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American Government and Politics

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PREFACE

This edition of my *American Government and Politics* appears at what is in many respects a revolutionary time in the history of our nation. The United States is playing a more active role in international affairs. It is committed by the law of the land to membership in the United Nations and takes part in the councils of that organization before which come for consideration and adjustment the conflicts and interests of the governments of the world. Through cooperation with particular countries and by unilateral actions, it is seeking to cope with the unsettled issues of World War II. Its foreign commitments, coupled with the strains in domestic economy created by war and preparedness, impose on the American system of government and liberty burdens which will test to the uttermost the endurance of the historic principles to which our nation is pledged.

During this revision I have kept constantly in mind the primary question: What knowledge is now most useful to American citizens in upholding, operating, and developing the American system amid present challenges and perils? In formulating answers to the question, I have emphasized (1) the enduring principles of American government and liberty to which our Republic is dedicated; (2) the institutions, or machinery, of government—federal, state, and local—for carrying these principles into effect; (3) the conflicts of interests, within the borders of accepted principles, which are reflected in the conduct of the party system; (4) the testing of principles, ideas, and theories by references to concrete practices, which appears in the discussion of public affairs; (5) the persistent trends, amid many fluctuations, in activities of government—federal, state, and local; (6) the living inter-relations of the constituent parts of the American system; and (7) the manifold influences of foreign affairs on domestic institutions and civilian life.

In keeping with this emphasis on fundamentals and trends, I have avoided many details where they tend to obscure first principles or are likely to become entirely obsolete before students have left college halls and gone far in active life, if not indeed before the day of publi-

the bibliographies, however, I have referred to many continuously revised manuals and other sources to which students may readily turn for the latest information on details of government, now and in the years to come.

From the beginning to the end of this revision, I have had the assistance of my son, William Beard, who has helped me immeasurably in giving form, consistency of substance, and precision to this edition.

CHARLES A. BEARD

New Milford, Connecticut,
June 1, 1948

COLLABORATOR'S NOTE

The death of my father, Charles A. Beard, between the delivery of the manuscript for this volume and the arrival of proof, left me with the responsibility for putting it through the press. Out of a feeling of deep obligation to my father to see that this, his last completed volume, is as truly representative of him as possible, I have made only such alterations as, through my experience in reading proof with him on previous occasions, I am confident he would have accepted had he had the opportunity. For example, I have added to his manuscript references to certain major events that took place while the volume was being put into type, developments which would have attracted his attention, such as the publication of the terms of the proposed North Atlantic Treaty. My labors have been reviewed by my mother, Mary R. Beard, who, through many years of collaboration with my father in writing enterprises, is thoroughly familiar with his standards. It is my firm belief, therefore, that the manuscript as here presented is a close approximation to the volume my father would have offered had he been able to go over the proof himself.

WILLIAM BEARD

Altadena, California,
April 30, 1949

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PART I

THE AMERICAN SYSTEM: ESSENTIAL FEATURES

CHAPTER 1

Government and Liberty in Check Under Supreme Law

The Nature of Government. The very essence of government, everywhere and always, is power—the power of persons called officials to make and enforce laws affecting the life, liberty, and property of the people. Such power is necessary in any great society to prevent it from dissolving into warring elements or utter chaos. If vested in a moderate and competent government held responsible to the people under supreme law, power may be so wielded in the public interest as to promote domestic tranquillity, measured liberty, and the general welfare. If it becomes unrestrained in the hands of ruthless leaders, power may be employed to arouse violent hatreds and destroy cherished liberties; through the launching of extravagant wars of conquest, such power may produce disaster at home and devastation abroad.

The American View of Government. In every democratic society, therefore, the primary political issue is how to maintain a government strong enough to govern effectively in the public interest and at the same time how to prevent it from becoming, in crucial situations, both dictatorial and oppressive. As Abraham Lincoln posed the problem in 1864: "It has long been a question whether any government, not too strong for the liberties of the people, can be strong enough to maintain its own existence in great emergencies."

To this eternal riddle the founders of the United States sought an answer after the Revolution of 1776. Leaders among them surveyed the lessons of history bearing on the question; and, taking advantage of their studies and their own experiences, they created a system of government and liberty, so framed in terms of power and so checked by concrete devices as to avoid, at least up to the present, both the extremes of anarchy or despotism. The outcome of hard thinking and bold experimenting, this system is still regarded by the American people as better adapted to serving the common interest, and upholding liberty in the United States, than any known alternative.

The American Answer Challenged. For a long time, particularly after the opening of the twentieth century, it was cheerfully assumed by American citizens that this system of liberty and government was destined to endure by virtue of its strength and merits. Encouragement in this hope came from other countries. Political struggles in Europe and Asia seemed to indicate that despotism would be finally overthrown everywhere and constitutional government substituted for it. But in our own day, the assumption has been rudely challenged by momentous events.

Before World War I came to an end in 1918, the Tsarist regime in Russia collapsed and at length a dictatorship in the name of the proletariat was founded on its ruins. Within a few years a political adventurer, Benito Mussolini, overturned the limited government of Italy and brought that country under the iron rule of his dictatorship, called Fascism. A few more years passed and a political adventurer, Adolf Hitler, smashed constitutional government in Germany and set up there a Nazi dictatorship. In Spain, with the aid of Italy and Germany, a similar system of tyranny was soon established under General Francisco Franco. In Japan, where beginnings had been made in popular government, military leaders seized the real power and relegated civilians to a position of political bondage.

Although in World War II despotic governments in Germany, Italy, and Japan were crushed, the dictatorship in Russia remained entrenched in power. By annexations of neighboring territories and peoples, the military occupation of other regions, and the support of puppet states, the sway of its authority was extended. In 1948, Russia dominated all Eastern Europe and was in possession of strategic posts in Eastern Asia. Not only this. Through the agency of communist parties in other countries, including the United States, the masters of Russia continued to carry on propaganda designed to overthrow by intrigue or violence moderate, constitutional democracies everywhere and then establish on the wreckage a dictatorship fashioned after the Russian model. Meanwhile the democracies of Europe, badly shaken by the devastations of war, were finding it hard to offer resistance to the communist march and were seeking outside aid, including the financial assistance of the United States.

The Task of Preserving the American System. Alarmed by the blows struck at liberty in other lands in recent years, the overwhelming majority of the American people have resolved that their system for achieving moderate government through constitutional means shall be honored and strengthened so that it can survive in a world beset by hostile designs and ideologies. Unlike the situation under a dictatorship,

where obedience, not independent thinking, is the mark of citizenship, the American plan can survive and operate effectively only if there exist an intelligent appreciation of its essentials and active participation in its management.

What, then, are these essentials? They may be briefly summarized in six statements. (1) Written constitutions are the established sources of all the powers which may be wielded by public officials. (2) Under a federal plan official authority is widely dispersed by division between the National Government and the states. (3) Within each of these governments, the lawful power conferred upon it is distributed among three branches—legislative, executive, and judicial—each having some protection against the others. (4) By constitutional affirmations a domain of individual liberty is marked out and safeguarded against encroachment by public agents. (5) In order that this elaborate system of government and liberty may be responsive to the changing conditions of American life and economy, it is made flexible by provisions for adjustments to new circumstances and for amendments. (6) All governments are conducted by agents or representatives of the people, chosen directly or indirectly by the people, who are at one and the same time the recognized masters and beneficiaries of government.

(1) AMERICAN GOVERNMENT IS CONSTITUTIONAL

Prime Considerations. The idea of constitutional government in the United States embraces certain fundamentals. A constitution in the American sense of the term is a general law, a written document, prepared in a special way by representatives and ratified by the people or their agents. This document sets up the frame of government, prescribes its powers, and defines the liberties of persons and citizens. It institutes the high authorities of government. It states what kinds of, and how many, such authorities there shall be; how they shall be chosen; the length of their terms; how they may be removed; what powers they may exercise and in what manner; and how they may create, fill, and control the subordinate places in government deemed necessary to the discharge of official duties. Within the domain to which it applies, a constitution is supreme over all other laws.

All the people of the United States and its possessions live under the Constitution of the United States. This instrument was drafted by a convention of state delegates at Philadelphia in 1787, ratified by state conventions, and put into effect in 1789; it now stands as amended by twenty-one articles adopted since that year. To its provisions are subject all officials, high and low, from village constables to the President in Washington, from the town council to the Congress at the national

capital. Everything done by every agent of government comes within the purview of this Constitution. It is "the supreme law of the land"—supreme over all other laws and all agencies of government (for text, see Appendix).

Besides living under the National Constitution, the people of every state also live under a state constitution. For them the latter document is supreme over all state and local laws in their own commonwealth. Yet, as already indicated, it is subordinate to the Constitution of the United States and to the national laws made in pursuance thereof; in other words, its provisions must conform to the limitations imposed by that higher law.

The Constitutional Way of Resolving Disputes. Under the American system, the people and their governmental agents are morally bound to observe the rules laid down in written constitutions. In practice, both the people and the public authorities have, on the whole, displayed remarkable willingness to obey these principles and, by orderly debate and action, carry on the work of government. Only once since the formation of the Constitution has a conflict of ideas and interests burst the bounds of argument and of respect for the results of popular elections; namely, the controversy that culminated in the Civil War of 1861–1865. Few students of this long conflict, however, now regard the outcome of the war as either better or nobler than a settlement that might have been effected within the terms of the Constitution. The power of reason in human affairs, to be sure, may easily be overestimated but as W. Y. Elliott puts the case: "If reason is permitted by the party system to operate, and the facts of economic necessity are recognized, constitutionalism offers a basis of moral strength that is lacking to shortcuts by the route of direct action." [1]

The Alternative of Government by Violence. A resort to "direct action" means the use of violence in establishing government, changing government, and carrying on political disputes. This method has been so commonly employed in ancient, mediaeval, and modern times that many political theorists have reduced political history to irrational rhythms of despotism, revolt, assassination, reformation, and despotism again, in endless repetition. Differences of opinion become quarrels; quarrels develop into fights; fights end in bloodshed; and out of civil war conquerors rise to power, only to be overthrown by new uprisings. "All history up to the present time" declared Karl Marx in the Communist Manifesto of 1848, "is the history of class struggles." Occasionally in history, these conflicts have resulted in settlements of some kind, frequently despotic in nature—but often they have ended in what Marx

[1] *The Pragmatic Revolt in Politics*, p. 497.

called "the common ruin of the contending classes." It was to prevent the occurrence of such rhythms in the United States that the founders of the American system substituted constitutional government for government by "direct action." "Happily for us," said Thomas Jefferson in speaking of the American way, "that when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers, and set it to rights, while every other nation on earth must have recourse to arms."

THE AMERICAN SYSTEM IS FEDERAL

Principle of Federalism. A federal system is marked by unity, in that to one common government are granted limited powers; and by diversity, in that to each of several states, or semi-autonomous areas, composing the union is reserved the independent power of managing its own internal affairs as if in this respect it stood alone. Thus the system prevents extreme centralization, such as exists in France, for example, where all local governments are creatures of and at the mercy of the national government. By dispersing power, federalism renders its concentration in the hands of a would-be dictator correspondingly difficult.

American Devotion to Federalism. Federalism is deeply rooted in American history and life. It was in origin no offspring of a paper plan designed by cloistered philosophers for the ordering of the American people. When the Constitution was framed at Philadelphia in 1787, few if any Americans advocated consolidating all the states "in one mass," to use a phrase of the time. The draftsmen of that document were aware that such a revolution was neither desirable nor possible. They knew how stoutly the people of the thirteen states clung to their rights of local self-government and how anxiously they feared the overshadowing power of one strong government at a national capital. It was also apparent to the draftsmen that such a government, if established, would encounter almost insuperable difficulties in trying to manage everybody and everything in the whole country from a single center of power. As a result of experience, necessity, and reflection, accordingly, they left the states well endowed with many powers for local purposes, and they based upon this foundation a general government possessing limited powers for handling affairs common to the union.

Federal Law Is Supreme in Case of Conflict. In exercising the powers assigned to it, the National Government makes laws which are supreme over all state laws. "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." So runs the Federal Constitution; and the

Supreme Court at Washington is the tribunal of last resort for deciding controversies between federal and state authorities in cases at law involving the provision.[1]

An Illustration of Supremacy. The application of the principle may be illustrated by a noted example. Long ago Congress provided by law that when any civil suit or criminal prosecution is begun against a federal revenue officer in any court of a state in connection with some official act on his part, the case shall be immediately removed into the federal courts. Such an officer, in the discharge of his duty, killed a man in Tennessee, and his trial, against the protest of the state, was transferred to a federal court in due form.

In discussing the constitutionality of the transfer, Mr. Justice Strong said of the Federal Government: "It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, these officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection—if their protection must be left to the action of the state courts—the operations of the General Government may at any time be arrested at the will of one of its members. . . . No state government can exclude it from the exercise of any authority conferred upon the Federal Government by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."[2]

The National Government Assumes the Existence of States. Though independent in its functions the National Government can only operate with state assistance. Senators are elected by the voters of the states and Representatives by voters of districts wholly within state boundaries, subject to state election laws and under the supervision of state election officials. No federal officer presides at local polling booths or takes part in the counting of ballots. The President is chosen by electors assigned to the states on the basis of their representation in Congress, and the electors themselves are chosen by the voters of the states at large. In no case are state boundaries crossed by any federal election districts. Only when a dispute arises between candidates over election returns and is carried to Washington does Congress normally intervene in the process of deciding contests. In the exercise of its functions also the Federal Government must rely upon the states to discharge the duties which belong to them under the Constitution. The United States mails roll over roads and streets built, at least in part, by state and local govern-

[2] Tennessee *v.* Davis, 100 U.S. 257.

ments, and the armed forces of the Union are augmented in emergencies by calling out the state militia.

A Republican Form Guaranteed to the States. So vital is the state to the perpetuity of the Union that the Constitution specially recognizes federal responsibility for defending its integrity. Congress cannot erect a new state within the jurisdiction of another state or form one by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned. Furthermore the Constitution guarantees to every state in the Union "a republican form of government," protection against invasion, and, on application by the proper state authority, assistance against domestic insurrection. There is still meaning in the old saying: "An indestructible Union of indestructible states."

The function of deciding when the government of a state is republican in form belongs to Congress. This maxim the Supreme Court declared long ago in a case involving a contest between two political factions in Rhode Island for supremacy.[3] "When the Senators and Representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government and could not be questioned in a judicial tribunal."

In respect of insurrections in states, the power to answer a call for help is vested by act of Congress in the President. "By this act, the power of deciding whether the exigency has arisen upon which the Government of the United States is bound to interfere is given to the President . . . and must therefore be respected and enforced by its judicial tribunals." When the legislature of a state, or the executive, if the legislature cannot be convened, invokes his aid, the President may at his discretion call out troops to protect the state against domestic violence.

States Depend upon the Union. Besides relying upon the Union in upholding the republican form of government, the states depend upon it for the discharge of many functions necessary to their existence. The Union defends them against foreign invasion, conducts foreign affairs, carries the mail used in conducting their operations, controls their relations with one another, decides disputes between them, and regulates commerce among them. By assuring to the citizens of each state the privileges and immunities of citizens in the several states, by guaranteeing the return of fugitives from justice, by requiring all states to give full faith and credit to the acts, records, and judicial proceedings of

[3] Luther *v.* Borden, 7 Howard, 1 (1848). Reaffirmed in our own time by Coleman *v.* Miller, 307 U.S. 433.

each state, by opening wide channels of trade, travel, intercourse, and migration, the Constitution enlarges the rights and privileges of citizens in every state, adding to their prosperity, convenience, and welfare. By imagining a condition of affairs in which all such privileges of traveling and doing business throughout the Union were cut off or seriously limited, the dependence of the state upon the Union for its safety and well-being can be readily comprehended.

SEPARATION OF LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS

Statement of the Doctrine. The American system goes beyond the division of powers between the Federal Government and the states, and beyond imposing definite limits on both. Squarely planted within the government of each state and the Federal Government is a positive check on despotism and arbitrary action. This check is called "the separation of powers"; that is to say, the making, enforcing, and interpretation of laws are assigned respectively to the legislative, executive, and judicial branches of government. It is based on two axioms of political science derived from long and bitter experience in the struggle for liberty against despotic rulers.

The first axiom is that the concentration of all governmental powers in the hands of one person or group is "the very definition of tyranny." The second is that such tyranny is not apt to be benevolent—that no person or group can be safely entrusted with unlimited power over life, liberty, property, and personal interest. The framers of the Federal Constitution were experienced statesmen. They believed, and had reason for believing that, whatever qualities of goodness human beings have, there are in every society power-hungry, ambitious, and even rapacious persons eager to raise themselves into power and dominate others. They felt certain that such passion could not be eradicated; so they sought to restrain power, for the protection of the public, by pitting the three departments of government against one another, while allowing them to cooperate according to prescribed methods and the dictates of prudence.

Application of the Doctrine in the States. The principle that the powers of government must be separated is expressly set forth in some form by every state constitution. A classic statement of the doctrine appears in the constitution of Massachusetts: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or-

either of them: to the end it may be a government of laws and not of men" (Chapter 26). Once the principle of the separation of powers was frequently applied at local levels. Since all local governments, however, are subject to state authority and their arbitrary actions may be overridden by appeal to the state judiciary, it is no longer deemed necessary to carry out the doctrine of the separation of powers uniformly in cities, counties, and other local units.

The Doctrine in the Federal Constitution. No separate clause or section of the Federal Constitution proclaims the separation of powers. But the principle is embodied in the opening sentences of the three articles relating to the legislative, executive, and judicial branches: "All legislative powers herein granted shall be vested in a Congress of the United States. . . . The executive power shall be vested in a President of the United States. . . . The judicial power . . . shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish."

Absolute Separation Impossible. A close examination of the Constitution, however, shows that the men who drafted it did not apply the doctrine strictly. Indeed it was thoroughly understood by the framers that a complete separation of powers is in practice impossible and undesirable. In commenting on the subject, James Madison remarked that the theory "does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other." And he undertook to prove that "unless these three departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained."

For example, in the National Government, the appointing power of the President is shared by the Senate. The treaty-making power—legislative in character—is divided between the President and Senate. At the same time, the President shares in legislation through his veto power. Even the judiciary, which is created by the Constitution, is in many respects subject to the control of Congress, for Congress may prescribe the number of the judges, fix their salaries, and create inferior courts, subject to certain restrictions. A kindred "blending" of powers is to be found in the three departments composing the central government of each state.

Influence of Departments Varies in Practice. Political practice has shown that the influence actually exerted by each department of the Federal Government varies from time to time. For example, during the period of Reconstruction which followed the Civil War, Congress dominated the executive, overrode his exercise of the veto power, and

through various measures gathered unto itself almost every shred of national jurisdiction. On the other hand, during American participation in World War I (1917–1918), leadership in legislation and in administration went to President Woodrow Wilson.

A similar state of affairs obtained immediately after the inauguration of Franklin D. Roosevelt on March 4, 1933. With practically all the banks in the country closed, industry and agriculture severely crippled by the panic, and physical distress widespread, the President took the leadership in formulating new legislation designed to meet the crisis. For months the great measures passed by Congress came from his office or expressed his views or had his approval in advance. Moreover, these measures were drawn in general terms and conferred upon him what amounted to the right to legislate by extending the general language of the statutes to innumerable details. While it is not true, as alleged at the time, that "Congress abdicated," it did in fact, however viewed in theory, accept the direction of the President and confer immense legislative powers on him.

THE DOMAIN OF INDIVIDUAL LIBERTY PROTECTED AGAINST GOVERNMENTAL AUTHORITIES

Universality of the Principle. No government in the United States possesses unlimited power over the life, liberty, property, and other interests of the people. No town, city, or county government has absolute power within its jurisdiction. No state government has it; nor in fact may the people of any state authorize their agents of government to exercise it. Not even the Government of the United States, supreme as it is within its sphere, can wield such dreadful power over the people.

Two Prime Sources of Liberty. Limited government in the United States is based in part on the axiom that by granting public officers only certain powers, it may be inferred that all other matters are automatically beyond their reach—within the domain of liberty. This principle works with some precision at the national level; that is, agencies of the National Government may legally exercise only those powers delegated to them by the National Constitution. In the states, the situation is different in one respect. While some state and local agencies possess only those powers expressly granted to them by the state constitution, this situation is not universal. For example, it is a rule of state constitutional law that state legislatures may enact measures covering all matters which are not placed beyond their reach by national or state constitutional provisions (Chapter 26). Hence it becomes difficult in practice to draw definite boundaries around the domain of liberty.

Not content with the mere axiom that powers not expressly delegated

to public agents reside with the people, Americans have sought more direct safeguards for liberty—by inserting in their constitutions concrete declarations of individual rights and by giving persons who claim that these rights have been invaded the privilege of appealing to the courts for protection. Many of these provisions apply to all persons, thus including aliens and citizens alike. While the rights of aliens are less extensive than those of citizens, nevertheless they are broad enough to insure them against wholly arbitrary actions on the part of government officials (pp. 80–81).

The Domain of Liberty Set Forth in the State Constitution. Subject to the National Constitution, the people of each state mark out a sphere of liberty for themselves in their own constitution, especially the section known as "the bill of rights." In this section are enumerated the rights which cannot be infringed by any official agent or agencies of the state—central or local. Although all the states proclaim a number of old rights, for example, freedom of the press, speech, and religious worship, some of the more recent state constitutions contain provisions designed to establish certain social and economic privileges. Naturally, these rights and privileges belong only to the residents of the particular state and have no efficacy beyond its borders. Hence the domain of liberty possessed by the residents of states, under state constitutions alone, varies in different parts of the country.

Provisions for Liberty in the Federal Constitution. The residents of each state, however, may look beyond their own constitution for security of life, liberty, and property against state authorities; for several provisions of the Federal Constitution relative to liberty apply to all the states in the Union. Thus the residents of a state have a double safeguard against the governing authorities.

As the Constitution of the United States came from the hands of its framers in 1787 it contained no bill of rights. Certain of its clauses did set forth specific liberties of person and property, but the failure to provide a separate list of rights distinctly limiting the powers of the Federal Government in other respects awakened strong opposition while the ratification of the Constitution was under way; and many leading sponsors of the plan promised that, after the new government was established, constitutional amendments designed to meet this objection would be presented to the states for their approval. Congress fulfilled this pledge by submitting twelve amendments. Ten of them were ratified and became a part of the Constitution in 1791. Although they were not then, and are not now, officially called a "bill of rights," it has become the fashion in recent times to apply that phrase to the first ten amendments. These amendments, coupled with Section 10 of Article I

and other provisions, notably the Thirteenth and Fourteenth amendments applicable to the states, provide a domain of liberty for the people of the entire Union.

The Scheme of National Guarantees. So it has come about that the Federal Constitution imposes positive restraints on all public authorities in the country, high and low, by setting metes and bounds to the actions they may take and the manner in which they may exercise their undoubted powers. These limitations are designed to protect the person, property, and civil liberties of the individual, by preëxisting and superior law, against all forms of mere arbitrary interference by government officials. In some matters the individual is protected against the Federal Government, in others against state and local governments, and in still others against all governments, federal, state, and local. An example of all-around protection is found in the Fifth Amendment and Fourteenth Amendment which jointly forbid Congress and states to deprive any person of life, liberty, or property without due process of law. The limitations on the powers of all governments are numerous and in many respects highly technical as interpreted and applied by the courts, but a knowledge and observance of the restraints by officials and citizens are indispensable to the preservation of civil liberty and the perpetuity of the American system (Chapters 3 and 4).

Contrast with the Sovereignty of the British Parliament. The fundamental character of these rules can be illustrated by comparisons, first with the English parliamentary system and then with dictatorships. Any law passed by Parliament—that is, by King, Lords, and Commons—must be enforced; it cannot be called into question by any court; the only remedy for the citizen who feels aggrieved by it is at the ballot box when members of the House of Commons are elected. If the British Parliament should pass a law confiscating the land now owned by private persons, there would be no relief for the victims, unless the same Parliament or a succeeding one could be induced to repeal the law in question. If the Congress of the United States, however, should pass such a measure, it would be the duty of the courts, on the presentation of the proper case, to protect landowners in their property rights by declaring the act null and void—in conflict with that section of the Fifth Amendment which provides that no person shall be deprived of life, liberty, or property without due process of law; and that private property shall not be taken for public use without just compensation. Likewise, if the legislature of a state should pass such a measure, it would be the duty of the courts to protect the citizen under the Fourteenth Amendment forbidding any state to deprive a person of life, liberty, or property without due process of law—compensation being, under judicial interpretation, an indispensable feature of "due process."

Contrast with Unlimited Powers of Dictators. Although the parliamentary system of Great Britain is theoretically absolute, it proceeds with so much self-restraint that in practice it seldom invades arbitrarily the liberties of persons and property. On the other hand, a dictatorship is despotic and arbitrary in both theory and daily operation. Under a dictatorial system a single person, surrounded by a small group of supporters, raised to power by violence, makes laws as he goes along at his pleasure or whim, enforces them by any method he chooses, changes them at will, and holds all individuals under his control at the mercy of his own ego. The dictatorial system reached what may be called a climax in the summer of 1934 when Adolf Hitler, Chancellor of Germany, flew to a scene of alleged disaffection, selected certain individuals whom he deemed objectionable, and had them shot immediately without open trial, without giving them a chance to be heard in their defense. On this occasion, he made the law which they were alleged to have broken, formulated the charges against them, acted as judge, condemned them to death, and ordered them executed. So far as forms and processes are concerned a dictatorship means the exercise of irresponsible power by an official or leader who has come into office by violence and can only be thrown out by force. It means the establishment, perhaps accompanied by pleasing phrases and guises, of a despotism under which the lives and possessions of people are absolutely subject to the passions and whims of the ruler.

It is true that the limitations imposed in behalf of human liberty in the United States are frequently violated by officials who overstep the bounds of preëstablished law and by mobs of people who defy the rules of law; but the violations that occur are treated as violations by all sober citizens. In contrast, a dictatorship puts the body and property of every person at the mercy of government as a normally accepted practice, and suppresses complaints.

Judicial Protection of Rights against Arbitrary Government. Although it is the duty of all branches and agents of American government to observe the limits imposed on their powers in behalf of liberty, it is the special function of the federal judiciary to give practical effect to them on appeals from persons who maintain that their rights have been infringed by public authorities. In such matters the Supreme Court in Washington possesses final jurisdiction over other agencies of government, federal and state. This judicial supremacy, said John William Burgess long ago, is "the most momentous product of modern political science. Upon it far more than upon anything else depends the permanent existence of republican government; for elective government must be party government—majority government; and unless the domain of individual liberty is protected by an independent, unpolitical depart-

ment, such government degenerates into party absolutism and then into Caesarism." [4]

Special Defense of Property. The doctrine that the federal judiciary in particular must uphold the primary rights of property owners against infringement by legislative majorities was set forth about the same time by A. T. Hadley, of Yale University. The theoretical position of property owners, he maintained, "the sum of the conditions which affect their standing for the long future and not for the immediate present—is far stronger in the United States [than in other countries]. The general status of the property owner under the law cannot be changed by the action of the legislature, or the executive, or the people of a state voting at the polls, or all three put together. It cannot be changed without either a consensus of opinion among the judges, which should lead them to retract their old views, or an amendment of the Constitution of the United States by the slow and cumbersome machinery provided for that purpose, or, last—and I hope most improbable—a revolution."

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

"This theory of American politics has not often been stated. But it has been universally acted upon. One reason why it has not been more frequently stated is that it has been acted upon so universally that no American of earlier generations ever thought it necessary to state it. It has had the most fundamental and far-reaching effects upon the policy of the country. To mention but one thing among many, it has allowed the experiment of universal suffrage to be tried under conditions essentially different from those which led to its ruin in Athens or in Rome. The voter was omnipotent—within a limited area. He could make what laws he pleased, as long as those laws did not trench upon property rights. He could elect what officers he pleased, as long as those officers did not try to do certain duties confided by the Constitution to the property-holders." [5]

[4] *Political Science Quarterly*, Vol. X, p. 422.
[5] *The Independent*, April 16, 1908.

Criticism of the Doctrine. Writing many years after Hadley set forth the doctrine of judicial protection for property in these stark terms, Henry Steele Commager impugned the idea in his *Majority Rule and Minority Rights* (1943). After reviewing the great cases in which the Supreme Court has invalidated acts of Congress, Commager contends that it has been zealous in upholding property rights and then attacks it for neglecting the rights of "the underprivileged." He concludes that judicial review has been a drag on democracy and that we are justified "in believing that majority will does not imperil minority rights, either in theory or in operation." For all practical purposes, Commager discards the idea that judicial review is useful and necessary for the protection of personal liberties, such as freedom of person, speech, and press, and proposes to leave all human rights at the disposal of legislative bodies and executives unhampered by judicial intervention.

(v) FLEXIBILITY OF THE AMERICAN SYSTEM [6]

Permanence and Change. The American system under the Constitution of the United States, as Chief Justice John Marshall said in 1819, is intended to weather the storms of the ages. What accounts for its survival thus far in time? If the National Constitution and those of the states had been loose and indefinite in their terms, ambitious leaders and politicians often engaged in fierce and angry conflicts might well have wrecked the American system beyond recovery long ago. On the other hand, if they had been too rigid, if they had allowed for no great changes in the functions of government as the country grew in size, population, and diversity of industries and occupations, the American system would have been unable to meet the demands of the passing years. In some respects, therefore, it is like human life. If one has no well-established habits of thought and work, a general disorder marks one's days; and if one resists all changes and new ideas, another kind of ineffectiveness ensues.

Provisions for Flexibility. While a number of first principles for the whole system are fixed in the National Constitution beyond dispute as to meaning, many provisions are open to interpretation and allow for radical variations in practice from time to time. Of the powers conferred upon Congress some are specific; others are general. Subject to the terms of the Constitution, the people of a state may establish any kind of government they please, as long as it is republican in form, and they may engage in social, political, and economic experiments to cope with new problems as they arise. The line between the powers of the National Government and the powers of the state are not sharply drawn. The Union and the state are indestructible; though checking

[6] For the development of this theme in detail see Chapter 2.

each other against excesses, they may cooperate in meeting new issues, such as those raised by the growth of gigantic industries and rapid means of transportation and communication. Moreover, in Article V the Constitution provides a process by which it may be amended. Thus government may be kept in step with economic and social change.

GOVERNMENT IS POPULAR AND REPRESENTATIVE[7]

The Sovereignty of the People. At bottom all features of the American system—constitutions, federalism, separation of powers, limited government, and liberty—rest upon the genius, spirit, and interests of the people and are subject to their control. This maxim of American political science is expressed in various forms. As the Declaration of Independence puts it, governments derive their just powers from the consent of the governed; when any form of government fails to promote such unalienable rights as life, liberty, and the pursuit of happiness, the people have the right to alter or abolish it and to institute new government in such a form as most likely to guarantee their safety and welfare. Or to use the language of Abraham Lincoln, American government is government of the *people*, by the *people*, and for the *people*.[8] A third formulation of the maxim runs: sovereign power is vested in the people, certain powers are delegated to government by the people, and to the people are reserved all rights not granted by them to public authorities.

The maxim does not assume that the people are infallible or that the voice of the people is the voice of God. Nor does it describe the processes by which the ideal is approached, if not wholly realized. But it does assume that the people constitute the safest depository of supreme power and that in the long run the will of the people is a better guarantee of wise, efficient, and moderate government than the will of any person or body of persons imposed upon them by intrigue or violence. It therefore stands in bold contradiction to government independent of popular will—such as government by an absolute monarch, an aristocracy, or an upstart dictator.

Popular Power Made Effective Through Agents. As a general rule the "will" of the people in and over government in the United States is expressed by agents or representatives chosen directly by the people, balloting at the polls. It is true that in state affairs the people often vote directly on constitutions, constitutional amendments, and laws submitted to popular approval, but such exceptions to the rule are of minor

[7] For development of this theme, see Part III below.

[8] In delivering his Gettysburg Address, Lincoln accented the word "people."

importance in the American system as a whole.[9] By far the major portion of lawmaking, as well as law enforcing, is entrusted to persons elected at the polls or appointed by such agents.

The continuity of popular supremacy over government is assured in two main ways. The terms of the highest lawmaking and law-enforcing agents are limited to specific numbers of years; and elections for filling such posts of authority over the people must be held at the times established by constitutional provisions, no matter what happens, even during a civil commotion or a foreign war. In this respect, the American system differs from that of Great Britain, for the British Parliament may, by an ordinary act of legislation, extend indefinitely the term for which members of the House of Commons are chosen; and this has been done more than once in time of war for the purpose of postponing popular judgment on the conduct of government. On the other hand, in the United States, no elected agents or bodies can escape the necessity of facing the people at elections when their fixed terms draw toward a close.

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There is no contemporary work on what may be called the philosophy of the American system. The best commentary of that nature is still *The Federalist*, by Hamilton, Madison, and Jay, first published in book form in 1788. It is available in many editions. For the numbers that set forth the fundamental principles of the American system: C. A. Beard, *The Enduring Federalist* (1948). Although more than a hundred years old, Alexis de Tocqueville, *Democracy in America*, remains indispensable for thinkers as distinguished from memorizers. References for the following chapters, especially Chapters 2, 3, 4, 5, 6, 13, 25, and 26, bear upon the essential features of the American system in detail. For government in general: R. A. MacIver, *The Web of Government* (1947) and C. E. Merriam, *Systematic Politics* (1945). The literature on modern dictatorships is immense; G. S. Ford, ed., *Dictatorship in the Modern World* (1939), is an excellent introduction to the subject.

[9] For "direct" government in states and localities, see below, Chapter 27.

CHAPTER 2

Flexibility of the American System

The Charge of Rigidity. It is often said that the American system of government was established in "the horse and buggy age" and that, in its primary features and as a whole, it is rigid and otherwise ill-adapted to coping with the complexities of public affairs in an age of technology and world intercourse. To some extent it is undoubtedly fixed and unyielding, but a degree of rigidity is necessary to assure that stability which effectively resists both disorder and despotism. Even so, the charge that it is inelastic and unsuited to the "needs" of today is largely due to a misunderstanding of its essential nature, its practical operations as disclosed in its history, and the wide freedom of action allowed and allowable under the fundamental principles of American constitutional law. Again and again it has been demonstrated that what appears to be the rigidity of the system is really due to the obstinacy of citizens and officials engaged in factional and party disputes, rather than to any Procrustean rules from which they are powerless to escape.

ELASTICITY PERMITTED BY THE NATIONAL CONSTITUTION

Wide Range of Actions Possible. What accounts for the flexibility of the American system as made evident in practice? The following chapters on federal and state government provide answers. They show that flexibility is inherent in the structure of the system and in the powers, express and potential, possessed by the component parts of the system under the National Constitution—the framework of the whole. In the first place, that document grants to the Federal Government a large variety of choices in enacting laws, creating administrative agencies, and undertaking new functions, without resorting to the process of amendment. Although the Constitution, besides vesting powers in the Government of the Union, imposes restrictions on the states, it leaves the several commonwealths otherwise free to conduct their internal affairs as they see fit, either individually or in collaboration with one another or with the Federal Government. Owing to the very general nature of the clauses of the Constitution respecting the government

of territories, possessions, and occupied areas abroad, federal authorities are at liberty to employ almost any expedients in dealing with their inhabitants.

Examples of Comprehensive Language in the Constitution. Some conception of the flexibility inherent in the Constitution may be gained by studying a few sample passages in the document. For instance, the clause empowering Congress to lay and collect taxes, duties, imposts, and excises, to provide for the common defense and general welfare, covers a multitude of operations. Moreover, the Constitution authorizes Congress to make all laws "necessary and proper" for carrying into effect this and other powers. Again, Congress may regulate commerce among the states. Already dimly aware of the possibility of technological progress in 1787, the framers refrained from limiting this regulation to instrumentalities of commerce then in use, such as sailing ships and stage coaches; hence the clause in question automatically reaches every new invention for handling interstate commerce—railroads, motor trucks, buses, airlines, pipe lines, and telegraph, telephone, radio, and electric power systems.

Strict and Liberal Views of the Constitution. With regard to the language of the Constitution in doubtful cases, two theories of interpretation have long occupied the attention of contending parties and factions. One theory holds that every clause which is not so definite in meaning as to be beyond dispute should be construed in the narrowest possible terms. According to the second theory, all clauses should be broadly construed with reference to the letter and spirit of the whole, as expressed in the Preamble.

From the debates and proceedings of the convention which drafted the Constitution, it is clear that the framers intended to vest in Congress general and flexible powers. This purpose they early declared in a resolution reading: "That the legislature of the United States ought to possess the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases for the general interests of the Union, and also in those cases to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." It was upon this declaration of fundamental principle adopted by the convention that the Committee of Detail, which filled in the outlines, based the list of powers delegated to Congress; and to the list reported by the Committee the convention itself afterward added the "general welfare" clause. Nowhere in the proceedings of the convention is there any indication that the framers of the Constitution intended to make all powers conferred on the Federal Government "specific" or to have them interpreted in a

narrow and stringent manner. On the contrary, the proceedings show the opposite intention. Nor does the official text assign numbers to the powers of Congress, that is, "enumerate" them. Collaterally, it is to be noted that a strict interpretation of the constitutional provisions imposing limitations on the states broadens the power of the states to manage their internal affairs as they please.

WHO INTERPRETS THE NATIONAL CONSTITUTION?

The Necessity of Interpretation. In the nature of things, responsibility for interpreting the Constitution falls with varying weight upon officials and private persons. The President and Congress, the governors of states and state legislatures, in promoting legislation and acting in their various capacities must inquire into the meaning of its clauses with regard to their projects and undertakings. Citizens who favor or oppose particular measures of law or administration must likewise reckon with its authorizations and prohibitions. In brief, all sorts and conditions of people having diverse interests and holding various positions, low and high, are called upon, in one way or another, to expound the Constitution and to share in the processes of making it rigid or flexible. But none of the expositors who engage in the operation can say the final word as to the import of its general clauses and thus fix its terms for all time, beyond the reach of coming generations.

The Supreme Court of the United States as Interpreter. The statement is sometimes made that the Supreme Court possesses the ultimate power of interpreting the Constitution in its application to the National Government and to the position of the states in the Union. This formula is lacking in precision. It is true that the Supreme Court is among the accepted and powerful interpreters of the Constitution and its decisions as to the meaning of certain clauses in the Constitution are final with regard to particular controversies. It can only act, however, when cases in law and equity are duly brought before it for settlement (see Chapter 12). Numerous problems arising under the Constitution and laws of the United States cannot be, or are not in fact, formulated into cases (that is, actions at law between parties), and carried before the Supreme Court. Moreover the Court has repeatedly ruled that some cases are political in character and lie outside its jurisdiction.

Congress as Interpreter. It is also the duty of Congress to interpret the Constitution. The Supreme Court has declared as a matter of principle that it will show great respect for the interpretations of Congress and will overrule them only when they are clearly and palpably wrong. Again and again bills assailed as unconstitutional in Congress by eminent lawyers have been passed, made the law of the land, and

upheld by the Supreme Court. With reference to many issues which never take the form of cases presented to the federal courts, Congress makes its own explanations of the Constitution and establishes precedents of great weight. Thousands of governmental acts that have never been brought before the courts reflect interpretations of the Constitution. When we ask, therefore, Who interprets the Constitution? we must answer, Congress also in part—that changing body of members elected by popular vote.

The President Interprets. Likewise, in his sphere, the President of the United States by his messages and policies expresses his views of the Constitution. Many of his findings are "political" in character; and the Supreme Court will not inquire into their legitimacy—for example, a declaration on foreign policy. Others are discretionary and these too, the Court has said, must be left to his judgment. Does the Constitution authorize the President to have a cabinet and to consult its members as a collective body? The written document is silent. Precedents stretching from Washington's time to our own settle that point in the affirmative. May the President, on his own motion, send troops out of the United States and wage war? Very explicitly the Constitution vests in Congress the power to declare war. Yet Presidents have dispatched troops to Caribbean regions and to distant parts of Asia to wage little wars or to be in a posture to wage them without any express authorization from Congress. These actions constitute an important interpretation of the President's powers, and it is not likely that they will be challenged by the Supreme Court.

Politicians and Citizens Act as Interpreters. Strange as it may seem, the Constitution is given meaning also by men and women who may hold no office in the government—by leaders of political parties and plain voters. For example, when Article II of the Constitution declares that persons designated as "electors" shall meet by states and choose the President of the United States, does that mean the electors are to pick the best available individual, regardless of the views of party chiefs or the rank and file of the general public? While such seems to have been the concept of the framers, who wished to avoid popular tumults in the choice of the highest officer in the land, in practice the "electors" are normally rubber stamps for recording the will of parties and voters. By calmly accepting this situation, millions of Americans have, in fact, profoundly altered the nature of presidential elections.

The Constitution a Phase of American Life. It was after reviewing many indubitable facts that the great commentator, Judge Thomas M. Cooley, came to the conclusion that the Constitution is not a mere written document with a determinate meaning which never changes: "We

may think," he says, "that we have the Constitution all before us; but for practical purposes the Constitution is that which the Government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing else is. . . . What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it." With regard to its indefinite provisions the Constitution *is what the Government and the people who count in public* affairs recognize and observe as such in the long run.

Nevertheless, owing to the respect they command among the people, the principles of the Constitution, though flexible, serve as restraining influences in dealing with new situations and thus affect the conduct of private and public affairs. They help to turn great conflicts of interest, as between agriculture and industry or capital and labor, for example, into channels of discussion and deliberation, in which knowledge, reason, and judgment act as moderating forces on the bare assertion of physical power and on the gusts of popular passion that arise from time to time. In spite of the fact that the process of interpretation is attended by many disputes which are far from useful or edifying, it is one of the important phases of American civilization by which the spirit and the capacity for self-government are nourished and is the key to the American system of change under law.

RULES, METHODS, AND AXIOMS FOR INTERPRETING THE NATIONAL CONSTITUTION

Using the Dictionary. *In their search for answers to disputed questions,* how do interpreters go about their work? Simply by taking the words of the Constitution as they stand and consulting a dictionary? Not as a rule. Although a justice of the Supreme Court has said that even the spirit of the Constitution "is to be collected chiefly from its words," difficulties remain. Many words are vague and the adverb "chiefly" leaves a great gap to be filled by some process other than a search for definitions. It is true that the Court sometimes uses Webster's dictionary in hunting for clues to the meaning of the Constitution, but the enlightenment to be attained by that expedient is limited. Those whose business it is to interpret the Constitution have other and more important methods at hand—methods sanctioned by high authority and long usage.

A Search for the Intention of the Makers. Among the controlling doctrines of interpretation recommended by custom is the theory that the "intention" of those who made the Constitution should govern. No other assumption seems more rational and inevitable. It is expounded

with great cogency by Chief Justice Marshall in the celebrated case of Marbury *v.* Madison (1803), and runs as follows: "The people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." This, he says, is the basis on which the whole American fabric has been erected. "This original and supreme will organizes the government, and assigns to different departments their respective powers." Then, in dealing with the issue at hand, the authority conferred upon the judiciary, the Chief Justice asks about "the intention of those who gave this power." Although in another connection he speaks of what "the framers" of the Constitution contemplated, the underlying theory of his argument is that it is the "original and supreme will" of the people which is to be discovered and given effect in interpreting the Constitution.

The Will of the Draftsmen. In their efforts to disclose "the intention of the makers of the Constitution," judges of the Supreme Court have frequently, if not generally, limited their inquiries to the "intention of the framers," the aims of the men who drafted it in Philadelphia. The Constitution, declared Chief Justice Taney in the Dred Scott case (1857), "speaks . . . with the same meaning and intent with which it spoke when it came from the hands of its framers."

If the inquest be limited to the intention of the framers of the Constitution, the solution of the problem is far from easy in respect of many constitutional points. No stenographic minutes were made of the debates in the convention; our information as to what the members said about the various clauses is limited to notes taken by James Madison and a few of his colleagues. On none of the clauses did all the members speak, on few if any did a majority speak. Hence, in many cases, it is impossible to discover the "intention" of the convention.

The Will of the Ratifiers. If reference is made to "the will of the men who ratified the Constitution," the mystery grows. What, for example, was the intention of the hundreds of delegates composing the thirteen state conventions called to ratify the Constitution? In some cases only the most fragmentary notices of speeches made in those assemblies have come down to us. In none of them were all the indefinite phrases of the Constitution fully expounded and agreed upon. What the majority in each case may have thought about many phrases, whether they thought about them at all, is not known, can never be known.

When this quest is extended to the will or intention of "the people," the enigma deepens. For various reasons about three-fourths of the adult males did not participate in electing delegates to the several con-

ventions. How many citizens who did vote had read the Constitution and made up their minds as to their "intention"? History is silent. It is useless to pursue this inquiry further. Those who are given to exactness in the use of language will be chary about speaking of "the intention of the people who made the Constitution."

The Intention of Amenders. So far we have spoken of the Constitution as if it were merely the original instrument which was drafted at Philadelphia in 1787. In a strict sense it includes of course all the amendments. Matters of "intention," therefore, involve the will of the several Congresses which passed resolutions of amendment and the state assemblies which ratified them. In these cases also interpreters of the Constitution encounter difficulties, in determining what proponents had in mind, which can only be resolved, if at all, by painstaking historical research.

The Use of Reason and Inference. While paying due respect to the writings and expositions of the men who took part in framing the Constitution, the courts, the President, Congress, party leaders, and laymen called upon to decide what the Constitution means with reference to concrete actions do not confine their studies to the words and purposes (if known) of the men who made and ratified the Constitution. They also resort to processes of reasoning, inferences, and to various claims or assertions made in times past. They cite history, both oral and written; they refer to their memory of what was done or intended. They make use of quotations from the Bible, preceding judicial decisions, acts of Congress, speeches by statesmen, and official documents by authorities presumed to be competent.

Deductions from Premises. Among the mental processes useful in expounding the meaning of the Constitution, that of "logical reasoning" is especially prominent in the great decisions of the Supreme Court. Chief Justice Marshall was noted for his use of this intellectual instrument. Nowhere is his method better illustrated than in the case of Marbury *v.* Madison. Though he speaks of the intention of the framers and the people from whom the Constitution emanated, he does not cite long statements from them to prove his proposition that the Supreme Court has the power to set aside acts of Congress when it deems them unwarranted by the Constitution. He uses logic. "It seems only necessary to recognize certain principles," he says, "supposed to have been long and well established, to decide it." Here in brief is his syllogism:

Premise: The people have made the Constitution, created the departments of government, and assigned powers to each of them, and this Constitution is declared to be the supreme law of the land.

Premise: The Supreme Court has taken an oath to uphold the Constitution.

Conclusion: When an act of Congress (admittedly inferior law) conflicts with the superior law, the Supreme Court cannot enforce it but must declare it null and void.

On its face, nothing seems simpler, but critics of the decision from Jefferson's day onward have been unable to accept it as inescapable. The logic of their interpretation may be formulated in the following fashion:

Premise: The people have made the Constitution, created the departments, and assigned powers to each of them, and this Constitution is declared to be the supreme law of the land.

Premise: The President has taken an oath to uphold the Constitution.

Conclusion: When a decision of the Supreme Court (admittedly inferior to the Constitution itself) conflicts with the superior law, the President cannot enforce it but must treat it as null and void.

Hence it would appear that "logic" is in reality a two-edged sword which cuts both ways. "Logical reasoning" is only one mode of discovering truth, at best an uncertain mode. Powerful minds, equally logical and, for practical purposes, equally informed, often arrive at different conclusions by the logical method.

Resort to the "Spirit" of the Constitution. The inadequacy of logic as an instrument of acquiring knowledge concerning the meaning of the Constitution has been recognized by authorities called upon to expound that document. Looking elsewhere for light, judges of the Supreme Court frequently refer to the "nature of the system," "the spirit of the Constitution," and its "general spirit." Marshall remarked in the Dartmouth College case (1819), with respect to a certain plea, that the framers of the Constitution "could never have intended to insert in that instrument" an idea "repugnant to its general spirit." Long afterward another judge maintained that there are some limitations, not clearly expressed in the Constitution, "which grow out of the essential nature of all free governments." Like the logical method, however, this process is beset by perplexities because two minds equally conversant with the Constitution may arrive at opposite conclusions regarding its spirit.

Respect for the Determinations of Congress. It does not follow from the degree of uncertainty which exists in matters of interpretation that all is uncertainty. There are several principles which serve as guides or points of reference in reaching conclusions respecting the meaning of the Constitution. First among them is the rule that, when Congress has

passed an act, the measure shall be presumed to be valid "unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." As the Supreme Court once said: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, unless its violation of the Constitution is proved beyond all reasonable doubt."[1] Although this axiom is often disobeyed and there would seem to be reasonable doubt when four Supreme Court justices dissent from the views of the majority, it is a canon of interpretation which, if generally followed, would eliminate many disputes over the meaning of the Constitution.

The Constitution Conceived as Permanent. "We must never forget," declared Chief Justice Marshall, "that it is a Constitution which we are expounding, a Constitution intended to endure for ages, and, consequently, to be adapted to the various crises of human affairs." The framers of the document certainly had in mind some degree of permanence. It was not their idea that it should last only a few years and be quickly superseded by a new instrument framed to meet changed circumstances. The provision for amendments clearly precludes this thought. Nor did they imagine that it was to be so strictly interpreted that amendments and radical revisions would be constantly required to keep government functioning smoothly. The Constitution is to endure for ages and to be regarded as adaptable to the various crises of human affairs, for adaptability is a necessary requirement for survival.

The Constitution as a Means. The idea of adaptability involves the assumption that the Constitution is not an end in itself. It was in fact designed as a means to serve the needs of American society as indicated in its provisions. Lincoln put this case simply when he said: "I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution. . . . I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if, to preserve slavery, or any minor matter, I should permit the wreck of government, country, and Constitution altogether."

Basic Interests of Society Contemplated by the Constitution. This doctrine was reaffirmed in other respects by Chief Justice Hughes in 1934 in upholding a law of Minnesota imposing a moratorium on mortgage foreclosures at a time of great economic distress—a law admitted to be in some measure a formal impairment of the obligation of contracts, which is protected by the Constitution. The Chief Justice stated that the very policy of upholding contracts against impairment presupposes the existence of a government competent to secure the peace and

[1] Ogden *v.* Saunders, 12 Wheaton 213–270.

good order of society and that the state had a reserved power "to protect the vital interests of the community," while safeguarding the substantial interests of contracts against arbitrary impairment. There are, of course, grave dangers to the whole concept of limited, constitutional government in permitting excessive development of this trend.

CONSTITUTIONAL AMENDMENT

The Amending Process as a Last Resort. Where new developments in American society have not been anticipated by broad constitutional provisions nor adequately covered by constitutional interpretations, changes may be effected by a resort to the process of amendment.

Initiating Federal Amendments. When for reasons of weight, Congress or the legislatures of the states find it desirable to alter or add to the Constitution of the United States, they may, under Article V, initiate amendments to it. Members of Congress may propose in their respective chambers resolutions of amendment and when a resolution is carried by a two-thirds vote of both houses it is laid before the states for ratification or rejection. On the other hand, if there is dissatisfaction with the Constitution in the country at large, the legislatures of the states may initiate a movement for a change. On application from the legislatures of two-thirds of the states, Congress must call a national convention for the purpose of drawing up and laying before the states an amendment or amendments as the case may be.

Ratification of Amendments. Whether proposed by Congress or a national convention, amendments must be submitted to the states for review. The Constitution stipulates that amendments shall be valid to all intents and purposes as a part of the Constitution "when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

Amending Practices. Since the establishment of the National Government in 1789, two-thirds of the state legislatures have never agreed upon an application asking Congress to call a national convention to revise the Constitution or add amendments. Until 1933 only one method of amendment had been employed, namely, proposal by a two-thirds vote in Congress and ratification by the legislatures of at least three-fourths of the states. Usually an amendment is submitted in the following form: "Resolved by the Senate and the House of Representatives [or vice versa] of the United States of America in Congress assembled, two-thirds of both houses concurring, that the following article be proposed to the legislatures of the several states as an amendment to the Constitution of the United States which when ratified by three-

fourths of the said legislatures shall be valid as part of the said Constitution."

The state legislatures are then left to their own devices in approving or rejecting the article laid before them. Congress merely directs that "whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published . . . with his certificate specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

In the historic practice Congress made a break when it submitted an amendment repealing prohibition in 1933. The resolution proposing the Twenty-first Amendment, to effect repeal, provided in Section 3 that "this article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution." As a rule state legislatures arranged for the popular election of delegates to the conventions in accordance with the laws applied to similar elections for their state constitutional conventions.

Ordinarily no time limit is placed on ratification by the states. To the resolutions for the Eighteenth, Twentieth, and Twenty-first Amendments, however, Congress attached a condition that the articles shall be inoperative unless ratified within seven years. The Supreme Court of the United States, in Dillon *v.* Gloss (256 U.S. 368) held that Congress could lawfully impose reasonable time limitations on the period for ratification.

What happens when a state alters its decision after ratifying an amendment? Ohio and New Jersey once rescinded their earlier approval of the Fourteenth Amendment. Congress, after considering the situation, ordered the Secretary of State to count these two states among the ratifiers nonetheless, and the Amendment was treated as duly adopted. Speaking of this precedent in the reverse case where a state had rejected and then later approved an amendment to the Constitution, the United States Supreme Court declared that the question of whether or not a state should be counted as having ratified an amendment, despite a change in its position on the issue, is "political" in character and that the courts will not intervene to prevent Congress from settling it. (Coleman *v.* Miller, 307 U.S. 433).

Criticisms of the Process. Two fundamental objections are urged against the existing method of amending the Constitution. Both of them rest on the ground that states—geographical districts—rather than pop-

ulation are the preponderant element in the ratification of proposed changes. On the one hand, the system is attacked as too conservative; approval by three-fourths of the states is necessary to give sanction to an amendment laid before the country for consideration. That means that thirteen states can hold up an overwhelming majority in its effort to make even the slightest modification in the scheme of government. If we take thirteen of the least populous states, we find that they have a combined population less than that of the single state of New York. In other words, about one-tenth of the people of the nation, distributed in the right geographical districts, can prevent nine-tenths of the people from effecting innovations in their system of government.

On the other hand, it is urged that the same rule makes it possible for a large group of the states which are mainly rural in character to force an amendment on the twelve largest states with their accumulated masses concentrated in cities—twelve states containing about one-half the people of the United States. This argument was frequently heard in connection with discussions of prohibition.

Another and perhaps more vital objection to the amendment process runs against the use of state legislatures in passing final judgment. In this case ratification can be effected by a relatively small number of persons who happen to be in the legislatures at the time a proposition is submitted. The number of persons taking part in the ratifying operation is not as significant as the fact that they are only incidentally concerned in it as legislators. They are elected for other purposes. Their main duty is to make laws for the states. Often they are chosen prior to passage of a proposed amendment by Congress and hence are asked to decide a matter which was not even before the public when they were candidates. Thus the method is open to criticism on the ground that it is casual in its nature and does not provide for that special and searching consideration which a change in the supreme law of the land deserves. This particular objection can be easily met however by providing for ratification through state conventions, as was the case in the repeal of the Eighteenth Amendment.

FLEXIBILITY OF THE AMERICAN SYSTEM IN THE STATES

Form of Government. As far as the Constitution of the United States is concerned, the people of each state may adopt any kind of government for their commonwealth that they happen to prefer, provided that it is "republican" in form. They cannot install a hereditary monarch or establish a legalized aristocracy but they may experiment in innumerable ways. They may create a legislature of one chamber or more, authorize the legislature to elect the governor and other high officers,

or adopt certain features of the British parliamentary system. For all practical purposes, the people of the state are free to mold their state and local institutions to meet their special needs and preferences. If the states tend to choose a stereotyped scheme of government, they have nobody to blame but themselves (Chapter 26).

State Powers. As to authority, the states, under the Tenth Amendment to the Constitution, have all powers not granted to the United States by the Constitution or denied to them by it. In practice, the states also share certain powers with the Federal Government—such as the power to tax. In forming and adopting their own constitution, the people of a state may grant, or withhold from, state and local agencies and agents of government such of these reserved powers as they deem fitting or desirable. Hence it is within the competence of each state to enlarge or contract, according to changing circumstances, the authority of each and every official engaged in transacting the public business of the commonwealth.

The Intermediate Zone. There is an important intermediate zone in which the several states may cooperate among themselves and with the National Government for public purposes. As demonstrated by recent experiences, this sphere of cooperation is wide and offers many possibilities for common action (Chapter 25), thus indicating again the adaptability of the Constitution to changing conditions in national life and economy. In cases at law involving such actions, the Supreme Court has been liberal in its views and lent sanction to a kind of third administrative system in the United States—the cooperating agencies of the national and state governments.

FLEXIBILITY OF THE AMERICAN SYSTEM OUTSIDE THE JURISDICTION OF THE STATES

Constitutional Provisions. The constitutional restrictions on the form and powers of government in the area divided into states do not apply in full force to the territories and possessions under the Government of the United States. In these regions, the American system achieves almost unrestrained flexibility. Although the National Constitution was primarily designed to serve the purposes of the original thirteen states composing the Union in 1787, it made provision for the acquisition and government of regions lying outside their borders as well as for the admission of new states to the Union. These authorizations appear in several clauses of the Constitution, general and specific. Under the power to make treaties and appropriate money, practice and the courts have held that the United States may buy territory from foreign countries. This power was exercised in the purchase of

Louisiana from France in 1803, Florida from Spain in 1819, Alaska from Russia in 1867, and the Virgin Islands from Denmark in 1917. Under its general war and treaty-making power, the United States may acquire territory by conquest or occupation, as in the case of the acquisition of territory from Mexico in 1848 and the annexation of Puerto Rico, Guam, and the Philippines after the Spanish-American War of 1898. Under its legislative power Congress may acquire territory by joint resolution. By this method the Hawaiian Islands were annexed in 1898. Under its power to send out naval expeditions, the United States may explore distant places, lay claim to territory, occupy it, and hold it; as in the case of various minor Pacific islands.

With regard to the management of regions under the sole jurisdiction of the United States Government, the terms of the Constitution are brief. Section 4 of Article IV reads: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." Section 8 of Article I authorizes Congress "to exercise exclusive legislation in all cases whatsoever," over the seat of the National Government, the District of Columbia. In these passages there is no prescription to the effect that the elaborate system of government and liberty conceived for the Union of states must be applied with full force to American regions lying outside that Union. The keynote is extreme flexibility.

