove locally elected officers upon proper complaints or petitions. These non-judicial functions place an undesirable burden on judges of general trial courts and tend needlessly to involve them in politics, and at times impair the efficiency of the judicial work for the performance of which these judges are primarily chosen. Courts are not organized to perform administrative duties, and the less of it that is imposed upon them, the better.

Intermediate appellate court

The tremendous increase of appellate work has caused ten states to create an intermediate court of appeals between the courts of general trial jurisdiction and the supreme or highest court of the state. Its purpose is to review and decide cases appealed from courts of original jurisdiction, and thus reduce the number of appeals to the supreme court. For this reason, it is

given final jurisdiction in a considerable number of instances. In Virginia the constitution provides especially for a court of appeals in case the press of business in the state supreme court becomes too great. These courts sometimes sit in districts, sometimes in divisions, and in some cases sit as one court for the whole state. They are appellate courts and do not conduct jury trials.[2]

Supreme court

The highest state court is usually called the supreme court, although in a few states it is known as the court of appeals, and in New York the supreme court is the name given to the general trial court. The state supreme court is one which confines its work almost entirely to the hearing of appeals from the lower state courts. Its original jurisdiction is not only narrowly limited, but its use discouraged by the supreme court itself because of the press of business which arises on appeal. It is composed of from three to nine judges (twenty-two states have seven) who sit in divisions in a very few states in order to deal with the numerous appeals, or as one court, and pass primarily upon points of law. There has been a tendency recently to increase the number of supreme court judges because of the steadily increasing number of cases which are coming before them. In some states special commissioners may be appointed to aid the supreme court in disposing of pending cases, and in New York certain of the justices of the inferior courts may be detailed to sit with the court of appeals. The highest state courts do not use a jury. Their work is largely confined to the interpretation of statutes, the development and application of the rules of substantive and procedural law, and the determination of the constitutionality of statutes. Their decisions are final except in cases involving a federal question, in which case an appeal lies directly to the Supreme Court of the United States. Occasionally one judge may hear a case alone, but such hearings are generally only on motions for temporary orders, and are subject to review by the whole court when it meets.

The justices of the state supreme court are usually elected by

[2] In New York the general trial court (supreme court), has an appellate division.

the people, although, as will be noticed later, in some states they are appointed by the governor or the legislature. Where they are popularly elected they are often chosen from the state as one district; but in some states the voters at large elect one justice from each of a number of districts into which the state is divided. A few states have followed the plan of having the people of each district elect one or more justices from that district to the supreme court.

Work of state supreme court

Cases which are appealed to the state supreme court are argued orally and also by brief, that is, in writing. When the oral arguments of the lawyers on points of law have been closed, the justices consider the case in conferences of the court, over which the chief justice presides. The chief justice is usually elected or appointed to the court as chief justice, and is the administrative head of the court, but has, like the other members of the court, only one vote in deciding a case. If the judges seem agreed as to how the case should be decided, the chief justice appoints one of the judges to write the opinion of the court in the case. This opinion is then read by the other judges, and after it is agreed to by them it is filed with the clerk of court and is subsequently published in a volume of opinions which is issued each year. Sometimes one or more judges disagree with the majority of the court and wish to put on record their reasons for dissenting from the view of the majority. These opinions are published as "dissenting opinions" along with the majority opinion of the court.

Miscellaneous courts

The justice-of-the-peace courts have been replaced in many cities by police or municipal courts. Sometimes, however, the police court is only one of several branches of an elaborately organized municipal court. Detroit, Chicago, Cleveland, and several other of the larger cities have the municipal court organized as one court, with several divisions for the handling of specific types of cases. The police court usually disposes of violations of police ordinances such as those regulating traffic, and of other petty criminal offenses. Municipal courts in the larger cities have jurisdiction over civil cases which involve several hundreds of dollars and criminal cases in which the punishment meted out is

1. Municipal courts

quite severe. The tendency has been to give to municipal courts a somewhat broader jurisdiction than is given to justice-of-the-peace courts. But they do not have as broad jurisdiction as the general trial courts, which may also sit in the city. The jurisdiction of the general trial courts sometimes is concurrent with that of the municipal court so that either of these two courts may take the case, depending upon which of them it is brought to by the plaintiff. This overlapping jurisdiction may be objectionable, since it may cause the plaintiff to bring his case in one of them because of reasons that are not related to its merits. There are sometimes special county or circuit courts in addition to municipal courts in the city, and the jurisdiction of the several sets of these often overlaps. In the larger cities the tendency is to make the judgeship of the municipal court a salaried office and this tendency is also discernible in some of the smaller cities.

Municipal courts are being organized in divisions for the purpose of specializing in the administration of law. Thus it may be that there is a night court for the trial of petty criminal offenders brought in during the night, or there may be a special women's court. There may also be a separate domestic-relations and divorce court. All of these may be divisions of the larger organization, the municipal court. To guard against the danger that the judges may become too narrow on account of their administration of law in a specialized group of cases for a long period of time, provision is sometimes made for rotating the judges from one division to another at fixed intervals. Such a rotation brings a certain freshness and dispatch with it when a new judge takes over, or comes to aid in, the disposition of cases in a given division.

2. Juvenile courts

Usually, however, the municipal court is not so elaborately organized as this, and the various courts in the city are organized independently of one another with no provision for the correlation of their work. Many cities are now engaged in the reorganization of the municipal judicial system, and much improvement along this line may be expected during the next few years. Juvenile courts are sometimes a division of the municipal

court, but are often separate. In some states the judges of some special court such as the probate court are given jurisdiction over juveniles. In other places this jurisdiction is given to one of the judges of the general trial court. These courts have been established because of a popular demand that different and more informal corrective treatment be accorded juvenile offenders against the law than that given to adults. The juvenile court tries cases in which children under sixteen or eighteen years are the offenders. Boys or girls who are delinquents are brought before the judge, who talks over their problems with them. He obtains from them, by winning their confidence, a frank statement, where that is possible, of the details of the act committed, with the attendant motives so far as he can. An investigation into the home life of the child may be undertaken. On the basis of the data thus obtained the child may be placed on probation or committed to a place of detention, often a school. Sometimes the court may find that the parents of the delinquent child are either unwilling or unable to rear and care for it properly, in which case a guardian is appointed. In order to administer the work of a juvenile court properly and effectively, it is necessary that there be available a number of persons who are fitted and able to act as guardians or probation officers. A chief purpose in the creation of juvenile courts is that the child shall not be made to feel like a criminal but shall be subjected to kind and corrective treatment. Punishment in the ordinary sense is avoided, except where it must be inflicted as a measure of last resort. The child may be forced to pay the damages which he has caused by his act, in order to make him realize the fact that he has committed an antisocial act and that someone has unjustly suffered because of the injury which he perpetrated. It is very essential that the judge of such a court be sympathetic with the problems of young people and be personally able to gain their confidence. The formality of the ordinary courtroom and of a regular criminal trial is dispensed with because it is very important that juvenile first offenders shall not be made to feel that they are enemies of society. The formal criminal procedure of most courts tends

to instill this feeling. The problem of administering the correction of juvenile delinquency is a perplexing one, and the detention and supervision of first offenders is one of the most important phases of the criminal work in the entire judicial system. The more effectively these courts perform their work and the more enlightened and thorough they become in their appreciation and understanding of the relation of child life and tendencies to criminality, the less will be the burden on the criminal courts of the future. An appeal from the finding of the judge is allowed to the higher courts in order that any tendency toward arbitrariness on the part of the judge of the juvenile court may be checked.

Just as the justice-of-the-peace courts are important in the smaller jurisdictions so the municipal courts are important in larger communities, because most of the people in a large city never come in contact with any other than the municipal court. The fair and intelligent performance of its work is one of the best means available of insuring a respect for government and law on the part of the millions who constitute the heterogeneous population of modern cities.

3. Domestic-relations courts

In many cities the domestic-relations or divorce court is a specially organized body or a division of the municipal court. Cases of divorce are adjudicated by, and the enforcement of the various decrees which are rendered in such cases effected through, the medium of this court. In many states these cases are handled by the court of general trial jurisdiction. Alimony allowances are not always promptly paid. Formerly it was the custom to institute suits for the recovery of the moneys due the wife and children by the arrest and imprisonment of the offending husband. This method did not always insure the payment of the alimony. Because of this, criminal process is now instituted as a supplemental aid to force the delinquent person to make such payments for the support of the wife and family as the court may have decreed.

4. Criminal courts

Although the regular courts of general trial jurisdiction usually try most of the criminal cases which are too serious for the

police or the municipal court, special criminal courts are now occasionally found in some cities. One objection to a separate criminal court is that it tends to make for a duplication of judicial machinery and overspecialization of work, as well as an overlapping of jurisdiction between the several courts in the same city. It is perhaps more desirable to have a division of the municipal court deal with criminal cases which are not serious enough to be taken to the general trial court of the county or district in which the city is located. Several of these general trial courts are often found in the larger cities, and for the most part the judges on them are quite independent of one another.

5. Probate courts

The judges of the general trial court in many states take care of the probate work which arises in the county; but in about half of the states a separate probate, surrogate, or orphans' court has been organized to administer this type of work in the county. The probating of wills is a highly technical and responsible task, and the amount of property and money which is under the supervision of the court is often very large. Guardians are appointed for orphans or mentally incapacitated persons, and administrators are appointed to administer the estates of persons who have died without leaving a will. In each of these cases the officers appointed must make reports to the court concerning their work. When trust funds are left by a will, the court must exercise a supervisory control over the administration of the fund by the trustees who have been appointed, and sometimes the court must appoint new trustees when vacancies arise. In several states a probate judge need not be professionally trained in the law.

6. State courts of claims

The states of the Union are immune to suits in the federal courts by citizens of other and foreign states by virtue of the Eleventh Amendment to the federal constitution. This amendment has also been interpreted to mean that a state may not be sued in the federal courts by one of its own citizens. The only place where the state may be sued is, therefore, in the state's own courts. And it is a rule of long standing in Anglo-American pub-

lic law that the state may not be sued in its own courts without its consent.

The constitutions of a few states forbid the state to be made a defendant to a suit in any court in the state. But almost half of the state constitutions contain provisions allowing the state to be sued and authorizing the legislature to make provision for such suits. Legislation is usually necessary to carry out these constitutional provisions, however, but the methods which have been used by the various states for settling claims made against them have not been altogether satisfactory. One method used in some states is to have claims presented directly to the legislature. That body may then authorize the payment of those claims which it thinks proper by an appropriation of money for that purpose. This method is not satisfactory because the legislature is not well fitted to determine the validity of such claims; and, moreover, if the number of claims presented were very large, it would require too much of the legislature's time. In practice the task of sifting claims is left to the committee on claims and it may or may not take its work seriously. In modern times, when so many states are embarking upon such elaborate construction programs which may involve matters both of contract and of tort, this method of settling claims against the state would seem to be inadequate.

A second method is for the legislature to authorize suits to be brought against the state in certain of the state courts. Under this method the legislature would still have to appropriate money for the payment of judgments of the courts before they would be satisfied. On this account and because of the technical procedure under which cases in the regular state courts are tried, it would not infrequently happen that recovery upon a perfectly proper claim would be defeated.

A third course which has been adopted in a few states is to establish a separate court of claims patterned after the federal Court of Claims at Washington and working under a simple and non-technical procedure. A state which is likely to have a large

number of claims presented for payment about which there might be some dispute could well afford to establish such a court.

The fourth plan which has been adopted by a number of states is to have a claims commission or a board of claims which hears and determines the validity of claims against the state and makes awards upon the basis of its findings, such awards to be paid upon appropriation of the money by the legislature. Where such a board is established, the legislature should not interfere with the settlement or audit of such cases, but should usually act without question upon the recommendations of the board of claims. The New York legislature is forbidden to audit or allow any private claim, the theory being that if a board is to be established for the purpose of allowing such claims, such boards should adjudicate all of these and the legislative remedy should not be open to any dissatisfied person who has failed to secure an award on his claim from the board. New York has now established a regular court of claims. Every state should make some provision for the settlement of private claims against it—for there is no greater moral justification for allowing a state to evade just obligations than there is for permitting a private individual to do so.

7. Conciliation courts

Delay and the high cost of justice in civil cases have created a demand for less expensive methods of settling disputes involving small sums of money. Foreign countries have experimented with courts of conciliation and small claims for upwards of a hundred years. The Scandinavian countries in particular have perfected a system of conciliation courts which succeeds in settling between 75 and 90 percent of the disputes brought to them, without a formal judicial trial. Some of the Middle Western states in this country have adopted the plan of conciliation courts, and the movement for the establishment of such tribunals is in full progress. The procedure followed in these courts is for the party who thinks himself aggrieved to state his grievance to the conciliator, who is sometimes a judge and sometimes not. Thereupon, the latter sends notice to the other party to appear at a certain date to state his side of the dispute. The conciliator then tries to settle the matter by suggesting that one or both of

the parties concede something of their original claim. Usually the parties will agree upon some proposed basis of settlement. Lawyers are often barred from practice in these courts, and where they are allowed, the technicalities of procedure which characterize general trial courts are avoided. If the parties agree, the agreement, when certified and filed by the conciliator, has the force of a judicial decision. If the parties cannot agree, they may take the case to a regular trial court. The procedure is informal, inexpensive, speedy, and non-technical. Courts of conciliation are organized as special bodies in some states, while in others the judges of the regular courts are given power to act as conciliators.

8. Small-claims courts

Special courts for the trial of disputes involving small claims exist in several states. They are organized as branches of municipal courts in a few of the larger cities, but in most instances are entirely separate. Lawyers are sometimes barred from practice in them, the procedure is non-technical, and very small fees are required of the parties to a case. Small-claims courts represent another attempt to make justice available to those who most need it in cheap, simple, and summary form. The complaining party goes before such a tribunal, fills out a blank, deposits a few cents, and thereupon can have the other party summoned to appear on a certain date. At the time fixed by the judge the parties meet and state their versions of the facts, and the judge decides the case then and there without further delay.

Adjuncts of the Courts

Legal aid bureaus

Legal aid bureaus are another recent innovation. They have been in existence for several years in many cities as private philanthropic institutions. A number of cities have provided for a legal aid bureau which gives legal advice to persons too poor to procure the aid of a lawyer, and which even furnishes the person with counsel if the case is thought worthy of it. Criminal cases are given over to a public defender, while the legal aid bureaus usually confine their activities to civil cases. Many divorce and bankruptcy cases, as well as many small cases in tort and con-

tract, are conducted yearly by legal aid bureaus. Senior law students are often detailed to work for an hour or two each week with the legal aid bureaus as a part of their practice work in the law school. One of the greatest services of such institutions is that they are able to settle many petty disputes without the formality of a trial, thus relieving the courts of this burden.

Public defender

Hitherto the state has not been expected to defend criminals, but to prosecute them. In recent years there has been a movement to provide accused persons with legal services in case they cannot afford to pay for their own defense. Courts have long been accustomed to assign an attorney to defend persons unable to secure the services of a lawyer, but this practice did not secure very satisfactory results. The person detailed to conduct such a case has no interest in the case and makes a very perfunctory defense. Therefore some of the states have gone one step farther and have provided, as a public defender, an officer whose business it shall be to defend persons accused of crime who are not able to provide for their own defense.

Quasi-judicial commissions

The increasing tendency to make use of commissions to perform certain types of administrative and quasi-judicial work in the states has been touched upon in previous chapters. Certain of these administrative commissions have broad powers of a semi-judicial nature. Public utility commissions, workmen's compensation boards, industrial commissions, securities commissions, and others too numerous to mention have been given the task of determining questions and disputes of such a nature that their settlement would normally be expected to be by way of the courts. Indeed, these disputes were formerly settled by the courts, but, due to the technical character of the subject matter involved in many of them, the tremendous increase in the number of cases coming before the courts, and the inadequate facilities of the courts for this type of work, these cases have been given to administrative commissions of from three to seven men. They act partly in the character of a supervisor and administrator and partly in the character of a court, in dealing with the problems which arise in connection with public utilities and with many in-

dustrial activities. The members of these commissions are sometimes elective but more often are appointive officers. There is a tendency to formalize the procedure of their work and thus reproduce the very conditions the avoidance of which was a chief object of their creation. In many cases their findings are final and conclusive on the facts, though not so on points of law. Appeal on points of law is allowed to the courts.

As has been pointed out elsewhere, these commissions were established originally primarily to engage in administrative work of a regulatory character, and although they were to perform some semi-judicial types of work, it is the latter that has come to occupy most of their time. The tendency is for administrative boards to become more and more formal in their work until finally they concern themselves almost exclusively with cases which are brought before them. The more they tend to formalize their procedures the less effective they become as regulatory bodies and the more effective as judicial bodies. However, the more effective they become as judicial bodies the less the courts interfere with them in their work. But the fact that this is so may indicate, not that the commissions are doing the work they were established to do in a more satisfactory manner, but that they are acting more as courts than as administrative bodies. To that extent it may be indicated that they are not performing their functions in the manner intended by those who created them. It seems that the more complex our economic and social life becomes the more we are forced to make use of administrative justice, because of the larger amount of administrative regulation that is called for in such a system.

Officers attached to state courts

In addition to judges there are certain other officers attached to state courts. They are the clerk of court, the prosecuting officer, the sheriff, and the coroner.

1. Clerk of court

All courts except those of the lowest grade have clerks to keep records of their proceedings. In some states this individual is a special clerk for the court and in others he combines the work of clerk of court with the functions of a county clerk. The work of the clerk of court is largely ministerial and routine in nature, and

for that reason he should be appointed by the court to which he is attached. This officer is, however, usually elected by the voters of the county. There is some tendency to make the office of clerk appointive, and in many of the higher courts this is now so. The clerk also issues writs and legal process as prescribed by statute, and is the custodian of the records and calendars of the court. Courts having a clerk are called courts of record.

2. Prosecuting attorney

One of the most important officers of the court is the one who acts as a prosecuting attorney for the state, county, and local governments. This officer is known by a variety of names in different states such as state's attorney, district attorney, prosecutor, county attorney, or commonwealth attorney, and is usually elected by the voters of the county or some larger district. The administrative phases of his work will be discussed in Chapter 19, and only his duties as an officer acting in conjunction with the court will be considered here.[3] The public prosecutor is the representative of the state in criminal trials, and performs certain functions in bringing criminals to trial. He also acts as counsel to the grand jury. To this body he presents cases which have come to his attention. Where the information or affidavit is permitted as a substitute for grand jury indictment, he institutes proceedings against the criminal without the intervention of a grand jury. Not only does the public prosecutor make these preliminary investigations into crimes and cause offenders to be brought to trial, but he is empowered to dismiss the case against offenders by asking leave of the court to enter a *nolle prosequi*, with the court's consent. By determining what cases he wishes to present to the grand jury and by his use of the "information" and the *nolle prosequi*, the public prosecutor can influence greatly the administration of criminal justice in any community.

3. Sheriff

The executive officer of the court is the sheriff who is usually elected by the people of the county. He executes the sentences of the court, serves writs and orders of the court, and maintains order in the court during trials. The duties of the sheriff as an

[3] See also pp. 582, 583–584.

administrative officer engaged in enforcing state and local policy will be discussed in later chapters on local government.

4. Coroner

The office of coroner is of very early English origin and was originally designed to aid in detecting the commission of serious crime. The primary function of the coroner at present is to determine the cause of death when any person dies by violent or unnatural means. The coroner usually summons a jury, called a jury of inquest, and in many cases their action is most perfunctory. It is questionable whether the office of coroner serves any useful purpose, as it is at present constituted. There has been a tendency in some states to replace the coroner by medical examiners and this would seem a more logical way of performing work of this kind.

Judicial Personnel

Selection of judges

It is very important that able and honest judges be chosen to preside over the courts. The method of selecting judges in colonial times was by appointment, usually by the governor. The practice of appointing judges continued in the states under the first state constitutions, although the legislature often shared the power of appointment with the governor, and in some cases exercised the power alone. Legislative appointment gradually gave way to executive appointment on the one hand, and to popular election on the other. Georgia was the first state to make use of popular election for the choice of judges. Beginning with that state in 1812, that method came into wider and wider use until now it is the one used to select some judges in forty-five states.

1. Appointment by the governor

Eight states now select some or all of their judges by executive appointment, the governor being empowered usually to make the appointment with the advice and consent of his council or the senate. This method of selecting judges though somewhat prevalent in the East is less used in the Central or Western states. Two or three recent constitutional changes have favored the appointment method of selection. All judges are to be appointed by the governor in New Jersey; and in Missouri, the judges of

the higher courts and some others are to be appointed and provision is made whereby elections may be held to decide whether judges in individual districts are to be appointed by the governor. Georgia (1945) continued the practice of election by the people.

2. Appointment by the legislature

Legislative appointment is the principal method of selection in three states, again all to be found among the older Eastern group. It has been assumed generally in recent years that legislative appointment is very unsatisfactory; but on the whole the courts of those states which use this method of selecting judges cannot be said to be decidedly inferior to those in which either executive appointment or popular election has been used. There are some obvious objections to choosing judges by legislative appointment, however, and it cannot be denied that this method was not satisfactory in many states when it was the prevailing system. The first objection which is advanced against legislative appointment is that members of the legislature are chosen primarily for other purposes than that of making appointments to office. A second objection is that since legislatures are political bodies, by an appeal to party loyalty the leaders may secure the endorsement of a man for the office who is not fitted for the position. The temptation to give undue place to political partisanship in legislative appointment is doubtless very great and constitutes a serious objection to this method of choosing judges.

3. Popular election

Selection of judges by popular vote is the principal method in the remainder of the states. No other country elects its judges, and even our federal judges are appointed by the President with the consent of the Senate. The pioneer influence was a very powerful factor in causing judges to become elective officers in the states, because the pioneer felt that the law-applying as well as the law-making processes should be controlled by the people through popular election of the officers who were to perform these functions. The political character and political influence of the courts were greatly increased by popular election, but it is doubted by most observers whether there was any corresponding increase in the ability and efficiency of the judges.

Elective versus appointive judiciary

The elective judiciary has been severely criticized, resulting in a recent revival of the agitation for an appointive judiciary in many states. Legislative appointment does not appear to be given serious consideration at present, and thus the choice seems to be between appointment by the governor and popular election. Opponents of popular election of judges argue that under that method judges are selected on a partisan basis. It is pointed out that judges are not essentially political officers, that party loyalty is not one of the requirements for an able judge, and that they should be selected on the basis of fitness for the office. Judges should be impartial and should not be swayed either by the passing political issues of the day or by the temporary ebb and flow of popular prejudice. The claim is often made that under this method of choice party leaders determine the selection of judges in the same way that candidates for any other office are selected.

The primary system of nomination seems not to have changed this situation greatly because the party leaders can influence the choice of the nominee almost, if not quite, as effectively in many states under the primary system of nomination as under the convention or caucus system. The statement is often made that the voters elect the judge; but, just as in the case of other elective officers, it is generally the party leaders rather than the voters who select him. It is very questionable whether the people can really select judges in some of the more populous states even if they wish to do so. In some cities the voter is asked to choose a half dozen supreme court justices and from eight to twenty municipal and general trial judges at one election. To perform a task of this magnitude intelligently would require much careful thought and study of the qualifications and personalities of the many candidates. Since candidates for judicial office rarely arouse as much enthusiasm as candidates for executive offices and since the duties of their office are so highly technical, it is much more difficult to make the voters either interested or informed concerning the qualifications of the various candidates for judicial places. It is said that the best that the voters can hope to do is to follow the suggestions of the party leaders, except in those

few cases where the voter has some particular information concerning some of the candidates. If it is true that in reality the voters merely ratify the nominations made by the executive, the bar, or the party leaders, then more attention should be paid to the methods of nomination than to the methods of election. These observations are also applicable to many of the administrative officers of the state, but are particularly true of judges.

To obviate the objection that judges are elected as partisans, about half a dozen states have made use of non-partisan ballots in judicial elections. A few states have changed the time for electing judges from that of the general election to a date when no other officers are to be voted for. The fact must not be lost sight of that judges cannot be entirely divorced from political matters in this country because some of their duties are of a semi-political nature, such as, for example, the administrative duties which many courts still perform, and, in particular, the exercise of the function of declaring laws unconstitutional. Because of this the people should not be wholly ignored in any discussion of the forces and factors which should be considered in the selection of these officers.

The practice in some states of returning judges to the bench as long as they wish to be reëlected and so long as they perform their work well has mitigated to some extent the evils which might be expected from a system of popular election. Notably honest and capable judges have, however, at times failed to obtain reëlection despite a brilliant judicial record, because of party conflicts. In some states death or resignation is the only way in which a vacancy occurs. The governor in such case is often empowered to fill the vacancy by appointment, and at the next election the people will probably reëlect this appointee to office. The bar has also exerted a great influence for good in the states using popular election of judges by endorsing certain candidates. The voters will naturally be inclined to pay considerable attention to the recommendations of the members of bar associations, because, after all, the attorneys of the state are the people best fitted to know the abilities and fitness of particular candidates for

the office. It is the lawyers who come into daily contact with the judges and their work. Of course, it should not be forgotten that local bar associations may sometimes reflect the views of a few of the leaders of the bar, and that for some personal reason or because of some fancied mistreatment at the hands of a particular judge seeking reëlection, the bar may be prejudiced in its stand. However, it may usually be trusted to be fair and just in this matter.

Comparison is often made between the elective and the appointive courts, and usually to the advantage of the latter. It is true that in some of the states in which the appointive system is used, the courts are of a very high grade; but it is not true that all of the elective courts are inferior to the appointive ones. Neither is it true that the best appointive courts are always superior to the best elective ones. If the appointive courts are excellent, it is probably due as much to the type of governor who has been chosen to make the appointments, and the traditions which have been developed in this connection in the particular state, as to any inherent excellence in the appointive system. Governors may be dishonest and as unwise as the electorate. If the people wish to have able judges, they can procure them either by appointment or by popular election. It may be more difficult to procure able judges by popular election, but that their services can be obtained has been adequately demonstrated.

Many of the states are still primarily agricultural, and it should be remembered that in such states the method of popular election is more successful than it is in congested urban districts. Popular election is more difficult to operate intelligently in the industrial and city states than in sparsely settled agricultural communities. In keeping with this, the governor has been empowered in New Jersey to appoint all the judges, and Missouri provided for gubernatorial appointment of judges in St. Louis and Jackson County. Demand for reform in the selection of judges is widespread and insistent in practically all the states using the elective method. In seventeen states, this demand has been given form in proposed constitutional amendments.

Terms of judges

The terms of judges vary from state to state and from court to court. There is at present a tendency to lengthen the term of office, particularly of the higher courts of the states. Selection for life or during good behavior is the rule in Massachusetts, New Hampshire, and four other states, while in eight states the term is from ten to twenty years. Six-year terms prevail in about one-third of the states. Judges in the courts of general trial jurisdiction commonly hold office for terms of from four to six years.

Long terms for judges are desirable, providing there is some adequate system whereby those who are not fitted for their work may be removed from office. It is very difficult to obtain the type of men who make able and efficient judges under existing circumstances; and if a short term is coupled with the other discouraging factors of compensation and the possibility of defeat in the next election, it is exceedingly difficult to attract to judicial positions men who are fitted for that type of work. The routine of judicial work is not easy to master, and it takes years of experience for the most able and conscientious of men to deal adequately with the problems continually presented to the court; if terms be short and uncertain it will be difficult to maintain an efficient state judiciary. The longer the term the more impartial and independent the judges will become; and only by establishing a policy of reëlecting judges can the states hope properly to man the courts. Contributions to the party campaign chest are sometimes exacted from judges in the same manner that they are demanded of other successful candidates. On the whole it is surprising that the state courts have been as able and efficient as they have, rather than that they have been mediocre.

Removal of judges 1. By impeachment

The removal of judges may be accomplished by impeachment in all of the states. As was pointed out in the chapter on the legislature, impeachment is an unsatisfactory method of removing state officers. It has been used very rarely in the states.

In many states judges may also be removed by the governor upon address of both houses of the legislature. The legislative resolution must usually have been passed by more than a bare majority vote, although two or three states require only such a

majority. The causes for which a judge may be removed by this process are not usually specified in the state constitution, and this method is, therefore, somewhat more flexible than impeachment. By it the governor is not compelled to remove the judge but is authorized to do so if he wishes. This method of removal is not often used, but it has the advantage over impeachment in that it can be used to remove judges who are unfit for their duties although they have committed no specific and serious offenses such as are required for impeachment. Removal upon address is an *ex parte* rather than a judicial proceeding; consequently no trial or notice need be given the person removed. But in practice it is common for the complaints to be written, and the governor customarily accords the judge a hearing before removing him from office. Removal by concurrent resolution of more than a bare majority of the legislature is provided for in about one-fourth of the states.