Classification of Regions under the Sole Jurisdiction of the National Government. Apart from the District of Columbia, which stands by itself, the regions over which the National Government exercises some degree of jurisdiction fall into five classes: (1) full and permanent possessions, (2) leased areas, (3) areas held in trusteeship under the formal authority of the United Nations, (4) the Philippine Islands in some respects, and (5) occupied areas in foreign countries. The first of these classes, with reference to forms of government, is divided into two groups: (a) organized territories—Alaska and Hawaii and (b) dependencies—Puerto Rico, the Virgin Islands, American Samoa, Guam, and minor islands, such as the Wake group, and Howland, Baker, and Jarvis Islands.

In the class of leased areas come the Panama Canal Zone (held in perpetuity); the American naval base at Guantanamo Bay, under lease from Cuba; also bases in the Bahamas, Jamaica, St. Lucia, Trinidad, Antigua, British Guiana, Bermuda, and Newfoundland (secured by agreement between the British Government and President Roosevelt in 1940). The second kind of region not owned outright consists of the Carolines, Marshall, and Mariana Islands, formerly administered by Japan as a mandatory for the League of Nations. These Islands were

taken and occupied by the United States during World War II. Under an agreement of 1947 with the United Nations Security Council, the United States now governs them as a trustee with what amounts to effective ownership.

In a special class are the Philippine Islands. Although "independence" was granted to them in 1946, the United States retains possession of naval, military, and air bases in the Islands and it has secured to American citizens equal rights with Filipinos in initiating, owning, and operating economic interests in the Islands. As a kind of offset to these material limitations on their independence, Congress authorized the appropriation of large sums of money to pay Filipinos for damages suffered in World War II.

Government of Outlying Regions under National Jurisdiction. Subject to the terms of the Constitution, Congress may establish in the outlying regions almost any *form* of government which it deems appropriate. As to the two organized territories—Alaska and Hawaii—it has followed in some respects the model of the states. In each of these territories, the general government consists of a governor, appointed by the President with the consent of the Senate of the United States, and a legislature of two houses locally elected by popular vote. Each of the territories sends a Delegate to Congress, who may speak but not vote in that body.

Although Puerto Rico is not an "organized territory," with corresponding prospects of admission to the Union, its general form of government is like that of Alaska and Hawaii, except that the governor, as well as the legislators, is elected by popular vote, and the Island sends a Commissioner to Washington who serves as its agent in the House of Representatives, without a vote. The governor of the Virgin Islands is chosen by the President with the consent of the Senate, and the two municipal councils on the Islands, elected by popular vote, constitute the insular legislature. Administrative power over the Panama Canal Zone is now exercised by a governor appointed by the President with the consent of the Senate; under the immediate direction of the President, he supervises the operation of the Canal and its adjuncts. The minor islands in the Pacific Ocean are under the immediate control of naval authorities. With regard to many administrative matters in territories and possessions, the chief responsibility for supervision is vested in the Department of the Interior, especially in respect of Alaska, Hawaii, Puerto Rico, and the Virgin Islands.

The District of Columbia. The seat of the National Capital embraces about seventy square miles of land ceded to the United States by the state of Maryland. By the Constitution full power over the government

of the District is vested in the Congress of the United States. After making several experiments in the administration of the municipality through the agency of a mayor and council, Congress abolished the last vestiges of popular representation in 1878. At present the supreme legislative power of the District is assumed by Congress, which devotes certain days each session to the business of the community. The executive authority is vested in a board of three commissioners—two from civil life appointed by the President with the consent of the Senate, and one a military officer detailed by the President from the Corps of Engineers of the Army. Besides discharging important administrative functions this body makes ordinances relating to public health, safety, and welfare. In addition to municipal courts for local cases, the District of Columbia has special United States courts.

The Liberties of People in Territories and Dependencies. From time to time since the establishment of the National Government in 1789 the nature of the liberties guaranteed to the people residing in regions under its sole jurisdiction has been the subject of heated disputes. In summary form, the central question has been: "Do all the provisions on behalf of private rights (Chapters 3 and 4) contained in the original Constitution, as well as in the first ten Amendments, apply in such regions and control the National Government in the exercise of its powers"?

For a long time the Supreme Court was inclined to an affirmative answer—that is, while the United States possessed no territory outside its continental domain. But when the United States acquired the Hawaiian Islands and possessions formerly owned by Spain a new problem arose: "In governing peoples wholly unaccustomed to American ways, must the National Government abide by the provisions in behalf of civil liberty set forth in the first ten Amendments?" In a series of decisions known as "the Insular Cases," the Supreme Court then held in effect that not all these provisions restrict Congress in making laws for insular possessions. In other words, all the civil liberties guaranteed by the Constitution do not automatically "follow the flag everywhere." In some of the small Pacific islands, such as Guam, the liberties enjoyed by the inhabitants are meager, to say the least, and are likely to remain so unless Congress by positive act provides a bill of rights for them.

Power to Rule Subjugated Regions and Peoples. No clause of the Constitution specifically mentions the power of the National Government over regions and peoples in other countries brought under its jurisdiction by arms. But a long line of precedents—executive, legislative, and judicial—has established a general principle applicable to such cases, until Congress may otherwise stipulate by law: when the

Government, in the exercise of its power to wage war, has conquered a foreign country or part of it, the President as Commander in Chief of the armed forces, in governing it, may exercise sweeping powers over life and property. As the Supreme Court has stated the principle: "There is no limit to the powers that may be exerted in such cases, save those which are to be found in the laws and usages of war."

It seems, indeed, that the President alone or in cooperation with foreign governments associated with the United States in a war may declare that new rules of international law are in effect and set up special courts for applying them to civil and military officers of the conquered country. This was done, for example, after the defeat of Germany and Japan in 1945, when German and Japanese officers charged with war crimes were tried and sentenced to death or imprisonment.[2] There were, it is true, some protests against such extraordinary actions, but the Supreme Court of the United States, in passing upon an appeal from a Japanese military officer, reaffirmed the general principle: American occupation forces, under the authority of the President, possess powers that are practically unlimited.

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[2] See *The American Year Book* for 1946, pp. 103 ff.

PART II

THE DOMAIN OF LIBERTY

CHAPTER 3

Personal Liberty

Diversity in Popular Views of Liberty. The domain of liberty covers a vast area. Skilled lawyers, given to measured language and familiar with constitutional clauses and court decisions, cautiously strive to discover its boundaries, while in the heat of discussion laymen may make the most astounding assertions as to its extent, claiming "rights" for themselves of a sweeping nature, and suggesting onerous restrictions on others. Indeed the same person may take radically different positions on different occasions. A manufacturer annoyed by official intrusions into his affairs, may call loudly for an end to governmental interference with business "as a matter of principle," yet gladly bring pressure to bear on utility commissions to force railroad companies to reduce the freight rates on his products. By their number, variety, and often conflicting character, popular claims regarding liberty are a striking proof of the continued vitality of the American passion for freedom. They are also a valuable revelation of what Americans deem desirable. If one wishes to come to grips with the subject of liberty, however, something more realistic than the impression to be gained by random observation of ordinary discussions is imperative.

General Definition. If this important topic of liberty is to be discussed in a practical way, a working definition is necessary at the outset. In the most general sense, the term means the freedom of the individual from restraints, whether imposed by government agents or by other persons, groups, or mobs.

Customary Liberties. Many freedoms belonging to this sphere of liberty lie entirely outside the province of government. It is a well-established principle of American law that all powers not granted to government are reserved to the people, and that within the domain thus marked out individuals and groups may adopt manners, habits, and practices satisfactory to themselves. These may be called customary liberties on the ground that, in the enjoyment of them, the individual or the group must look to the customs of the community, not to the law books and public officers, for guidance and support. In respect of such liberties, a community may be highly intolerant of all deviations from

its ways of life but it cannot enforce its intolerance through agents of government; nor can the individual or group that suffers from such intolerance appeal to the courts of law for a redress of grievances.

Liberties Prescribed by Law. Other freedoms for individuals are set forth expressly or by necessary implication in constitutions and laws. They are not only to be observed by agents of government and private persons; they are to be enforced by government authorities, especially by judges in the courts on appeal from persons whose rights are invaded. Broadly speaking, these freedoms include (1) political rights, such as the right to vote and hold office; (2) thousands of rights relative to persons and property covered in detail by civil and criminal laws enacted by Congress and the state legislatures (Chapter 31), and (3) a special body of constitutional rights enjoyed by individuals, in relation to their personal conduct, expression of opinions, occupations, property, and other concerns of daily life. Rights of the third class are variously known as civil rights, civil liberties, private rights, or personal privileges and immunities. This third class is thus to be distinguished from political rights, which are limited to duly qualified voters, and from innumerable rights of person and property prescribed in the details of civil and criminal laws. Although the distinction is not always sharp or absolute, it is material in practice and convenient for concrete treatment and discussion.

Classifications of Civil Liberties. Writers on the subject divide the rights called civil into groups according to various views of the whole field. In this volume, they are treated under two general heads—personal liberty and liberty in relation to occupations and property—and these in turn are broken into subdivisions. Furthermore, emphasis is laid on those freedoms which are protected against arbitrary actions by government officials and agencies, for the law of such freedoms is the most fully developed in legislation and judicial interpretations. They are, besides, basic to every other type of liberty. Without freedom of speech and press against government control, for instance, even the discussion of plans for extending the domain of liberty would be hampered, if not prevented.

According to another view of civil liberty, legislation and the agents of government should be used to compel private persons to refrain from customs and practices which discriminate against anybody on account of race, religion, or sex. In 1875, for example, Congress, by the Civil Rights Act, prescribed that hotels, railways, theaters, and other private concerns rendering public services should make no discrimination based on race or color. This prescription was declared unconstitutional by the Supreme Court of the United States, but demands for

legislation of such a character are vigorously agitated, and the principle has been advanced that even private employers and private schools and colleges should not be allowed to discriminate against any person, at least on account of race or religion. As yet, however, this broad proposition is far from universal acceptance and realization.

The difficulties of enforcing antidiscriminatory laws are undoubtedly serious. It is one thing for the law to declare that no government officials or agencies shall interfere with certain prescribed rights of individuals, such as freedom of speech, press, and religious worship. Of quite a different type is legislation that requires proprietors of industries, business concerns, and institutions to make no discrimination in the employment or admission of persons on account of race, color, or sex, and empowers government officials to compel obedience to the requirement. Although the Supreme Court has insisted that the states must provide equal facilities for the education of Negroes, it has repeatedly upheld the principle of segregation in public school systems; and efforts to break it down meet strong resistance in many parts of the country.

The Truman Committee's Report on Rights. Nevertheless, there is a widespread demand for positive action on the part of government to eliminate all social and economic discriminations. The demand is strongly voiced in the Report of President Truman's Committee on Civil Rights (*To Secure These Rights,* 1947). The committee divides essential civil rights, broadly conceived, into four general classes: (1) the right to safety and security of person—against bondage, lawless violence, and arbitrary arrest and punishment; (2) the right to citizenship and its privileges—equal rights to vote, hold office, and enjoy all the privileges of full citizenship; (3) the right to freedom of conscience and expression —liberty of press, speech, and religion; and (4) the right to equal opportunity—"the opportunity of each individual to obtain useful employment, and to have access to services in the fields of education, housing, health, recreation, and transportation, whether available free or at a price . . . with complete disregard for race, color, creed, or national origin."

In its report the President's Committee refers to violations of civil liberty, summarizes the principles of federal law on the subject, recommends additional legislation, and lays down a program for the better protection of civil rights by new devices of enforcement. Besides listing the provisions of the Federal Constitution bearing on civil liberty, the committee turns to the Charter of the United Nations in its search for new sanctions. It states that a strong argument can be made for the proposition that, since the United States has ratified the Charter by treaty, Congress has power to pass separate legislation to achieve the

purposes set forth in Article 55 of the Charter, including "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." If in fact Congress has this power, then its authority to extend civil rights is without discernible limits.

NATIONAL SYSTEM OF LIBERTY A RECENT ACHIEVEMENT

The Original System Dual in Nature. Many fervid orators and many writers seem to labor under the impression that a complete system of civil liberty was established in 1791 when the first ten amendments were added to the Constitution of the United States. Without any legal or official warrant whatever, they apply the term "Bill of Rights" to these amendments and talk as if the rights incorporated in it originally restricted all governments—federal, state, and local—and constituted a national system. The contention is, of course, unfounded. The rights set forth in the first ten amendments were intended to be restrictions on the National Government alone; and in fact, before they were adopted, other rights also fundamental had been declared in certain provisions of the original Constitution itself.

Subject to the few restrictions imposed on them by the National Constitution, the states, from 1789 until 1865, had almost unlimited power over the life and property of the people within their respective boundaries. It is true that the states included bills or enumerations of rights in their constitutions which were binding on the agents of their state and local governments. But each state still had, under the original Constitution of the United States, power to establish or abolish slavery; and many of them kept slavery until it was finally outlawed by the Thirteenth Amendment in 1865. During that period each state also had the power to establish a church by law and lay taxes to support it, and some of them had such churches for a time after 1789; the states likewise possessed the power to impose drastic restrictions on freedom of press, and many of them did. In short, as far as the Constitution of the Union was concerned, until after the adoption of the Thirteenth and Fourteenth Amendments each state could set up a government endowed with practically unlimited powers over life, liberty, and property as long as it was "republican" in form.

Efforts to Nationalize Civil Liberty after the Civil War. Among the results of the Civil War was the adoption of amendments to the Federal Constitution that drastically restrict the powers of all states in the interest of civil liberty. By the Thirteenth Amendment, slavery and involuntary servitude, except as punishment for crime, are forbidden in all places subject to the jurisdiction of the United States. The Fourteenth

Amendment, adopted in 1868, declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

These amendments constituted, in form at least, a revolution in respect of civil liberties. At the time many advocates of the Fourteenth Amendment asserted that it was their intention to "nationalize" civil liberty—to make it prevail throughout the United States against all governments—state and local, as well as federal. A member of Congress, John A. Bingham, who helped to draft this Amendment, claimed that it was the purpose of the provision to make "the poorest man in his hovel . . . as secure in his person and property" as any prince in his palace or king on his throne—to establish civil rights for all persons, not merely liberated slaves, and to protect them against all agents of state and local governments.

Strict Interpretation of the Fourteenth Amendment for a Time. For more than fifty years after 1868, the Supreme Court of the United States refused to take the view that the Fourteenth Amendment had nationalized civil liberty, that is, had in effect established as against the states all the rights proclaimed against the National Government by the first ten amendments of 1791. During this period, the Court did declare void many acts of state legislatures designed to regulate the practices of railroads and other public utility concerns and to control the hours and conditions of labor in certain industries. But as to other matters it took the position that, despite the Amendment, the states still possessed about all their original powers over liberty and property, except the power to establish slavery or servitude within their borders, either directly or by subterfuge. If the court had clung strictly to this line of argument, it would have maintained a dual system of civil rights, akin in many respects to that which had prevailed before 1865.

Nationalizing Liberty in Recent Times. Not until shortly after World War I did the Supreme Court widen its view of the Fourteenth Amendment and include within its scope, by interpretation, new civil liberties which states could not violate. In 1923 it declared void a Nebraska law that forbade instruction in any other language than English in the schools and even the teaching of foreign languages in grades below the eighth. This departure was followed two years later by a decision which invalidated an Oregon law abolishing private schools for

children between the ages of eight and sixteen. In 1931 the Court made a still sharper break with precedent by declaring a state law, restraining newspapers from freely criticizing public officials, to be contrary to the Fourteenth Amendment.

A National System of Liberties Now in Effect. From year to year the Supreme Court continued to broaden its opinions until at length it reached the position that the Fourteenth Amendment guarantees against the agents of the state and local governments most of the fundamental liberties guaranteed against the Federal Government by the first nine amendments. It does not hold that the two bodies of rights applicable to the National Government and the states are identical in all respects; in other words, that the Fourteenth Amendment includes all the liberties set forth in the first nine amendments. In fact it has often stated that they are not identical, particularly with regard to matters of procedure in the courts of law. But at long last it is correct to say that there is a substantial body of civil liberties which prevails through the Union against all agents of government, state as well as federal.[1]

A Warning against Oversimplification. Many persons who talk about civil liberties in the United States speak as if they are simple in nature and are all to be found in what is called a "bill of rights." As already indicated, this is wholly unwarranted. In no constitution or official document are all these liberties set forth in general or in detail. A comprehensive knowledge of them can only be acquired by a close study of constitutions, legislative acts, judicial decisions, and other official pronouncements embraced in thousands of pages—published and unpublished. From year to year, indeed from day to day, new rulings are made by the courts as new cases pertaining to civil liberty come up for hearing. Only a few of the rights are precise and simple in terms: for example, it is settled law that no government can compel any person to attend any church and pay taxes for the direct support of religious worship. Nearly all the rights are subject to limitations laid down by law in the interest of good order, public health, public morals, and social convenience. Yet some knowledge of these rights is necessary for all citizens who wish to enjoy, uphold, preserve, and strengthen them.

FREEDOM OF RELIGION

Religion. No government in the United States can make a law respecting an establishment of religion or prohibiting the free exercise thereof. This means that no government can designate one or more churches as official churches, compel people to attend them, or lay taxes

[1] See Benjamin F. Wright, *The Growth of American Constitutional Law*, pp. 148 ff. and pp. 227 ff., and index under "Civil Liberties."

to support them.[2] All denominations are free to organize their own churches and conduct religious services according to their preferences, customs, and desires. The property they use for such purposes is generally exempt from taxation but this is a privilege extended to them by legislation and not an absolute right guaranteed for all time.

By judicial interpretations religious liberty has been extended beyond the right to maintain churches and conduct religious services. Religious bodies may establish schools for the members of their respective denominations and states cannot interfere with them by requiring all children within certain age limits to attend public schools. Nor can there be any arbitrary government interference with the right of religious teachers and propagandists to disseminate and sell religious books, leaflets, or other literature, to use the streets freely in talking about and handing out such printed matter, or to knock on the doors of other citizens for the purpose of enlisting their interest in a form of religion.[3] Certain rights of conscience are assured to religious believers, for instance, if members of a denomination hold that it is idolatrous to salute the flag of the United States, their children cannot be excluded from the public schools for refusing to perform that ceremony.

On the other hand, no person may, under the guise of a religious creed or ceremony, commit acts which transgress the ordinary laws of the land enacted in the interest of good order, health, safety, and public morals. This rule is vague but it is often applied in practice. Long ago Congress prohibited polygamy in the territory of Utah and penalized persons who violated the law. A man indicted under this act claimed that his "plural marriage" was sanctioned by his religion and was protected by the clause of the Constitution on religious freedom.[4] But the Supreme Court rejected the claim and asserted that nobody had a right, in the name of religious liberty, to violate a criminal statute. It declared that while Congress had no power over religious opinions and beliefs as such it could forbid actions "in violation of social duties or subversive of good order." The same principle now applies to the state. For instance, no religious propagandist can publicly curse a policeman and thus violate a state law forbidding the use of profane and abusive language in the streets. For doing that he may be punished. Even ministers

[2] The Supreme Court has held, however, that a local government may lawfully provide for transporting children to schools conducted by religious denominations and draw upon funds derived from taxation to pay for such transportation. But this decision is under a fire of criticism as authorizing an action by government agents which is in the nature of laying taxes for the support of religious schools.

[3] Under a Supreme Court decision of 1948, religious instruction cannot be given in the public schools by representatives of religious denominations, even though attendance of the children for such instruction is voluntary.

[4] Reynolds *v.* United States, 98 U.S. 145.

in their pulpits, during a time of war at least, cannot expound the teachings of the Bible in such a way as to violate federal and state laws against seditious utterances, without incurring the risk of punishment by fine or imprisonment.

FREEDOM OF SPEECH, PRESS, AND PETITION

Objectives. Privileges of speaking, printing, and petitioning under the Constitution are not merely intended for personal enjoyment, although millions of people derive happiness from talking, writing, and getting up petitions. These rights were regarded by the founders of the Republic as absolutely indispensable to the maintenance and conduct of free government. Without such liberties popular elections would be farcical; for politicians, once in power, could stifle all criticisms of their proposals and actions, even the most tyrannical. Moreover, the unhampered discussion of issues and candidates during the various election campaigns is necessary to arriving at informed opinions and to making informed choices among candidates and parties bidding for governmental power. Only by the exercise of these rights can government of the people, by the people, and for the people be established, upheld, and made a reality. But, despite the constitutional provisions proclaiming these freedoms, the National Government and the state governments have often interfered with the exercise of such rights particularly in times of war.

Freedom of Speech. The First Amendment declares that Congress shall make no law abridging the freedom of speech and, under recent interpretations of the Fourteenth Amendment, free speech is now among the rights upheld against arbitrary actions by state and local governments. In the main, the exercise of this right involves speaking in halls, streets, groves, parks, and other public places on all kinds of subjects, including those which are political, economic, social, and controversial in nature. Ordinarily a speaker at a meeting may say what he pleases in a decent and orderly manner; for this privilege he does not have to secure a license or show a copy of his proposed speech to a censor in advance. If, however, he defames any person in vicious language, he may be sued by the victim for slander and compelled to pay damages.

When streets and other public places are used for meetings, however, difficulties are encountered. Crowds may block the streets to traffic, thus interfering with people going about their business, and disorders may arise. Hence it is customary for cities to require the organizers of open-air meetings to obtain the consent of the police; and the police may forbid the meeting or try to prevent the utterance of words they do not want to hear. To justify such interference they may allege that

the public would be inconvenienced or that violence might occur. But it is now settled by Supreme Court decisions that state and local authorities cannot make arbitrary distinctions between groups of people who desire to hold meetings and that it is their duty to protect meetings against the disorderly conduct of mobs and gangsters.

Special difficulties relative to freedom of speech have arisen as a result of the introduction of the radio. Owing to the "interference" that occurs when too many broadcasting stations are operated in the same region, it is necessary to limit the number of stations. This restriction is effected by federal laws which require licensing and regulation of all stations under the authority of the Federal Communications Commission.

Consequently no person can build a station and broadcast at any time of the day or night, without securing a license in advance from the Commission. Although efforts are made by federal law to give various political parties and factions "time on the air," the cost of this service and other considerations put at a disadvantage persons with small purses, as well as those who want to ventilate unpopular views. In competition with national "hookups" that may reach twenty million people or more in a single broadcast, the right to speak freely in halls, parks, and other public places may seem relatively insignificant. Even so, it remains among the precious and necessary liberties of a self-governing people.[5]

Freedom of Press. In current practice, freedom of press has two definite meanings. First, it is not necessary for anybody who wants to engage in the publishing business to obtain a license from any government agency. Second, it is not necessary for any person who publishes a book, newspaper, magazine, or other type of literature to submit it in advance to a government official for approval; that is, there is no government censorship in the United States—except in time of war. In other words, private persons and concerns may write and publish whatever they please. They may freely criticize public officials and political parties. They may discuss anything under the sun with an almost limitless abandon; they may misrepresent the facts in any case, express opinions that are false or even nonsense, and abuse individuals, classes, races, and associations in language bordering on outrage. Hence there is no positive guarantee of truth and fair play.

On the other hand, experience with press censorship in former times and, indeed our own, has convinced the American people that sole and plenary power to determine what is the truth and what is in the public interest must not be entrusted to government agencies. Wherever such power is regularly vested in governments, official propaganda takes the place of free discussion, criticism of the politicians becomes a crime, and

[5] For radio licensing and regulation, see Chapter 22.

government by the people disappears or turns into an utter farce.

The freedom granted to the press is, however, coupled with various liabilities. If a writer and his publisher falsely and abusively attack the character and honor of an individual, they are guilty of libel; they may be sued in a court of law and compelled to pay damages to the person attacked. The publication and circulation of obscene literature and pictures is forbidden by law; but the line between decency and obscenity is difficult to draw in many instances. Hence judges and juries in the courts make varying decisions in different parts of the country. In some states rulings on the subject are strict; in others they are liberal.

With regard to such matters the Federal Government has special powers. The importation of obscene pictures and literature is prohibited by federal law and the enforcement of this law is left to federal authorities, subject to appeals to the courts against arbitrary actions. The circulation of obscene publications through the post office is also banned by federal law, and postal authorities may exclude them from the mails, but private parties to whom the privilege is denied have the right to appeal to federal courts against the rulings of the Postmaster General and may secure a reversal of his orders.

The Right of Assembly and Petition. The First Amendment of the Constitution declares that Congress shall make no law abridging "the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Although this provision explicitly applies to Congress and the National Government, recent judicial decisions under the Fourteenth Amendment have included the right of assembly and petition among the privileges which states cannot take away from the people.

But the right of assembly and petition does not secure to petitioners the privilege of having their requests acted upon by public authorities. Their documents may be presented and placed in the legislative waste basket. Indeed under a precedent now long buried—a rule adopted by the House of Representatives in 1836—petitions may be spurned or tabled without being referred to committees or receiving any further consideration. Perhaps, as John Quincy Adams maintained, the rule is unconstitutional, but nevertheless it was in force for many years with respect to antislavery petitions.

Moreover, the right of petitioning is apparently limited to requests for things lawful under espionage and sedition legislation. Under the Sedition Act of 1798 a man was indicted for demanding a repeal of the Act. During World War I, "twenty-seven South Dakota farmers were opposed to the draft and believed that an unduly high quota was exacted from their county. They petitioned various state officers, ask-

ing for a new arrangement, a referendum on war, payment of war expenses from taxation, and repudiation of war debts. As an alternative they threatened defeat to the officers, their party, and the nation." On this and other charges they were arrested, tried, and sent to prison.

PROTECTION AGAINST ARBITRARY AND CRUEL TREATMENT BY GOVERNMENT AGENTS

Objectives. The founders of the American system were acquainted with the crimes against humanity which had been committed by governments in times past—the tyrannical actions of the Stuart kings of England during the seventeenth century and the methods employed by the Bourbon regime in France which disposed of critics by secret arrest, secret trial, secret imprisonment even torture and execution In colonial times many Americans had suffered bitter personal experiences in dealing with royal officers in their midst although the harsh and arbitrary actions of those officers were mild in comparison with doings of the Bourbon police in France at the time. To prevent in the United States a resort to arbitrary and brutal practices by government agents, the framers of the Constitution laid down explicit mandates against it. These mandates control the methods which these agents may employ in accusing arresting holding trying, and punishing persons for crimes alleged or real.[6] In the original Constitution the provisions pertaining to criminal processes applied mainly but not entirely, to federal authorities, but as a result of a long development they now apply to state and local agents as well.

The Civic Importance of Criminal Law and Procedure. Throughout their lives most of the people never come into collision with national or state officers engaged in enforcing the laws against crimes or appear in a criminal court as offenders but millions do every year for reasons good or bad and anyone may become so involved at any moment even inadvertently Accordingly the laws bearing on crimes, arrest, trial, and punishment have a vital relation to the liberty of the citizen.

The Power to Define Crimes and Prescribe Punishments. The power of government to declare what actions shall be deemed crimes how criminal cases shall be conducted and what punishments shall be meted out is a terrible power The Constitution contains many provisions pertaining to it. Congress has only a limited power to define crimes. It can declare what actions shall be deemed crimes against the laws which it may enact with reference to national affairs, subject always to the pro-

[6] Similar provisions also control government agents who make and enforce laws relative to the ownership and use of property (Chapter 4) See also Chapter 31

visions of the Constitution. The power to define crime in general belongs to the states.[7] But in respect of all crimes and the enforcement of all criminal laws, both national and state agents are bound to observe numerous restrictions on behalf of personal rights.

Treason Defined in the Constitution. One of the most dreadful devices used by despots in getting rid of persons deemed objectionable is to accuse them of "treason," which may be made to mean anything from mere criticism of the government to preparations for an armed uprising against it. The Constitution of the United States takes account of this peril to liberty. It does not permit Congress to define this crime in any way it sees fit, but provides a specific definition: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." Congress cannot, therefore, vindictively declare to be treasonable any act which does not meet its approval.

Trials and Penalties for Treason. In addition, the trial of persons accused of this high crime is carefully safeguarded. No person can be convicted of treason except on the testimony of two witnesses to the overt act or on confession in open court. In the case of the United States *v.* The Insurgents,[8] the Supreme Court, interpreting a federal statute, ordered that the names of the jurors and a list of witnesses be furnished to the accused, and that a reasonable time be allowed for the defense to prepare its case after receiving this information. The Court furthermore declared that until the overt act of treason had been proved by the testimony of two witnesses, no collateral evidence relating to the charges could be introduced.

While Congress has the power to provide the penalties for this grave offense, the Constitution stipulates that no attainder (conviction) of treason shall work corruption of blood or forfeiture except during the life of the individual thus condemned. In old English practice, corruption of blood meant that no attainted person could inherit lands or other property from his ancestors or retain those which he possessed or transmit them to his heirs. The constitutional provision mentioned above modifies the old rule by stipulating that no proceedings may be construed to work a forfeiture of the real estate of a traitor for a longer term than his natural life.[9]

Trial and Punishment by Judicial Process. The Constitution provides that except in cases of impeachment, the trial of persons charged with crimes, whether against national laws or state laws, shall be entrusted to courts of law. It expressly ordains that neither Congress nor

[7] For state criminal law, see below, Chapter 31

[8] 2 Dallas, 335.

[9] Bigelow *v.* Forrest, 9 Wallace, 339.

a state legislature shall pass a bill of attainder; that is, no legislative body can by resolution order the arrest of any person and then pass a law condemning him to death or imposing any other penalty upon him. In other words, an inflamed majority of a legislative body cannot seize and punish critics by mere legislative fiat; final decisions in the enforcement of criminal laws are entrusted to the courts, subject to many safeguards for personal liberty.

No legislative body can pass an *ex post facto* law; that is, a law declaring to be a crime a personal act which was not a crime when committed. The rule has been interpreted to mean also that a legislature cannot add new or harsher penalties for the commission of a crime or modify judicial procedure in such a way as to make it substantially easier to convict a defendant already accused. Thus persons who commit acts lawful at the moment of commission are free from the constant threat that they may be afterward punished for such innocent acts under a subsequent law passed by a legislative body.

Due Process in Arrest and Indictment. Government police agents may arrest persons caught in the act of committing a crime and confine them temporarily; but otherwise such officials must follow an established course in making arrests and imprisoning persons. Suspects cannot be arrested individually or wholesale on a general warrant or any kind of blanket order. Before arresting a suspect, a police officer must have a definite authorization in the form of a warrant from a proper law-enforcement authority. This warrant ordinarily gives the name of the suspect or suspects, indicates the crime alleged, and specifies the place or places to be searched if any.[10] In case of a capital or otherwise infamous crime under federal law, the person about to be arrested or actually arrested cannot be brought to trial until a formal indictment has been brought against him by a grand jury composed of citizens who have heard preliminary testimony as to his offense and have decided that there is sufficient evidence to support a probable conviction. In the states, however, under an interpretation of the Supreme Court, the use of a grand jury in criminal prosecutions is not absolutely necessary; the prosecuting officer may on his own motion and for good reasons lodge an indictment against a person suspected of a crime.

Habeas Corpus and Bail. When police officers have arrested a person accused of crime, they cannot hold him indefinitely in their custody and

[10] In 1947 the Supreme Court of the United States upset precedents and held that federal agents could search a man's premises merely by virtue of a warrant for arrest and that when such a search disclosed evidence of crime other than the one mentioned in the warrant, he could be tried and convicted on that evidence. Justice Frankfurter filed a vigorous dissent and the decision was severely criticized in the Senate. *Congressional Record*, May 9, 1947, pp. 5019 ff. It opened wide the door to possible abuses in the exercise of the power to arrest, search, and seize.

subject him to ill treatment, but they must take him shortly to a public place of confinement or to a court. If lodged in prison, he has a right to demand the aid of counsel and apply to a court for a writ of habeas corpus. This writ is an order issued by a judge to the jailer in charge of the prisoner, which commands that officer to bring the accused into court for a preliminary hearing. At the hearing the judge may decide that the evidence against the accused is not sufficient and set him free; or the judge may decide that it justifies holding him for a regular trial.

To prevent the imprisonment of any person for days and weeks awaiting trial, the law provides that, except in cases of murder or other grave crime, the accused may, by furnishing bail, obtain release from prison temporarily. Bail consists of a sum of money or a pledge secured by property which serves as some guarantee that the accused will be in court on the day set for trial; if he fails to appear and cannot be apprehended the entire amount is forfeited to the government. The bail demanded by a judge must not be "excessive," that is, all out of proportion to the gravity of the offense alleged to have been committed by the accused.

In time of rebellion, invasion, war, or other serious disorder, the privilege of the writ of habeas corpus may be suspended, and trials by military authorities substituted for ordinary civil proceedings. Who among the public authorities may suspend the writ of habeas corpus? With regard to the Federal Government, the Constitution is indefinite. But, judging by long practice, Congress may suspend it; or the President, with or without authorization from Congress, may exercise the power to suspend it in particular places or indeed throughout the Union. The Supreme Court has ruled, however, that trial by a court martial, composed of military officers, cannot be applied to civilians where the civil courts are open and carrying on their regular functions. Practice in the states varies, but ordinarily the governor may suspend the writ in case of grave disorders beyond the control of regular police agents, subject to constitutional restraints on arbitrary actions.

Fair Trial in Criminal Cases. In all criminal proceedings, federal and state, constitutional rules safeguard the rights of accused persons. It is a fixed principle of American law that the accused is innocent until proved guilty and that the burden of proof rests on the prosecuting officers. It is the duty of the prosecutor in every case to seek the truth and uphold justice. The obligation is often violated by hot heads but the presiding judge is legally and morally bound to enforce it during proceedings. Under the presumption of innocence, the accused cannot be compelled to be a witness against himself nor can confession of guilt be lawfully wrung from him by torture or other "third-degree" methods.

Every trial must be held, as a rule, in open court in the region or district in which the crime was committed. The accused must be informed of the nature of the charge against him; the witnesses against him must be brought face to face with him and submit to cross-examination by his counsel; and he may, by compulsory process, compel the attendance of witnesses in his favor. If charged with murder or other grave crime, he is entitled to trial by a jury composed of twelve citizens impartially chosen, and to the assistance of a counsel at public expense if he is too poor to pay the fee. If acquitted he cannot be put in jeopardy again for the same offense—forced to undergo another trial for it. If found guilty, he cannot be subjected to cruel or unusual punishment, such as torture or other physical abuse unauthorized by the criminal law applicable to his crime.

Additional Safeguards. Many other legal principles for the protection of liberty are set forth in federal and state laws. For example agents cannot harass or punish the innocent members of a convicted person's family or deprive them of the rights to his property which belong to them if he is put to death for crime or died in prison. Even the conviction of a person for treason against the United States cannot "work corruption of blood"—deprive his children or heirs of their rights in inheritable property; in other words, in this respect, the sins of the fathers are not even visited upon the first generation, to say nothing of the fourth. Nor may the agents of government rob the people or break their spirit by quartering soldiers in any house in time of peace without the consent of the owner; or in time of war, save in a manner prescribed by law. Numerous statutes, federal and state, make provision in detail for carrying into effect the personal liberties guaranteed by brief constitutional clauses.

Protection of Persons against Conspiracies and Mobs. It is, of course, the duty of all agents of government, within their respective jurisdictions, federal and state, to prevent mobs from depriving persons of life, liberty, or property. This duty is prescribed by many provisions of law. Two statutes passed long ago with a view to affording protection to Negroes come under this head. One penalizes actions of two or more persons designed to injure, oppress, threaten, or intimidate any citizen in the exercise of rights and privileges secured to him under the Constitution and laws of the United States. The other lays penalties on those who under the color of law, namely officials and their deputies, deprive citizens of their rights, privileges, and immunities. Persons forcibly deprived of rights by conspirators shall have the privilege of suing, in courts of law, the offenders for damages done. By Act of Congress, the President of the United States is empowered to employ armed forces

in suppressing violence or a conspiracy designed to deprive any portion or class of people of their constitutional privileges.[11]

THE UNENDING CONTEST TO UPHOLD CIVIL LIBERTIES

Such are the great principles of law designed to protect private rights throughout the Union. Although some of these rights are assured to citizens only, most of them, especially with regard to fair trials, are guaranteed to all persons. From day to day, in countless ways, they are quietly observed and duly carried into execution. The system is not perfect, and efforts to improve it are continuously made by interested citizens, law-makers, law-enforcement officers, administrators, and enlightened judges in the courts. On the other hand, violations of the principles already established are matters of frequent occurrence—so frequent as to show that here, as in other affairs of government, constant vigilance is the price of liberty. To this fact the history of struggles over liberty bears eloquent witness.

Historical Backgrounds. The first Amendment of the Constitution promising freedom of speech and press was only a few years old when Congress, dominated by the Federalist party, passed the Sedition Act of 1798, which imposed severe penalties on persons who published or said openly anything that brought, or tended to bring, the Government or any of its officers into disrepute. Thomas Jefferson and members of his party, then called Republicans, denounced this law as a gross violation of freedom guaranteed by the Amendment, and a stormy agitation over the question shook the country. At the expiration of the term set in its provisions, the Sedition Act lapsed, and Jefferson, as President, pardoned all the men who had been imprisoned for violating it. During the Civil War, while the National Government was in dire peril of dissolution, Congress passed no sedition law modeled on the Act of 1798; but the Government suppressed newspapers, arrested and imprisoned editors, and punished speakers for opposing the prosecution of the war against the Southern Confederacy. President Lincoln justified such actions on the ground that they were necessary to save the Constitution and the Government founded upon it.

Contests during World War I. Although the danger to the Government was by no means as great as it had been during the Civil War, Congress, in the second year of World War I, placed stringent penalties on all persons who printed, wrote, or published any "disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States . . . or any language intended to bring the form of government of the United

[11] *Safeguarding Civil Liberty Today* (Cornell University Lectures, 1945), pp. 131 ff.

States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States or the uniform of the Army and Navy into contempt, scorn, contumely, or disrepute."

This measure, it is evident from the context, was not directed primarily against those who interfered with military affairs but rather against those who criticized the form and operations of the National Government. It was hotly denounced during the debates on it in the Senate, Senator Hiram Johnson going so far as to say that it would "suppress the freedom of the press in the United States and prevent any man, no matter who he is, from expressing legitimate criticism of the present Government." Nevertheless it was adopted in the House with only one dissenting vote and in the Senate by a vote of forty-eight to twenty-six, and was sustained by the federal courts. As if determined not to be outdone by Congress, the legislatures of several states enacted sedition laws of their own, many broader in scope and more drastic in their restrictions on freedom of speech and press.

Under federal legislation relative to freedom of speech and press hundreds were arrested and scores were sent to prison during and after World War I. As applied in practice, says Professor Zechariah Chafee,[12] "it became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional, . . . to say that the sinking of merchant vessels was legal, to urge that a referendum should have preceded our declaration of war, to say that war is contrary to the teachings of Christ." Many who openly opposed the war or denounced it as a "capitalist" quarrel were swiftly sent to prison for long terms. One girl twenty-one years of age was sentenced to the penitentiary for fifteen years for taking part in issuing a circular severely attacking President Wilson's policy of intervention in Russia. It was with ample historical warrant that Charles E. Hughes, a man given to measured language, warmly protested in an address delivered in the summer of 1920 before the Harvard law alumni against inflammatory appeals to prejudice made by district attorneys and the browbeating of witnesses during trial by judges in every kind of court and in every part of the country, in civil liberty cases.

Questions of Liberty during World War II. In 1940, before the United States became involved in World War II, Congress passed what may justly be called a sedition law. This measure it incorporated in the Alien Registration Act of that year. The peacetime sedition law of 1940 made it a crime, if committed with disloyal intent, (1) to counsel, urge, or in any manner cause mutiny, insubordination, or refusal of

[12] *Free Speech in the United States* (second edition, 1942).

duty by any member of the armed forces of the United States; (2) to distribute written or printed matter teaching or advising the overthrow of government by violence; (3) to organize or help to organize any group having such propaganda as its purpose; and (4) to be a member of any group of this kind.

These provisions, it is evident, penalize not merely revolutionary actions, which have always been treated as unlawful, but the expression of revolutionary opinions, such as Thomas Jefferson and Abraham Lincoln had once declared to be an American right. Thus they mark a departure from previous peacetime legislation on the subject of free press, free speech, and civil liberty in general. As Zechariah Chafee points out: This law also "makes it a crime to be a member of an organization which is subsequently found to advocate the overthrow of the government by force, regardless of what he himself says or does. . . . We got safely through the Civil War and the [first] World War without finding it necessary to create group guilt outside the limits of actual conspiracy. . . . The Alien Registration Act brings into our federal criminal law the European principle that a man is known by the company he keeps and that guilt is not personal."

Aware of the protests made by lawyers of national standing against the mass arrests, harsh prosecutions, and hysteria of World War I, the Roosevelt administration, especially the Attorney General, promised that arbitrary and sensational invasions of civil liberties would not be repeated during World War II. In various respects the promise was observed; and more easily on account of the fact that most of the extreme radicals and communists, such as had denounced the previous world war as a capitalist or imperialist quarrel, were heartily in favor of World War II which they regarded as an aid to communist Russia.

Federal police officials, under the direction of the Federal Bureau of Investigation, were instructed to refrain from hasty and arbitrary arrests of persons on trumped-up charges or none at all. In general the trials of persons accused of offenses against laws respecting liberty of opinion were marked by less hysteria and less tyrannical conduct on the part of judges and juries. The penalties pronounced upon men and women found guilty of expressing opinions against actions of the Government and its theories of the war were often severe; but in the trials of indicted persons due process of law was, as a rule, more scrupulously observed than during World War I.

There were, however, some noteworthy exceptions to this rule. The most striking exception was known as "the mass sedition trial," which began in the United States District Court in Washington on April 17, 1944. In this case thirty persons were charged with violations of sedition

legislation and brought to trial in the National Capital, although only one of them was a resident of that district. Amid uproars in the court room and the press, the trial went on for more than seven months, until stopped by the sudden death of the trial judge. The possibility of starting the case again remained open for nearly three years longer but it was ended at last by a decision of a higher court in 1917. From start to finish, the affair was a disgrace to American justice, whatever the merits or demerits of the defendants charged with seditious activities.

Writing in 1943 on the fortunes of civil liberty in the United States during World War II, Professor Robert E. Cushman, learned in the law and practice of the subject, declared: "Today civil liberty enjoys a vitality which even the optimist hardly dared to hope for." This judgment, Professor Edward S. Corwin, also learned in the subject, maintains should be "supplemented and partially qualified." [13] Professor Corwin cites cases and actions in respect of constitutional rights which raise grave doubts as to whether civil liberty was not in fact seriously weakened, if not substantially impaired, during World War II.

LIMITS AND CONDITIONS OF LIBERTY

Liberty for Those Who Would Destroy Liberty. The Declaration of Independence proclaims that the people have a right to alter or abolish any form of government *destructive to life, liberty, and the pursuit of happiness*, and to institute "new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." In frank recognition of this right, the American system accords the people the privilege of making changes through peaceful constitutional amendment.

Suppose, however, that advocates of change, being unable to win sufficient popular support to effect their purposes by peaceful methods, propose to overturn the government by revolution, perhaps with foreign assistance, and to substitute for it a form of despotism destructive of life, liberty and happiness. Should such persons be guaranteed unrestrained freedom to pursue their designs? The answer of anyone who believes in liberty and government by popular consent must be no. Yet it involves a difficult question: How can any restraining law be so clearly drawn that it will prevent grave abuse of its terms by prosecutors, judges, juries, and excited crowds in times of crisis?

Freedom is Relative, Not Absolute. It is not easy to trace the correct line between the expression of opinions that are actually dangerous to continued liberty and the expression of opinions that, even if extreme,

[13] Corwin, *Total War and the Constitution*, pp. 106 ff.

are within the boundaries of the liberty guaranteed by the Constitution. In any event, freedom of expression is not absolute, that is, it does not give the citizen a right to say anything he likes, anywhere, at any time, regardless of circumstances. No government could allow unrestricted liberty to persons who urged direct attempts to overthrow it by violence or the murder of its officials. In ordinary criminal law the man who induces another to commit a crime by persuasion or promises also shares the guilt of the principal and is punished. So in the case of opposition to government, conspiracies and attempts to overthrow it by violence are necessarily crimes; otherwise its foundations would be built on sand.

But it is difficult to distinguish between spoken and printed words intended to produce open violence and those that merely stir up a discontent which might possibly eventuate in violence. Some courts have attempted to fix the boundary by saying that language which has "a reasonable and natural tendency to encourage resistance to the law" should be made criminal. This is a doctrine dangerous to liberty of opinion, for does not every criticism of a law have a "tendency" to encourage resistance to it? A perfectly innocent remark by a responsible citizen to the effect that a particular law, in his opinion, is unwise, unjust, or foolish may turn the scale in the mind of someone else and set him in motion to resist the law by displays of violence.

A safer and sounder doctrine is that of Jefferson to the effect that only when criticism of the government immediately threatens to culminate in open resistance should public officials interfere with freedom of press and speech. Indeed, between World War I and World War II, the Supreme Court of the United States, in interpreting state and federal legislation restricting freedom of press and speech, developed the doctrine that the test of whether officials should intervene in the exercise of this freedom is: Does such exercise constitute a "clear and present" danger of disorder and violence? But this doctrine is not the law of the land, and Title I of the Alien Registration Act of 1940 provides that any person who is merely a member of an organization which advocates the overthrow of government by force is guilty of crime even though he personally says or does nothing dangerous to public order.

Freedom a Question of the Spirit. In view of recent legislation, federal and state, respecting freedom of speech, press, and person, it is patent that mere words in the Constitution do not in themselves precisely define or insure liberty. Fundamentally, as Alexander Hamilton knew so well, freedom depends in a large measure upon the spirit of the people and their representatives in the various branches of government. Do they believe in liberty as a good in itself to which the dignity

of human nature is entitled? Do they recognize the truth that it is essential to democratic government by discussion? Are they willing to allow to others the right of opinion which they claim for themselves? Finally, in cases at law, it is the character of the judge, the prosecutor, and the jury that largely determines the fairness of the trial and verdict. An English writer has gone so far as to say that liberty is what twelve grocers, bakers, and candle-stick-makers in a jury think it is, and little more. Certainly judges and juries may temper harsh law with moderation and justice; and under high-sounding phrases they may slay liberty in its own house.

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CHAPTER 4

Liberty in Relation to Occupations and Property

Personal liberty includes the rights of individuals relative to earning a living and using their property, but these rights involve such large economic interests and have received such specialized treatment by legislatures and the courts as to constitute a distinctive field. It is in recognition of this fact, and for the sake of convenience, that they are treated separately here.

THEORIES OF ECONOMIC LIBERTY

Mercantilism. When the Constitution was drafted in 1787, the economic theory generally prevalent in the Old World and in the United States was known as "mercantilism." According to this theory, it was the right and duty of government to regulate and otherwise intervene in the production and distribution of goods and in the occupations of the people with a view to increasing the wealth and security of the nation. The American uprising against Great Britain in 1776, it is true, was in part a revolt against British regulation of American industries and commerce, but the issue at stake was not merely a matter of "regulation" or "no regulation." It was rather a question of whether the British government was to do the regulating in the interest of the British Empire or the Americans were to do it in their own interest. After independence had been achieved Americans themselves differed sharply as to whether the regulation of economy should be entrusted to the thirteen states, or to a new general government endowed with large powers.

Economic Views of the Fathers. The leading members of the convention which drafted the Constitution were nearly all mercantilist in economic theory; that is, they accepted the doctrine that government can and should be used to regulate and promote economic activities in the interest of society. Although Adam Smith had published in 1776 his Wealth of Nations advocating a minimum of government interference with domestic and foreign trade, his doctrines were not followed by any government anywhere in 1787 nor did the theory come into general vogue until many years later. Far from incorporating Smith's ideas in the Constitution, the framers laid great emphasis on the power to regu-

late interstate and foreign commerce and the use of government to control and promote the general interests of the Union.

Their spirit was well expressed by the first annual message of President George Washington. He had presided over the convention which drafted the Constitution, and in the Congress before him were included a large number of men who had taken part in formulating it. Surely they knew the letter and spirit of the Constitution. In advising the Senators and Representatives respecting their first duties under the Constitution, Washington said to them: "The advancement of agriculture, commerce, and manufactures by all proper means will not, I trust, need recommendation. . . . Nor am I less persuaded that you will agree with me in opinion that there is nothing which can better deserve your patronage than the promotion of science and literature." Daniel Webster was undoubtedly right, when after an examination of the writings of the Fathers, he found it "everywhere held up as the main reason for the adoption of the Constitution that it would give the General Government the power to regulate commerce and trade." In many respects, the Constitution is an economic document of the first order.[1]

Theory of Laissez Faire. About the middle of the nineteenth century a different conception of the relation of government to economy came into general circulation, the theory of *laissez faire,* formulated by British economists by developing a French doctrine of the eighteenth century into a system. As the French words indicate, *laissez faire* means "let alone," that is, government should refrain from interfering with the ownership, acquisition, inheritance, and enjoyment of property, the making and selling of goods, the employment of labor, or the social conditions resulting from such activities. In the course of time this idea came to appeal strongly to Southern planters, Western farmers, and exporting-importing merchants in the United States. Leaders among them arrived at the conclusion that agriculture and commerce would be more prosperous if no protective tariffs were imposed on imports and they could freely exchange their produce for the manufactured goods of Britain and the Old World. In its platforms adopted between 1844 and 1860, the Democratic party, then largely under the domination of planters, expressed the *laissez faire* theory in planks which denied the constitutional and moral right of the Federal Government to interfere with economic institutions and activities, including the institution of slavery, even in the territories subject to federal authority. In 1856 it went so far as to proclaim that the time had come for the people to declare themselves in favor of "progressive free trade throughout the world."

[1] C. A. Beard, *An Economic Interpretation of the Constitution,* pp. 152 ff.

The economic theory to which the Democratic party had committed itself was succinctly stated by James Parton in his *Life of Andrew Jackson*, published on the very eve of the Civil War which was to oust the party from power in the national capital for a long period of time. "The party who hold to the Jeffersonian creed," Parton declared, "are of opinion that the office of government is solely to maintain justice between man and man, and between the nation and other nations. It should have nothing to do with carrying letters, supporting schools, digging canals, constructing railroads, or establishing scientific institutions. Its business is simply to suppress villains, foreign and domestic. The people are to be left absolutely free to work out their welfare in their own way; free, especially in all departments of industry, from the paralysing touch of government patronage." Ignoring the plain fact that Jefferson was the founder of a state university, an advocate of public education, and believer in the use of government to promote highways and other internal improvements, this creed, formulated for the party by the biographer of Jackson, fairly summarized the political economy widely accepted by Democrats near the middle of the nineteenth century and long afterward. Even to the present time the doctrine has been the basic working theory of most academic economists in the United States.

In expositions of the theory certain primary principles usually appear. Each individual knows better than any government agents what his interests are and how to apply his talents and energies most effectively in the production and exchange of goods. The production of wealth in large quantities depends upon the initiative and abilities of the individuals engaged in it. If government does not interfere in the process, each individual will rise or fall in the scale of earnings and wealth according to his merits and the amount of wealth he creates. As a result of pursuing this policy, the annual production of wealth in the country is kept at a high level, the amount of wealth to be distributed yearly is at or near the maximum, individuals are more prosperous than they would be otherwise, and society as a whole is most benefited. In any case, according to the theory, interference in economic operations by government is dangerous to liberty and to be feared, for its agents lack practical knowledge of industry and commerce, and are likely to be more concerned with keeping themselves and their party in power than with the general welfare of the people.

Theory of Communism. At the opposite pole is communism. Stated in its simplest terms, communism calls for the ownership of property, particularly land, resources, and tools, in common; for work in common; pooling of the wealth produced; and the distribution of this wealth equally

among the members of the community. This theory has long been known in America. Even in colonial times students of the classics who had read Plato's *Republic* were familiar with it. During the nineteenth century many "colonies" were established in various parts of the country by voluntary associations formed to experiment in communism; and all, save a few dominated by self-sacrificing religious leaders, failed and disappeared. Meanwhile another conception of communism came into circulation after the introduction of the works of Karl Marx into the United States, notably the Communist Manifesto published in 1848. According to Marx communism is not to be effected by a voluntary arrangement among people or by ordinary legislation; it is to be imposed on all the people by a revolution made in the name of "the proletariat."

Marxian communism remained everywhere a mere theory until 1917 when revolutionists in Russia, led by V. I. Lenin and Leon Trotsky, took over the government, liquidated the middle class, suppressed the small land owners, nationalized lands, mines, and other forms of productive capital, and established government by a dictatorship. Then, for the first time in the history of the world, it could be seen just what communism meant in practice on a large scale.

Shortly after the Russian revolution in 1917 small political groups committed to communism on the Russian model were founded in the United States. At length the present Communist party emerged and took direction of communist agitation, following with obvious regularity the Communist party "line" laid down by the dictatorship in Moscow. Although, nominally, the Communist party disavows commitment to the overthrow of the American system of government by violence, this is a concession in tactics on the part of many communists rather than a matter of principle.

The American Combination of Theory and Practice. Judging by the pronouncements of great leaders in government, politics, organized labor, and business, and by practice as expressed in laws and administration, the American people at large accept none of these theories as a political creed. They reject communism as wholly incompatible with the American system of government and liberty; and they are not committed unreservedly to the doctrine of mercantilism or *laissez faire*. In general the American view is that whatever citizens can do better for themselves, either as individuals or in associations, government should not undertake; but that government, besides assuming various obligations respecting defense, property, and order, should provide as far as possible the conditions favorable to the prosperity of industry, agriculture, and labor, and should cope with the evils of economic depressions

and the hazards of accidents, sickness, and old age dependency. Herbert Hoover doubtless expressed the American view when he said: "In our individualism we have long since abandoned the *laissez faire* of the eighteenth century—the notion that it is 'every man for himself and the devil take the hindmost.' . . . Ever since the Industrial Age began we have devised and enforced thousands of regulations in prevention of economic domination or abuse of our liberties through growing instruments of business. Furthermore the sense of public responsibility for the general welfare has successively produced public education, public health, public works, public stimulation of scientific research, and in 1929 for the first time embraced the responsibility for public action in the battle against depression. That is hardly *laissez faire*." [2] This conception Franklin D. Roosevelt reenforced and elaborated in numerous addresses, varying from it only in specific applications.[3]

LIBERTY IN RELATION TO OCCUPATIONS

Freedom to Choose Occupations. No clause of the Federal Constitution guarantees to the individual in specific language the right to choose and follow any occupation at will. The right, subject to restrictions noted below, is sustained, however, by several general provisions of the Constitution against interference by the National Government and the states. The right is protected in various respects against government intervention by the provisions that neither Congress nor the states shall deprive any person of "life, liberty, or property, without due process of law." Two other provisions apply to the states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

In numerous cases, the Supreme Court of the United States has expounded these constitutional provisions in plain language. It has said, for example, that the right to work in the common occupations of the community is of the very essence of personal freedom and opportunity; that the right to earn a livelihood by following the ordinary occupations of life is fundamental; and that the liberty mentioned in the Fourteenth Amendment embraces the right of the citizen to live and work where he will and to earn his living by any lawful calling. It has also declared that no state can deny to citizens of other states the privilege of carrying on within its borders any legitimate calling or business which is open to its own citizens.

No Forced Labor. No person in the United States may be seized and

[2] Wilbur and Hyde, *The Hoover Policies*, pp. 7 ff.
[3] *The Public Papers and Addresses of Franklin D. Roosevelt* (1932–1940, 8 vols.).

held in slavery, servitude, or bondage by any other persons or by government agents. The Thirteenth Amendment to the Constitution prohibits slavery; it likewise forbids involuntary servitude, except as punishment for crime after conviction in a court of law. This Amendment has been amplified by federal legislation. "The holding of any person to service or labor under the system known as peonage" is forbidden. All acts, laws, regulations, and usages of any state or organized territory which directly or indirectly authorize or enforce the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation or otherwise, "are null and void." In other words, no government, no private person or concern, can seize any person for nonpayment of debt or other economic reasons and compel such person to labor for a term of weeks or years or indefinitely; thus "forced labor" [4] is forbidden by the Constitution and laws of the United States.

Speaking of antipeonage legislation, the Supreme Court of the United States has said that it is "both a shield and buckler against forced labor because of debt." If, for example, an employer advances money to a person on an agreement to work for a given term of days or months and the worker refuses to perform any labor at all, still the employer cannot compel him by force of state law to carry out the contract. Nor may an employer use force or threats of force to keep laborers or tenants at work on his premises. For instance, several years ago a large landowner in Arkansas carried a gun, a revolver, and brass knuckles as he toured his estate and so terrorized the Whites and Negroes on his plantation that they were afraid to leave the place; for this offense he was indicted, convicted of peonage, and sent to prison for two years and six months. Other successful prosecutions in recent years have demonstrated a resolve on the part of the Federal Government to stamp out involuntary servitude in all parts of the country.

Preventing Discrimination. To protect Negroes, Congress has enacted special legislation. It has provided that all persons shall have the same rights as White citizens in all matters relative to security of persons and property in all states and organized territories, and shall be subjected only to like punishment, penalties, taxes, and exactions of every kind. Thus the right to acquire, use, and transfer property, to make and enforce contracts, and to enjoy the equal benefits of laws and proceedings relative to occupations and callings is assured to all citizens, without regard to race, color, or any previous condition of servitude.[5]

[4] For examples of forced labor in Russia, see Dallin and Nicolaevsky, *Forced Labor in Soviet Russia* (1947).

[5] By 1947 four states, New York, New Jersey, Massachusetts, and Connecticut had enacted "fair employment practices" statutes which forbade employers to discriminate against persons on account of race, religion, and other grounds.

Furthermore, if a person acting in the name of the law deprives any other person of his rights, the victim may bring suit against the offender and collect money for the damages that have been done. If the rights thus set forth in an act of Congress are often violated or neglected in practice, the fault is due to failures in enforcement, not to the law itself.[6]

Restrictions on the Pursuit of Occupations. Both the National Government and the states, within their respective spheres of power, may, however, impose restrictions on occupations. They have abolished many occupations by making them criminal; for example, engaging in the lottery business, gambling, selling narcotics without a license, manufacturing and advertising fraudulent drugs, and issuing fraudulent stocks and bonds. National and state statute books are crowded with prohibitions against the pursuit of occupations designated as criminal. Moreover, in order to engage in some occupations, persons must hold licenses from public authorities, state or federal according to circumstances; and to acquire licenses they must comply with given requirements or pass examinations designed to test their competence or fitness. Physicians, surgeons, lawyers, nurses, plumbers, barbers, and other practitioners are usually put in this class by state laws. Such license holders enjoy protection against competition by unlicensed persons, and, as members of privileged professions and trades, often seek to raise the barriers against newcomers with a view to tightening their monopoly; but in principle the licensing system is intended to protect the public against incompetents, frauds, and quacks.

Employment in public services—federal, state, and local —is generally restricted by legislation in such a way as to exclude communists and other persons who advocate the overthrow of government by violence. An act of Congress requires the exclusion of such persons from the federal civil service, and many states have similar laws respecting their own services. In 1947 President Truman issued a directive ordering that communists and persons associated, even loosely, with "subversive" organizations be excluded from federal offices or ousted if already employed in them. Acting on the President's order the Attorney General later published a long list of subversive organizations with which association was to be deemed disloyal (Chapter 14). Owing to the vague language in which the President's directive was phrased, protests were made at the time that he had authorized "witch hunts" and the discharge of federal employees who entertained views out of line with the

[6] In a public address on June 29, 1947, President Truman said: "We cannot be content with a civil liberties program which emphasizes only the need of protection against the possibility of tyranny by the Government. . . . We must make the Federal Government a friendly, vigilant defender of the rights and equalities of all Americans. I mean all Americans." *New York Times*, June 30, 1947.

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doctrines of the most conservative politicians. In the midst of a widespread determination to drive communists out of the public service such protests often received scant attention.

The Right to Employment. Liberties relative to occupations do not guarantee "the right to employment." Demands have often been voiced that this right should be secured by law to all persons able to work. While the so-called "full employment bill" was pending in Congress in 1946, efforts were made to write such a pledge into law but they were defeated (Chapter 24).

LIBERTY IN RELATION TO PROPERTY

Legal Basis of Private Ownership. In no single section of the Constitution are the rights of persons and associations to acquire, hold, and use property comprehensively defined. The Constitution of the United States and the constitutions of the states are, however, founded on the principle that individuals and associations have the right lawfully to acquire, hold, and use property in lands, houses, factories, stores, consumable goods, money, and other things necessary to a going economy—subject to the power of government to tax, regulate, and control property in the public interest.

Justification of Rights in Property. Innumerable arguments have been advanced to support this system of private rights in property. Two of them are outstanding in the thought of our times. First, the system is best adapted to sustain the production of wealth at a high level and promote the economic welfare of the people. Second, if all the means of production and distribution were in the hands of government, the people would be in fact employees of the officials who wield political power and, being without other means of livelihood, would be economically unable to battle to preserve their liberties against the encroachments of government.[7]

Recognition of Property Rights. One of the primary duties of governments in their respective spheres—federal, state, and local—is to sustain rights of private property; and the rules of law applied in practice fill whole libraries of books, statutes, ordinances, administrative decrees, and judicial decisions. In all the states, local agencies take charge of recording the deeds showing the ownership of all pieces of private land in the local subdivision, and also mortgages on real property. Thus the question of ownership may be definitely settled in cases of controversy. While the ownership of personal property, for example, clothes, jewelry, furniture, and books, is not meticulously recorded in public documents, the owners of such property usually have papers or other evidences by

[7] C. A. Beard, *The Economic Basis of Politics*, especially pp. 112 ff.

which to support their rights against persons who make false claims to it. If private persons unlawfully enter the premises of a property owner and by force seize any of his possessions, it is the duty of appropriate government agents to arrest and punish the offenders and to restore possession to the owner. In other instances, an owner has the right to start civil actions in courts of law against any person who invades his property rights.

Basic Constitutional Restraints in Respect of Property. The National Constitution contains many provisions bearing on rights in private property but two of them are basic in nature. The Fifth Amendment declares that no person shall be "deprived of life, liberty, or property without due process of law"—by the Government of the United States. The Fourteenth Amendment commands that no state shall "deprive any person of life, liberty, or property, without due process of law."

Power of Government over Property. Despite the restraints imposed by the Constitution on government, the powers of Congress and the states over the ownership and use of property are undoubtedly great. Among them is the power to define the objects which may be held as property by private persons and associations of persons, to tax property, and to regulate the use of property. As James Madison said in Number 10 of *The Federalist*, the regulation of property interests "forms the principal task of modern legislation" and this axiom is abundantly illustrated in the chapters which follow. Furthermore, the National Government, the states, and local governments own and manage many varieties of property, amounting in value to billions of dollars.

Definition of Private Property. The general power to declare what objects shall be regarded as subject to private ownership is left to the states (Chapter 31), with one great exception, namely that property in human beings—slavery and involuntary servitude—shall not exist anywhere within the jurisdiction of the United States. Congress has no power to define property, except in the territories and districts not organized into states, and in respect of lands, forests, navigable rivers, and other objects in the direct ownership or control of the National Government.

Taking Property by Taxation. Among the powers enjoyed by agencies of governments—national and state—is of course the power of taxation, and by exercising it they take away property. In laying taxes, the National Government must follow certain rules prescribed by the Constitution,[8] and the states are bound to observe the requirements of

[8] *Below, Chapter 15. It is noted in Chapter 15 that the federal taxing power has been employed for purposes other than revenue—in some cases to destroy enterprises.*

the Fourteenth Amendment in respect of taking property without due process of law and denying to persons "the equal protection of the laws."

In practice, the restraints on the taxing power of the National Government and the states, as interpreted by the Supreme Court, are immensely complicated. But one principle is generally applied: without discriminations against individuals, the burden of taxation must fall equally on (1) all recipients of incomes equal in amount, (2) all property of a given class and amount; and (3) all transactions identical in nature. In short, individuals and classes cannot be singled out with no regard to the kinds and amounts of their property and by taxation deprived of everything they possess. The principle of taxation on the strict basis of ability to pay is by no means fully observed in practice but it is widely applied; and, in any case, wholly arbitrary and unreasonable classifications of persons and property for tax purposes are unconstitutional.

Government Regulation of Property Uses. Under established principles of constitutional law, governments—federal and state—may regulate the rates and services of private concerns known as public utilities: for instance, railways, bus lines, electric power plants, and radio networks. They may also regulate the use of almost every kind of property for the purpose of protecting and promoting public health, safety, and morals. They may intervene extensively in economic activities with a view to preventing or breaking up trusts and monopolies, which restrain competition in industry and commerce, or enter into agreements to enhance the prices of goods to consumers. Federal and state statute books are, indeed, crowded with laws regulating, controlling, and directing the management and use of private property, under the principle that the public interest is paramount over private rights.

Limitations on Government Regulation. Yet in regulating the use of private property, the National Government and the states are bound to observe the rule laid down in the Fifth Amendment and the Fourteenth Amendment: they cannot deprive any person of liberty or property without due process of law. The rate and service rules imposed on owners of public utilities by law cannot be of such a nature as to make it impossible for them to earn any return on their investment, that is, of such a nature as to confiscate their property (see Chapters 22 and 34). In respect of regulations in the interest of public health and safety, numerous restraints forbid government agencies to employ arbitrary methods and make arbitrary discriminations among individuals and classes of individuals.

Taking Property for Public Use. Governments—national and state —may take land and other types of property by a process known as condemnation. Particular pieces of property can be condemned for public purposes only; that is, for the use of government in carrying out public projects. This means, for example, that government cannot condemn the land of one person and give it to another person for his personal use or profit. Whenever a government takes private property for public purposes it must make just compensation to the owner. In determining what is just compensation, government authorities must consider the purposes for which the property in question is suitable and pay due regard to the existing business or needs of the community and such as may be reasonably expected in the immediate future. The proceedings in ascertaining the value of property condemned for public use may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as Congress or a state may determine. They must be conducted in a fair and just manner, affording to the owner of the property in question an opportunity to present evidence as to its value and to be heard. Owners dissatisfied with the payments offered may appeal to the courts for review and redress.

Summation. It is evident, therefore, that private rights in property and its use are strongly entrenched in the American system and are protected by the Constitution against all agents of government. While the amount of property in the hands of the National Government, the states, and local government is large, it is relatively small in value as compared with farms, industries, and other forms of property in private ownership. But the "rights of property" are not absolute. Nor is it true, as often said, that the rights of property are placed by law above the rights of persons. If at times there is a tendency on the part of government to exalt the rights of property, at other times the pendulum swings in the other direction. In any event, while the power of government over the ownership and use of property is immense, the exercise of it in practice is always subject to the rules of due process and to other constitutional provisions that forbid arbitrary discriminations against individuals and classes of persons similarly situated. A mastery of these provisions is not easily acquired but it is necessary to any informed discussion of liberty in relation to occupations and property.

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PART III

THE POPULAR BASIS OF GOVERNMENT

CHAPTER 5

People, Citizens, and Voters

Theory of Rule by the People. An essential principle of the American system is expressed in the proposition that ultimate power is vested in the people, that government must be conducted with the consent of the people, that the powers of government are exercised for the benefit of the people, and that the people may alter the form of government or may, in extreme cases, abolish it and create a new government more likely to assure their liberty and happiness. The proposition is laid down by the Declaration of Independence in one statement (p. 18). It is implied in the Preamble of the Constitution: "We the people of the United States . . . do ordain and establish this Constitution for the United States of America." [1] Abraham Lincoln, in the ever memorable Gettysburg Address delivered at the close of the Civil War, spoke of America as having government of the people, by the people, and for the people.

The Logic of the Theory. Although the formula of popular government, as stated in the Declaration of Independence and implied in other great documents, has been continuously recited and appealed to by statesmen, reformers, and agitators, no American theoretician has ever worked it out into a full, logical system. That feat was not accomplished even by Jean Jacques Rousseau, the French political philosopher of the eighteenth century, whose work, *The Social Contract*, has been widely circulated in the United States. Rousseau maintained that all men [2] are created equal, that they are endowed with equal powers in government, and that all just law is the expression of their will. Aware that there are differences of opinion in every society, he went on to say that the popular will is to be established, in ordinary circumstances, by

[1] C. A. Beard, *The Republic*, pp. 1 ff., on the nature of the Preamble.

[2] For a brief analysis of Rousseau's theory, see C. A. Beard, *The Economic Basis of Politics* (1915 ed.) pp. 16 ff. Rousseau, in speaking of politics, meant *men*, thus excluding women from political power. The Declaration of Independence states that "all men are created equal." The term "man" is often used in its generic sense, as including women, but commonly it is used especially by male writers as if it means only male human beings. No little confusion has thus arisen and respect for scientific precision in language calls for caution in the loose use of the term "man." See Mary R. Beard, *Woman as Force in History*, pp. 47 ff.

majority vote. Thus two of his primary principles are: the equality of all men and government by the majority. For example, if there are 10,000 men in a society, each man has one ten-thousandth part of the total power, and 5,001 men can, if they agree, express the whole will by vote.[3]

Widening the Suffrage. If the opinion of the people is to be canvassed in any such fashion, then it becomes necessary to determine which members of society are to be legally permitted to vote. Even Rousseau was highly selective in this regard, for he excluded women entirely from the franchise. From the beginning of the American Republic conservative citizens, frankly fearing that the masses of the people are turbulent and destructive in their tendencies, sought to forestall simple majority rule among adults by imposing property, tax, and other qualifications on the right to vote (pp. 82–83). Among them democracy was, and still is, suspect.

Nevertheless, since the establishment of the Constitution efforts to widen the popular base of government have been unremitting. By the middle of the nineteenth century, nearly all adult White males had won the right to vote; and after the Civil War an attempt was made to confer the suffrage on adult Negro males. While this contest was going on women began a campaign for "equal suffrage"—the same rights as men in respect of voting and holding office. By 1920 women had won the right to vote in many states; and in that year was adopted the Nineteenth Amendment to the Federal Constitution declaring that the right to vote shall not be denied or abridged in the United States on account of sex. Despite this extension of democracy, poll tax limitations on the suffrage exist in a few states, and various devices are employed in several states to exclude Negroes from voting or to reduce materially the number permitted to vote. On the whole, however, wide popular participation in government has been firmly established, and the struggle to enlarge it is evident in our own times.

CITIZENSHIP THE BASIS OF POPULAR GOVERNMENT

Exclusion of Aliens. The full enjoyment of the political rights necessary to sharing in the processes and powers of government is restricted to American citizens. Aliens temporarily or permanently resident in the United States have numerous rights relative to travel, commerce, property, speech, and press,[4] but everywhere the suffrage is now confined to citizens; and with exceptions so rare as to be negligible, only citizens

[3] For a discussion of this concept, see "Majority Rule" in the *Cyclopaedia of the Social Sciences*.

[4] See pp. 80–81 for the rights of aliens.

can hold positions of authority in any branch of American government. Citizenship is hence the very basis of participation in American government.

Citizenship Once a State Affair. In a general way, the word "citizenship" means membership in a nation and full allegiance to its government. When the federal system was formed in 1787 the term was loosely used. Before the Constitution was adopted each state had the right to decide who among its residents should be deemed citizens and also had the right to naturalize, that is, to make citizens of, aliens. By conferring upon Congress the power to establish "an uniform rule of naturalization," the Constitution deprived states of that privilege. Even so, its language with regard to citizenship was vague. It nowhere defined citizenship. It referred to "citizens of the United States," "citizens of the states" and "persons," without making clear distinctions between the terms. It declared that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," that only citizens of the United States were eligible for membership in Congress, and that only natural-born citizens were eligible for the office of President.

Under the original Constitution was there any such thing as American citizenship? For a long time that question was left unanswered by law. As late as 1833, John C. Calhoun declared in the Senate there were no citizens of the United States "at large," that "every citizen is a citizen of some state or territory," entitled "to all privileges and immunities of citizens in the several states," and "in no other sense are we citizens of the United States." This extreme view was contested at the time and its validity remained unsettled for more than thirty years.

Citizenship Made National in 1868. After the Civil War the controversy was closed by the adoption of the Fourteenth Amendment. The first section of that Article stipulates: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ." Then, as if in a gesture to old times it added: "and of the state wherein they reside," thus precluding the states from denying citizenship to American citizens residing within their borders. By this Amendment allegiance to the United States was made supreme and citizenship became national beyond all shadow of a doubt. Thereafter no state could declare to any American citizen so defined: "You are merely a person with no special rights to be respected." So the state is now without power to bestow or withhold citizenship, although it may confer many civil and political rights upon aliens residing within its own jurisdiction.

Citizenship by Birth. Citizenship in the United States may be ac-

quired by birth or by naturalization. Under the Fourteenth Amendment, all persons born in the United States and most of its possessions,[5] with a few exceptions such as the children of foreign diplomatic and consular officers, are automatically citizens of the United States. This is called citizenship by reason of birth on American soil. Under certain circumstances children born outside of the jurisdiction of the United States of parents one or both of whom are American citizens are also deemed to be citizens of the United States.[6]

Formerly, an American woman who married an alien lost her citizenship in the United States. By acts passed in 1922, 1930, and 1934, Congress altered this harsh rule. The law now provides that an alien who marries a citizen of the United States shall not become a citizen by reason of such marriage but may become a citizen by compliance with the naturalization laws on special terms. Marriage to an alien, or subsequent residence with him abroad for a long time, does not automatically deprive an American woman of her citizenship. She retains her citizenship but may voluntarily surrender it by formally renouncing it.

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

The naturalization of individuals is subject in all its details to the laws of Congress. It is effected by judicial process in specified federal, state, and territorial courts. Only White persons and persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere and adjacent islands, Filipinos, Chinese, and persons indigenous to India may acquire American citizenship by naturalization. Foreign-born Japanese and certain other Asiatics are ineligible.

Method of Naturalization. Ordinarily an eligible alien, if at least eighteen years old, may begin his quest for citizenship by filing in the proper court a declaration of his intention to become an American citizen. At the end of a given period (after not less than five years' residence in the country), the applicant presents to a naturalization court a peti-

[5] In a few small islands in the Pacific Ocean, natives under American jurisdiction are "nationals" of the United States, not citizens or aliens. They owe allegiance to the United States but do not possess the full rights of citizenship.

[6] For details regarding such circumstances, see *United States Code*, Title 8, Sec. 601 ff.

tion signed by his own hand, stating that he is not opposed to organized government, is attached to the principles of the Constitution, and is well disposed to the good order and happiness of the United States; he also declares under oath his intention of renouncing his allegiance to his former country. His petition must be supported by the testimony of American citizens as to his residence and moral character.

After thirty days have elapsed from the date of filing the petition, the case may be heard by the court before which it is laid. On this occasion the applicant announces his adherence to the declarations of the application and is then examined. The investigation may be a formality or very searching, according to the standards of the judge who conducts it. At all events the judge is required to satisfy himself, either on his own motion or on information received from an examiner, that the provisions of the law have been complied with, that the applicant has behaved as a person of good moral character, can speak English, is attached to the principles of the Constitution, will defend it, and is well disposed to the good order and happiness of the United States. If the court is convinced, the certificate of naturalization is issued.

Grounds for Denial of Citizenship. Evidently a large power of discrimination is conferred upon the judges and may be employed to exclude from citizenship applicants who believe in political doctrines that appear objectionable to the court. In 1929, for example, Rosika Schwimmer, an alien woman forty-nine years of age, was denied citizenship by the Supreme Court on the ground that she, as a pacifist, refused to declare herself willing to take up arms personally in the defense of the United States. Subsequently this ruling was applied to other "conscientious objectors" to war who applied for citizenship. But in 1946, the Supreme Court reversed the ruling and held that an alien applicant could be admitted to citizenship even though unwilling, for religious reasons, to bear arms, if otherwise qualified for citizenship.[7]

Grounds for the De-naturalization of Naturalized Citizens. The mere fact that an alien has been declared to be an American citizen by regular processes of naturalization does not in itself guarantee citizenship to him forever. A naturalized citizen may lose his certificate of citizenship "on the ground of fraud or the ground that such certificate . . . was illegally procured." Luella Gettys gives a list of the concrete conditions on which citizenship has been cancelled.[8] They include proof after naturalization that the person at the time of naturalization was not actually of good moral character, or was not truly attached to the principles of the Constitution, or took a false oath of faith and

[7] Girouard v. United States, 328 U.S. 61

[8] *The Law of Citizenship in the United States*, pp. 97 ff.

allegiance to the United States, or was not qualified as to race, or was an enemy alien.

Under these principles many difficult cases have arisen in the courts. For example, may the citizenship of a person be revoked twelve years after naturalization on the ground that, at the time of naturalization, he did not disclose his membership in the Communist party or his various communistic activities and that he thus did not have the requisite qualifications for loyal citizenship? This question the Supreme Court answered in the negative, by a divided vote, on June 21, 1943, in the case of William Schneiderman *v.* The United States. Such matters are highly technical and they involve important questions of morals and of political or social opinions.

Rights of Aliens in the United States. In connection with issues of citizenship, consideration should be given to the position of aliens within the area of the continental United States. In law their rights are determined partly by the Constitution, acts of Congress, and treaties with foreign countries and partly by state legislation. At several points the Constitution specifically mentions persons rather than citizens. The Fifth Amendment refers to specific rights of persons. Again, the Fourteenth Amendment declares that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person the equal protection of the laws.

Such provisions are supplemented by treaties with various countries guaranteeing a reciprocity of rights in specified cases; but the enforcement of these treaty agreements is generally left to the states, with appeal, of course, to the federal courts for final determination respecting the validity of any particular local law or action. Undoubtedly Congress has the power to provide federal processes for enforcing treaty provisions which guarantee rights to aliens resident in the country; more than one President has recommended this step; but the opposition has always been too strong. Thus while treaty rights stand squarely on the books, states may encroach upon them, subject to judicial review in the courts of the United States. Furthermore, Congress itself may discriminate against aliens in certain cases; it has, for example, denied to foreign-born Japanese and persons belonging to certain other non-Caucasian races the right to become naturalized citizens, even though they have lawfully entered the United States.

By judicial rulings, particularly federal, the rights and disabilities of aliens have been authoritatively defined in various relations. It is unlawful under the Fourteenth Amendment for states to deny aliens the equal right to engage in certain callings, such as the laundry business, on the same terms as citizens; it is unlawful to tax employers specifically

for hiring alien laborers or to compel employers having more than a fixed number of employees to hire a certain proportion of American citizens. On the other hand, state legislation forbidding aliens not eligible to naturalization to buy or lease land for agricultural purposes has been sustained. Aliens may be denied the right to hunt and fish in public places, to enjoy the benefits of workmen's compensation legislation, to practice law, or to be employed on public works. In time of war, the rights of alien enemies may be curtailed to the point of disappearance. Moreover, the power of Congress to provide for the expulsion of aliens on various grounds is broad, if not unlimited. Hence, while a majority of alien residents enjoy nearly all the nonpolitical rights of citizens, many of them labor under disabilities.

Deportation of Aliens. The right of aliens residing in the United States to carry on radical agitations became an acute issue after the communists rose to power in Russia in 1917. For a long time, it had been a practice of the Government to deport aliens who had entered the country in violation of the immigration laws. But in 1917–18, amid the excitement of the times, hundreds of aliens were charged with holding or propagating communist, subversive, or dangerous opinions, and were rounded up by the police to be deported, with little regard for their legal rights. After the war closed more respect was paid to due processes of law in deportation proceedings but controversies over such actions continued.

By the Alien Registration Act of 1940, Congress made drastic provisions for expelling aliens. Now they may be deported if found guilty of advocating or having advocated at any time previously—"no matter how short the duration or how far in the past—revolutionary doctrines or having been a member of any organization engaged in advocating such doctrines of violence." Under an act passed in 1948, the federal Attorney General may postpone deportations, subject to congressional review if the delay exceeds six months. Thus Congress is in the novel position of being able to intervene in specific deportation cases, almost as if it were a court.

THE SUFFRAGE

The possession of American citizenship is not of itself a guarantee of the right to vote and hold office in the United States—to participate actively in all the processes of government through which the popular will is realized. Not only is the whole body of the people narrowed for political purposes by the exclusion of resident aliens from political privileges, but it is further reduced by the imposition of restrictions on the right of citizens to vote and hold office.

Suffrage Qualifications Originally Left to the States. In respect of the right to vote, the flexibility of the American system is strikingly illustrated. The original Constitution contained no provision establishing qualifications on the suffrage for either national or state elections. It stipulated that the voters in each state for members of the House of Representatives should have the qualifications requisite for persons entitled to vote for members of the most numerous branch of the state legislature. Thus each state was left to its own devices. It could place any restrictions—tax paying, property, or other limitations—on the right to vote for that branch of its state legislature and hence automatically determine who in the state should be empowered to vote for its Representatives in Congress. The Constitution also provided that the two United States Senators from each state must be elected by the legislature thereof; and it permitted each state legislature to decide how and by whom its quota of presidential electors should be chosen. In none of these provisions, it is evident, were qualifications for voters defined or fixed.

Present Constitutional Limitations on the Suffrage. Since the Civil War four amendments of the Constitution bearing on the suffrage have been adopted. The Fourteenth Amendment (1868) declares that when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such 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 states. This provision was designed to force each state to establish adult manhood suffrage by indirection—under the penalty of having the number of its Representatives in Congress proportionately reduced. But Congress has never enacted a law designed to enforce this provision. For practical purposes it is apparently a dead letter.

The Fifteenth Amendment (1870) is negative in nature. It does not prescribe any qualifications for the suffrage but places restraints on the states' power to establish them. It reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude"; and it empowers Congress to enforce its terms by appropriate legislation.

When in 1913 the Seventeenth Amendment substituted popular election of United States Senators for election by the state legislatures, no qualifications were placed on the right to vote in such popular elections. The suffrage provision of the Amendment reads: "The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures." In other words, it prescribes the same qualifications as those required of voters who take part in electing members of the House of Representatives.

The Nineteenth Amendment (1920) which makes woman suffrage national, likewise prescribes no qualifications. It simply declares: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of sex."

No Uniform Suffrage for the United States. Accordingly, as long as the states formally comply with the restraints imposed in the Constitution relative to race, color, previous condition of servitude, and sex, they may establish any qualifications they prefer for voting within their respective boundaries. In practice these state qualifications vary widely, covering such diverse matters as age, citizenship, residence, literacy, and voting by Negroes (Chapter 27). Since the same passages of the Constitution also limit the powers of the United States Government, Congress is also bound by them in fixing the suffrage qualifications in the organized territories and presumably in other possessions where it makes provisions for popular elections.

Despite the limited nature of the constitutional provisions bearing directly on the suffrage, it is sometimes claimed that Congress has the power to determine the suffrage qualifications in the states, particularly for voting in national elections. Section 4 of Article I states: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." During World War II, in 1942, Congress by law provided facilities for allowing members of the armed forces to vote; and it ruled out the poll tax as a qualification on voting, in federal elections, by members otherwise qualified under the laws of their respective states. Attempts have been made in Congress since that time to effect a general abolition of the poll tax qualification in the states where it exists, but such attempts have failed and the proposal is at best of doubtful constitutionality. How far Congress, under its power to regulate federal elections, can go in the direction of determining suffrage qualifications for such elections is still a debatable point of constitutional law.

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CHAPTER 6

Popular Rule Through Elections

Theory. In American political theory the doctrine of popular rule has two corollaries. The will of the people is normally expressed through the election of governmental agents—legislative, executive, and judicial—by the people.[1] In the choice of these agents the will of the majority prevails (Chapter 5). Thus, the theory runs, public authorities are made responsible and responsive to the majority at least, if not the whole people. Sometimes it is added that the victors in the elections derive their powers from the people and are also mere agents commissioned to carry out the policies explicit or implicit in the election results. To put the case in the language of some old writers, governmental agents act as if they were the people themselves convened in a general assembly.

During the upsurge of Jacksonian democracy in the middle of the nineteenth century efforts were made to apply the theory more extensively by increasing the number of high state and local officers to be chosen by popular vote. A tradition was then developed to the effect that the popular election of more executives and judges would strengthen popular control over governmental policies and actions.

The democratic theory of popular control through elections then formulated was simple. For each elective position in government a number of candidates will present themselves to the people. Each of the candidates announces that he will do certain things and refrain from doing others if elected and each has certain standards of honesty and efficiency. At the election the voters select the candidate who most accurately reflects the prevailing public sentiment and seems most likely to realize the dominant public desires. If he does not carry out the policy he is expected to realize or fails to come up to the standards set by his constituents, he is turned out at the expiration of his term (which ought to be short in order to give the people a chance to express their judgments with great frequency) and someone who more nearly represents the

[1] Exceptions are found in states that have the initiative and referendum (Chapter 27) and in town meetings (Chapter 38).

people is chosen in his stead. Thus in the long run representative democracy triumphs and popular control is constantly maintained.

On the assumption that popular election meant popular selection, choice, and control, the number of elective offices was steadily increased in the states. It is estimated that there are now about 800,000 public officials in the United States who are elected by popular vote.[2] One may find on the same ballot on election day the names of two or three hundred candidates for twenty or thirty federal, state, county, district, and municipal positions. Voters are not only invited to choose congressmen, governors, legislators, mayors, and councilmen; they may be asked to decide who among many is best qualified to be bailiff, clerk of a court, statistician, or engineer of a town, county, or city.

LIMITATIONS ON MAJORITY RULE

Election of Agents by Pluralities. How general is majority rule in actual practice? In the first place, only duly qualified persons may participate in the choice of governmental agents—local, state and national. Inasmuch as many persons who are legally entitled to vote fail to do so, relatively few governmental agents are elected by a majority of the potential voting population. Nor does any law require such a majority at any American election. Is a majority of all the voters who actually vote necessary to victory in an election? Not as a rule, although there are occasional exceptions, particularly in the primary elections of some Southern states. In most cases, a mere plurality is sufficient. The candidate who receives the largest number of votes is declared to be the victor; hence if there are several candidates on the same ticket the vote cast for the victor may be as low as a third of the total vote cast, or even lower.

Effects of Inequalities Among Voting Districts. Also standing in the way of straight majority rule is the practice of electing many public agents by districts, and giving them equal voices in government even though the number of potential voters in their respective constituencies varies widely. For example, every state is entitled to two Senators in the Congress of the United States. The net result is that the inhabitants of the most sparsely populated state are represented by Senators who have the same voting power as the Senators from the most populous state (Chapter 8). Similar conditions prevail in many state legislatures, due to inequalities among local election districts (Chapter 29).

Constitutional Restraints on Majority Rule. However they may be elected, public officers do not derive their authority solely from the

[2] E. E. Schattschneider, *The Struggle for Party Government* (University of Maryland, 1948).

people who voted them into office. Such agents are under the constitutional and statutory obligations pertaining to their respective offices and may lawfully yield only to the demands of their constituents which are compatible with these higher obligations. Otherwise, the rights of the rest of the people, whether a majority or a minority, would be at the mercy of the party or faction that carries an election. For example, if the victors at an election should be resolved to suppress freedom of speech or press, they cannot lawfully effect their resolve, for that freedom is guaranteed by the National Constitution against all agents of government—federal, state, and local. There is, indeed, only one legal way to accomplish that despotic design: that is by an amendment of the National Constitution in the manner prescribed by that instrument, which in any event requires the sanction of extraordinary majorities duly constituted (Chapter 2). If unrestrained government by the majority is the first and necessary principle of democracy, then the United States is not a democracy; and no person who believes in civil liberty and minority rights can favor democracy so defined.

Elected Agents Are Not Mere Puppets of the Majority. It is sometimes asserted in America that every agent of government elected by the majority must at least conform to the will of that majority, except in so far as constitutional restrictions take precedence. A distinguished member of the constitutional convention of 1787, James Wilson, asserted in a public lecture on government: "Representation is the chain of communication between the people and those to whom they have committed the exercise of the powers of government." Another member of the convention defined representation as "an expedient by which the assembly of certain individuals chosen by the people is substituted in place of the 'inconvenient meeting of the people themselves.'"

In American practice, however, the elected agent in government is no mere deputy or marionette who responds automatically to demands of his constituents. In the nature of things he cannot be just that. The agent is, to be sure, morally responsible for the fulfillment of campaign pledges made in bidding for votes but as a rule there is no way of enforcing that responsibility to the people except by repudiation at the next election. The elected agent in office may confront many issues of state or national importance, in addition to those discussed in election campaigns, and in such cases frequently uses his own independent judgment, whatever may be the favorable or unfavorable opinion among particular constituencies. Every agent of government is also bound by oath of office to obey the Constitution and laws of the United States or of his state or both, as the case may be, and to oppose the demands of constituents for actions not authorized by supreme law.

The American system provides no way by which "the will of the people" may be determined continuously with reference to specific questions of policy and action arising from day to day. Nor has political imagination yet discovered or invented any device to effect such a purpose. The legislature of the state may by resolution express to the Representatives and Senators of the state in Congress its demand or desire respecting some measure or measures but under the Constitution they are free to accept or reject such advice or proposal. In a number of states provisions are made whereby citizens may "recall" or attempt to oust agents of state or local government who are alleged to be out of harmony with public sentiment but little use has been made of this device.

THE ESSENTIAL PRINCIPLES OF POPULAR ELECTION

Free Election Is Fundamental. Since the representative system requires the election of certain agents of government at all levels—national, state, and local, the establishment and conduct of free elections are fundamental to the operation of the American system. It is by the processes of election that the will of the voters is expressed in the designation of persons to occupy those positions of power in government which according to law are to be filled by direct popular action. If the processes of election are not carefully safeguarded and a high degree of liberty guaranteed to the people who take part in them, against government agents and mobs, an election may become a futile formality. Hitler's Germany had elections at which the voters had the "privilege" of approving the government ticket of candidates; and Soviet Russia has elections which are open only to candidates of one official party.

Character. Narrowly viewed an election seems mechanical in nature: polls are opened by government officials at proper places; voters appear at the polling places and by marking ballots or pulling the levers of election machines indicate their choices among persons offering themselves as candidates for particular offices; and after the balloting is over the votes are counted and the victors are formally announced. But these operations are only phases of the election processes. They are the outward signs of the American system at work. They represent an exercise of political rights in the momentary determination of the specific persons who are to wield the lawful powers of government in the community, the state, or the nation.

Election processes involve far more than what is visible at the polls on an election day. They include the activities of persons who aspire to be candidates for offices, higgling among aspirants for advantages in the race, the selection of aspirants for places as candidates on the ballot at elections, and other preliminaries to the opening of the polls for the

final decision of the voters in the trial at politics (Chapter 7). In these preliminary operations many rights called civil (Chapter 3) are involved; for example, freedom of speech and press and protection against coercion by government agents, gangsters, and mobs. Without liberty of candidacy for office, liberty in the discussion of personalities and issues, and freedom of choice among persons offering themselves for places of power in government, elections are illusory and voters are little better than robots.

Power to Regulate and Protect Elections. The times, places, and manner of holding elections for the choice of persons to fill public positions are established and regulated by constitutions and laws which are above parties and factions. Here again we find no single law applying uniformly through the United States. As befits the adaptability and variety of the American system, many constitutional provisions and laws govern the processes of elections. The National Government has large powers over them; and in so far as they are not restrained by the Constitution and acts of Congress, the states have power to regulate their state and local elections and even elections at which Representatives, Senators, and presidential electors are chosen (Chapter 28).

National Control over Elections. Congress has the power to regulate the times and manner of holding elections for Senators and Representatives in Congress. In this respect laws enacted by Congress are supreme over state regulations applicable to such elections. From time to time Congress has passed laws bearing on the apportionment and election of Representatives and other laws relative to the use of money in federal elections (Chapter 7). As to the election of President, the method is left to the determination of the state legislatures. But Congress may by law provide for inquiring into the legality of elections of presidential electors; for example, the Act of January 29, 1877, which provided for counting and determining the validity of electoral votes cast for President and Vice President in the disputed presidential election of 1876; and the Act of February 3, 1887, still in force as amended, for the counting of electoral votes by the two houses of Congress. Although at the present time federal legislation with regard to national elections does not go into great detail, there is no doubt that the Congress has ample authority to inquire into and safeguard the regularity of such elections as occasions may arise.[3]

With regard to elections in the states, Congress has acted under the provisions of the Fourteenth and Fifteenth Amendments. It has provided by law as follows: "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any

[3] *The Federalist* Nos. 59–61

state, territory, district, county, city, parish, township, school district, *municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage,* or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding." This provision, even if enforced in fact, would not cover all the processes of elections; and for the protection of their other rights in state and local elections, citizens must look to the laws and agencies of their respective states. Since, however, the Constitution guarantees to every state a republican form of government, it is probable that the National Government would intervene if purely state and local elections were regulated or conducted in such a way as to result in a dictatorship or other grave transgression of "republican" principles.

Indeed, federal intervention in state and local elections, in cases less grave, is already authorized by law. The Criminal Code of the United States makes it a crime for two or more persons to conspire "to injure, oppress, threaten, or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The code also imposes penalties on any person who "under color of any law, statute, ordinance, regulation or custom, wilfully subjects . . . any inhabitant of any state, territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States."

These and other provisions of law were applied by the Supreme Court of the United States to a commissioner of elections in New Orleans indicted in a federal district court for altering and falsely counting ballots cast in a congressional primary election in that city.[4] By logical extension, this decision would authorize federal intervention in purely state and local elections if officials and other persons, at such elections, deprived any voter of any right or privilege guaranteed by the Constitution and laws of the United States.[5]

Attitude of the National Judiciary toward Intervention in Election Processes. By legislation the several states have provided that citizens and officials may appeal to proper state and local courts for orders assuring the lawful conduct of state and local elections, the lawful counting of the ballots cast, and the correct reporting of election results. State and local laws also assure to citizens police protection against election

[4] R. E. Cushman, *American Political Science Review*, April 1942, pp. 269 ff.

[5] The body of federal law relative to elections is large and complicated, and how far national authorities may go in intervening in elections at which the choice of no federal officer is involved is a disputed matter. For a summary treatment of the subject see the *Congressional Record*, July 25, 1947, pp. 10245 ff.

agents and gangsters while exercising their rights to the suffrage. The election law of each state is crowded with provisions of this nature.

When called upon to deal with cases involving election processes, the Supreme Court of the United States is usually reluctant to interfere. It has generally avoided what it calls "political" questions, as by holding that the determination of whether a state has a republican form of government is a political matter, to be settled by actions of Congress. In one case the court rejected a plea for intervention, on the ground that it cannot take over and manage elections in the interest of maintaining the rights to the suffrage, and that in general wrongs done in any state are to be corrected by political authorities, state or federal.

An example of the Court's attitude toward intervention in election processes is furnished by its decision in the case of Kenneth Colegrove and Others v. Green, June 10, 1946. In this case the appellants claimed that their rights had been violated by the refusal of the Illinois legislature to redraw the boundaries of the state's congressional districts since the year 1901, with the result that one congressional district had 914,000 inhabitants and another 112,000 inhabitants.[6] This disparity made a citizen's vote in the more populous district count for about one-ninth as much as another citizen's vote in the less populous district, thus in effect depriving the former of equal rights in the exercise of the suffrage. The majority of the justices rejected the plea, mainly on the ground that the case was political in nature and that judicial intervention would entangle the Court in political disputes.

Justice Hugo Black, however, dissented. With cogency he argued that the equal protection clause of the Fourteenth Amendment would certainly prohibit a law which gave certain citizens half a vote each and other citizens a full vote, and that the Illinois law in substance grossly violated the principle of equal suffrage. Justice Black also reminded his colleagues that the Court had in recent decisions interfered in matters of "political" rights by deciding that states could not deprive negroes of the right to vote in party primaries. In short, he charged the Court with inconsistency in respect of its decisions involving the right to vote and to have the vote counted in elections.

State Regulation and Protection of Elections. Although Congress has large powers over elections, by far the major portion of the laws on the subject in each state come from its legislature (Chapter 28). Federal legislation of this type, apart from certain provisions relative to the time and manner of the election of Representatives, Senators, and the President, pertains mainly to the use of money by political parties and

[6] Subsequently the Illinois legislature corrected some of the disparities that had come about under the law of 1901.

candidates for office in campaigns for nomination and election (Chapter 7). It is the usual practice of the state government to combine its election laws in a single pamphlet or booklet and issue copies to election officials and citizens for the purpose of giving them exact information with regard to their legal rights and duties in conducting elections and voting. In states that have gone far in the detailed regulation of elections, the book of election laws is a volume of one or two hundred pages, sometimes even more.

Principles of Election Legislation. In the course of recent years many definite principles of election legislation have been worked out and are now almost universally applied in the states. Among these principles the following are particularly designed to assure citizens the right to express their preferences freely in the choice of public agents to represent them in government. The times and places of elections are fixed by law and are made known well in advance of the election days. The methods by which the names of aspirants for nomination to office and the candidates of political parties for office may be placed on the official ballots or voting machines are defined by law. Elections are held in small districts and polling places are so distributed as to be within the easy reach of voters. Order is maintained at each polling place by the police or other law-enforcement officers. Voters are guaranteed the privilege of marking their ballots or operating the voting machine secretly in booths. The duty of supervising the balloting, counting the ballots, and reporting the official returns is vested in a bipartisan board of officials. To ensure fair play, each of the political parties concerned in the election may assign watchers to observe operations at the polling places. Bribing of voters and intimidation at the polls are forbidden under penalties of fine or imprisonment. The amount of money which may be expended by candidates and political parties in promoting their interests during campaigns is subject to certain limitations.

Summation. As constituted the American system is designed to assure to "the main body of the people" in all constituencies, local, state, and national, a full and free expression of will on matters of governmental policy and action, as far as this can be done through the election of legislators and executives. It is the duty of each agent, under the constitutional and other legal limitations applicable to his position, to make the judgment of the community prevail in the enactment and enforcement of laws. Since all legislators are elected to serve in general bodies—local, state, or national—they are under obligation to serve the whole community for which their respective legislatures act and to be governed in their decisions by reference to the general interest, rather than the special demands of their several constituents. Executives—the President,

governors of states, and local administrative authorities, likewise serving whole communities—are under similar obligations. This is not to say that the American system expresses "the logic of democracy" or attains perfection in any respect. Even justice is "rough hewn" at best. Yet the system, while certainly open to criticism and improvement, provides instruments for making popular government effective.

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CHAPTER 7

Popular Parties As Agencies of Popular Will

A political party is an organization of citizens formed and maintained for the purpose of gaining possession of the government and expressing their will in legislation and administration. It is by banding together in a party that voters commonly agree on a program of political action, and by electing candidates to offices in government, put their program in effect. Citizens who remain entirely outside of party organizations, it is true, often have a decisive influence on party programs and operations by compelling party leaders to bid for their votes at elections. When they hold the balance of power in a closely contested party battle, independents may indeed determine the outcome of the election. But the great majority of citizens make their ideas and interests count in the processes of government by working in and through political parties.

ROLE OF PARTIES UNDER THE AMERICAN SYSTEM

The Party as a Unifying Force. If its numerical strength is sufficient, a party may gain control over two or more branches of government and unite them in a drive to achieve some common purpose. Usually a party has a program that calls for action in the national and state spheres and hence will try to capture both of them. As a matter of tactics, any party which formulates a general program covering important questions of the day relative to railways, utilities, labor, conservation, trust regulation, taxation, and social security, for instance, must include among its designs both federal and state projects; and in order to realize them it must be strong enough to control state legislatures and Congress.

Parties are also employed in moderating the rigors of the legal separation of legislative and executive powers. If popular government is to function effectively a certain degree of cooperation between the legislature and the executive is necessary; and in general this cooperation may be the more readily accomplished if both departments are controlled by members of the same political party. In fact a party in possession of both branches may bring about, at least during its tenure of power, such a consolidation of forces as to block the working of the check and balance system. This is particularly true when the party succeeds in securing the

appointment of enough of its members to serve as judges in the courts which have the power to uphold the laws that are enacted by the legislature.

Partisan Divisions Protect Liberty. In achieving unity parties may endanger liberty. If any single party were to gain undisputed supremacy throughout the land, it might be tempted to crush its opponents and suppress freedom of speech, press, and opinion generally, thus achieving "national solidarity" by compulsion. This is precisely what happened in Russia. There the single official Communist party is supreme. Individual or collective opposition to its creed is banned and those who engage in it openly are "liquidated" by the secret police. Thus government by violence and by rote, rather than by free debate and uncoerced action of the people, is the order of the day.

On the other hand, the existence of two or more major parties, free to criticize and plead, assures the maintenance of a vast forum where public discussion, not the secret police, becomes decisive. Seldom has any American party been strong enough to trample down minorities with impunity, making no concessions to any of them. Even when a party is entrenched in power at a given moment, it must show a certain degree of tolerance for the opposition if it is to prevent dissidents within its own ranks and opponents outside from whittling away its supremacy at elections.

Factionalism. On the other hand, the division of citizens into parties may be carried too far. In some countries the number of factions or petty parties is so large that the government is always in the hands of an unstable coalition of party leaders representing two or more contending groups, temporarily united by opposition to other groups. Upheavals within the coalition are common and produce frequent changes in the personnel and policies of government, which foster weakness and indecision, disruptive to the national economy and sorely trying to the people. Hence the continuous wrangling of numerous parties may easily prepare the way for "the strong man" who promises order, stability, and prosperity to the people if they will rally around him. In short, belligerent factionalism may easily end in a dictatorship.

The Workable Balance. To steer a middle course between the perils of the single-party dictatorship on the one hand and paralyzing factionalism on the other is a major problem in political science. So far in their history, the American people have managed to avoid these extremes and pursue a moderated course. Whether this is due to their political "genius" or to their good fortune or to the constitutional system they inherited furnishes an interesting subject of speculation for political philosophers.

ORIGINS OF PARTY DIVISIONS

Conflicts of Economic Interests. A primary source of party divisions and strife is the conflict of economic interests. American constitutions and laws give protection to private property; that is, people have the right lawfully to acquire property in lands, houses, factories, stores, savings, and other forms, and to use such property in producing wealth and gaining a livelihood. As a result the overwhelming majority of the people have property of some kind, if only in insurance and savings accounts, and are either self-employed or employed by others in private undertakings. Accordingly, as James Madison succinctly explained in Number 10 of *The Federalist*, there ensues a division of the people into groups and classes possessing different kinds and amounts of property—landed, mercantile, industrial, creditor, debtor, labor, and other interests, for instance.

The number of these interests, minutely analyzed, runs into the hundreds but they may be classified into four broad divisions, each with many subdivisions: (1) manufacturing, divided into industrialists who produce mainly for the home market and call for protective tariffs, and industrialists who are heavy exporters of goods and need no such protection; (2) financial—domestic bankers and export-import bankers; (3) labor, including craft unions generally affiliated with the American Federation of Labor, industrial unions composed of all workers in and around plants—now largely affiliated with the Congress of Industrial Organizations, and unorganized workers of various grades and classes; and (4) agricultural, embracing several interests, such as dairying, which produce principally for the domestic market, and others that are large exporters—wheat, cotton, and corn producers, for example.

And as Madison also pointed out, with each of these interests are associated sentiments and ideas as to what government should do or refrain from doing. Since the regulation of varying and conflicting interests is involved in the ordinary operations of government—taxation, for example—these sentiments and ideas divide the people into parties and factions, each bent on forcing government to comply with its demands. Politics is not all economics but if economics is left out of account, politics becomes illusive. At all events, as Arthur Holcombe states the case: "National parties cannot be maintained by transitory impulses or temporary needs. They must be founded upon permanent sectional interests, above all upon those of an economic character. The economic basis of national politics has never been overlooked by successful American statesmen." [1]

[1] *Political Parties Today*, p. 41.

That both statesmen and the interests affected recognize this fact is made evident in Louise Overacker's studies of contributions to campaign funds. For example, on examining individual contributions of over $1,000 to the national treasury of each party and to one large group affiliated with each party, she found that in 1944 more than forty per cent of such Republican assistance came from bankers and manufacturers. Great industrialists and food processors were conspicuous among contributors to the Republican party chest. Conversely, little more than thirteen per cent of the corresponding funds for the Democrats came from banking and manufacturing sources. Offsetting this weakness on the Democratic side were extensive contributions by contractors and builders—many of whom profited extensively from war jobs, by beverage interests indebted to the Democrats for the repeal of prohibition years before, and by movie, amusement, and similar interests. Dr. Overacker's investigation also showed that organized labor, through the Political Action Committee and other committees, lent strong financial support to the Democratic cause.[2]

Nationalities and Races in Politics. Americans are not only divided into economic camps, they are also split into many different national and racial groups. According to the 1940 census there were, in round numbers, 11,500,000 foreign-born Whites in the United States. Of this total 1,200,000 were from Germany; 1,600,000 from Italy; 1,000,000 from Russia; and about 2,000,000 from England, Scotland, and other parts of the British Empire. The total number of persons in this country who are either foreign-born themselves or the offspring of foreign-born or mixed parents is in the neighborhood of 40,000,000 or more than one fourth of the total population. How many of this large group are citizens entitled to vote cannot be determined with exactness but the number has been estimated at approximately 8,000,000. In addition, the census of 1940 records the presence of over 13,000,000 Negroes and other persons in the United States, not of the White race. Since a few thousand votes may determine the outcome of a state, congressional, or presidential election, practical politicians must take nationalities and races into account in developing campaign plans.

Religious Sentiments in Politics. On no principle were the framers of the Constitution more firmly agreed than on the need for the exclusion of theological and sectarian passions from the conduct of government; and later changes made in state constitutions were in accord with this conviction. At a time when religious qualifications for office holding were common, the framers rejected all such qualifications in connection with the Federal Government. They provided that the

[2] *American Political Science Review*, October, 1945, pp. 899 ff.

President on taking the pledge of office could "affirm" or "swear" according to his own desires; and the First Amendment added in 1791 forbids Congress to make any law respecting the establishment of religion or the free exercise thereof.

The wisest of leaders in all denominations have deplored the introduction of religious disputes into political discussions and campaigns. But it is none the less true that some representatives of nearly all churches do actively participate in politics for the purpose of gaining ends called "religious," that appeals are made to coreligionists by or on behalf of candidates for public office, openly or covertly, and that religious hatreds are invoked to elect or defeat candidates. Only strenuous efforts on the part of leaders in all denominations can prevent the development of clerical factions in the United States and subdue sectarian controversies to the principle of religious toleration.

The "Ins" and the "Outs." Intimately associated with the clash of economic, racial, and religious groups is another struggle—that between those in power at the moment and the opposition. Whatever the party temporarily in the saddle does, it cannot fail to antagonize one or more groups. If the voices of criticism grow numerous and loud, then leaders may take advantage of the discontent, call on the people to "turn the rascals out," and seek to capture public offices for themselves. In such circumstances, issues may be lost to sight and political contests turned into battles between energetic and ambitious persons who love power for its own sake as well as the ends that may be gained by its possession.

The Quest for Government "Jobs." By giving permanent tenure to many public employees, civil service reform has materially reduced the proportion of offices filled by party workers but there still remains an enormous number of positions to be divided among the victors at elections. The political appointments subject to the President's orders have an annual value of millions of dollars. The multiplication of the functions of state administration has enlarged the appointing power of the governor and the state senate. Every legislature has at its disposal many offices and positions adapted to partisan purposes, usually free from civil service control; for example, there are sergeants-at-arms, door keepers, clerks, librarians, secretaries, caretakers, janitors, stenographers, and messengers to the various committees and assistants first and second, too numerous to specify. There are also many city offices, high and low, steadily increasing in number which, in spite of the civil service restrictions, are within the gift of the political party that wins at the polls. Not to be overlooked is a veritable army of inspectors, ballot clerks, and poll clerks for the primary and regular elections, who receive annually thousands of dollars from public treasuries. The desire of the

"outs" to expel the holders of these many posts and win the offices for themselves is a fertile source of political activity and party strength.

Zeal for Association. Turning to the realm of social psychology, we are on less secure ground, but here too are factors which contribute to the strength of political units. From the days of Alexis de Tocqueville to our own time, foreign observers have noted that the American people are given to the formation of associations of every kind. There are in the United States literally thousands of lodges, orders, and fraternal societies; political, social, benevolent, religious, and reform organizations seem to be numberless. It is a rare American who is not a member of two or more.

The sources of this zeal for association are obscure but it is attributed in part to the ferment of opinions in a democracy. Any person who gets a new idea or a variant on an old one may want to start a society to spread it. The phenomenon has also been ascribed to the weakness of the individual and the power of the mass where theories of equality prevail. Since levelling doctrines are professed and no aristocracy is legally recognized, the individual who declines to associate on equal terms with other members of the community is an object of curiosity if not suspicion. If he must live by a trade or profession, he cannot hope to succeed as long as he refuses to join lodges and organizations.

The Party as a Social Ladder. Like a church or any other society, the political party may be used as a fellowship through which valuable acquaintances may be made and business, clients, or patients secured. This social power of the party organization draws into its ranks the energies and talents of young people who, though by no means devoid of idealism, cannot be blind to the struggle for existence. In some cities it is well for the young lawyer practicing in certain courts to be known as a prominent worker in the party to which the presiding judges belong. A Democratic doctor in a strongly Republican district would doubtless find his rise in the world handicapped if he were overzealous in the support of his party, and a belligerent Republican lawyer in a southern community might encounter political obstacles in the way of his advancement. The subtle insinuations of party control are doubtless more powerful than the gross influences which appear on the surface.

Propaganda. Quite as elusive, and yet substantial, is the influence of the press and propaganda. Nearly all newspapers are partisan; even the so-called independent journals are usually controlled by men affiliated with parties. Most political editorials are written with a bias or a view to party advantage, and the news itself is colored more or less by party opinions, through the emphasis given to certain events in the head-

lines and the articles. During campaigns, especially, the political atmosphere is charged with propaganda—printed, written, and oral. Gossip, damaging or favorable to candidates, sweeps like a whirlwind through the country fanning the fires of partisanship.

Party Aids to Citizens. Last, but not least, parties are strengthened by various aids of a personal nature rendered to voters. Besides making big promises and handing out jobs, political leaders and workers favor the poor by innumerable charitable acts. They give outings, picnics, clambakes, and celebrations for them; they help the unemployed to get work; they pay the rent of sick and unfortunate persons about to be dispossessed; they manipulate relief grants from the public treasury in time of economic distress; they appear in court for those in trouble, and a word to the magistrate may save the voter from the workhouse or even worse; they remember the children at Christmas; and, in short, they are ever watchful charity agents for their respective neighborhoods. A kind word and a little money in time of pressing need often go farther than an eloquent sermon on civic virtue. Thus politics as it operates through party organization is a serious and desperately determined business activity; it works night and day; it is patient; it gets what it can; it never relaxes.

THE AMERICAN PARTY BATTLE

Two Major Parties. One striking aspect of political contests in the United States has been the persistence of two major parties, alternately in and out of power, particularly in the National Government. Despite their changes in names, the composition and platforms of each of these major parties have shown a considerable degree of consistency from the beginning. One is the Federalist-Whig-Republican party, associated with the names of Hamilton, Webster, Lincoln, McKinley, Theodore Roosevelt, Coolidge, and Hoover. Its center of economic gravity has been in the industrial and financial interests of the nation. Although it made a combination with farmers in 1860 and still has a strong hold on them in the north, the chief source of its economic strength has remained the same for nearly one hundred and fifty years. The second party—called "Republican" in the early years of the nineteenth century—is now the Democratic party, with Jefferson, Jackson, Bryan, Wilson, and Franklin D. Roosevelt as its heroes. Its historic center of gravity was long in the agricultural interests of the country, although a large body of importing merchants and urban mechanics was early brought into its fold. This interpretation of our party divisions does not mean that all industrialists have been in one camp and all tillers of the soil in the other, but that the predominating interests in American politics

have been industrialist and agricultural respectively, with organized labor displaying, on the whole, Democratic inclinations.[3]

If reference is made to the great issues involved in this party antagonism, it will be found that they have distinctly economic bearings. Broadly speaking, the Hamilton-Webster-McKinley combination long supported high protective tariffs for American industries, centralized banking, a currency based on gold, ship subsidies, a strong navy, internal improvements, the promotion of commercial enterprise, and light taxation on great fortunes. In the main the Jefferson-Jackson-Bryan party was on the opposite side throughout the nineteenth century. Exceptions may be found, no doubt, in American history, but in the main the cleavage was fairly clear, at least until the opening years of the twentieth century.

Party Divisions No Longer So Clear-cut. As American society grew more complex under the driving force of technology, the lines of the old party battle became confused. Industry now overtops agriculture in the capital employed and the proportion of the population engaged. Large sections of the middle west and the south, once the strongholds of agrarian Democracy, have been industrialized, with corresponding changes in attitudes toward politics—the protective tariff for instance. On the other hand, industrialism is divided against itself. New industries, such as the manufacture of automobiles, requiring no protection against foreign competition, have sprung up; a part of the accumulated riches of the country is invested abroad or in foreign trade, and bankers in this field usually favor low tariffs rather than high.

So deep are these changes that as surveys of the votes in Congress show, scarcely a single issue brings about a clear-cut division between the two parties. At times the cleavage between the right and left wings of each is greater than the gulf between the parties themselves, especially in the Senate where agrarian states have a disproportionate weight.

After examining the history of parties in the United States, James Bryce exclaimed in metaphorical terms: "The great parties were like two bottles. Each bore a label denoting the kind of liquor it contained, but both were empty." Strictly speaking this is an oversimplification of the facts in the case. It reduces the voters to phantoms voting for empty words. If in reality the appeals of the two parties were identical in their emptiness, the party divisions at the polls should have cut across all group, sectional, and class divisions without reference to any ideas or interests cherished by members of such groupings; and this has not been a fact.

For example, according to a sampling poll taken by the American

[3] C. A. Beard, *The American Party Battle.*

Institute of Public Opinion in December, 1940, the Democratic candidate, President Roosevelt, received 28 per cent of the votes in the upper income group of citizens, 53 per cent in the middle income group, and 69 per cent in the lower income group; while his Republican opponent, Wendell Willkie, received 72 per cent of the votes in the upper income group, 47 per cent in the middle group, and 31 per cent in the lower groups. Another poll taken by the Institute in 1943, when World War II was already raging, showed that, despite some changes in percentages, a similar cleavage in the electorate existed as between President Roosevelt and Mr. Willkie. If it be assumed that the promises made by the platforms and candidates of both parties are as empty as Bryce declared, it must be admitted that conflicts of economic interests and ideas do characterize the party divisions among the voters. Their differences are not all irreconcilable; but each of the major parties, especially in times of social tension, is something more than an empty bottle with a label on it.[4]

Peculiarities of "the Solid South." Although the two-party division runs throughout most of the Union, even into state, municipal, and village elections, it is marked by sectional variations. Broadly speaking the Republican party is stronger in the north and the Democratic party is stronger in the south. Since the Civil War several southern states have almost uniformly gone Democratic in elections. The number of southern states constituting this solid south has varied from time to time. Some so-called "border states" between the north and "the deep south" are occasionally found in the Republican column at least in national elections. In 1928, for example, the Republican candidate for President, Herbert Hoover, carried even Florida and Texas as well as Virginia, North Carolina, Kentucky, Tennessee, and West Virginia. Only South Carolina, Alabama, Georgia, Mississippi, Louisiana, and Arkansas went Democratic that year. Nevertheless in a majority of southern states, the Republican party counts for relatively little. There political contests are largely confined to disputes within the Democratic party.

Minority Parties. Although the two major parties have avoided complete disruption, both have been periodically attacked by dissatisfied farmers, urban laborers, and others. Agrarian factions, called Greenbackers, then Populists, Non-Partisan Leaguers, and Farmer-Laborites, have kept up a steady fusillade on the "political machines." Appealing principally to urban labor, the Socialist party has been in the field since 1900 and the Communists since the close of World War I. In the 1948 presidential election, two minor parties—the "Dixiecrats" and the Pro-

[4] For a summary treatment of party motivation and electoral behavior, see V. O. Key, *Politics, Parties, and Pressure Groups* (1942), pp. 606 ff.

gressive party—together polled about two million votes. While such fragments have made great inroads on the old parties, at times, none of them has ever come within gunshot of victory in a national election; most dissenting groups speedily perish or are merged with the Democratic or Republican organizations as left wings.