2. By governor on legislative address

3. By concurrent resolution

Seven states make use of the recall for the removal of judges as well as other officers of government. The recall as applied to judges involves the same steps described in Chapter 7 as when applied to other officers.[4] Many arguments have been advanced against the application of the recall to judges, but most of the fears of the opponents of this method of removal have proved groundless in the light of past experience with it. It is impossible to say that judges are any more hampered or controlled in their work in states having the recall than they are in states not having it. The theory of the recall was supposed to be that judges perform certain functions having important political results, such as declaring laws unconstitutional, and therefore should be subjected to popular supervision in the same manner as other public officers elected by the people. If the theory of elective judges is correct, there would seem to be no reason why the recall of judges is not also correct. This method of removal is not valuable for the constant use to which it may be put, but because it provides a method of removing a judge when the governor or the legislature refuses to do so.

4. By recall election

[4] See p. 156.

Retirement of judges

The movement to retire superannuated persons on pension has spread to the state judiciary. Now twenty-seven states provide pension payments for some or all of their retired judges. The common retirement age is seventy years, although there is usually a period of service, varying from seven years in Maine to twenty-four in Wyoming, with ten to twenty years being the most frequent length of term necessary to qualify for retirement compensation. In a few states, the judges of the highest court may retire at full salary, but usually retirement benefits are paid in some proportion to length of service.

Judicial salaries

The pay of judges covers a wide range. At one extreme is the compensation of some justices of the peace which is based upon fees and at the other extreme is the salary of $30,500 paid the presiding justice of the Appellate Division of the Supreme Court of New York (1947). It has long been a notorious fact that successful lawyers can ill afford to become judges. Despite the increased salaries which in part reflect the rising price level since World War II, judicial salaries have been too low, though perhaps not disproportionately lower than those of professional and technical workers in the administrative branch of state government. The salaries of judges in the highest state courts range from $5000 in three states to $28,500 in one state, New York. About one-half of the states pay salaries of $10,000 or more to their judges. It is difficult to make generalizations about the pay in other courts, except to say the salaries of the judges in the lower courts range down from the pay in the highest court of each state. The exception is the salary of New York's supreme court (appellate division) which, it must be remembered, is not the state's highest court.

The outcry which has been made against making a judge's income depend upon fees collected from persons whom he finds guilty has started a trend toward giving salaries to some justices of the peace and in abolishing the fee system. In some states this is done a jurisdiction at a time, but in the Missouri constitution, the fee system was completely abolished.

The fact must not be lost sight of, however, that the judges of

state courts as a group are not highly trained or always eminently qualified for their work. They have sometimes been quite unaware of the social, economic, and political implications of their work, and have proceeded with the task of deciding cases in a purely mechanical manner. The relation of the legal system to society as a whole has been too often overlooked by the courts. The defective general education of many judges has been one cause of this situation, and to the extent that state judges are more broadly educated men, the tendency in the future will be for the courts to perform more intelligently and effectively their work as one of the agencies of human society.

Problems in Judicial Organization

The organization of the courts of the states has changed very little since the colonial period. The general outlines of the system remain the same, and only in very recent times have any radical changes in the judicial system been seriously considered. State courts as originally organized were designed to serve a country which was essentially rural and quite sparsely settled. The number of cases which came before the courts in those early days was small, and the administrative problems then confronting them were few. Simplicity of organization and the keeping of judicial tribunals close to the people were prime considerations to be kept in mind in that early period. But the country has become more thickly settled and the complexity of the social, industrial, and political problems has greatly increased. The amount of work which now confronts state courts is tremendous.

Increased judicial work

As has been noted earlier in this chapter, the growth of cities has raised troublesome problems in court organization, and many states are confronted with the problem of organizing a judiciary which will fit a state with both large urban areas and large rural areas, each of them requiring utterly different types of judicial organization. The multiplication of the records which must be kept by the courts, the preparation of jury lists, the supervision of probation and parole officers, the supervision of

masters, receivers, and trustees, and the administration of the subsidiary and important auxiliary aids to the court, such as clinics and statistical departments, have put such an administrative burden upon the courts that they are unable effectively to perform their work in many communities. As the work of the courts increased, the conventional methods of providing for its care were (1) to multiply the number of judges of each court, (2) to provide a greater number of courts for a given community, or (3) to organize a separate court for the trial of particular classes of cases. These methods of affording relief from the increasing congestion looked only to that phase of the problem which concerned itself with purely judicial work, and did not address itself to the administrative problems confronting the courts.

Delays in justice

The thousands of statutes and decisions which are turned out each year by the legislatures and courts of the forty-eight states have naturally tended to make the burden of the purely judicial work very heavy, and the relief afforded even at this point has been entirely inadequate. The courts can no longer take days and weeks to deliberate over the pros and cons of a particular and interesting case, but must now decide more cases each month than were decided in a year in the earlier period of our history. They have no aid in searching for precedents and for checking up the law and citations contained in the elaborate briefs of opposing counsel. The result is that courts must rely to a great extent upon the industry and integrity of the members of the bar. Then, too, when new courts were established, little attention was paid to the relation of the work of the new creation to the work of those already existing. Overlapping of jurisdiction, insufficient work for some judges, and too much for others, resulted. Courts were independent of one another, and there was no unified central administrative control over the administration of justice. Some courts are from two to three years behind in the trial of cases on their dockets. Delay, which is so fatal to the administration of justice, is insured, not prevented. No real relief has come in the difficulty of handling the ever-growing num-

ber of appeals. The insertion in the state constitution of an increasing number of details governing the organization of the courts has tended to magnify the already existing defects in judicial organization by rendering it more inflexible than it was before.

Movement to improve court work and organization

As a result of these conditions and many others too technical to consider here, a movement began a few years ago to secure some much needed reforms in judicial organization in the various states. Bar associations were slow to join the movement, and individual lawyers often opposed the proposed changes, but gradually it has gone forward. By its own merits it has attracted to its support one bar association after another, as well as the prominent members of the bench and bar of almost every state. These in turn have brought pressure to bear upon the legislatures to make such needed changes as could be made without constitutional amendment, and also in some cases have fostered the proposal of certain amendments to the state constitution which would make possible further improvements. Many of the needed changes can be accomplished through legislative action and do not necessitate constitutional change. Recent reforms in state judicial organization have centered about (1) the creation of a unified court, and (2) the establishment of a judicial council. The movement for a unified system of state courts has already accomplished much meritorious change in judicial organization and will doubtless accomplish much more in the future. The idea of a unified state court is slowly gaining ground. The proponents of this system would have all of the existing state courts organized as divisions or branches of a single large body. This consolidated court would work under the supervision of a chief justice or a judicial council. Along this line Ohio, Massachusetts, Nebraska, Louisiana, Missouri, and some other states have made more or less adequate provision for the consolidation of the judiciary of the state into one organization, with separate divisions of the general tribunal for the various communities of the state.

The chief justice of the state supreme court has sometimes been made the chairman of the judicial council, and has some-

The judicial council

times been given the power to assign judges from one circuit to another where their services are needed. Members of the judicial council are representative judges from the various courts, supreme, appellate, and district. Provision may also be made for representation of the state bar association on the judicial council. It is the function of the council to study the work of court organization and to interpret the statistics on judicial work. On the basis of these the council will either suggest to the courts such rules for the organization of the business as seem necessary for the various courts of the state, or will make recommendations to the legislature of the state suggesting needed legislation.

The functions or duties of the judicial council may be summarized as follows:[5]

1. From time to time recommend such changes in the law as it deems necessary; to modify or eliminate antiquated and inequitable methods of law and methods of administration, and to bring the law of the state, civil and criminal, into harmony with modern conditions.
2. To receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in our procedural law and its administration.
3. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in our civil and criminal procedure and recommending needed reforms.
4. To make a continuous study of the organization, rules and methods of procedure and practice of the judicial system of the common law, the work accomplished, and the results produced by that system.
5. To secure statistical information concerning the operation of the courts, keeping an up-to-date record of how the various laws, rules and methods are succeeding, making the same available to the public in convenient form; to survey the condition of business in the several courts with a view to simplifying and improving the administration of justice.

[5] C. H. Paul, "The Judicial Council Movement," 1 *Washington Law Review* 101. On current progress in improving judicial organization and work, the publications of the American Judicature Society, Chicago, Ill., are invaluable.

6. To submit such suggestions to the several courts as may seem in the interests of uniformity and the expedition of business.
7. To report to the governor and the legislature at the commencement of each session such recommendations as may be deemed proper.

Some of the advantages of the judicial council may be enumerated as follows:

1. Through the judicial council there is provided, for the continuous, thorough, scientific study of defects in procedure and proposals to remedy those defects, a small, compact, yet representative body whose conclusions, by reason of the personnel of the council and the manner of investigation will carry weight with lawyers, the legislature and the people. It differs from a code commission in that it is a permanent body which can hold public hearings from time to time, and provides a medium for flexible actions which could not be secured through a code commission or any body which would make a special recommendation and then be discharged from further action. Furthermore, it is unlike a code commission in that no compensation is allowed to the members of the council, the only appropriation being for necessary traveling and clerical expenses of the members.
2. If the council is composed of a cross-cut of judges and lawyers, a breadth of view will be obtained which, unfortunately, has been lacking in many previous attempts at judicial reform. Through its operation the judges will become active in measures for improvement of our legal procedure and if the judicial council functions properly the public as well as the judges and the lawyers will cooperate in the solution of our procedural problems.
3. The official character of the judicial council should replace inactivity with action and initiative and, more than that, responsibility. Due also to its official character, leading members of the bar feel appointment to the judicial council desirable, and their appointment naturally gives weight to the council's findings.
4. The council tends to prevent ill-advised, radical and undigested reforms and piecemeal, spasmodic or ill-advised proposals which have too often been presented, and sometimes adopted by the legislature. In the place of unscientific action, or no action at all, the judicial council proposes to act upon full information and to secure action from the legislature or from the judges on needed reforms of sound character.

Approximately two-thirds of the states have judicial councils. Some of these councils are active and perform much useful work. The experience with these councils has proved that these institutions can be most beneficial.

The movement for the unification of courts has borne fruit in the reorganization of the municipal courts of several of the larger cities, and almost incredibly beneficial results have been accomplished in a very short time where such reorganizations have been effected along the lines of unification.

Recent constitutions, as in Georgia, Missouri, and New Jersey, all show the effect of the newer trends in judicial organization and procedure. The power to make and modify rules of procedure, the power to transfer judges, the power to control the docket in order that delays in the administration of justice may be avoided, and numerous other innovations are to be found in the judicial articles of these constitutions. It is likely that these models will serve to influence many other states to include similar provisions in their new constitutions, and in some instances to adopt amendments to existing documents where general constitutional revision is impracticable.

It is difficult to overemphasize the close relationship that exists between legal education, the conditions surrounding the practice of law and the standards fixed by bar associations for their members, and the whole subject of court organization and procedure. If lawyers are well trained not only in the law but in the broader fields of the social sciences, philosophy, and the humanities they will be more likely to appreciate the significance of their own work and that of the courts and public officers working with the courts. If the conditions surrounding the practice of law are such as to make of it a profession rather than a trade and if those only who are both able and fit are accepted to carry on the work entrusted to them as lawyers and public servants, the public will have no cause to berate the bar but will be indebted to it. If the bar is organized so that it includes all lawyers, if it then has the power to discipline its members and fix standards of ethics and practice, and if it actually enforces those standards, the courts will be strengthened greatly.

Fortunately legal education is receiving more and more critical appraisal and attention and improvements in it are being made steadily though slowly. The conditions of practice, though not what the public expects them to be ultimately, are being improved through the efforts of leaders in almost every state. Bar associations have come to be regarded more as public than as private or professional societies and their responsibilities increased correspondingly. A determined movement led by some of the nation's outstanding lawyers is on foot to make of these associations formal legal agencies with broad powers of self-government. This is referred to as the movement for the integrated bar.

Judges and courts can be as good as the lawyers and the people will permit them to be. Judicial organization will be improved as the better lawyers educate the public to needed improvements.

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CHAPTER 19

LAW AND ITS APPLICATION

The nature of law

That the primary function of state courts is to settle disputes has already been indicated in a preceding chapter. In settling disputes the courts are governed by certain rules and principles. These as they are administered by the courts or other properly constituted political agencies are collectively known as law. Law is one agency of social control. The sources of law are several in number.

Sources of law

The federal constitution is a source of law for state courts in so far as it contains rules and principles which must be followed by them. State constitutions also contain rules and principles to which state courts must adhere. The federal constitution is of course of higher authority than the state constitution, and if there is any conflict between them on any subject the latter must be disregarded on that point by the state courts. But both federal and state constitutions are paramount to laws passed by the legislature.

1. Federal and state constitutions

2. Statutes

The legislature of each state passes several hundreds of statutes at each legislative session. Many of these do not contain rules or principles which the courts need apply in settling disputes. As was pointed out in the discussion of the functions of state legislatures, a large number of statutes are of an administrative nature and do not deal with rules of private conduct at all. Statutory law is of course formally written and is sometimes referred to as the written law. The number of statutes enacted by the legislatures of the states is increasing from year to year, and the number and variety of rules which are contained in them is bewildering even to a lawyer.

Some states have attempted to make statutory codes of rules covering whole divisions of the law. This has been done in all branches dealing with negotiable instruments and with the sale of goods. A few states have attempted to make systematic statements of all the rules and principles which are to govern the relations of individuals to each other. It is very difficult to make such codes completely comprehensive, and although they sometimes serve as useful and surer guides for the judges in the settlement of disputes, there remains the danger that they are likely to be too rigid. There will always be some situations which the framers of the code could not anticipate, and in these cases the judges will have to resort to custom and analogy to find the correct rule or principle to be applied to the situation. The most carefully drawn code will contain phrases which will require interpretation to determine whether they apply to the particular case in court. Some provisions will be vague and the courts will have to decide what they mean and what their boundaries are. The decision of cases can never become a purely mechanical process even under the most comprehensive code. United States statutes and treaties are also sources of law for state courts. Closely akin to statutes are administrative rules and regulations formulated by executive officers under constitutional or legislative grants of authority. These have the force of statutes.

3. Common law

The common law is a third source of rules and principles for state courts. It is very difficult to define the phrase "the common law." It is, perhaps, a method of legal reasoning as much as a body of rules. A brief sketch of its origin may serve to indicate its nature. When viewed as a system of rules and principles, the common law originally consisted of those particular rules which were recognized by the courts of England from time to time following the period of the Norman conquest. These were at first only customs of the people and had been applied in the local communities before formal courts had been established, and long before the conquest. The customs of merchants were gradually incorporated into the general custom recognized by the courts, and the feudal customs concerning land were also

a. As a body of law

included to some extent. From these beginnings the courts gradually built up a comprehensive system of rules for the settlement of private controversies. Thus it is true that the common law is founded on custom; but only customs which were recognized and applied by the judges really became a part of the system. The process of introducing and including customs of the people and of businessmen in the law is going on constantly, and takes place before our very eyes.

The judges began very early to write down the settlement they made of cases which came before them, and as time went on they would naturally tend to decide similar cases which arose later in the same way as they had decided the earlier ones. The next step, if the earlier decisions in such cases were recorded and could be ascertained, was for the judges to look over the decisions of earlier judges and follow the rules established by them. But if the later judge did not think that the earlier decision was just and fair, he would not follow it.

It was only natural, however, if many earlier judges had decided a certain type of case in a certain way, that a later judge would be very slow to change that rule. As the rules became established and people came to know that they would be applied in certain kinds of cases, it became more and more difficult for the courts to refuse to follow them as they had been laid down by their predecessors. That earlier decisions shall control judges in their decisions of similar cases is called the doctrine of *stare decisis*, and was mentioned in the preceding chapter. However, it should not be thought that the courts never changed these rules. They did so whenever they thought that they became too unfair in operation. This process of changing rules of law is still taking place. Sometimes the judges made exceptions to a rule, and these became so numerous that, although it was still enunciated as the rule, the exceptions had deprived it of any real effect. When the courts did not change the rules quickly enough to please the community, Parliament would step in and do so by statute. Such statutes had the effect of superseding any rules of the common law which were contrary to them.

Common law in United States

The common law as it existed at the time of the founding of the American colonies was not adopted *in toto* by the settlers. In fact, it seems that many of the colonists thought that the common law of that time was very harsh, which was true to some extent. So in many instances they turned to other sources, particularly the Scriptures, for the rules and principles which were to govern the relations between men. Many of the early colonial bodies of law contain rules taken verbatim from the Bible. The early colonial judges were not trained lawyers and the colonists did not wish them to be. Not being such, they did not take kindly to the technical rules of the English common law; and it was not until several years after the American Revolution that courts in the American states turned whole-heartedly to the rules and principles of the English common law for guidance. But even then they did not accept all of the rules of that body of law. They adopted only those which suited them and seemed applicable to the pioneer conditions then existing in this country. Some of the earlier statutes of Parliament which had become thoroughly embedded in the English system were also adopted, sometimes by the courts and sometimes by the legislatures. It is stated by some courts that all the rules, principles and statutes which were in force in England and applicable to the colonies at the time of the forming of the Virginia colony in 1607 are also in force in the American states unless they have been expressly repealed by the state legislatures. Other states fix the date at 1776. American courts at the present time often examine English decisions rendered prior to 1607, and even down to the present time, to see if particular situations which are confronting them have been passed upon. These English decisions are not binding on American courts, but are always of persuasive force. A few states have formally abolished the English common law on certain topics such as crimes; and in Louisiana the French civil law, although in somewhat modified form, is used in settling civil cases.

The statutes passed by the state legislatures are binding upon the courts, and if there is one rule of law established by judicial

decision and a quite different one set up by legislative act, the courts must apply the rule established by the legislature. Just as constitutions are superior to statutes, so the latter are superior to the common law. But the courts will always attempt to harmonize the two rules unless there is a clear and irreconcilable conflict between them. The judges are prone to interpret the words of statutes in the light of the common law meaning which has been attached to them as they have been used in decisions of courts preceding the passage of the statutes. The common law system is not in force in the federal courts because the federal government has no authority to make rules other than those necessary for carrying out the powers delegated to it, and is not empowered to adopt a comprehensive legal system governing the whole range of relations between individuals. The only time when federal courts enforce common law rules and principles is when they are enforcing state laws in cases coming before them because of diversity of citizenship, that is, when the parties are citizens of different states. But it should be observed that in the federal courts, as well as in the courts of those states where portions of the common law have been wholly supplanted by statutes, the common law is used to interpret many rules and phrases found in statutory enactments.

b. As a method of legal reasoning

If a new situation arises, one that has never confronted a court before, the court will try to reason by analogy or from some general principle of the common law and attempt to find out what is a reasonable and fair decision in such a case. The common law, therefore, may well be said to be a system of reasoning, as well as a system of rules. Both analogous rules and situations are considered in attempting to settle new cases. The judges must always try to decide upon a fair disposition of the particular case, and they must also be careful that the rule they lay down will be a fair one when applied to other similar cases which may arise in the future. The desire of courts to avoid contradicting well-established rules is a third factor in the settlement of new cases. These three factors make the work of the judge in deciding cases very difficult. If he pays too much attention to the

particular case before him the rules will become uncertain in application; if he is too greatly interested in the formulation of a uniform and certain rule for the future, an injustice may be done in the case being tried. It is difficult properly to balance these factors, but unless this is done the rules and principles which we call law fail to serve as an effective agency of social control. Many people fail to appreciate this and are apt to become impatient with the rules of law applied by the courts in certain cases. It is true that courts are sometimes too slow to change legal rules, and that at times they are too mechanical in applying the rules. But it should be remembered that the rules and principles which constitute the prevailing system of law must be at all times nicely geared so as to insure not only change and progress but also a reasonable degree of certainty and stability. Law must move forward and give an appearance of standing still at the same time. A businessman could not afford to incur the risk involved in continuing his business if he could not know what his rights and privileges were to be in the conduct of it. There must be some certainty in them. On the other hand, if these rules did not gradually change they would become a hindrance to business because it is continually changed and requires new and modified rules of law. It is one of the advantages of the common law that it is flexible and can be altered as conditions demand it, and at the same time can remain fairly stable because of a reasonable application of the doctrine of *stare decisis*.

Certainty and flexibility in the common law

The common law developed slowly and did not afford adequate remedy for every wrong which might be committed by one person against another. Two defects particularly became apparent. First, it did not give any relief against threatened wrongs. The only remedy known to the common law was to make the wrongdoer pay money damages for the wrong after it had been committed. But certain threatened wrongs, if committed, could sometimes be only inadequately compensated for by money damages. It was not always possible to fix in terms of money the amount of damages which had been suffered, and

Rise of equity

because of this, injustice often resulted. A second defect in the common law was that only certain kinds of wrongs were redressed, namely those which had been recognized by providing writs for their redress. A writ was an order giving the court authority to settle a particular case. These orders were issued by the king through his officers. If no writ had been provided for a certain type of wrong, the injured person had no remedy. Because of these two defects in the common law system, the king began to afford special relief in those cases which could not be adequately settled by the common law courts. He acted through his chancellor, who was often a churchman, and this official would give special relief by issuing orders where no remedy was available under the common law rules and principles. Finally, these special orders or writs and the system of rules which grew up about them came to be administered by special courts established to dispose of such cases, and became known as equity. The principles thus developed and applied are commonly called equitable principles. Equity was not limited by the technical rules of the common law courts, but its rules were formulated to do justice according to the principles of ethics; and a fair disposition of the particular case was looked upon as the important goal to be attained. For this reason it was sometimes said that the court of equity was a court of conscience. As time went on, the tendency was for the system of equitable rules and principles to become somewhat fixed; and in time equity became as rigid as the common law system which it was originated to supplement. The desire for stability in the administration of equity caused the chancellor and the courts of equity to begin to follow precedent and to try to avoid making the measure of justice meted out in these courts so uncertain.

For many years the system of equity which was brought to the United States from England along with the common law was administered, as was the case in the mother country, in different courts from those which applied the common law. This was not satisfactory because the equity and common law courts often engaged in disputes over the question of which of them

should try certain kinds of cases, and also because a person could not be sure in which of the two courts he should bring his case for trial. At the present time most states have remedied this situation by providing that both equitable and common law remedies shall be administered by the same court, although the procedure for each type of case may be different. But if a person seeks the wrong relief at the present time, he need not go to another court. He need only change his pleadings so as to comply with the formalities prescribed for presenting a common law or an equity case.

Kinds of relief

A person may go into a court asking equitable relief when he cannot get relief at common law or when the relief which he can get there is inadequate. Thus, for example, if a person threatened to dam up a stream which ran through a neighbor's land with the result that his cattle and crops would be irreparably injured by drought, the neighbor could go to court and, upon a proper showing to the judge, get an order issued which would command the person threatening the injury not to commit the anticipated act. So, too, if a group of people threaten injury, and there is no adequate remedy against them as a group, or it would be necessary to sue so many individuals to obtain damages because each of the wrongdoers was financially irresponsible, an order may be obtained from a judge commanding the group not to carry out the threatened action. Such an order in either of the above cases is called an *injunction.* These orders are often issued in labor disputes, and some dissatisfaction has been manifested in recent years with the liberality with which some courts issue them in such cases. If a person disobeys an injunction he is tried for contempt of court and does not usually have the right to a jury trial, but the judge in his own discretion fines or imprisons the offender. This is a severe and summary method of punishment and is very effective in preventing the threatened injury in most instances. In a few jurisdictions jury trial has been provided for in cases where injunctions have been violated, but relatively few states have adopted this innovation thus far.

But equity does not act merely in a negative way. It also provides positive relief in case a person is committing an injury to another through a failure to perform some act which he ought to perform. For example, one person may make an agreement in writing with another for the purchase of a piece of land particularly suitable for the certain purpose for which it is to be used by the purchaser. If the vendor then refuses to give a deed to the land in accordance with his agreement, the purchaser can go into a court of equity and procure an order commanding that the recalcitrant person give a deed as he agreed. If he does not do so, the same penalty can be visited by the court as in the case of violating an injunction. This is contrary to the usual rule of the common law governing breaches of contracts. Ordinarily if a person breaks a contract the only penalty he must pay is money damages to compensate for the loss which he has caused the other party. But in the case of the sale of a particular piece of land there might be no satisfactory way of compensating by money damages, and it might not be possible to say what the damages would amount to in a particular case. What the man wants is the land, not money, and no other land which he would be able to buy might serve his purposes. Hence, because it is unjust to try to fix damages in money in such cases, equity decrees that the title to the land must be transferred in accordance with the agreement. Thus it is that equity may offer positive as well as negative relief.

Civil Law

Law classified

Rules of law are classified for purpose of convenience into various groups, depending upon the nature of the subject with which they deal. In a few cases, however, there is no particular logic in the classification made and it can be accounted for only by reference to historical considerations. The rules of law may be divided into two large groups called the *civil* law and the *criminal* law. Not all of the wrongs committed against individuals are of such social significance that the state needs to step in to punish the wrongdoer. Many wrongs are not serious

enough to merit state intervention. In such cases the state merely furnishes impartial tribunals to decide the disputes which arise between individuals. Many minor wrongs are considered to be of such slight social significance that the state does not even open its courts for their redress. Other violations of people's rights are so serious that the state finds it necessary itself to punish the wrongdoers, because society demands greater protection from them than is afforded by merely allowing one person to sue another for the wrong done. Acts which are of such social significance that they are punished by the state are called crimes, and the rules concerning them are called the criminal law. Acts which violate some personal right which is not considered of enough social significance to merit state action but which the individual may bring before the courts, are called civil wrongs, and the corresponding rules are known as the civil law. The subdivisions of the civil law will now be considered.

1. The law of property

The rules of law which have been developed to protect private property are very technical and complicated. Property in law does not consist of "things" but of rights. One owns the right to use and dispose of a piece of ground or a chair, but the property is not the chair or the ground itself, as is so often supposed. In popular speech, however, we call the thing itself property. Property rights are divided into two main classes, depending upon the kinds of material things to which these rights attach.

a. Real property

Real property consists of rights as to the acquisition, use, and disposal of land. There is a borderline between real and personal property where it is difficult to tell whether the rights in a thing are personal or real; but the general distinction between them is that the rights which a person has in land and in things permanently attached to land are real, while rights in movables are called personal. Sometimes one has certain claims or rights to, or in, the land of another person, such as a right of way over his neighbor's land. Such rights are called incorporeal rights as distinguished from corporeal rights, and are a species of property.

A person who buys the lot on the next corner does not "own" that piece of ground which we measure off and call his. All that he owns is certain rights to use and dispose of the land; and the largest bundle of these rights which any person can have in a piece of land is called a "fee simple estate." The interest or right which one has in land is called an "estate." There are other estates which do not carry with them as many rights as that in fee simple, nor do they last for so long a time as in the case of that estate. Examples are estates for life and for years. "Dower" is the estate which the wife has in the lands of her husband and "curtesy" is the estate which the husband has in the property of the wife. Both of these are life estates. Rights of dower and curtesy have been modified by statute in many states.

b. Personal property

We have noticed that personal property embraces those rights which people have in movable things. There are various classes of these rights, such as: (1) leases of lands or buildings; (2) rights in ordinary movables; (3) choses in action, which are claims against persons or corporations, such as that held by a person against another who has broken a contract with him; and (4) rights included in patents and copyrights.

There are many rules regulating the inheritance of property upon the death of the owner thereof. Certain rules govern the disposition of the property if a will is made, while others govern if there is no will. The making of wills, as well as their interpretation, has been the subject of an entire branch of the law of property.

2. The law of torts

If Jones steals Smith's automobile, Jones has committed a crime and is liable to prosecution by the state. But Jones has also committed a wrongful act against Smith, and the latter does not have to be content to see Jones fined a certain sum for taking his car. What Smith wants is the return of the car or its equivalent in money. So the state permits Smith to come into court and have his claim against Jones tried under the civil law and the amount of money which Jones shall pay him decided upon. The wrong which Jones has done Smith by stealing the latter's car is called a *tort*. It is impossible to enter into a detailed analysis of each of

the acts which one person may commit against another which will constitute a tort. Some of them are directed against the person, as false imprisonment, assault and battery, abduction of child or wife, adultery, alienation of affection, and defamation. Defamation may be either oral (slander), or written (libel). Other torts are wrongs against both persons and their property. An illustration of these is a nuisance, such as factory smoke which not only inconveniences persons a great deal but also seriously affects the uses to which their property may be put. In certain cases nuisances can be stopped or "abated" upon proper complaint. There are still other torts which consist of wrongs against property alone. The most important of these is perhaps that of trespass, which is the disturbance of a person in the possession of his property.