Still their operations have made a deep impression on the policies and fortunes of both major parties. It has been claimed, with full historical warrant, that these intransigent factions have set most of the leading issues of the past fifty years—the income tax, regulation of railways, popular election of Senators, limitation on the use of injunctions in labor disputes, woman suffrage, labor legislation, social security, and "farm relief." Since the two traditional parties are often rather evenly balanced, they must make concessions to dissident minorities in return for votes. No doubt this trading, coupled with the enormous expense of constructing a new national political machine, is partly responsible for the failure of third parties to advance far on the road to victory. Danger from their direction is allayed before it becomes too serious.

The Party Spirit. By orthodox partisans, the independent citizen who refuses to become a party member is looked upon as a "crank" or "goody-goody." This attitude was forcefully expressed long ago in the Richmond *Whig*'s editorial on the "no-party man": "We heartily join in desiring the extermination of this pestiferous and demoralizing brood. . . . Let the Whigs and Democrats everywhere resolve that the gentry who are too pure to associate with either of them or to belong to either party shall not use them to their own individual aggrandizement. Let them act upon the principle that the Whig or Democrat who has sense enough to form an opinion and honesty enough to avow it is to be preferred to the imbecile or the purist or the mercenary, who cannot come to a decision, or is ashamed of his principles, or from sordid consideration is afraid to declare them."

Writing long afterward, W. B. Munro indicated that the kind of spirit praised by the *Whig* was still abroad in the land. "Most men and women," Munro declared, "inherit their party affiliations. . . . They are Republicans or Democrats because their fathers and grandfathers were, although they do not relish being told so. Taking the country as a whole at least sixty per cent of the active electorate is strictly 'regular' in its party allegiance. Irrespective of issues or personalities, the partisan loyalty of these groups is almost absolutely dependable."

Independent Voters. Despite the strength of party loyalties there is a large body of independent voters who swing from one party to another or do not vote at all when they see no issues at stake. Elaborate efforts have been made to discover by statistical research and calculation the

proportion of voters who inherit or habitually cling to their party affiliations and the proportion who are really independent, in that they easily turn "right" or "left" according to times and circumstances. Here, too, exactness in conclusions has not been attained. It can be said with assurance, however, that the proportion of independents is substantial, that it varies from region to region, and that it seems to be higher in the professional and business classes and among skilled and semiskilled workers. Estimates of the percentage of independents range from 20 per cent upward. Whatever the exact figure, the body of independent voters, combined with members of minor parties, is so large that managers of the two major parties take account of them and make bids for their support in election campaigns. Often the nonpartisan, or independent, vote is a decisive factor, particularly when the contest between the two great parties is very close.

Nonpartisan Associations. In nearly every great city there is a nonpartisan citizens' organization of one kind or another. New York City, for example, has the Citizens' Union, a group of persons united without regard to party for the purpose of securing the honest and efficient government of the City of New York. The Union was at first a sort of political party with officers, committees, and conventions modeled somewhat on the plan of the older parties; but it now confines its work largely to political education and to scrutinizing and reporting on candidates for office. It maintains a representative at Albany to keep a watch on legislation affecting New York City. It issues bulletins from time to time on the questions of local government, and brings under review important acts of the city administration.

On the larger stage of state and national politics, the outstanding nonpartisan organization is the National League of Women Voters formed by certain leaders in the woman suffrage movement shortly after the adoption of the Nineteenth Amendment. It consists of local and state associations federated in a great national society. Women of all parties are affiliated with it. They do not endorse or support political parties as such, but they do favor many specific legislative proposals and public policies, and sometimes give their support to candidates who agree to promote the measures they have approved. As a matter of fact, in some respects the League has lost its "nonpartisan" character. It maintains headquarters in Washington, holds an annual convention, lobbies for measures before Congress, keeps speakers in the field enlisting the interest of women in public affairs, conducts schools of citizenship, gives special attention to laws pertaining to women, and urges the election or appointment of qualified women to positions in local, state, and national governments.

PARTY ORGANIZATION

Practical Utility. To be effective in gaining and exercising governmental power a party must have an organization and that necessarily implies regular membership and party officials, committees, conventions, conferences, and other selected groups authorized to speak and act in the name of and for the party. Hence all parties, great and small, maintain what is called "party machinery" which functions in national, state, and local elections, more or less according to the party's numerical distribution and strength. Through the operations of the machinery candidates are nominated for public offices, campaigns for election are waged, and the membership kept in line from season to season. For a long time in American history, each party was regarded as a purely private institution and was allowed to set up its organization and conduct its affairs without interference by lawmakers and public officials. But party machinery and operations are now subject to extensive regulation by law—particularly state law (Chapter 28).

Membership. Since voters are free to join and leave parties, it is difficult to determine just what constitutes membership in a party. Some minor parties, the Communist party, for example, require each member to have a personal card issued by party officials and to pay periodical dues to the party chest, but neither of the major parties has any such strict test. It is customary to include in a party's membership all those who support its candidates at the polls with some degree of regularity but this usage is at best very loose. Thousands who support a party at a given moment are independents or members of opposing parties, who for the time being favor its candidates and platforms. Additional thousands who regularly vote a given ticket bestow no thought or time on the party's debates and conferences, contribute no money to its support, and could not give a fifty-word account of why they belong to the organization or approve its doctrines and methods.

According to another definition, a "party" includes only those who are openly inscribed on its roster and entitled to participate in its primaries. Ordinarily this group consists of from thirty to eighty per cent of the party voters. But the number who actually go to the primaries and take a hand in electing party officers and nominating candidates is much smaller, ranging sometimes as low as ten per cent of the enrolled members and not often higher than seventy or eighty per cent.

Influential Members. Only a limited number of the party members who take some positive interest in party affairs are active and influential. Of this number some are loyal and zealous citizens who believe

that the safety and welfare of the country depend upon the adoption of the principles they advocate—members who hold no office and are not seekers after office. In another category are the regular and permanent officials of the party, their paid helpers, and aspirants for office who hope to rise by services to the party. In this category also are numerous attorneys for railway, utility, and other corporations that are involved more or less in politics, labor leaders and labor agents who can swing trade union votes, recipients of relief and other public benefits, and the retainers affiliated with the precinct or election district captains who are described below (pp. 106–108). In short, the most permanent, most loyal, most dependable elements of the party machine are those who derive emoluments or favors directly or indirectly from its operations or expect to do so. Since we have in America no leisure class of independent means devoted to party management, as was once the case in England and still is to some extent, it is necessary that those who apply themselves to this form of public service should derive at least a certain degree of economic support from their activities. Of course the public suffers frequently from the evil deeds of machine politicians, but on the whole the public business is managed about as well as could be expected in the circumstances.

The Basic Unit of Party Organization. To force party members, active and inactive, into an association capable of getting things done is a major task in organization. It begins, close to the people, in the local precincts, or voting districts, into which the entire country is divided. Here it is that the party workers come into immediate contact with the voters; here it is also that public opinion may be organized to bring pressure to bear upon the party machinery.

The Precinct Leader. A thoroughly organized party has in each precinct a loyal and tried official known as the captain, chairman, or president—a tireless party worker, personally acquainted with a large number of the residents and trained in the art and science of winning votes. If this party worker in the lowest political subdivision represents the interests and aspirations of the party voters in his district, the party organization is representative. If, on the other hand, the precinct leader is appointed, sustained, and financed by somebody "higher up," the whole party organization may be lifted out of popular control and vested in the superior officers who are in charge of the base of supplies. Vote getting "pays" in the economic sense of the word, for the man who can deliver votes can exact a price from those who are willing to pay for the delivery.

The Leader Marshals a Block of Voters. The precinct, ward, or election district, in which the leader or captain operates, contains from

200 to 600 voters of all sorts and conditions; perhaps the number who actually vote is not more than three or four hundred at most. Let us fix the figure at four hundred. Then two hundred and one constitute a majority. If the captain can get out a party vote of that size or larger, he can carry his district. So he has to manage only about two hundred party members. If he has one hundred of them "sewed up," he can ordinarily "swing the district" at will.

How can he get control of a hundred voters? He starts with his own family and relatives—perhaps eight or ten voters. Then he usually has the right to choose ballot and election clerks allotted to his party—petty jobs which pay sometimes as high as fifty or sixty dollars a year and are eagerly snapped up by party members. He recommends persons for appointive positions, suggests candidates for minor local offices, gets jobs for the unemployed with contractors in charge of public construction, and renders numerous other services of an economic sort. Perhaps he is himself a petty officeholder and can work a few of "the boys" into his own branch of the local government. He passes out "judiciously" the share of the campaign fund which is assigned to his district and has a hand in distributing public relief money among the unemployed. Usually there are ten or twenty shiftless persons who are happy to "run errands" and do other odd jobs more or less arduous during the campaign rush. The captain or leader, therefore, has many ways of bringing together a fairly solid mass of voters on a practical basis, counting the members of the families of the retainers.

Local Leadership Geared into the Machine. By managing this group the precinct leader makes himself "solid" with the officials or bosses of the party machine higher up; they cannot ignore him as long as he holds his forces together and delivers the vote as instructed in primaries and elections. Inasmuch as the primary vote often amounts to no more than fifty per cent of the party strength, it is clear that nothing but the most powerful effort on the part of independent citizens can force the nomination of a candidate who is not approved by the machine. Since there are over 120,000 election districts in the United States, the precinct leaders, each with a band of faithful retainers, constitute a truly formidable army.

Winning New Recruits. Besides managing the machine in his own party, the leader or captain must always seek new recruits. If he is efficient, he has a list of all the voters in his district, knows their occupations, and discovers how to help those who are in trouble. When newcomers take up their residence in his neighborhood he finds out about them perhaps from the leader of the precinct from which they came. As youngsters approach the voting age, he takes an interest in them

and invites them to enroll in the party. He is acquainted with local merchants and does what he can to "throw business" their way. He is always accessible and anyone in difficulty can easily approach him. He is the channel through which the humble citizen can reach officials high in authority; if necessary he may take a constituent down to the city hall to see a department head. He is always treated with respect by superiors because he is their sheet anchor in time of a political storm. If he can familiarly call the mayor or sheriff by his first name, the whole neighborhood finds vicarious pride in his self-esteem. In fair weather and foul, in victory and defeat, in primaries and elections, in season and out he must keep his battle array in order. His livelihood, his chances of promotion, his honor, such as it may be, are all at stake; if he cannot "deliver the vote," he is ruined politically and perhaps financially.

The County Machine. Going up the scale of party hierarchy from the precinct or district level, one finds next the county machine. It consists of a chairman, county committee, and a convention (unless the direct primary takes its place). The county convention, where permitted, is composed of delegates from lower units—towns, townships, or other districts as the case may be. The county committee, as a rule, is also made up of representatives from certain local subdivisions and the chairman is chosen at a convention, or by the committee, or at a primary. The county organization operates not only in the rural regions of the states but also in great cities; the Cook county organization in Chicago, the New York, Bronx, and Kings county machines in New York City, and the Suffolk county organization in Boston are already more than famous in the history of politics.

The State Chairman. Above the district and county levels stands the state organization of each party. At the head of this unit is the chairman of the state committee who may or may not be the dominant leader in the party. Sometimes he is a mere figurehead who obeys the orders of bosses and private persons who dictate party policies and use him as a screen.[5] The real director of party affairs may be a United States Senator who has patronage to dispense or the governor who commands a large popular following on account of his personality or policies, or an astute manipulator who moves in the background. The state chairman is chosen by the state committee, the state convention, at a party primary, or by a group of party candidates nominated at a primary—according to the laws and political customs of the particular state.

State Committee. The state committee is a representative party organization. As a rule, the members of the committee represent some local unit or election region, such as the county, or legislative district.

[5] See H. F. Gosnell, *Boss Platt and His New York Machine* (1924).

In assigning membership in the state committee to the local districts, practice varies. In some cases, all districts are given the same number of members, no matter how many votes the party may poll in them. In other cases, each district is given a fixed representation and then additional representation according to the number of party voters it contains. After the establishment of woman suffrage it became a general practice to choose women for a certain proportion of the places on the state committee.

The methods of electing state committees differ from state to state. Where the party convention is still retained, members of the committee are sometimes elected by local conventions in the units represented and sometimes by the delegates of the several units attending the state convention. Owing to the general adoption of the direct primary for nominating purposes, it is now frequently provided that state committeemen shall be elected by direct party vote in their respective units of representation. According to Charles E. Merriam, "there has been a general tendency in this direction in recent years."

The power of a state committee cannot be easily defined, because party rules usually contain few if any provisions on the subject, and the work of the committee really depends upon the personal strength of its members and their capacity for leadership in the party. In a formal way, the committee holds periodical meetings, calls state conventions and other state party assemblies, and takes charge of the preliminaries. In some states the committee chooses delegates to the national party convention.

It is also the duty of the state committee to supervise the process of obtaining a full party registration and vote; to adjust quarrels and dissensions within the ranks; to see that local organizations are in good working order; to raise funds; and sometimes to nominate candidates for state offices in minor cases. Finally, it is the duty of the committee to direct campaigns throughout the state, cooperating on the one hand with the national committee when there is a national election, and on the other hand with the local party committees, strengthening the weak places and devoting special attention to the districts in which it is believed the vote will be close.

The work of the state central committee is done by the officers—the chairman, secretary, and treasurer—and such members as choose to devote their time and attention to party matters. Usually its executive committee, composed of a small number of members, manages to gather into its hands, by constant attention to business, substantially all the powers.

Party Conventions and Primaries. Formerly it was the custom for

each party to nominate its candidates for offices at a convention composed of party delegates from subdistricts. As long as this practice prevailed, there was a hierarchy of conventions—city, county, state, and national. This process of nominating candidates is now closely regulated by law (Chapter 28) and the primary, that is, an election within the party, has been generally substituted for the convention as a method for nominating candidates. So far had this substitution gone by 1948 that only two states, Connecticut and New York, used the party convention for nominating candidates for offices in the state executive department. As a general rule, candidates for local offices and for the state legislature are nominated at primaries. Nevertheless, a convention or, where it has been eliminated by law, a party caucus is frequently held in advance of the primary for the purpose of arriving at a formal or informal understanding as to the persons who are to be nominated for office. While not supreme, as it formerly was, the convention or caucus is far from death's door.

The state convention, where it is permitted by law, is composed of delegates from counties or other local districts who are chosen by party voters or local conventions. So far as the management of party affairs is concerned, the convention has extensive powers, subject to the laws of the state. It is bound by nothing save its own will, the theory being that the delegates coming "direct from the voters" are the sovereign power within the party for the time being. Generally there is no written constitution for the party; each convention is regarded as an original and independent body, which may make its own rules; for practical purposes in matters of procedure it is governed only by principles of parliamentary law and by precedents.

National Organization. The state and local machinery is crowned by a national organization. It consists of the national committee, composed of party representatives from all the states and certain territories. At the head of the committee is the national chairman, nominally chosen by the national committee but usually selected by the party's candidate for President of the United States. For the purpose of nominating candidates for President and Vice-President, each party holds in election years a national convention made up of party delegates from the states (Chapter 10).

Supplementary Organizations. In addition to the local, state, and national organizations outlined above, there are several other party units for election purposes. For example, each party in the state has machinery for managing elections to both branches of the state legislature and to the national House of Representatives and the Senate respectively. Furthermore, each party in the House and the Senate has

separate congressional committees which take part in congressional elections, generally in connection with the state and local party committees and chairmen.

Magnitude of Party Officialdom. As to the exact number of officials, committee members, and regular workers in the hierarchy of each major party, from precinct or election district groups at the bottom to the chairmen of the national committees at the top, no definite figures are available; but estimates place the number in the neighborhood of a million. Of the number, whatever it is, a considerable proportion hold government jobs, large or small, or derive some compensation from political sources or have hopes of gaining pecuniary or other rewards of some kind.

GOVERNMENT REGULATION OF PARTIES

Parties as Semipublic Institutions. The political party began as a purely private association. At first it devised its own form or organization, decided how many and what committees it would have, provided for the choice of its officials, arranged for the nomination of candidates, raised money to pay its bills, and carried on campaigns without any interference from government. Owing to the abuses which arose in connection with party practices, however, the states and to some extent the Congress of the United States have undertaken to regulate party practices in detail, believing the party to be a matter of general public concern.

Objectives of Government Regulation. What particular practices should the lawmakers attempt to control? Are parties to enjoy freedom in formulating and espousing their objectives? Is the internal management of each party to be entrusted solely to its members, without interference from persons on the outside? Shall each party have the privilege of setting up and operating its own organization of committees, conventions, officials, and nominating machinery? Shall the managers of each party be allowed to raise and spend as much money as they please or can secure in carrying on campaigns for the election of its candidates, as long as they do not indulge in bribery and corruption? Should every office-seeker be permitted to spend money freely in his campaign for nomination and election?

Division of Power over Elections. Under the Constitution Congress could undoubtedly provide answers to these questions insofar as they involve elections at which Representatives, Senators, and the President are chosen. It could indeed go into great detail in the regulation of party machinery and operations, for in practice federal elections are not separated from the elections at which state and local agents are chosen.

But, instead of attempting to cover the whole domain of elections, Congress has confined its legislation mainly to regulating the use of money in elections, and has allowed the states almost a free hand in regulating the machinery and operations of parties. Accordingly the states have made their own answers, in varied ways, to the fundamental questions related to the nature and functions of political parties in the American system. Many of these answers are of national significance and interest and others are of state and local concern primarily (Chapter 28).

State Limitations on Party Purposes. As a rule, under state legislation, the party is free to declare its purposes in platforms and other statements and to advocate them frankly and openly between and during election campaigns. To this general rule, however, notable exceptions have been made by several states since the rise of totalitarianism in the world. By 1947 twelve states had by statute outlawed every party that advocates totalitarianism, the overthrow of government by violence, and other methods called "subversive." The language of these laws varies. In some cases the Communist party is specifically mentioned; Texas excludes from the ballot candidates of "the Communist party, the Fascist party, and the Nazi party." The Illinois statute not only names these parties but also declares that no other political group or organization shall be qualified as a political party and given a place on the ballot if it is associated with such parties or avows "other un-American principles" and engages in activities or propaganda designed to teach subservience to the political doctrines and ideals of foreign nations and the overthrow of established constitutional forms of government by violence.[6]

Federal Aid in Outlawing the Communist Party. Similar revolutionary activities and associations are forbidden throughout the United States by Title I of the Alien Registration Act, passed by Congress in 1940. In 1948 the question of further restraints on the activities of the Communist party came up in Congress and was discussed at length. In the course of the debate it was generally recognized that the right to advocate communism merely as a proposed system of economy for the United States is protected by the Constitution, and attention was directed especially to communists in the party who acted as agents of the Russian government or as if they were following "the Russian line." In its final form the act passed by Congress did not exclude the Communist party as such from participation in elections but by requiring public registration of its agents and of the officials of communist

[6] The twelve states were Arkansas, California, Illinois, Indiana, Kansas, Oklahoma, Ohio, Oregon, Pennsylvania, Texas, Wisconsin, and Wyoming. For summaries of these laws, see the *Congressional Record*, April 1, 1947, pp. A-1179 ff.

"fronts" the law lent assistance to the states already committed to the suppression of the party.

Evasions and Dangers of Limitations. When the Communist party was established shortly after World War I, it openly declared its revolutionary principles and its affiliation with revolutionary parties of the kind everywhere, including Russia. But after it was attacked by state and federal legislation, its leaders sought to escape the penalties of law by disavowing former doctrines and declaring their intention to follow constitutional methods in their political activities. In the 1948 presidential campaign, for instance, it was asserted on reputable authority that followers of the "Moscow line" threw their strength behind the recently formed independent Progressive party that had nominated Henry Wallace for President, a party that was able to get on the ballot in virtually every state.[7]

Although there is good reason for popular hostility to communist tactics, it is widely understood that there are dangers to liberty in anti-totalitarian legislation respecting elections. As framed in some of the states it permits Republican or Democratic election officials or both to outlaw not only real totalitarians but also progressives, liberals, radicals, and dissenters in general and thus can be used to protect the two major parties against all "third" parties which challenge their dominance.

Other State Regulations. As applied to parties officially recognized, state legislation respecting elections is mainly concerned with state and local party machinery and operations (Chapter 28). In nearly all states, however, it does cover the nomination and election of federal Representatives and Senators. In many cases it also covers the selection of delegates to the national conventions of political parties and the choice of men and women to serve on the national committees of parties. With regard to the apportionment of convention delegates among the states, the procedures of the national conventions, and some other phases of presidential elections and campaigns, federal and state legislation allows party customs to prevail (Chapter 10).

RAISING OF MONEY FOR POLITICAL PURPOSES

Party Operations Cost Money. Under our system of popular elections thousands and even millions of voters must be reached through various means—such as the press, meetings, letters, circulars, telegrams, radio broadcasts, and party workers. Huge expenditures are necessary even for legitimate purposes. To win party nominations for offices in large jurisdictions, individual aspirants and their supporters must make con-

[7] L. F. Budenz, "How the Reds Snatched Henry Wallace," *Collier's*, September 18, 1948, pp. 14–15 ff.

siderable outlays, and to win elections party organizations as well as candidates must do likewise, if they have formidable competitors. Here the American theory of democratic equality breaks down. Although it is not true that the longest purse is always victorious, it is certainly true that without a purse of some kind no citizen can expect to win any important office.

Money from Candidates and Office Holders. One major source of party funds is the body of office seekers. Generally speaking, no one can hope to be elected to office today without being nominated by a political party. The party organization wages the campaign upon which the victory hangs. What is more natural and just than the demand that the candidate help to pay the legitimate expenses of the undertaking? It is a regular practice, therefore, for party organizations, state and local, to collect tribute from candidates for nomination as well as from nominees to office—ordinarily in proportion to the value of the places they seek. There are in addition levies on officeholders after election, sometimes in spite of laws forbidding them.

Funds from Private Interests. Large sums of money come to party organizations from private economic interests. For a long time business corporations were accustomed to making heavy contributions in return for favors rendered by governments—federal, state, and local—or prospects of favors in the future. After 1933 trade unions, having won advantageous legislation from the New Deal, began to pour huge sums from their regular treasuries into the "war chest" of the Democratic party. Such contributions are now forbidden by law (p. 115); but the officials and stockholders of corporations can still make campaign gifts to parties, and leaders of trade unions may collect money from officers and members as individuals to be used for political purposes. Contractors who sell goods to governments or build post offices, highways, and other public works may remember their benefactors when money is needed for politics. In local governments, particularly urban, it is occasionally the practice of party bosses to raise party revenues in return for official protection of gambling, liquor selling, and vice in various forms. authentic documents show that in the not distant past huge tributes for political treasuries came from "the underworld."

Sometimes private interests affected by governmental action give money to parties to secure favors or prevent regulation that promotes the public welfare. Sometimes they are forced to contribute by party leaders under threats of punitive legislation. On many occasions, they have given money to both the leading parties with a view to getting a "friend at court" without fail.

Attempts to raise large sums of money by seeking petty contributions

from the rank and file of party voters have never been successful. Inevitably, then, there is a concentration of political power in the hands of a relatively small number of persons with money at their command. Even so, the party with the biggest treasury is by no means always victorious at the polls.

LEGISLATION ON THE USE OF MONEY IN POLITICS

Division of Authority. Under the system of dual control over elections, the states and Congress have enacted legislation relative to the use of money in politics. In general state legislation of this character covers the giving and taking of money for political purposes, the amount or amounts which can be expended by candidates and committees, the uses to which parties may apply their funds, and the reporting of contributions and expenditures to public authorities. Within its sphere of power Congress has enacted legislation of a similar nature applicable to federal elections.

Federal Limits Relative to Employees on the National Payroll. By extensive legislation, notably the two Hatch Acts, Congress has placed numerous restraints on the political activities of federal officers and employees and of state employees paid in whole or part from federal funds (Chapter 14). The statutes prohibit promising work, compensation or benefits as a reward for political activities in federal elections. Likewise banned are other political activities: depriving or threatening to deprive any person of relief benefits; soliciting and receiving funds from persons who receive public assistance; furnishing lists of persons on relief rolls; and using any part of relief funds for the purpose of interfering with the rights of persons in elections.

Limits on Contributions to Campaign Funds. Under the first Hatch Act the amount of any individual's contributions to any one campaign fund for federal elections is fixed at not more than $5,000, but the same individual may make a contribution up to that limit to each of any number of different organizations and committees in one or more parties. The Hartley-Taft Labor-Management Relations Act of 1947, based in part on earlier legislation, put contributions by corporations and labor organizations under severe restrictions. Under its terms, it became unlawful for any national bank or corporation organized under authority of Congress to make any contribution or expenditure in connection with any election to any political office or primary or political convention or caucus held to select candidates for any political office; it also became unlawful for any corporation whatever or any labor organization to make any contribution or expenditure in connection with any federal election or any primary, caucus, or convention held to nominate

candidates for federal elections; furthermore, it became unlawful for candidates or other persons to receive contributions prohibited by the act. Meanwhile, labor urged repeal of the act.

Limits on Expenditures. Besides restricting the giving and collecting of campaign funds, Congress has placed limits on the amount which candidates for the Senate and House may spend in elections; and it has also limited contributions to, and expenditures by, any single political committee, for federal campaign purposes, to $3,000,000 in any one calendar year. In no case may candidates for the Senate or House exceed the sum set by state legislation. In the absence of a state law fixing a smaller figure, a candidate for the Senate may ordinarily spend $10,000 and a candidate for the House of Representatives $2,500. However, if the number of voters in a constituency is especially large, this amount may be increased proportionately. Even then, no matter how large the vote, no candidate for the Senate may spend more than $25,000 and no candidate for the House more than $5,000. In summing up all his expenditures under federal limitations, a candidate may omit outlays for his necessary personal, traveling, and subsistence expenses. He may likewise leave out of the reckoning money spent for stationery and postage, for distributing circulars, and for telephone and telegraph services. Also excepted from the return are all assessments, fees, and charges levied on him as a candidate under the laws of the state in which he resides.

Limits on Purposes of Expenditures. It is unlawful for any candidate for Congress to offer public or private employment in exchange for votes. It is likewise unlawful to offer to make or to cause to be made outlays to any person with a view to inducing him to vote for or against any candidate or to withhold his vote. The acceptance as well as the tender of money for these purposes is prohibited. In some measure, no doubt, the restricted nature of federal limitations on the uses of money is due to the fullness of state laws dealing with bribery and other corrupt practices in elections (Chapter 28).

Publicity for Party Funds. A further restraint on the collection and disbursement of money in federal elections is supposed to be afforded by federal legislation for giving publicity to campaign funds. Every candidate for Senator or Representative must file with the secretary of the Senate or the clerk of the House, as the case may be, both before and after election, statements showing in detail contributions received in support of his candidacy and itemized expenditures made by him or by any person with his knowledge and consent.

The law also prescribes publicity for the financial operations of political committees. Included within the scope of the statute is every

committee, association, and organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of Senators, Representatives, or presidential and vice-presidential electors in two or more states. The law does not stop here. It also applies to every other committee, association, or organization engaged in influencing elections, whether it operates in more than one state or not, if it is a branch or subsidiary of a national committee, association, or organization—excluding duly constituted state and local committees of political parties. All political committees covered by this legislation must file periodically statements giving receipts and expenditures and showing in detail the purposes as well as the dates and amounts of the outlays.

Loopholes in Federal Laws. Perhaps the greatest gap in federal legislation respecting the expenditure of money in connection with elections is the total exclusion of primaries. The publicity law of 1911 covered them as well as elections, but in 1921 the Supreme Court ruled that the power of Congress to regulate the manner of holding elections did not extend, at the time of the enactment in question, to senatorial conventions and primaries. Subsequently Congress expressly provided that the term "election" does not include a primary or convention of a political party. This exception is no longer necessary; in 1941, the Supreme Court clearly indicated that Congress can regulate primary elections for federal offices.

A second criticism of the federal corrupt practices legislation bears upon the clause which exempts from the limits fixed on expenditures all money disbursed by candidates for stationery, postage, printing, personal use, and publicity in general (except for newspapers and billboards). Under this rule outlays for most of the purposes which may be called "legitimate" are in fact not restricted in amount and the person with a long purse is distinctly favored.

Besides leaving the candidate free to spend as much as he likes for such publicity, the law allows his friends to pour out money individually and independently on his behalf without rendering any accounting whatever. It is in this connection that some of the worst abuses arise. Frequently it is not the candidate or his committee but some powerful economic interests behind him that are responsible for major outlays in primaries and elections, perhaps without his knowledge and consent. As long as the candidate himself is not held personally responsible for all expenditures in support of his contest—a requirement practically impossible to enforce—and as long as the amount is not strictly limited, wealth has a decided advantage in every campaign.

Not until 1940 did federal legislation forbid national committees to

print campaign books which include advertisements paid for by business concerns at huge prices and sold to party officials and members at fancy prices. To this practice the Democratic national committee had resorted with great profit in 1936. Republicans made an outcry against it, calling it illegal, a bald subterfuge for evading limits on campaign funds. Democrats paid no official attention to the outcry at the time; but four years later the Hatch Act made the subterfuge unlawful.

There are some grave weaknesses in the Hatch Acts. By limiting the amount of money that may be spent by any one political committee in a national campaign, this legislation has encouraged formation of many committees, each entitled to spend the maximum amount authorized by law. The provision has resulted in a decentralization of responsibility for the handling of money in campaigns rather than in a reduction in overall expenditures (Chapter 10).

Through another hole in the federal law money may creep. Political committees may have large deficits at the end of a campaign and may raise the money to cover them long after the period for making public their accounts of the election has expired. As Senator Bronson Cutting remarked in speaking of a concrete case of this kind: "A contribution made to a preelection fund would have been in the nature of a gamble, but a contribution made to a deficit and particularly to a deficit of the party which had been successful in the election was simply putting . . . money over the counter and getting a return for the investment. That is a danger which is not dealt with under our present statutes at all."

Laxity in Enforcement of Laws. In addition, federal law is weak on the side of enforcement. The provisions for publicity are not effective. Statements of campaign receipts and expenditures are carelessly filed in irregular form: they are not published: and after a period of two years they may be destroyed. Most of them merely accumulate dust. Eager newspaper reporters may dig out certain figures that will make news or a sensation but as a rule candidates and committees can be fairly sure that little will be heard of their "public" statements. While the national committees of the great political parties report in detail, other political committees and associations and many candidates for Congress are, to say the least, extremely careless in making their returns. It is doubtful whether the news of their publicity statements often reaches their respective districts. In this relation federal law has no teeth.

Furthermore no agency is directly responsible for enforcing its terms. Although a defeated candidate may attack his opponent in the federal courts or before a committee of Congress for some infraction of the law or may contest the election results there is no permanent machinery to

investigate charges of irregularity. Committees on elections in both houses and special committees for inquiring into campaign expenditures often do go into specific cases of illegal expenditures as they arise but they are almost always partisan in character and there is no continuity in their operations.

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PART IV

THE NATIONAL GOVERNMENT

CHAPTER 8

Congress: Over-all Structure and Elections

Responsibility for giving expression in the form of national legislation to the demands of political forces—the interests and aspirations of the American people reflected in elections, lobbies, and pressure groups—is vested in the Congress of the United States. Its acts under the Constitution are supreme laws of the land. However weighty may be the influence of the President in proposing and shaping legislation, responsibility for lawmaking rests in final analysis upon Congress. Without its passage of organizing acts and appropriations of money, the complicated structure of judicial and administrative agencies could not come into being or, once established, continue to function. It was with good reason, therefore, that the framers of the Constitution devoted the first Article to the organization and powers of Congress.

Congress Is Bicameral. Congress is divided into two chambers—the Senate, in which each state has two members, and the House of Representatives, apportioned among the states according to population, counting all persons, including resident aliens, excepting Indians not taxed. Historical and practical considerations are responsible for this bicameral system. When the framers of the Constitution devised the national legislature, they had to deal with stubborn facts—with states already established and bent on having equal shares of power, if possible, and with insistent demands for a proportional representation of the people in all states, large and small.

Origins of the System. Under the Articles of Confederation, all states stood on an even footing in Congress, and the small states would not agree to a new plan of government unless their old status was preserved in at least one branch of the legislature. On the other hand, the movement for the formation of the Constitution was particularly sponsored by the larger and more populous states and they would not federate unless they were given a weight in the legislature approximately proportioned to their respective populations. Underlying this controversy were important economic facts. The more thickly populated section of the country, the north, was extensively commercial in interest,

while the sparsely settled region, the south, was primarily agricultural. The division of Congress into two houses based on different principles of representation was in part the outcome of an effort to balance these economic powers in the Federal Government. Another consideration was the fear of majority rule which the Fathers entertained. They thought that the Senate should function as a conservative check on the "turbulence of democracy" likely to appear in the popular branch, the House of Representatives. With reference to that design, attempts were made in the constitutional convention to guarantee that the Senate would represent the wealth of the country, but in vain. As a result of a compromise the Congress is based on states as political entities and on population.

THE HOUSE OF REPRESENTATIVES

Provisions for Apportionment. The number of members in the House is not fixed by the Constitution. Its determination is left to Congress subject to two limitations, namely, that each state must have at least one member and that the total shall not exceed one for every thirty thousand inhabitants. When Congress has fixed the number, it must distribute the Representatives among the several states according to population, including all persons except Indians not taxed. The Constitution also directs that the enumeration of the inhabitants shall take place every ten years and by implication that an apportionment should occur after each census is completed. As a courtesy the territories—Alaska, Hawaii, and Puerto Rico—are permitted to send agents to the House of Representatives—who may speak but cannot vote.

Number of Members. The membership of the House in the beginning was fixed at sixty-five but the figure has been increased until it now stands at 435. Even so, the average number of inhabitants for each congressional district has risen from about 33,000 in 1793 to about 300,000 in the reapportionment following the 1940 census.

Methods of Apportionment. After the census of 1920 had been taken a deadlock occurred over apportionment which lasted for ten years, violating the spirit if not the letter of the Constitution. At length, in providing for the census of 1930, Congress stipulated that the existing number of members in the House of Representatives, namely 435, should remain unchanged and directed the President to report to the next short session of Congress three projects for allocating the seats among the states. It further provided that, if Congress failed to enact legislation for apportionment at the short session, one of these plans should go into effect for the next Congress to be elected. Late in 1930

President Hoover transmitted his report on the subject to Congress and a scheme of reapportionment went into effect for the election of 1932.

As required by law, the President of the United States submitted to Congress in January, 1941, two plans for reapportioning seats in the House of Representatives, to bring it in line with the 1940 census figures on population. Under the first of these plans, known as the system of major fractions, Arkansas would have lost a seat to Michigan, and the Democratic majority in the House opposed its adoption. Owing to the failure of the Senate to take action the system of major fractions automatically went into effect 60 days after the presentation of the President's calculations. Under the new apportionment the size of the House remained at 435 members. Each of ten states, Arkansas, Illinois, Indiana, Iowa, Kansas, Massachusetts, Nebraska, Ohio, Oklahoma, and Pennsylvania, lost one representative. Thirty states experienced no change in representation. Seven states gained a representative apiece, namely Arizona, Florida, Michigan, New Mexico, North Carolina, Oregon, and Tennessee. California won three additional representatives. By an act of November 15, 1941, Congress provided that, in future apportionments, the House shall consist of 435 members and prescribed a new plan for the distribution of seats, designed to reduce the differences in the number of people represented by each member of the House.

Laying Out Congressional Districts. For a period of about fifty years, Congress simply assigned to each state its quota of Representatives and let it decide whether they should be elected at large—the whole number on a single ticket—or by separate districts. In 1842 this practice was abandoned. Every state having more than one Representative was then required by federal law to create a congressional district for each member allotted to it, and to provide for electing only one Representative in each district. If a state legislature fails to lay out a sufficient number of congressional districts in the manner prescribed by law, then as a matter of necessity one or more of its Representatives in the House must be elected at large on a state-wide ticket.

For a long time it was the practice of Congress to stipulate by law that all congressional districts should contain as nearly as feasible an equal number of inhabitants. The failure of Congress to repeat these words in the law of 1929 covering the next apportionment seems to have removed a major barrier against discrimination. At least when Professor Kenneth W. Colegrove and his associates attacked the Illinois congressional districting act of 1901, on the grounds that subsequent

shifts in population had made it highly inequitable, the United States Supreme Court, in 1946, refused to grant relief.[1]

Gerrymandering.[2] Failure to provide districts fairly equal in population is not necessarily a mere sign of indifference or neglect—it may have a definite partisan purpose. That is, the party dominant in the state legislature may deliberately try to make its votes go as far as possible in congressional elections and make the votes of its opponent count for as little as possible. To accomplish this end it masses the voters of the opposing party in a small number of districts, giving it an overwhelming majority in each, and so marshals its own voters that they can carry many districts by slight majorities.

Gerrymandering, as it is called, is responsible for curious political geography. In one of the Southern states the legislature once created a famous "shoe string" district which ran through a large part of the state and by this grouping of voters counteracted the negro vote. At another time there was an equally famous "saddle bag" district in Illinois, in which many Democratic counties were linked together, assuring the Republicans safe majorities in neighboring regions. In the effort to redistrict the state for the election of 1932, the Minnesota legislature created one district that "almost cut the state in half. Beginning on the South Dakota boundary, it embraced a large farming territory in the western part of the state and then extended a long finger to the eastward, a distance of nearly 175 miles, to include a single ward of the city of Minneapolis."

Inequalities in Districts. Owing to gerrymandering and other practices, there is a great variation in the number of people for whom the several Representatives in Congress speak. By 1940, changes in population since the previous state redistricting act (1901) had produced a situation in Illinois whereby the most populous district had over eight times as many inhabitants as the least populous. In a test case the United States Supreme Court refused to declare it void but the state legislature soon corrected some of the worst abuses. The rule that each state, no matter how small its population may be, shall have at least one Representative, gives Nevada, with a population of 110,000, one member, al-

1 Franklin L. Burdette, "The Illinois Congressional Redistricting Case," *American Political Science Review*, October, 1946, p. 958.

2 The term "gerrymander" originated in Massachusetts. It appears that Elbridge Gerry, a distinguished Democratic politician of his day, was instrumental in redistricting his state in such a way that one of the districts had the shape of a lizard. When an artist saw the map of the new district, he declared; "Why, this district looks like a salamander," and gave it a few finishing touches with his pencil. The editor, in whose office the map was hanging, replied, "Say rather a gerrymander," and thus an ancient party practice was given a name.

though the average number of people per Representative is about 300,000.

There are also glaring discrepancies in the number of voters in the several congressional districts, due to limitations on the suffrage, especially in the South, and to the indifference of those who could, but do not bother to, vote. The votes cast in a congressional district vary with the nature of the contest, if one party normally has an overwhelming majority in a district, there are likely to be no spirited battles, except in the primaries and the number of ballots cast in the regular elections may be small On the other hand, in hotly contested districts, party leaders may conduct house to house campaigns, urging citizens to go to the polls and swell the returns.

The House Not an Exact Mirror of Opinions. As a result of gerrymandering and other practices, the House of Representatives is seldom, if ever, an exact mirror of the political opinions as expressed in numbers at the elections. Sometimes one party secures a majority of the popular vote of the country, taking the congressional districts as a whole, but the other party obtains a majority in the House. For example in the elections to the House in 1942, the Republicans polled 50 6 per cent of all the votes cast throughout the country in those elections, the Democrats, 47 4, and independents 2 per cent On the strictly numerical principle the Democrats should have been ousted from power, but, while their majority in the House was reduced, they won enough seats to keep their control

In congressional elections minorities never receive a representation in the House that is proportioned to the number of their votes. In the Pennsylvania congressional election of 1936 for example, an equal distribution of Representatives on the basis of popular votes at that time would have given the Democrats 19 members instead of the 27 they received, and the Republicans 14 as against their 7 while minor groups would have been entitled to one seat instead of none. Nothing except a complete national program of proportional representation, giving parties representation according to their respective number of votes, can remove the discrepancies created by the gerrymander and other practices. But that reform is certainly not now within the realm of 'practical politics" even if it were deemed desirable.

Elections to the House. According to the Constitution, the times, places, and manner of holding elections for the House shall be prescribed by the state legislature but Congress may make or alter such rules (Chapter 6). At present regular elections to Congress must be by ballot and occur everywhere, except in Maine, on the same day—the

Tuesday following the first Monday in November; special elections are held only when there is a vacancy. Subject likewise to federal law, the states fix the qualifications for voters; apart from its negative clauses, the Constitution merely stipulates that persons entitled to vote in each state for members of the most numerous branch of its legislature may also vote within its borders for members of the House of Representatives (Chapter 5).

Nomination of Candidates. Candidates for the House of Representatives are nominated by political parties in accordance with party customs and state laws; and usually independents may present themselves by filing with the proper officials petitions signed by a certain number of voters. In a few states the candidates of each party are chosen at district conventions composed of delegates representing its membership in units of local government, such as towns or counties. In a great majority of the states, however, official direct primary elections have been substituted for the convention. Under the primary system a party member who wishes to run for Congress must have his name put on the party primary ballot by petition. Then at a subsequent primary election the party voters select from the aspirants on this ballot their nominee for the regular election (Chapter 28). The general direction of campaigns is entrusted to the national committees, and to congressional committees made up of party members in the Senate and House.

Qualifications of Members. No one can take a seat in the House of Representatives unless he has the qualifications required by the Constitution. A member of that body must be a citizen of the United States of at least seven years' standing; he must be not less than twenty-five years old and an inhabitant of the state in which he is chosen. He cannot be at the same time an active military or civil officer of the United States; and nearly all states have forbidden their own officers to hold positions of trust under the Federal Government. Some states have gone further and provided that each Representative must be a resident of the district in which he is elected--a restriction which is apparently unconstitutional.

At all events, political custom generally dictates that the member of the House must be a resident of his district. Occasional exceptions, as for example in New York, where downtown constituencies have sometimes been represented by uptown residents, merely confirm it. The reasons for this custom are thus summarized by James Bryce: local pride will prevent a district from seeking its Representative outside its borders; the member of the House is relatively well paid and the party machine does not want to waste the post on a stranger, preferring to strengthen the local organization; the Representative in Congress is ex-

pected to know local needs and to secure special favors for his constituents; and Americans regard the Representative as a spokesman of local interests rather than as a statesman "formulating reason and justice into law." Undoubtedly the custom excludes many able men from Congress because talent is not distributed according to congressional districts, but party affairs are not conducted on the basis of intelligence tests.

Can the House Add Qualifications? While states theoretically cannot add qualifications to those imposed by the Constitution on members of Congress, it is conceded in practice that the House of Representatives may exercise its power as judge of the elections, returns, and qualifications of its members in such a way as to exclude persons on other grounds than those laid down in the Constitution. For example, in 1900, the House shut its doors to Brigham H. Roberts of Utah, alleging that he was a polygamist. The committee reporting in favor of this action asked: "Must it be said . . . that every person who is twenty-five years of age and who has been for seven years a citizen of the United States and was when elected an inhabitant of that state in which he was chosen is eligible to be a member of the House of Representatives and must be admitted thereto even though he be insane or disloyal or a leper or a criminal?" It answered: "The whole spirit of the government revolts against such a conclusion."

To this view a minority of the committee opposed a vigorous dissent: "The adding by this House alone of a disqualification not established by law would not only be a violation of both the Constitution and the law, but it would be a most dangerous precedent which could hardly fail to 'return to plague the inventor.' . . . What warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House, with other standards of morality and propriety, which will create other qualifications with no rightful foundations? . . . To depart thus from the Constitution and substitute force for law is to embark upon a trackless sea without chart or compass."

The principle of exclusion was applied long afterward to Victor L. Berger, elected to the House in a Wisconsin district in 1918. Shortly after his election, Mr. Berger was tried under the Sedition Act and found guilty of obstructing and embarrassing the Government in the prosecution of World War I. He appealed his case[3] and appeared in Washington to take his seat, but he was quickly excluded by the House, with only one member dissenting. A new election was then held and Mr. Berger was once more chosen. Once more the House denied him admission. In reporting against Mr. Berger, the chairman of the com-

[3] On appeal, Mr. Berger's conviction was overruled.

mittee in charge of the matter did not rest the decision on the ground that the man had been convicted of a crime. On the contrary, he said: "The one and only issue in this case is that of Americanism."

To this contention the Republican floor leader, James R. Mann, tersely replied: "Has it come to the point that a man who believes certain things cannot be heard? His people, his constituents, desire him to represent them. It is not our duty to select a representative from this congressional district. That is the duty of the people back at home. . . . To me the question is whether we shall maintain inviolate the representative form of government where people who desire changes in the fundamental or other laws of the land shall have the right to be represented on the floor of this House when they control a majority of the votes in a congressional district." As things now stand it would seem that the House might exclude a person for conduct and views which it deems immoral or un-American or indeed simply objectionable. Thus precedents have been set for partisan purges if the House should ever fall into a violent mood.

Settling Disputed Elections. In passing upon the elections, returns, and qualifications of members, the House of Representatives exercises its own judgment. Unlike the Parliament of Great Britain it does not submit cases of dispute to an independent tribunal. Any candidate intending to contest the results of an election is required by law to serve notice on the member whose seat he claims, and to state his grievances. The member put in jeopardy must answer. Copies of the papers are referred by the Speaker to the committee on House administration; a subcommittee hears testimony, the contestants are given an opportunity to be heard and to be represented by counsel; a report is presented to the House, and usually accepted. Inasmuch as the committee is dominated by the majority party, a disputed election is likely to be decided in the interests of that party, especially if the countervailing facts are not too glaring.

Term of Service. The term of the member of the House is two years —a brevity of tenure which has received so much criticism in our age that it is difficult to understand early apologies for failure to provide annual elections. It is well-known that no Representative can secure a considerable influence in so short a time; it requires a great deal of practical experience to master the realities of House procedure and get a hearing from the leaders of the chamber. Often it happens that, as a result of the two-year limit, the party in opposition to the President carries the House at the mid-term election and that unseemly disputes, delays, and deadlocks then occur in the transaction of public business. During most of the time from 1873 to 1893 the House was controlled by

the party opposed to the President; this state of affairs obtained during the close of President Wilson's second administration and the second half of President Hoover's administration; in the elections of 1946 the Republicans captured the House as well as the Senate and thus held the legislative power during the remainder of President Truman's first term. While the two-year term for Representatives has been criticized as too short and as producing grave inconveniences, it is a feature of the general check and balance system in which the House is set over against the Senate and the President.

THE SENATE

Terms of Senators. The term of the Senators is fixed at six years and they are frequently reëlected. A service ranging from twelve to twenty-four years is by no means uncommon. Additional solidity is given to this chamber through an arrangement by which, save in the case of vacancies due to the death, resignation or expulsion of Senators during their tenure, only one-third of its membership is renewed at each biennial election to Congress.

Inequality of Representation in the Senate. The Constitution prescribes that there shall be two Senators from each state, and that no state, without its consent, shall be deprived of equal representation in the Senate even by a constitutional amendment. Inevitably this rule of equality results in clear violations of the democratic theory that human beings, not geographical units, should be the basis of representation. For example, the state of Nevada with about 110,000 inhabitants has the same weight in the Senate as New York with about 14,000,000. It now takes eighteen of the less populous states, with thirty-six Senators to their credit, to equal in population the Empire State with its two Senators. Ten states have within their borders about half the people but command less than one-fourth of the Senators.

In legislative actions, however, the small states are not often aligned wholly on one side; many social and economic factors work against such a geographical distribution of political forces. Yet the system gives to the agricultural regions a strength in the Senate all out of proportion to their population, sometimes causing great lament in industrial regions.

Qualifications of Senators. The qualifications of the Senator are fixed by the Constitution. He must be not less than thirty years old, an inhabitant of the state for which he is elected, and a United States citizen of nine years' standing. The same question has arisen here as in the House of Representatives, namely, whether the Senate, under its power to judge of the qualifications of its members, can add any to those fixed in the Constitution. The logical answer seems to have been made in

1907 during a debate over the proposition to exclude Reed Smoot of Utah on various grounds, particularly alleged polygamist affiliations. It was then claimed that neither the Senate, Congress, nor a state can add to the qualifications prescribed by the Constitution; that the power given to the Senate is not to create Senators but to judge whether they have the qualifications set forth in the Constitution; that the Senate has no authority to inquire into the antecedents and early career and character of a Senator who applies for admission with proper credentials from his state; and that the Senate should content itself with the exercise of its power to expel a member for disorderly behavior whenever his conduct is such as to lower the standard of that body or bring it into disrepute. On the basis of such reasoning, Mr. Smoot was given his seat and became one of the leading bulwarks of conservatism.

Disqualification by Excessive Use of Money in Elections. Such were long the accepted principles governing the qualifications for the admission of Senators-elect but they are no longer regarded as binding. Persons possessing the qualifications laid down in the Constitution may be excluded if they have spent too much money in their primary or election campaigns either lawfully or fraudulently. In this respect a precedent was set by the Senate in 1922. Efforts were then made to exclude a Senator-elect from Michigan on the ground that he or his friends had raised and disbursed a large sum of money in securing his victory at the polls. Although the efforts failed, the Senate passed a resolution that "the expenditure of such excessive sums in behalf of a candidate, either with or without his knowledge and consent, being contrary to sound public policy, harmful to the honor and dignity of the Senate, and dangerous to the perpetuity of a free government, such expenditures are hereby severely condemned and disapproved." This was a warning to candidates against lavish outlays of money.

The threat was soon applied. In 1926 a Republican Senator-elect from Illinois, who after his election had been appointed by the governor to fill out the term of a Senator who had died suddenly, was charged with having received large campaign contributions from certain vested interests. The charge was sustained by a committee on the investigation of campaign expenditures and the candidate was denied admission to the Senate by a vote of thirty-nine Democrats, twenty-one Republicans, and one Farmer-Labor Senator against twenty-one Republicans and two Democrats. Shortly afterward, in 1929, the Senate followed this precedent in the case of William S. Vare, a powerful Republican "boss" in Pennsylvania. An investigating committee reported that in the campaign of Mr. Vare about $785,000 had been spent on his behalf and that some instances of fraud had occurred in connection with his candidacy.

There was no doubt, however, that he had been nominated by a plurality of the lawful votes cast and elected by an overwhelming majority. Yet by a vote of 58 to 22, Mr. Vare was excluded from the Senate.

In vain was it argued that, since Mr. Vare possessed the credentials of election and the qualifications prescribed by the Constitution, he was entitled to admission. While some Senators voted against the petitioner on account of alleged frauds, it was evident from the debates that merely a huge outlay of money was regarded as affording justification for exclusion. Judging by these precedents, the Senate may debar persons, otherwise qualified, on the ground that they have disbursed too much money in securing their nomination and election. Where is the line to be drawn? The law makes no answer. The Senate assumes the power to answer it at pleasure.

The Case of Senator Bilbo (1947). The whole question of the Senate's power to debar a Senator-elect and the proper procedure in such cases was extensively discussed in connection with the case of Senator Theodore Bilbo in January, 1947. The Senator had been reëlected in Mississippi and presented himself with his credentials at the opening of the Senate. For a long time he had been under a fire of criticism. He was charged with having professed contempt for certain provisions of the Constitution, with boasting that he had violated the election laws of his state, with using vile language in speaking of Negroes and foreign-born citizens, and with corruption in relation to government contractors. Although such charges had not yet been investigated by any Senate Committee on credentials, the Democratic majority of the Senate committee on campaign expenditures in the election of 1946 had, after an inquiry, reported that Senator Bilbo had been duly elected to the Senate and was entitled to his seat. But, during the preliminary organization of the Senate, when the Senator came forward on January 3, 1947 to take the oath, he was stopped by Republicans in a parliamentary maneuver. A long debate over the action to be taken then occurred.

In the course of the debate what may be called the politics of senatorial qualifications was brought into consideration, as well as the pertinent provisions of the Constitution. The division in the Senate, however, was not strictly partisan. Several Senators who spoke displayed some awareness of the fact that the exclusion of a Senator-elect on grounds other than those provided by the Constitution—age, citizenship, and residence—was dangerous business. Southern Democrats took the lead in efforts to force the admission of Mr. Bilbo, but a few northern Democrats, not oblivious to the Negro vote in northern states, opposed the action. On their part a few leading Democrats, having a

care for the national interests of their party, were not eager to put themselves on record as voting for the admission of the Senator-elect. The Republicans, commanding a majority, were in a position to prevent the seating of Mr. Bilbo, if allowed to organize the Senate, but they did not possess the two-thirds majority necessary to expel him after admission.

Amid these circumstances, Senator Alben Barkley, long the majority leader of the Democrats in the Senate, now occupying the post of minority leader, hit upon an ingenious expedient. He explained that Mr. Bilbo was a sick man and would soon have to undergo a serious operation. He asked unanimous consent to two propositions: (1) that the credentials of Mr. Bilbo lie on the table, "without prejudice," until such time as he might be able to return, "in view of his physical condition," and to be present when the Senate takes them up "or until such time as the Senate itself may order them to be taken up for consideration"; and (2) that other Senators-elect entitled to take the oath be permitted to be sworn in immediately. The presiding officer of the Senate asked whether there was any objection to the request of Senator Barkley and reported: "The Chair hears none, and it is so ordered."

Other Senators-elect were immediately sworn in and Mr. Bilbo left in *statu quo*. He was not admitted; nor was he definitely debarred. Thus important questions that had been raised in the debate were left unanswered. For instance, is a Senator-elect who has often publicly expressed contempt for certain provisions of the Constitution on behalf of liberty entitled to take the oath to support the Constitution and assume his place in the Senate? [4]

But the perquisites of office were not denied to Senator Bilbo. While he remained figuratively in a state of suspended animation and had no duties to perform, he was authorized to receive his salary and other allowances. As he had been a Senator in the previous Congress, he already had an office at the Capitol and a secretarial staff. These he was permitted to keep during the interim period—while he waited for an improvement in his health, a verdict from the official physician of Congress to the effect that he was able to return, or a decision of the Senate to take action in his case. As the matter was "hot" politics for Democrats and Republicans, they were content to leave the case hanging in the air. When the first session of Congress ended in July, 1947, Senator Bilbo was still in a state of suspense but was receiving his salary and the usual allowances for personal expenses, secretarial assistance, stamps,

[4] The debate and the documents in this case fill many pages of the *Congressional Record* for January 3 and January 4, 1947.

and stationery. Shortly afterward, however, his death closed the case, without settling the major issues raised by it.

Procedure in Qualification Contests. Judging by precedents now established, the Senate has three choices at the opening of a contest over qualifications. It may refuse to seat a Senator-elect while it investigates the charge that he does not possess the proper qualifications, and may withhold or pay his salary. The Senate may temporarily accept the credentials of the Senator-elect and afterward investigate and decide at its pleasure. Or, as in the case of Senator Bilbo, it may lay the matter on the table "without prejudice," awaiting time and circumstance. Under the Congressional Reorganization Act of 1946 questions relative to contested elections, corrupt practices, credentials, and qualifications are referred to the Senate committee on rules and administration and are acted upon by the privileges and elections subcommittee of that general committee.

Perils in the Precedents Set by the Senate. By Article I, Section 5 the Constitution provides that Congress may alter the regulations made by state legislatures respecting the times and manner of holding elections for Senators and Representatives; and each house is judge of the elections, returns, and qualifications of its own members, subject to the principle that, strictly speaking, it cannot add to the qualifications of age, citizenship, and residence. Hence the Senate may properly go behind the election credentials which a Senator-elect presents and determine whether his election was bona fide—in accordance with the terms of the election laws, federal and state, applicable to the case. But when the Senate, finding no flaws in his legal qualifications or violations of law in the processes of his election, excludes him on the basis of charges against his personal views or habits, it ventures on dangerous ground.

This is especially noteworthy when it is remembered that two-thirds of the Senators hold over from previous elections. If the party in power has been defeated at the polls, the Senators of that party already secure in their seats may refuse to admit incoming Senators-elect on frivolous charges and thus keep control of the Senate in spite of the returns. Elections are often close and the exclusion of only one or two Senators-elect may be sufficient to effect a repudiation of popular will. What might happen in time of a great crisis may be readily imagined. Observance of the Constitution commands adherence to the qualifications of age, citizenship, residence, and lawful election—no matter how objectionable a Senator-elect may be, particularly as he may be expelled by a two-thirds vote at any time for dishonorable conduct as a member of the Senate.

Popular Election of Senators. Until the ratification of the Seventeenth Amendment in 1913, the Constitution provided that Senators should be chosen by the legislatures of the respective states. The Amendment in question, adopted after a long struggle, provides that the two Senators from each state shall be "elected by the people thereof for six years. . . . The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Under this Amendment, the states faced the task of making provision for the nomination of Senators, and the direct primary was adopted in nearly all cases.

Changed Character of the Senate. It became apparent, a few years after the adoption of popular election, that the character of the Senate had been altered. For some reason it became impossible to construct in that chamber a well-oiled machine dominated by a few powerful Senators capable of marshalling a majority of the members in solid ranks behind selected measures. Again and again the Senate carried resolutions, defeated bills, rejected presidential nominations to offices in the administration, and made startling investigations of administrative practices against the wishes of the President and leaders of regular party organizations. In these circumstances it was often alleged that the appearance of so many "radicals" in the Senate and the lack of party discipline there were due to the substitution of popular election for election by state legislatures. Thus, it was claimed by critics of the new system, the Senate, as a conservative bulwark against the popular distempers reflected in the House of Representatives, had been destroyed.

A close examination of political history since 1913 admits of no easy answers to the question raised by such criticism. Undoubtedly the "machines" of both major political parties exercised a stricter control over the choice of Senators in the old days when selections were actually decided in the secret caucuses of state legislatures. Doubtless many Senators who have fought their way up through primary and election campaigns have been more independent and "progressive" than the old run-of-the-mill Senators picked by small political groups behind closed doors in the state capitols. But how far the change must be attributed to popular election and how far to political and economic movements in general must be a matter of conjecture. Numerous ideas and reforms that were widely regarded as dangerous at the beginning of the

twentieth century are now accepted as commonplace, largely on account of economic dislocations and shifts in public sentiment.

As to party discipline in the Senate, much depends upon the size of the party majority in control. If it is small, a few dissident party members may, by joining the minority, keep the party floor leader and his aides on pins and needles, indeed prevent them from carrying through various measures on their program. In the Senate at the opening of its session in 1931 there were forty-eight Republicans, forty-seven Democrats, and one Farmer-Labor member. To make matters worse for the Republicans several of their Senators were "insurgents," and by abstaining from voting or by voting with the Democrats they destroyed all semblance of regular party discipline in legislating and in confirming presidential nominations to office.