It should not be thought that an injured person can recover damages from a wrongdoer for every wrong which the latter may commit. There are many instances in which the injured person is as much to blame as the one who committed the act, and in such cases no recovery is allowed. Where the injured party is himself partly to blame or is negligent, his claim against the wrongdoer is nullified. There are also many acts which are morally wrong but which are not recognized as such in law; and there is a continual change in our ideas as to what particular wrongs of this kind ought to be considered so at law. The law is recognizing an increasing number of acts which have been considered wrong from a moral standpoint for a long time, and the persons injured by the commission of these acts are given legal redress in the form of money damages. For example, as the law now stands, an able-bodied man may stand by and watch a three-year-old child drown when he could have saved it by reaching out a hand. This would surely be considered a moral wrong but is not a legal wrong at the present time. The time may soon come, however, when such a failure to act will be considered legally as well as morally wrong.

When Jones and Smith make an agreement of a certain kind, containing certain essentials, we call the legal relationship which

3. The law of contracts

results from it a contract. The agreement itself is not, as popularly supposed, the contract, but the law attaches certain importance to given types of conduct, and as a result of the agreement made by the parties, a certain legal relationship is established between them. If, then, one of them does not do what he promised, the other can sue him in a court. These rights, which are the gist of the legal relationship arising from this particular kind of conduct, are classified as contract rights. The technical rules which govern the making and enforcing of contracts cannot be considered here, but it should be kept in mind that a large group of cases continually come before the courts which involve breaches of this legal relationship. There are special kinds of contracts to which certain special rules have been applied and which form the basis for separate courses of study in law, such as, for example, negotiable instruments, suretyship, contracts for sale and of sale, and insurance contracts.

4. The law of business organization

Individuals often wish to combine for the purpose of carrying on certain types of commercial activity. The two most common types of business organizations are corporations and partnerships. A corporation is thought of in law as a legal entity. Thus, if ten people combine to carry on a business and form a

a. Corporation

certain kind of business organization called a corporation in conformity with the laws regulating the formation of these organizations, they form an eleventh legal person, distinct from the ten but including the ten. This "it" is the corporation, is suable, and has certain rights, just as natural persons have. It is usually endowed with a certain period of legal life fixed by the charter. The members of a corporation may change, but the corporation endures for the period fixed in its charter; and because of this continuity of existence regardless of the existence of its members, the corporate form of business organization has become very popular during the last century. One of the advantages of this form of organization is that the ownership of the "it" is divided into many parts, each called a share of stock, evidenced by a certificate, and the money with which to run

the business can thus be gotten from various sources through the sale of these evidences of ownership.

b. Partnership

A partnership is another form of business organization and differs from a corporation in several ways. The partnership is dissolved as soon as one of the members drops out. The debts of the partnership firm are also the debts of each member. This is not so in a corporation. There has been much discussion as to whether a partnership is a legal entity apart from its members, and the question has not been definitely settled as yet, although it is at present not treated as such by most courts.

5. The law of domestic relations

A number of rules have been evolved by courts and legislatures regulating family relationships. The duties of husband and wife, their respective rights in the property of each other, and the rules governing the status of marriage and divorce are all regulated in detail by statute in most states. The relations existing between parents and children, as well as between children and their guardians, have also been the subjects of many legal rules.

The foregoing are only some of the more important divisions of the civil law, but they will serve to indicate how widely human actions and relationships have come under legal regulation. It should be noted that the tendency is to increase rather than to lessen the complexity and scope of legal regulation of the individual and the group, and relations between the two.

Procedure in civil case

Thus far only the substantive rules of the civil law have been mentioned. The next problem to be considered is the procedure whereby these rules are enforced. One of the purposes for which courts exist is to enforce legal rights which have been granted to individuals. As has been pointed out in a preceding paragraph, the prevention of the threatened violation of a legal right is the peculiar function of the courts exercising equitable jurisdiction. But the redress of rights already violated must be sought in courts administering the ordinary rules of civil law as formulated in constitutions, statutes, or the common law. As noticed earlier, most states now have one system of courts for the ad-

ministration of both equitable and ordinary civil relief. The procedure whereby a person secures redress for the violation of some civil right granted by law is now largely regulated by so-called codes of civil procedure. The procedure at common law in trials under the system of writs mentioned earlier in this chapter was very technical and dilatory. Many of the technicalities of the old common law procedure have been abolished, and civil procedure is being simplified gradually in the interests of speedy and effective justice, although much still remains to be done along this line. The procedure in civil cases as outlined below is in general that which is provided for in modern codes.[1]

1. The complaint

The person who claims that some right of his has been violated and who commences the suit before the court, is called the plaintiff. He begins his lawsuit by writing out a statement of the facts alleged to constitute the violation of his right. Of course it is the plaintiff's lawyer rather than the plaintiff himself who does this. This document is called a complaint. A copy of it is served on the person who is alleged to have violated the plaintiff's right and who is called the defendant. The defendant must answer the complaint within a certain time, and in answering may deny the truth of the statements set forth in it. If he does that, there is an issue of fact to be tried by a judge or a jury. The case is brought into court by bringing it to the clerk of the court and having him place it on the docket, which is a list of cases to be tried by the court. The defendant may admit that the plaintiff's statements are true but deny that they constitute a ground for a lawsuit. This is called a *demurrer*, and the judge instead of the jury must then decide whether the facts set forth do or do not constitute a violation of a legal right. The plaintiff in turn may demur to the answer filed by the defendant and claim that the answer does not constitute a justification or a defense. Most codes place a limit on the number of these inter-

2. The answer

[1] C. N. Callender, *American Courts*. This work contains an interesting and nontechnical presentation of the organization and procedure of state and federal courts. See also Hugh Evander Willis, *Introduction to the Study of Anglo-American Law*, and Edmund M. Morgan, *How to Study Law*.

changes between the defendant and plaintiff, but at the common law the pleadings were continued until some issue of fact had been agreed upon by the parties. When the defendant's answers are in and the last papers have been filed with the court, the case is ready for trial.

3. Pre-trial conference

A procedure called pre-trial conference has been adopted in many courts to expedite the work of trying cases. Under this procedure the attorneys in a case meet with the judge to talk over the main facts of the case and the main issues that arise from those facts. The purpose of the conference is to see whether or not the opposing counsel can agree on the facts and can confine their disputes to one or more major issues. If this can be done the case can be tried more quickly than otherwise, and time and expense will be saved the parties as well as the court. The success of pre-trial conferences depends partly on the willingness of the attorneys to contribute to the speedy and fair settlement of the cases, and partly on the ability and personality of the judge in bringing the opposing counsel together for purposes of limiting the facts and issues to be dealt with in the trial. If an issue of facts exists and the parties wish a jury, they usually have a right to have one impanelled, providing the amount involved in the case is great enough to meet the requirements fixed by statute. If the suit is in equity, the judge passes on the facts without the aid of a jury although he may summon a jury to help him if he wishes to do so. If the parties agree to waive a jury in civil cases they can usually do so. Many cases are now tried in which this is done, because they wish to have the case settled without delay and also because they distrust juries and have more faith in the intelligence and honesty of the judges.

In case a jury is demanded, a number of persons are summoned from the panel, or list of persons, which is made up by the sheriff, the clerk of court or a special jury commissioner. Persons unfitted to serve for some reason or other may be excused from jury service by the judge. The lawyers for either side may also object to a certain person as a juror because of

prejudice or some other disqualification, such as relationship to one of the parties or pecuniary interest in the case, and this objection is called a challenge. The trial is ready to begin when the jury has been sworn in.

4. The trial

The plaintiff's lawyer usually opens the trial by describing to the jury the general nature of the complaint which he is making, and outlining some of the facts which he expects to prove. The witnesses are then called and are first directly examined by the plaintiff's lawyer and then cross-examined by the lawyer for the defendant. When all the plaintiff's witnesses have thus been examined, the defendant calls his witnesses, and these are first examined by the defendant's attorney, and then by the plaintiff's attorney. The kinds of questions which are permissible and the manner in which they may be framed, are strictly regulated by the rules of evidence. After the defendant has presented his testimony, the plaintiff may call witnesses by way of rebuttal. The defendant may do the same, and this is called surrebuttal. The attorneys then make their speeches, or pleas, to the jury.

Examination of witnesses

Speeches to jury

Judge's charge to jury

Following the closing arguments before the jury, the judge usually charges them as to the rules of law which govern the type of case being tried, and directs the jury to adjourn to a room wherein they are to reach a verdict, i.e., to determine whether the plaintiff or the defendant shall win. It may be, however, that the jury is not allowed to decide the facts of the case at all, because after the testimony is presented it may be clear that no semblance of a case has been made out by the plaintiff. If this is true, the judge may dismiss the case and the plaintiff loses. Or the judge may direct the jury to find a certain kind of verdict, because the evidence allows only one conclusion to be drawn. But in most cases the facts are left to the jury, which must decide whether the plaintiff's story is true or false and then determine how much damages the plaintiff shall be awarded, if the latter has really been injured by the violation of some legal right. Sometimes the jury cannot agree on the conclusion to be reached, and if an agreement cannot be

Jury deliberations

reached within a reasonable time the case must be retried before another jury. In many states the verdict of the jury need not be unanimous, although the unanimous verdict was the rule at common law. Two-thirds or three-fourths of the jury are a sufficient number to decide the case in several states now, especially if the case does not involve large amounts of property or money. The number of jurors required at common law was twelve, but six- and eight-men juries have now been introduced in a number of states for smaller cases. Women are now eligible to jury duty, and many of them have served on juries in recent years.

Referee

Sometimes the facts are very technical and complicated and the judge in equity cases appoints a "referee," called a "master" or "master in chancery," to take the evidence or testimony, and make a report to the judge on his findings. When juries are not used, this is often done. The judge then makes his decision on the basis of the referee's report, but he need not follow his recommendations, although he is likely to do so in most cases if the referee has done his work well.

Defects in jury work in civil cases

There has been much dissatisfaction with juries in civil cases in recent years. Many businessmen prefer to submit their cases to the judge without the aid of a jury and allow the judge to decide upon the facts of the case as well as the law applicable to those facts. Juries are not always composed of well-educated, or even intelligent, men. Many of the questions which they must settle depend upon information and testimony of a very technical nature. It is often true that expert testimony is presented to the jury which most of the members of the jury can hardly understand. In such cases as this the verdicts are likely to be the result of mere guess or prejudice. Another objection to juries is that they cannot rid themselves of deep-seated prejudices prevalent in the community or common to people in the particular vocation in which some of them may happen to be engaged. It is a notorious fact that in some sections of the country juries are prejudiced against certain commercial corporations, and in the Middle Western and Northwestern states rail-

roads are particularly liable to be the objects of such prejudice. For these and other reasons jury trial is made optional for certain types of cases in many states. But either party may usually demand it if they wish.

5. Appeals

If one of the parties to the suit is not satisfied that the decision of the judge on some point of law was correct, he may appeal the case, that is, have the law on that point of the case passed upon in a higher court. The questions of law may either be on the evidence which was admitted or on questions arising out of the conduct of the trial. They may also be questions relating to the rules of law applicable to the state of facts found by the jury. If the losing party in the higher court is not satisfied, he may under certain conditions appeal the case still higher, until the supreme court of the state has finally settled the point. It may happen that the case will not reach the supreme court of the state but that final disposition of it rests with some intermediate appellate court. The appellate courts do not pass upon the falsity or the truth of the facts alleged to have been established at the trial, but confine themselves to decisions on points of law. If new questions of fact arise during the proceedings before an appellate court, the case may be sent back to a trial court to have these facts determined. The higher courts do, however, have power to pass upon the question of whether the evidence warranted the verdict at all, because sometimes the juries will award damages to the plaintiff even though the evidence is clearly contrary to such a verdict.

If the appellate court which finally disposes of the case affirms the findings of the trial court, the case is at an end. But if the higher court reverses the decision of the lower court, the case is usually sent back again to that body for an entirely new trial. Then if the decision is not to the liking of the other party, he in turn may also appeal and go through the same procedure outlined above. The system of appeals as it now operates in many states is very costly, and a great deal of time is consumed in the final disposition of the case. From two to four years not infrequently pass by before the dispute is ended. Ten or even

twenty years will sometimes elapse before the case is finally decided in exceptional cases. This means that a poor man may be defeated and fail to receive justice in the courts because he cannot afford to continue the costly fighting of cases on appeal. Justice is likewise frustrated in a great number of instances because of delay in the settlement of cases.

The difficulties involved in the problems arising out of appeals in civil cases are very perplexing. It would not be wise to forbid appeals entirely, because, in the hurry and press of business, judges in the lower courts often make mistakes in their decisions on points of law and some higher tribunal must be resorted to correct these errors. One improvement in the present situation would probably be to dispense with a retrial of a case when a reversal on points of law occurs in the appelate courts, and to allow the higher court to make the correction and finally dispose of the case. Of course, there are times when new trials are necessary because of the need of taking new testimony, but they are often unnecessary. Appellate courts now possess power to enter final judgments in cases on appeal, but few of them exercise the power as broadly as would seem to be desirable. The cases sent back to trial courts for final settlement in accordance with the rules announced by the higher court are still too numerous. The total cost to the state of civil trials is very great, and this could be reduced in some measure by some limitation on frivolous or dilatory appeals.

When the jury has found its verdict and has been discharged by the court, the judge renders a judgment based on the verdict. A judgment is merely a statement by the judge that the court has awarded so many dollars' damages to the party who wins the case, and it is of course based upon the findings of the jury. The judgment is written and filed with the clerk of the court. It does not always follow, however, that merely because the court renders judgment for one of the parties he immediately receives his money. If the losing party has the money and is willing to abide by the decision of the court, he will perhaps bring the money into court and pay the amount of the judg-

ment against him. If he has property and does not wish to pay the sum due on the judgment, the winning party may have the court issue an order to the sheriff to seize some of the property of the defendant and sell it at an auction. This is called a sheriff's sale. The seizure of property by the sheriff is called an execution or a levy. If the person who lost the case does not have any property, it is sometimes almost impossible to collect anything from him; and in such a case the winner gets little for his trouble except that if the loser should acquire property at some future time that property could be reached on execution. The decision of a court of equity is embodied in a "decree" instead of a judgment. The only difference between them is one of name, except that the court of equity often orders something to be done other than the payment of money.

Damages in civil cases

The damages usually awarded in civil cases are money damages, but in equity a specific order to do or not to do a particular act is entered on the records and served on the party who is subject to the order.

Many a plaintiff has discovered to his sorrow that winning a case does not mean necessarily getting one's money. The law gives the winning party some help in obtaining a satisfaction of his judgment but it also seems to give to the loser various aids in defeating the winner. Most lawsuits are followed by a proper payment after the judgment has been entered, but great numbers of them are only reminders that men who have nothing and rascals who have something create problems with which the law itself has difficulty in dealing. The process of execution and sale to obtain the satisfaction of the judgment is one which is set in motion by the plaintiff himself and he must obtain the aid of the sheriff or other proper officer to carry out the details of the procedure. The court does not take these steps subsequent to judgment on its own initiative.

Preventive justice

The old saying that "an ounce of prevention is worth a pound of cure" is as applicable in legal matters as it is in medicine. Many expensive lawsuits could be saved if the parties to a contract, or heirs under a will, could be informed by the court be-

forehand of their respective rights. The function of courts of law has hitherto been conceived to be to act as an umpire between two parties to a dispute after the damage has been done by one or both of the parties to the other. The idea seemed to be that there must be a dispute between two or more persons before the court could take the case. Only in the peculiar cases in equity do the courts develop any method of preventive justice by use of orders compelling people to do or not to do some particular act. The courts of equity also take cognizance of cases where there is a doubt as to the title of a man to certain land, and even though there is no dispute between the owner and any other person, the court declares the land free from any defect of title under certain circumstances.

The declaratory judgment

To extend the jurisdiction of courts to cases involving the construction of the terms of a contract or will was a great step, and several states have now authorized courts to render this service to the people of the state. One party to the instrument may institute a proceeding in a court before an actual breach of the agreement takes place. The case is handled like an ordinary lawsuit, but instead of asking for damages against the defendant the plaintiff asks for a judgment against him declaring the rights of the parties. This enables the parties to learn what their rights under the contract are so that they may act accordingly. Such a judicial opinion, or declaratory judgment, does not have the effect of barring further relief in case one of the parties should commit a breach of the contract, if such relief is otherwise available in the particular case. The process whereby the court gives its opinion upon the meaning of the terms of some legal instrument is called a "declaratory judgment." Some lawyers were afraid that the courts would become the legal advisers of the people and that the practice of law would suffer a severe blow from this innovation; but the practice in foreign countries where this device has been used for many years, and the experience in this country in those states which have used it for several years does not warrant the fear originally entertained.

The parties to this kind of case need lawyers to handle it just

as those in other legal cases do. Over three-fourths of the states now have declaratory judgment statutes authorizing courts to render these judgments.[2] Declarations have been given in quite a number of cases involving the "construction of wills, trust deeds, statutes and ordinances and the powers of statutory public bodies thereunder; the powers and privileges conferred by corporate charters or by-laws; the construction of contracts, either before or after breach, including leases and the legal relations of the parties thereto; and the trial of claims to the enjoyment of property, real or personal." The courts of some states seem to be unwilling to give full scope and effect to the declaratory judgment, and this will perhaps retard an increased use which should otherwise follow from the adoption of this excellent reform. It is not like an advisory opinion, since there must be an actual dispute as to the meaning of the law or document involved in order to get the court to render a declaratory judgment; while an advisory opinion is given even though there is no dispute or controversy over the interpretation of the rules of law or the meaning of any document. Advisory opinions are given to the executive or legislative branch of the government, but a declaratory judgment is rendered in threatened controversies between private individuals.

Arbitration

Many businessmen now include in their contracts a provision for an arbitrator to settle any disputes which may arise concerning the interpretation of the agreement. The various parties to the contract agree to abide by the decision of the arbitrator, and elaborate provisions are sometimes included relative to the method of selecting the arbitrators and the powers which they are to exercise. The courts were jealous of such agreements for a long time but they are now coming to recognize them as valid. Several large industries are committed to arbitration on a large scale and it seems to be securing satisfactory results. Much time and expense is saved by the use of arbitrators. The chief cause for the increasing use of this method of settlement of disputes is the delay incident to the trial of cases in the courts

[2] L. M. Borchard, *The Declaratory Judgment*, rev. ed.

under modern court procedure and with the present congested dockets. Another reason for its growth is that businessmen have grown impatient of many of the technicalities of the law governing commercial transactions.

Criminal Law and Procedure

The criminal law

The line of distinction between torts and crimes is not always very clear. But when one individual commits an act against another of such a nature that the social good demands that some punishment be administered other than that which results from a lawsuit by the injured person and when that punishment is administered in the name of the state through its courts, we call such an act a crime. A tort is redressed by the injured individual or his representative, whereas a crime is punished by the government. Many acts are of little social significance in a simple rural community which are dangerous in more congested areas. Of course, it should be borne in mind that, as has already been pointed out, an act which constitutes a crime may at the same time constitute a tort for which the injured person may secure redress. Both torts and crimes are wrongs against either the individual or property. The primary distinction between them is the method of their redress. That depends upon social policy and the degree of danger ascribed to the acts in question according to the social standards of the time and place. The number of acts which now constitute crimes is much larger than was true a hundred years ago. The reason for this is that in an increasingly complex social and industrial life more acts become a menace to society as a whole.

Classification of crimes

Crimes are classified on the basis of the severity of the punishment meted out for their commission, and also on the basis of the directness with which they threaten the agency of government. The usual grouping of criminal acts is into treason, felonies, and misdemeanors.

1. Treason

Treason consists of the act of levying war against the state or adhering to or giving aid and comfort to the enemy. Acts constituting treason are regarded as direct attacks on the institution

of government itself, and because of this, treason is regarded as the most serious of crimes. State constitutions often contain provisions regarding treason, defining it and providing that certain essentials and conditions be fullfilled before persons be convicted of it. The Constitution of the United States defines treason against the United States. In most instances, acts which would constitute treason against the states would also be treason against the United States.

2. Felonies

There are two groups of felonies, common law felonies and statutory felonies. Most felonies now are statutory, and included in these are the graver crimes, punishable by a term in the penitentiary of a year or two, or more. It is not possible to state exactly what constitutes a felony in every case because the different states do not require the same elements in order to bring a crime within the class called felonies. At common law all crimes punishable by death were felonies.

No attempt will be made to give a complete enumeration of all the crimes which constitute felonies, but certain of the more common ones will be mentioned and defined in a general way.

a. Murder

Murder is the unlawful and intentional killing of a human being by another. In many states of the Union there are two and even sometimes three degrees of murder, depending upon the presence or absence of what is called malice. Malice is usually thought of as aggravating the offense; and if the acts committed in the killing of a person are so cold-blooded that they seem inhuman or unusually cruel, we say that the crime was committed with malice. Because of that we punish the criminal in question more severely than if he committed the same acts without malice.

b. Manslaughter

The killing of a human being without intent to do so, or under circumstances affording certain kinds of excuse, is called manslaughter. For example, if A kills B in a sudden fit of passion, which fit of passion was partly caused by B himself, A is not guilty of murder but of manslaughter. The intentional and malicious or deliberative element is absent in this case. Or A may be doing some act which is perfectly lawful but so negligently that B is killed as a result of A's negligence. This would be in-

voluntary manslaughter, and not being deliberate and malicious or premeditated would not be so serious as murder.

c. Arson

Arson is a crime against property which consists of the burning of a building, and the term is now much broader than it was at common law. It is not necessary to burn down the building to establish arson, but any burning is sufficient to constitute the crime. If human beings are in the building and are injured or killed, the act of setting the fire is often made a more serious offense than otherwise.

d. Burglary

One is guilty of burglary when he intentionally breaks into the building of another with intent to commit some act therein which would be considered a felony. Many people think that burglary is breaking into a house for the purpose of stealing something. This is quite an erroneous idea, and doubtless is commonly held because it often happens that people break into houses for the purpose of stealing. But if a person breaks into a house with the intention of committing rape, or of setting fire to the house, or of committing murder, it would still be burglary. It is not necessary that the person commit the intended act at all in order to constitute burglary. It is *the breaking in* with the *intention* to commit the act which is the forbidden thing in this crime. At common law burglary was carefully defined and certain elements were required which are no longer necessary. For example, the breaking and entering had to be at night and also had to be the breaking into a house. But now breaking into any building during the day or with intent to commit a felony is sufficient.

e. Robbery

The taking of property from the person or presence of another by force or through fear of violence constitutes robbery. To point a pistol at a man and demand his money is robbery because he is put in fear of violence; and although he may hand over the money, the law regards it as having been forcibly taken from him.

f. Larceny

Larceny, which is the carrying away of the property of another with intent to steal it, is not always distinguishable from robbery. If larceny is against a person and with force

or fear of force, it is robbery; but if it is from a house with no people present therein at the time the goods are taken, and if there is an intention really to steal them, that would be ordinary larceny. Larceny is often divided into various degrees. Thefts of larger amounts are called grand larceny, but the taking of smaller amounts, petty larceny. Only grand larceny is a felony, and petty larceny is usually regarded as a misdemeanor. The intention to steal the property taken must accompany the taking in most cases, and the property must be personal property and must belong to another. Larceny is one of the more common crimes and the amount of property stolen each year in the United States totals an enormous sum.

In addition to the foregoing crimes there are certain others which are classified as felonies by some states. In other states they are called misdemeanors. One of these is forgery. Forgery is the crime of altering a written instrument with the intent of defrauding another person. Apparently the instrument so altered must impose a legal liability before the act of altering constitutes a forgery. Raising the amount for which a check is written is forgery, as is also the changing of the signature of the person who made the check. Counterfeiting money is also a felony in most states, and is closely associated with "uttering" counterfeit money, which is the crime of passing the money into circulation. Perjury is often a felony and consists of knowingly telling a falsehood while testifying in a judicial proceeding. Bigamy consists in having more than one wife or husband at the same time, and is sometimes classed as a felony. Kidnapping is a felony in many states, and the same is true of conspiracy. This is the combination or agreement of two or more persons to do some illegal act or accomplish some legal end by illegal means. In conspiracy it is not necessary to accomplish the intended act to make it a crime, but the agreeing or combining is in itself sufficient to be criminal.

3. Misdemeanors

Offenses usually treated as misdemeanors and only occasionally as felonies are assault and battery, bribery, unlawful assembly and riot, breach of the peace, and knowingly receiving stolen

goods. The large number of petty violations of city ordinances and regulatory laws passed by the state legislatures are misdemeanors. False imprisonment, which is the unlawful restraint by one of the personal liberty of another, is a misdemeanor in some states, as is mayhem. Mayhem consists in violently depriving another of the use of any of his physical members, such as fingers, legs, etc. A common nuisance, such as the maintenance of conditions which threaten to injure the peace, health, or morals of the people in the community, is also a petty crime. Libel, the printed defamation of a person, is a misdemeanor and consists in writing something false about another person which may injure his reputation or bring him into contempt and ridicule in his profession. To constitute a libel, the writing need not be published in a paper in the ordinary sense but must be brought to the attention of persons other than the injured party. There are numerous other crimes besides these, but those mentioned are among the more common ones.

It should not be thought that it is always necessary actually to commit some act in order to have violated the criminal law. To attempt to commit some crimes is in itself a crime. And to have aided another in the commission of a crime or in escape after the commission of a criminal act is also a crime. Persons guilty of giving such aid are called accessories to the crime. On the other hand, not every person who commits acts prohibited by law is a criminal. Neither a small child nor an insane person is treated as a criminal, even though they commit prohibited acts, because they lack the necessary criminal intent.

The organization of the agencies of law enforcement, as has been pointed out earlier, is divided into the apprehending, prosecuting, judicial, and correctional branches. The work of police, prosecutors, and correctional officers, and the manner in which they correlate with the judicial branch has been dealt with in the chapter on law enforcement. The particular phase of law enforcement to be discussed here is that of the steps connected with court procedure in criminal cases. But inasmuch as court procedure in this field is so closely bound up with the work of the

police, the preliminary subject of apprehension has been included in the outline presented below.

Procedure in criminal cases

Civil actions are brought by the injured party; but in criminal cases the initiative is taken by the prosecuting officer who acts for the state. Some private individual may take the first step by informing the officers who are charged with the enforcement of the law; but in any event the first formal step is taken by some officer of the law or some person acting under the authority of law.

1. Arrest

Usually the first step in any criminal case is to apprehend or arrest the criminal. A person may be arrested with or without a warrant, depending on circumstances. A person who has committed a crime may be arrested by an officer or private person who has seen him commit the crime, although the rules in the states vary somewhat as to what crimes justify an arrest by a private person. If an officer has good ground for believing that a person has just committed a serious offense he may also arrest the person, even though he did not see the commission of the offense; and in a few cases a private person may also arrest in such cases, but usually he may not. Private persons assume considerable risk in these cases because, unless very good reason exists for thinking that a very serious crime has been committed, he may be sued by the apprehended party for false arrest. Thus far we have discussed arrest without a warrant. Arrests are often made on warrant, that is, by virtue of an authorization issued by a judicial officer upon proper complaint by some officer or private party.

2. Preliminary hearing

The second step in a criminal case is to bring the arrested person before some court or judicial officer who determines whether there is any probable cause for committing him to jail until the case can be investigated further. No decision on the question of the guilt of the arrested person is made at this stage. For all ordinary crimes, and even many serious ones, a money security is accepted to insure the return of the accused person for trial if he should be brought to trial, and if this is furnished he is given his freedom. This security is called "bail." If the per-

son for whose appearance this bail was given does not present himself when he is wanted for trial, the security is forfeited to the state. The right to have bail has been much abused in recent times, and judges have been too lenient in allowing persons who have committed several serious offenses to go at large by having friends or professional bail-givers put up security for their appearance at the trial. In some of the larger cities there are persons and companies who make a business of "going bail" for persons charged with crime. Too often it happens that inadequate security is required, and that the merits of the question of whether the person should be released upon bail of any amount are not considered at all. No compulsion may be used to make the person answer questions during the preliminary examination which takes place before some justice of the peace or other inferior judicial officer. In some instances this rule is violated, however, and this is particularly true where the person is not effectively represented by counsel from the beginning of the procedure against him. The use of arbitrary and cruel methods to obtain information from the accused at the preliminary hearing is referred to as putting one through the "third degree."