On the other hand, in the next Congress, which met in 1933, the Democrats had a substantial majority of fifty-nine as against thirty-six Republicans and one Farmer-Labor member. From that time until the end of 1946, the Democrats maintained undisputed control of the Senate, as well as the House of Representatives. After 1937, the party leader in the Senate, Alben Barkley, of Kentucky, although he had more than one sharp brush with President Roosevelt, encountered little or no trouble in engineering through almost every measure or appointment which the President insisted upon. It was deemed expedient at times to offer judgeships, public works for their states, and other prizes to Democratic Senators in return for votes on measures, but by judicious strategy serious "revolts" were prevented.

When the Republicans assumed control of the Senate in January, 1947, they had a safe majority and few "progressives" in their membership inclined to belligerency. Some Republican newcomers to the chamber objected to the management of affairs but did little or nothing that was disturbing to the smooth conduct of business. Moreover, the Republican managers of the Senate were supported in several contentious cases by Democratic Senators unfriendly to the New Deal. On the score of discipline, therefore, it would seem that changing circumstances rather than the popular election of Senators account for "insurgency" in the Senate since 1913.

With regard to what is called "radicalism" in the Senate criteria of judgment are difficult to establish. About all that can be said with assurance is that on some matters the Senate is more "radical" than the House of Representatives and on others more conservative. For the past ten years or more, the Senate has been on the whole more careful in safeguarding personal liberties and, owing to the freedom of debate that obtains in that chamber, questions of public interest, great and

small, usually receive fuller consideration there than is accorded to them in the House of Representatives. In view of the historical record, it would be difficult to establish the proposition that the Senate has declined in talents, skill, and the arts of good management, either relatively or absolutely, merely as the result of the resort to popular election.

CONSTITUTIONAL PROVISIONS GOVERNING PRIVILEGES OF MEMBERS AND THE ORGANIZATION OF THE HOUSES

Salaries. Members of both houses of Congress are entitled to certain advantages. First among these may be reckoned payment for their labors. The Constitution prescribes that Senators and Representatives shall receive compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. Under existing law they receive an annual salary of $12,500—to which is added a tax free expense allowance of $2,500. In addition each member is furnished a secretarial staff and has the right to a pension under the Federal Retirement System, on certain conditions.

Freedom from Arrest. The second advantage enjoyed by members of Congress is exemption from arrest during attendance on the sessions of their respective houses, and in going to and returning from the same, in all cases except treason, felony, and breach of the peace. This privilege frees Representatives and Senators from many processes which might involve imprisonment as a penalty for disobedience. That is, no member of Congress, during the period mentioned above, can be compelled to testify in a court, serve on a jury, or respond to a civil action brought against him. On the other hand, the term "breach of the peace" extends to "all indictable offenses, as well those which are in fact attended with force and violence as those which are only destructive to the peace of the government"; therefore the member of Congress really enjoys no exemption from the ordinary processes of the criminal law.

Freedom of Speech. A third privilege conferred on members of Congress is freedom of speech during discussions in their respective chambers. According to the Constitution, they shall not be questioned in any other place for anything said in either house. This famous right, sometimes regarded as a mere guarantee of the full and free discussion of public matters, is really derived from the practices of the English Parliament where it was formerly invoked to safeguard members against arbitrary arrest for criticism of the king. Apparently it was placed in the American Constitution to relieve Senators and Representatives from servitude to their constituents. However that may be, the effect of the concession is to give them immunity from the risk of legal action for slander or libel for anything said in Congress, in committees, in

official publications, or in the legitimate discharge of their legislative duties. Apparently also it allows them to circulate derogatory speeches at will throughout the United States.

Freedom of Action. Members of Congress are free to determine the kind of business to be transacted in their respective chambers. To be sure, they are often requested by state legislatures in formal resolutions to bring up for discussion, or to support, certain propositions, but such requests have no binding force. No provision in the Constitution warrants actions of this character. Indeed many publicists hold that a representative, though chosen in a geographical district, is in reality a member of a national assembly bound to act on broad national grounds. But every Senator and Representative is sensitive to the wishes of his constituents, or at least the local party leaders, and he is not likely to ignore imperative communications from below. From regions where party contests are close and a few marginal voters hold decisive power, every demand of any significance carries weight.

Control over Organization and Procedure. With respect to internal organization both houses of Congress are governed by several explicit provisions of the Constitution. The Vice-President of the United States is made the presiding officer of the Senate with a vote only in case of a tie; neither house can expel a member for a breach of its rules except on a two-thirds vote, a quorum being present; each chamber must keep a journal of its proceedings and publish the same from time to time, except such parts as it may deem necessary to keep secret; if one-fifth of the members present in either body demand a record of the yeas and nays on any question, a vote must be taken by roll call. Subject to these conditions, each house has the right to elect its own officers, compel the attendance of members, and prescribe rules of procedure and discipline.

Open and Closed Sessions. Nothing in the Constitution requires the houses of Congress to hold their sessions in public. In fact it is implied that they may, if they wish, transact their business behind closed doors for, as we have just said, they can except from publication such parts of their journal of proceedings "as may in their judgment require secrecy." Shortly after the House of Representatives assembled in 1789, it threw open its meetings and has departed from that practice only in very special circumstances. The Senate, on the other hand, during the first four years of its life, kept everything secret and issued no official reports of its debates. Only under great pressure did it begin to hold public meetings in 1793. Later it decided that all sessions dealing with treaties and nominations presented by the President should be secret. It also provided for the expulsion of any Senator who divulged information respecting its confidential transactions.

Under rules still effective early in 1929, "executive sessions" on presidential matters were closed, unless the Senate, by a two-thirds vote, rarely by majority vote, resolved to open them to the public. Nevertheless news of the proceedings in secret meetings usually leaked out, creating confusion and controversy. So a new plan was devised.

According to a rule adopted in 1929, the Senate must transact all business openly unless it specifically decides in favor of secrecy. Even if it so decides, proceedings in an executive meeting may be made public by the action of a mere majority; and any Senator may publicly state how he voted in a closed session, although he cannot give the reasons he assigned for it in debate unless the Senate grants him permission by special resolution.

The Quorum. The quorum necessary for official operations in each house is fixed by law and practice at a majority of all the members legally chosen, living, and officially sworn, but a smaller number may adjourn from day to day, and may compel the attendance of absentees. This is no formal matter. It is necessary to make the quorum large to prevent "snap" legislation by minorities, and yet the stipulation may result in serious inconveniences.

For a long time it was a common practice for members of the minority party in the House of Representatives, whenever they desired to delay business, to refuse to answer the roll call, and thus compel an adjournment on the ground that a quorum was lacking. To stop "filibustering," as such dilatory tactics were called, Speaker Thomas B. Reed, in 1890, held that members actually in the House who declined to answer should be counted as legally present in determining a question of a quorum. Shortly afterward the House embodied this principle in a rule authorizing the clerk, on demand of a member or at the suggestion of the Speaker, to record as present Representatives who are in the chamber and yet refuse to respond when their names are called.

Control of Houses over Private Citizens. The right of Congress, in the course of its proceedings, to interfere with private citizens is clearly limited by the Constitution: Neither house has general authority to punish outsiders for contempt. If, however, the examination of private citizens is necessary to the performance of regular legislative duties, each house of Congress may compel persons to attend sessions of its committees and give testimony there. If a witness refuses to come when called by a committee of either house or to answer questions properly directed to him, he may be cited for contempt by a resolution of the proper chamber, tried by a court of proper jurisdiction, and, if found guilty, punished by fine or imprisonment or both (below, p. 164). Each house may discipline its own members for disorderly behavior on the floor;

but its power to penalize members is confined to the session during which the action is taken.

SESSIONS OF CONGRESS

Regular Sessions. In accordance with the Twentieth Amendment, Congress must assemble at least once every year and at noon on the third day of January, unless it shall by law appoint a different day. Thus members of Congress elected in November begin their work about two months later. Under the Reorganization Act of 1946, except in time of war or during a national emergency proclaimed by the President, the two houses shall adjourn sine die not later than the last day (Sundays excepted) in July each year, unless otherwise provided by the Congress.

Special Sessions. Either house or both may be called in a special session by the President whenever he so desires, after an adjournment. As a rule the President convenes the national legislature only to deal with some pressing issue and usually he announces his designs in advance. Thus in his call as well as his message he can direct the attention of Congress and the country sharply to the business in hand. If Congress adjourns without acting on his program, he can call it again. In this way he can assume vigorous leadership on extraordinary occasions.

Meetings of Congress Called by Party Leaders. The power of Congress to adjourn for a specified time and thus take a vacation is duly recognized by the Constitution and has often been exercised. But what if a crisis arises during the temporary adjournment and members want to reassemble, before the date set, for the purpose of dealing with the crisis? Can they make provision for such a contingency or must they depend upon the President to call them in a special session? Suppose the President is eager to be rid of congressional interference and refuses to summon them before the date fixed in the resolution of adjournment?

In 1943, many members were unwilling to recess even for a month or two without making provision for meeting earlier than the date set in a resolution of adjournment, in case of urgency. In these circumstances party leaders made an arrangement for a "conditional" adjournment of the two houses. The resolution provided for adjournment in July and fixed the date for reassembling as September 14, 1943, or until three days after the members were notified to return, whichever event occurred first. To provide for such notification, the resolution stipulated that Congress was to be recalled "whenever the majority leader of the Senate and the majority leader of the House, acting jointly, or the minority leader of the Senate and the minority leader of the House, acting jointly, file a written request with the Secretary of the Senate and

the Clerk of the House that the Congress reassemble for the consideration of legislation."

The Republicans controlling Congress in 1947 provided in a concurrent resolution that the Speaker of the House, the President pro tempore of the Senate, and the majority leaders of the two houses acting jointly could call Congress in session again if they deemed it in the public interest. When some Democrats complained that by this provision Democratic party leaders were excluded from sharing in the power to summon Congress, Republicans answered by saying that the President is a Democrat and he can call a special session whenever he pleases.

THE TWO HOUSES COMPARED

Size and Term. Certain differences between the House and the Senate are fundamental. The Senate is the smaller body, being composed of ninety-six members, as against 435 in the House of Representatives. Generally speaking, its fellowship includes citizens older in years and wider in political experience. Frequently Senators have previously served in some branch of state government or in the House of Representatives. As their term is longer and the chances of reëlection greater, they are usually better acquainted not only with the problems of lawmaking but also with the inner workings of the federal administration.

Influence. The influence of Senators, due to age and experience, is augmented by their position as party leaders within their respective states. Through their right to pass on many presidential nominees to positions in the administration, they have a large power over appointments to federal offices; sometimes they are able by this means to strengthen their political machines in their respective states. They usually have great weight in selecting delegates to national party conventions, and in fact they are often responsible for the presence of a huge officeholding element in those assemblies. Such command over party resources within their states also enables the Senators to bring more or less pressure on the members of their party in the House of Representatives. When the state party organization, in close touch with its Senator or Senators, adopts a policy, it is usually expedient for the members of the lower chamber affected by it to fall in line with instructions.

Superior Skill of Senate. The Senate holds a whip hand over federal legislation. Owing to the almost unlimited freedom of debate in that chamber, a few members can block some bills indefinitely and hasten consideration of others. In such circumstances the "steamroller" tactics of the House cannot be so effectively applied to the Senators. Their technical skill due to long experience, and their other talents give them

a superior position in strategy. Seldom does a debate in the House attract the attention of the press throughout the country, but senatorial discussions on vital questions frequently break into front-page news. Whether on its merits or not, the Senate overshadows the House in both government and politics.

Economic and Cultural Backgrounds. In terms of economic and occupational groupings, the membership of Congress is drawn predominately from what is called the middle class. As George B. Galloway shows in a careful survey of the Seventy-ninth Congress,[5] a substantial majority of both houses belong to the legal profession. In comparison, there was a mere scattering of editors, publishers, physicians, teachers, and other professional men and women. If agricultural vocations and fishing had been represented in the House according to the percentage of the working population over fourteen years of age engaged in those occupations, they would have had eighty-three Representatives, whereas only fifteen came from those economic groups. Still more striking is the finding that while organized labor claimed about 14,000,000 members, only two trade union officials had seats in the House.

The fact that a majority of the members have received a college training of some kind shows that Senators and Representatives are removed at least a few steps from labor in fields, factories, and mines, if indeed they have ever encountered that experience. Many set themselves down as members of lodges and fraternal orders—Masons, Elks, Odd Fellows, Knights of Columbus, or Knights Templar. Veterans of the World Wars have a representation larger than their proportion of the adult population. The presence of women in Congress sometimes invites especial courtesy during proceedings, but in the main they serve on committees, act as committee chairmen, and take part in debates according to customary procedures.

Political Experience. To their work, the members of Congress bring varied experiences in politics. In the Senate, even after a political overturn, there is always a large proportion of members who have served several terms in that house. Enough "old timers" are ever present to take charge of directing the business of the chamber. The House likewise has a substantial quota of persons who "have grown gray in service," although after a party upheaval perhaps one-fourth or more are new to the business.

Many of the Representatives and Senators have had an apprenticeship in state or local government as legislators, governors, mayors, judges, or county officers. George Galloway's study of the Seventy-ninth Congress

[5] *Congress at the Crossroads*, pp. 28 ff. and Appendix Tables IV and V.

shows that nearly forty per cent of the members had previously served in city councils, state legislatures, and other legislative bodies.

Yet when there is a drastic upset in an election, a large proportion of the Representatives and Senators of the party that comes to power, after a long season in the wilderness of defeat, are likely to be new at the business; and those who have served previously may have had little, if any, practice as chairmen of committees, presiding officers, and managers of legislative operations. This was true, for instance, of the Republicans who took control of Congress in January, 1947. They had been out of power for fourteen years—since March 4, 1933. Many of them had served in previous Congresses but merely as minority members, without any effective authority over procedure and legislation. Accordingly the Republicans had some difficulties in getting under way at the beginning of the first session. Even so, they had in their membership a substantial number of experienced Representatives and Senators and were soon able to start the direction of proceedings in the customary manner. "Veterans" among the Republicans possessed a decided advantage over the novices but that was to be expected in the circumstances.

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CHAPTER 9

Congress: Internal Organization and Work

THE FUNCTIONS OF CONGRESS

Participation in the Appointment of Public Officers. Congress is far more than a lawmaking body, although legislation is regarded as its primary duty. Acting separately or together, the two houses may exercise large powers with regard to the appointment and removal of high officers. Thus if no candidate for President receives a majority of all the electoral votes cast, the House of Representatives shall immediately choose the President by ballot and majority vote from among the three persons standing highest on the electoral list, the Representatives from each state having collectively one vote. If no candidate for Vice-President receives a majority of the electoral votes, then the Senate, each Senator having one vote, shall, by majority vote, choose the Vice-President from the two highest persons on the electoral list.[1]

Although Congress itself cannot appoint any administrative officers,[2] it may by law determine the number, titles, and duties of such officers, and with some exceptions decide whether they are to be appointed by the President alone, the courts of law, the heads of departments, or by the President with the consent of the Senate. In the Seventy-eighth Congress, the Senate was called upon to review and confirm or reject nominees to more than 21,000 posts in the Federal Government presented to it by the President—at a great expense of time and energy on the part of Senators; but Senators are constantly demanding that even more appointments shall be made subject to their confirmation. If the President is of one political party and the majority of the Senators belong to another party, the power of the Senate to confirm appointments

[1] Twelfth Amendment. Thomas Jefferson (1801) and John Quincy Adams (1825) were chosen President by the House of Representatives, and Richard M. Johnson, with the support of President Jackson, was chosen Vice-President by the Senate (1837). Congress may, in the case of a contested presidential election, create a commission to settle the dispute. This was done in 1877 and the special commission decided in favor of the Republican candidate, Rutherford B. Hayes.

[2] The houses of Congress, however, exercise special administrative powers over the Library of Congress, the Government Printing Office, the Botanic Garden, and Capitol Buildings and Grounds.

may be used to control or deflect his policies in administration and in general. In such cases, especially with reference to many strategic offices, the President does well to consult opposition Senators quietly in advance.

Removal of Officers. The Constitution expressly authorizes the removal of the President, Vice-President, and all civil officers by the process of impeachment, trial, and conviction. The House of Representatives may by majority vote impeach, that is, bring charges against any such officer on grounds of treason, bribery, or other high crimes and misdemeanors; impeachment cases are tried by the Senate, and upon conviction the person impeached is removed from office. This is, of course, a cumbersome and time-consuming operation; there have been only twelve cases of impeachment since the beginning of the Federal Government in 1789 and only four of the twelve officers impeached—all judges—have been removed. While Congress cannot directly remove a federal officer by any other method, it can accomplish this end indirectly. It may abolish any administrative office which it has created and thus eliminate the head and all employees under his direction. It may cut off the appropriations for any administrative bureau, agency, or office and so effect removals by a circuitous route.

In an indirect manner Congress may oust individual officers—by stopping their pay. In 1943, Martin Dies, in the House of Representatives, named and denounced thirty-nine officials as "crackpot, radical bureaucrats," and shortly afterward Congress incorporated in a deficiency appropriation act a provision that after a given day none of the money could be used to pay the salaries of three men mentioned by name, unless prior to that day they were reappointed by the President with the consent of the Senate. President Roosevelt branded this action as unconstitutional, the three men kept at work, and later they sued for their pay in the Court of Claims. They won their case. On appeal the Supreme Court declared that the action of Congress was a bill of attainder in effect and hence void. Thereafter it was the duty of Congress to appropriate the money to pay the salaries of the three men for their services. But there was no way to compel Congress to make the appropriation and when it came up in the House of Representatives in 1947 opponents of payment cited precedents to show that Congress had previously refused to pay claims which had been adjudged valid. Such action is open to criticism on moral grounds but neither the President nor the courts can compel Congress to appropriate money for any purpose.

Running Errands. A time-consuming task for every member of Congress is that of serving as "Washington agent" for "the folks back home"

—running all kinds of errands for constituents. Some of these duties are related to securing rights to which citizens are entitled under the law; others are related to obtaining government jobs, contracts, or protection; and still others are simply personal favors having no relation whatever to the business of government. Personal favors may range from collecting materials for a high school debating team and finding hotel accommodations in Washington for constituents or friends, to giving free legal advice and making contributions to local charities. Representative J. P. Priest of Tennessee once reported that on a single day forty-six out of the forty-eight people who came to see him presented personal problems unrelated to legislation.[3]

Legislative Duties. The major duty of Congress is, of course, to make laws. With reference to their substance federal laws fall into three broad classes. The first embraces laws which may be called administrative—laws respecting the structure and functions of the executive and judicial branches of the Federal Government and the management of business in Congress itself. In this relation Congress creates and prescribes the duties of the departments, offices, commissions, boards, and other agencies through which the President carries out his executive responsibilities. Under this head also Congress determines the number of Supreme Court justices, the number and nature of all inferior courts, the procedure of the courts, and, subject to a few limits in the Constitution, the kinds of cases which each type of court may hear and decide (Chapter 12). Finally, Congress alone can lay taxes and provide the money for the conduct of the executive and judicial branches, without which they would be powerless.

The second broad class of laws, which may be called social and economic, embraces statutes respecting the life, liberty, and happiness of the American people and their relations to other nations of the earth in peace and war. Under this head Congress, subject to the Constitution, may prescribe what the people or classes of people must do or refrain from doing, what they may say and do in expressing their ideas and opinions, and what uses and dispositions they may make of their labor and property.

The third class of federal laws consists of special acts bewildering in variety. Within this class come such measures as laws transferring particular tracts of public lands to private parties, settling claims made by Indian tribes, making gifts of obsolete military equipment, and restoring the name of Hoover to Boulder Dam on the Colorado River. The Congressional Reorganization Act of 1946 shifted from Congress to

[3] G. B. Galloway, *Congress at the Crossroads*, pp. 278–280.

other agencies the settlement of various claims against the Government, thus reducing the load of special bills but despite that action both houses must give considerable attention to minor matters that involve no large questions of national interest.

Foreign Policy and Affairs. It is sometimes alleged that the President has unlimited powers in determining foreign policy and directing foreign affairs but this is, to say the least, an exaggeration. Congress may by law declare the foreign policy of the United States in respect of matters, general and particular; for instance, that the United States will not permit the further acquisition of territory in the Caribbean region by any Old World power. If a foreign policy is incorporated in a treaty, the consent of two-thirds of the Senators is necessary to make it effective. The realization and support of a foreign policy often call for the expenditure of money, and Congress, having undisputed control over the making of appropriations, may determine its effectiveness. Besides, the power to regulate commerce with other nations, to define offenses against the law of nations, and to levy tariffs is specifically vested in Congress by the Constitution of the United States. In the discharge of its duties, therefore, Congress is under obligation to be thoroughly informed about foreign policies and affairs, especially in these times when the foreign operations and commitments of the United States place an enormous strain on the administration, economy, and other internal affairs of the country.

Responsibility for Law Enforcement. Besides enacting, amending, and repealing statutes, Congress must scrutinize their enforcement and inquire into the results of such enforcement. Thus it is bound to be constantly concerned with the ways in which the executive and judicial branches of the Government actually operate and, if need be, to correct unlawful or inefficient modes of conduct. Although Congress cannot itself exercise ordinary executive and judicial powers, it bestows many kindred powers upon particular agencies and has responsibility for guaranteeing that they are duly exercised in accordance with its intentions.

Congress as Guardian of Public Interests. Its obligations do not end here. Under the Constitution members of Congress are representatives of their constituents and at the same time guardians of the national interest and welfare no less than are the President and the judges. They are under obligation so to conduct themselves in official and private life as to uphold the American system of constitutional government, command the respect of the American people for that system, protect the liberties of the people against arbitrary actions by the Government, maintain national security against foreign and domestic foes, and assure

the safety of the Republic. In discharging their manifold duties they are morally bound to inform themselves respecting matters with which they deal and dedicate their talents to the fulfillment of the trust vested in them.

THE CONGRESSIONAL REFORM OF 1946

The Reorganization Act. Shortly after the advent of the New Deal in 1933, Congress came under a fire of criticism from many quarters on the ground that it had failed to meet some of its primary obligations. Congress, critics alleged, maintained cumbersome and outmoded machinery for the transaction of its complicated business; it wasted time in endless bickering over trivial matters, it lacked both the equipment and the methods necessary for dealing effectively with the number, variety, and weight of the matters before it for discussion and settlement; it shirked its responsibilities by yielding too readily to the President's demands for legislation and money; it hastily enacted too many laws conferring blanket powers on the President and executive agencies; and was too indifferent to the manner in which the administration enforced the laws.

In response to such criticisms, Congress appointed a joint committee to investigate the subject and propose reforms. After a long inquiry the committee made numerous recommendations, and in 1946 Congress embodied many of them in what is known as the Legislative Reorganization Act, "to provide for increased efficiency in the legislative branch of the Government." [4] The Act fills forty-five pages of print. It reduced the number of committees (p. 157) in both houses, specified the matters to be referred to each, and regulated their procedures in many details. It provided for closer congressional supervision over executive agencies, the civil service, and the expenditure of the money voted for the support of the Government. It prescribed stricter methods for scrutinizing and making appropriation and revenue laws. By establishing new methods for handling claims for money damages against the Government, it materially diminished the number of petty bills which had hitherto occupied a great deal of time in both houses. To aid Congress in obtaining more information on affairs before it, the Act expanded the Legislative Reference Service in the Library of Congress and enlarged the staffs of experts at the command of committees in conducting research. It also sought to curtail the pressure of special interests on the members of Congress by requiring the registration of lobbyists engaged in promoting or blocking the proposal and enactment of laws.

[4] For the general operation of the Act, see Chapter 13.

NATURE OF THE LEGISLATIVE BUSINESS BEFORE CONGRESS

Complexity of Issues. Despite the improvements made by the Reorganization Act of 1946, the business before Congress is intricate in character and enormous in amount. It involves every phase of political economy and international relations. Taxation in all its branches, the administration of the post office, natural resources and other property, military questions (manpower, guns, battleships, airplanes, and atomic bombs), the regulation of railways, the control of agriculture, the interests of labor, the relief of the unemployed, the government of the city of Washington—these and a hundred other matters are constantly pressed upon the attention of the members. The demand for new legislation from every quarter is steady and insistent. Large questions of policy and problems minutely special in nature continually call for judgment of the highest order and knowledge deep and wide-reaching.

This is true in times called "normal." It is doubly true in times of war and national crises. And in this connection it is well to remember that nearly every generation in American history has been involved in war and that economic depressions seem to be frequent cyclical occurrences. In times of war and economic distress demands for far-reaching legislation affecting life and property flow in torrents upon Congress, as the center of legislative action on a national scale.

Immense Number of Bills. At all times the business before Congress is immense in sheer bulk, to say nothing of the difficulties involved in it. Each Congress in the course of its life of two years is confronted by thousands of bills, joint resolutions, concurrent resolutions, simple resolutions, and reports. Any member may introduce as many proposals as he likes. He does not have to secure the permission of anyone in advance or assume any responsibility for them even if they carry a charge upon the treasury. As a matter of fact many are introduced "by request" just to please this or that group of voters.

Public Bills. It is not enough to say that a multitude of bills is introduced in each Congress; the character of these measures must be analyzed, for it has a close relation to tactics and leadership in both houses. Some of the measures are broad in scope; these we may call "general bills." Others pertain to particular persons, localities, or claims; these are "special bills." For every important general bill a variety of special propositions are laid before Congress, despite the limits imposed on such legislation by the Reorganization Act of 1946.

The significant general bills affect vital economic interests throughout the country such as railways, manufacturing, shipping, labor, and farming; they concern the whole nation as well as special groups. Over

them the more serious political divisions occur. It is mainly in carrying bills of this character through Congress that the leaders of the majority must bring pressure to bear on the rank and file. It is in this connection that cleavages between the right and left wings of each party appear and threaten the disruption of the regular organization.

Special Legislation—The "Pork Barrel." Great as may be the interest of the ordinary member in the fate of general bills, his own political fortunes are likely to be closely bound up with special local measures making appropriations for post-office buildings, river and harbor improvements, and other projects. The local party machine and active citizens among his constituents expect him to get all he can out of the federal treasury for his district or state. On seeking reëlection he must be in a position to "point with pride" to the amount and importance of the favors he has secured for "his people." If he fails to obtain advantages for them, they may turn against him and support some more energetic and resourceful person.

Law making of this character is called "pork-barrel" legislation, a term reminiscent of plantation days. It was an old custom on southern estates to allot periodically a certain amount of pork to the slaves; at the appointed time the pork barrel was rolled into view, the head knocked in, and the contents distributed among eager beneficiaries. The applicability of the figure of speech to the legislative process described above needs no elucidation.

"Log Rolling." To "get his pork" from the treasury, the ordinary member is usually compelled to do two things. In the first place, he must secure the consent of his party leaders who control legislation, and in return he must usually vote as he is told on other bills. Thus he may have to sell his birthright for a "mess of pork." In the second place, he must cooperate with others bent on helping their own districts. Such cooperation is called "log rolling." In olden times pioneers on the frontier helped one another to cut trees and pile up logs for cabins or for burning—a process known as "log rolling." Like the term "pork barrel," the phrase affords a homely but accurate characterization of the legislative procedure to which it is applied. So when the member of Congress with his eager eye on special bills is not busy placating his party leaders, he is likely to be engaged in negotiating petty exchanges with his friends.

PARTY MANAGEMENT AND LEADERSHIP IN CONGRESS

The Majority and the Minority. In organizing each house, determining the measures to be acted upon, and providing for the direction of business, political parties play a prominent role. The members of the

majority party in a given house are regarded as mainly responsible for the chief policies and measures to be adopted. In opposition to them is an organized minority and usually one or more independents, who may criticize and perhaps vote against the measures advanced by the majority. It is true that votes on propositions in Congress are by no means always cast according to party lines, but the principal achievements as well as the failures of each session are generally to be ascribed to the majority party, especially its leaders.

The Party Caucus. Connected with the directing machinery of each party is a separate caucus or conference of its members in each house, but definite statements about the organization and functioning of this body are difficult to make.[5] Its meetings are irregular and its powers are informal. Yet we may safely say that, before the opening of a new Congress, the majority in the House of Representatives holds a caucus which selects its party leaders, including its candidate for Speaker, and arrives at decisions respecting the membership of committees and rules of the House—adopting or modifying those previously in force. About the same time the minority also holds its caucus and agrees upon its party leadership and appointments to committees. From time to time other meetings are held to discuss matters of high importance, including bills and resolutions of evident party significance. In the Senate similar partisan conferences operate behind the scenes.

Power of Caucus in Senate. During some periods in our political history, the caucus has been a mere "rubber stamp" for approving projects and measures already formulated by a few leaders. Such was the state of affairs in the Senate near the opening of the twentieth century. At the present moment however no such concentration of power exists in that body.[6] True, the party conference continues to function there, but owing to the independence of "insurgents" and "progressives" and to the absence of narrow limits on speech-making, those who appear to direct things must resort to persuasion; and the caucus has become a kind of informal council called occasionally as special efforts may be required to reach an understanding by common consent. Senators are not bound to speak and vote for the measures agreed upon in their party assembly, although naturally they must allow some weight to its decisions. Only occasionally does a caucus session have national significance; as, for example, in 1944 when Alben Barkley, the Democratic leader, after a clash with President Roosevelt, resigned his position and

[5] See Kefauver and Levin, *A Twentieth Century Congress*, pp. 99 ff. Democrats seem to prefer the term caucus, and the Republicans, the word conference.

[6] For a discussion of leadership in the Senate, see the surveys of each session of Congress published in the *American Political Science Review*.

was given a vote of confidence by reëlection at a special meeting of the Democratic caucus.

Power of the House Caucus. In the House of Representatives the power of the party caucus varies from time to time and party to party. If the leadership of the President is strong in Congress, then consultations with the rank and file of members in caucuses are likely to be less frequent, if not abandoned entirely. On the other hand, if the members of a party are highly independent in their position and views, the leaders will have to reckon with them continuously and often call them into conference on major matters.

Nature of Caucus Meetings. Whether acting under its own momentum or under the direction of a few masterful figures, the caucus has often overridden individual dissenters in the party, in the House of Representatives at least. Meetings are held in secret. Many members may be absent, and decisions in such cases will be made by a small portion of the party group. Since every member is morally bound to abide by the decision of his party caucus—unless he has made contrary pledges to his constituents—a vote in the conference may compel him to support, on the floor, a particular bill or resolution which he does not favor. Again and again it has happened that the dissenters among the majority, if united with the opposition, could have defeated or carried a measure. In other words, the caucus, when employed, may encourage legislation by a minority of the House.

Limited Utility of the Caucus. It would be a mistake to lay too much emphasis on the caucus as a tool for resolving intraparty conflicts and holding party members in line. In any event only a small part of the business before Congress is settled in advance by any solemn conclave in which all party members may participate. Even the conferences held at the beginning of a new Congress for the nominal purpose of designating the candidate for Speaker and the members of committees sometimes do no more than "rubber stamp" lists furnished by party leaders. Votes in both houses on issues of policy show that a caucus decision may be treated as far from binding on the participants.

In the Seventy-eighth Congress, which opened in January, 1943, many Democrats united with Republicans in defeating or carrying bills contrary to the wishes of majority leaders and President Roosevelt as the Chief Executive and titular leader of the Democratic party. After the Republicans took possession of both Houses in 1947, many Democrats joined them in opposing Democratic leaders, even President Truman; only by enlisting the aid of Democratic Representatives and Senators were the Republicans able to muster the two-thirds vote necessary to pass the Hartley-Taft Labor Bill over the President's veto. In

short, many sources of managerial power must be sought outside caucuses or conferences.

Presiding Officers. To some extent a concentration of power for the determination and direction of business is effected in the House of Representatives by the Speaker. Once regarded as a presiding officer and moderator, he is now the outstanding figure of the majority party in that chamber. Chosen nominally by the party caucus and formally elected by the whole House as required by the Constitution, he cannot sit passively in his chair and see proposals advocated by his party defeated by the dilatory tactics and maneuvers of the minority. He has great power over procedure and can exercise it in many directions. He may refuse to put motions which he thinks are merely designed to delay business; in the absence of other arrangements made by party leaders he may recognize or refuse to recognize anyone who wishes to call up a measure for debate or to make a speech; he may rule members out of order and decide questions of parliamentary law—subject, of course, to appeals from the decisions of the chair. Inevitably, by virtue of his office and his party prestige, the Speaker as such is a directing force in the management of legislative proceedings.

It is otherwise in the Senate. There the presiding officer, by constitutional mandate, is the Vice-President of the United States, if there is one at the time and if he chooses to exercise his prerogative; but, though a party man himself, he is a moderator and interpreter of parliamentary law rather than a manager. In the absence of the Vice President the presiding officer of the Senate is the President pro tempore, a leading member of the majority party, selected by the party caucus and confirmed formally by the Senate. Even the President pro tempore, however, is merely a kind of moderator, not an autocrat in the chair.

Party Floor Leaders. The dominant party in each house of Congress has a floor leader, chosen or approved by the party caucus; and the minority party also has a floor leader, selected in the same way. As a rule these leaders are members of wide experience and high standing in party councils. For instance, when they took control of the House of Representatives in 1947, the Republicans designated as floor leader Charles A. Halleck of Indiana, who had been a member since 1935; and the Democrats designated as minority leader Sam Rayburn of Texas, who had long served as Speaker of the House. In the Senate, the Republicans chose as floor leader Wallace H. White of Maine, who had served for years first in the House and then in the Senate; on their part, the Democrats designated as minority leader Senator Alben Barkley of Kentucky who had been their masterful majority leader since 1937.

It is the duty of the majority leader to keep in close touch with the

rank and file of his party colleagues, to learn their opinions, to understand their prejudices and ambitions, and whenever necessary to "line them up," if he can, in support of measures on which party managers have reached decisions. In the House the floor leader is influential in determining who shall speak on bills and other measures, for by conferences with his party brethren he helps to divide the time allowed for debates and to make up the list of members whom the Speaker will recognize. The majority floor leader has succeeded to many of the prerogatives formerly exercised by the Speaker; in terms of power he ranks next to that official; and if he is clever and efficient he may hope, in time, to have the honor of taking the chair himself. The minority floor leader, also, has influence and prospects; for example, Joseph W. Martin, who had previously been minority leader in the House, was elevated in 1917 to the post of Speaker by the Republicans.

Besides conducting maneuvers in support of their respective party interests, the majority leader and the minority leader in each chamber often confer with regard to many matters, such as deciding upon the business to be raised for consideration, the amount of time to be allotted to debate, and finally the hour or day for bringing a specific issue to a vote. They are "friendly enemies" and the majority leader, although quietly or openly dictatorial in his methods, must often be circumspect enough to seek some cooperation with his "opposite number."

Whips and Steering Committees. Each of the party leaders in the two chambers has under his direction a whip and a number of assistant whips. As their name implies the whips aid their superior in maintaining contacts with party members—in collecting and passing out information respecting legislative business. To assist him in the conduct of legislative management and maneuvers, each of the party leaders also has at his side a steering or policy committee composed of influential members. In recent years the Democrats have made little use of steering committees, preferring to rely mainly on their whips; while the Republicans have employed them extensively in determining matters of policy and tactics. Recognizing the vital importance of the function to be performed by whips and steering committees, the Joint Committee on the Organization of Congress recommended in 1946 that each house establish majority and minority committees on policy, to consist of seven members each, chosen by the party caucus; but this recommendation was not adopted. Party leaders evidently shrink from creating such a definite body of legislative counselors and policy makers.

Special Agencies of Control in the House. Subject to overhead

managers are two special groups in the House. The first is the committee on rules, in which the majority speak for the party that is dominant in that chamber. Owing to the limitations on debate there and the large number of members to be heard, strict management is necessary in the transaction of business. Hence large powers are vested in this committee. It has a right to be heard at almost any moment. It may bring in resolutions stating what measures shall be considered, how long they may be discussed, whether they may be amended, and when the vote shall be taken. Members of the party for which the committee acts may revolt and refuse to vote as directed but if they do they incur all the risks inherent in party "treason." The second group in the House endowed with large powers of direction consists of the chairmen of the standing committees in charge of the weightiest measures brought up for debate and action. They do not constitute a coherent body. Indeed, they may be competing among themselves for the right to be heard and to secure the enactment of the measures they sponsor but they may draw together informally and resort to mutual aid. In any event, the chairmen of the powerful committees must be reckoned with in party councils.

Character of Leadership in the Senate. It is one of the axioms of political science that the more members a governing body has the more certain is a concentration of business in a few hands. This axiom applies to Congress. The Senate has only ninety-six members, as against 435 in the House. The Senators are usually well acquainted with one another. Among them are always several members with experience derived from long service who are marked out for management. The presiding officer has far less authority than the Speaker of the House to affect the course of affairs. In such circumstances actual leadership falls largely to the floor leaders or to the policy committee and a few committee chairmen in charge of the primary measures up for action. Each party in the Senate, as we have seen, has a caucus or conference, but its power is seldom if ever despotic. Majority and minority floor leaders, whips, and the steering or policy committees in the Senate have as their function, not dictation, but rather the maintenance of party harmony and the transaction of business by informal methods. Hence the individual Senator enjoys far more freedom in party councils and on the floor than does the average member of the House.

Leadership Outside Congress. There are in addition other practices and customs which work for a concentration of power in the transaction of business in Congress. The President, through his prestige, his party leadership, and his control over appointments to office, often exercises an immense influence on the work of Congress. In times of

crises, informal conferences of the party leaders in both houses and party officers and workers outside may be held at the Capitol or the White House. But here we pass from routine practices into the realm of complex and often hidden forces which press in upon Congress from every point of the country.

Struggle over Leadership in Congress. Leadership in Congress, once secured, thrives on power. Every member has schemes of his own relating to his district and demanded by the voters who elected him. So he must get a hearing. And in the press of things he cannot get it without the consent of one or more powerful leaders and committee chairmen. What can he give in return? His vote on the measures recommended by party leaders, his loyal support to the program as formulated by them. So the net is drawn tightly and power concentrates. In time, members, especially newcomers, who receive few or no favors or recognition, grow tired of their subordinate position and become "insurgent." They insist upon reforms: a wider dispersion of committee assignments and party authority, and some kind of device for getting their bills out of committees and up for action. Intransigents have occasionally gone beyond this and demanded that every bill introduced shall be automatically brought out and put to a vote. But it is not likely that such a utopian reform will occur soon; it is more probable that we shall witness the continuance of the old uproar over leadership and "gag-rule," with changes only in emphasis.

THE COMMITTEES OF CONGRESS

Standing Committees. Active, though not strictly coordinated, leadership in Congress is afforded by the major standing committees—nominally chosen by each house but in fact by party managers, with more or less control by caucuses, subject to the weight of seniority—the precedence of members oldest in service. As the bills in Congress become more complicated, with the advance of technology and changes in the public business, so the power of those who have special knowledge and experience in various fields must increase. This is almost inevitable. It is highly desirable. At all events, the legislative work of each house is done mainly by committees composed of members more or less expert in particular branches of lawmaking. Each important committee is dominated by a majority representing the party which is supreme for the time being, and its chairman is nearly always a prominent person. He has influence and must be heard.

Under the Reorganization Act of 1946, which went into effect in January, 1947, the number of standing committees in the Senate was reduced from thirty-three to fifteen and the number in the House

from forty-eight to nineteen. Several of the committees in both houses have identical names—appropriations, armed services, banking and currency, District of Columbia, expenditures in the executive departments, interstate and foreign commerce, judiciary, public lands, and public works. In other cases the committee titles vary, but with some exceptions the committees of the two chambers have similar functions to perform.[7] In addition, the houses have some joint committees; for example, on printing, the Library of Congress, internal revenue taxation, and atomic energy. To comply with the terms of the Employment Act of 1945, Congress created a joint committee on the economic report which the President sends to that body periodically. Besides establishing standing committees, Congress creates from time to time special or temporary committees for the purpose of conducting particular inquiries and reporting results and recommendations.

While the reduction in the number of standing committees in the Eightieth Congress worked for a centralization of over-all responsibilities in the hands of fifteen chairmen in the Senate and nineteen chairmen in the House, the number of subcommittees was greatly increased, each with a chairman. The House committee on the armed services, for example, was divided into twelve subcommittees. Owing to the gravity of the business assigned to most of the subcommittees, their chairmen at once acquired a special position in legislative operations and were soon known as "that new governing class created by the Reorganization Act." If, for instance, a citizen or newspaper reporter wishes to find out what is going on in the judiciary committee of the Senate with regard to patents, immigration, or constitutional amendments, he will find it desirable to see the subcommittee chairmen in charge of these special subjects.

Each standing committee has a well-furnished office and many perquisites which are appreciated by members of Congress; that is, it has an allowance for secretaries, stationery, and other purposes. Often members employ their wives or relatives as clerks and assistants. Undoubtedly money is wasted in useless activities, but criticisms of the system fall on deaf ears. Although efficiency demands a pruning of the outlays for committee secretaries and political "assistants," the necessity of having assignments for all members and jobs for their constituents, and sometimes their relatives, makes economy in this domain difficult to achieve.

Committees Nominally Elected by the House. At the beginning of this century the Speaker appointed all standing committees of the

[7] The House has a unique committee, on un American activities, which is constantly engaged in the investigation of persons and activities deemed "subversive."

House, but by the so-called "revolution" of 1910–1911 the practice was brought to an end. As matters now stand, the committee members allotted to each party are chosen by majority vote at a solemn party caucus and their names are submitted to the House for approval. While the change has reduced the ability of a small group of insiders to dictate the final choice of committee members, a few leaders can still exert great influence through the making of nominations.

Several days before each new Congress opens, the leaders of each party who have seen long service in the House assemble in Washington and prepare a provisional list containing the names of proposed committee chairmen and members, perhaps leaving a few vacancies for later consideration. Subsequently at a caucus negotiations are continued; and a party committee on committees may be appointed to draw up the final "slate" for approval by another caucus. After Congress opens, the majority and minority lists are submitted to the House for confirmation.

The Rule of Seniority in the Selection of Committeemen. In practice committee assignments fall to members roughly according to seniority in service, their abilities, their demonstrated force as leaders, and their capacities for debate and management. Of the traditions governing the choice of committee members none is more noteworthy than the custom that distributes important assignments among members of Congress in accordance with the length of their service—the "seniority rule." It is only natural that the direction of affairs should fall to the most experienced in the work of legislation. However, when one of the parties returns to power after a long season in the opposition, its new incoming members are sure to make a great outcry against allowing their older colleagues to monopolize all the choice committee posts; but the principle of seniority is applied with few exceptions. This means, when the Democrats are in power, that southern members, who have usually been in a long time because of continuous Democratic supremacy in their section, will loom large among committee chairmen. In the Seventy-fifth Congress, for example, the chairmen of five out of ten important committees in the Senate were from the south, and the chairmen of seven out of ten important committees in the House were from the same section.[8]

Committees Receive and Originate Measures. Thus each of the two houses has created miniature legislatures to which are referred, in accordance with their subject matter, all bills and resolutions. For instance, in the House, every piece of proposed legislation relating to the revenue or purporting to raise revenue automatically goes to the

[8] O. R. Altman, *American Political Science Review*, December, 1937, p. 1074.

committee on ways and means. The recommendations contained in the President's message are distributed among committees on the same principle. *But a committee is not limited to suggestions from outside; it may and does itself originate bills and other measures relating to* questions placed under its jurisdiction.

Committee Action on Bills. Hundreds of the bills and resolutions that go to committees are not considered at all.[9] It is only the propositions which are likely to be reported favorably for action that receive a more or less severe scrutiny. In such cases papers and documents may be secured from the President or high officials; department heads or other administrative authorities may be requested to appear personally, express their opinions, and answer questions. Friends and opponents of projects may be freely admitted to state their views; witnesses may be summoned to give testimony; and the committee may even travel about the country, hold hearings, and gather evidence. Every year thousands of pages of testimony before committees are taken and printed at heavy expense. Thus citizens with ideas to expound, valuable or otherwise, and grievances to express, have extensive opportunities to be heard.

In most instances the measures entrusted to a particular committee are scrutinized or formulated by a subcommittee (in which the minority members may receive scant recognition, if any), and the whole committee generally accepts its report. When a strict party question is on the carpet, the majority members of the committee in charge may fix up the bill. After it is completed, they may invite the minority to vote on it as a matter of form or they may even overlook that courtesy. With regard to any proposition in hand, a committee may recommend its adoption, with or without amendments, report adversely, delay the report on it indefinitely, or ignore it altogether.

Committee Decisions Carry Great Weight. As a rule, committees really control the sifting, preparation, and report of bills for debate, and their final deliberations are secret. In the pressure of business, especially in the House of Representatives, important measures are often forced through exactly as they come from committees, without any serious examination or a single amendment while on the floor. This practice, of course, vests an enormous authority in the committees and has almost changed the House from a deliberative into a ratifying assembly, despite the appearances of discussion. At the other end of the Capitol, however, the Senators, fewer in number, can insist on subjecting projects laid before them by committees to more careful

[9] Less than one bill out of four was reported out of the committees of the Seventy-eighth Congress.

analysis and more searching review. In their chamber the committee holds no such power of life and death over bills and resolutions.

Committee Decisions May Be Overruled. Measures on which committees do not report favorably have a very slight chance of passing. Even a favorable report is no sure guarantee of victory, especially in the Senate. In the House it rarely happens that a member is able to get action on a bill which the committee in charge opposes; only by securing the signatures of 218 members, including his own, can he bring on the floor a project "bottled up in committee." In the Senate greater freedom is enjoyed in this respect because it is easier for a Senator to obtain unanimous consent to a motion discharging a committee from the consideration of a measure and thus secure some discussion of it.

Criticism of Committee System. Owing to the high prerogatives enjoyed by committees, to the privacy that surrounds their operations, and to the pressure of lobbies on them, a great deal of criticism has been directed against the whole system as a part of the legislative machinery. In the House complaints are constantly made, especially by the minority. "You send important questions to a committee," once lamented a member, "you put into the hands of a few men the power to bring in bills, and then they are brought in with an ironclad rule, and rammed down the throats of members; and then those measures are sent out as being the deliberate judgment of the Congress of the United States when no deliberate judgment has been expressed by any man."

It would be idle to contend that the indictments brought against the committee system are to be lightly dismissed. In the House of Representatives, at least, it certainly tends to break responsibility into nineteen fractions and to confine the work of that chamber to the business of ratifying committee decisions. Since debate on the floor may be brief and desultory, the secrecy that surrounds committee proceedings is made all the more objectionable. To make matters worse, the system permits the committees to work on their respective measures with little or no regard for one another, each preparing its own bills without constant reference to over-all policies and kindred measures in other hands. Under these conditions conflicts, contradictions, and confusion in legislation are inevitable.

In their operations, spirit, and effectiveness, both standing and special committees vary widely. The hearings of a committee may be carefully prepared in advance and the testimony of witnesses, whether administrative officials or private persons, may be skillfully directed to specific issues of immediate pertinence to legislative action. More

than occasionally, however, they are merely rambling discourses and conversations, punctuated by disputes and irrelevant wrangling or by the browbeating of witnesses with little or no regard for their rights, moral or legal. Corresponding committees of the House and Senate waste the time of officials and citizens by holding separate hearings and making reports that duplicate information. If the committee chairman is a sensationalist, and in the case of the special committee he often is, then a committee hearing may degenerate into a public brawl which gives egotists a chance to break into the headlines of newspapers and win a meretricious notoriety.

INFORMATION FOR LEGISLATIVE ACTION

Each house makes special provisions for securing information on economic, technological, administrative, and other complicated problems. Both chambers have definite allowances for this purpose and additional amounts may be set aside by law at any time.

Inquiries by Committees. Generally speaking, five types of agencies are employed in such work. The Senate or House may direct one of its standing committees to conduct an inquiry into a particular matter and supply it with funds to hold hearings and engage expert investigators and advisers; or it may create a special committee for such a purpose—a practice now frowned upon but not forbidden by the Reorganization Act of 1946. If the question is deemed of high significance by both chambers, they may unite in appointing a joint committee of inquest with similar powers; for example, the joint committee of 1945–46 on the Pearl Harbor catastrophe of December 7, 1941. A fourth type of exploring organ, occasionally created, consists of members of both houses and prominent citizens named by the President or members of both houses and representatives from executive agencies. Such committees are usually authorized to appoint expert assistants for the purpose of collecting data, making detailed analyses, and aiding in the formulation of policies.

Inquiries by Executive Agencies. The fifth type of agency used by Congress in developing information is a branch or division of the executive department. For example, on one occasion, by joint resolution, it instructed the Interstate Commerce Commission to scrutinize railroad discriminations and monopolies, and to report on the same from time to time. Frequently an executive office or agency is authorized by law to carry on certain studies on its own motion and present the results to Congress. Such powers, for instance, are enjoyed by the Federal Trade Commission. Again, an executive establishment may

be called upon by both houses or either of them to make a particular inquiry.

Power of Congress to Investigate Executive Affairs. In making inquiries Congress may pry into the workings of federal departments and offices. Although the Constitution vests the executive power in the President, a long line of precedents establishes the right of Congress to scrutinize his enforcement of the law. In the early part of the nineteenth century, the House of Representatives asserted its authority in this respect to find out whether any of the federal employees had conducted themselves improperly and to discover whether the money appropriated had gone into legal channels. Long afterward, during the winter and spring of 1923–24, more than forty congressional investigations were made into the "oil scandals," corruption in the Veterans' Bureau, and other seamy matters. Before the season closed two cabinet members were forced out, one prominent official went to the penitentiary, and indictments were formulated against other alleged offenders.

Notwithstanding these and many other precedents, it is still an open question how far Congress or either house may go in compelling the executive branch of the Government to yield to a demand for information. For example, President Theodore Roosevelt once directed the Attorney General not to respond to a request of the Senate for a report on a particular matter and he further declared that "heads of departments are subject to the Constitution and laws passed by the Congress in pursuance of the Constitution, and to the direction of the President of the United States and to no other direction whatever." In 1943 President Franklin D. Roosevelt ordered certain officials not to turn over to a committee of the House a number of documents demanded during its investigation of the Federal Communications Commission. On some occasions, executive officials have insisted that their communications must be kept secret or have declined to give documents and data to congressional committees on the ground that such action would be incompatible with sound public policy. This practice is often followed by the State Department in respect of foreign affairs.

Evidently there is a line which Congress cannot cross merely by passing a resolution. But presumably by formal legislation it may proceed to almost any length. Surely the theory of the separation of powers does not mean that the moment an executive agency is created, it is subject to the President alone and is entirely emancipated from congressional scrutiny. It would be preposterous to say that Congress can organize

and abolish departments and offices at will, and yet cannot inquire into their operations.

Citizens May Be Compelled to Testify. Although the power of Congress to investigate other branches of the Federal Government is limited in practice by certain restrictions, its right to secure information from private citizens on matters germane to its duties is now fully recognized. If there had been any doubt on the point, it was settled by the Supreme Court of the United States in the case of McGrain *v.* Mally S. Daugherty, decided in January, 1927. The defendant in the case declined to appear before a select committee of the Senate engaged in investigating certain acts of his brother, Harry M. Daugherty, Attorney General, and was taken into custody under a Senate resolution directing the sergeant-at-arms to bring him before the bar of the chamber. Shortly after he was arrested under this measure, the defendant was released by the Federal District Court at Cincinnati on the ground that the Senate had exceeded its authority. On appeal the Supreme Court reversed the decision of the lower tribunal and in the course of a long opinion held that the Senate investigation was ordered for a legitimate object, that the witness had wrongfully refused to appear and testify, that he had been lawfully arrested, and that the Senate was entitled to require him to give testimony pertinent to its inquiry either at the bar or before the committee. Later the power of Congress in this connection was reinforced when a prominent leader in the oil industry was sent to prison for refusing to answer questions respecting alleged frauds in the granting of oil leases by the Federal Government. Hence a private person who refuses to testify is in peril of imprisonment.

Ordinary Committee Services. Naturally the chief sources of information for legislative purposes are the hearings and investigations conducted by the various standing committees of Congress, with reference to the legislative business before them. Each committee has commodious quarters in the Capitol or in one of the magnificent office buildings maintained for the Senate and the House. It has at hand a collection of materials bearing on the subjects referred to it, and commands the facilities of the libraries maintained by various departments and agencies of the Government.

Technical Assistance. Committees as well as individual members of Congress may call upon the Legislative Reference Service in the Library of Congress to conduct researches, collect materials, and supply facts and opinions bearing on various aspects of questions up for consideration. They also have experts of their own to aid them in dealing with difficult questions that are highly technical in nature. In formulating

and drawing up bills they may bring to their aid the skill of experienced men in the Legislative Drafting Service, headed by counsels, one for the Senate and another for the House of Representatives.

Debates as Sources of Information. Although some debates in the two houses are desultory, fruitless, and marred by unseemly partisan or personal wrangling, others are informing in many ways, especially when they are held to the subject of discussion by the presiding officers and the floor leaders either under a rule or a previous agreement. In such orderly debates the majority and minority members of the committee in charge of a measure, if they have given it more or less serious study, may lay the theme wide open and reveal in reasoned arguments the grounds of their differences to their colleagues on the floor.

The average member of the House or Senate, however, is absorbed in his own affairs and the work of the committees to which he is assigned. Hence he is likely to accept the bills reported by the other committees without attempting to make investigations of their merits on his own account. But opposition members and majority members who have not specialized in the subject under consideration often bring their experiences to bear upon it, ask illuminating questions, force a better joining of issues, or give pertinent and informed opinions on the probable results of the proposed measure if enacted into law.

This is particularly true in the Senate where freedom of debate is generous if not unlimited. There it is worth while for the member to devote days and weeks to special inquiries of his own. In that chamber he is given enough time to present to his colleagues all phases of the most complicated question and to discuss it at length amid a running fire of questions put to him by Senators as his argument proceeds. Speeches in the Senate receive more attention in the press. The Senator knows that an able argument may produce changes in bills, command attention in the White House, and affect national opinion.

THE GENERAL COURSE OF PROCEDURE

Organizing the Chambers. At the opening of a new Congress the House of Representatives is brought to order by the clerk or another official of the last House, who calls the roll and, finding a quorum present, announces that it is time to choose the Speaker. In response the majority and minority put forward their candidates already picked by the caucuses; the former's nominee is duly elected and takes the oath of office. Standing in their places, the members are sworn in collectively. The other officers are chosen and the President of the United States and the Senate are informed that the chamber is ready for the transaction

of business. Rules for the conduct of proceedings are proposed and adopted, often with protests from the minority. In due time the names of the committeemen presented on behalf of each party are read and approved by the House.

The Senate differs from the lower chamber, as we have said, in being a continuous body. At each Congress only one-third of the membership is renewed. The presiding officer, the Vice-President, as required by the Constitution, usually takes the chair. In case of his absence, the duties are performed by a president pro tempore. The names of the newly elected Senators are read, often in alphabetical order; sometimes each in turn is escorted to the presiding officer's desk, by the colleague from his state, and there takes the oath of office, but sometimes they are inducted collectively or in groups. The President and House are then notified.

Introduction of Bills. Proposals for legislative action originate in various ways, obvious and obscure. Nominally every bill is introduced by a member but this does not necessarily mean that he originated it or even approves it. Many bills owe their origins to individual Senators or Representatives or to committees of Congress. Others, particularly those relative to national defense, foreign affairs, and war may come directly or indirectly from the departments or the White House, particularly if the President belongs to the party in control of Congress. Still others are devised and drafted by unofficial groups or politicians outside of Congress and are introduced in one or both houses by members in close touch with the initiators, with or without presidential sponsorship, as the case may be.

For a time during the administrations of President Franklin D. Roosevelt so many measures were drawn up by advisers of the President and pressed upon Congress under his direction that Congress was often charged with having "abdicated."[10] The contention was, however, exaggerated and even before his death in 1945 Congress had displayed signs of a reaction against presidential leadership in vital matters of legislation. After Vice-President Truman became President in April, 1945, the Democratic Congress asserted its independence and rejected his principal recommendations in respect of domestic affairs. When the Republicans assumed power in 1947, the reaction became an open revolt except as to matters of foreign policy. They approved his call for legislation granting financial and military aid to Greece and Turkey but other important recommendations from the White House they defied, frequently with substantial support from Democrats.

[10] In his indispensable work, *The President, Congress, and Legislation* (1916), Lawrence H. Chamberlain, on the basis of painstaking research, demonstrates that presidential leadership in legislation has been overrated in popular writings on the subject.

Reference of Bills and Reports on Bills. On introduction in the House by a member, a bill is referred to the appropriate committee in charge of the subject matter with which it deals. The committee may hold hearings and give the measure any amount of attention it sees fit. It may report the bill favorably, unamended; it may make changes and report its version; it may report unfavorably; or it may not report at all. Similar arrangements prevail in the Senate. When a bill is reported favorably for passage it may be placed on a calendar and, unless otherwise ordered, come up for discussion on the day when the particular calendar is reached. But the chief measures, such as appropriation bills and important projects sponsored by party leaders, have the "right of way" under various technical rules, including the privilege of "unanimous consent" and, in the House, special orders of the rules committee. Such orders may be brought out on the floor at almost any time. As a matter of fact bills reported favorably may be pushed aside by party leaders and not considered at all. The day and hour for proceeding with many bills, even the most important measures, and the amount of time to be allotted to debates are often arranged by private conferences between the majority leader and the minority leader, occasionally quite informally on the floor of the House or the Senate in full view of the other members.

Debates in Congress. Days and days are wasted in both houses of Congress in the making of speeches which do not take the form of debates on definite legislative proposals. For example, the proceedings of the House of Representatives for about six weeks in January and February, 1913, were devoted to discussing recent attacks on Congress, assailing "subversive bureaucrats," and wrangling over personal and partisan affairs. As expressions of opinions, tempers, and distempers, these diversions may have had some value, but in terms of constructive results they seemed scarcely worth the effort and expense. In the Senate also a great deal of time is spent on partisan and personal wrangling, but not so much as in the House.

When, however, an important bill is brought into the House of Representatives under specific rules or arrangements or with unanimous consent, the chairman of the committee in charge of it may make a statement setting forth the main provisions of the measure, the purposes to be effected by it, and the supporting arguments. On such occasions, the proceedings in the House, limited as to time by agreement in advance, will take the form of orderly discussions bearing on the principal points at issue. Out of the discussions may come amendments and, rarely, a return of a bill to its sponsoring committee for reconsideration and modification. During "full dress debates" Senators likewise subject bills,

proposals, and relevant public policies to keen and systematic analysis.