3. Accusation

The third step is to accuse the person formally of the offense which he is supposed to have committed. This may be done in one of two ways. The method used for all serious offenses in most states has been that of indictment by a grand jury. The grand jury is a body of citizens selected at the beginning of the term of court from the inhabitants of the community. This jury considers the evidence against the suspected person but does not hear his side of the case at all. All that the grand jury has to determine is whether there is sufficient evidence to warrant bringing the person to trial. Is there a probable guilt on the basis of the evidence presented against the person? If there is, the grand jury indicts him. If not, it does not indict him. The proceedings of the grand jury are secret. It may attempt to gain information on its own initiative or it may rely solely on the information which the officers of the law have been able to secure. The prosecuting attorney collects this evidence and aids the grand jury in

The grand jury

its work. The grand jury consists of from thirteen to twenty-three persons at common law, and the decision it makes may be reached by majority vote. If the grand jury thinks there is sufficient evidence to warrant bringing the man to trial they return what is known as a "true bill," or an indictment, which specifies the crime, the place of commission, the time of the same, and many of the known details concerning it.

The grand jury is not used so much now as formerly because of the difficulty in obtaining information, the need for quick action, and the difficulty of securing able men to serve on it. In many states it is seldom used; in many others it is only a rubber stamp for the prosecuting attorney, and in still others it has actually been corrupt and negligent in its work. However, it has served a useful purpose and when composed of conscientious and able men, safeguards the work of the officers of the law, and may at times act properly as a supervisor of the prosecuting attorney.

The information

Many states now allow the prosecuting attorney to file an information against a person suspected of having committed a crime, and this instrument contains a statement concerning the nature of the act supposed to have been committed, and the time and place of its commission. Some states allow an information to be used in quite serious crimes also; and the tendency is for the states to use this process more and the grand jury less as time goes on. The information tends to place still more of the responsibility for the enforcement of the criminal law on the prosecuting attorney.

4. Trial

After an information or an indictment has been filed against the accused person, he is brought before the court. He is then informed of the nature of the charge against him and is asked whether he wishes to plead guilty or not guilty. If he pleads guilty, there is no further trial, but the judge imposes a sentence at that time or at a later date. The accused person may employ counsel, and even though a plea of guilty is entered, counsel may make a short statement to the judge in which circumstances may be set forth which might soften the sentence imposed, because

they show that the accused person did not commit the crime in its most aggravated form.

Selection of jury

If a plea of not guilty is entered, the date for trial is fixed. The next thing in order is to select a jury. This is done in much the same manner as in the trial of civil cases and need not be described again at this point. This jury is often called a petit jury, as distinguished from the grand jury. As a result of the prevailing rules governing the grounds on which jurors may be challenged and the large number of challenges permitted, it is sometimes very difficult to secure a jury to try a particular case. This is so if it has attracted any notoriety before the trial is begun, because knowledge of, or opinion concerning, phases of the case are sufficient to disqualify. The result is that there is great delay in impanelling a jury and the trial is thus postponed. When the jury is finally drawn, it will probably be composed of men and women who are scarcely intelligent enough or educated enough to understand or comprehend the nature and significance of the whole procedure; and in a large number of cases the evidence and arguments concern matters of such technical nature that it is impossible for the type of men and women on the average jury to pass any intelligent judgment upon the dispute. Not only is justice often delayed, but the whole process is exceedingly expensive. For serious offenses a jury of twelve men is still required in many states, but for minor offenses an eight- or six-man jury is often permitted.

Prosecutor's statement to jury

The jury being summoned and sworn in by the clerk, the trial opens with a statement by the prosecutor of what he will attempt to prove against the accused person. The prosecuting attorney calls his witnesses one by one, and examines them in the presence of the judge and jury. Photographs and other exhibits may also be shown to the jury. The examination by the prosecutor is called the direct examination. When he has finished asking questions of the witness, he asks the defending lawyer whether he has any questions he wishes to ask. If the defendant's lawyer wishes he may do so, and this process is called cross-examination. There are many technical rules governing the admission of certain evidence

Examination of witnesses

and the exclusion of other kinds, and it is for the judge to decide in each case whether the particular evidence should be allowed to go to the jury for their consideration in reaching their conclusion as to the guilt or innocence of the party. If a lawyer does not think a bit of evidence or testimony should be admitted, he objects; and if the court thinks his objection sound, the objection is sustained; but if the judge thinks it unsound, he overrules it. If the lawyer is not satisfied he files an exception, and such exceptions may be the basis for asking for an appeal later on.

Attorney's speeches to jury

The attorney for the accused person calls his witnesses as soon as the prosecuting attorney has finished his side of the case. The defendant's attorney directly examines those witnesses he wishes to call, and the prosecuting attorney may cross-examine them. When all the testimony has been given, the prosecuting attorney makes a speech to the jury in which he sums up the evidence presented and attempts to influence the jury to convict the accused person. These speeches are sometimes very elaborate and emotional, but this is perhaps less true now than was the case during the past century. Following the prosecutor's discourse to the jury, the defending attorney makes his jury speech. This address is so framed and delivered as to work upon the sympathies of the jury in the hope that it may cause them to bring in a verdict of not guilty, or if they find him guilty, to find him guilty of as small an offense as is possible. After the arguments of counsel have been completed, the judge delivers a speech to the jury in which he summarizes the evidence, states the rules of law which govern the case, tells the jury how they are to proceed with their work and the possible verdicts they may return. This speech by the judge is called a "charge" to the jury. The charge by the judge will sometimes greatly influence a jury which has great confidence in, and respect for, the presiding judge. But state judges are rarely permitted to comment to the jury upon the evidence. This is an unfortunate restriction, and often deprives the jury of wise and pertinent suggestions concerning the value of the various parts of the evidence.

Judge's charge to jury

The jury retires to deliberate in secret as soon as the judge has

finished his charge. The sheriff or a deputy guards the room in which it conducts its deliberations. The work of the jury consists in going over the evidence which has been presented to them and deciding from it whether the prisoner is guilty or not guilty. If a unanimous vote of the jury is required, it often takes a long time to secure action by them. One man or woman may sometimes prevent them from reaching any decision. This is called "hanging" a jury. The jury is presided over by a foreman, and when a conclusion is reached they march into the courtroom and the foreman announces the verdict to the judge. If the jury is unable to agree upon any decision after a long period of deliberation, the judge may discharge them and order a new trial. In many states the requirement of a unanimous verdict has been dispensed with, and a three-fourths or five-sixths majority is all that is needed to convict, particularly for less serious offenses.

Jury deliberations

The verdict

The jury does not fix the sentence which the accused shall receive, even though it finds the man guilty. The judge is empowered to sentence the criminal, and the circumstances of the case will be taken into account in fixing the length of the sentence or the size of the fine. The prisoner is brought before the judge after the verdict has been returned by the jury and the judge pronounces the sentence. The usual sentence imposed for criminal offenses used to be a fixed number of years in some place of detention. The judge was sometimes given some latitude in awarding the sentence by a provision in the statute fixing the minimum and maximum penalties, and the judge could select any period which fell within these bounds. The tendency has been to introduce more flexibility than was formerly the case in the fixing of penalties. It has come to be recognized that legislatures cannot make scientific awards of penalties for whole classes of acts, nor is it always possible to tell whether one act should be penalized more or less than another. After all, it is the person who commits the act, not the act itself, who is to be punished, and for that reason the punishment should be based to some extent on the person as well as on the nature of the act. When sentence is pronounced, an officer is ordered to

The sentence

take charge of the prisoner and place him in such place of detention as has been mentioned in the sentence.

Methods of releasing persons convicted of crime

There are several methods of relieving a person convicted of crime from serving the term or paying the fine imposed upon him[8] by the court. One of them is pardon. A pardon is an executive act of clemency whereby the convicted person is freed from the legal consequences of his crime. It does not wipe out the guilt but wipes out the legal consequence attendant upon guilt. Pardons may be either absolute or conditional. Under a conditional pardon the prisoner is freed provided he agrees to observe certain stipulations made in the pardon.

1. Pardon

Closely associated with pardon is commutation, which consists in lessening the penalty imposed for crime. A reprieve is a temporary suspension of the sentence. Reprieves are granted when there are unusual circumstances which warrant delay in the execution of the sentence, such as, for example, the discovery of new evidence after conviction. An amnesty is a legal pardon to a group of persons and is usually granted by legislative act.

About three-fourths of the states give the governor complete power of pardon. In many of these states there is also a pardon board which is only an advisory board, whose advice the governor may but need not follow. The remaining states now have pardon boards which share the power of pardon with the governor, the latter having only one of several votes on the board. The practice of granting pardons varies considerably from state to state. Governors sometimes follow closely the recommendations of pardon boards, while at other times and in other states the recommendations of such boards are frequently ignored. About two-thirds of the states provide that reports on all pardons be made to the legislature at stated times.

Pardons are decreasing in number, the popular notion to the contrary notwithstanding. But there are many criticisms constantly being made of the present pardon practice. (1) It is

[8] E. H. Sutherland, *Criminology* (Philadelphia, 1924), chaps. 21–23. See also the admirable discussion in J. L. Gillin, *Criminology and Penology* (New York, 1926), chaps. 22, 24–25.

argued by many, not without some reason, that the pardon is often available to persons of political influence. (2) The effect of pardons upon prisoners is bad because they are more interested in securing a pardon than in reforming their habits of life. (3)The effect upon the courts of a system of pardons is said to be bad, for judges will be careless in the imposition of sentences. Sometimes they will gratify powerful groups of people who demand heavy penalties regardless of the merits of the case, thinking that the pardon power will relieve the severity of the sentence. (4) Finally, it is pointed out by many, including persons who have been governors, that the burden of the pardon function is too great to place upon the shoulders of the chief administrator of the state. It is also observed that the governor does not have the time nor means for determining whether particular cases merit pardons or not. This is one of the strongest arguments for placing the pardon power in a board whose decision should be final.

Pardons are given for a great variety of reasons, and the longer and more severe the sentence, the more likely it is that a pardon will be granted. There is no doubt that there have been great abuses of this power on various occasions. A need for some system of taking care of possible miscarriages of justice and also of keeping the administration of the criminal law apace with changing public opinion is evident, however. Public opinion, to which the governor will be likely to respond much more quickly than the courts, sometimes demands a change of policy in the administration of the criminal law long before courts and legislatures are able to adapt themselves to changed standards. Perhaps the greatest defect in pardoning systems, as at present operating, is that there are no satisfactory methods for determining the question of whether a pardon should or should not be given in a particular case. The individual, and not the penalty or the crime committed, should be the basic factor in any intelligent system of pardon. Until there is found some more comprehensive means for securing information concerning the individual who seeks pardon, and ascertaining his ability

to enter into the normal activities of an ordered society with safety to himself and his fellow men, the granting of pardons must remain what it has been for centuries, mostly guesswork.

Provision is also made in a number of states for relieving persons convicted of crime from paying the penalty imposed upon them by means of a variety of good-time, indeterminate sentences, and parole laws. These laws are usually enforced and applied by some administrative board. The release of persons sentenced by a court is regarded as an administrative function under these statutes.

2. Good-time laws

Many states allow prisoners to be released before the expiration of the term for which they were originally sentenced because of good behavior during confinement. The reasons for these laws, called "good-time laws," are various. They help to solve the problem of prison discipline, encourage a desirable attitude in the prisoner toward prison work, and at the same time lessen the severity of penalties. The administration of such laws may tend to become mechanical, and in so far as they are predicated upon a fixed sentence and arbitrarily determined without reference to the individual concerned, the value of good-time laws is at best problematical.

3. Parole and probation

A person who has been released from a jail or prison after he has served part but not all of his sentence, on condition that he will properly behave himself and remain under the supervision and in the custody of some state agency until his final discharge, is said to be on parole. Parole differs from probation in that a part of the sentence is served before the person is released, whereas in probation no part of the sentence is thus served. Parole refers only to the penalty of imprisonment. It does not carry with it a "remission of guilt" such as is true of a conditional pardon; and therein lies the difference between the two. The honor system allows the person less freedom than does the parole, and the latter is of statutory origin, while the former is not. A parole reduces the length of time served in an institution. State supervision is maintained over the liberated person and some assistance given to him, such supervision and assistance being partly to keep

informed concerning him and partly to assist him to live up to the conditions on which he was released.

Practically every state now has some system of parole, but the extent to which it is used varies greatly from state to state. Some states release as high as 90 percent of the persons committed to prison, while in others as few as 12 percent are released. In local penal and reformatory institutions there are often boards of parole in charge of releasing and supervising prisoners. In many states there is a board of parole; but these boards meet once a month or at similar fixed intervals, and the members are seldom required to devote their entire time to this work. In some cases their work is almost perfunctory, although in other states they perform the task well. The problem of supervising and aiding persons released on parole is a difficult one; and before an intelligent solution of it can be reached, full-time officials must be employed to take charge of the system, and more scientific methods must be devised for extending or limiting the effects of the system as it now operates.

Restrictions on parole

Several limitations on the extent of parole are found in the statutes of many states. (1) Parole is often restricted to persons committed on indeterminate sentences, thereby being inapplicable to serious offenders. (2) A part, one-third or one-fourth, of the sentence must be served before the prisoner is eligible for parole. Some states require that a fixed number of years must be served before those convicted of certain types of crimes can be paroled. (3) A guarantee of employment is often required. These three limitations are not the only ones to be found but they are the ones commonly prescribed. They are not satisfactory, and it is questionable whether the legislature of a state should attempt to classify prisoners who are to be eligible for parole. Prisoners can hardly be dealt with as classes, but must be dealt with as individuals. The test for parole should be whether the particular prisoner can be trusted with his liberty under some supervision, and whether he will use his freedom for useful purposes. Some states seem to parole all prisoners as soon as they are eligible unless some good reason appears for not doing so. In the

present state of information regarding criminology, the best that a parole board can do is to make as careful a guess as possible. It must be remembered that good conduct in a reformatory institution is not always an accurate or complete test of fitness for release. Although the system of parole is apparently a step forward in the treatment of persons of antisocial tendencies, much remains to be learned about its operation and effects before it can be utilized with any certainty of success.

Judicial Review

The judicial branch of state government is not, however, concerned solely with the adjudication of private rights between individuals, or in the enforcement of the criminal law. The courts in American states are also given certain powers of peculiar political significance: (1) the enforcement of constitutional and statutory limitations upon administrative officers, and (2) the enforcement of constitutional limitations upon the work of legislative bodies.

Review of administration

Much of the work of law enforcement is done by administrative officers without the aid of courts. This is true because most people obey the orders of administrative officers or boards without question. But, of course, in the final analysis the courts must be called upon if the law or administrative order is resisted by the individual. With the ever-increasing complexity and extension of administrative work in the states has come the necessity for preliminary investigations into the facts of various situations by administrative bodies. This is particularly true in the field of industrial and social regulation. It is now very common to allow these bodies to make final findings of fact and to permit them to call in witnesses and make extensive and intensive investigations into the many facts bearing upon various phases of the subject which has been brought under administrative regulation.

But the decisions of state officers and commissions on points of law are never final. Appeal to the courts is provided for on points of law, and for this reason the courts are often called upon to review decisions of these fact-finding commissions. When ad-

ministrative commissions were first established, the public did not trust them, and appeals from their decisions were very frequent. As time goes on, it is probable that people will come to have the same respect for these quasi-judicial bodies that they now have for courts. They are apparently indispensable under present conditions, but it is nevertheless true that the work of the courts has been increased because of appeals from these commissions. On the other hand, it is probable that the burden on the courts would have been infinitely greater if it had not been for the establishment of these bodies, because the task of investigating the many technical phases of cases which come up in the course of regulating industry is tremendous, and courts are ill-suited to perform that duty.

This right of judicial review of administrative action which is available to a person claiming to be injured by such action, extends not only to administrative boards or commissions but also to any individual officer engaged in state administration. Thus, for example, the citizen may appeal from the act of a policeman just as he may appeal from a commission's finding, if the constitutional rights of the individual are invaded. Of course, American citizens often think that many more of their constitutional rights are being invaded than is true in reality. At times the courts, in taking cognizance of the complaints of citizens, may seriously interfere with the work of the administrative department by forbidding certain practices which the administrative agencies of state government are using. It should be remembered, however, that a highly organized administration has a tendency to undervalue the rights of the individual, but few would maintain that American administrative organization has reached that point as yet. In most instances, state administration is oppressive because it is ineffective rather than because it is overeffective.

Functions entrusted to administrative officials must be performed in accordance with the statutory provisions whence the power to perform these functions is derived. To the courts is given the task of deciding whether executive and administrative officers act within the limits of their constitutional and statutory

powers. The question whether the legislature has acted within its constitutional power in entrusting an executive officer with a particular function is sometimes a troublesome one because of the doctrine of the separation of powers. Legislatures occasionally attempt to delegate judicial or legislative functions to the executive branch of government. In such cases, the courts are likely to be called upon to decide whether this is permissible. Thus it is that the courts are engaged to some extent in the executive and administrative departments of state government.

Attitude of courts

Earlier in the history of the growth of administration in this country the courts were very strict about these matters, but they are now tending to recognize the demands of efficiency in government. Hence the legislature is allowed a greater degree of freedom in the organizing of administrative agencies and the granting of sufficient powers to them to carry on the work of state government in an efficient manner. Usually the protection afforded the individual by judicial review of administrative officers is of a negative nature and it seldom takes the form of compelling officers to act affirmatively in the enforcement of state policy. Courts rarely take the initiative in the enforcement of state policy, but, as has been indicated previously, it is true that in this negative way they can sometimes influence the enforcement of such policy by the administrative agencies of the state.

There are also certain procedural limitations imposed upon administrative boards and officers having quasi-judicial functions. There must usually be a hearing for all interested parties and also sufficient notice to them that a hearing is to be held. The facts must, of course, be sufficient to support the conclusions, and the proceeding must be conducted in an orderly way, though it need not be so formal and technical as the procedure required in a court. But usually there must be a chance to examine witnesses and to inspect documents and otherwise introduce evidence before the commission or officer. In a few instances administrative action may be summary in form, but the courts restrict these to cases where special need for speedy action exists.

One of the most important functions performed by state

courts is the function of deciding whether legislative enactments are constitutional or not. When we speak of laws being declared unconstitutional, we usually refer to an act passed by the legislature, i.e., a statute. And when we refer to a statute as unconstitutional, we mean that the rule or the principle enunciated in the statute is contrary to the rule or principle found in the state or federal constitution. These rules often take the form of express limitations on the power of the legislature. State courts may declare a state law unconstitutional because it is thought to be contrary to the state constitution; but they may also declare a state law unconstitutional on the ground that it is contrary to the United States Constitution. The occasion of courts declaring laws unconstitutional arises because they must determine what the rule of law is in a given case. The court is confronted with two rules—one contained in the constitution, the other contained in the statute. The state constitution being of higher character as binding law than the statute, the courts must necessarily follow the constitution and refuse to follow the rule laid down in the statute. When a law is declared unconstitutional all that is done by the court is to refuse to apply the rule established in the statute. The statute is not repealed by the court; only the legislature can do that. A statute is declared unconstitutional only when some person comes into court or is brought into court because of a dispute, and it appears that some right of his, or power of the government, depends upon the statute and constitutional provision in question. The courts do not have the power to declare a law unconstitutional at any time they feel like doing so. There must be an actual case being litigated before the court can touch upon the question of the unconstitutionality of the statute involved.

Review of legislation

But the process whereby statutes are declared unconstitutional is not so simple as the foregoing paragraph would seem to indicate. The principle or rule which is embodied in a constitutional provision is not always easy to define. It is sometimes equally difficult to tell what the rule is which is contained in the statute. The constitutional provision may be worded very vaguely, and

the result is that the courts will have to decide what the rule is as best they can. The way in which judges make up their minds as to what the principle or rule of a constitution is on a particular point is exactly the same as the manner in which anybody else makes up his mind on such a question. The judges try to find out what the words as they are written really mean, if anything; and when the meaning is not clear, they attempt to find out what the framers of the constitution might possibly have meant when they used these words. In trying to discover this, the judges will look to see what ideas these men expressed on this subject in the course of debates on the floor of the convention, or will try to find the object of the provision in general, or what seemed to be the general attitude of the people at that time toward the subject involved in the section of the constitution which they are trying to interpret.

But after all this has been done, it is still very difficult in many cases to tell just what the section means. Then the judges will have to read into it very cautiously what they think it should mean. This is to say, of course, that the section in question is given an interpretation which is influenced by the views of the judges on the various subjects concerned in the cases arising under this part of the constitution. It sometimes happens that the vague portions of the constitution are those which treat of subjects upon which there is a radical difference of opinion among the people of the state. When that is true, it is to be expected that the people who think that a different principle should be read into the section of the constitution involved in a particular case will criticize the court for adopting the interpretation it does. So it is that people criticize the courts for their exercise of the power to declare laws unconstitutional. Those people who agree with the court's interpretation of the constitution on a given subject think that the court is quite right in exercising the power. In the next case it may be that the positions will be reversed, and those who were in favor of judicial review of legislation in the first case will be against it in the second. It depends upon which side of the fence one is on. If his beliefs or interests are better

advanced or safeguarded by having the law declared unconstitutional, he is likely to favor the use of the power; but if his interests and beliefs demand that the law be declared constitutional, he will naturally criticize the court for declaring it unconstitutional. It is because of this that vague phrases in the constitutions of the states should be eliminated. They place upon the courts too great a burden of responsibility.

Some state courts have been very wise in their interpretations of constitutional provisions, but others have been very mechanical in their attitude and have read their own opinions into the words of the constitution even when their meaning was quite clearly opposed to that which the words would ordinarily have, and which the framers must have intended. Most people feel that when the meaning is not clear from the words themselves, the courts should pay some heed to the wishes of the people as represented in the legislative and executive branches which have approved the law. The reason why we have five-to-four decisions is just the one we have mentioned—that people do not agree on what shall be the meaning to be given the words of the constitution.

The number of state laws which have been declared unconstitutional is quite large, though small when compared with the number of those which have been held constitutional. But the difficulty is that the few cases which arouse public opinion are just those which have a widespread interest and wherein the people and judges are divided among themselves over the question of the interpretation to be given the constitution. When large numbers of people have interests at stake it is only to be expected that there will be much debate pro and con.

Not only do the courts declare laws unconstitutional because they embody rules and principles which are contrary to those thought to be enunciated in the constitution, but they also declare them unconstitutional because they have been passed by the legislature without regard to the rules of procedure to be followed by the legislature specified by the constitution. Many laws are declared unconstitutional for this reason, and it is very

unfortunate that this is so. The practice has led the courts sometimes to evade their duty by formulating a doctrine that whatever the journal of the legislature says will be taken as final on the question of what procedure was followed. The belief was expressed in the chapter on legislation, and is repeated here, that it is a mistake to put so many rules of legislative procedure in the constitution.

On the whole the courts of the American states have done their work well, and this estimate is perhaps more true of the way in which they have performed their function of supervising the administrative officers of the state and of enforcing the constitutional restrictions upon legislatures and legislation, than of the way in which they have done the work of settling ordinary civil and criminal cases. The great task of the courts is not to enforce constitutional limitations, but to try civil and criminal cases, and they must stand or fall upon their record in this branch of their work. Although they have done their work in as intelligent a manner as probably could be expected of them, there is, nevertheless, need for much improvement before the courts can hope to gain that confidence of the people at large which is so essential to the effective and just administration of the law and the orderly conduct of government.

Advisory opinions

As a general rule the supreme courts of the states will not pass upon the constitutionality of any law or upon the legal significance of any given set of facts unless there is actual dispute which culminates in a case such as may be presented to the court. But in about one-eighth of the states the giving of advisory opinions by the state supreme court to the governor or legislature is authorized by the constitution or by statute and custom. The governor or the legislature may submit a set of facts to the court and ask for an opinion on them. Sometimes the court is asked to render an opinion on the constitutionality of some proposed law which is being considered by the legislature, or to advise the governor on the extent of his power to act in a certain situation confronting him as chief executive. The opinions thus given by the court do not have the force of an actual decision in a case

which might subsequently arise on this same point, but of course such an opinion will be very persuasive with the court in the later case.

There is considerable difference of view over the wisdom of having advisory opinions given to the governor and the legislature. In favor of the practice it is pointed out that proposals which would otherwise be passed only to be later declared unconstitutional by the court would be abandoned by the legislature on the advice of the court, and that the court would be saved much work and time in this way. The practice of rendering advisory opinions exists in Massachusetts, and fewer laws are declared unconstitutional in that state than in most states where the advisory opinion is not used. But opponents of the practice argue that this is not accounted for by the use of the advisory opinion. The main argument in opposition is that the court renders its opinion in the abstract without the benefit of the argument of counsel. Another criticism is that it tends to draw the courts too close to the political side of the actual work of legislation and administration, and that the court will be subjected to political influences to a greater degree than it is at present. A further objection is sometimes offered that the court will not feel free to declare the statute unconstitutional after it has once given an advisory opinion in which the measure, when pending in the legislature, was said to be constitutional. Of course, it is not meant that the court should become the attorney general of the state by the introduction of advisory opinions, nor would the court be expected to give an opinion except upon important matters pending in the executive or legislative branch of the government. The court would perhaps not answer questions of form and procedure with regard to legislation, but would leave those to the governor and legislature, who would perhaps seek the advice of the attorney general, as heretofore has been the practice.

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CHAPTER 20

RURAL LOCAL GOVERNMENT

As has been pointed out previously, we have in the United States three levels of government—federal, state, and local At the local level there are two well-known and fairly distinct types of governmental organization. One of these we call, for convenience, rural local government and the other urban local government Rural local government is typified by counties and townships, whereas urban local governmental units consist of cities, towns, villages, and boroughs. There is no clear line of demarcation between rural and urban areas of local government Densely populated areas are usually included in urban units. There are many exceptions, however, and even in terminology there may be confusion. The term town, for example, has two distinct applications as will be pointed out below. In this chapter attention will be directed primarily toward rural local government and in the next chapter, urban local government will be discussed.

Functions and Functional Relations

Distribution of functions: state or local

There is to be found in various quarters a wide divergence of opinion with respect to the proper distribution of the functions of government between the states on the one hand, and the several areas of local government on the other. Certain categories of activities have been set down by various persons and designated as being "naturally" local in character. Accepting these categories as beyond question, their proponents proceed to declare that action looking to the transfer of any of the functions from local to state authorities is an invasion of

the "natural" and "inherent" rights of self-government. Even the extension of state control over the performance of such functions by the locality is branded by them with the same stigma. Unfortunately for the force of such contentions, convincing proof is lacking that any such particular right is, as a matter of fact, either natural or inherent.

The fact seems to be that historic forces combined with the exigencies of recent circumstances have brought it about that certain functions are at a given moment assigned to the state government, whereas others are vested in local authorities.

It is generally conceded today, for example, that the regulation of banks and the care of the mentally ill are matters of general interest which are best left to state administration. On the other hand, the administration of outdoor poor-relief, the maintenance of minor roads, and the management of public libraries are matters primarily of local interest and should be left to local authorities. Since 1933, the financing and supervision of outdoor poor-relief has shifted away from the local level to a marked degree. Between these is a wide range of services concerning which no one can say with finality that they are solely or preëminently either of state or local interest and hence should be definitely assigned to either authority.

Transformation of functions

Moreover, it is well known that matters which at one period are universally viewed as being of local interest assume in course of time a state-wide importance and hence call for state action. Not many years ago, the maintenance of roads and the generation and distribution of electric energy were matters of purely local interest. Today, the development of the automobile and of improvements in electric transmission have made both arterial highways and high-tension power lines objects of state-wide interest and of state action. Less frequently the shifting of interest is in the opposite direction from state to local. At the present time, however, there is in some quarters a movement to transfer the function of higher education at the junior-college level out of the hands of the state and place it under local administration, subject merely to state control. To

attempt, then, to set up any categorical classification of functions into state and local is bound to prove futile. Apparently the functions or "rights" of local self-government are those which upon grounds of efficiency and social expediency the people of the state have for the time being seen fit to repose in the local rather than the state authorities.

Federal-state and state-local relations compared

If a comparison is made of the relations existing between the federal government and its subdivisions, the states, on the one hand, and between the several states and their subdivisions, the counties, townships, and cities, on the other, two distinct points of difference appear.

First, it will be discovered that the relation between the government at Washington and that of the states is federal in character. This means that the states are recognized as distinct entities and that an apportionment of functions and power between the central and state governments is made in the constitution. Thus the sphere of action of the states is protected from encroachment, save by the process of constitutional amendment.