At other times, however, controversial questions regarding proposed legislation may be raised, particularly in the House, and discussed in an irregular manner that allows the most reckless assertions to pass with little or no challenge; and a reading of the whole record will fail to disclose any reasoned or consistent policy on either side. In other words, the people, as well as members of Congress, may be left in a state of confusion as to the grounds for the differences of opinion and the nature of the conclusions, if any, to be drawn from the prolix dispute.

Many speeches that appear in the *Congressional Record* are delivered to a small group, especially during sessions of the committee of the whole in the House [11] or consist largely of extended or revised remarks afterward put into the text or the Appendix of the *Record*, with the consent of the chamber. Often members revise their speeches in the manuscript or in the printer's proof cutting out whole passages and inserting new matter before delivering the final copy for publication. Numerous speeches are directed to the constituents of the orator rather than to his colleagues on the floor. Since "leave to extend remarks" is generously granted, Senators and Representatives may appeal freely to the voters of their districts through addresses nominally made on the floor, printed frequently at public expense, and sent free of charge through the mails.

Bills Sent to the President—the Veto. If a bill has passed one house, it is immediately transmitted to the other chamber for review. For example, if it goes through the Senate, it is sent to the House; if it is carried there in its original form, the Senate is notified; it is then signed by the President of the Senate and the Speaker of the House and is handed to the President of the United States for his signature. If he approves the bill, it becomes law. If he vetoes the measure, he returns it to the house of its origin, with a statement of the reasons for his decision, unless that body has adjourned. Repassage by a two-thirds vote is necessary to carry a bill over the President's veto.

The provisions of the Constitution are explicit to the effect that every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President; but Congress has devised a scheme known as the "concurrent resolution," which although

[11] The committee of the whole in the House of Representatives forms a convenient body for discussion and provisional voting on measures. During a session of the committee in the House, one hundred constitute a quorum and the Speaker's chair is taken by some other member. Measures approved in it are reported to the House for formal adoption.

it clearly has the effect of law, is not submitted to him for approval. Generally it is employed in ordering the publication of documents, in paying therefor, and in incurring and meeting other expenses, from money that has already been appropriated for the use of the two houses in their legislative work. At other times it is used to enact what amounts to legislation in fact.

A Check on the Executive Veto Power. In recent years, especially since Congress has adopted the practice of conferring immense blanket powers on the President by legislation, the concurrent resolution has taken on new significance.[12] When Congress vests powers in the President, without any time or other limit, it can only take them away from him by an act of repeal subject to his veto. According to this constitutional arrangement, Congress may pass a law by a bare majority and later be unable to muster a two thirds vote to repeal it over a veto. To hold the President in check, Congress has, on numerous occasions in recent times, included in laws conferring large powers on him a provision to the effect that it may withdraw them by a concurrent resolution—a resolution not subject to executive veto. In this manner Congress reserves the right to abrogate such laws merely by an ordinary majority. The constitutionality of using the concurrent resolution in this fashion has been questioned, but the practice is now fairly well established.

Adjustment of Differences Between Houses. Whenever a bill originating in one house is altered in the other, it must be returned to the first for reconsideration and for adoption or rejection as amended. If, at last, the houses are unable to agree—which often happens in the case of important measures—the presiding officer of each body appoints representatives on a joint conference committee, as it is called, authorized to discuss the differences, to come to some conclusion on the disputed points, and to report back to the houses their agreement or their inability to come to terms.

As a general principle the conference committee, in reaching an understanding, should introduce no new matter into the proposal which it has under consideration—that is, no provision which has not been already adopted by either the Senate or the House. But it is not easy to determine whether new materials have been introduced into a long and complicated bill. Certainly the conferees are not limited to a mere choice of clauses actually passed by one house or the other. They may, and often do, effect a compromise, perhaps midway between the extremes, and in drafting it they may in fact depart substantially from the lan-

[12] Howard White, "Executive Responsibility via Concurrent Resolution," *American Political Science Review*, October, 1942, pp. 895 ff.

guage of the two bills before them. When a conference committee report is submitted to the respective houses it is adopted or rejected as a whole, unless it is purposely divided into parts so that separate action can be taken on special items. Clearly, then, conference committees exert great influence over the final wording and ultimate disposal of important measures.

RULES FOR DIRECTING AND EXPEDITING BUSINESS

Scattered references have already been made to various rules for the detailed transaction of congressional business. These principles are to be found in Jefferson's *Manual of Parliamentary Practice*, the standing rules of each chamber incorporated in a volume for the guidance of members, and a vast number of precedents established by presiding officers and the chambers, covering the application of rules to various points of order.

Variations in Practice. Besides promoting regularity in procedure and providing for exceptional actions, the rules of the House and the Senate make it possible for leadership to direct, limit, and in a measure dictate decisions. A study of transactions reported in the *Congressional Record*, for example, shows that influential Congressmen make extensive use of the rules relating to the privilege of "unanimous consent." With unanimous consent almost anything can be taken up at any time, and unless the pressure of business is great the privilege is generously granted. Floyd M. Riddick, an editor of the *Congressional Record's* Daily Digest, states that in the First Session of the Eightieth Congress, in 1947, approximately 900 of the 1,029 bills and resolutions passed by the House were brought up under unanimous consent procedure. Similar freedom prevails in the Senate. Hence it is possible to get around burdensome rules expeditiously, in many cases. Powerful committees, privileged to report projects whenever they are ready, may interrupt proceedings at almost any hour, especially in the House, and start them off on a new tack.

Despite the mass of rules in use, it is still true that in neither chamber does there prevail a rigid procedure which requires the consideration of measures in order of their importance or their appearance from committee rooms, holds debates to specific topics until disposed of, and relegates all minor issues to definite days. In discussions, particularly in committee of the whole, members may use their time in speaking on matters not germane at all to the subject in hand. For example, debates on the wool schedule of a tariff bill may include speeches on good roads, patriotism, or banking.

Dilatory Actions Forbidden. In the larger body, the House of Representatives, the Speaker is authorized, by a rule adopted in 1890 and still in effect, to refuse to put dilatory motions—that is, propositions designed merely to delay business. The rule is not applied, however, until the purpose of such a motion has become apparent, and the Speaker usually waits until a point of order is raised on the floor before he brings it into force. Even then the constitutional right of members to call for yeas and nays cannot be denied although the object is dilatory.

The purpose of the rule against dilatory motions is to stop "filibustering" by the minority or by small groups. In ordinary use, the term filibuster means to act as a freebooter or buccaneer, but in a parliamentary sense it is applied to the obstruction of legislation "by undue use of technicalities of parliamentary law or privileges, as when a minority, in order to prevent the passage of some measure obnoxious to them, endeavor to tire out their opponents by useless motions, speeches, and objections." Frequently, the purpose of such interfering tactics is to call the attention of the country in an emphatic way to the policy of the majority, and often it is highly successful, particularly in the Senate where more freedom of debate prevails.

As a part of the program for expediting business in the House of Representatives, the Speaker is also authorized to count as present those members who are actually in the chamber but refuse to answer to their names on a roll call for the purpose of compelling an adjournment on the ground of the absence of a quorum. This principle was established about the same time as the rule on dilatory motions.

Limits on Debates in the House. Besides putting a ban on dilatory acts, the rules of the House expedite business by limiting the time devoted to the discussion of propositions. They provide that no member shall occupy more than one hour in debate on any question in the House or in the committee of the whole. This restraint was imposed in 1841 and in commenting on it Senator Thomas Benton declared that it was "the largest limitation upon the freedom of debate which any deliberative assembly ever imposed upon itself, and presents an eminent instance of permanent injury done to free institutions in order to get rid of a temporary annoyance." But it is difficult to see how the House could meet the enormous pressure upon it, if any member could talk as long as he pleased on any project. When the House goes into committee of the whole for a debate on a bill, it fixes a time to be employed in discussion which cannot be extended by the committee; the time is divided among members by agreement among party leaders; and members are allotted only five minutes each to offer and oppose amend-

ments. As a final check on verbosity it is always in order to move and carry "the previous question" in the House and thus to shut off debate automatically.

Privileged Reports Have Priority. Fortifying these restraints on dilatory tactics and time limits on debate are provisions which enable the leaders of the majority party in the House of Representatives to compel that body to give attention to important measures whenever they see fit. This end is accomplished by a practice which permits the leading committees, especially upon an order by the rules committee, to report on specified subjects practically at any time in the course of proceedings, no matter what may be under discussion. When such a privileged report is made, the House must consider it, subject to definite restrictions on the hours or days allotted for debate.

More Freedom of Debate in Senate. With respect to such restraints the Senate by contrast is singularly free. When its rules were revised in 1806, the right to move the previous question and thus close debate summarily was omitted, and all attempts to restore control failed until 1917. At the session convened in March of that year, the Senate found its business blocked in an apparently endless dispute. By a certain irony of fate the Democrats, who had often been ardent champions of free speech, were forced to insist upon some method of limiting it. Acting on the recommendation of a special committee, the Senate then adopted a new rule providing that, on petition signed by sixteen Senators, a motion to cut off the discussion of any measure can be presented to the Senate. If approved two days later by a two-thirds vote, debate will come to an end, after each member has enjoyed the privilege of speaking for not more than one hour on the pending question; when such a closure has been approved, amendments to the bill under consideration can be made only by unanimous consent, and dilatory motions are out of order.

In practice this rule has been applied only a few times and long filibusters have often blocked the business of the Senate since it was adopted. Denunciations of delays still occur, but the Senate is obdurate, and with reason. As Lindsay Rogers cogently contends in his book, *The American Senate*, liberty of debate in that body acts as a salutary check on the administration, gives the minority the right to be heard, and assures at least one open forum in the country for free consideration of issues which might otherwise be smothered.

Talking endlessly on the merits or demerits of a bill is not the only way of delaying business or killing a bill in the Senate. Another type of tactics consists of making motions that are purely procedural in nature. For instance, with regard to a filibuster in 1946, speech-making was diverted from a measure up for consideration by a motion to in-

clude the chaplain's prayer in the journal, and a debate over this matter lasted until another Senator moved that the names of Senators who had not answered a roll call for a quorum should be inserted in the journal. After a large amount of time had been consumed in discussing these issues a third Senator moved the application of the cloture rule and was declared out of order. An appeal from the decision of the chair was thereupon made an issue for more debate. Three times during that session of Congress petitions to apply the cloture failed to pass the Senate for the lack of the requisite two-thirds majority.[13]

Rights of Minority to Check Majority Rule. After this survey of the devices by which the dominant party leaders, especially in the House of Representatives, may control reports of committees and the discussion and passage of measures, it might be assumed that the minority is powerless to influence in any effective manner the course of legislative procedure and action. This view, however, is not strictly correct. By exercising certain constitutional privileges, the minority may hamper proceedings and go a long way toward forcing the majority to accept policies it would not initiate on its own motion or at least to allow a freer discussion of measures than it prefers. The Constitution provides that, on the request of one-fifth of the members present, the roll of either house must be called on any question and the yeas and nays of the members entered upon the journal. It furthermore stipulates that no business shall be done unless a quorum is present. Therefore the minority in the House or Senate may insist upon one roll call after another, thus delaying final action on measures. Moreover, since a great deal of the legislative business is actually done under the rule of unanimous consent, the minority can employ the threat of refusal as an engine of coercion. More than once a leader of the opposition has thrown down the gage to the directors of the majority and frankly informed them that unless a certain course is followed his contingent will exercise all its privileges for the purpose of obstructing business.

PRESSURE GROUPS AND LOBBIES

Affiliations of Congressmen. So far we have spoken of Congress as if it were merely a body of representatives working at a given spot—the national Capitol. In reality this is far from the whole truth. Congress is a part of the living organism of American society—united with that society not only on election day but throughout the whole course of its proceedings. Each of the 531 Senators and Representatives is a personality, with a cultural heritage of his own, and has immediate associations with his constituents. In the process of winning his seat he has made

[13] Floyd Riddick, *American Political Science Review*, February, 1917, pp. 15 ff.

commitments and formed ties which bind him as a legislator. After he arrives at Washington, perhaps even before, he comes under wider influences. He may, indeed, owe his election largely to funds furnished by the congressional campaign committee of his party—funds derived from sources outside his district. Once in Washington he establishes connections with his party in Congress, with an organization having national responsibilities and subject to forces operating on a national scale.

Pressures of Groups. In the discharge of his duties the member of Congress is under pressure from two directions—his constituents at home, particularly the local party leaders, and individuals and associations operating in Washington. And it must be remembered that various elements in these two groups may be themselves united by innumerable ties. Farmers, manufacturers, and trade unionists in his district have national affiliations; and national associations in their turn have local branches. All of them may be welded into compact bodies by the post office, the telegraph, and the radio. Theoretically the member of Congress represents free and equal heads, all animated by a common aspiration—the public good. In reality he is under constant surveillance by powerful groups linked in chains throughout the country.

Economic and Professional Groups. Considered according to type those groups may be divided into four classes—economic, professional, reform, and religious. To the first belong the industrial and trade associations, organized on a national basis, numbering about one thousand, and including all important divisions such as railways, oil, steel, retail stores, real estate, and public utilities. To this class also belong the farmers' organizations—the National Grange and the Farm Bureau Federation, for example. Under this head comes organized labor, directed by the American Federation of Labor, the Railway Brotherhoods, and the Congress of Industrial Organizations. Functioning both cooperatively and independently are federal employees' unions, concerned especially with the hours, wages, and conditions of work in the government service. Likewise partly economic in character, various professional bodies—lawyers, engineers, and architects for example—offer advice and counsel in technical and other matters. Not wholly disassociated from economic considerations is the American Legion, speaking for the veterans of the two World Wars, for, besides its other activities, it is constantly concerned with appropriations for hospitals, pensions, and other projects conveying benefits to its members.

Reform and Religious Groups. Acting as reform organizations not seeking economic legislation as such, at least directly, are literally scores of societies, large and small. Some of them lobby for bigger appropriations for the Army and Navy in the name of patriotism—the Daughters

of the American Revolution, the Navy League, and the American Legion. On the other side are several active peace societies. In the reforming class may be placed the National Popular Government League and the People's Lobby concerned with the developing of popular government and in exposing the operation of powerful economic interests in politics. Feminist in its views, the National Woman's Party demands a federal amendment putting women on a strict legal equality with men. Less specialized in interest, but vigorously active, is the League of Women Voters which sponsors selected policies and measures of legislation from time to time, marshals its members behind them, at least nominally, and exerts a recognized influence on Congress.

The fourth class includes numerous religious organizations—for example, the National Catholic Welfare Council and the Federal Council of the Churches of Christ in America. Although they deal primarily with religious and ethical questions, such associations occasionally take a stand on issues in other fields.

Special Pressure Agencies in Washington. Many of these organizations maintain in Washington capable staff agencies which concentrate their energies on advancing or blocking legislation. Without attempting to arrange them in order of importance, there is the National Chamber of Commerce, a federation of the local chambers throughout the United States, with elaborate machinery for ascertaining the opinions of American business men on measures before Congress. Not far from the Capitol stands the large building which houses the American Federation of Labor, always indefatigable in its support of favoring legislation and in its warfare on measures deemed inimical to labor's cause. Close at hand is the office of the Congress of Industrial Organizations. Equally active are some nation-wide farmers' associations. Then turning to specific trades we find each one of the leading manufacturing and mercantile branches and many special trade unions, such as the United Mine Workers, represented in Washington and prepared to bring influences to bear on Congress in season and out.

It is estimated that there are in all about one hundred and fifty economic organizations (to say nothing of moral and religious reformers) which can place agents in the lobbies of Congress on short notice. Among them, for example, are the spokesmen of the coal, leather, beef, silk, glove, fertilizer, cotton, banking, wire, steel, express, drug, advertising, utility, insurance, lime, beet sugar, and real estate interests. To the more or less permanent bodies may be added temporary associations formed and financed to advocate or oppose particular measures. These interests have skillful and astute agents, paid large salaries, and granted expense accounts for entertainment and other purposes.

Types of Pressure Agents. Experts in lobbying vary widely in their training, talents, prestige, and methods. Some of them are distinguished lawyers who are retained by corporations to file briefs with the committees of Congress, interview members, and otherwise make themselves useful to their employers. Other lobbyists are former members of Congress or federal officials, of deep experience and broad acquaintanceship at the Capital, who may "practice law" in Washington or engage in some nominal vocation. More recently there has come upon the scene a third type—"the high-powered publicity expert," the ex-journalist, who specializes in "putting stuff over" through the newspapers and in attempting to frighten Congressmen by threats of antagonism or revelations in the press. Still operating in spite of the emphasis on the new psychology, are the quiet, informed agents of special associations, who are expert in the statistics and technology of their business and rely largely on "the correct presentation of their cases" to the committees and members of Congress.

Lobby Methods. With respect to methods, lobbyists who seek to direct governmental action seem to be masters of the science and art of influence. They appear formally before committees of Congress to offer facts, briefs, and arguments. They form "personal contacts," directly or through the social lobby, with "key" officials, Senators, and Representatives. They promise employment to politicians about to retire. They "build fires" behind recalcitrant members at home by instructing prominent constituents and local organizations, such as chambers of commerce and trade unions, to deluge their representatives with telegrams and letters. They "release" to the press news "stories" designed to construct in the popular mind images known as public opinion.

Criticism of the Pressure System. Congress must always work therefore amid a vast net of agencies which have large sums of money at their disposal to spend in agitation and in maintaining research bureaus to accumulate facts favorable to their concerns—agencies equipped with all the mechanisms of modern society for bringing pressures to bear. Consequently some students of government advocate giving up the theory of political equality and suggest the incorporation of manufacturing, labor, agricultural, and professional interests in Congress itself. But owing to the number and diversity of such interests in the United States no such scheme is practicable and, besides, men and women are not mere "economic animals" motivated by no cultural, moral, or intellectual interests.

Other critics of "pressure politics" have demanded the "abolition" of lobbies by law. This proposition is based upon a superficial view of society and government. In the nature of things, legislation and admin-

istration involve regulation of numerous conflicting interests, and denying them the right to be heard or to express their views violates the first principles of constitutional freedom. As long as they keep within the law against bribery and corruption, their representatives have the right to lay their cases before members of Congress and the country. Indeed, knowledge respecting these interests and their demands upon government is the beginning of political understanding. Only by violently suppressing them, as in totalitarian countries, can their conflicts of opinions be abolished and such action simply means substituting governmental despotism for constitutional liberty.

Registration of Lobbies and Lobbyists. After years of discussion relative to lobbies, Congress at last, by an act approved January 13, 1940, prescribed penalties for any person who, corruptly or by threats or by threatening letter or communication, attempts to influence, impede, or intimidate any witness before any agency of the United States Government or any committee of Congress, or, by such methods, attempts to interfere with proper administration of the law or proceedings of congressional and administrative inquiries. The language of this act is broad and general. Its consequences are difficult to gauge. But certainly it can be used against lobbyists of all kinds. The word "influence" in the Act would seem to cover almost any kind of "pressure" known to politics, whether brought against administrative agencies or committees of Congress.

Six years later, in the Reorganization Act of 1946, Congress dealt comprehensively with lobbies and lobbyists. It brought within the scope of the law all persons, organizations, and groups of persons engaged in efforts to influence by various means the passage or defeat of legislation in Congress. It ordered the registration of such persons, organizations, and groups, and their agents, with the Clerk of the House and the Secretary of the Senate. In registering, every person who engages himself for pay or other considerations to influence legislation must give the name and address of his employer, state in whose interest he appears and works, the duration of such employment, the amount of pay received or to be received, by whom the payment is made, and how much he is to be allowed for expenses.

Between the first and tenth day of each calendar quarter, every person so registering must file a detailed report under oath. This report must show all money received and expended by him during the preceding calendar quarter, to whom paid, and for what purpose. It must also give the name of any papers, periodicals, or other publications in which he has caused to be printed any articles or editorials, and indicate the legislation he is employed to support or oppose.

Registrations and statements so filed are submitted to Congress and printed periodically in the *Congressional Record* so that Representatives and Senators may keep duly informed as to lobbies and the men and women employed as agents.[14] Thus lobbyists are publicly introduced to Congress, the people, and one another.

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[14] For example see the long list of registrants and lobbies in the *Congressional Record* of February 5 1947 pp. 859–884.

CHAPTER 10

Nomination and Election of the President

Fear of "Popular Tumults" in Elections. The framers of the Constitution sought to make the Executive a kind of bulwark against the "assaults of ambition, of faction, and of anarchy," as Hamilton phrases it in No. 70 of *The Federalist*. With this end in view, they rejected the idea of allowing the voters at the polls to elect the President directly. Instead, they tried to establish a method of election which would, to use Hamilton's words, "afford as little opportunity as possible to tumult and disorder," and would not "convulse the community with any extraordinary or violent movements." To accomplish this end they provided that the President should be indirectly elected by a small body of electors chosen in each state, as the legislature of the state should decide, and casting their ballots for President separately in each state. Each state electoral body, it was expected, would meet quietly, consider the merits of the important persons deemed best fitted for the high office, and select the candidate most eminent "for virtue and ability."

The Election of the President Is a Tumultuous Affair. Today, however, the electors in any given state no longer exercise their own free and independent judgments in choosing a President; they are mere agents of the victorious party at the polls, pledged in advance to cast their ballots for its candidate. Thus the real choice of the President has been transferred to the national convention of the winning party, and the mass of voters supporting the party at the polls. In this way, the deliberative, dignified procedure contemplated by the framers of the Constitution has been replaced by a popular operation of the first magnitude. It fills the land with discussions and agitations for six months or more every four years. It puts at stake the ambitions of individuals in quest of power, the interests of classes, and the fortunes of the country. Nearly everybody takes part in it, from the President, busy reëlecting himself or helping to select his successor, to ordinary citizens who discourse on the merits of candidates with as much assurance as on the outcome of the latest prize fight. The performance involves endless discussions, public and private, oratory,

uproar, surveys, the election of thousands of delegates to elaborate national conventions, the concentration of opinion on a few ambitious leaders, a nation-wide propaganda as the sponsors for various aspirants exhibit the qualifications of their favorites to the multitude, and the expenditure of millions of dollars on publications, meetings, "rounding up delegates," and "seeing that goods are delivered."

As transformed by party practices, the process of electing a President begins with "booms" on behalf of particular aspirants, engineered by friends. These booms find their ultimate outlets at the national conventions of political parties, where party candidates for President are formally selected.

COMPOSITION OF THE NATIONAL CONVENTION

Congress as a Model for the Apportionment of Delegates. For a long time it was the practice of both the leading political parties to form their national conventions on the model of Congress by assigning to the party in each state a number of delegates based on the number of its Senators and Representatives in Congress. In other words if a state had eight Representatives, besides its two Senators, each party in the state was given twenty delegates in the national convention of the party. Under this arrangement, obviously, the number of delegates assigned to each party in each state bore no necessary relation to the number of voters affiliated with the party. As applied in the Democratic party, the system gave to a handful of Democrats in a northern state that was as a rule overwhelmingly Republican the same number of representatives in the convention as it allotted to a state of equal population in the South where there might be eight or ten times as many Democrats. The practice worked for even greater inequality among the Republicans. There have long been several states in the South in which regular Republicans constitute a small minority. As a result, whenever there was a Republican President in the White House, he could handpick the southern delegates to the convention of his party, and almost force his own renomination or the nomination of some favorite to succeed him. In the course of time vigorous protests were made in the major parties against the congressional plan of apportioning delegates to national conventions, and in recent years many changes have been made in the old system, without destroying it entirely or establishing any fixed substitute for it.

Recognition of Party Strength in Apportionment. In response to demands that party voters be given a more equal representation in the national convention, both parties have made concessions. Yielding to urgent pleas, especially from the southern states, the Democratic party now accords additional delegates to each state in which the party vote is

especially large but in the main continues to follow the congressional model of apportionment. The Republicans grant additional delegates at large to each state in which their party won a majority of the popular vote in the most recent state-wide election for President or United States Senator; they deny any representation to the congressional district where the Republican vote is below a certain number; and they allot an additional delegate to each district where the Republican vote is at a certain figure above the minimum required for securing at least one delegate. Besides assigning delegates to each state, both parties allow representation to the District of Columbia, Alaska, Hawaii, and Puerto Rico; and occasionally to other American "possessions."

In spite of these changes, glaring inequalities of representation continue but too much stress should not be laid on political arithmetic. The vote of each party fluctuates and the outcome of one election is no exact criterion for estimating the poll in the next. Moreover, the Republicans, always suffering from sectionalism, are loath to destroy their skeleton organizations in southern regions where they have little or no strength at present, for they hope that the future may be different from the past.

Election of Delegates. For more than half a century the Democrats and Republicans prescribed different methods for the selection of delegates to the national convention. The former, regarding the state as the unit of representation, provided that the delegates should be chosen at a state party convention or by the state committee. Professing another view of the Union, the latter ordered the election of all the delegates-at-large at the state convention and the remainder at congressional district conventions. But the appearance of the direct primary as a means of selecting delegates forced alterations in the traditional rules. About one-third of the states now require the selection of delegates at primaries; in a large majority, the delegates are chosen at party conventions, state and district; and in a few cases they are chosen by party committees.

Direct Voting on Presidential Aspirants. In addition to applying the direct primary to the choice of delegates to the national convention, approximately one-third of the states allow their voters to express preferences for the presidential nomination. The primary laws vary widely in character, but they provide two general methods of assuring the people a chance to voice their opinions on party contestants. In some states, a list of presidential aspirants is printed on the primary ballot of each party and the voter may readily indicate his choice among them. In others, candidates for delegate to the convention may specify on the ballot whom they will favor for President if elected. Thus the voters may disclose their will indirectly. First used in the campaign of 1912,

when Theodore Roosevelt and William H. Taft waged a bitter contest to secure control of the Republican organization, the presidential primary is still the scene of factional fights.

It is easy to pick flaws in the presidential primary. No method is provided for assuring the submission of the names of all prominent aspirants to the party voters in the primaries. In fact, aspirants may refuse to lay their claims before the voters in states in which they believe their strength is slight, to avoid the risk of a conspicuous defeat or, if required to allow the printing of their names on the ballots, they may decline to campaign for votes. Since the primaries are held at different dates in the various states during the election year, the earliest primaries may unduly influence voters elsewhere. Nor, since so many states do not now have presidential primaries, is it possible to secure, by this means, an expression of the majority in either party on the merits of candidates. Besides these objections, there is no way of forcing delegates to fulfill pledges to vote in the convention for the men preferred by the electors at the polls. About all that can be said for it at present is that it permits aspirants to test their strength, if they care to take the risk.

THE NATIONAL CONVENTION AT WORK

The Convention a "Big Show." The national convention of each party assembles on the date—during the summer preceding the election—and in the place fixed by its national committee at a preliminary meeting. Before the convention is formally opened, the committee confers again, arranges the program of proceedings, selects temporary officers subject to the approval of the grand party conclave, and makes up a provisional roll of delegates from the returns sent in by the authorities under whose auspices the primaries or local conventions have been held.

The convention assembles in some huge building—large enough to seat the thousand delegates or more and perhaps ten or twenty thousand spectators. Each delegation is arranged around the banner of its state, and is directed by a chairman. Some of the more important delegations have brass bands, and often carry curious symbols and transparencies. In the audience are gathered the most active politicians not serving as delegates, enthusiastic partisans from all over the country, and visitors attracted by the spectacular affair. Bands play; party heroes receive prolonged cheers as they appear; wire pullers rush about, making and extracting promises. It is a cool-headed politician who is not swept off his feet by the excitement of the hour. Adding to the emotional tension are radio broadcasts to the general public.

The purpose of the national convention is threefold. It formulates party principles into a platform on which an appeal is made to the voters

during the ensuing campaign. It nominates candidates for President and Vice-President. Finally it organizes a new national committee charged with carrying on the campaign and managing party affairs for four years.

Organizing the Convention. While procedure varies, a certain general course is pursued. The convention is called to order by the chairman of the national committee and prayer follows. Even here discretion is necessary. Clergymen from different congregations are chosen for the several sessions, so as to avoid offending religious susceptibilities. After prayer, the first important action is the nomination of the temporary officers already selected *in fact* by the committee. Usually these nominations are accepted without question, for the function of the temporary organization is largely formal. The temporary chairman, it is true, delivers an appropriate address which is often regarded as the "keynote" to the proceedings, but he does not make important decisions which affect either the platform of the party or its nominations. The first day's session is then concluded by calling the roll of the states and territories and securing from each of them the names of its members for the four great committees of the convention: on credentials, on permanent organization, on rules and order of business, and on resolutions or platform.

In due course the reports of the various committees are heard, not necessarily in any fixed order. The committee on credentials, charged with passing upon disputes over seats, naturally must act quickly. All notices of contests are filed in advance with the national committee, which makes up the temporary roll. Documents relative to the several cases are transmitted to the credentials committee, which holds meetings, hears arguments, and prepares reports for the convention. Sometimes the conflicts are very exciting, for the policy of the party on national issues and the fate of candidates may be decided by the admission or rejection of a few individuals. Generally speaking, however, the recommendations of the majority of the committee on credentials are accepted by the convention; if necessary to peace, two opposing delegations may be seated and each member given one-half a vote.

The next important report is that of the committee on permanent organization, which nominates the regular chairman, secretary, and other officers of the convention. Usually this report is also approved without debate, although, of course, the convention may refuse to confirm the names suggested by the committee. The permanent chairman is promptly installed and makes a long speech. The regulations, under which he controls the assembly, are drawn up by the committee on rules and are, in principle, those of the House of Representatives.

Adopting a Platform. On the second or third day the convention is

ready to hear from the committee on resolutions, to which is entrusted the preparation of the platform. This committee begins its sessions immediately after its appointment and ordinarily agrees on a unanimous report—which may have been written by a person or group outside the convention, even by the President of the United States, especially if he is to be nominated by his party to succeed himself. The platform is not often a statement of the particular things which the party proposes to do if it gets into power; it is rather a collection of generalities which will serve to create good feeling and unite all sections around "the grand old banner." Custom dictates that it shall contain, among other things, references to the great history of the party, interspersed with the names of its leaders, and denunciations of the policies and tactics of other parties. Owing to its elusive character, the program drafted by the committee on resolutions seldom faces opposition in the convention. It is only when some very contentious matter arouses deep feelings that there is likely to be a divided report or any serious discussion of its terms.

Presenting Candidates. About the third or fourth day the chairman announces that the next order of business is the nomination of the party's candidate for President of the United States, and the roll of the states is then called in alphabetical order. If the first state has no "favorite son" to offer, it may defer to another lower on the list. A representative of the delegation which gets the floor thereupon places a candidate before the assembly in a speech full of high-sounding phrases and lofty sentiments dealing with many subjects. This opening gun may be followed by speeches seconding the nomination, delivered by "spellbinders" from various delegations, including as a rule at least one woman orator. After the way is opened, the names of other aspirants may be presented in a similar manner.

Balloting—The Old Unit Rule. When the nominations are all made, the vote is taken by calling the roll of the delegations by states, which announce their respective choices through the chairmen. Previous to the rise of the direct primary, every party followed its own rules relative to balloting in the convention. The Republicans assumed in theory that each member could vote as he pleased, although in practice he was often instructed by his party organization at home to support a certain candidate. The Democrats, on the contrary, permitted the central organization in each state to authorize a majority of its delegation to decide that all its votes should be cast in one block. This practice, known as the "unit rule," was defended on the ground that the party machine of a state had greater weight when it could "swing" all its representatives at the national convention.

Now the direct primary and the presidential primary, wherever ap-

plied, have upset the historic practices of both parties. Delegates in the Republican convention may be morally bound by pledges made in their campaign for election or by preferences indicated by the party voters. Owing also to obligations imposed by primary legislation, the Democratic state organization could not always bind its delegation to follow the unit rule; at their 1936 convention the Democrats abolished the rule.

Counting the Ballots. After all the delegations, subject to the various limitations imposed by law, customs, and pledges, have reported the results of their balloting to the convention, the total is announced. If any aspirant for President receives a bare majority of the votes cast, he is declared to be the party candidate. The Democrats long had a rule making a majority of two-thirds necessary to a choice but they abolished this rule in 1936 and adopted the majority principle, much to the dissatisfaction of Democratic leaders in the south. If no one receives the requisite number of votes, the roll is called until that outcome is reached—sometimes for hours and even days, should the contest be sharp. Immediately after the presidential candidate has been selected, the nomination for Vice-President is made in the same manner and by the same majority, with less display of rhetoric however.

Notifying the Victors. When the convention has chosen its candidates, it may appoint a special committee to convey to each of them a notification of his triumph. But Franklin D. Roosevelt broke the custom by flying to the Chicago convention in 1932 to deliver his acceptance speech to the assembly itself and again in 1936 by going to Philadelphia to address a huge outdoor mass meeting. In 1940 he accepted his nomination by radio from the White House to the convention in Chicago. In 1944 Governor Thomas Dewey accepted the Republican nomination in person at Chicago. Often the acceptance speech is an important political document, for the candidate may employ it to interpret the party platform in his own way, going even so far as to modify its spirit, if not its letter, thus injecting unexpected issues into the campaign. After all, it is his speeches, rather than the platform, that attract the attention of the country. It would be interesting to know how many voters ever saw a political platform.

Nature of Presidential "Timber." What are the qualities that make men available for the presidency? What elements of distinction? It has often been asked why "great men" are not selected. One answer is that some of them have been chosen, but still a number of mediocrities have also been elevated to that position. Another answer is that merits are difficult to assess. Was Clay greater than Jackson, Blaine than Garfield, Hill than Cleveland? Who in the Republican party was greater than

Charles E. Hughes in 1916 or in the Democratic party greater than Franklin D. Roosevelt in 1932? Friends of defeated aspirants lament the failure of the democratic process to choose the best, but their motives are open to suspicion.

At all events certain factors enter into the business of selection. Very often unknown men, "dark horses" as they are called, have been presented as candidates. This frequently happens when there is a spirited contest among a number of prominent party leaders, none of whom can command enough votes in the convention to win. An outstanding man whether great or not, a man who has seen long service and taken a positive position on one issue or another, is sure to have foes, so many that his election may be out of the question. Protestantism in religion seems to be one prerequisite, for America is predominantly a Protestant country. Since the Civil War no resident of the south has been elected. Republicans for obvious reasons do not look in that direction. And the Democrats, knowing that it is loyal anyway, can ignore its claims. Since 1860, the Democrats have been successful chiefly with candidates from the east—Cleveland, Wilson, and Franklin D. Roosevelt; apparently the conservative wing of the party distrusts western radicalism. The Republicans, on the other hand, commanding the support of eastern conservatism, usually offer the nomination to the middle west. Until 1928 all its successful candidates, save two, Theodore Roosevelt and Calvin Coolidge, came from Ohio, Indiana, or Illinois; in that year it presented Herbert Hoover, a son of Iowa, who had lived abroad for a long time and had a nominal residence in California.

Careers Leading to Presidency. What career leads to the White House? It is certainly not a straight and narrow path like that to the premiership in England—constant service in and out of power for many years and marked qualities of leadership. We have had many generals: Washington, Jackson, Harrison, Taylor, Pierce, Grant, and Garfield; two colonels, Monroe and Theodore Roosevelt, and one major, McKinley. So we might venture the suggestion that military service, often accompanied by no definite political opinions, is an element in availability. Men of marked power in the Senate are never chosen. To carry a strategic state, New York, for example, as a candidate for governor, as did Franklin D. Roosevelt in 1928, is to enhance one's value in the presidential field. Lincoln was somewhat unique in that, beyond a term in the House of Representatives, his political experience on the national stage had been slight. He was not widely regarded as a great man when elected, and had he served in time of peace he might today be reckoned among the insignificant occupants of the presidential chair.

In the presidential roster, Wilson, Harding, and Hoover stand apart

—the first was a teacher and a university president, the second a newspaper editor, and the third an engineer who, after winning fame during the first world war as an administrator, added to his claims by work as Secretary of Commerce. Franklin D. Roosevelt was a man of inherited wealth, who had served in the New York legislature, in President Wilson's administration at Washington, and as governor of his state. Once humble birth, perhaps in a log cabin, was an asset to a candidate; but in an age of big business and demands by organized labor for good wages that appeal has lost its charm. It is an uncertain path that leads to the White House. Many who have deliberately set out in that direction have missed the goal and others have been blown into the right path by the winds of personal and political fortune.

Favorite Sons. It often happens that there are many aspirants for the nomination, all fairly equal in talents and claims, as well as popularity, or that the run-of-the-mine politicians are bitterly opposed to some outstanding aspirant. In such cases it is a common practice for the politicians in each of several states to put forward "a favorite son," sometimes because they believe he has a chance of winning and sometimes for trading purposes. When this comes about the victor usually owes his triumph to the bargaining skill of his managers rather than to any demonstration of superlative merits on his part. At all events favorite sons nearly always appear. For example, John N. Garner was a favorite son of Texas in 1932, with some support from the outside, and in the final shakedown his backers were able to win for him the nomination for the vice-presidency after throwing their votes to Franklin D. Roosevelt for the presidential nomination. Occasionally a delegation carries its favorite son to success; quite often it merely manages to exchange him for one consideration or another, such as a cabinet position or a desirable post in the diplomatic service.

King Makers and Booms. No man now wins a nomination for President purely through talent and character popularly acclaimed in a kind of spontaneous combustion. The process of selection is more devious. A President may be in a position to utilize patronage and the prestige of his office to bring about the result he desires. For an aspirant "fresh from the people," other devices are necessary. Somebody must recognize his merits or at least his availability, put him forward, and press for his success. The country always has a large number of potential makers of Presidents. Editors, publicists, and politicians are ever scanning the horizon for "likely" candidates. In that way they hope to serve their party and their country, and perhaps achieve fame and position for themselves. Every President, except Washington, has first been "picked" by some person or group of persons. Marcus A. Hanna, a retired busi-

ness man, played the role of Warwick, the king maker, for William McKinley, and won a place in the Senate for himself. Woodrow Wilson was heavily obligated to George B. Harvey who early brought many "Wall Street" friends to Wilson's support and launched his "boom"; and subsequently to Walter F. McCombs who led the struggle for his nomination in 1912. Franklin D. Roosevelt owed a large part of his strength in 1932 and in 1936 to the indefatigable labors of James A. Farley, perhaps the most astute calculator, patronage dispenser, and "maker of friends" ever produced in "the great game of politics."

Once started, booms are engineered with the aid of powerful agencies of propaganda—press, radio, post offices, and public speaking. With a few thousand dollars, a clever public relations counsel, and friends among editors, a governor in a strategic state can readily start what appears to be a spontaneous demand for his nomination as "the man of the hour." Well aware of this fact, those who play the game begin to plan for the next election soon after a new President is installed and often for even eight years ahead. Most king makers fail and most booms burst, but without the aid of one or more king makers and a boom no citizen can ever hope to be elected President of the United States.

The Vice-President. Since the sole function of the Vice-President, in ordinary circumstances, is to preside over the sessions of the Senate, not much consideration is usually given to his qualifications for the presidency to which he may be called on the death of his superior. Two rules usually govern the choice of candidates for this office. The first is that he should not be from the same geographical region as the presidential candidate. If the latter is from the west, the former may be from the east, and vice versa. Wilson was from New Jersey; Marshall from Indiana. Harding came from Ohio; Coolidge from Massachusetts. Franklin D. Roosevelt came from New York; Garner from Texas. The second, by no means so strictly applied, is that the candidates for the two offices shall represent different wings of the party. In 1940 Henry A. Wallace of Iowa was united with Roosevelt, and Charles McNary of Oregon with Wendell Willkie of New York and Indiana. For the election of 1944 Roosevelt designated Harry Truman of Missouri as his "running mate."

THE PRESIDENTIAL CAMPAIGN

Recent Decentralization of Campaign Management. Until the passage of the Hatch Act (Chapter 7) restricting the amount of money that may be spent in a presidential campaign in any one year, by any one national political committee, to $3,000,000, the management of the presidential campaign was well centralized in the hands of the national committee of each party. Since the adoption of the act, as Louise Over-

acker has ably demonstrated,[1] it has become customary to divide the work of campaigning among the national committees and various separately organized supporting groups, each entitled to spend its $3,000,000, to the end that money may be poured in great streams into the campaign without violating the law.

In the presidential campaign of 1940, for example, heavy contributions were made by members of both parties to state party committees and to numerous "auxiliary" committees formed to forward the interests of the Democratic and Republican candidates respectively. For example, the Associated Willkie Clubs of America spent $1,355,604 in the Republican cause and the National Committee of Independent Voters for Roosevelt and Wallace, formed under White House auspices, spent $350,155 in the Democratic cause. The total reported Democratic outlay for 1940 amounted to $5,855,082 and the Republican outlay to $14,941,142.

There was a repetition of this state of affairs in the 1944 campaign. On the Republican side were aligned the national committee, with a reported expenditure of $2,828,652 for 1944, the United Republican Finance Committee of Metropolitan New York with $1,260,593, the Republican Finance Committee of Pennsylvania with $939,934, and nine other bodies with reported expenditures of over $100,000 apiece. On the Democratic side, the national committee reported spending $2,169,077; while the C.I.O. Political Action Committee disbursed $819,351, and the National Citizens Political Action Committee $378,125, not to mention numerous smaller organizations.

The National Committee. Despite general dispersal of financial responsibility in this fashion, the chief directing force in each national campaign is still wielded by the national committee of each party, composed of two members—one man and one woman—from each state and in some cases from the territories. Although formally confirmed at the national convention, the committee members are in reality chosen at state conventions, by state committees, or at direct primaries, as local custom and law prescribe. The principal officers of the national committee are the chairman, secretary, and treasurer. Since the chairman conducts the campaign for victory, the wishes of the presidential candidate count heavily in his selection. Harmony between the two men is essential to success. If no capable and energetic organizer is found in the original committee, the chairman is taken from party leaders on the outside. A similar practice is followed in the case of the treasurer. Owing to his importance as the collector of funds, he must be capable of wielding a large financial influence and the most available man will be

[1] Louise Overacker, *American Political Science Review*, August, 1911 and October, 1945.

drafted wherever found. It is, therefore, impossible to lay down absolute rules regarding the choice of committee officials, for the operation is not determined by any law. It is left for adjustment according to circumstances.

The Work of the National Chairman. Immediately after the convention adjourns, the newly elected committee meets and proceeds with preparations for the campaign. Leadership in this great national contest is taken, of course, by the chairman, who disburses the collections made by the treasurer, directs the huge army of speakers, organizers, and publicity agents scattered over the Union, and as the day of election approaches surveys the field, looking for weak places, hurrying up reinforcements to the doubtful states, and, perhaps, pouring immense sums of money into districts where more intensive canvassing may bring wavering voters into line. The outcome of the campaign depends in a great measure upon the generalship of the chairman of the national committee.

Campaign Literature and the Press. Since the chief purpose of the national committee in carrying on the campaign is to influence the voters, it gives systematic attention to the preparation of campaign "literature." As soon as the issues of the contest are fairly well settled, each party publishes a campaign textbook, which usually contains the platform, notification and acceptance speeches, biographical sketches of the candidates, statistics on business, labor, tariffs, trusts, money, and other economic problems, addresses by eminent leaders, papers in defense or criticism of the administration, and the most cogent arguments which the party can advance in support of its position. Campaign textbooks are sent out in large quantities to newspapers, speakers, and others in a position to affect the total vote. Besides this main document another textbook is issued for each party by its congressional committees (chosen by the party delegation in the House and Senate respectively) to furnish collateral information on the legislative "records" and policies of contestants.

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

A far more effective way of reaching the public is through the newspapers. Thousands of the uninteresting documents sent out by the national committee are doubtless thrown away unopened. The newspapers, however, have regular readers and reach the public directly:

accordingly the national committee makes extensive use of the established journals, all the way from the great city daily down to the rural weekly.

Campaign Orators. In addition to the printed arguments, there are oral appeals. To supervise use of the latter, the national committee generally maintains a special bureau which prepares a list of available "spellbinders." These orators are of every rank and ability, from the person with a strong voice who can harangue a street corner crowd from an automobile or a sound truck to the finished speaker whose very name will draw multitudes. Hundreds of them are directed from the national headquarters, while thousands of local volunteers are supervised by state and county committees, sometimes in consultation with authorities higher up. Itineraries are laid out, halls and bands engaged, parades organized, and every device utilized to give the liveliest possible effect to campaign eloquence.

Generally the presidential candidate himself enters the lists. In 1896 Bryan toured the country and delivered at least four hundred reported speeches in twenty-nine different states—the greatest oratorical record of any candidate up to that date. Twelve years later Bryan equaled his first record, while Taft, his opponent, outdid him by traveling eighteen thousand five hundred miles and making four hundred and thirty-six speeches in thirty states. In 1940 President Roosevelt and Wendell Willkie made long tours and spoke in many strategic centers. Even in the midst of World War II in 1944 President Roosevelt "took to the stump." During 1948 his successor, Harry S. Truman, went on extended speaking tours, turning what experts predicted would be his defeat into a striking victory. The day has long passed when candidates can safely remain at home to address visiting delegations from the front porch.

The Radio. A very efficient means of enabling candidates and their supporters to invade the homes of the people with party appeals is now afforded by the radio, an agency on which more than $1,500,000 was expended by the national committees of the two leading parties in the campaign of 1944. Within two or three weeks the candidates and their supporting orators can lay before more than twenty-five million radio owners the merits of their respective causes.

If a President is a candidate for reëlection, he enjoys special privileges in the use of the radio. As President he can broadcast his message to Congress and make addresses to the country over the radio, nominally in the process of transacting public business, but practically with a view to capturing voters for his party cause. It is, of course, difficult if not impossible for a President in such circumstances to separate public affairs

from party interests and maneuvers. In any case he is likely to be charged by his political foes with using his high office as a "sounding board" for partisan politics. For instance, when President Franklin D. Roosevelt in the summer of 1943 made a broadcast to the nation in which he discussed proposals for aiding soldiers on their return from the war, he was accused by the chairman of the Republican national committee with "playing politics" and seeking to promote his own reëlection in 1944, for a fourth term. Whatever the merits of such disputes, a President as a candidate for reëlection has many advantages over his opponents in using the radio, as well as in the dispensation of patronage, jobs, contracts, and favors to various economic interests representing wealth and poverty.

Advance Polling of Voters. Campaigns, of course, are not limited to oratory and the dissemination of political literature. A very practical part of the national committee's work is the study and supervision of wavering states. Early in the contest a political census is usually taken, especially of the regions in which the vote is known to vacillate or in which incipient revolts appear. Frequently this survey is minute in the extreme. With the results of the census in its hands, the national committee attempts to gauge the strength of the opposition and plans the lines of advance calculated to gain a victory. Means for influencing doubtful persons may then be dispatched to the scenes of action. Upon the skill with which these forecasts and plans are made may depend the fortunes of the party at the polls, as the "surprise" election of President Truman in 1948 dramatically demonstrated.

It is indeed a marvelous contest that closes on the day when the ballots of more than forty million voters are cast for presidential electors, pledged in advance to vote for particular candidates. By act of Congress that day is fixed: Tuesday following the first Monday in November.

CASTING AND COUNTING THE ELECTORAL VOTES

Constitutional Provisions. To assure all sections a voice, each state is given a number of electors equal to the number of Senators and Representatives to which it is entitled in Congress. To remove the electors from direct connections with the Federal Government, it is provided that none of them shall be a Senator or Representative or a person holding any office of trust under the United States.

The electors of each state are to be chosen as the legislature thereof may determine. No less than three distinct methods have been tried. In the beginning the state legislatures often elected them; but later this practice was displaced by popular election. When the more democratic system was adopted, it was frequently the custom at first to have two elec-

tors chosen by the voters of the state at large, and the others by congressional districts. It was discovered at length that a state's influence in national politics was greatly increased if all its electors were carried by one party or the other; consequently, the district system was abolished, and election of the entire list on a general ticket by popular vote throughout the state became the universal rule.

Nomination of Electors. *It is necessary, accordingly, for each party organization in each state to prepare a list of candidates equal to the total number of electors assigned to the commonwealth under the Constitution.* In practice the presidential electors are usually nominated by the state convention or state committee; very often the office is treated as a titular honor to be given to distinguished citizens or to partisans willing to make liberal contributions to campaign funds. The names of these electors for each party are then placed on the ballot for the regular election in November.

The necessity of securing a place on the ballot makes it difficult in most states for a small party or a new party to put a candidate for President in the field. A few states do allow any party convention (even one hastily organized) the privilege of placing the names of its presidential electors on the ballot by an easy method but in a large majority of the states a minor party with a small number of voters or a new party must draw up a petition and secure a certain number of signatures before it can enjoy this right. The number of signatures required by law in some states is fixed and in others it is a percentage of the votes cast in some previous election. It is this practice, calling for great effort and the outlay of considerable sums of money, which makes it so very difficult for new parties to organize nation-wide machines and break the force of the two-party system.

On election day the voter does not formally cast his ballot directly for President and Vice-President, although for his information the names of the candidates of officially recognized parties appear on the ticket.[2] On the contrary, he ordinarily votes for all the electors put forward by his party in his state. There is no point in distributing preferences among the various parties, unless a fusion occurs, whereby two political groups share the electors by agreement. What happens then on the election day is the choice in each state of its quota of presidential electors—totalling 531 for the entire country.

Election by Plurality Vote. Normally the party which secures a plurality of the popular votes in any state is entitled to all the electoral

[2] A few states put only the names of the candidates for President and Vice-President on the ballot and assign the ballots cast for them to the proper candidates for presidential elector. "The Presidential Short Ballot," by L. L. Aylsworth, *American Political Science Review*, November, 1930.

ballots of that state for President and Vice-President; very rarely is there a split in the tickets. It would violate a long cherished custom if an elector dared to break faith with the party which nominated him and vote for the candidates of any other party. Consequently, the deliberative, judicial, nonpartisan system designed by the framers of the Constitution has been overthrown by political custom.

Minority Victories Are Possible. It is sometimes held that through this party practice the popular election of President and Vice-President has been established but, if by this is meant choice by a majority of the voters throughout the United States, it has not been attained. Indeed, several of our Presidents have been elected by a minority of the popular ballots cast. Lincoln, for example, was chosen President in 1860 by a vote of 1,866,452 against a total of 2,815,617 polled by his opponents, the opposition being so distributed that it obtained only a minority of the presidential electors. In the election of 1912 Woodrow Wilson's total vote fell short of a majority by more than a million. Two Presidents, Hayes and Benjamin Harrison, did not receive even a popular plurality, that is, they stood lower in the scale than their principal rivals.

The possibility of election by a minority of the popular vote cast is due to the fact that when a party carries a state, even by the smallest margin, it wins all the presidential electors allotted to that commonwealth. Therefore, a party that is victorious by narrow margins in enough states to obtain a majority of the presidential electors may in reality have a smaller popular vote to its credit than the opposing party which may have swept its states by enormous majorities. As a matter of fact, the system works with a certain degree of fairness only because the voters are somewhat evenly divided between two great parties. The appearance of a strong third party or the multiplication of factions would frequently result in throwing the choice into the House of Representatives.

Victory by a Minority of the Eligible Voters a General Rule. If in the presidential electorate are included all the voters who are lawfully entitled to vote, then no victorious candidate for President in recent years has won a majority of all the voters. It appears that the proportion of men and women eligible to vote who actually take the trouble to cast their ballots in presidential elections ranges from fifty-five to seventy per cent of the total number who could vote if they would. Exact percentages cannot be obtained, for the number of persons who have the qualifications of voters under the laws is unknown; even the best of estimates vary more or less. But if the number of actual voters is fixed at the highest point, namely, seventy per cent of all the eligible voters, every

presidential election since 1912 at least has been carried by a minority of the people entitled to vote.[3]

Casting and Counting Electoral Votes. The rules according to which the electors chosen in each state meet and cast their votes for President and Vice-President are prescribed by the Constitution and federal and state statutes. Federal law provides that the electors of each commonwealth shall convene on the first Monday after the second Wednesday in December, following their election, at such place as the legislature of their state directs—in practice, the state capital. When they have assembled, the electors vote by ballot for President and Vice-President, "one of whom at least must not be an inhabitant of the same state with themselves"—that is, for the two candidates nominated by their party. Thereupon they make separate lists of the number of votes cast, and sign, certify, seal, and transmit the documents to the president of the Senate of the United States. Among their returns the electors must include their certificates of election as evidence of their power to act—evidence of crucial importance in contested elections. When they have cast their votes and dispatched their documents, the electors have performed their whole duty.

The counting of the total electoral vote begins in the Hall of the House of Representatives on the sixth day of January, following the meeting of the electors in their respective states. It is conducted in the presence of the two houses of Congress with the president of the Senate in the chair. Except in the case of a contested election, this count is, of course, a mere formality, for the result is always known in advance.

Action in Absence of Majority Vote. If no candidate for President obtains a majority of all the electoral votes cast, the House of Representatives chooses the President from the three candidates who received the highest number of electoral ballots. In the selection of the President by this process, each state represented in the House is entitled to only one vote; a quorum consists of the members from two-thirds of the states; and a majority of all the states is required for a choice. Necessarily, in such cases, the single vote of each state is commanded by the majority of its Representatives. Should the House be unable to reach a decision prior to January 20th, then the Vice-President shall act as President until a President shall have qualified. Only two Presidents have been elected by the House of Representatives—Jefferson in 1801 and Adams in 1825.

If none of the candidates for Vice-President receives a majority of all

[3] V. O. Key, *Politics, Parties, and Pressure Groups* (1947 ed.), pp. 584 ff., for estimates and comments on the nature and significance of nonvoting in elections.

the electoral votes, the election is thrown into the Senate, and the Senators voting as individuals must choose one of the two candidates standing highest on the list. Two-thirds of the whole number of the Senators constitute a quorum for this purpose, and a majority of the entire body is necessary for a choice.

QUALIFICATIONS AND SUCCESSION

Legal Qualifications for President. The legal qualifications for President are laid down in the Constitution. He must be a natural-born citizen, not less than thirty-five years old, and a resident of the United States for at least fourteen years. Identical rules apply to the Vice-President. The term is fixed at four years, and so far as the Constitution is concerned, the President or Vice-President may be reëlected indefinitely.

Inauguration. Under the Twentieth Amendment, a new President assumes office on January 20, following his election. Curiously enough no official notice is given to the President-elect. He is supposed to be aware of election himself. On the day of inauguration, he is driven to the Capitol. If the weather permits, the oath of office, administered by the Chief Justice of the United States, is taken in the open air on a platform at the east front of the Capitol; otherwise, in the Senate Chamber. Following the custom established by Washington, the new President then delivers an inaugural address. After the ceremony, he returns to the White House, where he reviews from a special stand a long procession organized in his honor. Then he is ready to begin his official duties.

Presidential Succession. In case of the death, resignation, removal, or inability of the President to discharge the powers and duties of his office, the Vice-President succeeds him. By law Congress has provided for the performance of the duties of the office in case of the removal, resignation, death, or inability of both the President and Vice-President. The statute, as amended, provides that the Speaker of the House of Representatives shall then assume the office of President and after the Speaker shall come the President pro tempore of the Senate. Next in line, in the following order, are the Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, and Secretary of Labor.

The Third-Term Doctrine. Until President Franklin D. Roosevelt was elected for a third term in 1940, it had long been supposed that no President should have more than two terms, at all events in succession. This "third-term doctrine," as it is called, is often alleged to have been established by the example of George Washington, who declined reëlection after eight years of service as President. According to one tradition,

he acted on principle but there is no reason for believing that Washington objected to three terms or more. Indeed, in his Farewell Address he explained why he in particular ought not to be charged with a lack of patriotism or neglect of duty in refusing to continue in office.

Jefferson was for a time dubious on the point of the presidential term. He originally believed that the President should have a seven-year term and be ineligible for reëlection. Later he decided that service for eight years with the possibility of removal at the end of four years was nearer the ideal arrangement. By retiring in 1809 he followed the example of Washington and besides he urged the adoption of an amendment to the Constitution forbidding a third term. Thus the third term doctrine received a high sanction and seemed to be an accepted rule of politics until President Roosevelt broke it successfully by winning a third term in 1940 and a fourth term in 1944.

Proposed Limitation of the President's Term. When the Republicans came to power in Congress in 1947, they were determined if possible to put limits on the indefinite reëligibility of the President permitted by the Constitution. Assisted by enough Democrats to make the necessary two-thirds majority in both houses, they carried a resolution for a constitutional amendment to effect their purpose. The proposed amendment provides: "No person shall be elected to the office of President more than twice, and no person who has held the office of President, or has acted as President for more than two years on a term to which some other person was elected President shall be elected to the office of President more than once." It also states that the article of amendment shall not apply to any President holding office at the time the amendment is proposed and shall not prevent any person holding the office during the term within which the article becomes operative from continuing to serve as President during the remainder of such term.

The Debate over the Presidential Term. In the discussions in Congress and outside that accompanied the proposal of the constitutional amendment designed to limit the tenure of the President, the nature of the presidential system was extensively explored. Although the arguments did not run entirely along partisan lines, the Republicans in Congress stood solidly for the proposal. In taking this position they were troubled by no serious problems of historical consistency. They had not started the third-term tradition. None of their Presidents had served for more than two terms. Yet they were taunted with the allegation that their party was the heir of the old Federalist tradition, and that Alexander Hamilton, the founder of the Federalist party had argued cogently in Number 72 of *The Federalist* in favor of indefinite reëligi-

bility of the President, in the interest of stability and strength in the administration of government. In reply they could easily recall that Hamilton was then arguing for election and reëlection by presidential electors one or two degrees removed from heats and tumults of popular campaigns. At all events, Republicans lightly cast off the Hamilton theory and chose another line, namely, that experience under the recent Roosevelt regime had demonstrated that a President could readily create or take advantage of emergencies and use his multitude of office holders for the purpose of keeping power for himself and his party as long as he lived, thus endangering popular government under the Constitution.