Within the states an entirely different situation exists with respect to the relation of the state government to its various subdivisions. Save for certain constitutional exceptions to be considered presently, it is a definitely established principle that the subdivisions of the state owe their origin, organization, and continued legal existence to the will of the state as expressed by the legislature. In other words, the unitary rather than the federal system prevails in state government.

A second point of distinction is that the government of the United States does not depend to any great extent upon state governments to effectuate its purposes. The central government maintains within every state its own organization and personnel to collect its revenues, enforce its regulations, handle its mail, and prosecute and try offenders against its laws. Until quite recently it was true that in the matter of elections alone did the federal government make use of the organs of the state to do its work. It is to be observed, however, that in the carrying out

of the program of social security legislation and the various forms of state aid, and in the prosecution of World War II, there has been some slight modification of this severance of federal and state administration.

But quite different is the situation between the state and its subdivisions. Not only are state elections conducted by local officials, but state taxes upon property are collected by local tax gatherers. The administration of elementary and secondary education, the enforcement of the health and many other police laws for the protection of persons and property, the recording of titles to property, the administration of the estates of deceased persons, and the administration of petty justice are examples of state duties entrusted wholly or in part to local authorities. Each area of local government, then, stands in a dual position in that it serves at the same time as an area of local self-government and as an administrative district of the state. This duality of function must always be borne in mind when questions of local "self-government" and "home rule" are under consideration.

Principle of local self-government

Although, under the general theory of our law, the position of all institutions of local government is one of complete subserviency to the power of the central government of the state, practical considerations have led to certain modifications of the rigorous application of this rule. There exists among English-speaking peoples a conviction that it is desirable to foster a general public interest in government and to develop everywhere a lively civic consciousness. To that end there has developed the practice of entrusting to each local area, so far as is consistent with the protection of the wider interests of the whole community, the direction of those affairs with which it is primarily concerned. Confessing the practical wisdom of this idea, the constitution-makers in a considerable number of states have recognized certain rights of counties, townships, and cities, and have set up specific constitutional restraints on the power of the legislature to work its will upon these areas of local government. In recent years this has been especially the case with respect to cities.

Constitutional protection of localities

1. Special legislation limited

One group of constitutional limitations upon legislatures which works as a protection to local units of government is that which limits special legislation in general. The nature and extent of these limitations have already been discussed in Chapter 9 dealing with the powers of the legislature. Some of these limitations seek to eliminate special legislation entirely, while others limit its enactment only in certain particulars with respect to subject matter or method of enactment. Local areas are sometimes guaranteed the right to select their own officers by popular election without state interference. Sometimes local offices may not be abolished or the salaries reduced during the incumbency of an officer. Another group of limitations has for its object the preservation of the integrity of the county either territorially or as a permanent and distinct organ of government. Most frequently of all, the legislature is forbidden to alter county lines or to divide counties without the consent of the voters of the areas concerned. In a number of the newer states, no county can be created to contain less than a specified area, commonly fixed at four hundred square miles, or less than a specified population. Sometimes county seats can be removed only with the consent of the voters of the county. Similar restrictions with respect to townships and cities are seldom met with in constitutions.

2. Territorial integrity preserved

3. "Home rule" secured

A third group of limitations on legislative power over local government is one which has attracted widespread attention especially in connection with city government. This includes the so-called "home-rule" sections which appear in the constitutions of a number of states. These provisions formerly designed to confer upon cities power in varying degree to frame their own charters and to legislate freely upon all matters of purely local concern have, in several states, been extended to counties and hence stand as barriers against legislative action affecting these areas. Some aspects of this tendency to demand and to secure increased powers of "home rule" have been considered in previous paragraphs of this chapter.

Administrative development

As a result of the study of the chapters devoted to the administrative services performed by the state, certain facts will have been observed which have a bearing upon the subject of

local government. In the first place, it will have been seen that a considerable number of the functions which are now performed by the state had their beginnings as matters of purely local concern. Such, for example, is the regulation of public utilities. Again, it will have been observed that the role now played by the state with respect to a large number of public services is merely a supervisory one, and that the actual administration of the service has been left to the local authorities. The administration of health and of elementary education suggest themselves as examples of this. In the third place, it will be found that where the state has actually assumed the details of administration, it is generally in matters with respect to which the advantages of highly specialized professional treatment could best be secured by state action or where distinct gains in economy and efficiency might be effected by large-scale operation. Examples of this are the care and treatment of the defective and dependent classes, and the carrying on of scientific inquiry in many lines for the public benefit, or in the construction and maintenance of main highways.

Possibilities of generalization, with respect to:

Such are, in general, the relations which exist between the states and the various areas of local government into which they are divided. If one examines the functions of local government as they have been assigned by the several states, it will be discovered that everywhere the sum total of the work performed by local authorities is substantially the same. But when attention is turned to specific offices and to the actual distribution of the work of government among them, it will be found quite impossible to make general statements which will hold true throughout the country. Each state has solved these problems in its own way, by a process of historical development, by copying the institutions and methods of other states, or in some cases, apparently, by the merest chance. Under these circumstances it seems advisable to investigate first the several functions usually performed through local agencies and afterward to inquire what institutions have been set up in various parts of the country to perform them.

1. Functions

2. Institutions

Functions of local government

1. Taxation

The universal unpopularity of the tax gatherer is intensified when that officer is a stranger, not of the immediate neighborhood. Hence, everywhere, localities have strenuously resisted attempts to centralize the machinery of taxation. The salient features of the taxing process and the defects in its administration have already been touched upon in Chapter 14. The general practice is to vest the work of assessment of property in the smallest active unit of local government. Where the township exists as a vital institution, the assessor is usually elected in that area. He is ordinarily wholly untrained for his work and enjoys but a brief tenure of office. In states where the township does not function, the primary assessment is commonly made by a county assessor. Quite generally in urban areas as well as in some rural districts, some progress has been accomplished in placing the work of assessment on a professional or semi-professional basis.

The amount of revenue to be raised locally is determined and the levy made by each local taxing unit. It is then customary for a local financial officer of the township or county to bring together these levies and the state levy, if there is one, and to prepare a single statement of the total amount payable by each taxpayer. It is the practice in some jurisdictions for one taxing unit to collect taxes for the several units. The funds thus collected are distributed to the appropriate custodians of the several areas and to the treasury of the state.

2. Elections

The actual holding of primary and general or special elections, not only local but state and national, is in immediate charge of officials of local government. State laws provide in great detail the steps in the processes of nomination, election, and the canvass of votes, and sometimes for state supervision of the registration of voters and of the conduct of elections, but the actual conduct of these processes is in the hands of local officers. The definition of precinct lines, the preparation of polling places, the naming of election boards, the initial canvass of the vote, and in the case of local elections the preparation of ballots are all attended to either by the county or some lesser

division. Local areas also serve as organization units for political parties and are recognized as such by the statutes regulating party activities.

3. Police protection

The fact has already been emphasized in discussing the general problem of law enforcement that the ordinary duty of police protection is imposed for the most part upon local officers. From time immemorial the sheriff and the constable have been charged with the preservation of the peace in rural districts. In certain localities containing a large suburban population adjacent to a great city, as, for example, in Cook County, Illinois, there is maintained a county police resembling in its main features a city police force. The giving of general law-enforcement to state police agencies was a slow process, and most people still look to local officers for police protection. Although their chief duty is the enforcement of state law, the local officers are, in the performance of that duty, almost wholly free from state control. Besides the preservation of the peace and the apprehension of criminals, local police officers are charged with serving summonses, subpoenas, and other legal papers. As a corollary to the work of capturing offenders against the law, there is imposed on the local officers of the peace the care of the jails and other places of temporary detention.

4. Justice

Hand in hand with the maintenance of order, and indeed an essential part of that process, is the administration of justice. There has always been a popular insistence upon free and easy access to courts in the immediate vicinity for the vindication of the rights of the people and the settlement of their disputes. Large powers to this end have been conferred upon local authorities everywhere. Although it is true that in most states there are in every county or in each small group of counties state courts acting directly under state authority, there are also petty courts of a local character. It should be observed, however, that the officials of the court, not only the sheriff but the clerk, the prosecutor, and even the judge of such local state courts in many cases are the choice of the voters of the county.

Both the organization and the functions of these agencies of justice have already been enlarged upon in Chapter 18, so that further discussion is unnecessary here.

5. Public health

When, in the first half of the last century, the public health became an object of governmental concern, its care was definitely confided to the localities through the creation of local boards of health. But during the nineteenth century little progress was made in this work outside the cities. Rural health authorities maintained a nominal legal existence, but powers in this field were commonly reposed in some existing county authority acting ex officio. Their activities were for the most part confined to sporadic and ineffective action in combating outbreaks of infectious diseases, especially smallpox. Such local representatives were with the lapse of time invested not only with the duty of administering quarantine and vaccination laws, but with the reporting of diseases and vital statistics, the abatement of nuisances dangerous to health, and, sometimes, the enforcement of at least a part of the pure-food law. In some localities these broader administrative duties were delegated to a local health officer. Since the turn of the century state departments have been given an increasing measure of control over local health boards, and under the stimulus thus administered real progress has been made in some localities. Local health units, larger than the county, have been established in some states. These do not have local autonomy but are more truly state administrative units. County and district health authorities have, in some states, done commendable work in public health education and preventive medicine through the activities of the public health nurse. In some places work of this kind has profited by the substitution, as local health officer, of a public health specialist in place of a general medical practitioner.

6. Charity

Another function of government which, in many of its phases, remains in local hands is that of dispensing charitable relief. It has already been seen how groups requiring public care of specialized kinds, particularly those afflicted with disease of either mind or body, have one after another been provided

Outdoor relief

for by the state. There still remain everywhere under local care two classes: those receiving outdoor relief, and those who, though not specifically diseased or defective, stand in need of institutional care. Traditionally outdoor relief was administered by a layman, selected in many cases at the ballot box, with much extravagance and unintelligent giving as an inevitable consequence. With the institution of the social security program and the federal and state aid resulting therefrom, local governments have been enabled to employ trained social workers, and the administration of such assistance has been placed upon a more satisfactory basis. With respect to the care of those wholly and continuously dependent upon public support there has also been a progressive though not as marked development. Two generations ago it was still the practice in backward communities where paupers were few, to board dependent persons out in the private family of the lowest bidder. The abuses arising from the ignorance and greed of those who thus assumed the care of such persons led to the abandonment of the system.

Institutional care

At this point institutional care was introduced in the form of the "poorhouse." Here all those who were wholly dependent were brought together, usually upon a farm where those physically able were expected by their labor to contribute to their own maintenance. In New England the township poorhouse is still to be found, but elsewhere the county has been made the unit of institutional poor-relief. By selecting a unit of this extent it is possible in an economical manner and under competent supervision to give proper care to those who become inmates of the institution. Unfortunately it must be confessed that even in spite of the present awakened interest in social welfare problems and a considerable degree of state supervision, many of these county institutions fall far short of the standards set by state institutions of similar character. In many populous counties throughout the country there has been a great improvement brought about through a segregation of special classes of

dependents, and separate institutions similar to those maintained by the state have been established for each group.

The new era which opened in welfare activities with the passage of the Social Security Act of 1935 brought an expansion of local as well as state action in this field. The state legislation enacted to take advantage of the federal grants-in-aid provided in most states for placing the acting authorities under close state supervision. The local welfare authorities administer the payment of allowances to the aged, to the blind, and to dependent children, whether in their homes or in institutions. They also are charged with the care and treatment of dependent, neglected, and handicapped children, and children in danger of becoming delinquent, and such other welfare activities as the state authorities may stipulate. These services are, in a typical state, administered by a local welfare board appointed by the county judge acting through a full-time director appointed by them, and a corps of trained investigators. The director and investigators are appointed on a merit basis. The cost of the payments made under the law are shared by federal grants-in-aid supplemented by funds variously apportioned between states and locality. A probable development in many states will be that the administration of both outdoor and indoor relief will ultimately be placed in the hands of the local welfare boards.

7. Highways

Despite the phenomenal expansion of state policy in the field of highway construction, a great majority of the mileage of the public roads of the country is still constructed and maintained by local authorities. After the collapse of the early adventures of the states in road-building, the highways were almost invariably left entirely to the care of the local communities, in some localities to the township and elsewhere to the county. A separate levy for highway purposes was at one time not infrequently imposed and the privilege granted of working out the road tax in lieu of the payment of money. Great progress has been made by local authorities in the construction of gravel highways, and, in more densely populated regions, of macadam and

even hard-surfaced roads to supplement the state system. Coincident with the movement for state highways has come a tendency more and more to centralize control of at least the principal secondary roads in the county. It has already been pointed out that as a result of this tendency in North Carolina all highways have been taken over by the state, and in Virginia and Pennsylvania by successive steps almost the same result has been effected. Where the smaller civil divisions still retain control, a certain degree of supervision over the plans for building roads is, in some states, vested in engineers of the county or the state.

8. Education

In New England and wherever the influence of the New England tradition extended, schools were early established and the school district became everywhere the unit of common school administration. The school district meeting deliberating on the educational concerns of the neighborhood became as potent a training school in self-government as did ever the town meeting. Bitter fights were waged and neighborhood feuds engendered in these assemblages of the voters, over the levying of a school tax, the building of a schoolhouse, or the election of a trustee, agent, or school committee as the executive authority was variously denominated. When at a later date in the states where the New England example was less influential free public schools were established, the "magisterial district" in the states where it existed became the unit of school administration. Elsewhere the creation of the school district constituted the first attempt to erect a political division smaller than the county. In the Northern states, the school district has generally been supplanted by a system of township management and the district school by the consolidated graded township school. A further step in centralization has been brought about in placing the administration of the schools entirely in the hands of the county. Though the expansion of state supervision has brought the determination of educational policy, including the course of study, the textbooks to be used, the length of term, the minimum salary and even in some states the examinations to be given, largely under state control, yet the management of the physical property

is still vested in the county or its subdivisions. Several states have fixed minimum salaries for teachers and have undertaken to grant money sufficient to pay all or nearly all of this minimum salary. On the whole, however, the cost of public education is still to a large extent a local cost. A more equitable plan now gaining favor is one in which a foundation program is predetermined for all schools in the state. The cost of this program is calculated and a modest "qualifying" tax rate is prescribed, beyond this the state meets the cost of the foundation program. Programs or curricula beyond the foundation program may or may not receive state aid. The development of state aid and control has not altered the fundamental fact that there remains great variation in the excellence of the local schools from place to place within the same state. In large measure the quality of its public education is still a fair index of the worth and intelligence of a community.

9. Clerical functions

Local governments everywhere perform certain duties of a clerical nature. Naturally the records of the proceedings and acts of the local governmental authorities are matters of local record. It is further desirable that certain public records having a wide interest should be constantly available to the general public. Hence such records are entrusted to local custodians whose positions, although clerical in character, are highly important and responsible. Among such records may be specially mentioned those of land transfers, mortgages and liens, wills, probate proceedings, and vital statistics including births, military discharges, marriages, and deaths.

10. Minor functions

Besides those enumerated in the preceding pages, there is an increasing number of other functions which are performed by the various local authorities outside the cities. Some of these are purely ministerial, but others, like planning, zoning, and conservation, are of a distinctly discretionary character, carrying with them wide freedom of local initiative. The shifting of population, due in large degree to the development first of the suburban electric railway and more recently of the automobile and motorbus, has brought into existence extensive suburban

and semi-rural communities which lie outside the limits of city or even village government. These communities demand a variety of public services which have in the past been generally thought of as city functions. Among them may be mentioned the providing of libraries, parks, and forest preserves, and the supplying of sewers, water, gas, electricity, and fire protection.

Units of Organization

Local governmental institutions

Having thus surveyed the fields of governmental action which in this country have generally been confided to local authorities, we may proceed to a study of the institutions which have been set up in various parts of the country to perform the duties thus imposed. The whole territory of every state is divided into major subdivisions which are called counties in all the states except Louisiana where the term parish is employed instead. It should be explained that in a few states certain cities do not form a part of any county but are virtually, if not legally, counties in themselves. As will be seen presently in greater detail, uniformity in the matter of subdivisions ceases with the county. In some of the states, counties are apportioned into minor political divisions variously known as townships or towns, whereas in others there are no corresponding systematic subdivisions. In some of the former class of states, subdivisions of the county exist for special administrative purposes only. As pointed out above, densely populated districts are given special forms of organization under the name of city, borough, town, or village.

City excluded

Most conspicuous as well as the most important of these minor areas of government is the city. Like other organizations of local government, cities derive their powers from the state, and this remains true even in those instances where the city was already in existence before the state government was set up. The management of this most complex as well as important area of local government is made the subject of the next chapter.

For purposes of study it will be found possible and convenient to classify the rural local government of the states into four

groups: the New England, the Southern, the "supervisor," and the "commissioner" types. This classification is based upon two factors: first, the distribution of the function of local government between the county and its subdivisions; and second, the structure of the central organ of county government, the county board. Classification of local governments

The New England system of local government is peculiarly the product of well-marked historic forces, and can be understood only in the light of its origins. Some of the earliest settlements were made and local institutions set up before colonial governments were established, but upon the creation of the colonies they were quickly brought under colonial authority. The New England type

When the people of New England went out from the older communities to found settlements in the wilderness, they almost invariably went as groups and not as individuals. These groups found themselves bound together by a threefold tie affecting profoundly the form of government which developed there. First, they located upon land which they procured, either by grant from the colony or by purchase from the Indians, and of which they became joint proprietors. Second, the group of settlers, especially in Massachusetts and Connecticut, were members of an organized church society. Sometimes this society was formed and a minister chosen before the trek into the wilderness was begun. Upon their arrival, one of the first acts was the erection of a meetinghouse. *Origins* of the "town"

Finally, to secure protection from the Indians who were, until the close of the seventeenth century, a continual menace, the pioneers built their dwellings near each other in a group about the meetinghouse. Thus they became intimate neighbors. These people, therefore, found themselves bound together by the ties of a common ownership of land, a common church, and a common danger.

This tract of land, made up of three parts: woodlands owned by all in common, separate farm lands or "out-lots" apportioned to individual ownership, and, about the meetinghouse, the central group of "home lots" on which the houses of the "free-

men" were located, constituted the New England "town" as it existed in the earlier colonial period. Later comers were admitted either as "freemen" to a share in the common lands, or as "inhabitants" only, by the vote of the freemen.

As the danger from the Indians became less and the inhabitants of the towns became more numerous, the people no longer huddled their houses within the shadow of the meetinghouse but dispersed themselves over the lands of the town. Gradually the common lands were divided and parceled out to individuals so that by the time of the Revolution the earlier bond of joint proprietorship had for the most part ceased to exist. Towns organized after the seventeenth century were sometimes formed from new grants of wild lands, but were also frequently created by dividing the territory of the older and the larger towns.

Use of the word "town"

A source of great confusion among students of local government in the United States is the varying use of the word "town" in the several parts of the country. In most places outside New England and outside the state of New York, where the New England influence in this respect is strong, the word "town" is applied to a compact settlement of urban or semi-urban character, usually smaller than what in the same neighborhood is called a "city." When the name is given this meaning, it may be applied either in a strict technical way to incorporated areas to which the name town has been legally assigned, as in Indiana and several other states, or it may be used merely in a vaguely descriptive sense to apply to any urban locality whatever its legal designation may be, to distinguish it from the "country" or rural regions.

In New England and New York, as has just been observed, the name "town" is applied to an area which in the Middle and Far West would be called a civil township, and which is of irregular shape and of varying area. While in most of these towns of New England there is a village, such a compact settlement is not necessary to constitute a town. There are towns which contain no village at all, and in many cases where a

village does exist it has but a mere handful of inhabitants, forming but a fraction of the total population of the town Where urban places of considerable size are found in the towns they have usually grown up at a later date as a result of industrial development To avoid confusion as far as possible, in the pages which follow the word "town" will be used with its New England meaning. When reference is made to the compact settlements which constitute "towns" in the Western and Southern sense, the words "village," "borough," or "city" will be used This distinction in use should be borne in mind by the reader.

Town meeting

The government of the town was from the beginning vested in the town meeting, a democratic assembly of all the freemen, i e, all those who by vote of the town meeting had been admitted to full citizenship, and all powers vested in the town were exercised by that body It was held at frequent intervals and the freemen were summoned to it by the constable. The executive committee of the town, known usually as the selectmen, though sometimes as the council, presented matters of business for the consideration of the meeting, and any freeman could likewise present any matter of business which he saw fit to bring forward.

Town functions

1. Governmental

The subjects which ordinarily engaged the attention of the meeting were local improvements, such as roads, bridges, and ferries, the building of a school or meetinghouse, the care of the poor, and the maintenance of the military company or "train band" of the town Appropriations of money were made and taxes voted or day's work levied for these public purposes Even the most trivial appropriations were sometimes made by vote of the town meeting. When an expenditure of money had been authorized, it was customary to make a special tax levy to meet it. Not the least among the governmental functions performed by the town meeting was that of establishing police regulations. Besides the ordinary regulations for the public safety and convenience, the early meetings in the colonies which were dominated by the Puritan clergy made rules requiring regular church attendance, and controlling the

conduct of adults and children. Speech, dress, and deportment were all made the subjects of regulation, and the rules were rigorously enforced and severe penalties inflicted for breach of the letter of the law. At an annual town meeting officers were selected to manage the details of public affairs in accordance with the directions given by the meeting. These officers included the selectmen, clerk, constable, treasurer, and a considerable number of other minor officers.

2. Non-governmental

Besides the functions of an ordinary governmental nature which are today exercised by town meetings, the early meetings performed others which are no longer within the scope of its activities. One of these functions was to determine who should be permitted to come to live in the town, and what should be the status of such persons as were permitted to come in. The towns did not admit every stranger who saw fit to wander into the community and take up his residence; nor did they allow every person to remain there merely because he had once been admitted. A bad reputation, a suspicious appearance, the lack of a trade, or the failure to conduct oneself with propriety were sufficient grounds for refusing admission or for expelling a person. Under the theocratic regime in Massachusetts, ability to subscribe to the tenets of the established church was made a condition of admittance, and failure to live in conformity with its rules of conduct was ground for expulsion.

The persons who were admitted to residence did not always possess the same status in the community as the first comers. After the lands had been purchased and settlement made, newcomers might be admitted to full fellowship including full rights to share in the common lands. This, however, was not likely to be the case. Ordinarily such persons were granted one or more tracts of land in individual ownership. They were also made "freemen," a status which gave them full right to vote in town meeting upon matters of government, but they were not made joint proprietors of the undivided lands; nor were they given a voice in the management and disposi-

tion of them. There came also to be another class, that of "inhabitants," who were admitted to residence without having conferred upon them even the rights of freemen. Thus there were recognized the three classes: proprietors, freemen, and inhabitants. In later years, when joint proprietorship in land had ceased and the theocratic influence had waned, these distinctions of status faded, and the privileges of citizenship were extended to all inhabitants, or at least to all freeholders.

A second non-governmental function which was at first performed by the town meeting and which for a century was important in the life of the town was the administration of the common lands. When, with the growth of population, there came to be a separate class of "freemen" who were entitled to participate in strictly governmental affairs, this common domain was administered in a separate "proprietors' meeting." From time to time it would be voted in the meeting to divide a tract of the common land into "lots," or farms. When these had been laid off equal in number to the number of proprietors by a committee for that purpose, the shares were assigned by lot to the individual proprietors or to their heirs or grantees. The meeting of proprietors also made rules, sometimes strict and minute, concerning grazing and the cutting of timber, as well as other uses of the lands still undivided.

Present-day functions

With respect both to its functions and its institutions the New England town has for the most part preserved to the present time the character which it acquired during the colonial period. The town meeting no longer performs the function of admitting persons to the privileges of citizenship, nor does it administer a proprietary domain of common land. Neither are the police ordinances enacted by the town meeting of the present day concerned with the intimate details of personal dress and deportment as was the case two centuries ago. In the rural towns and in the thickly populated ones which have not been incorporated as cities, the direction of town policy is still vested in the town meeting. The voters continue to assemble in the town hall at the annual meeting presided over by the

"moderator" to listen to the reports of their officers and to their proposals of expenditures for the ensuing year. The determination of matters of public improvements and the fixing of the tax levy of the town still furnish occasions for spirited debates among the voters present. After these matters of policy and finance are decided, the meeting proceeds to the election of town officers. Among these are included the board of selectmen (in Rhode Island called the town council), clerk, treasurer, overseer of the poor, tax assessors and collector, supervisor of highways, school committee, and in some states a town sergeant or chief constable, and in others, justices of the peace. Besides these there are in some cases a number of minor officers. In some places there is a disposition in recent times to delegate the selection of minor officers to the board of selectmen.

Town officers' duties

The selectmen are in reality an executive committee of the town acting in the interval between town meetings. It is their duty to see that the policies formulated in town meeting are carried into effect, and that the duties imposed upon the town by statute are performed. To these ends they order specific improvements, let contracts, supervise the acts of the above named officers, and approve accounts and claims. Generally the selectmen rather than the town meeting enact police ordinances. The duties of the other town officers mentioned are clearly enough indicated by their titles. It will be found in New England, since the county is an unimportant area of local administration, that the town meeting and the various town officers perform virtually all the functions which fall within the scope of local government.

New England county origins

The county made its appearance early in New England but did not attain general acceptance until the eve of the Revolution. Unlike the New England town, it was an institution imposed from above and never became a vital factor in local government. Even to the present day it inspires no loyalties; neither does it enter into the political consciousness of New England.

Massachusetts was divided into counties in 1643 for purposes

of administering justice and militia affairs. Magistrates to preside in the county courts were chosen by the legislature, although after 1650 candidates were nominated by the voters. In the same year, representative county commissioners were chosen by the towns to equalize taxes. About the same time, militia officers and a treasurer were first elected by the people of the county and the town clerk of the county-seat town was made recorder of deeds. By the end of the seventeenth century, the magistrates of the county had become a court of probate. In Connecticut, county courts for judicial and probate purposes, consisting of a member of the upper house of the legislature and two justices chosen by the legislature, came into existence in 1666. Rhode Island established counties at the opening of the eighteenth century, and New Hampshire in 1771, but in both colonies only for judicial purposes.

County government

County government, so far as it exists at all at present in New England, may be quickly disposed of. In Rhode Island, where it reaches its lowest ebb, the county has no power to lay a tax, has no treasury, holds no property, and elects no officers. Its courts are state courts, its courthouse and jail are the property of the state, and its only officers, the sheriff and the clerk of court, are chosen by the legislature and paid from the state treasury. Hence, in that state it may be said that the county is merely a judicial district of the state. In the other states of this group there is a county board consisting usually of three commissioners, elected in Connecticut by the legislature and in the remaining states by the voters. In Vermont, the meager functions of a county board are performed by the county justices. In each of five states the board has power to erect and maintain county buildings, in Maine to maintain certain county roads, and in New Hampshire to carry on poor-relief. Police powers and the conduct of elections are nowhere vested in the county in New England. In Maine and Vermont alone do the county boards levy taxes. Elsewhere this power, even for county purposes, rests with the legislature. Other officers, found in New

England counties outside Rhode Island, are a sheriff elected by the voters, a prosecuting attorney, and a treasurer chosen by various methods.

The Southern type

In the Southern colonies, the conditions of life lent themselves to the development of a very different type of local government from that set up in New England. Neither a joint proprietorship of land, nor a common church, nor a common and imminent danger from the Indians was present to bind the people together. The land was, during the first century of settlement, granted in large tracts to individuals who, with slaves and white servants, established themselves upon isolated plantations. These plantations constituted self-contained economic units usually widely separated from each other. Villages or urban centers grew up only at rare intervals. The immigration of other and less aristocratic classes of persons, who settled the back lands of the colonies, came at a later date and had no immediate effect upon the political system. Under these circumstances the county came to be the unit of a form of local government which bore a marked similarity to that of the English county.

Southern county origins

As early as 1634 counties were established in the South. Like their English prototypes the country gentry, the larger planters were appointed by the governor as justices of the peace. Their semi-feudal position being reinforced by their political authority as magistrates, the justices of the peace individually dispensed petty justice. Sitting collectively in court of quarter-sessions they became the governing body of the county. This county court regularly consisted of at least eight justices, only one of whom was required to have legal training. The individual justices made the assessment of their own precinct, and the court levied the county tax. The objects of county expenditure were few, including roads, militia, and the maintenance of the courthouse and jail. Besides the justices there were a sheriff, lieutenant, and coroner, appointed by the governor on nomination by the court, and a clerk of the court and constables appointed directly by the county court. The sheriff performed the or-

dinary police duties attaching to that office, apprehended runaway servants, inspected tobacco fields to secure observance of the regulations imposed by the legislature, served writs, collected taxes, and acted as treasurer of the county. He also served as returning officer for elections to the assembly in which body the county was the unit of representation. The lieutenant was the head of the militia company of the county. The clerk of the county court served also as a recorder of land titles.

Even before the division of the colony into counties there had been created ecclesiastical parishes with their minister, wardens, and vestry. As an adjunct to their churchly functions the parish administered poor-relief and had power to levy taxes both for this and for their more strictly ecclesiastical purposes. The vestry, at first elective by the parish, soon became self-perpetuating and at a comparatively early date lost all civil authority. Thus there was set up in Virginia an aristocratic system of local government in sharp contrast, both in externals and in spirit, to the system which was taking root in New England.

In North Carolina alone of the three colonies south of Virginia, was there more than a rudimentary development of county government in the colonial period. In that colony a system of government by justices of the peace sitting in county court and having both judicial and administrative authority took form before 1700, and during the eighteenth century became fully developed. Although counties were legally recognized in South Carolina and local courts of justice established, neither in that state nor in Georgia was there anything worthy of the name of county government during the colonial period. In both these colonies parishes were created for ecclesiastical purposes, and these were charged with the civil functions of poor-relief and the election of members of the legislature. In neither colony, however, did the parish acquire political significance.

Maryland was first divided into counties in 1650. County government developed slowly there, but by the close of the colonial period such a system of government had emerged. Undoubtedly the evolution of county government was delayed

there by the existence first of the hundred, and later of the parish which tended to supersede the hundred. These subdivisions of the county had minor civil functions in connection with electoral and militia matters. The conclusion must be reached that outside of Virginia and to a lesser degree in North Carolina, no vigorous development of local government of any sort took place in the Southern colonies.

Present-day organization

The Revolution brought little or no change in local government in the South, but before the Civil War there had come about a swing away from the centralized system of appointed local officers toward popular election. At the present time it may be said to be a system based everywhere on the county as the unit and, with a single exception, centering about an elective county board as its chief organ of government. The single exception to the rule is Georgia where the probate judge under the title of "ordinary" performs the functions of a county board with respect to finance and highways. Whatever its specific form, the county board in the South is known variously as the board of supervisors, county commissioners, county court or, in Louisiana, the police jury. With respect to their composition, county boards of the South may be divided into two classes, although their functions are essentially the same. The first class is exemplified by the board of supervisors in Virginia, the police jury in Louisiana, the county court in West Virginia and the county commissioners of Florida. The members of these bodies are elected either at large or by districts in every case except South Carolina, where in most counties they are appointed by the governor upon nomination by the county delegation to the legislature.

County board

The second class of county boards is exemplified in the county courts of Kentucky, Tennessee, and Arkansas. The distinguishing feature of these courts is that, like their prototypes the county court in early Virginia and the court of quarter-sessions in old England, it is composed of the county magistracy including the county judge and the justices of the peace of the county. It should be noted that in Kentucky any county may,

by vote of its people, substitute for the fiscal court a board of three county commissioners. In spite of its name and composition, however, there is not in these courts in any great degree a mingling of judicial and political functions. Except perhaps in some cases in Tennessee, sessions for judicial business are held by the county judge alone. When it is convened for legislative and administrative purposes, it is composed of both judge and justices except in Tennessee where it may sit without the judge. When sitting for purposes other than judicial, it is called in Kentucky the "fiscal" court and in Arkansas the "levy" court.

Functions

The political functions of all these county boards in the South, of whatever variety, are substantially the same as those of similar boards in the Middle West and Far West. Since this is true, and in order to avoid repetition, their activities will be discussed in subsequent pages together with the activities of local authorities in those sections.

County officers

Besides the county board there is in each of the states in this section a sheriff, and generally a treasurer, surveyor, county clerk or clerk of court, recorder of deeds, assessor, prosecuting attorney, and a superintendent of schools. A few variations from type may be observed. In Virginia the assessor is known as commissioner of revenue, and in Georgia, as tax receiver; whereas in Kentucky, where the tax administration is highly centralized, the assessor has been superseded by a county tax commissioner appointed by the state tax commission. In Tennessee a "trustee" performs the duties of treasurer and collector of taxes. Sometimes in these states the registration of land titles is performed by the county clerk.

County subdivisions

A most striking characteristic of local government in the South, when compared with that found in New England, is the absence of divisions less than the county which have real political significance. When these lesser districts in the South are compared with the northern subdivisions of the county, the differences will be observed. In the first place, instead of employing a single area for the various local purposes, it is not unusual to create for each individual purpose special districts which are not

coterminous. Furthermore, it is noticeable that many of these Southern districts are without corporate existence or the power of taxation. They constitute what are sometimes known as administrative, rather than political areas.[1]

Middle colonies

Origins of local government

In the middle colonies of New York, New Jersey, and Pennsylvania, all originally in the proprietary class, conditions seemed at first to favor the development of a form of government similar to that found in the South. Land was granted in large tracts, settlements were scattered, and an aristocratic element was introduced in the first-settled portions among the Dutch patroons of the Hudson valley. Certain leavening influences appeared early to give a new trend to institutional development. An early influx of Puritan settlers into Long Island and the lower mainland of New York and into New Jersey injected a strain of democratic sentiment. The Quaker influence, too, tended away from aristocracy in government. The result was the development of a type of government which, while embodying features similar to those found in the North and South, was distinctly unlike either. Both the "town" in the New England sense and the county after the Southern model gained a foothold which they have maintained to the present day.

Upon the assumption of control over New Netherlands by the Duke of York and the setting up of a system of local government, the town meeting already well established in the Puritan settlements within the colony was given official recognition. The function of the body was, however, restricted to the election of a constable, and overseers who were to decide local policies, levy taxes and act as justices. Established, at first somewhat tentatively, in New York in 1665, county government had definitely been set up in these three colonies by 1682, somewhat upon the Virginia plan, with appointed justices exercising both administrative and judicial functions. Soon after the revolution of 1688, local government was reorganized and in both New

[1] J. A. Fairlie, *Local Government in Counties, Towns, and Villages*, chap. 10. See also J. A. Fairlie and C. M. Kneier, *County Government and Administration*.

York and New Jersey there was chosen from each "town" a person to assist the justices in their fiscal duties. Gradually these elected representatives took over the administrative functions of the justices, thus definitely departing from Southern models. In New York this body of representatives came to be known as the board of "supervisors," and in New Jersey as the board of "chosen freeholders." In New York, the supervisor, in addition to his duties as a member of the county board, became the treasurer and chief administrative officer of the town. Besides the supervisor each town elected in town meeting a clerk, constable, surveyor, overseer of the poor, and assessor. In Pennsylvania the New England influence did not prevail and there was created a body of three commissioners in each county elected at large and corresponding to the board of supervisors in New York. In all three colonies a sheriff was elected. Although the "town" in the New England sense existed in Pennsylvania, its importance as a governmental organ was negligible. Thus we find comparatively early in the middle colonies, two types of government intermediate between those of North and South and partaking of the nature of both the others, but in varying degree. The one, the "supervisor type," and the other, the "commissioner type," were to serve as models for the local governments to be established everywhere beyond the Alleghenies except in the states immediately south of the Ohio River which were dominated by southern influences.

Supervisor type

Commissioner type

When settlers crossed the mountains into the Northwest Territory they found that provision had been made for both counties and townships. The county officers: the sheriff, treasurer, coroner, recorder of deeds, probate judge, and justices of the peace were to be appointed by the governor, and the justices were to perform political, administrative, and judicial functions after the fashion of Virginia. Within a few years there was substituted, to perform the political and administrative functions of the justices, a board of three elected commissioners like that existing in Pennsylvania.

Meantime a system had been introduced under which the land

The old Northwest

was surveyed into what came to be known as "congressional townships" and these subdivided into sections one mile square. The congressional township was made also the standard area of local government under the designation of "civil township," although in many places the boundaries of the "civil" and "congressional" townships did not actually coincide. As in New York, the town meeting performed no function other than that of electing township officers: constable, clerk, overseers of the poor, fence-viewer, assessor, road supervisor, and three trustees.

Ohio

The recognition accorded to the township as an institution in the early government of Ohio was undoubtedly due to the fact that the settlements made about Marietta by the Ohio Company were dominated by New England men. Likewise, the settlers who came presently into the Western Reserve of Connecticut on the shore of Lake Erie were accustomed in their old home to the "town" system of government. Wherever the physical surroundings of frontier life made it convenient to make use of the county as the chief local unit, people with a New England political heritage naturally preferred the supervisor type of New York to the commissioner system of Pennsylvania. When the time came to decide upon a permanent system of local government in the new state of Ohio, a spirited contest ensued between the advocates of the two forms of county government. The result was in favor of the three-commissioner type, which relegated the township to a position of less importance.

Rivalry between types of local government

It has already been seen how local government in the newer South had tended, except in a few states, in the direction of a system under a board of commissioners chosen from election districts rather than from townships. As lands further to the southwest were opened for occupancy, settlers from the more Southern states streamed in bringing with them their peculiar views as to local institutions. In the newer states of the Northwest Territory and in the great regions west of the Mississippi both north and south the three systems of local government—the supervisor, the county-commissioner-township, and the

county-commissioner-district systems—have contended for mastery of the field. In the end, the result has been determined in the main by two forces: the political antecedents of the dominant group of settlers, and the physical and economic conditions by which the people in the new state were surrounded.

In Michigan, Wisconsin, and Illinois, where the stream of emigration from New York was stronger, the supervisor system was set up, with the township playing a subordinate but real part in government. Later the same system was established in Nebraska. The commissioner-township type has found much wider acceptance than has the supervisor system. From Ohio it has spread to Indiana, Iowa, Minnesota, Missouri, the Dakotas, Kansas and Oklahoma. In each of these states the board of county commissioners exists, and along with them the usual officers: sheriff, justices of the peace, coroner, treasurer, recorder, clerk, or their counterparts. A characteristic of this type of government is the presence of the township as a real functioning organ of government, although it is not made the basis of representation on the county board.

Whenever two streams of population having different traditions of local government have met within a state there has usually resulted a contest between the two sets of ideas. Usually one or the other tradition has emerged triumphant, as has been described in Ohio. Elsewhere the difference has sometimes been adjusted by resort to the principle of home rule, permitting the people of each county to decide for themselves what form of government they shall have. In Illinois and Missouri, the contest has been between the supervisor system of the North and the commissioner-district system of the South. Eighty-five of the 102 counties in Illinois have seen fit to organize townships and inaugurate the supervisor system, while in Missouri 90 of the 114 counties have chosen to live under the commissioner-district system. In Nebraska about one-fourth of the counties have adopted the township system, and in Washington, where they may be organized at will, no county has yet availed itself of the

Home rule applied

privilege. Shifts in some of these states are constantly being made. One Missouri county voted in 1946 to adopt the commissioner-district system.

Type in the Far West

When we proceed to examine the local governmental systems of the newer states it is found that the Southern type with county commissioners elected by districts has found favor everywhere in the Rocky Mountain and the Pacific states. In all these states it appears that the comparative sparseness of population has made impracticable any development of the township.

Résumé of county types

If an attempt is made at generalization, disregarding mere differences in nomenclature, the situation with respect to local government outside cities and villages may be summed up as follows. The county exists in some form in every state in the Union. Counting Illinois as a state having the township and Missouri as being without it, it may be said that in twenty-two states both the county and the "town" or township exist, sharing the functions of local government. Wherever both exist, save in six states of the supervisor type, there is no organic relation between county and township. In the forty-two states in which the county is the dominant local area of government, twenty-nine, or two-thirds of the number have as the characteristic of their system a board of commissioners elected from election districts. It may be fairly said, then, that the commissioner system has come to be the dominant form of government in the United States.

Administrative Officers and Duties

Present-day county government

Since it is apparent that the county has become the dominant unit of local government throughout the United States, save in a half-dozen of the older and smaller states, it may not be inappropriate to take a survey of the institutions and their functions as they exist today in so large a part of the country. This task is made the less difficult because, as has been demonstrated, county government throughout the country has tended within the last generation to assume a common structure.

The county board may be said to be the central and most

vital organ of government. However selected and of whatever size, it everywhere performs substantially the same functions. Meetings of the board are held at intervals ranging from once or twice a year in localities where their functions are limited, to once a month or even more frequently in places where they directly concern themselves with the details of administration. One session at which the budget is approved and the tax levy made, stands out as the most important of the year. As is usually the case with boards primarily of an administrative character, most of their deliberations are held behind closed doors, action at the open sessions being confined chiefly to the formal registration of action already privately agreed upon. The board organizes by the selection of its own chairman, and its proceedings are conducted in an informal manner.

County board

Meetings

Like other agencies of local government, the county is a unit of strictly enumerated powers. Whenever a power is conferred upon the county without any specific agency being designated for its exercise, it is the county board which exercises it. Counties are vested with but slight power to make regulations of general application so that their powers of a legislative character are confined chiefly to the approval of the budget, making appropriations, the levy of taxes, and the borrowing of money. There is great diversity in the financial methods of counties, but it may be said that modern budgetary methods have not made marked progress in the counties, except in a few states where they are imposed by state authority. Where more approved methods have been adopted, the budget is scrutinized and appropriations made by the board. The total authorized expenditures including the county's share of the state levy having been determined, a tax levy sufficient, with other sources of income, to meet this, is made.

Functions

1. Financial

In a very few states, typified perhaps by Indiana, the appropriation of funds and the levy of taxes are made by an elective board which is distinct from the regular administrative body. The discretionary functions of the county board consist in determining upon the purchase of land, the erection of buildings,

2. General administrative

the laying out of roads, the ordering of bridges, and the contracting for supplies, materials, and equipment for the county offices and institutions. Specifications are approved and contracts let by the board. It is in connection with the awarding of contracts that the greatest offenses against economical administration are to be found. Commissioners are too often unfamiliar with technical matters with which they are called upon to deal, or are not men of good business judgment. The financial losses suffered by the county from ignorance and poor judgment are vastly larger than those arising from dishonest practices. State law has endeavored to eliminate fraud and collusion in these financial operations by requiring quite generally that purchases shall be made and work done only by contract awarded to the lowest bidder after open competition. In a few places the state prescribes forms of contract and specifications, and supervises the execution of the work to determine whether the specifications are complied with. Funds of the county are disbursed upon order of the board. Bills or claims against the county are presented to the board, and when approved by it go to the treasurer for payment.

3. Electoral

The county board is in many places assigned certain duties in connection with elections, not only for the counties themselves but for the smaller areas within them. These duties include the delimitation of precincts, the providing of polling places and furnishings, the appointment of election officials, the preparation of local ballots, and canvassing and returning the vote.

4. Directoral

The work of the county is by law decentralized to such an extent that the board has very little control over the county officers except the few minor ones sometimes appointed by it. The board is frequently given power to investigate the work of all county officers, although it has no direct power to control their actions. The powers and duties of county officers, as in the case of local officials generally, are prescribed in such detail by statute that there is left to them little discretion as well as little opportunity for their direction even indirectly by the board. It is able, nevertheless, through its power to appoint and remove

administrative officers and to make appropriations and allow claims, to exercise a degree of control over the limited discretion left to the several officials.

5. Minor functions

Besides the larger duties just enumerated, the board performs a considerable number of minor ones such as the preparation of jury lists, the filling of vacancies in office, and, where that unit exists, sometimes the changing of township boundaries. Besides the county board there are certain other officers of considerable importance who are so universally encountered throughout the country that their position and functions merit discussion. Among these may first be mentioned the sheriff.

Sheriff

Although in no sense the head of the county administration, the sheriff may be spoken of as the best known administrative official. Descended from a notable official lineage, he is found in every state, acting as the chief conservator of the peace and custodian of the jail, as well as the agency for the serving of judicial process and carrying out the orders of the courts and of the county board. In common with a majority of the other county officials, and perhaps to a greater extent than any other, the sheriff acts as an agent of the state as well as of the county by which he is elected. Originating in an equally remote past, though playing a less important part, is the coroner. He is usually to be found in all states except where he has been superseded by a medical examiner. His duty is to determine by inquest, when necessary, the cause of the death of persons who die under suspicious circumstances.

Coroner

Clerical functions

What may be spoken of collectively as the clerical work of the county falls under three heads: that of clerk of the court; that of clerk of the county board; and that of a financial nature. It is the duty of a clerk of the court to prepare and keep the records of the court, make transcripts of papers, take acknowledgments and depositions, make up jury lists, prepare summonses for jurors and witnesses, issue licenses, and affix to documents the seal of the court. The functions of this office sometimes extend to acting as clerk of the court of probate where such a separate court exists. The chief duties as clerk of the

county board are to keep a record of the proceedings of the board and issue papers upon their order. To these there is occasionally added the duty of acting as a recorder of deeds and mortgages of land. As financial clerk, the duties are to prepare and submit the budget (where a budget is in use), keep the accounts of the county, issue warrants upon the treasurer upon vote of the board, and prepare the tax lists for collection by the treasurer.

Clerical officers

There exists considerable diversity from state to state as to the distribution of this clerical work among specific officers. Occasionally there is found in a county a clerk of court, a county clerk and an auditor, for the three classes of work respectively. Sometimes the county clerk is at the same time clerk of the courts. Elsewhere the duties of clerk of the board and auditor are combined under the same person, in some places bearing the title clerk and in other places auditor. Although the land records are sometimes in the custody of the county clerk, in other states there is a separate recorder of deeds.

In the administration of an area of government, there grow up in the course of time certain methods and traditions with respect to the doing of things; a body of precedent which is the product of experience rather than of law; a fund of information with respect to details which only time can impart. These must be given due consideration if administration is to move forward smoothly and to the satisfaction of a majority of the citizens. It is usually the clerk or auditor who is the repository in the county of such traditions and information, and it is for this reason that this officer is in some states given by custom through reëlection a considerable degree of permanence of tenure.

Treasurer

In most of the forty-seven states in which the county performs political functions, there is a county treasurer or an officer who performs a corresponding duty. His prime function is to have the custody of the county funds and to pay them out upon warrant issued by the clerk, auditor, or other designated officer. County funds are actually deposited in a bank or banks in the county. In a small number of states the office of county

treasurer has been abolished and depositor banks act solely as custodians of funds. The county is usually a large depositor and much sought after by banks. Sometimes gross favoritism, personal or partisan, is shown by the treasurer or tax collector in making deposits. An older practice whereby the treasurer himself pocketed the interest paid on county deposits is now generally made impossible by law, but instances still occur in which a treasurer is granted special favors of one sort or another in return for reciprocal favor. Many states have effectively put an end to these practices by rather rigid public depository laws, applying not only to state but to local funds.

Collector

It is the practice in the rural portions of certain of the older states to have a collector of taxes, either elected by the voters or appointed by the county board, who actually calls upon the individual taxpayers in person, while in some others this service is performed by the sheriff. In a greater number, however, taxes are paid by the citizens direct to the treasurer. The tax roll having been made up by the clerk or auditor, it is transmitted to the treasurer for collection. It is the duty of the taxpayers then to make their payments to him within certain designated dates.

Assessor

The functions of the tax assessors have been explained in the chapter on finance, so that it is unnecessary to enlarge upon them here further than to say that in a number of states the assessor is a township rather than a county officer.

Superintendent and board of education

The trend toward centralization in the control of elementary education has tended to increase the power of the county school authorities, except where the movement has gone so far as to place a large degree of control in the state department of education. Whatever the situation, there is usually a county superintendent of schools, generally elected but sometimes appointed by the county board of education, or in a considerable number of states appointed by the state department. In some states there is also a county board of education, either elected or appointed by the state department or some other authority. Where both a board and a superintendent are found, there is usually a division of function much as exists in many cities throughout the

country. The board manages the material interests of the schools, including the control of property, the making of contracts for supplies and with teachers, the making of the annual budget, and the levy of school taxes. To the superintendent is left the inspection of schools, supervision of teaching, advising with teachers, and serving in general as the local representative of the state department of education. Except where the prescribing of the curriculum and the examination and licensing of teachers have been assumed by the state, he performs those functions as well.

In large areas, especially in the West, where the immediate control of school property and policy is still vested in the school district, there is, nevertheless, not infrequently a county superintendent possessing some supervisory functions over the academic interests of the schools. It is a fact to be noted that the school systems of cities, or at least of those of considerable size, are not usually brought within the jurisdiction of the county school authorities. As a result of the present movement in the direction of greater centralization, it is likely that there will come, in the not distant future, a considerable increment in the powers of one or both of these county educational authorities.

The development of the New England "town" has been described at some length, and the fact has been noted that this institution spread through New York into a considerable number of states where it appears in modified form as the township.

Township

At the present time, townships exist in less than half the states, and in scarcely more than one-third of the states are they more than mere electoral districts. In most places townships, like the New England "town" and the county, possess the usual legal powers of public corporations, but their governmental functions

Functions

are seldom extensive. Their functions are ordinarily of a purely local character, although they sometimes serve as agencies of county and state administration. Highways and poor-relief were traditionally their most universal functions, but these functions have been gravitating to the county or state level in recent years. Schools, too, are sometimes under township control, but

here also the trend is toward the county as the unit of school administration. In some states the areas incorporated as cities are excluded from the township, so that township authority extends over only rural and suburban populations. In a few states, however, such as Illinois, Indiana, and Ohio, the incorporation of a city does not exclude it from the township of which it has been a part. In such cases the functions of the township take on increased importance, and sometimes there arise overlapping and conflicts of jurisdiction, as well as a division of responsibility which is inimical to good government.

Township meeting

The township meeting, composed of all the voters, is found in New York, New Jersey, the northern row of states from Michigan westward as far as North Dakota, and in South Dakota and Nebraska as well. In New York and in some others of the group, the township meeting has power to levy taxes, but elsewhere it is little more than an occasion for the election of township officers. In certain of these states, notably in Pennsylvania, Ohio, Iowa, Minnesota, and the Dakotas, the chief authority of the township is vested in a board of trustees, whereas in most of the others of the group possessing townships there is, instead, a single trustee or supervisor.

Trustee

In Indiana, where the township plays an unusually important though diminishing part in the scheme of government, the trustee is the administrative head of the township. He has in his charge the dispensing of outdoor relief, the control of school property, the employing of teachers outside the school cities and school towns, except in counties in which county units with broad control have been set up, the preparation of the budget, and the custody and disbursement of township funds; and in smaller townships he acts as assessor. Assessment of property for all taxes is performed by the township rather than by the county assessor. There are also in the township in that state constables, justices of the peace, and an advisory board.

Township board

The supervisor in New York acts as treasurer, and in Michigan as assessor. The township board is, in New York, Illinois and Kansas, made up of the trustee or supervisor, clerk, and

justice of the peace, and in Indiana of three elected citizens. Its functions are generally financial, and especially the approving of claims and the auditing of accounts. In Indiana the advisory board of three elected by the voters has as its duty the adoption of the budget, the levy of the township tax, and the authorization of bond issues. Here the importance of the township has diminished through the transfer of the control of all highways to the county and is destined to diminish further with the impending introduction of the "county unit" system of school administration. Farther westward, as for example in Kansas and Oklahoma, the importance of the township appears to have decreased. In Wisconsin the township board allows bills, audits accounts, controls township property, and creates and alters school and road district boundaries. Where no single administrative officer is found, the board performs the administrative duties elsewhere imposed on that officer.

Minor township officers

Wherever the township exists, except in Indiana, there is elected a township clerk who sometimes serves also as clerk of the school board. In the states of this group, the assessment of property is ordinarily vested in a township assessor, except where the supervisor or trustee serves in this capacity. In several instances a separate treasurer is also elected. Poor-relief by the township is almost always restricted to outdoor relief administered by the trustee or an overseer of the poor. Highways maintained by the township in most cases of the present day are the lesser roads, control of the more important ones having passed to the county or the state.

In the states possessing organized townships, the justice of the peace is almost always a township officer, although in many townships no one offers for the office, hence it is vacant year after year. Some recently revised constitutions provide for the abolition of the office of justice of the peace. His functions in holding preliminary examinations of accused persons, admitting prisoners to bail, and the trial of petty cases, both civil and criminal, have been described elsewhere in these pages. The township constables are sometimes vested with general police

powers but are frequently restricted in their authority to the serving of warrants of arrest, and writs and processes of various sorts under orders from the justices of the peace.

County districts in the South

Reference has already been made to the various districts into which the counties of the South are divided. It was there suggested as a point of difference among them that some have no corporate existence nor power to levy taxes, but are merely areas for purposes of holding elections or the administration of justice. Others, it was pointed out, do possess corporate capacities and fiscal powers.

1. Administrative

The districts which exist merely for administrative convenience are known by a variety of names. In Virginia and Kentucky they are called magisterial districts; in the Carolinas and Arkansas the name township appears; in Tennessee, civil districts; in Maryland and Florida, precincts; in Mississippi, supervisor districts or "beats"; in Delaware, hundreds; and in Louisiana, wards. These districts are made use of variously for electing members of the county board, justices of the peace, constables, school officers, assessors, overseers of the poor, and sometimes still other officials.

2. Fiscal

Among those divisions, which are corporations and which have the power to levy taxes, are especially to be noted the school districts which exist rather generally through that section. In some states, such as West Virginia, for example, the school district is coterminous with the county districts created for other purposes, whereas elsewhere they are smaller. The school district has power to levy school taxes and, except in the South Atlantic states, the school officers are popularly elected. In many of the states of the South there exist also local areas, such as drainage, levee, and health districts, which possess the power to tax and in some cases to select administrative officers for their particular purpose. The second class of districts has no corporate and fiscal powers but exists for electoral purposes only. In some cases these districts are the local administrative areas for tax assessment, road maintenance, and poor-relief, though they are themselves without the taxing power.

The question is frequently asked: Why have these rudimentary local areas in the South not developed into something comparable to the New England town in the interest they arouse and the functions they perform? In the opinion of Professor Fairlie it is due to a combination of influences which may be mentioned here. In the days before the Civil War, in a period of slavery, large landholding, and a scattered population, there grew up a society which was semi-feudal and aristocratic. The existing system of county government suited such a state of society. Today, in the South, although slavery is gone, many of the old characteristics persist. These facts, together with the conservatism of a rural population, have worked together, just as has been the case in New England, to bring about a close adherence to early forms of government. Wherever cities have arisen in the South, the form and functions of their government are substantially like those in other parts of the country.

County districts in the West

In the Western states, the name precinct is the one most often applied to the county subdivisions, although the name township is not unknown. These are, however, not true townships in the sense in which the name has been used above. Their chief function is to serve as election precincts for county and state elections, and for the choice of justices and constables. There exist also for the election of school trustees school districts which have sometimes been given the power to levy the school tax. Road districts, too, have been established in a number of states.

Functions

Viewing the whole field of rural local government in retrospect, it will be observed that local institutions persistently strive to adjust themselves to local conditions, geographical, economic, and social. It is found that wherever the institutions of the old homes are transplanted by a group of people to new and unfamiliar surroundings they tend to become atrophied and disappear, or to undergo such modification as to be scarcely recognizable. Wide differences in institutions appeared in the early days when communication was slow and contacts between regions were infrequent. But when population passed beyond the Alleghenies and found greater uniformity in frontier life,

local institutions tended more to common types suited to the new environment. Here and there archaic institutions persist as interesting survivals. Such are the New England town meeting, the county court of the justices in Kentucky, Tennessee, and neighboring states, and the county "ordinary" of Georgia.

Progress is being made in rural local government. Some states permit counties to establish home rule. County or town-manager government is permitted in a number of states. Out-of-date offices have been abolished in some areas; administrative areas have been increased in size to keep step with modern communication methods; good personnel systems, including merit or civil service plans, are not unknown in county government; and rural local governments have assumed new functions to keep pace with the demands of the population for the services of government. In spite of this progress, however, there is much yet to be done before the highest degree of efficiency can be attained in rural local government.

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CHAPTER 21

URBAN LOCAL GOVERNMENT

Wherever compactly settled population groups occur, social needs which can best be met by governmental action multiply rapidly. Problems of better streets and walks, of lighting, of drainage and water supply, of public health, and of public comfort and convenience confront the community for solution. These needs, in the larger centers of population, have been provided for by the creation of city governments of more or less elaborate form and with extensive functions. Lesser urban groups in the United States have been provided for by the creation of more simple forms of municipal organization known variously as villages, boroughs, and towns. Whatever their names, their functions are everywhere essentially the same. Distinctions between cities and towns, boroughs or villages are usually based on differences in population. These vary from state to state. The Census Bureau takes 2500 as the dividing line between urban and rural places. Many incorporated places are below 2500 in population but will be treated here as urban and will be referred to as cities hereafter.