For Democratic members of Congress the two-term issue likewise presented problems in party tradition. After all, was not Thomas Jefferson, the founder of their party, the original creator and exemplar of the anti-third-term doctrine? The records of their party showed that many distinguished Democrats, including Grover Cleveland[4] and William Jennings Bryan, had often inveighed against the very idea of a third term. What about the solemn declaration in favor of a single term and an amendment "making the President of the United States ineligible for reëlection" presented to the country in the platform of 1912, on which Woodrow Wilson was elected President, even though he personally did not believe in any such "reform"? Republican advocates of limitation on reëligibility did not fail to remind Democrats of many such passages in the history of their party. Democratic opponents of the proposed amendment also used "history" on their side. While its Republican champions discarded the Federalist tradition expounded by Hamilton in 1787, Democratic adversaries warmly espoused it and argued that by recent experience under the leadership of President Roosevelt the soundness of indefinite reëligibility had been conclusively demonstrated. Imagine the tragedy, they urged in sum and substance, if he had not been reëlected in 1940 for a third term and in 1944 for a fourth term.

Such was the intellectual "atmosphere" in which Congress passed the resolution of amendment. A scrutiny of the speeches and the votes indicates a primary line of division. Republican and Democratic opponents

[4] Grover Cleveland had said in 1884, in accepting the Democratic nomination for President: "When we consider the patronage of this great office, the allurements of power, the temptations to retain public place once gained, and, more than all, the availability a party finds in an incumbent whom a horde of officeholders, with a zeal born of benefits received and fostered by the hope of favors yet to come, stand ready to aid with money and trained political service, we recognize in the eligibility of the President for reelection a most serious danger to that calm, deliberate, and intelligent political action which must characterize a government by the people." Charles W. Stein, *The Third-Term Tradition*, p. 117. Subsequently, however, Mr. Cleveland apparently acquired doubts as to applicability of the doctrine in his own case. *Ibid.*, p. 118.

of President Roosevelt and the New Deal were in favor of the amendment. Resolute champions of the late President and his doctrines were opposed to it. This line of division appeared also in the state legislatures called upon to ratify it. Among the twenty-two states which had approved it by May 30, 1948, were two from the South, which, though Democratic in politics, had been hostile to many of President Roosevelt's measures.

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CHAPTER 11

The Office of President

Nature of the Executive Power. Leaders among the framers of the Constitution were convinced that a strong executive was necessary if stability, force, and efficiency were to be achieved in the National Government, and if the historic tendency of legislative bodies to accumulate all powers in their own hands was to be effectively combatted. So they discarded a proposal for dispersing executive power among a board of three or more persons and instead concentrated it to a high degree in the hands of a single officer. Section 1 of Article II of the Constitution reads: "The executive power shall be vested in a President of the United States of America." Another clause makes him Commander in Chief of the armed forces.

At the same time, the framers were well aware that the executive power was a dangerous instrument, and that in the past dictators had repeatedly risen to despotic heights on the ruins of popular government. So the framers took the precaution of placing major checks on the will of the President, thereby making "the executive power" considerably less extensive than a mere hasty reading of Section 1 of Article II might imply. The President shares with the Senate the function of appointing high officers, and of making treaties. Under Section 8 of Article I, Congress may make all laws necessary and proper for carrying into effect the powers vested by the Constitution in Congress and "the Government of the United States, or in any department or officer thereof." Hence the President must rely on Congress for legislation creating, organizing, and financing all the subordinate agencies of the executive department.

THE PRESIDENT AS A POLITICAL LEADER

Presidents Choose Their Role. Within limits, the President may employ the prestige of his office and the powers conferred upon him in playing almost any kind of role on the national stage. A President may, if his temper and circumstances permit, confine his activities rather narrowly to the discharge of routine duties of administration, without seeking to secure the enactment of laws or to force new policies upon public

attention. He may make few speeches, send few messages to Congress, and refrain from carrying on agitations. Like President Calvin Coolidge, he may not strive to be "a great President."

On the other hand, the President may take a broad view of his powers and responsibilities; as did Theodore Roosevelt when he said that his powers were not limited to matters expressly mentioned in the Constitution, but extended to every question of public welfare not closed to him by the Constitution. He may proclaim domestic and foreign policies of far-reaching significance for the future of America. By a message to Congress in 1823 President James Monroe laid down a doctrine of foreign policy that is still influential in American thought and practice. By defining and insisting upon American rights of commerce and travel in the early stages of World War I President Woodrow Wilson took a position which, when challenged by German acts of power, made war the only alternative to the surrender of those rights. Immediately after his inauguration in 1933, President Franklin D. Roosevelt assumed leadership in framing and pressing through Congress a program of measures designed to overcome the economic crisis then prevailing, and later he formulated foreign policies respecting the aggression of the Axis powers in Europe and Asia, under which the United States became involved in a global war.

Role of the President Affected by His Personality and the Times. The sayings and doings of the President depend upon many things. They are shaped by the nature of his personality—his manner, his convictions, his theories, his will power and his ambitions. They grow in part out of his capacity "to get along with people," to engage their confidence, to arouse them by the cogency of his messages, to charm them over the radio by the clearness and friendliness of his voice, to win their affection, and draw them into the train of leadership. His actions and achievements are conditioned by the state of the country; whether it is at peace and enjoying "prosperity," or tossing in the fever of a business depression, or suffering from the stresses and alarms of war and its aftermath. The spirit of the times—the ideas in circulation and at the forefront of public discussion—has a direct bearing on his course. In any event, he plays a dual role. He is a leader of his party, of the wider multitude willing to follow him, and of the official hierarchy of the federal administration. He is also a public functionary bound to discharge certain duties vested in him by the Constitution and laws of the United States.

Methods of Political Leadership. As a political leader, the President may use his exalted position to appeal to the nation or to sectional, class, or group interests; he may use his veto power against laws passed by

Congress; and he may agitate by means of his messages. Owing to his preëminence he can exert a tremendous influence on public opinion by the distribution through his messages and interviews of selected facts, alleged facts, and theories of government and policy. There is a corps of sharp journalists in Washington ever alert to catch even the trivial phrase that falls from his lips at press conferences or offhand, and spread it broadcast over the country and the world. Such is the state of modern science that the President can even dispense with the press and through the radio speak directly to the nation and the peoples of the earth. So we may say that mechanical inventions have made a marked change in the political influence of the President.

Leadership in Work of Government. Besides manifesting itself in the formulation of great national projects and in the creation of supporting sentiment, presidential leadership also appears in the discharge of the various duties prescribed by the Constitution and the laws. As head of the federal administrative hierarchy centering in Washington and operating throughout the United States and abroad, the President may shape policies in detail and hold agencies of government up to a high standard of performance; or he may neglect this side of his work and allow administration to sink into a state of inefficiency. Upon his success or failure as an administrator may depend the outcome of his other policies and activities.

PRESIDENT AND CONGRESS

The Proposal of Legislation. Although the Constitution states that "all legislative powers" therein granted shall be vested in the Congress of the United States, it does not entrust to Congress the sole right to propose or originate legislation. On the contrary, it requires the President to act in this respect, for it states: The President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."

The Presidential Message. These responsibilities he discharges in part by delivering public messages to Congress. He may deliver them orally in the presence of both houses or send them as documents. Washington and Adams adopted the former procedure; Jefferson discontinued it and substituted the practice of sending written messages. This was the rule for more than a hundred years until President Wilson, in 1913, with a somewhat dramatic gesture, returned to Washington's custom and read communications to the houses. For a time his successors followed in his footsteps. President Coolidge even read his first message to the general public over the radio as well as to Congress. But later

he resumed the old practice of transmitting messages to Congress in the form of state papers. Subsequently the custom of reading important messages to Congress was restored by President Franklin D. Roosevelt and continued by President Truman.

The nature and purpose of the message vary from time to time. Occasionally it is a formal document conveying definite information on some special issue. Again, particularly at the opening session of Congress, it may have high political significance. It may be a solemn declaration of party policies drafted in consultation with party leaders. It may be a bid for reelection in the form of an attractive statement of the views entertained by its author. It may be an announcement to some other country, warning it against pursuing a certain course of action, such as President Truman's appeal to Congress in March, 1947, calling for aid to Greece and Turkey in their resistance to Russian aggression in the name of communism. It may contain a noteworthy statement of principles, such as the doctrine incorporated in Monroe's famous message of December, 1823, or the Four Freedoms in which Roosevelt summarized the objectives of his foreign policy in 1941. Sometimes the message even goes into details and suggests specific laws.

Whatever may be their purport, messages are great public documents, widely read and discussed. Congressional debates receive scant notice, but the President's messages are often quoted extensively in metropolitan dailies, and are the subject of general editorial comment throughout the length and breadth of the land. They stir the country; they affect congressional elections, and they may establish major policies.

Presidential Pressure on Congress. The treatment which the President's recommendations receive at the hands of Congress varies, of course, according to circumstances. They may be accepted if Congress feels that they are sound and that there is an effective demand for them in the country. If it is not convinced on such grounds, the President may seek to compel action. As the leader of his party, he may use the party organization to line up members of Congress in support of his proposals.

The President's Legislative Weapons. The constitutional power to recommend measures to Congress and the strength of party leadership do not alone account for the force of the President's influence in legislative affairs. He has other instruments, honorific and pecuniary, at his command. He can make nominations to high offices carrying prestige and honor throughout the country and may bestow these prizes on members of Congress if they court or receive his favor and politically "deserve" it, or on others named by friendly Senators or Representatives. He has at his disposal thousands of less glittering offices, with salaries

attached, for rewarding constituents of loyal congressmen. He has a certain degree of control over the distribution of lucrative contracts and of funds from the federal treasury in the home districts of congressmen. With the enormous increase in the number of federal officials and employees and in expenditures for a variety of purposes, the power of the President over the ambitions and fortunes of Senators and Representatives in Congress has undergone striking amplification.

The Veto Power. The article of the Constitution which vests legislative powers in Congress also states that every order, resolution, or vote to which the concurrence of the two houses may be necessary (except on a question of adjournment) shall be presented to the President. In practice this has been taken to mean every bill or joint resolution, except proposed constitutional amendments, some concurrent resolutions, and questions of adjournment.

When a bill has been presented to the President, one of four things may happen. He may make it a law by signing it. He may withhold action; if he fails to return the bill within ten days (Sundays excepted) while Congress remains in session, it becomes a law without his signature. He may veto the bill. If he does this, he must return it with his objections to the house in which it originated and that house must proceed to reconsider it. If the bill is repassed by a two-thirds vote in both houses, it becomes a law in spite of his veto; otherwise it is a dead letter. In case Congress adjourns within ten days after presenting bills to the President (Sundays excepted) and he refuses or fails to sign them, they do not become laws. By this process of neglect, known as the "pocket veto," he may quietly kill measures he does not favor.

Unlike the governors of most states, the President cannot veto a part or parts of a bill, including single items in appropriations bills. Taking advantage of this situation Congress occasionally attaches to an appropriation bill other provisions, which the President is known to oppose, with a view to compelling him to approve them. Unwilling to stall the wheels of government by cutting off money supplies, he usually, but not always, accepts the objectionable measure or measures, along with the grants of money. This practice of attaching "riders" to appropriation bills is somewhat discredited, but Congress regards it as a kind of "gun behind the door" to be used in extreme cases to force the President to accept its will.

Grounds for Exercising the Veto. On what grounds is the Chief Magistrate justified in employing the veto? According to the opinion of Hamilton, the right of negation was conferred on the President so that he could defend his prerogatives against the propensity of the legislature

to absorb the powers of the other departments. To this Hamilton also added: "The power in question has a further use. . . . It furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body." On the question of propriety, Presidents themselves have differed. Jefferson contended: "Unless the President's mind, on a view of everything which is urged for and against the bill, is tolerably clear that it is unauthorized by the Constitution—if the pro and con hang so even as to balance his judgment—a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion." On the other hand, President Jackson thought that he could do as he pleased, and besides he had his own opinion about the meaning of the Constitution; he even alleged unconstitutionality as one of the reasons for refusing to sign a bill, although the validity of such a measure had been definitely upheld by the Supreme Court several years previously.

Frequency and Nature of Vetoes. It might be supposed that under the American party system, the exercise of the veto power by the President would be both striking and frequent when he is of one party and Congress is in the control of an opposition party. This has often been true. In 1947 the Democratic President, Harry S. Truman, vetoed a Republican tax bill and a Republican labor bill. In the former case Congress sustained the President, for a two-thirds vote could not be mustered in both houses to carry the measure over his veto; but in the latter case the two-thirds vote was secured and the bill became a law in spite of his objections. Battles over the veto also occur when the same political party is in possession of the executive and legislative branches. For example, right in the midst of World War II, in 1943, the Democratic Congress overrode President Roosevelt's veto of the Smith-Connally "antistrike" bill—a measure hotly opposed by organized labor, upon whose support the President had drawn heavily in his three elections. The next year, 1944, after President Roosevelt had vetoed an important revenue bill and sharply criticized Congress in a veto message, the House and the Senate, in a burst of wrath, carried the bill over his veto by overwhelming majorities.

Frequently, there is more "politics" in veto operations than appears on the surface. Sometimes it is understood among party leaders that the President will veto a bill if passed; occasionally he will openly threaten to do just that; thus members of Congress may win favors among their

constituents by voting for a particular bill, knowing in advance that they need not assume responsibility for it, since the President will refuse to sign it.

Criticism of the Veto. Whether the veto system as operated has improved the quality of legislation or worked for responsibility in government is certainly open to question and has often been questioned. In 1943, Hatton W. Sumners, a Democratic member of the House, severely criticized it as operated, and proposed an amendment to the Constitution authorizing Congress to override a presidential veto by a simple majority vote. Mr. Sumners declared that "from Washington to Lincoln, inclusive, there were only 43 bills vetoed by those sixteen Presidents . . . ; whereas from March 4, 1933, to June 26, 1943, inclusive, there have been 592 vetoes." The existing plan, he said, gives a President too much power, especially at a time when his power has been greatly augmented in other ways. In 1947 and 1948, during conflicts between President Truman and Republicans in Congress, similar objections to the veto system were made in Republican quarters.

Presidential Leadership in Legislation. Ordinarily, it is to the President rather than to Congress that his supporters look for the translation into law of the promises made in the party platform or in speeches delivered during the campaign for election. "Under our system of politics," said William H. Taft, "the President is the head of the party which elected him, and cannot escape responsibility either for his own executive work or for the legislative policy of his party in both houses. He is, under the Constitution, himself of the legislature insofar as he is called upon to approve or disapprove acts of Congress. A President who took no interest in legislation, who sought to exercise no influence to formulate measures, who altogether ignored his responsibility as the head of the party for carrying out ante-election promises . . . , would not be doing what is expected of him by the people."

Legislative Leadership of Franklin D. Roosevelt. Beginning with the inauguration of Franklin D. Roosevelt in 1933 presidential leadership in legislation reached a point of power higher than ever before in the history of the United States. With a few striking exceptions, every important measure enacted by Congress between 1933 and 1943 either originated in the executive department or was sponsored by the President. Not only did President Roosevelt recommend measures to Congress and use his many powers in pushing them through to enactment. He even sought, though with little success, to "purge" Congress of certain Democratic opponents by openly seeking to defeat them for reëlection, especially in the congressional election of 1938. His triumph in the campaign of 1940, making him the first President to win a third term,

seemed to give the stamp of popular approval to both his methods of leadership and his measures.

The congressional election of 1942, however, marked a turn in the tide, at least for a time. In that election Republicans and independents received a majority of the total vote cast, and the Democratic majority in Congress was materially reduced. The new Congress, which assembled in January, 1943, struck down one after another measures sponsored or favored by President Roosevelt; and its members, Democrats as well as Republicans, assailed the policies of his administration, especially in respect of domestic affairs. Meanwhile, the question of presidential leadership and congressional responsibilities was vigorously discussed and demands were made for reforms in legislative practices and in the relations of the President and Congress (Chapter 13).

The President's Powers as a Rule Maker. In matters of legislation the President is not merely limited to his role of leadership in initiating bills and pressing them through Congress. He is in fact, if not in theory, a legislator in his own right. In respect of some matters he has a power to issue decrees and make ordinances as Chief Executive and as Commander in Chief of the armed forces. In addition, it has long been a common practice of Congress in passing laws to cast them in general terms and to allow the President or executive agencies under his supervision to fill in the details—to legislate in fact. During the administrations of President Franklin D. Roosevelt, Congress enacted many "blanket bills," that is bills written in vague language, vesting in the President immense authority to issue amplifying orders.

THE PRESIDENT AND THE COURTS

Although a tradition assigns the function of interpreting the Constitution to the judiciary, and great Chief Justices, such as John Marshall and Roger B. Taney, have exerted a profound influence on American views of that document, it is probable that Presidents have outstripped them in the formation of constitutional opinion. The broad interpretation adopted by Washington in the beginning, the liberal conception held by Lincoln, the theory of loose construction put forward by Theodore Roosevelt, and the doctrines expounded by Franklin D. Roosevelt have perhaps done more to develop that line of thought than all the opinions of the judges put together.

Furthermore, it is relevant to note that Presidents have led in many conflicts with the judiciary which have ended in the modification of its views or in a constitutional amendment or both. Lincoln did. So did President Grant. In our own time President Franklin D. Roosevelt chal-

lenged opinions of the Supreme Court which ran contrary to his program, proposed changes in the personnel of the Court, and, though not always victorious, had the satisfaction of seeing the Court reverse itself on one point and alter its conceptions of others (Chapter 13). As an interpreter of the Constitution, the President has responsibilities no less grave than those of the Supreme Court of the United States, and no less than the judges of that court he is bound in law and conscience to protect the processes of constitutional government against the assaults of ambition and interests within the Government and outside.

THE PRESIDENT AS HEAD OF THE CABINET

Nature of the Cabinet. In addition to his manifold responsibilities in dealing with Congress and the courts, the President carries heavy obligations as chief administrator. Immediately under his supervision are the secretaries of the nine executive departments who form, collectively, what is called the cabinet.[1] Though these individuals usually rank high in the councils of his party, the President cannot shift his responsibilities to that body or any officer in it. He cannot make them individually or collectively accountable to the country for the policies and actions of the Government over which he presides.

Origins of the Cabinet. In creating the first departments in 1789, Congress did not even recognize the possibility that the chief officers would form a presidential council. As a matter of fact, the language of the law establishing the Treasury Department indicated a desire to bring the Secretary under congressional control in many ways. Apparently the Senate was then expected to serve as the President's advisory body, for it shared with him the power of making treaties and appointments and was in the beginning sufficiently small in size to meet the requirements of a council.

Whatever may have been the view of Congress, Washington regarded the four chief executive officials, including the Attorney General, as his confidential advisers, though the term cabinet was not immediately applied to them. He also exercised his constitutional right of requiring opinions from the heads of departments, and took them into his confidence in all important matters very soon after the first appointments were made. By a gradual process, he welded them into an executive council, and by 1793 the term cabinet or cabinet council had come into use.

Work of the Cabinet. Some Presidents have cabinet meetings at stated times, but others merely call sessions when particular issues seem to

[1] Not to be confused with the European parliamentary cabinet which consists of a prime minister and his colleagues chosen by the party or coalition in control of the legislature.

require common consideration. The meetings are usually secret, and no minutes are kept of transactions. As the special business of each department is discussed separately with the President by the appropriate officer, only affairs pertaining to the general policy of the administration are likely to be brought up for consideration in the cabinet. Votes are seldom taken on propositions, and, if taken, they are of no significance beyond securing a mere expression of opinion. This is illustrated by an incident related of President Lincoln, who closed a grave debate in the cabinet, in which he found every member against him, with the announcement: "Seven nays, one aye, the ayes have it." Nevertheless, cabinet meetings are of service to the administration, especially in maintaining harmonious cooperation among the departments and in formulating executive programs.

In the ordinary course of things, it appears from such glimpses as we can catch in papers of former cabinet members, most of the sessions are of slight importance, especially under a dominant President. This view is given in the records of Franklin K. Lane, who served under President Wilson as Secretary of the Interior. A few entries will illustrate the point: "Today's meeting has resulted in nothing, though in Mexico, Cuba, Costa Rica, and Europe we have trouble. . . . For some two weeks we have spent our time at cabinet meetings largely in telling stories. Even at the meeting of a week ago, the day on which the President sent his reply to Germany, . . . we were given no view of the note which was already in Lansing's hands and was emitted at four o'clock, and we had no talk upon it, other than some outline given offhand by the President to one of the cabinet who referred to it before the meeting; and for three-fourths of an hour we told stories on the war and took up small departmental affairs."

A study of the public papers, addresses, and memoirs relative to the administrations of Franklin D. Roosevelt, from 1933 to 1945, discloses the fact that the cabinet as a collective body counted for little in the formulation of his major policies and decisions, as compared with the influence of his personal friends and advisers from the outside, upon whom he drew for aid and counsel. In the index to the first five volumes of President Roosevelt's own papers appears only one reference to his cabinet and that one is trivial—the dismissal with a bare comment of a newspaper report on alleged changes to be made in his cabinet. As Andrew Jackson came to rely almost entirely upon his "kitchen cabinet" of personal friends, so President Roosevelt took into his confidence a small group of men picked to suit his purposes—a circle called by its critics "the White House janissariat."

Extent of the President's Control. Clearly the cabinet is merely the

kind of organization which the President wishes to make of it. It is his *own council in a very peculiar sense. Having no existence in terms of* formal law, it is not subject as such to congressional control. In the first administration of President Jackson this point was settled. When the Senate requested the transmission of a paper supposed to have been read by him to the heads of the executive departments, he replied: "I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as cabinet council." Congress cannot hold them to account collectively for anything that they do.

THE PRESIDENT AS HEAD OF THE ADMINISTRATION

President's Power to Direct Subordinates. Besides serving as leader of the cabinet, the President assumes other technical responsibilities as the head of the national administration. It is his duty, among other things, to see that the Constitution, laws, and treaties of the United States and judicial decisions rendered by the federal courts are duly enforced throughout the country. In the fulfillment of this obligation, he may direct the heads of departments and their subordinates in the discharge of the functions vested in them by the acts of Congress. Some of the departments are placed, by law, more specifically under his control than others. For example, the Secretary of State, in the conduct of foreign affairs, is completely subject to the President's orders; and the Attorney General must give an opinion or institute proceedings if required to do so. On the other hand, when the Treasury was organized in 1789, it was provided that the Secretary should report to either branch of Congress, in person or writing, respecting matters referred to him.

How far the President, in ordinary times, may go in controlling administrative officers is a matter of dispute among lawyers. Long ago the Supreme Court held that he is bound to see that an officer faithfully carries out the duties assigned to him by law, but is not authorized to direct the officer as to the ways and means to be employed in the operation. It is doubtful, however, whether this view would be taken by the Court today. Clearly the President has power to remove the head of a department who refuses to obey orders, and it is difficult to see why, in reality, he cannot determine, within the lines of the statutes, the steps to be taken by that officer. He is not likely, of course, to quarrel with a cabinet officer about details but when there is a serious conflict over important public policies, the President, if firm in his views, will prevail and the officer will yield, resign, or be dismissed. Such a con-

flict occurred in the administration of President Coolidge in 1924 between the President and his Attorney General, Harry M. Daugherty; and the Attorney General was forced to resign, under protest. In 1946, President Truman ousted Henry A. Wallace from the Department of Commerce after a clash of opinions over foreign policy.

Overhead Organization for Administration. In order that the President may have knowledge of the work done by hundreds of thousands of officers and employees and supervise it with some degree of efficiency, he is provided with an overhead organization consisting of the following principal parts:

1. The White House office—secretaries, administrative assistants, clerks.
2. The Bureau of the Budget—to prepare the annual estimates of receipts and expenditures for presentation to Congress by the President.
3. The cabinet composed of nine department heads.

Especially useful to the President are the administrative assistants whose offices were created in 1939 on the recommendation of the President's Committee on Administrative Management. The duties of these assistants are not precisely described by law but they include: collecting information for the President on matters of interest to him as chief administrator and head of his party; smoothing out troubles in politics and administration by seeing and talking to the "right" people; scrutinizing and reporting on appointments to offices and on the work done by the immense body of civil servants; maintaining contacts with Congress and acting as conciliator in his relations with that body; and keeping the President informed as to the opinions, desires, and complaints of citizens and groups of citizens and of state and local governments with respect to the work of federal agencies.

Power of Law Enforcement. The President's authority over the direct execution of the law through the agency of the Attorney General is very great. He may instruct the Attorney General to institute an action against anyone suspected of violating federal statutes. Since the principles which control the proceedings of officers in arresting, holding, and prosecuting accused persons are general in character, the very spirit as well as the tactics of law enforcement can be shaped by the President. Laxness or severity is largely within his discretion, subject, of course, to the vigilance exercised by members of Congress; and such vigilance is always latent or active, often highly effective. It was largely the attacks made by Senators on Harry M. Daugherty that induced President Coolidge to demand his resignation. On protests from a Senator in 1943 a federal prosecutor given to violent language and practices in a certain trial was forced to withdraw from it. If the liberties of

the people guaranteed by the Constitution are strictly upheld or grossly violated by federal authorities, however, the credit or the blame, as the case may be, belongs in a large measure to the President of the United States.

When the enforcement of the laws encounters resistance too strong for the United States marshals and other officers, the President may use the armed forces at his command under conditions established by federal statutes. Indeed, he is not wholly limited in the exercise of this power to cases of violent resistance. If, for instance, postal operations are obstructed or interstate traffic is seriously hampered by local disturbances, he may order out the troops. In 1894 President Cleveland, against the protest of the Governor of Illinois, sent soldiers to Chicago which was the scene of a great railway strike affecting the movement of commerce and the mails. President Wilson resorted to similar action on the occasion of a labor dispute at Gary, Indiana, among the steel workers; and President Harding turned to the Army in 1922 when a strike threatened to tie up the railways.

The Pardoning Power. The President may grant reprieves and pardons (except in cases of impeachment) for offenses against the United States. He may remit a fine, commute a death sentence to a term of imprisonment, or give a convict complete freedom; but when forfeiture of office is one of the penalties imposed, he cannot restore the offender to his former position. Clemency may be exercised before or after conviction. The pardoning power, in other words, rounds out the President's authority over law enforcement.

In using this power, the President relies, of course, largely upon the conclusions of others. In each instance the application for pardon is sent to the office of the Attorney General, where a specialist in such matters takes charge of preliminaries. Usually the judge and the district attorney under whose direction the case was first tried are asked to make a statement about the merits of the appeal.

After the facts are reviewed, the Attorney General expresses his opinion on the application and transmits the documents to the President for final determination. "If the trial seems to have been fairly conducted," said President Benjamin Harrison, "and no new exculpatory evidence is produced and the sentence does not seem to have been unduly severe, the President refuses to interfere. He cannot weigh the evidence as well as the judge and jury. They saw and heard the witnesses, and he has only a writing before him. It often happens that the wife or mother of the condemned man comes in person to plead for mercy, and there is no more trying ordeal than to hear her tearful and sobbing utterances and to feel that public duty requires that she be denied her prayer."

THE PRESIDENT'S POWER OF APPOINTMENT AND REMOVAL

In connection with his executive functions, the President chooses or nominates a large number of federal officers. The exercise of this power is significant from the point of view of politics, as well as administration. It is a power which may be employed to foster partisanship or to secure the efficient performance of public duties regardless of parties.

Two Classes of Appointive Officials. When considered in relation to the manner of their selection, the civil authorities of the United States —other than the President, Vice-President, presidential electors, Senators, and Representatives—fall into two groups: officers whose appointment is entrusted by the Constitution or by act of Congress to the President and Senate; and "inferior" officers whose appointment is vested by Congress in the President alone, the courts of law, or the heads of departments.

Between superior and "inferior" offices no clear distinction has ever been made. The right of Congress to decide, when establishing an office, that it shall be deemed "inferior" is beyond question, but no very consistent rule has been adopted for guidance. A few bureau chiefs of great importance are inferior officers in the view of the law, while others, some relatively less significant with respect to their duties, are in the upper range. In the main, minor officers and clerks are chosen by departmental heads subject to the terms of the Civil Service Act (Chapter 14).

Political Appointments. The first or superior group—chosen by the President and Senate—embraces nearly all the high officers of the Federal Government; for example, the heads of departments, most bureau chiefs, judges of the federal courts, the members of various commissions, heads of divisions, and chiefs of agencies. Taken together, they constitute an official army numbering thousands of persons, whose salaries amount to millions of dollars a year. In filling positions in this class, usually by choosing party workers, the President and Senate must observe laws imposing such qualifications as citizenship, "loyalty," professional attainments, technical training, and the like. Since many of these officers serve only for a term of years, under various acts or in practice, each incoming President has at his disposal an enormous amount of patronage, subject to the approval of the Senate.

When Congress is in fairly harmonious relations with the President it is inclined to increase the proportion of officials whose appointment is vested in him alone or in heads of departments. But in times of conflict, it displays another mood. When, for instance, in 1913, Congress was in revolt against some of President Roosevelt's domestic measures, it de-

voted days to criticising several of his appointees and the Senate actually passed a bill providing that the selection of all officials, with certain exceptions, receiving $4500 a year or more, should be subject to the approval of the Senate. Such a threat is always "a gun behind the door" which Congress may employ in controlling the exercise of the President's appointing powers.

The officers appointed by the President and Senate may be subdivided into classes according to the degree of freedom which the former enjoys in exercising his own judgment.

The President's Personal Appointments. Members of the cabinet, that is, heads of departments, are usually the President's personal choices, although in this relation he is often bound by preëlection promises or by obligations incurred in gaining the support of prominent persons in his party. At all events, the Senate, even when it is in the hands of the opposition, usually ratifies the President's nominations to these offices promptly and without objections. One exception in the course of thirty years or more—the rejection of a nominee for the office of Attorney General presented by President Coolidge—merely illustrates the rule. The choice of diplomatic representatives is also left largely to the President's discretion, as far as the Senate is concerned, although he always has many party obligations to consider in this connection. On occasion however he may be defeated in an attempt to secure the appointment of an ambassador or a minister. In 1943 when President Roosevelt nominated Edward J. Flynn, a warm personal friend and an influential Democratic party leader of New York City, to the post of minister to Australia, a storm broke in the Senate. Mr. Flynn was attacked as a politician with a clouded past and a man utterly unqualified for the position in question. Impressed by the attacks or convinced that the nomination would be rejected by the Senate, President Roosevelt, at the request of Mr. Flynn, withdrew his name from consideration. In making military, naval, and air appointments, especially in time of war, the President encounters little or no interference in the Senate but political influences are by no means wanting here. Nominations to the judiciary are nearly always approved—although occasionally the subject of hot contests in the Senate.

Influence of Senators. A class of important federal offices scattered among the states, though nominally filled by the President with the advice and consent of the Senate, is largely under the control of the latter, as a result of a time-honored practice known as "senatorial courtesy." Under its power to advise and consent, the Senate does not officially suggest names to the President, but it will ratify nominations to many offices only on certain conditions. If either one or both of the

Senators from the state in which the offices under consideration are located belong to the President's political party, then executive freedom of choice almost disappears. If only one Senator is of the President's party, then that Senator's will is likely to prevail. If both Senators are party colleagues, the preferences of the senior member will probably be accepted, especially if he is the stronger of the two; or a division of spoils may occur. In such circumstances selections are made in fact, or at least approved in advance, by the Senators in question; otherwise the Senate, acting under the rule of senatorial courtesy, will probably reject the nominations. Sometimes the Senate will refuse to confirm if one of the Senators from a state declares the nominee "personally obnoxious" to him. In case the federal offices to be filled are located in a state which has no Senator of his party, the President has more freedom of action, but even here he is bound to consult party leaders in the region concerned.

Influence of Representatives. A third class of officers subject to presidential nomination is composed of minor authorities of the United States such as revenue officers, marshals, postmasters, and federal attorneys within congressional districts. It has become the custom to allow the Representative, if he is of the President's party, to name such appointees for his district; but if he is not of that persuasion, the patronage may go to a Senator, if there is one of the President's political party; unless for special reasons the President desires to make a "personal" appointment. The advice of the Representative is not always taken, but it has much weight, for as a rule such patronage is of considerable utility in maintaining his local party organization.

Speaking on the subject, President Taft remarked: "A member of a community remote from the capital . . . wonders that a President, with high ideals and professions of a desire to keep the government pure and have efficient public servants, can appoint to an important local office a man of mediocre talent and of no particular prominence or standing or character in the community. Of course the President cannot make himself aware of just what standing the official appointed has. He cannot visit the district; he cannot determine by personal examination the fitness of the appointee. He must depend upon the recommendations of others; and in matters of recommendations, as indeed of obtaining office, it is leg muscle and lack of modesty which win, rather than fitness and character. The President has assistance in making his selection, furnished by the Congressmen and Senators from the locality in which the office is to be filled; and he is naturally quite dependent on such advice and recommendation."

Proposed Reforms in Appointment Methods. It is obvious that the

appointment and removal of federal officers may consume a large share of the President's energies, especially just after his inauguration. The task is made far from easy by the necessity of consulting Senators and Representatives, hearing complaints from them, considering their suggestions, and allaying their grievances. It has been proposed therefore that nearly all the offices, except those political in nature, now filled by the President and Senate be placed under civil service rules (Chapter 15). This would require in some cases a constitutional amendment and in others changes in law calling for a self-denying ordinance on the part of the Senators.

It has been argued that if the President could appoint without having to consult the Senate, the quality of the persons selected would be improved. The contention may be well founded but, on the other hand, the President could thus build up a political machine of his own. This is exactly what Republican Presidents usually do in the southern states where they have no Senators of their party to placate with appointments. Nor have Democratic Presidents failed to take advantage of the situation in northern states which insist on electing Republican Senators. The popular election of Presidents inevitably involves politics, and appointments will be made with reference to partisan exigencies as well as efficiency. For some social problems there is no mechanical solution.

Another proposed reform in appointment methods contemplates abolishing the practice of giving good posts in the executive or judicial departments to former members of Congress defeated for reëlection—"lame ducks." As matters stand, a President may encourage or hold in line supporters in Congress by assuring them that, if they are defeated by the voters on account of their loyalty to him and his policies, they may count on getting good jobs in the Government after they are ousted from their seats in Congress. From time to time this practice has been severely criticized but it is not likely to be abolished soon.

Efforts to Limit the President's Power to Remove Officials. The power of removal, so indispensable to the conduct of efficient administration, has long been one of the controverted points of American law. The Constitution itself makes no provision for removal except by impeachment—accusation by the House of Representatives and trial by the Senate acting as a court. With respect to officers chosen by the President in cooperation with the Senate, it was early agreed that the President could remove them at will without asking for senatorial approval. However, by a memorable act passed in 1867, during the long dispute between Congress and President Andrew Johnson, it was provided that in effect no person holding a civil office to which he was ap-

pointed with the ratification of the Senate could be removed by the President without the consent of that body. Although this sweeping provision was subsequently modified, Congress from time to time applied the same principle to certain classes of federal officers. For example, by a law enacted in 1876, it stipulated that first-, second-, and third-class postmasters shall be appointed and may be removed by the President by and with the advice and consent of the Senate.

Consent of the Senate to Removal Not Necessary in Some Cases. Fifty years later this provision came squarely before the Supreme Court in the case of Myers *v.* the United States, and the Court ruled that the section in question "by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid." Apart from certain historical arguments, Chief Justice Taft, who rendered the opinion, rested his conclusion mainly on the clauses of the Constitution which vest in the President the executive power, the duty of appointing officers (when it is not placed elsewhere by Congress), the duty of taking care that the laws be faithfully executed, and the responsibility for commissioning officers of the United States.

Uncertainties in the Law. While clear as to the exact point decided, this case left important questions hanging in the air. What other restrictions, if any, can Congress place on the President's removal power? Can it stipulate that certain officers shall hold their positions for a fixed term of years and shall not be removed during that period except for specified causes? According to law, members of the Federal Trade Commission may be removed for "inefficiency, neglect of duty, or malfeasance in office." Could the President oust them merely for dissenting vigorously from his policies? These points were not definitely settled by the Myers case.

Limits on the Removal Power. Although Chief Justice Taft indicated in the Myers case that the President's power of removal was very broad and might be used generally, even to oust members of various federal commissions exercising quasi-legislative powers, the Supreme Court ruled otherwise in 1935 in the Humphrey case. This case involved the action of President Roosevelt in removing W. E. Humphrey, a Republican member of the Federal Trade Commission, who had been outspoken in his opposition to the President's views. In this instance the Supreme Court insisted that the President could remove only on grounds set forth in the law and not because of differences in opinion respecting the enforcement of the law. At the same time it implied that the ruling also governed members of the Interstate Commerce Commission and the Court of Claims, and left unquestioned merely the power

of the President to remove purely executive subordinates. In other words, there seems to be a clear distinction between ordinary officials and those who exercise quasi-legislative and quasi-judicial powers. The former the President can remove at will; the latter, only on the specific grounds, if any, set forth in the law.

Senate's Influence over Removals. Perhaps this is laying too much stress on legal formalities. Although it seems that Congress may no longer require the consent of the Senate to the removal of every officer whose nomination it ratifies, the upper chamber is not powerless. Its consent is still necessary to the appointment of the successor to any officer in this class whom the President may wish to oust. Hence it may serve informal notice on the President that it will not approve any name suggested for the vacancy if an incumbent is dismissed. This is not academic. Many years ago a President ardently desired to get rid of an Interstate Commerce Commissioner whose term had expired, and was taking steps in that direction. But his plan was blocked by underground news from powerful Senators to the effect that in case he did not reappoint the man in question he would face a lively battle in the Senate to secure the confirmation of any new person; the President yielded and renominated the Commissioner whose tenure was in dispute.

THE MILITARY POWERS OF THE PRESIDENT

President Is Commander in Chief. In peace and war the President is Commander in Chief of the Army and Navy and of the state militia when called into the service of the United States. Provisions of law empower the President to appoint military and naval officers by and with the advice and consent of the Senate—except in the militia—and in time of war to retire or to dismiss them at will. The practice of vesting the removal power in courts-martial during peace relieves the President of a heavy burden.

War Powers as Commander in Chief. In the actual conduct of hostilities the President is not limited to the mere direction of the armed forces; he may do whatever a commander in chief is warranted in doing under the laws of war to weaken and overcome the enemy. It was under this general power, belonging to his office, that President Lincoln, during the Civil War, suspended the writ of habeas corpus in states even outside the theater of combat, emancipated the slaves in sections in arms against the Union, arrested persons charged with giving aid and comfort to the Confederacy, established a blockade of southern ports, and, in short, brought the whole weight of the north, material and moral, to bear in the contest. Under his war power, the President may also

govern conquered territory. He can appoint officers there, make laws and ordinances, lay and collect taxes of all kinds, and, in brief, practically exercise sovereign jurisdiction until Congress has acted (Chapter 2).

Extent of and Limitations on War Powers. As demonstrated by President Wilson and President Franklin D. Roosevelt during world conflicts in which the United States became involved, the war powers of the President as Executive and as Commander in Chief are undoubtedly colossal; and Congress may add to them by enacting blanket legislation giving him discretionary authority in matters of key importance in domestic and foreign affairs. In the name of war necessity, he may make decisions almost immeasurable in their commitments and consequences (Chapter 18). But his powers are not limitless. In time of war, the President, as well as Congress, is subject to the provisions of the Constitution. It is scarcely conceivable, for example, that he would be permitted, even if he so desired, to postpone a presidential election indefinitely, on the ground that such action is necessary to winning a war.

Power of the President to Initiate and Carry out Naval and Military Measures. According to the Constitution, Congress declares war, but in practice, numerous minor armed clashes have been started and carried on by Presidents on their own motion. Many times since the establishment of the Federal Government, Presidents have, without previous authorization by Congress, ordered American naval or military forces, in effect, to wage war. President McKinley in 1900 directed American forces in the Far East to cooperate with the troops of other governments in an armed expedition to Peking for the purpose of rescuing foreigners from the hands of the Chinese insurgents known as the Boxers. During President Wilson's administration, American marines were landed in Haiti and Santo Domingo under executive orders, local skirmishes occurred, and American military supremacy was established over the two countries. In 1918 President Wilson, in cooperation with certain Allied powers, including Japan in the Far East, sent American troops to points in Russia. Nominally the United States was at peace with that country. War was not declared on Russia by Congress. But in fact American soldiers took part in fighting Russian troops. Under Harding and Coolidge, American armed forces were employed to suppress "disorders" in certain Caribbean countries.

It has been estimated that between 1811 and 1941 the President on his own motion employed the armed forces in waging "little wars" about 150 times; and some publicists, seeking to exalt the presidential office, have claimed that according to these "precedents" the President actually

has an almost unlimited power to make war at his discretion, despite the clause of the Constitution which vests the power to declare war in Congress. In 1946 a former Secretary of War, Henry L. Stimson, went so far as to contend that when Congress has, by providing an army and navy equipped for war, proclaimed the policy of defending the United States, "it is the President of the United States who is charged with the execution of that policy, both as Chief Executive and as Commander in Chief of the armed forces"; and that it is "his duty to make the decisions as to how this policy of defense should be best carried out." On such grounds Secretary Stimson argued that President Roosevelt, without calling upon Congress for a declaration of war, had the power to "strike" Japan if the government of that country refused to comply with certain of his demands. But as Professor Corwin states, in speaking of the 150 or more warlike acts cited above, "for the most part they have always been regarded by Americans as something to be apologized for"; and those Americans who are loyal to the letter and spirit of the Constitution are not likely to accept the extreme view set forth by Secretary Stimson.[2]

Use of Troops in Domestic Conflicts and in Case of Invasion. At home the President may use armed forces in executing federal law against resistance that cannot be overcome by ordinary civil process. The United States, under the Constitution, guarantees to each of the states a republican form of government, protects it against invasion, and, on application of the legislature or of the executive (if the legislature cannot be convened), defends it against domestic violence. By act of Congress, the President is authorized to send troops when aid is asked by a state legislature or governor struggling with disorder; and he may employ them immediately in repelling an invasion of the United States by the armed forces of a foreign government.

THE PRESIDENT AND FOREIGN AFFAIRS

Although foreign affairs are treated below in separate chapters, the President's powers in this field are so great that, even at the risk of some repetition, they must be emphasized in the present review of his high office. It is true that in some respects he is controlled, in the conduct of foreign relations, by the Senate, and in others by Congress. The Senate may confirm or reject the treaties which he negotiates, and has a similar jurisdiction over his nominations to diplomatic and consular posts. Congress alone can provide for American representation abroad and appropriate money for its support. In many instances also Congress

[2] For a discussion of this question, see Corwin, *Total War and the Constitution*, pp. 144 ff.

must enact the special laws necessary to put treaty stipulations into effect. Congress may invite representatives of foreign governments to address its members. Foreign ambassadors and ministers may visit and consult with members of the House and Senate committees in charge of foreign affairs. Committees of either house may travel abroad to investigate conditions bearing on the exercise of legislative powers. Congress thus has extensive responsibilities in respect of foreign relations. But while Congress may do these things and pass bills and resolutions, such as tariff and immigration measures, which deeply affect the attitude of other nations, neither house nor Congress as a body attempts to establish and maintain formal relations with any foreign country.

Control over Diplomatic Relations. The Constitution does not expressly declare that the President is the official spokesman of the United States in international affairs; constitutional interpretation and practice ascribe this function to him. Under the terms of the Constitution he appoints ambassadors, other public ministers, and consuls, by and with the advice and consent of the Senate; he negotiates treaties with foreign governments, subject to the approval of the Senate by a two-thirds vote; and he receives ambassadors, ministers, and other agents from abroad.

But his authority is not limited to the letter of the law. He may do many other things of vital significance in this sphere. He may proclaim foreign policies having manifold consequences. He may dismiss an ambassador or minister of a foreign government for political reasons and embroil the United States in a diplomatic dispute, if nothing worse. His power to receive foreign representatives authorizes him to recognize the independence of a new state, perhaps in rebellion against a legitimate sovereign, and thus he might involve the country in serious complications.

Naval and Military Measures. As head of the Navy, the President may order a fleet or a single naval vessel out on the high seas or to a foreign port under circumstances likely to result in difficulties, if not armed clashes "short of war." As Commander in Chief of the Army he may move troops to the very borders of another country and invite or bring about a conflict that may become a full-fledged war (p. 219).

Messages and Declarations on Foreign Affairs. Again, in his messages, notes, and public addresses the President may outline a foreign policy so hostile to another nation or combination of nations as to precipitate a diplomatic clash, if not open belligerency. In his negotiations with Germany after the sinking of the Lusitania in 1915, President Wilson followed a policy that ended in an open break and then war. By his enunciation of principles, his notes to Germany, his dismissal,

of the German ambassador, his appeal to the nation for popular support, and other acts, he placed Congress in such a position that war was, for practical purposes, the only choice before it in April, 1917. On the other hand, a negative attitude on the part of the President may be of high significance in foreign affairs. The refusal of President Harding to recognize the government of Soviet Russia and to take part in numerous conferences held in Europe after World War I kept the United States out of the official international assemblies of the Old World and contributed to the growth of the policy called "isolation." After pursuing in effect an isolationist policy for a time, President Franklin D. Roosevelt veered away from it in the direction of "collective security"; and, after the United States became involved in World War II, he was instrumental in the planning of a world organization, which took the form of the United Nations, established in 1945 (Chapter 16).

Treaties and Executive Agreements. In directing foreign affairs the President is not compelled to draw up every positive arrangement with another country in the form of a treaty. Under the Constitution only treaties must have the approval of the Senate; while other types of international understandings are left by custom to presidential discretion. If this seems extraordinary at first glance, the reasons become clear on second thought; the number and variety of minor adjustments necessary to the smooth working of international relations render it impossible to employ the cumbersome treaty-making process in every case. Taking this fact into account, Congress has recognized the existence of a distinction between agreements and regular treaties; for example, by empowering the Postmaster General to make "conventions" with foreign countries respecting the carriage of international mails, without asking for senatorial approval.[3] Again, Congress, by the Reciprocal Trade Act, authorized the President to enter into trade agreements with foreign countries and lower the tariff rates, within limits, by proclamation without securing the ratification of the Senate.

Exchange of Notes. Another class of compacts is covered by the term "identical note." Such an understanding may be effected merely by an exchange of letters between the Secretary of State, acting under the President's direction, and the representative of some foreign power. A remarkable instance of that kind is afforded by the Lansing-Ishii Agreement of 1917 between Robert Lansing, our Secretary of State, and Baron Ishii, the Japanese ambassador, recognizing, so to speak, "by correspondence," among other things, the special position of Japan in the Far East—a sort of Oriental Monroe Doctrine for that country.

[3] For the controversy over the distinction between treaties and executive agreements, see Chapter 16.

This was in reality a vital commitment with respect to American foreign policy, and under the administration of President Harding it was cancelled.

Secret Understandings Possible. The President is not limited to "open diplomacy." He may enter secret agreements with foreign powers and commit himself, if not Congress and the country, to the pursuit of a specific policy. Through a high emissary sent to Tokyo in 1905, President Theodore Roosevelt came to terms with Japan on certain oriental affairs. On her part Japan undertook to respect American dominion in the Philippines; on the other side President Roosevelt agreed to accept the establishment of Japanese sovereignty over Korea (whose independence the United States had once officially recognized). In the same exchange the President assured the Japanese premier that the people of the United States were in full accord with Japan and Great Britain in maintaining peace in the Far East, and that "whatever occasion arose, appropriate action of the government of the United States . . . for such a purpose, could be counted upon by them quite as confidently as if the United States were under treaty obligations." The whole affair was so quietly arranged that the American people knew nothing about it until after Theodore Roosevelt's death. Both before and after the United States became involved in World War II, President Franklin D. Roosevelt held conferences with the heads of other governments, in Washington and in places outside the country—for example, Casablanca, Cairo, Teheran, and Yalta. Some of the agreements reached at these conferences were publicly announced but others were kept secret at the time.

Presidential Agencies in Foreign Affairs. Whatever the nature of the foreign business in hand, the President has a wide range of choice as to methods to be employed in negotiation. He may take up matters with the spokesmen of other countries in Washington or in foreign places, personally, or by telegraph or telephone. If he employs agents, he has many possibilities open before him. The regular ambassadors, ministers, and consuls, of course, are at his command, but he is by no means limited to them. He may use a personal representative chosen and instructed at his pleasure, without reference to any act of Congress or the approval of the Senate. Hundreds of such representatives have been enlisted by Presidents since the establishment of the Republic. President Hoover and later President Franklin D. Roosevelt employed Norman Davis as general commissioner for carrying on negotiations with governments in Europe respecting a reduction of armaments. Again, the agent may be very secretly engaged; even the American ambassador in Tokyo did not know the purpose for which the President's agent

visited Japan in connection with the affair mentioned above. If circumstances warrant, presidential representatives may be given high official rank. When President Wilson dispatched a mission to Russia in 1917, he assigned to the chairman the title of ambassador and to the other members that of ministers plenipotentiary. Yet they were not officers of the United States in a legal sense; they were merely executive agents. President Franklin D. Roosevelt often sent representatives, notably Harry Hopkins, abroad on "roving commissions" for the purpose of inquiring into and reporting on specific or general situations. Designations of this kind are not submitted to the Senate for ratification; and the President, who always has a contingent fund at his command, is for all practical purposes free to use his own discretion.

THE PRESIDENT'S PRIVILEGES AND RIGHTS

In the discharge of his duties, the President enjoys certain privileges and rights. No court of law in the land has any jurisdiction over him for any offense. He cannot be arrested for any crime, no matter how serious. Like other civil officers he may be impeached by the House of Representatives and tried by the Senate for treason, bribery, or other high crimes and misdemeanors but, until judgment has been pronounced against him, he cannot be in any way restrained in his liberty.

The President is entitled of right to payment for his services, for the Constitution provides that he shall receive at stated times a compensation which may not be increased or diminished during the term for which he is elected. He is forbidden however to receive any other emolument from the United States or from any state. The salary of the President now stands at $100,000 per annum, subject to heavy taxation. In addition to his personal compensation the President is furnished a residence known as the White House, administrative offices, and allowances for contingent expenses. In time of war or other crisis huge sums have been placed in his hands by Congress to be expended at his own discretion.

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CHAPTER 12

The Federal Judiciary

Place in the American System. Like Articles I and II of the Constitution, which deal mainly with Congress and the Executive, Article III relative to the Judiciary must be read in connection with all the other articles if a comprehensive view is to be acquired. When so read, it becomes evident that both the independence and powers of the courts are substantial. They are vital to the maintenance of the whole scheme of limited government and liberty.

In many ways the judiciary is the guardian of the balance in powers and of individual rights. It passes upon the validity of the acts of the legislative and executive branches of federal, state, and local governments and in cases duly presented it draws the dividing line between the National Government and the states. It is also often called upon to decide whether public officers—from the President of the United States down to village justices of the peace—have exceeded their legal powers and invaded the domain of private rights protected by the Constitution.

The federal courts do more. Since by far the major portion of the business coming before them pertains to routine civil and criminal cases, the courts are regularly engaged in vital processes connected with law enforcement. In expounding acts of Congress that are couched in general, if not vague, language, the courts are compelled to "legislate," in the sense that they must say what the loose clauses of such statutes are supposed to mean and apply them to concrete situations which Congress may not have envisaged at all.

JUDICIAL INDEPENDENCE

The Selection of Judges. In recognition of the vital functions to be undertaken by the federal courts, the framers of the Constitution, many of whom were skilled lawyers, sought to place the judges more or less beyond the reach of ordinary party politics, assuring to them a high degree of judicial independence. Article II provides that the judges of

the Supreme Court shall be nominated by the President and appointed by and with the advice and consent of the Senate, thus requiring the legislative and executive branches to pass upon the merits of each selection. When the President is of one political persuasion and the Senate of another, this necessity of cooperation may lead to a careful probing of the qualifications of candidates for positions in the judiciary. Although the Constitution does not specifically require it, Congress has by legislation prescribed the same procedure for the selection of judges for the regular inferior courts of the United States—namely, appointment by the President with the advice and consent of the Senate.

Judicial Tenure. Once installed in office, federal judges are well protected against the President and Congress in the ordinary course of politics. Article III provides that all federal judges hold office "during good behavior." Unlike members of the cabinet, they cannot be removed by the President at his pleasure. If practice for more than one hundred and fifty years is conclusive, they can be removed only on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors, and a two-thirds vote of the Senators present is required for conviction. The Constitution also assures to the judges a certain economic independence, for it stipulates that they shall at stated times receive a compensation for their services and that this compensation shall not be diminished during their continuance in office. Hence, if a majority in Congress is incensed by the decisions of judges, it cannot drive them from power by reducing or cutting off their salaries.

Could Congress constitutionally provide for the removal of judges, not for offenses warranting impeachment, but for mere lack of "good behavior"? For instance, could Congress authorize the Supreme Court to remove judges of inferior courts on such grounds or establish some other procedure for removal on charges of misbehavior without resort to impeachment? It has been contended that, while the Supreme Court has never construed the "good behavior" tenure clause, Congress might so define it as to allow a removal of judges for any form of misconduct or neglect which tends to corruption or inefficiency; but Congress has taken no such action. As matters now stand there is no provision of law which permits the chief justice or a majority of the Supreme Court to compel any justice to attend its sessions and discharge his duties; at times members of the Court have accepted commissions from the President and neglected their judicial obligations for days, weeks, or even longer, occasionally becoming involved in politics in the operation. Still it is doubtful whether Congress has constitutional power to

authorize the removal of judges for mere lack of good behavior or for flagrant disregard of their duties.[1]

Powers of Congress in Respect of the Courts. While the judiciary enjoys a substantial measure of independence, Congress has important powers over the composition and work of the courts. The Constitution merely provides that the judicial power "shall be vested in one supreme court and such inferior courts as the Congress may from time to time ordain and establish"; and, with some exceptions, it leaves Congress free to determine what kinds of cases the Supreme Court and the inferior courts shall respectively hear and decide. Congress has power to fix the number of the justices of the Supreme Court, although it cannot oust a justice by abolishing his justiceship during his continuance in office. Having fixed the number of Supreme Court justices, Congress may increase it at will and may provide that when one or more justices resign or die, the number may be reduced to a lower figure.

Judges of the inferior federal courts are more completely subject to the power of Congress, for these courts are ordained and established by acts of Congress. May Congress abolish inferior courts after they have been created and thereby remove the incumbent judges? This question was answered in the affirmative long ago. A short time before his term expired in 1801, President John Adams, with the approval of the Senate, filled sixteen new circuit judgeships with Federalists but the next Congress abolished these positions by law. Although this action was denounced as unconstitutional by objectors at the time, the precedent stands in history.

Nevertheless, the conviction is widely held among the people that the judiciary should enjoy a high degree of independence against Congress and the President, lest civil liberties be endangered by politics. This was evident in 1937 when President Roosevelt proposed a plan to bring about a change in judicial views (p. 264). The Democrats controlled both houses of Congress. Yet opposition to it was led by Democrats, especially in the Senate, and despite his power and prestige the President still could not win enough support to carry out his project.

RELATION OF THE JUDICIARY TO POLICIES AND POLITICS

Judicial Handicaps. Notwithstanding the very widespread belief that an independent judiciary is necessary for the protection of private

[1] Memorandum on the Removal Power of Congress with Respect to the Supreme Court, March 20, 1947, 80th Congress, 1st Session, Senate Print for the use of the Committee on the Judiciary.

rights, civil liberties, and minorities against arbitrary actions by the President and Congress, and in spite of the provisions of the Constitution designed to protect its independence, the judiciary is still at a disadvantage in several respects. It has been said correctly that it has neither the power of the purse nor the power of the sword—the principal sources of strength in government. The judges are not elected by the people and cannot appeal, in case of a conflict, to the people against the elective legislature and executive. The structure of the courts is largely at the mercy of Congress. All judges are appointed by the President with the advice and consent of the Senate; and for this reason the character of the judges and the kind of decisions they make depend to a considerable extent on the politics and policies of the President and Senators who install them in power as new judgeships are created and as judges in service die or resign.

Changing the Number of Supreme Court Justices. From time to time Congress has made use of its power to fix, increase, and reduce the number of Supreme Court justices. By an act of 1866, Congress provided that no vacancy in the Court should be filled until the number of associate justices was reduced to six, thus contemplating a Court of seven members; and three years later, in 1869, it provided that the Court shall consist of a chief justice and eight associate justices. The reduction in 1866 prevented the appointment of new justices by President Andrew Johnson, the Democratic Vice-President who had become Chief Executive on the death of Lincoln; and the increase allowed President Ulysses S. Grant, a Republican President, to appoint the additional justices.

In 1937, President Roosevelt, dissatisfied with recent judicial decisions invalidating parts of the New Deal legislation, called upon Congress to reorganize the judiciary. Among other things he proposed that he should be authorized to nominate, up to six, another Supreme Court justice for each justice at least seventy years of age, who had served at least ten years and insisted on continuing in office. The President's "court packing plan," as critics called it, was rejected by Congress, but a bill allowing all Supreme Court justices to retire at seventy on full pay was enacted into law. Meanwhile the Court reversed some of its earlier decisions and soon a few justices resigned. Within a short time, as a result of new appointments, Democratic justices constituted a large majority of the Court (p. 265).

Party Politics and the Selection of Judges. It is a matter of historical record that Presidents have often sought to choose judges in harmony with their general policies and have deemed it proper to select Supreme Court, as well as other, judges from among the members of their own

political party. For example, the Federalist President, John Adams, appointed to the post of Chief Justice, John Marshall, an ardent Federalist who had served his party as a member of Congress and as Secretary of State. His successor, Roger B. Taney, a Democrat who had held the post of Secretary of the Treasury, was chosen by a Democratic President, Andrew Jackson. When Taney died in 1864, the Republican President, Abraham Lincoln, put in his place Salmon Chase, who had been head of the Treasury Department and was an aspirant for the Republican nomination for President in the very year of his appointment. Chief Justice Taft was a Republican President of the United States before he was elevated to his high judicial post by President Harding, a member of his political party. President Hoover selected his Republican colleague, Charles F. Hughes, to fill the vacancy created by the retirement of Chief Justice Taft in 1930.

In 1937, the Supreme Court had two vacancies. President Roosevelt appointed Senator Hugo Black to fill the first and Stanley Reed to fill the second. Senator Black had been a stanch supporter of the Democratic administration in the Senate and Mr. Reed, as Solicitor General, had argued in favor of New Deal legislation before the Supreme Court. In 1939 President Roosevelt appointed one of his close political advisers, Felix Frankfurter, to the post made vacant by the death of a justice. As other vacancies occurred, he filled them with men who had been active in the politics of the Democratic party or were known to be sympathetic with the policies of his administration. As a result of discrimination in the use of the selective power by President Roosevelt and by his successor, President Truman, eight of the nine Supreme Court justices in 1947 were Democrats, "balanced" by one lone Republican. In January, 1947, the total number of incumbent federal judges who had been appointed since the close of 1932 was 231; of this number 17 were Republicans and all the others, Democrats.[2] Of the Democrats thus appointed, a large proportion had been active in party politics of the New Deal type prior to their elevation to the bench, but in their decisions they did not follow that "line" uniformly.