Minor urban areas

The growth of cities is a phenomenon of comparatively recent development in both Europe and America. We are surprised when we are told that at the time of the American Revolution there were not more than twenty incorporated places in the country, and that of these not more than six had a population of as many as 8000 persons. By 1820 there were thirteen which exceeded that number. New York, forging ahead of Boston and Philadelphia, had, at that date, reached a population of 150,000. Chicago, in 1840, numbered but 5000 persons though by the

opening of the War Between the States it had reached 100,000. Today, over one-tenth of our people are gathered in our four largest cities while several millions more live in smaller places under conditions which are essentially urban. In 1940, ninety-two cities each had a population of over 100,000.

In the colonial period the cities derived their legal existence from an act of the governor. The city's primary functions were to act as the representative of the colonial government in the maintenance of certain courts and to enact police regulations, while their sole service as representatives of the local citizenry was the management of certain public property. Since they had no power to levy taxes, their income was derived from city property such as markets, wharves, and ferries, supplemented by fees and fines.

Dual position

The modern idea that the city has a mission to serve expanding community needs was a plant of slow growth. While it was gaining power to minister to such needs, the city was retaining its position as an agent of the state. Hence it is said that the city legally holds a dual position: first, as a governmental subdivision of the state, and, second, as an organ for the performance of services for its citizens.

Legal Status of Cities

Upon separation from Great Britain, the power to create municipal corporations passed to the state legislature and that body was, for a century, the sole source to which cities looked for their creation and their powers.

A corporation

The central fact concerning the city, viewed from a legal standpoint, is that it is a corporation created by and owing its continued existence to public authority, as well as deriving its powers from the same source. In these respects it is like a private corporation. A corporation is an artificial person created by public authority having the power to hold property, to sue and be sued, and to be the repository of certain rights and duties the exercise of which is the purpose of its creation.

As a form of public corporation, the city is composed of the

citizens of a defined area whose membership in the corporation is involuntary. It differs from a private corporation in that the latter is usually organized for profit and membership therein is always voluntary. The law recognizes a third class of corporations, the quasi-public, which, like most private corporations, are organized for profit but which, because their purpose is the rendering of a public service, are given certain limited powers of government such as the power of eminent domain. Examples of quasi-public corporations are railroads and corporations rendering public utility services.

A public corporation

The act of legislation which creates a corporation is its charter. Incorporation by action of the legislature may still be considered as the normal method for the creation of cities, although by constitutional mandate in a considerable number of states the cities themselves are given some share in the making of their own charters. The charter, besides creating the corporation, prescribes in some degree of detail its frame of government and sets forth the range of its powers and duties. The powers usually conferred are, in addition to those necessary to its corporate existence, to lay and collect taxes, to borrow and appropriate money, to enact and enforce police ordinances, and to perform certain public services for its people. Some of these powers are merely permissive, to be exercised if desired, whereas others are made mandatory and thereby converted into duties.

The charter

Powers conferred

Under the Anglo-American system of law both public and private corporations are bodies possessing only those powers which are expressly conferred or which are plainly, if not necessarily, implied. Such powers are construed strictly against the corporation. The traditional attitude of the courts has been that if a given power is not conferred it is judged to be withheld, although it is true that in some states there is perceptible a tendency to soften the rigors of such strict construction.

Rule of construction

With respect to its legal liability, the city holds a position intermediate between that of the state, which is not liable for any of its acts, and the private corporation, upon which full legal liability rests as it does upon natural persons. This intermediate

position arises from the fact that the city exercises two sorts of functions, the one governmental, the other private. When exercising its governmental functions the city shares to some degree the immunity of the state from legal liability. But when performing private functions its liability is that of a private corporation. Although the "governmental" functions are frequently spoken of as being identical with those exercised as an agent of the state, the former is more inclusive. The power to establish and maintain parks, to provide recreational facilities, to regulate traffic, or to license local business enterprises are classed as governmental functions, but it would require a straining of a legal fiction to class them as "state" functions.

Functions: governmental or private

Liability: 1. For governmental functions

2. For private functions

Neither is the boundary line between governmental and private functions sharply drawn; nor is the line of demarcation drawn at the same point in different states. It is customary, however, in most jurisdictions to include among the governmental functions those of maintaining police, fire and health protection, education, relief, and corrections, as well as those of elections and taxation. Among the private functions are usually included the operation of the ordinary public utilities: water, gas, electricity, and street transportation, the operation of docks, ferries, markets, baths, and cemeteries. Between the governmental and the private fields is a "twilight zone" in which there is some uncertainty of classification. These functions, sometimes spoken of as "corporative" embrace the construction and maintenance of streets, bridges and sidewalks, and the disposal of sewage, garbage and rubbish.

3. In "twilight zone"

Liability: 1. In contract

With respect to both its governmental and its private functions the city is liable on its contracts as completely as is a private corporation. With respect to torts, i.e., civil wrongs other than those arising from contracts, the city when acting governmentally is not responsible for the acts of its agents nor for the use of its property unless specifically made so by statute. For example, the city could not be held liable for an injury caused by a fire truck on its run to a fire, nor could it be held liable for a personal injury caused by a defect in the steps of the city hall to

2. In tort

a person visiting the building for the purpose, say, of paying his taxes.

With respect to its governmental acts the city is liable neither for the non-use nor the misuse of its powers, unless specifically made so by statute. For example, the city is not liable for its failure to enact ordinances to secure safety either in building operations or to subsequent occupants of the structure. Nor is it liable for its neglect of the safety of citizens in failing to enforce laws and ordinances. But, on the contrary, for an injury to property caused by the failure of the city to maintain in reasonable repair the dam of its water-supply reservoir, or for injury to a person due to the negligence of an electric linesman at work on its commercial electric service the city would be liable to the same degree as would a private utility company under similar circumstances.

With respect to functions in the "twilight zone" the rule seems to be that a city will not be held liable for non-action, but will be held for improper action. Thus, a city would not be held for an injury resulting from a hole in an unimproved street, but when the same street has been improved, the city would be held liable for injuries resulting from a similar defect.

Three methods of creation

Although cities in the United States have from the beginning derived their political existence from the state, to accomplish their incorporation, the determination of their form of government and the delimitation of their powers three procedures have been employed. The first of these is by special charter granted by the legislature: the second, by general law applicable to all cities; and the third, by so-called "home-rule" charters.

The first of these methods has produced the charter which has already been described. It is merely a statute having the same form and enacted in the same manner as any other act and, like any other act, the charter may be amended or repealed at the will of the legislature. These charters have usually, if not in every case, been enacted at the request of the community affected. They are likely in each instance to conform to the governmental type generally favored at that period and to provide for the

range of municipal functions believed by the public generally to be of local interest. Any change in the charter provisions either as to form or functions, calculated to keep pace with the popular trend of the times toward greater democracy or a broadening of city activities, could be made only by going to the legislature for amendment to the act of incorporation. So long as the number of cities was small, the range of municipal functions narrow, and the revenues relatively small, no serious problem developed.

1. By special act

The charters granted to cities and the amendments to the same constituted no small proportion of the special legislation of the middle years of the nineteenth century. But with the growth and multiplication of cities and the ever-broadening scope of municipal services demanded by the public, the same evils characteristic of special legislation made their appearance in this field as in others. Especially to be noted was the logrolling among the representatives of different cities. This sort of legislation resulted in the determination of local questions by the votes of legislators who had no interest in nor felt any responsibility to the communities affected.

When the movement to place constitutional restrictions on special legislation got under way, among the subjects on which such action was to be taken was that of the granting and amending of municipal charters. Although such limitation in one form or another became very general throughout the country, in some states no such limitations have even yet been imposed, and in them municipalities continue to be incorporated and governed under special acts.

2. By general law

In some states the prohibition of special charters was accompanied by specific mandate that the legislature should provide a general law under which all municipalities should be incorporated and their governments prescribed. Under the terms of most of the resulting laws, any urban area having requisite population could by vote of its citizens and upon the filing of notice of that fact with the proper officer of the county or state, become a city under the form of government and possessed of the powers and responsibilties established for all. Under such a regime there

would be set up in every city in the state a government identical with that in every other city. No additional act could be passed affecting any one city without its applying to every other city likewise.

Modification of general laws

It is obvious that the needs of different cities may vary greatly on account of size or special local conditions. A municipal charter and code fitted to the needs of New York City or Chicago would clearly not be suited to the needs of a city of 25,000 inhabitants located in up-state New York or down-state Illinois. In the course of time there were worked out three methods of meeting such dissimilarity of needs while preserving the semblance at least of uniformity.

a. By permissive acts

The first was to add to the municipal code a series of permissive acts framed in language applicable to all cities alike, which might be adopted by those cities whose peculiar situation made it desirable to do so. Such acts were devoted chiefly to the purpose of conferring additional powers or authorizing the appropriation of money to objects not provided for in the general city law, though sometimes authorizing changes in or additions to the governmental structure.

Although such permissive acts, so popular in Great Britain, appear in many states they have never proved popular in the United States. They have, indeed, been unpopular in cities themselves because they serve as standing invitations to special-interest groups to campaign for their adoption, thereby adding to the burden of taxation without a corresponding general benefit.

b. By classification

A second device by which the prohibition of special legislation could be formally met and at the same time allowance made for real differences in the needs of cities was that of classification of cities. It was perceived that differences in needs were more attributable to differences in population than to any other single factor. Hence cities were divided into classes based upon population and statutes enacted applicable to all cities in a specific class. Although this course of action violated both the spirit and the letter of the constitutional prohibition, the courts, giving way to the obvious necessities of the situation, held that the de-

vice of classification and the resulting legislation was not a violation of the constitutional mandate. Thus it was made possible to prescribe both a different frame of government and a different range of functions on small, middle-sized, and large cities. In some states constitutional approval was specifically given to classification, and in a few the precise number of classes to be set up was prescribed.

Abuses of classification

It was but natural that in some states the freedom to set up classes should be abused. In those places the legislature multiplied the number of classes, and in some instances went so far that there was but a single one of the larger cities in each class. Thus statutes applying ostensibly to a class did, in reality, apply but to a single city. In some instances where a reasonable classification system was in existence, the principle of uniformity was further abused by creating a special "class" with boundaries fixed so as to include but a single city. Such would be, for example, a statute framed so as to apply "to all cities which should, at the last preceding census, have a population of not less than thirty-three thousand and not more than thirty-four thousand five hundred." Such obvious abuses have been repeatedly sustained by the courts. Classification of cities on a basis other than that of population has been made to a limited extent with judicial sanction.

c. By alternative forms

A third method of meeting varying municipal needs or demands with respect to the frame of government is that of prescribing alternate forms of organization from among which the individual cities are permitted to make their choice.

As a result of the choice of various alternative forms of organization, the variety of functional activities permitted or withheld from various classes of cities, and the adoption or rejection of permissive acts, a condition of affairs has been brought about in some states as bewildering in its variety as once existed under the special charter system.

3. By "home-rule" charters

While the granting of special charters has endured in some jurisdictions from colonial times even to the present, and classification in some of its forms from the middle of the nineteenth century, a third method of determining the form and functions

of municipalities has been more recently devised by permitting cities to frame their own charters. This authority to frame and adopt "home-rule" charters is conferred sometimes by statute and sometimes by constitutional grant. It should be borne in mind, however, that under this method of procedure the charter-making power is enjoyed as a privilege granted by the state and not as an inherent right. The right of making its own charter does not confer upon a city the right of self-incorporation in any greater degree than is conferred upon all cities under the general laws of the state.

The power of cities to frame and adopt "home-rule" charters is everywhere exercised subject to certain limitations imposed by the state. As to functions, power is given to legislate only with respect to "purely local or municipal affairs," or "to make and enforce all laws and regulations in respect to municipal affairs." These powers are to be exercised in conformity with the constitution and general laws of the state. With respect to the frame of government the city is left free to set up whatever form it chooses, though in some states certain particular features or institutions must be included.

Evaluation of "home-rule" charters

It is claimed for the home-rule charter privilege that it enables each city to have the form of government and to enjoy such city services as it may think adapted to its special needs. It is pointed out that it relieves both the legislature of the need of continually being called on to consider municipal legislation, and the cities from the hazards of laws forced upon them by legislatures the majority of whose members owe no direct responsibilty to those to whom the laws apply. Finally, it is claimed that it stimulates civic interest among the citizens. It should be remembered that cities, like families, do not always care to live by exactly the same patterns.

On the other hand, these constitutional and statutory grants of power fail, in most cases, to offer any clue as to what matters are meant to be included under the terms "municipal" or "local." The vagueness of these terms has thrown upon the courts a vast burden of litigation in the effort to secure a more precise defini-

tion of the boundaries of the authority thus conferred. The problem is still more complicated by the fact that a matter which in one jurisdiction is held to be local is sometimes in another declared to be of a general nature. Still further, it has been proved that a matter which at one period may be considered local may, in the next decade, have taken on regional or state-wide interest. The latter complication has been intensified in recent years by the rapid developments in the fields of transportation and communication.

The practice of permitting cities to make their own charters leads to a question of wider scope than that of securing practical governmental arrangements which are pleasing to the citizens of a single city. It involves the reconsideration of the whole relation of local areas of government to the state, i.e., to the question of "home rule" in its larger aspects.

Some aspects of the general problem of "home rule" have already been considered in the preceding chapter. The fact that the controversy between the advocates of a wider degree of local autonomy and those who contend for the maintenance of a more effective control of local governmental units by the state has assumed its most acute form with respect to cities warrants, perhaps, its further consideration at this point.

State-local relations

The fact is that the citizen finds himself a member of a number of social groups ranging in size from the nation to the smallest neighborhood group. Each has its own sometimes conflicting interests. A practical problem of government is how best to set up a system of political relations under which all these interests may best be served. Federal-state and interstate arrangements to that end have been considered in early chapters of this volume. No less important is the reconciliation of the interests of the state and the lesser communities, including not only the cities but the counties, townships, and villages as well.

In spite of certain constitutional limitations the government within the states is unitary and there is evident no general desire that it should be otherwise. The share in the government to be exercised by the localities is determined by the state. Any depar-

ture from this policy would be of a most fundamental character affecting the whole state and transcending the interests of any one group. No one advocates complete autonomy for units within a state.

The responsibility for the protection of private rights and the promotion of the public well-being rests primarily on the states. In meeting these responsibilities the state employs the local governments as its agents in certain directions. It employs the localities in the execution of police laws and in the rendering of a wide range of other services. The state contributes directly to the support of many services performed by the localities, such as education, welfare, and highways. Furthermore the revenues of the local governments are drawn from the same economic reservoirs as are those of the state. For all these reasons the state has established a certain degree of control over these governments.

The problem of control

In earlier days, when governmental services were few and state control could be expressed in simple positive rules of law the violation of which was easy to observe, the problem of state control was not difficult. Under those conditions control was exercised through statutes and special charters enforced by resort to the courts. Some of the defects of such a system have been suggested in connection with the attempts to find a means of escape through resort to home rule. It was discovered that the courts, although able to cope with the illegal acts of local officers, were quite unsuited to the task of controlling unwisdom of action or of dealing with situations due to failure of the locality or of its agents to take positive action when they should do so.

Administrative control

Seeking to avoid the unsatisfactory features of the system of control through legislative-judicial control, recourse has been had with increasing frequency to what is usually spoken of as "administrative" control. This is a method which has long been applied in foreign countries but which has never been popular in the United States. The method is, in fact, a combination of legislative, administrative, and judicial control. Under it the form and functions of local government may be determined upon by either of the methods above described—by special charter, by

general law or by the "home-rule" method. Thereupon the duty of seeing to it that prescribed forms and functions are observed and that the local services are performed efficiently and according to prescribed standards is entrusted in the first instance to administrative authorities. In all cases where the rights of the municipality or the private rights of the citizens are involved appeal may be had to the courts.

Devices of control

The desired supervision by administrative authority may be accomplished through a variety of channels and by devices involving varying degrees of coercion. These may be briefly described.

1. Advice and information

In the first place, the desired result may be sought by placing at the disposal of the local authorities information and advice, or services of a technical nature, which are not otherwise readily at the command of the municipality. This form of control through suggestion and assistance depends for its effectiveness upon the ability of the administrative agency to establish friendly relations with local officials. It is used especially with finance and public works.

2. Reports

A second method of control is by requiring reports to be made to appropriate state authorities. Such reports, valuable for comparative purposes, may be made the basis of legislative or administrative proposals or furnish the stimulus for competitions in excellence between municipalities.

3. Inspection

Control through inspection, for the purpose of observing local conditions and the faithfulness of the performance of duties imposed by law, has been widely introduced. Such inspection may be made the basis of advice and technical assistance, or of coercive action where such advice or service is not accepted. This form of control is resorted to in cases where minimum standards of excellence have been set up by law. In education, public health, and finance, much use is made of it.

4. Grants-in-aid

Grants-in-aid with conditions attached, such as practiced by the federal government toward the states, have been extensively employed also as between state and local areas. Such grants have long been made to schools and libraries, more recently to a lim-

ited extent for health purposes, and even more recently and extensively in the fields of welfare and of highways. In all these cases the alacrity with which the grants are accepted exceeds the willingness to accept and comply with the conditions imposed. The amount of money paid by states to local units of government is not all involved in programs of grants-in-aid. Much of it results from the operation of state-collected, locally-shared taxes.

5. Approval and review

Preliminary approval and subsequent review of local action has been an even more potent means of exerting control. This method has been applied to the preliminary approval of plans and specifications for public works, to debt-financing, and to the supervision of the administration of finance generally. These have been employed effectively in the prevention of waste and poor service due to either ignorance or corruption. Whenever the administrative has been substituted for the earlier form of control the most effective results have generally been secured by the employment of a combination of these various devices.

6. Order or regulation

The desired degree of control may be accomplished, as has been suggested, by cultivating friendly relations between state and local officials, but it may, however, call for the issuing of an order or a permit affecting the specific action under consideration. Again, it may be embodied in rules or regulations having the force of law which set general standards or prescribe rules of procedure. Where administrative control has reached its maximum of effectiveness such administrative rules have been worked out in conferences where representatives of all interests, state and local, public and private, have coöperated.

Why administrative control?

The advocates of a larger, rather than a smaller, degree of state control of local government in general, and of administrative control in particular, insist that many of the activities usually looked on as of a local character are of vital interest to the state as a whole. Such problems as those of health, education, communications, welfare, and law enforcement know no local boundaries. Those who thus urge administrative control emphasize the fact that the supervision of such activities as these calls for such detailed consideration and such technical knowledge that legisla-

tive bodies cannot grapple intelligently with the problem. It is asserted that when regulation in detail is undertaken by the legislature, the enactments, since they cannot be changed until a subsequent session of that body, are so rigid that they cannot be readily adjusted to changing needs.

The old method relies on the courts to assist in making effective the legislative mandate in each particular case. The advocates of administrative control point out that the courts are not suited to this task; that their action is slow; that their rules of evidence and procedure are too inflexible; and that they act only after the event. They emphasize, too, the fact that while the courts can take cognizance of illegal action, their power to intervene in cases of failure to act is very limited and in cases of unwise action is non-existent. Those who fear dictatorial or arbitrary action from administrative officers are reminded that whenever excess of authority is charged or public or private rights involved there is still access to the courts for suitable relief.

It is further stressed that by the newer method the regulation is not only flexible but that at the same time it is applied by persons equipped with training and technical knowledge which the courts cannot possess.

Too often the problem of "home rule," or state control, has been discussed as if there were a moral right involved—as if cities have an inherent moral right to local self-government. Appeal is made to the emotions rather than to reason. Epithets such as "undemocratic," "bureaucratic," "paternalistic," or others similarly difficult of definition, are hurled about. Having little application to actual facts, such epithets of disapproval arise perhaps equally from misunderstanding of facts and from an ingrained dislike of executive authority.

Those who most loudly protest in the name of self-government are in danger of proving too much. It might be argued in the same vein that still smaller units—the East Side, the West Side, "across the tracks," the ward, or the block—too, have their right to home rule.

Stripped of its sentimental accompaniments the problem of

state-local relations becomes one of practical expediency. The problem then is to determine what status will as a matter of fact result in the greatest degree of social contentment and well-being in both the larger and the smaller group. In spite of vigorous criticism it seems probable that state control will increase rather than diminish, and that it will be made effective more generally through administrative agencies.

Governmental Organization

The form which the government of American cities should assume has been a matter of experiment throughout our national history and is still in the experimental stage. Examples of most of the forms which have been tried out in the past are still to be found somewhere in the United States. Examined in detail their variety seems almost infinite. However, three general types may easily be distinguished. They are: (1) the mayor-council type, (2) the commission type, and (3) the council-manager type.

Types of city government

The oldest and still the most widely adopted is the mayor-council type, which for a century held the field without dispute. About three-fifths of the cities of 5000 population or over have this type. The outstanding features of this type are, as the name suggests, the presence of a mayor and a council, both popularly elected. The mayor is almost always elected for a term of either two or four years. His salary varies from a nominal compensation in some of the smallest cities to several thousand dollars in the larger cities, and in the largest may rise as high as $25,000.

1. Mayor-council type

The council members are elected for a term of from one to four years. In some cities, especially small ones, councilmen receive no salary, but in most cities they receive a salary which ranges from a small allowance for attendance at meetings to a salary of $8000, the amount councilmen in Pittsburgh, Pennsylvania, are paid. The council varies in number from less than ten to as many as twenty members. They formerly sat as two separate chambers—the smaller being called the Board of Aldermen and the larger the Common Council—but the bicameral form is now used in only about a dozen cities.

In spite of the many varieties of governmental forms to be found, two distinct species of the mayor-council genus may be recognized: the weak-mayor and the strong-mayor forms. These differ from each other chiefly with respect to the position in the government which is assigned to the mayor.

a. Weak-mayor form

Following somewhat the English model, while at the same time yielding to the prevailing dislike of executive authority, a mayor of the weak type was at first provided for. He was made little more than the ceremonial head of the city and the chairman of the council.

Mayor

Whatever the type of government, wherever the mayor's office exists, he is the legal head of the government for the service of legal papers, the official head for ceremonial purposes and the representative of the city in conferences of various sorts, state and national. In the larger cities a considerable portion of his time is consumed in such activities. In small cities he also acts sometimes as judge of the city court. In those places where boards play a part in the government he is likely to be an ex officio member of such bodies.

Such is still the position of the mayor in the extreme form of the species where he is in no sense the real head of the administration. His appointing power is slight and the removal power he does not possess at all. In such instances the heads of administrative departments are either elected by the voters or by the council, and in either case perform their duties independently under the direction of council committees.

b. Strong-mayor form

The "weak-mayor" form has, in practically all larger as well as in a majority of the smaller cities, been replaced by the "strong-mayor" form. Under this form the mayor's position is somewhat analogous to that of the President in the federal government and of the governor in the states which have undergone administrative reorganization. The list of elected officers tends to become smaller and administrative positions, including those of the heads of departments, are filled by appointment with or without confirmation by the council. In 43 percent of the cities with over 5000 population no administrative positions, other

than the mayor, are filled by popular election. Where council-manic confirmation is required the effect is, as is usually the case when applied to appointments of the President or of a governor, more often to hamper wise choice than to prevent unwise action by the chief executive. Even in the strong-mayor cities, and where confirmation by the council does not exist, the power of the mayor with respect to appointments and removals is often limited by the existence of "civil service" laws as well as by the fact that the power to remove is not inherent in the mayor's power to appoint but must be specifically conferred.

In many of the strong-mayor cities the mayor is charged with responsibilty for the formulation of the budget and exercises some measure of control over the expenditure of the appropriations made by the council.

On the whole the position of the mayor has come to attract more attention than formerly, but it has not proved to be as generally a stepping stone to state-wide office, as might have been expected. In view of the power wielded by the mayor of a large city under the strong-mayor form, the office does not appear to have risen high in popular respect and esteem.

Council

The city council is elected in about four-sevenths of the cities from the several wards into which the city is divided for election purposes and in about two-sevenths on a general ticket. In other cities it is made up in part of members chosen on a general ticket and in part of ward representatives. In a number of cities, including Cincinnati, the council is elected on general ticket by the system of proportional representation. The ward system of election has been the subject of much criticism. It is contended that persons so elected are representatives, not of the whole city but of their particular ward, and that the quality of the membership is adversely affected by the small areas from which they are thus chosen. The political implications of the ward system have been the subject of much literature, both fact and fiction. About the election and the subsequent activities of ward councilmen has centered so much petty politics, and in numerous instances acts of unsavory character, that the term "ward politician" has be-

come a synonym for graft and corruption. It was to escape these undesirable aspects of councilmanic activities that the general ticket plan was introduced.

Functions

The council is primarily the legislative body of the city. Its enactments, known as ordinances, deal with the wide variety of matters which, under the state constitution, the charter, and other statutes of the state, fall within the scope of city government. In accordance with the policy of strict enumeration of corporate powers the ordinances of the city are likewise strictly construed by the courts.

In some instances city councils have been given a measure of power to organize certain services, create minor offices and employments, and define the powers and duties of the incumbents, but in general such powers are very sparingly conferred.

The council has wide powers of levying taxes, of borrowing money (within statutory or constitutional limitations), and of making appropriations for municipal purposes. Regulatory powers of a police character find expression in ordinances covering a rather wide range of subjects in the fields of safety, health, morals, and general public convenience.

Administrative functions of the council

It will be discovered upon an examination of the proceedings of almost any city council that a large proportion of its ordinances are not of a legislative character at all, but are purely administrative in their nature. They may order the improvement of a certain street, the installation of a street or traffic light at a particular point, or grant a permit to do some specific act which would otherwise be unlawful, such as to break a pavement or curb, move a building through a street, or erect a sign overhanging a sidewalk. In a city under the weak-mayor form of government substantially the whole work of administration is likely to be performed under the immediate direction of the council or of one of its several committees. In other words, there is no attempt, especially in the weak-mayor cities, to adhere to the principle of the separation of powers.

Furthermore, it may be observed at this point that in many cities the council shares its legislative powers with various ad-

ministrative boards such as those which deal with education, health, sanitation, parks, and zoning, which not uncommonly have the power to issue rules or regulations with the force of law. Sometimes these boards have powers of taxation, borrowing money and appropriation quite independent of the city council. In fact, the decentralization of city government in this manner is carried so far that school, park, and sanitary districts are sometimes made corporations quite independent of the city. The purpose of the decentralization has frequently been to take these services "out of politics." Instead of endeavoring to elevate the quality of the city government in general, the citizens have thus sought to salvage the administration of important interests, thereby confessing their incapacity for or their unwillingness to insist upon excellence in self-government in other fields.

Legislative decentralization

Since the variety of services rendered by the average city remains much the same whatever may be the form of governmental organization, it will be more convenient, before considering these services and their administration, to examine the newer types of government which have recently come to share the field with the older mayor-council type.

2. Commission type

The next type of city government in point of historical development is the "commission plan." Ignoring certain sporadic and temporary experiments of an earlier date, it may be said that the introduction of the commission type grew out of the devastating results of the tidal wave disaster in Galveston, in 1900. The use of the plan spread to Houston and then to Des Moines where it gained wider attention and, by the time of our entrance into World War I, had been adopted in a large number of cities. Since that time few cities have adopted the plan, but a large proportion of those which have made the experiment have abandoned it. This does not mean, however, that they have all reverted to the mayor-council type of government, since many of them have adopted that council-manager type explained below.

Born of an emergency to escape the breakdown of the older form of government, it seemed to its enthusiastic advocates to embody the answer to many of the defects of and criticisms di-

rected toward those older forms. The separation of powers and the ward system were completely abandoned and it was recognized that the more important problems of city government are administrative rather than legislative, and that those problems are for the most part city-wide.

The voters elect a number of commissioners, usually five, on general city ticket and for a term of four years. Sometimes corporate officers, such as clerk and treasurer, and in some instances a mayor, are also elected. Under this type of government the mayor occupies a position of even less importance than under the weak-mayor form. In the commissioners is vested the legislative power as well as the administration of all the services of the city. The commissioners are, first of all, individually administrative heads of the several departments and, secondarily and collectively, the legislative body of the city. Sometimes the commissioners themselves designate their departmental assignments and sometimes they are elected by the voters as heads of specific departments.

In their collective capacity the commission exercises the legislative functions usually performed by a city council. The administrative work of the city is grouped into a number of departments equal to the number of commissioners, each acting as a department head responsible nominally at least to the whole commission of which he was a member.

Merits and demerits of the commission form

While the commission plan has failed to offer a solution to all the ills of city government, it has served to create a break with some of the old and objectionable traditions; to eliminate the endless squabbles between mayor and council existing under the strong-mayor-council form; to discourage some of the forms of petty politics and graft which had become entrenched, and to emphasize the importance as well as the increasingly technical character of administration. It has served also to attract attention to and arouse new interest in city government and, in its earlier years at least, to raise city government to a new level.

Certain defects early made themselves manifest. The commission places too little emphasis on its legislative functions and is

too small to be adequately representative of public opinion. The commissoners are inclined to think of themselves too exclusively as department heads. There is afforded no single responsible head for the whole administration and hence there is likely to be a lack of coördination of effort. There developed a tendency for certain commissioners, seeking first of all the advancement of their own departments, to trade and logroll among themselves, to the detriment of other departments and the general interests of the city. Furthermore, the activities of a city are too numerous and too diverse to lend themselves advantageously to a system which provides for so small a number of departments. The system, too, has resulted in placing commissioners in immediate charge of highly technical services, although such commissioners are not qualified for such responsibilities. The early proponents of this plan had their eyes fixed so intently upon certain aspects of the governmental picture that they failed to give sufficient attention to others equally important.

3. Council-manager type

Again a great disaster brought to general notice and eventually to wide popular favor a new type of municipal government: the "council-manager" plan. Having been established in a smaller way in Sumter, South Carolina, in 1912, it gained prominence through its adoption in Dayton, Ohio, after the flood of 1913, and at present almost 1000 cities operate under the council-manager plan. In general the plan resembles the approved form of organization of a large business corporation, possessing most of the advantages and avoiding most of the disadvantages of both the mayor-council and the commission types of government. The rivalries between council and mayor inherent in the mayor-council form are obviated by placing the responsibility for the whole government in the hands of a single body elected by the voters. This body was at first thought of as a continuation of the "commission" under the commission plan and so did not exceed five in number. It was soon perceived that, since its duties were wholly legislative, it might properly be made more widely representative. Hence the tendency has been to increase its numbers somewhat and to supersede the title commission by that of coun-

cil. Having elected the council and in some cities a mayor who stands in much the same position as the mayor under the commission form, the voters have completed their task at the ballot box.

Council

The council proceeds to elect a city manager who, under the general direction and supervision of the council as to matters of policy, is responsible for the whole administration of the city. Where the system has been set up and carried out in accordance with the spirit in which the plan was conceived, the council in its selection of a manager is not restricted to residents of the city or state but seeks to fill the place with a competent person from the country at large. Selection is usually made of someone who has had some experience in an engineering or managerial capacity, sometimes as manager of a smaller city. Thus the position is placed upon a purely professional plane, on the assumption that the manager is to be in no way concerned with party or factional politics but is to carry on the city administration in a manner analogous to that of the general manager of a private corporation. Sometimes, from a lack of understanding of the fundamental idea of the plan, the manager has been made the political head of the city or has been made subject to the recall by the voters. Sometimes the council has been guided by political motives in the selection of the manager. Where these mistakes have been made the government of the city becomes no better and sometimes even worse than under the time-worn mayor-council form.

Where the system is properly set up, the manager under responsibility to the council makes all appointments and removals subject to the personnel laws if such there be. He prepares the budget, which is then revised, and the appropriations and tax levies made by the council. He sits with the council to give information and, if called upon, to give technical advice. It is true that a manager may influence distinctly the formation of policies, and there is present the danger, which must be firmly resisted by the manager, that he will be led into the position of dominating the policy-making. Such action will be quickly resented by the citizens and if persisted in will wreck this form of government.

The manager as head of the administration directs the work of department heads and those below these officers in the administrative services. He is given wide powers and grave responsibilities are placed upon him, and, when supported by a council which has caught the spirit of good government combined with wisdom of action, he can develop a service to the citizens which it is difficult if not impossible to attain under the older types.

City Court

Whatever the type of government, there is usually found a city court, existing under a variety of titles, the composition and jurisdiction of which varies widely. At its lowest it has criminal jurisdiction over infractions of city ordinances only, but in many places its authority extends to minor civil actions as well as to certain infractions of state law.

No type automatic

It must be remembered, however, that good or bad government is not produced by forms alone. There seems a widespread notion that somewhere there is a magic form of government which having been inaugurated will produce good government without further care or attention of the citizens. Although it is easier in city government, as in any other complicated business, to secure good results when working under a good rather than a defective form of organization, it will be found that good government under any form, like liberty, may be secured only at the price of eternal vigilance on the part of the citizen.

Whatever be the type of government adopted, the range of services which the modern city performs for the people is everywhere in this country substantially the same. The frontiers of what are sometimes referred to as the "proper" functions of the city are continually being pushed farther and farther afield, due to the changing attitude toward government in general and in response to insistent demands of the citizens. A result is that more and more persons are brought into the city service and more and more things in greater quantities are purchased; and these in turn mean that more and more money must be raised and expended.

The resulting problems duplicate on a smaller scale, save in the largest cities, those of the state government. The task of deciding what specific services shall be performed, the instrumentalities of

their performance, and the amount and sources of the necessary revenues are for solution by the council just as they are by the state legislature. But the problems presented to the administrative authorities of city and state are of even more complexity in detail. How to keep the machinery of administration in condition so as to produce results day after day, and how with such machinery actually to produce the services demanded, even in a city of moderate size, are tasks of no small proportions.

Administrative development

The historic development of city administration has not been essentially different from that observed in the state government except that in its adaptation of the administrative machine to changing needs the city has outrun the state. It has already been stated that under the weak-mayor form city services are administered sometimes by committees of the council and sometimes by boards. These boards are either appointed by the council and directly responsible to it, or popularly elected and responsible to neither the mayor nor the council. Thus has been set up a state of disintegration and decentralization in city administration not unlike that described in a previous chapter for the state.

Developments under strong-mayor form

The administrative changes brought about by the supplanting of the weak-mayor by the strong-mayor form were three in number. First, there was the grouping of the many activities into a relatively small number of departments on the basis of similarity of functions, a process of integration. Second, there was a tendency to supplant administrative boards by single heads in charge of the several services, a process of centralization. Third, the departments were brought under the direction and control of the mayor, a further step in centralization. The commission plan was, administratively, integration carried to an unscientific degree since it resulted in bringing into one department matters quite unlike. It was also a violation of the principle of centralization, since it brought the administration under a board instead of a single head. These errors contributed heavily to the general discrediting of that type of government. On the contrary, the success which has attended the adoption of the manager plan is

due in large degree to a wise application of the principles of integration and centralization.

City Governmental Activities

As is true in the state, the administrative activities of the city include those of both a corporate or staff nature and those of a service or line character. The one group is concerned with maintaining the corporate existence of the city and its effectiveness to perform its service functions. The other is engaged in performing those services for the public for which the government exists.

Corporate activities

The corporate or staff agencies of a city include those concerned with problems of finance, law, records, personnel, purchasing, and planning. Principles and practices relating to record keeping and purchasing are not essentially different in cities from those described in Chapters 8 and 20 applying to other units of government. Problems relating to corporate activities vary in detail depending upon the size of the city, the general type of government established there, and the peculiar form assumed by the government of the state.

Finance

The financial mechanism, on the whole less elaborate than that of the state, may or may not be organized into a single department. In any case there is a treasurer who is responsible for the custody and frequently for the collection of the city revenues. There is an auditor or comptroller, whose chief duty is to preaudit bills and claims against the city and to authorize their payment by the treasurer. In many smaller cities the city clerk acts in this capacity. The auditor sometimes, under the direction of the mayor or manager, prepares the budget, and makes up the assessment roll. In some states the assessment and collection of taxes is placed in the hands of county or state officers, but whether done by the city or the county, the work is usually performed under some degree of supervision by the state.

Expenditures

Like all governmental units the problem of securing adequate revenue is an acute one. Municipal expenditures have increased on account of both the expansion of services previously rendered

and the additions due to a constant demand for new public services. To these has recently been added the great problem of public relief during the period of business depression and high cost of goods and services because of inflation. So overwhelming for local governments did the responsibility for the former become that state and national governments have been called upon by the cities to assist with their resources of money and credit.

Revenues

1. Taxes

The general property tax is still in the greater number of states the largest source of city revenues. Because of the added difficulty of administering the general property tax in large cities where so great a proportion of the wealth is in personal property, and much of it of an intangible character, this form of taxation is there found at its worst. To supplement this tax, business, pay-roll, income, and various other special forms of taxation are resorted to. The city sales tax, imposed in addition to the state sales tax, has been resorted to in a considerable number of cities.

2. Privilege license payments

The revenues derived from business, highway, and other privileges granted by the city under licenses yield in many places a substantial sum. These licenses are for two purposes. In the first place they are regulatory in intent. Through them standards of various sorts are imposed—restrictions as to numbers engaging in the business, as, for example, in the case of liquor-selling establishments, are secured and reports required which are useful for a great variety of statistical purposes. In the second place, they are a source of revenue. Today license fees are secured from owners of theaters, gasoline stations, restaurants, pawnshops, hotels, taxicabs, as well as from peddlers and auctioneers, and a host of other businesses and activities.

3. Special assessments

Special assessments have been widely employed to secure revenue for the carrying out of projects of public works. These have been more widely employed in cities than in any other area of government. They are used most frequently for park and boulevard development, street paving, and sewer and other drainage projects. Special assessments are levied on neighboring property upon the theory that they are payments for special benefits conferred by the improvement.

Although city socialism has made much less progress in America than in most foreign countries, the proceeds from proprietary enterprises, mostly of a public utility character, have come to furnish no inconsiderable contribution to the city's revenues. The reduction of property tax rates made possible in many places by contributions from utility earnings has been widely acclaimed by property interests. It has been denounced by others as being a consumption tax, imposing an increased proportionate burden upon the section of the public least able to bear it. 4. Proprietary activities

More recently grants-in-aid from federal and state governments have been made in large sums. Some of these are true grants while other contributions are but state-collected revenues distributed to the localities. Though eagerly accepted and even sought after, these grants are widely condemned as concealed taxes and as incentives to unwise spending by the municipalities. On the other hand, it is urged that by the insistence of the grantors upon certain standards of performance in the expenditure of the funds there have been secured for the cities a more enduring return than would otherwise have been obtained. The direct subventions made by the federal government to the cities for public work relief, over the head of the state, have introduced a new situation the latent possibilities of which are causing concern in some quarters. Hitherto cities have had relations with the federal government only through the channels of the state government. 5. Grants-in-aid

Trust funds, donations, and gifts are an irregular but sometimes considerable source of revenue. These are more often notable in the older cities, where large private fortunes are more common and families have been longer established in the community. Rents and earnings from property other than public utilities sometimes, especially in the older portions of the country, add their share to the stream of public income of cities.

Cities, like states and other units of government, very generally make use of their credit to secure funds. As has been suggested elsewhere, borrowing to finance large capital outlays is, within reasonable limits, permissible provided that proper Use of credit

arrangements are made for the repayment of the debt. Until comparatively recently, debt payment has generally been by the accumulation of sinking funds. This plan has been widely abused either by neglecting to make payments into the fund or by the use of the fund for some other purpose. In either case the accumulation at the time of maturity of the bonds becomes inadequate to meet their payment. This danger has led to the widespread abandonment of the sinking-fund plan. Instead, the serial-bond plan has been widely substituted. Thus the redemption of a proportionate part of the debt is made an item in the current expense budget of each year.

Legal department

The legal department is the general legal advisory department of the city. The opinions of the city attorney, sometimes called the corporation counsel or city solicitor, are relied upon by officials as a basis for their action, and if the matter is never brought into court, his opinion stands as the final word on the point in question. The legal department also represents the city in all cases in court to which the city is a party.

Personnel

The merit system has been more widely adopted and greater progress in the direction of developing a real career service made in cities than in the state governments. Except in a few states, like New Jersey, New York, and Massachusetts, where the state civil service commission administers, in whole or in part, the city's merit system, the system is usually administered by a civil service commission ordinarily established on a bipartisan basis. In a few instances the commission has been dispensed with and the administrative functions turned over to a personnel director. Sometimes the commission is retained but is given only duties of a quasi-legislative and quasi-judicial nature. The civil service authority sometimes is governed by a state civil service law which prescribes its functions rather minutely, while in other instances the local authority is granted somewhat wide power to organize and conduct the service as it will. In cities where the civil service department has been made bipartisan and given a relatively independent status, there has been a tendency for the commission to assume a superior and censorious attitude

toward the city administration in general. Thus friction has frequently resulted. Where the personnel system has been brought within the regular city administration, this friction has been avoided, and a new attitude of coöperation rather than of mutual suspicion has resulted. Under any plan of organization much of the effectiveness of a merit system is defeated if the administration is unsympathetic or hostile. In no city can any system yield satisfactory results except with the cordial coöperation of the head of the city government and the persistent and watchful interest of the public.

In many cities where no general civil service system is established, certain services, in which the evils of the spoils system are especially apparent to the general public, have been placed upon a merit basis. Police, fire, and educational services are those which have most widely been given such special protection.

Planning

A field of civic activity which has claimed increasing public attention within the present generation is that of city planning. The planning function as usually understood involves activities which might logically be classed as direct services but for purposes of convenience will be included here. This function is usually administered by an independent city-plan commission. Although not usually organically connected with the department of public works, it is dependent upon that branch of administration in many phases of its execution. City planning has been defined by a pioneer and leading authority on the subject as "The attempt to exert a well-considered control on behalf of the people of a city over the development of their physical environment as a whole." Although it has been too often thought of as merely an attempt to create "the city beautiful" by the creation and adornment of a civic center, the illumination of a "great White Way," or the decoration of a few show places, it has in truth more practical and far-reaching purposes than these. Some elements of city planning have long been recognized as matters of public concern, and a few of our older cities bear evidence of early interest in the subject. Washington, the na-

tion's capital city, is the most striking example among our older and larger cities of an early appreciation of the merits of planning. Planning may be thought of as centering about three groups of problems: those of the circulatory system, public buildings and grounds, and the control of private property.

1. Circulatory system

The circulatory system includes the streets and squares, terminals for freight and passengers, and the accommodation of all forms of transportation and transmission. The street system is the framework of the city plan. On it depend many of its aspects such as transportation, communication, distribution of utility services, sewer and water systems, the location of parks and public buildings, and the layout and use of private tracts of land for residential and business purposes.

The earliest evidence of rudimentary planning is seen in the widespread adoption of the rectangular street plan. This combines the qualities of simplicity and of economy of land, but has few other advantages to offset its ugliness and monotony. The combination of the radial with the rectangular plan has offered, perhaps, the most desirable combination of economy of space and adaptability to the natural movement of traffic. Streets in the older cities are usually narrow and inadequate for the modern volume of traffic. Replanning by the widening of old streets and the opening of new arterial thoroughfares has in many of these cities proved to be a necessary, though tremendously expensive, undertaking. The accommodation of motor traffic both on the streets and at parking places has added much to the difficulties which inhere in the transportation problem.

Excess condemnation

When private property is desired for public use, it may be taken by the city under the right of eminent domain, but it sometimes becomes desirable, especially in replanning projects in older cities, to take more land than is needed for "public use" as the term is legally understood. In such replanning it may happen that it is desired to take a wider strip than necessary for the street. The purpose is that the land may be replotted and sold with restrictions as to its use so that it may add to rather than detract from the effectiveness of the improvement. Sometimes

a similar situation presents itself with respect to property bordering on a boulevard or parkway which is being improved with a view to its beauty as well as to its utility. Again, in the replanning of a street, it may happen that remnants of land too small to be used separately but which could be joined to adjacent property are left. When the owner refuses to sell, these remnants remain as scars which detract from the value of the improvement and the surroundings. Under such circumstances since they are not under usual constitutional interpretation taken for "public use," the city cannot take these areas from the owners. To meet these situations cities have in several states been authorized by constitutional amendment to take such property under what is known as "excess condemnation." Whether the taking of property under excess condemnation is permissible under the federal constitution seems still to be a matter of doubt. It would appear, however, that some of the same evils may be reached through the application of the "zoning" principle.

Redevelopment

Cities may also take under eminent domain procedure land and buildings constituting "blighted areas." Such areas may then be cleaned off, replanned, and sold to private interests who agree to construct buildings according to plans approved by the redevelopment authority. It may involve the complete development or redevelopment of an area or urban community.

2. Buildings and grounds

The providing for the proper location of public buildings with respect to both convenience and adornment is a matter of importance to a city. The use of the radial street plan lends itself to the effective location of public buildings and the creation of small parks and open spaces in congested localities. The location of such small parks as well as public recreation grounds in crowded districts and the development of park and forest areas in outlying sections are important matters which, when once established, come within the province of the park authorities.

3. Regulation of private property

The regulation of private property not desired to be actually "taken" as a step in city planning, has presented problems sometimes as perplexing as those mentioned in the preceding paragraphs. Under the police power it is permitted to regulate the

use of private property in the interests of the public safety, health, morals, and welfare. Limitations on the use of real estate with respect to the type of construction of buildings or their height, and the proportion of the lot which may be covered by buildings, have been held in recent years to be proper applications of that power.

Offensive uses

Public opinion as to what constitutes an offensive use of private property has undergone a progressive development within the present generation. In response to a developing public opinion, offenses against the sense of sight have grudgingly been brought within the field of police regulation in some states. Billboards, building signs, and similar disfiguring structures, especially when in the neighborhood of highways, have been held to be within the proper field of regulation or prohibition. It is, of course, recognized that the use of land for industrial and business purposes is, under ordinary circumstances, not only quite proper but highly desirable. It is almost equally apparent that such a use of land in the midst of a residential neighborhood may be unpleasant, or even dangerous to health, and detrimental to property values. Likewise the intrusion of an industrial plant into a retail commercial or financial district may become almost equally injurious to comfort and to values, if not to health. To prevent such undesirable consequences the practice of "zoning" has been introduced and has had widespread adoption. The city is laid off into districts or "zones." Certain districts are restricted to residential uses only. Commercial or industrial uses of land in these districts is prohibited, and sometimes even the erection of apartment houses is restricted or prohibited here. In business or commercial districts no industrial uses are permitted, though residences may be erected. In industrial districts all kinds of uses are allowed. In larger cities zoning is applied to the height of buildings and even to the materials of their construction, as well as to area restrictions. Zoning as well as other aspects of planning may extend into the areas around a city.

Zoning

The ever-broadening services performed by the city may be

grouped under a few classes of functions including: safety, health, education, recreation, welfare, public works, and proprietary services such as electricity, markets, and transportation. Whether administered under the mayor-council, the commission, or the council-manager systems of government; whether grouped into a few or scattered among a larger number of departments; and whether those departments are directed by a board or by a single head, the individual services remain substantially the same. It will be found, too, that these services are for the most part identical in character with those furnished by the state, and in most instances articulated to some extent with the respective state services. Service activities

Under the decentralized system of law enforcement prevailing in the United States, the city police have been relied on for the most part to enforce state laws for the security of persons and property. As has been before pointed out, this has been practically universally true, until the recent development of state police systems. Even now there is some disposition to restrict the activities of the state police to rural areas or to types of offenses or circumstances with which the city police find themselves unable to cope successfully. Conditions of city life make the enforcement of the ordinary laws more difficult there than in the rural districts and call for a great variety of police regulations which are not necessary outside of the corporation boundaries. 1. Safety

a. Police

Police systems in all but the smallest cities tend to become professionalized, and are organized under a chief, captains, lieutenants, and sergeants, in semi-military fashion. In the direction of greater specialization of functions there are found in the larger cities bureaus of detectives and of criminal identification, as well as traffic, homicide, and morals squads. Being brought into contact with the classes engaged in criminal practices some of which are highly profitable, the police are especially exposed to corrupting influences such as bribery offered by lawbreakers in return for protection, and to intimidation by venal politicians. The wonder is not that the police are sometimes corrupted, but

that their standards of character and efficiency are as good as we find them. Where state police forces have been established, although rivalries and friction have sometimes developed, the local police usually work in close coördination with the state force. Considerable progress has been made in raising the level of police service by the organization of police schools by the cities or in connection with state educational institutions, and by the Federal Bureau of Investigation.

b. Fire The fire department is sometimes organized separately and sometimes administered along with the police in a department of public safety. As a fire-fighting machine American fire departments have been more highly developed and equipped than have those in foreign countries. Following the lead of some European countries, the departments have tended to become also important as fire-prevention agencies. In connection with officers of the building department, usually a separate branch of service, fire departments have also sought to enforce laws for fireproof building construction. Prevention work is carried on, too, by inspection for the reduction of fire hazards in buildings and through efforts to educate the public in the schools and among adults in habits making for the reduction of fire risks. In their fire-prevention efforts the department works in coöperation with the state fire marshal. Good fire departments operate on the principle that the best way to fight a fire is to prevent it. In some cities, especially in states where state fire marshals' departments have not been established, arson squads are maintained to investigate the causes of fires and to seek the apprehension of incendiaries.

2. Health The care of the public health and sanitation, though police functions in the broader meaning of that term, are seldom thought of as such by the public and are administered separately from the safety agencies. The health service in the smaller cities is placed under the care of some local practicing physician, an arrangement which is not usually satisfactory. Ordinarily medical education does not include specialized instruction in public health. Moreover, the coercive measures which an effective

health administration must employ have the effect of making the official unpopular with the public upon whom he must depend through his private practice for his livelihood. There is a tendency in the larger cities to employ persons who have had training in public health work, while smaller cities are more frequently being included in the larger health districts which are able to avail themselves of the services of persons properly trained. Public health work includes the prevention and eradication of communicable disease through vaccination and quarantine and the relief of suffering from disease through the maintenance of clinics and hospitals which are free to those unable to bear the necessary expense. To these are added systematic efforts to disseminate public health information and to cultivate sanitary practices through educational methods, such as the distribution of literature, health talks, and the providing of exhibits and demonstrations. The larger cities frequently maintain laboratories for the analysis of water, milk, and other food stuffs, and for making other bacteriological tests.

3. Sanitation

The activities of health authorities, as will have been perceived, are supported at most points by the work of state health authorities. The work of sanitation is sometimes combined with the duties of the public health department, although on account of the engineering aspects of the work it is, perhaps, quite as likely to be linked with the department of public works. Sanitary activities in the direction of the inspection of foods and food markets, and slaughterhouses, as well as housing conditions, are the activities of a sanitary nature which are most frequently handed over to the health authorities for administration.

4. Public works

The planning, construction, and maintenance of the public works of the city are matters of major concern, not only on account of their close relation to the health and comfort of the citizens but because of the heavy capital investments involved. The close relation of some aspects of public works to public health has already been suggested, as well as the fact that the two fields impinge on each other somewhere in the region which we refer to as that of sanitation. The active responsibility

for the administration may be divided between a civil and a sanitary engineer, or entrusted to a specialist in municipal engineering who has had training in both fields. Public works are sometimes subdivided into four classes—those relating to streets, to sewage and garbage disposal, to water supply and to public buildings. The distinctions between them are sometimes made the grounds for placing these activities under the control of separate departments.

a. Streets

The duties of the street authorities include those of planning the type, width, and drainage of streets; their construction, including paving, curbing, and providing sidewalks; and the installation of street signs. No small part of the work, too, is the maintenance of these thoroughfares and their appurtenances. If the city has no separate authority set up for the purpose, the street department may be charged also with the maintenance of parks, parkways, and recreation grounds. The installation of lighting equipment for streets and public places, especially if current is derived from a private utility, is sometimes a duty of the street authorities.

b. Waste disposal

The construction of sewers and their maintenance is a public work of first-class importance, not only to the comfort but to the health of the city. A great number of the smaller cities as well as an occasional larger one still dispose of their sewage wastes by dumping them into some neighboring stream. Given a small city, a scattered surrounding population, and a convenient waterway, this crude means of disposal may for a time serve as a practical solution of the problem, though one very unpleasant for dwellers along the river banks. But when populations become greater and cities more numerous this relic of barbarism results in intolerable conditions. Not only smaller streams such as the Delaware but even those as large as the Ohio become so polluted that the construction of sewage disposal plants, sometimes involving large expenditures, becomes a necessary duty.[1] Strong coercive measures have been found necessary in many instances

[1] In 1948 the states in the Ohio Valley ratified a compact to control Ohio River pollution.

to compel the cessation of evil practices in the disposition of these waste products. Many states have passed anti-pollution bills within the last fifteen years which apply to cities as well as to private persons and industries.

Closely connected with the question of sewage disposal is that of the disposal of garbage, trash, and ashes. The disposal of trash and ashes, since it does not involve problems of health, is more frequently left to be solved by the householder, the merchant, and the industrialist as he can best arrange. But the removal and final disposition of garbage, on account of its potential menace to health and comfort, early in the growth of a city becomes a problem of municipal administration. The earlier practices of dumping garbage or the feeding of it to hogs have usually been superseded by methods of incineration, ordinarily after fats and other useful ingredients have been salvaged.

c. Water supply

Since the open well and the town pump are, even in small villages, a fertile source of disease, water supplies for towns became early a subject of public concern, although they did not generally become a public undertaking until after the middle of the nineteenth century. At present, however, it will be found that the supplying of water for domestic and industrial uses is more often the subject of public ownership than any other utility. Few of the larger cities or even those of medium size are still supplied from privately owned plants. Water supplies are derived from ground waters taken from wells and springs, or from surface waters, either impounded in reservoirs or drawn directly from neighboring rivers or lakes. Most such supplies are subjected to purification by filtration or chlorination or both.

5. Proprietary enterprises

Public markets, ferries, and wharves have been conducted as proprietary enterprises by cities since an early day without becoming subjects of heated controversy. Water supply, as pointed out above, has likewise without serious opposition become a proprietary undertaking of the city.

Proposals to extend the field of municipal ownership and operation to other utilities, usually to the supply of gas, electricity, and street transportation, are likely to arouse arguments highly

emotional in character. The question: "Should cities own and operate their utilities?" seems apparently to many people one which can be answered by a categorical "Yes," or a "No," a conclusion which, they believe, holds true at all times and in all places. Examined in the light of fact and of logic, and divested of prejudice, there seems to be no more good reason why the city should not own and operate its public utilities than that it should not own and operate its schools, hospitals, or sewage disposal plants. It would seem to many that the answer is, in each case, simply one of expediency. The best answer should, perhaps, be found in traditional Yankee fashion, by the propounding of two other questions: "Is the privately owned utility now operating giving reasonable service at reasonable rates?" and: "Is the city in question conducting the services which it already is carrying on in an economical, efficient and businesslike manner?" A fair answer to these inquiries should usually furnish the answer to the original question.

6. Welfare

Social welfare work in the state has already been considered. The range of activities of cities in the same directions is so great and so varied that it is impossible within a short space to discuss it adequately. It includes relief, public nursing, the care of defectives, employment agencies, and social case work of various sorts. With recent encouragement from the federal government many large cities have undertaken housing projects. The problems inherent in such a program are numerous since they include those of planning, financing, and administration. The conviction seems to be rather firmly established, however, that this field of activity, which has long been engaged in by European cities, is a desirable one to engage public effort. By these housing undertakings it is hoped that the worst slum conditions hitherto existing in some of our larger and medium-sized cities may be eradicated. Eventually the problems of supervising the construction and maintenance of such projects will call for an administrative agency not yet established.

7. Education

Although the general subject of public education has been considered elsewhere in this volume, a few additional observa-

tions may be made with respect to municipal activities in this field. Cities have in many cases in recent years expanded their educational activities into fields not formerly occupied. These have brought with them new problems of finance and of administration. Some cities have entered the field of higher education by the establishment of municipal universities and junior colleges, or have given assistance to private institutions of such rank located within their limits. It must be remembered that many institutions bearing the name of the city are not publicly supported but are private institutions. Municipal collegiate institutions are frequently administered by special boards of trustees independent of the board of education. In many cities the educational program has been broadened to include provision for educational training and for adult education supported in part by emergency grants from the federal government. State and federal aid have given great impetus to developments in these lines which will probably crystallize into permanent activities. The additional attention now being given to vocational education at the elementary- and secondary-school levels are among the most promising developments in contemporary education. The problem of adjusting educational facilities to the stabilizing of population is occupying attention in some cities. Because of the lag in building during and after World War II and the increased birth rate during this period, many cities now find themselves without educational plant facilities.

Future prospects of local government

DeTocqueville remarked more than a century ago that as a nation matures it becomes less well satisfied with local standards and local resources, and turns with increasing force of opinion to the larger units of government for the performance of those services for which it feels the need. The truth of this observation is being demonstrated on every hand at the present time. Today we vigorously demand that local institutions be preserved, but at the same time we call on the state and federal governments to take over one after another public service because of the higher standards which we have come to expect from them. The result is a centralization of administration which so many dislike to

contemplate. Such tendencies can be retarded only if citizens take a more active interest in local affairs and demand and secure from their local representatives a quality of service at least as high if not higher than can be anticipated from the higher ranges of administration.

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