JURISDICTION OF THE COURTS

Limited Nature of Judicial Power. Unlike the President and Congress, the federal courts cannot, on their own motion, initiate actions and carry them into effect. They can deal only with questions which come before them from the outside in the form of issues raised, as a

[2] Mimeograph of a letter by Attorney General Tom Clark to Senator Alexander Wiley, Chairman of the Senate Committee on the Judiciary, January 7, 1947.

rule, by agents of government—federal and state—or by private parties having disputes to settle. Thus the influence of the courts on the tendencies in public affairs depends rather upon the character of the questions and controversies taken before them for decision and settlement than upon their initiative or desires. In the ordinary course, the courts are engaged in hearing cases of persons charged with crimes, and routine controversies between persons over property rights. This business is of utmost importance in the life and economy of the nation but relatively little is heard of it in the newspapers or noted by the general public. If, however, questions before the courts involve civil liberties, the constitutionality of federal and state statutes, or the interpretation of disputed acts of Congress, the decisions of the courts may receive sensational publicity.

Only Cases and Controversies Can Be Heard. The range of business coming within the scope of the federal judiciary—its jurisdiction—is established in general terms by the Constitution; ordinarily this business is confined to "cases" and "controversies" involving two or more parties and their rights and duties. In no instance will federal judges consider the validity of a law in the abstract or render any opinion to Congress or the President on the constitutionality of a proposed measure. This rule was adopted early. In 1793 Washington sought the advice of the Supreme Court by laying before it twenty-nine different questions, but the Court declined to answer them on the ground that it could not give opinions except in regular cases properly brought before it in the customary course of judicial proceedings.

Nor will the courts hear and answer the questions raised by every private person who desires to know what his rights are under the law and yet does not want to sue anybody or get into a formal dispute over the subject. It is true that Congress has by declaratory legislation authorized federal courts to hear and render judgment on some questions raised by private persons or government agents for the purpose of getting an opinion, without going to the trouble and expense of starting and carrying on a lawsuit in the regular manner. But to secure such a declaratory judgment, the party or parties who seek it must show the court that they have substantial rights and interests at stake which could take the form of a case to be decided if brought in the form of a regular action or controversy at law. Declaratory legislation has, no doubt, made it easier for some persons to find out what their legal rights are without employing a lawyer and starting a lawsuit. Yet it is still true that the main business of the courts is to hear actual suits between parties.

A person who contends that a given law affecting his rights is contrary to the Constitution may therefore find it necessary to disobey that law, undergo prosecution by the government, and be threatened with fine, imprisonment or other penalty before the merits of his claim can be settled by a court. This is a costly and time-consuming process, attended by considerable hazard, for if the contestant fails to win his case he may be penalized for his temerity and discredited before the public besides. If a person takes the risk of challenging the validity of a federal law appropriating money, that burdens him as a taxpayer, he is very apt to lose his case on the ground that he is only one among the millions of taxpayers and that the proportion of the total expenditure which is traceable to him is too slight and hard to determine to warrant judicial notice.[3]

Limits on the Jurisdiction of Federal Courts. The kinds of cases or controversies which the federal judiciary can hear and decide are restricted by the Constitution. They are divided into two broad classes: those affecting certain *persons* and *parties* and those relative to certain *matters*.

Persons and Parties. The federal judicial power extends to all cases involving ambassadors, other public ministers, and consuls; controversies to which the United States is a party; controversies between two or more states, between a state and citizens of another state, between citizens of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects. To this generalization an exception must be made, namely, that the judicial power does not extend to any suit in law or equity commenced or prosecuted against any state in the Union by an American citizen or by a citizen of a foreign country. It must be noted also that, in actions coming within federal jurisdiction, corporations are citizens although for other purposes they may be deemed persons. When parties enumerated above are involved in actions at law their cases may come under federal judicial authority, even though the Constitution and laws of the United States are not at all drawn into the controversy.

Jurisdiction over Matters. Regardless of the parties involved, the federal judicial power extends to certain matters, that is, to all cases in law and equity arising under the Constitution, the statutes, and the treaties of the United States and to admiralty and maritime questions. Under this head a proper case is made, says Story, "when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law," that is, starts a suit involving federal law.

[3] Massachusetts *v.* Mellon and Frothingham *v.* Mellon, 262 U.S. 447.

THE POWER OF PASSING UPON THE CONSTITUTIONALITY OF STATUTES

The Question of Intention. The jurisdiction of the federal courts extends not only to matters in law and equity in the strict sense; it also includes cases involving the constitutionality of state and federal acts. Nowhere, it is true, does the Constitution expressly provide that the federal courts may declare an act of Congress or of a state legislature invalid. Some writers hold that in fact the framers did not intend to confer such a power, at least over federal statutes, upon the courts of the United States, and that the judiciary has usurped its authority in this regard. Long ago President Jefferson declared that it was the design of the Fathers to establish three independent departments of government, and that to give the judiciary the right to invalidate acts of the other branches would make it supreme over Congress and the President.

Despite many claims made in their name, it is not possible to discover exactly what was the opinion of all the members of the convention at Philadelphia on this point. The issue was not laid before that body in the form of a definite proposition and was never made the subject of a direct vote. Still we are not entirely in the dark. It is known that a few of the delegates were opposed to the idea of such judicial control, for they expressed objections to it incidentally while discussing other topics. It is likewise established that many other members, either before or after the adoption of the Constitution, indicated their belief that the federal judiciary, in the normal course, should exercise the power to pass upon the constitutionality of laws.

The affirmative side of the case was very plainly put by Hamilton in the *Federalist:* "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." There are good reasons for thinking that a majority of the prominent members of the convention took a similar view of the federal judicial power.[4]

Question Answered by Marshall. Whatever may have been the intention of the framers, Chief Justice Marshall, in the famous case of

[4] C. A. Beard, *The Supreme Court and the Constitution.*

Marbury *v.* Madison, decided in 1803, announced that the Supreme Court, under the Constitution, possesses the power to hold federal statutes void when they conflict with the fundamental law. Although there were some protests at the time, they made little stir, especially as the provision of federal law which Marshall declared invalid was of no great importance. The Court did not attempt to nullify another act of Congress until 1857 but since that year it has often exercised the power.

Power over State Actions. In the early days of the controversy respecting the judiciary far more attention was paid to the decisions of the Court which invalidated acts of state governments. With triphammer strokes, Marshall struck down one state statute after another as violating the Constitution. And with equal regularity Jefferson or other defenders of states' rights protested against his policy. They admitted the supremacy of the Federal Government within its domain, but they argued that to give the Supreme Court the right to determine the validity of state laws would in fact enable the National Government to define its own sphere of power and reduce the states to mere administrative subdivisions. The leaders of this opposition did not offer, however, any adequate plan for settling amicably disputes between federal authorities and state governments over their respective limits of power. The logic by which the federal judiciary secures its right to pass upon the validity of state legislation is as compelling as that applied in the case of federal statutes.

Process of Testing State Laws. At all events, Congress has provided by law various ways for testing in the federal courts the constitutionality of state actions. For example, a case may be taken to the Supreme Court of the United States from the highest court of a state having jurisdiction over the issue, whenever such a court denies the validity of a federal treaty or statute or any exercise of authority in the name of the Government of the United States. A case may also be carried to the Supreme Court whenever a state court of final jurisdiction declares that a state law or an act done under state authority does or does not violate the Constitution or the laws of the United States.

To make the process clear, let us consider a concrete case. The legislature of New York once passed an act limiting the hours of employees in bakeshops to sixty per week or ten per day. One Lochner, an employing baker in that state, contended that the statute interfered with rights which he enjoyed under the Constitution of the United States, and resisted its enforcement. His case was carried up to the highest court of New York where the statute in question was declared valid. Since this ruling was against the privileges which he

claimed, Lochner appealed to the Supreme Court at Washington and won from that tribunal a favorable decision, holding the law in controversy void, as contrary to certain provisions of the Federal Constitution.

The Nature of Judicial "Annulment." In deciding against the validity of any statute, federal or state, the Supreme Court does not officially abrogate the measure; it declares it void and refuses to enforce it in the particular case in hand. Thereupon the appropriate officers and other courts take cognizance of the fact and stop their efforts to carry it into execution.

But what if a law has been long on the statute books before it is declared unconstitutional? What of the persons who obeyed it for years and transacted business under it between the day of enactment and the day the Supreme Court declared it null and void from the beginning? Are all their rights, duties, and liabilities arising during that period to be erased by the decision of the Court in holding the law unconstitutional? Theoretically the answer is yes. Practically the answer is not necessarily, for to invalidate all settlements and arrangements previously made by innumerable persons according to that statute would work grave injustice and the destruction of valuable interests created while the law was deemed valid by citizens and parties who did business under it. Hence the Supreme Court will in specific cases uphold substantial rights established under the authority of a law which, strictly speaking, was from the day of enactment no law at all.[5]

THE STRUCTURE AND WORK OF THE COURTS

The Supreme Court. At the head of the hierarchy of federal courts established by Congress stands the Supreme Court composed of nine judges—a Chief Justice, paid $25,500, and eight associate justices with salaries of $25,000, all subject to taxation. This Court holds its formal and open sessions usually from October until May in Washington. Concerning the actual duties of the Supreme Court the Constitution says little. It confers on that tribunal original but not exclusive jurisdiction over all cases affecting ambassadors, other public ministers, and consuls, and those to which a state is a party; that is, as far as the Constitution is concerned, such cases may be carried before the Supreme Court in the first instance without having been heard previously in a lower court. But in all other cases the jurisdiction of the Supreme

[5] R. E. Cushman, *American Political Science Review*, April, 1941, pp. 255 ff. This illustrates again the proposition that the reality of personal and property rights and what the courts will do in respect of them depends in a large measure on the vigilance of citizens in seeking to maintain their rights in actions at law, and of the lawyers they employ to aid them in the operation.

Court is appellate, subject to such exceptions and regulations as Congress may see fit to make.

Wide Discretion of the Supreme Court. Hence the language of the Constitution throws little light on the actual work of the Supreme Court—on the substance of the business which comes before it for decision. For information on this point it is necessary to examine the laws of Congress stretching back over more than a century. In general the later laws, especially the highly significant Judiciary Act of 1925, reveal a striking tendency to diminish the obligation of the Court to hear specific kinds of cases and to widen its discretionary authority. To speak concretely the classes of cases which can be carried up on appeal, as a strict matter of right, from state and lower federal courts are now limited mainly to matters involving the constitutionality of state and federal laws and the regulation of economic enterprises.

The discretionary power of the Court is flexible. It has wide authority to hear petitions for the writ of *certiorari* asking it to call up, review, and determine cases tried or pending in lower courts, for "special and important reasons" governed by "sound judicial discretion." Although the reading of such petitions consumes a large amount of its time, the process enables the Court to concentrate on matters which in its opinion merit special attention.

Changing Character of the Court's Business. With the narrowing of its obligatory jurisdiction, a noteworthy decline has occurred in the amount of ordinary private and common law litigation before the Supreme Court.[6] On the other hand, a great increase has taken place in cases relative to state and federal control over trusts, railways, labor, and other economic matters and in cases questioning the constitutionality of state and federal statutes, which also involve the regulation of economic enterprises.

Cases of Large Policy. The exercise of the jurisdiction conferred upon the Supreme Court makes necessary two types of intellectual operations, one pertaining to large issues of public policy and the other to technical matters. In the former instance the Court is usually controlled only by the general language of the Constitution, which, as a judge once remarked of a particular clause, is characterized by "convenient vagueness." Speaking of problems under this head, the authors just cited remind us: "The words of the Constitution on which their solution is based are so unrestrained by their intrinsic meaning or by their history or by tradition or by prior decisions, that they

[6] Frankfurter and Landis, *The Business of the Supreme Court.*

leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life. . . . The process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the Justices are their 'idealized political pictures' of the existing social order."

Technical Cases. The second type of intellectual performance mentioned above, namely, that pertaining to technical matters, is illustrated in innumerable railway and utility cases. Frankfurter and Landis give a few examples. "What constitutes a 'spur track,' when public convenience justifies a railroad extension or abandonment, under what condition one railroad must permit use of its facilities by a rival, how far the requirements of a state for the abolition of grade crossings depends upon approval by the Interstate Commerce Commission, these and like questions cannot be answered by the most alert reading of the Transportation Act. Their solution implies a wide knowledge of railroad economics, of railroad practices and the history of transportation, as well as political philosophy concerning the respective roles of national control and state authority." Even more complicated issues may arise in patent litigation, forcing the Supreme Court to review the development of difficult technical processes and inventions and to pass upon matters that might well baffle the most skilled chemist, physicist, or engineer. Of such diverse materials is the business of the Supreme Court composed.

Nature of a Case. A case as presented to the Court is ordinarily an action between two parties over property, personal rights, or the validity of some act of a state or federal authority touching on such matters. It takes the form of a statement of facts and law involved in the controversy, supplemented by briefs and arguments of attorneys supporting the contentions of their respective clients. When a case has been submitted and argued, it is the duty of the justices to consider the issues and to apply the law. After each judge has examined the matter independently, a conference is held at which the various points are discussed at length and a decision is reached on the basis of the will of the majority.

Opinions of the Court. Thereupon the Chief Justice either prepares, or requests one of his colleagues to prepare, a document called "the opinion of the Court," which contains a line of reasoning, citations of authorities, and the final order for the disposition of the case. Any judge who agrees with the decision but bases his conclusion on grounds other than those given in this opinion may prepare a "concurring

opinion," in which he explains how he arrives at the same end by a different route.

Dissenting Opinions. Judges who are not in accord with the decision of the majority may file one or more dissenting opinions setting forth their reasons for believing that the case should have been decided otherwise. Occasionally each of the dissenters prepares his own statement; sometimes one of them writes an argument which is concurred in by one or more of his colleagues. Such dissents are, of course, not law but they are by no means futile gestures. Since many great cases are decided by a narrow vote of five to four, it can readily be seen that a slight change in the membership of the Court may transform a dissent into a majority opinion. At all events powerful dissenting opinions are widely read by lawyers and enter into public discussions of the law, thereby becoming a part of the thought of the land which in the long run affects the law of the land.

All opinions rendered by the Supreme Court are published in the *United States Reports*, and at the present time the decisions for a single term may fill three or four volumes. These reports furnish a great authoritative source of information on the historical development and present status of constitutional law.

District Courts. At the bottom of the regular judicial hierarchy are the Federal District Courts. To bring such tribunals within easy reach of litigants, Congress has divided the country into numerous districts and provided a federal Court for each of them. In sparsely settled regions, a state may constitute a single district; but the larger and more populous states are laid out into two or more districts. If a district is very large it is laid out into divisions; and arrangements are made for holding terms of court in each of them at stated times in the year. The number of judges allocated to a district varies from place to place according to the magnitude of the business. Normally a judge is appointed to serve in a definite district but a few states have additional "roving" judges, with no fixed districts, who, on assignment, serve where they are needed to help clear crowded dockets. Furthermore the Chief Justice of the Supreme Court may in certain circumstances transfer a judge to another district temporarily to relieve a congestion in business.

The classes of cases which may be tried in a District Court are so varied in character that they need be mastered only by the practicing lawyer whose duty it is to discover the proper forum to which his clients' business may be taken for review. Among other things the jurisdiction of this tribunal embraces all crimes and offenses cognizable under the authority of the United States, cases arising under the in-

ternal revenue, postal, and copyright laws, proceedings in bankruptcy, and actions involving the laws which govern the immigration of aliens, contract labor, and monopolies in restraint of trade.[7]

The United States Courts of Appeals. Between the Supreme Court and the District Courts is a Court of Appeals in each of the eleven circuits into which the United States is divided.[8] Where the amount of litigation is large, the Court of Appeals consists of five to seven judges; in other places, as few as three. As its position in the judicial system indicates, the prime function of the Court of Appeals is to hear appeals from the District Courts and to relieve the Supreme Court of a large mass of transactions that would otherwise glut its calendar.

To effect this purpose two fundamental arrangements are made by law. In the first place all appeals from District Courts, with a few substantial exceptions, must go to the Court of Appeals acting for the appropriate circuit. The exceptions are cases involving federal legislation against trusts and monopolies, the enforcement of the orders of the Interstate Commerce Commission, the validity of federal and state laws, and a few other matters of special weight; such controversies may be carried from District Courts directly to the Supreme Court of the United States. In the second place the decisions of the Court of Appeals in the ordinary run of things are conclusive. However, it may ask the Supreme Court for instructions on any point of law and under certain conditions causes may be removed from its forum to the highest court of the land. Thus by a sifting process, as we have said, the Supreme Court gets cases of high economic and constitutional significance.

The Judicial Conference. For more than a century the several regular, or constitutional, courts operated separately and Congress was left largely to its own devices in discovering the needs of the judiciary as revealed by experience. Meanwhile judicial business increased in size and complexity, taxing the strength and ingenuity of the judges to the limit. If perplexed by their tasks or overburdened with duties,

[7] Outside the regular hierarchy of courts known as "constitutional" are other courts called "legislative," created by Congress to help in carrying its powers into execution. They are the Court of Claims, which hears certain classes of claims against the Government, the Court of Customs and Patent Appeals, and the Customs Court. The Court of Appeals and the District court for the District of Columbia are both constitutional and legislative, for besides their jurisdiction over many federal matters in general they have jurisdiction over matters pertaining to the District of Columbia alone. The financial, business, and other administrative affairs of the federal courts are under the supervision of the Administrative Office of the United States Courts.

[8] By an act of Congress that went into effect in September, 1948, the former Circuit Courts of Appeals were renamed United States Courts of Appeals and the District of Columbia was recognized as constituting one of the eleven circuits.

they could merely address appropriate congressional committees in search for remedial legislation.

At last in 1922 Congress, in response to obvious needs, authorized the establishment of a "judicial conference," to be called annually by the Chief Justice, or in case of his disability by the senior associate justice of the Supreme Court. This is a diversified body. The session of September, 1943, for instance, was attended by the Chief Justice, a judge from each existing circuit, the Chief Justice of the District of Columbia, the Attorney General and departmental assistants, officers of the Administrative Office of the United States Courts, and, on invitation, majority and minority representatives from the judiciary committees of the House and Senate.

Before this conference came the following matters for discussion and action: recommendations of the Attorney General respecting procedures and future legislation on judicial matters; the state of the dockets in all the federal courts; questions of delays in judicial business and proposals for overcoming them; budget estimates for the maintenance of the federal courts; many technicalities important for improving the procedure of the courts; and resolutions pertaining to issues of judicial efficiency and to legislation to be enacted by Congress. Among the resolutions adopted was one declaring it to be the sense of the Judicial Conference that it is incompatible with the proper service of the federal judiciary for its officers or employees to become candidates for political office or participate in other political activities of a kind forbidden to employees of the executive branch of the Government. At the close of the conference special committees were appointed to study and report on matters to be considered in the future. Since 1913 the proceedings of judicial conferences have followed a similar pattern. By an act of Congress adopted in 1948, each circuit is required to hold an annual judicial conference.

Growing Importance of the Judicial Conference. Many things conspire to make the judicial conference of increasing significance for the government of the United States and the rights of life, liberty, and property. As the complexities of legislative problems multiply and Congress confers new regulatory, ordinance, and discretionary powers on the President or specific executive agencies, the burdens of the federal courts grow in number and weight, for upon them falls the duty of interpreting such legislation and determining whether executive agencies have exceeded their powers. Their judgments in such cases affect not only the rights of parties to the particular cases they decide but constitute guiding law for all outside parties coming within the purview of the acts of Congress and for all executive agencies in ques-

tion. Federal judges are thus, in a way, high administrative supervisors in the Government and quasi-legislators, as well as adjudicators in ordinary legal controversies. They are active in, and informed respecting, almost the whole business of the United States Government.

Jury Trial. Attached to the federal judiciary, of course, is the ancient jury system, so long and so intimately associated with the development of personal liberty in Great Britain. The trial of all federal crimes, except in cases of impeachment, shall be by jury, runs the original Constitution; and to this stipulation have been added detailed provisions by way of amendment (Chapter 3). In practice, however, the jury is not used in federal criminal cases called "petty," and the right to jury trials in some cases may be waived by the accused. Similar rules apply to the use of the jury in civil cases involving property rights.

Judicial Power to Punish for Contempt. In connection with the exercise of their authority, federal courts, in common with courts in general, have the power to punish private parties for "contempt." It is an accepted theory that this power may be used only to punish persons for acts which are committed in the presence of the court or have the effect of interfering with the proper conduct of judicial proceedings. Yet in times past judges have fined and imprisoned critics for spoken or written objections uttered outside the court room and merely casting some reflection on judges themselves. For example, on one occasion, the Comptroller of the City of New York published a letter passing certain more or less severe strictures on the conduct of a federal judge in that city in a particular case and was promptly sentenced to prison by the irate judge. The Comptroller was only saved from jail by a timely pardon issued by the President of the United States. Such cases led to a demand for the curtailment of the power of the courts to act as accusers, judges, and jurors in matters of contempt against themselves committed outside the court room, especially in controversies involving criticisms of judicial policies and decisions, which in no way impede the course of justice. In recent decisions, the Supreme Court has accepted this view and curtailed the power of lower courts to punish critics for contempt.

LAW ENFORCEMENT

Dependence of the Courts on Other Public Officers. Federal courts, as we have seen, have no power to initiate cases. They must rely on executive officers, in and under the Department of Justice, for the presentation and prosecution of criminal cases and the institution of many civil cases in the name of the Government. If these agents are diligent, the courts may wield a powerful influence in many fields; if

enforcement officers are lax or operating with small staffs, the courts will have correspondingly little opportunity to exert their powers. This is well illustrated by the history of antitrust operations. During the lenient administration of President William McKinley (1897–1901), only two indictments were brought under the antitrust laws, while under the sterner direction of Theodore Roosevelt there were forty-five indictments. In the second administration of President Franklin D. Roosevelt there was a wave of antitrust sentiment, leading to the institution of ninety-two antitrust actions in the year 1940. Then came America's involvement in World War II. Soon a board of review was established, consisting of the Attorney General and the Secretaries of War and of the Navy, which with the sanction of the President proceeded to defer the prosecution of such antitrust cases as it felt might injure the war effort. Within a very short time, twenty cases were postponed in this fashion; but after 1945 antitrust prosecutions were renewed.

The dependence of the courts on other public agents does not end with the presentation and decision of cases. To a large extent, courts must rely on executive and legislative agents to carry out the judicial will. Ordinarily such compliance is automatic but, where it is not, the situation may prove very embarrassing to the courts. When the commander of Fort McHenry, during civil war days, in response to a judicial order, refused to show cause why he should not release a man held in his custody, the Supreme Court had to drop the matter. Again, when West Virginia failed to discharge a debt to Virginia, held due by the Supreme Court, the Court felt constrained to speak softly. It refused a Virginia request for an order directed to the West Virginia legislature, demanding the enactment of a tax law raising the money to discharge the debt. Instead, the Court hinted at the desirability of further consideration of the issue, and suggested that if necessary Congress might help.[9] Fortunately for the Court, West Virginia relieved it of further embarrassment by paying the bill in due course.

The Department of Justice. The work of discovering offenders against federal law and bringing them before the courts is distributed among several distinct units of the Government with a personnel totalling more than 50,000. Only one of these agencies, the Department of Justice, has general authority over the enforcement of the whole body of federal legislation. The head of the Department is the Attorney General of the United States, who is the chief law officer of the Federal Government. "He represents the United States in matters

[9] Virginia *v.* West Virginia, 241 U.S. 531; 246 U.S. 565.

involving legal questions; he gives his advice and opinion when they are required by the President or by the heads of the executive departments on questions of law arising in the administration of their respective departments; he appears in the Supreme Court of the United States in cases of especial gravity and importance; he exercises a general superintendence and direction over the United States attorneys and marshals in all the judicial districts in the states and territories; and he provides special counsel for the United States whenever required by any department of the Government." In a strict sense therefore vigorous execution of federal laws depends upon the activities of the Attorney General, or rather upon the policy of the President imposed on him.

District Officials. Cooperating with the Department of Justice and subject to its general direction is a large corps of federal authorities scattered throughout the Union. Each judicial district has a United States district attorney (with one or more assistants) who represents the Government in the prosecution or defense of cases arising within his jurisdiction. Each judicial district also has a marshal and deputy marshals whose duty it is to arrest offenders against federal law, carry out orders of the courts, and otherwise aid in judicial administration. Since these attorneys and marshals are appointed by the President with the consent of the Senate and may be removed by the President alone, they too are subject to his supervision, directly or through the medium of the Department of Justice.

Federal Bureau of Investigation. Besides local officials in every judicial district, the Department of Justice has a separate enforcement branch of its own, the Federal Bureau of Investigation, with a large corps of agents operating in Washington and in all parts of the country. These scattered representatives report periodically to the central office where threads of evidence from various sources are compared to determine whether a case is merely a small infraction or an incident in a widespread plot. The bureau does not work alone. It keeps in touch with other federal police agencies and it cooperates with various public authorities, both here and abroad, in the search for criminals and fugitives from justice. Through a Division of Identification and Information it maintains a clearing house of data on criminals for the use of the state and local police everywhere in the nation.

Special Agencies. Supplementing the historic agencies in and under the Department of Justice are several outside agencies which concentrate their attention on the enforcement of particular laws and regulations or on certain types of offenses. An important phase of

this policing is the patrolling of our national boundaries and seaports. Upon the Bureau of Internal Revenue falls the duty of preventing and running down violations of laws imposing taxes on liquor, tobacco, and other objects of revenue; while the Bureau of Customs performs a similar function pertaining to the smuggling of goods into the United States. The Treasury Department, through its secret service, is constantly warring against the counterfeiting and forging of United States money and securities. The Post Office Department, commanding a large staff of inspectors, keeps watch over the administration of its own affairs and seeks to apprehend offenders against the postal laws and regulations in detail. In view of the complexities involved, these divisional police authorities, acquainted with the characteristic problems of a single service, are useful adjuncts to the general force.

Cooperation with State Police Forces. In connection with the enforcement of criminal law, special note should be taken of a novel development which came to a climax in the enactment of "Six Federal Crime Control Acts" in 1934. Under the Constitution, as originally applied, federal authorities were largely confined to dealing with crimes against the Federal Government alone. They had little to do with crime in general, for that was left to the states. But with the growth of rapid transportation, especially by automobile and airplane, it became increasingly difficult for the states to cope with burglars, kidnapers, bandits, and "hold-up" men who moved swiftly from one state to another, committing the gravest of crimes. If such criminal activities were to be handled effectively by public authorities, then cooperation among state and federal officers was deemed imperative. By the series of statutes enacted in 1934 federal officers were drawn into the work of suppressing and grappling with criminal offenses once left entirely to state and local authorities.

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CHAPTER 13

Stresses and Strains in the Balancing of Powers

Separate studies of the powers, duties, and work of Congress, the President, and the Judiciary at a given moment yield no more than a superficial view of the Federal Government. If its dynamics are to be understood and appreciated, it is necessary to examine the continuous interplay of all three branches over a considerable span of years.

The most casual glance at the historical record shows that in one period the three departments may be working smoothly together, that in another period Congress is the dominating influence in the Government, that in a third period the President may be in high command, and that in a fourth period the Supreme Court may be holding Congress or the President or both in check more or less. In the historical record it also appears that extreme action by one of the departments has often been followed by strong reaction in another department, as foreseen by the framers of the Constitution.

RECENT TRENDS IN LEGISLATIVE-EXECUTIVE RELATIONS

Multiplying Challenges to Statesmanship. With the passage of the years, Congress, the President, and the courts have been swept through periods of increasing stresses and strains. The days of simple agriculture and handicrafts, with their limited range of competing economic interests and their restricted demands on government, have been left far behind. In their stead has come a new age of inventions, characterized by giant mechanized industries and comprehensive systems of transportation to mass markets everywhere. The people are being increasingly differentiated into interdependent, specialized economic groups, many of which agitate for favors or seek to impose regulations on others. To peacetime difficulties have been added the growing burdens associated with large-scale warfare and intricate international relations. Thus the spheres of governmental action have become broader and more diversified, while the ramifications of any proposed course of official action have become correspondingly harder to trace and calculate. In short, the need for constructive statesman-

ship of the highest type has become more and more pressing with the passage of the years.

Decline of Efficiency in Congress. It is an understatement to say that Congress has often failed to meet the challenges of the times, by neglecting its duty to provide skilled leadership in legislative matters and to maintain scrutiny over the enforcement of the laws, especially since the panic of 1929. For about four years after that calamity fell on the nation, it spent days, weeks, and months in almost futile wrangling over partisan and personal matters, petty details of business, and questions of little or no national significance. It is scarcely an exaggeration to declare that Congress as a body was wholly unprepared in 1933 to come to grips with the principal controversies in public affairs, then aggravated by the general collapse of the banking system which had occurred early in the year. Nearly all the primary measures enacted into law during that year came from the Executive Department or, if drafted elsewhere, were driven through Congress under the forceful leadership of President Roosevelt.

In subsequent years, Congress, as the supreme legislative body, charged by the Constitution with the primary responsibility for the wise, thoughtful, and deliberate planning and enactment of laws designed to cope with the basic issues of national life, sometimes drew near to the point of abandoning its obligations, particularly after the outbreak of war in Europe in 1939. This is not to say that congressional debates were then of a low order. On the contrary many of them were filled with information, well reasoned, and worthy of the best traditions of the House and the Senate. Nor is it to say that individual Representatives and Senators were not active in framing bills and pressing them upon their colleagues.[1] But the burden of whipping legislation rapidly into shape and seeing that it received prompt consideration in Congress was assumed to a large extent by the President and members of the executive branch of the Government.

The almost total lack of consultation among Democratic members of the House during 1931–1946, regarding major policies, is tersely described by one of them, Estes Kefauver, a Representative of long experience: "The Democrats . . . just quit having caucuses on issues. They still had sessions at the opening of a Congress to nominate House officers and rubber stamp recommendations for committee appointments. But in the House, where for sixteen years they had the re-

[1] The recent historical studies of Lawrence H. Chamberlain have demonstrated that President Roosevelt drew extensively on ideas circulating in Congress, when formulating his legislative programs. *The President, Congress and Legislation* (1946), especially pp. 23 ff. and pp. 150 ff.

sponsibility of leadership, the Democrats did not use the valuable technique of the caucus, and this accounts in part for their failure to retain control in the 1946 congressional election. We assume leaders of the party considered these meetings too risky. . . . In 1938, when a caucus was called to consider the Fair Labor Standards Act, a quorum could not be secured and the caucus was never held. This was the last effort. No caucuses were held on Lend-Lease, Selective Service, Arms Embargo, Full Employment, Housing, OPA [Office of Price Administration], or any of the major bills which were presented to the House during recent years." [2]

Rise of the Executive Power. The decline of Congress in creative efficiency was accompanied by an almost revolutionary increase in the power of the Executive. Many circumstances contributed to this transformation. Among them were the multiplication of the administrative duties imposed on the President by law, the increasing army of civil servants and officers put under his control, and the billions of dollars placed at his disposal—all of which enhanced his authority. But no small part of the transformation was due to the temper of Congress itself. By haggling over trivialities in times of crisis and refusing to act on pressing questions before the country, it again and again created situations in which the President had either to act or stand idly by and allow public business to drift, perhaps into perilous channels. Besides augmenting the executive power by a display of negative qualities, Congress deliberately enlarged it by enacting numerous blanket bills conferring upon the President all the powers applicable to particular contingencies and permitting him in effect to do the legislating himself. In a large measure it was the neglect of its duties by Congress that allowed strong and determined personalities in the Executive Department to assume a legislative and administrative dominion over life, liberty, and property that finally attained such gigantic proportions as to awaken protests and alarms throughout the country.

Illustrations of Tendencies. These tendencies in government may be illustrated by legislative and executive reactions to the economic distress of 1933. For two years, the Senate in the hands of Republicans and the House under Democratic control had done little or nothing in the way of overcoming the paralysis in business, the unemployment of millions, and widespread poverty. When the new Congress assembled in March, 1933, it was no better prepared for the discharge of its immediate responsibilities. In the circumstances, President Roosevelt,

[2] Kefauver and Levin, *A Twentieth Century Congress* (1947), pp. 103 ff.

with the aid of advisers, drafted and laid before it a number of bills dealing with the economic crisis. He urged Congress to adopt them or such other measures as it might "build out of its experience and wisdom." Then he warned Senators and Representatives that if they did not act quickly, he would call upon them to grant him "broad Executive power to wage war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign power."

Unready itself and thoroughly frightened, Congress sidestepped its obligations and yielded to the President's demands. It passed the emergency banking bill in just forty minutes. Between March 4 and June 15 it enacted twelve fundamental bills dealing with every major phase of national economy and spent only sixty hours in debating this entire legislative program. All the bills were blanket bills conferring immeasurable powers upon the President and some of them authorized him to create at will the agencies required to enforce them. And yet it was boasted in Congress that the efficiency of democracy and a popular legislature had thus been demonstrated.

For several years of President Roosevelt's long incumbency, while his party easily dominated both houses of Congress, his leadership in legislation continued almost unabated. Congress acquiesced in innumerable actions and decisions on his part, which had little or no specific sanction in the Constitution or in statutes duly passed and in force. Nearly all the great laws materially affecting life, liberty, and property enacted in Congress between 1933 and 1945 were originated by the Executive Department, were inspired by it, or were carried through the House and Senate under administration pressures.

By statute after statute couched in general terms Congress added to the powers vested in the President, until a climax was reached in the Lend-Lease Act of 1941. Legislation by presidential decree expanded; between 1933 and 1943, Congress passed 1,300 public laws and during that period 3,556 executive orders were issued, to say nothing of executive agreements, public and secret, made by the President with various foreign governments.

Among major actions taken by the President on general grounds during this period, with little or no statutory authorization, two were outstanding: the exchange of destroyers with Great Britain for leases on naval bases in this hemisphere in 1940, and a decree putting a ceiling on salaries at the figure of $25,000 a year after taxes. The former was the subject of an ineffective protest and the latter was overridden by an act of Congress. Able lawyers offered briefs in support

of both actions and extended arguments were made against them. But both were exercises of high authority by the President on his own volition as Chief Executive.

After the United States became involved in World War II, Congress, by blanket legislation, conferred enormous powers over the national economy, the expenditure of money, and the organization of the administration; and, as Chief Executive and Commander in Chief, President Roosevelt made many commitments of the gravest nature to the heads of foreign governments, several of them secret and all destined to raise vexatious problems for Congress and his successors.

EXALTATION AND DEFENSE OF THE EXECUTIVE

Woodrow Wilson's Exposition. Along with these tendencies in practice ran the development of a political theory that defends and justifies presidential leadership, almost to the point of exalting dominance in domestic and foreign affairs, and reducing Congress to the level of a subordinate debating and ratifying society. The theory was hinted at as early as 1888 by Woodrow Wilson in his *Congressional Government* and elaborated in his *Constitutional Government in the United States* published in 1909. In the latter volume Wilson wrote: "He [the President] is . . . the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unification and it craves a single leader. . . . If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it."

Another Version of the Presidency. In an article published in 1941,[3] Professor Henry Steele Commager worked out a series of propositions designed to justify the exaltation of executive power and the reduction of Congress to the role of criticizing and restraining the President's activities and ambitions. The separation of powers, he maintained, was a mistake on the part of the framers of the Constitution. In a democracy, he argued, there is no need for men to fear government, for they

[3] *The New York Times*, March 2, 1941.

themselves are the government; the President is "the peculiar representative of the whole people—the voice and symbol of national unity"; "democracy apparently flourishes when the Executive is strong, languishes when it is weak"; "Presidents have aggrandized power not because they were ambitious but because power had to be exercised and the President was the natural and effective instrument for its exercise." This theory Professor Commager later amplified by attacking the power of the Supreme Court to declare unconstitutional any acts of Congress whether passed on its own motion or under the pressure of executive power and patronage.

In sum and substance the doctrine thus stated savors of the fascist "leadership principle," despite the fact that it retains the restraints of popular elections and legislative criticism and permits a possible rejection of presidential demands by Congress. Although it amounts to a denial of the system of government conceived by the framers of the Constitution and incorporated in that document,[4] the theory has strong support in various circles.

Depreciatory Criticism of Congress. Accompanying the acquiescence of Congress in President Roosevelt's leadership was a running fire of words directed against Congress by the press and by independent publicists. The criticism increased in volume and intensity after President Roosevelt broke the third term tradition in 1940 and especially after he accepted the nomination for a fourth term in 1944. Some of this criticism was of course partisan in character and concerned more with discrediting Democrats than with arriving at constructive and constitutional ends. But it was by no means all captious and partisan. In no small measure it was serious in thought and purpose. In view of the fact that dictatorships had recently arisen on the ruins of popular legislative bodies in many parts of the world, such loss of confidence in the capacity of Congress to act promptly and efficiently could not lightly be ignored by citizens who were loyal to democracy.

The keynote of scornful hostility to Congress was sounded in 1942 by a popular columnist in a declaration that "the ignorance and provincialism of Congress render it incapable of meeting the needs of modern government." Censure in this vein also ran to the effect that Congress had become a mere "rubber stamp" for the President and had hopelessly sunk into futility as a legislative body.

Specifications in the Criticism of Congress. By no means all the criticisms of Congress were so wholesale and indiscriminate. Many were directed to objectionable practices in particular, which could be corrected by positive actions on the part of the two houses and the

[4] C. A. Beard, *The Republic*, Chapters xiii–xvi.

President. Among such criticisms, the following had immediate and clear pertinence:

> Although the House and the Senate have members possessing high talents for the work of government, such talents, instead of being concentrated on public business, are dispersed among many committees and wasted in rambling debates.
>
> The practice of having so many committees for each house, and allowing each committee of each house to hold hearings, make investigations, and completely dominate the business before it, makes it impossible for Congress to initiate and formulate an integrated legislative program early in each session and to secure orderly and concentrated debates on this program.
>
> The insistence of Congress upon dealing with thousands of bills relative to petty matters that could be handled by executive or judicial agencies leads to the waste of days and weeks in debates about very minor affairs—desultory debates attended by only a few members and likely to give the public false impressions of congressional abilities.
>
> While Congress votes millions of dollars annually to executive agencies for the purpose of employing the best experts in the country in their work, it has no large and competent staff of experts to draw upon in framing and discussing bills of the highest importance for the life, liberty, and property of the people.
>
> The public debates and proceedings of Congress, usually shaped from day to day by little arrangements among party leaders, are marked by confusions and irregularities unworthy of the national legislature.
>
> Relations between Congress and the President, duly recognized by the Constitution and indispensable to competent government, are conducted in an irregular, subterranean, and often vulgar and capricious fashion and should be so institutionalized as to be regular, open, dignified, and direct.

CONGRESS TURNS TO SELF-SCRUTINY

Congress Takes Note of Its Deficiencies and Responsibilities. With striking frequency, especially after 1940, members of Congress referred to indictments brought against their honorable assembly, discussed the validity of these outside protests, and brought forward proposals designed to assure the better discharge of their duties as legislators and to improve relations with the Executive Department. This self-examination became especially marked in the Seventy-eighth Congress which opened in January, 1943. To some extent the diagnosis was due to Republican gains in the congressional elections of the previous year which substantially enlarged the Republican minority in the House and the Senate. But it was by no means solely due to that partisan turn in politics, for members of both parties joined in the general self-scrutiny and in making three types of proposals: (1) for trans-

forming Congress into a more efficient and responsible legislature; (2) for drawing more clearly and strictly the boundaries of the President's power; and (3) for establishing more effective working relations with the Executive Department and its agencies in general. Although no little pettiness and vindictiveness marred the discussion of these subjects in both chambers, many speeches reasonable in tone and rising far above mere party considerations were made in the House and the Senate. Some were directed to details and others to the problem of congressional reform in general.

Matters of Detail. Discussions of congressional reform are scattered all through the *Congressional Record* for the year 1943. Two examples may be taken as illustrative.

On February 2, 1943, Jerry Voorhis, a Democratic member from California, spoke on the subject in the House of Representatives and introduced a resolution containing one concrete proposal. He remarked that speech after speech had been made on the floor demanding that "Congress should assume its full and proper place as a coordinate branch of government," and expressed himself in hearty accord with this doctrine. His resolution opened by referring to the extensive powers which had been conferred on executive agencies and to the responsibility of Congress for seeing that such powers are actually exercised in harmony with legislative purposes and neither abused nor arbitrarily employed by these agencies; and it declared that Congress should be continually informed respecting the functioning of executive agencies. Mr. Voorhis then proposed that either the standing committees of the House in charge of specific matters, or standing committees especially designated by the Speaker, should be required to maintain a continuous review of the way in which executive agencies operated and to report their findings periodically to the House. This plan, Mr. Voorhis declared, would promote cooperation between the executive and legislative branches of government and avoid unnecessary confusion, friction, and misunderstanding between the people and their government.

Addressing himself to the problem of foreign relations, Senator Alexander Wiley, a Republican of Wisconsin, resubmitted to the Senate on January 7, 1943, a resolution calling for a better coordination of the plans and decisions of the President and Congress in respect of foreign affairs. Mr. Wiley drew attention to the fact that both branches of the Government had constitutional responsibilities in this sphere and insisted that machinery should be established to avoid conflicts such as had often marked their transactions in times past. Senator Wiley's resolution proposed that the Chief Executive be invited to

join with the Senate in the creation of a Foreign Relations Advisory Council consisting of the Secretary of State and other representatives of his Department, members of the Senate committee on foreign relations, and members of the House committee on foreign affairs—members from the majority and the minority. Such a Council, Senator Wiley argued, would especially facilitate cooperation between the Senate and the Executive in spheres where the Constitution requires them to work together and would help in finding better answers to questions of war and peace. Prodded by other suggestions, the Senate committee on foreign relations later entered into personal communication with the Secretary of State and arrived at a modus vivendi with him by which he was committed to the closer observance of the rights and duties of Congress in making further agreements with foreign governments.

General Overhauling of Congress Demanded. In an article written for a popular magazine and reprinted in the *Congressional Record* for January 14, 1943, Representative Albert Gore, a Democrat of Tennessee, pictured a general decline in the efficiency and prestige of Congress and called for a thorough overhauling of its machinery and methods. "There are," he said, "basic reasons why Congress has steadily declined in public popularity and power. . . . Congress has failed to keep step with a national development . . . has become wholly unable to function on an equal footing with the ever-swollen executive branch of the Government. . . . Rarely does Congress pass an important law which does not originate in some executive agency. . . . Today, executive officials not only draft legislative proposals and submit them to Congress but they use the facilities and overwhelming strength of the executive branch to push and persuade the people and Congress to their points of views." The President castigates Congress for action or inaction. The press and the public scold it for faults that lie at the door of the Executive. The President's addresses and statements are broadcast all over the country; congressional proceedings receive little attention, often only because they are marked by crackpot ideas or intemperate speeches. "How," Representative Gore asked, "can Congress regain its rightful place as an independent branch of the Government and recapture public esteem?" His answer was: Thoroughly overhaul its traditional organization and procedure.

Later in the same year Senator Robert M. La Follette of Wisconsin sounded a note of general alarm, also in a magazine article, reprinted in the *Congressional Record* for July 1, 1943. "Wars and dictatorships," he opened, "have swept aside all but the merest vestiges of representative government elsewhere in the world. It should come as no surprise

that representative government in the United States is on trial for its life." Although he gave little weight to the immense amount of captious abuse hurled at Congress, Senator La Follette was oppressed by the growing complexity of the political, social, and economic questions with which Congress has to deal and by the increasing predominance of the Executive in legislation as well as administration. Functions of government have become more technical. Congress sidesteps its legislative duties by leaving the initiation of laws to the President and by enacting blanket legislation, authorizing him to "issue such regulations and orders as he may deem necessary and proper in order to carry out the purposes" of the acts passed. The President grows in power. The Congress declines. If control by the people's representatives in Congress is not to drift into the hands of a bureaucracy, relatively irresponsible, then Congress must be reorganized for the efficient discharge of its responsibilities and constructive relationships must be established between the Legislature and the Executive. This survey of Congress, Mr. La Follette followed up on July 5, 1943, by introducing in the Senate a set of resolutions for a thoroughgoing reorganization of the committee system of that body.

Constructive Proposals for Congressional Reorganization. In speeches made in Congress and in articles, editorials, and special studies, numerous proposals were presented for changes in organization and procedure in the interest of competence and efficiency. These proposals ran from minor alterations in the committee system to large plans for a general overhauling.[5] For purposes of summation the chief proposals may be formulated as follows:

A reorganization of the committee system; drastic reduction in the number of committees in each house; provision for joint hearings and operations by the committees of the House and Senate having charge of common subject matters.

The creation in each house of a general planning and directing committee to formulate the legislative program of each session in advance and give an orderly direction to the proceedings connected with, and actions upon, the several features of the program.

The establishment of a general legislative council for the nation, more or less on the model of such councils in several states (below, Chapter 29), composed of representatives of the majority and the minority in each house, and equipped with a staff of experts in primary problems up for congressional consideration and action; such a council to be made responsible for preparing, either in full outline or in detail, the principal measures to be

[5] See "Second Progress Report of the American Political Science Association's Committee on Congress," *American Political Science Review*, December, 1942, pp. 1091 ff.

acted upon in the sessions of Congress; the fundamental purpose being to concentrate talents upon legislative business, to command expert counsel, and overcome the present dispersion and confusion of efforts.

The creation of staffs of experts for each committee or a general staff to be drawn upon by committees according to need or by the legislative council if established.

The use of the legislative council or the organization of a special committee or council for the purposes of regularizing and institutionalizing the relations of Congress and the Executive Department.

Elimination of petty business before Congress by transfer of private claims and other private legislation to administrative agencies, subject to congressional review and action en bloc.

Reduction in the number of days given to debates; curtailment of idle and rambling discussions on the floors; concentration of debates in a relatively few debate sessions, stricter enforcement of the rules for decorum; and perhaps enforced attendance of members at debate sessions devoted to primary measures.

Creation of a special agency of Congress or use of the legislative council for the purpose of maintaining constant scrutiny over administrative agencies in the Executive Department, especially those in which large discretionary powers are vested by blanket legislation.

Further reorganization of the executive branch of the government to bring it in closer correspondence to the revised organization of Congress, with a view to more effective cooperation and exchange of information between those who make the laws and officials engaged in enforcing them, thus reducing the number of needless clashes between congressional and executive authorities.

A revival of the old proposition that members of the President's cabinet shall appear on stated occasions before the House and Senate, expound their policies, and answer questions according to some formal rules of procedure.

REORGANIZATION AND RESURGENCE OF CONGRESS

Congress Restive Under Executive Preponderance. Even while World War II was raging and national energies were concentrated on victory, Congress, though controlled by Democrats, showed increasing resistance to demands made upon it by President Roosevelt. Again and again after the opening of 1943 Congress peremptorily refused to grant additional general powers to the President, abolished agencies created by executive orders, and forced through measures of its own even in spite of executive objections or vetoes.

In 1947, when the Republicans returned to power in the House and Senate, they would not accept anything like "dictation" from the White House. Already, between the installation of President Truman in April, 1945, and the end of December, 1946, the Democrats

in Congress had rejected many of his proposals for domestic legislation. Leaders of both parties showed a willingness to cooperate in upholding what was called the "bipartisan foreign policy" of the Administration but the Republicans insisted on carrying through domestic measures of their own devising. In disregarding the President's recommendations and taking their own course, the Republicans had much strong support from the Democratic side. With this assistance they were able to pass, over his veto, a labor bill in 1947 and a tax bill in 1948. Before President Truman's term had expired, it was evident that the spell of executive leadership had been broken, at least for a time, and that Congress had resolved to control its legislative business. This development became one of President Truman's chief complaints, in seeking reëlection for himself and defeat of Republican congressmen in 1948.

To some extent such actions expressed partisan hostility to the President and represented political expediency, but those who firmly believed that indefinite accumulation of authority in the hands of any one branch of the Government was the very essence of tyranny, took heart at this resurgence of Congress. At the same time, Representatives and Senators recognized that protests against presidential dominance would be in vain unless Congress could demonstrate capacity for leadership and efficient operation commensurate with its responsibilities as a coordinate branch of the Government.

Congress Orders an Investigation of Itself. Near the close of 1943, a joint resolution for the establishment of a committee to inquire into the organization and working of Congress was introduced in the Senate and the House by Francis Maloney, Democratic Senator from Connecticut, and A. S. M. Monroney, Democratic Representative from Oklahoma. At length, early in 1945, the resolution as amended was passed. By the terms of the resolution the committee was to be composed of six members from each chamber, no more than three of whom were to be from the majority party. Shortly afterward, the committee was established under the Chairmanship of Robert M. La Follette, Progressive Senator from Wisconsin, with Representative Monroney as Vice-Chairman. The committee held extended hearings, invited the counsel of experienced members of Congress, and early in 1946 made its report, with a projected measure for reforms in congressional organization and procedure. With great skill the Chairman and Vice-Chairman directed the discussion of the measure in their respective chambers and in August, 1946, after undergoing some amendments, it became a law: "An Act to provide for increased efficiency in the legislative branch of the Government."

Limited Nature of the Reorganization Act. By the terms of the resolution under which the committee operated, it was severely restricted and its members knew that many reforms widely deemed desirable would not be accepted by Congress if recommended. Furthermore, owing to the power over internal organization and procedure given to each house by the Constitution, they were aware that in important matters Congress could not, by law, bind both houses to adopt common machinery and methods. The Act did, however, provide means for supplying the members and committees with more information respecting measures before them and with expert services in the discharge of their legislative duties. Besides materially reducing the number of committees in both houses, the Act also gave committees better equipment for establishing continuous relations with the several agencies of the Executive Department and for exercising more control over them in matters of finance and law enforcement (Chapters 9 and 15).

Two propositions before the joint committee were not embodied in the act. The first proposition was that an attempt should be made to institute closer relations with the Executive by providing in each house definite periods for hearing and questioning the heads of departments; but the committee did not feel at liberty to make any recommendations on this suggestion. The second proposition was designed to establish responsibility for legislative policy in each chamber and for cooperation between the two houses and the President. The purposes were to be accomplished by directing the party members of each house to set up a majority and a minority committee and by requiring the majority committee to serve as a legislative council for conducting relations with the President. The joint committee on congressional reform did recommend this radical change in historic practices but Congress refused to accept it.

The First Experiment Under the Reorganization Act. It happened that the task of putting the new law into effect fell to the Republicans, victorious in the congressional elections of 1946, and for this undertaking circumstances were scarcely propitious. For fourteen years, the Republicans had been in the minority in both houses, and when the new Congress met in January, 1947, no Republican present had ever served as the chairman of a House or Senate committee. For many years the government had been living extensively on borrowed money; the national debt stood at about $250,000,000; the burdensome war taxes were still in effect; the process of "reconversion" from war to peace was far from completion; Congress confronted numerous executive commitments to foreign governments and to enormous ex-

penditures in various parts of the world—some known and others only vaguely known, if at all; and, at the same time, the Executive Department was under the control of a Democratic President who, naturally enough, had an eye on his reëlection in 1948.

At the first session of Congress in 1947, the Republicans in the House and the Senate carried into effect many provisions of the Reorganization Act but ignored or only partly complied with the terms of other provisions. During that session disputes over Republican operations under the new law occurred in Congress and outside, in accordance with the use and wont of party politics; and after the adjournment in July, attempts to evaluate the practices under the Act resulted in no general agreement. One of the most informed judgments then made was presented to the public in a long press release on August 10, 1947, by Representative Monroney, who had been vice-chairman of the joint committee on reform and had served in the House during the session. Mr. Monroney listed full and partial compliances with the requirements of the new law and pointed out that many of its provisions had been "virtually ignored and unused." He drew the conclusion that "after seven months' experience with the Reorganization Act, Congress has rung up a 50–50 score on performance under the new rules."

Proposals to Abolish the Check and Balance System. During these years of controversy over the reform of Congress, many critics contended that none of the plans for reorganization were comprehensive enough. A few of them demanded nothing less than a revolution in the check and balance system. In their view the system should be abolished and the United States should adopt some kind of parliamentary government on the English model or a scheme for making sure that Congress and the Executive Department, if not even the Judiciary, will always be simultaneously in the hands of the same party, to assure quick action in domestic and foreign affairs, thus putting an end to delays and conflicts between the departments.[6] Such projects, however, commanded no widespread popular support—perhaps partly for the reason that the American people had recently witnessed the operations of quick-action governments under Hitler and Mussolini in Germany and Italy, and could then observe similar operations under Stalin in Russia. Nor did the fortunes of parliamentary government in England or France indicate that a short cut to speed, efficiency, and competence in government had been found in those countries. It will take more than arguments drawn from experience with parlia-

[6] For example, see Henry Hazlitt, *A New Constitution* (1943), and Thomas K. Finletter, *Can Representative Government Do the Job?* (1945).

mentary and short-cut governments in Europe to convince the American people that they should abandon the system of checks and balances incorporated in the National Constitution. They may seek better methods of operating the system but it seems improbable that they will approve its abolition.

THE JUDICIARY IN RELATION TO CONGRESS AND THE EXECUTIVE

Nature of the Judicial Power. Under the American constitutional system, the judiciary also has special functions in the exercise of which it becomes involved in the great political questions that divide the people—and thus in contests for power between the legislative and the executive branches as well as in the conflicts between the Federal Government and the states. In the last analysis the Supreme Court has the duty of interpreting and upholding the provisions of the Constitution for civil liberty and protecting the people in the enjoyment of this liberty against infringement by Congress, the President, and the states—all the governing authorities in the country. The Judiciary also interprets and applies, in concrete cases before it, acts of Congress and orders of the President, which are often cast in loose and vague language, allowing a wide range of opinion to the judges. It passes upon the constitutionality of state and local measures and acts. According to long and accepted practice, it has the power to set aside acts of Congress and orders of the President which it finds contrary to the Constitution. No less than Congress and the President, it is duty bound to resist encroachments upon its power from every direction and to help in maintaining the whole system of government. Ultimately, as the highest court of appeals, the Supreme Court must bear a burden that, in its way, is fairly comparable to the responsibilities of Congress and the President.

Origins of Conflicts over Judicial Power. In exercising the power to interpret the Constitution and laws and to declare invalid acts of Congress, orders of the President, and acts of state and local authorities, the Supreme Court uses power against power and in so doing it may invoke conflicts. Usually an important statute of Congress or act of a state legislature reflects the policies of a political party or a large number of interested people; often it is the fruit of a long and ardent agitation. If it is set aside by the Supreme Court, resentments are naturally aroused. Although the Court, in declaring an act void, seldom appears to depart from the austere logic of the law, it may in fact pass judgment upon the wisdom or merits of the measure under scrutiny. In such cases there may be severe stresses and strains within the Court—

five judges may think the Constitution means one thing and four may think it means something else.

Two Classes of Disputes. Broadly speaking, controversies arising from this exercise of power by the Court fall into two main classes. Some issues grow out of cases in which the Court invalidates state laws. In recent times many contests of this type have arisen in connection with judicial rulings under the Fourteenth Amendment, which strike down social and economic measures enacted by state legislatures. Since the power of the Supreme Court to declare state legislation void is now generally recognized, its wisdom in actions of this nature, rather than its authority, is usually questioned in such disputes. A second type of controversy springs from decisions of the Court setting aside acts of Congress. These decisions may involve hotly disputed issues of national politics, and on several momentous occasions they have plunged the Court into partisan hostilities.

The Dred Scott Case. Perhaps the most famous of all these conflicts occurred in connection with the celebrated case of Dred Scott (1857), in which Chief Justice Taney sought to accomplish the impossible feat of settling the slavery issue by a judicial discourse. In principle Taney held that Congress had no constitutional warrant for abolishing slavery in the territories of the United States. But at the very moment, the new Republican party was staking its hopes and gaining strength on the contention that Congress had full power in the premises and should immediately exercise it.

Owing to the excitement over the slavery question that prevailed at the time, Chief Justice Taney's opinion precipitated a bitter struggle in the political forum. Naturally southern leaders accepted his dictum as final. In the north however it aroused a storm of protest, and the legislatures of several states passed resolutions condemning his doctrines enunciated in the name of the Court. Maine, for example, expressed her views in the following legislative declaration:

> Whereas, such extra-judicial opinion subordinates the political power and interests of the American people to the cupidity and ambition of a few thousand slaveholders, . . .
>
> Therefore—
>
> *Resolved*, that the extra-judicial opinion of the Supreme Court in the case of Dred Scott is not binding in law or conscience upon the government or citizens of the United States and that it is of an import so alarming and dangerous as to demand the instant and emphatic reprobation of the country.
>
> *Resolved*, that the Supreme Court of the United States should, by peaceful and constitutional measures, be so reconstituted as to relieve it from the domination of a sectional faction. . . .

On reading Taney's epoch-making opinion, Lincoln, who was to wage war and attack slavery to strengthen the Union, spoke of the ruling with moderation, but he refused to accept it as the last word on slavery in the territories. Two or three months after it was rendered, he declared his belief in, and respect for, the judicial department of the government, saying that its decisions should control the policy of the country until reversed by some lawful process. "We think the Dred Scott decision is erroneous," he declared to his neighbors at Springfield. "We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it."

But in the heat of the fray he grew more belligerent. A year later, in a speech at Edwardsville, he exclaimed: "Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people."

Furthermore Lincoln accepted without reserve the declaration of the Republican platform on which he stood for the presidency in 1860: "The new dogma that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country." In the end slavery was abolished not only in the territories but also throughout the Union. The Supreme Court was overruled by history.

Income Tax and Injunction Cases. It was the Democratic party that was to raise the next serious controversy over a judicial action, nearly forty years after the Dred Scott case. In 1895 the Supreme Court, by a narrow vote of five to four, declared unconstitutional the fundamental parts of the federal income tax law passed by a Democratic Congress during the preceding year—a law avowedly designed to shift a part of the burden of federal taxation from goods consumed by the masses to "accumulated wealth." When the Democratic national convention assembled in 1896, feelings ran high among the radical elements against the action of the Court. It was openly said that the Court had discriminated against the poor in favor of the rich. At the same time popular indignation was intensified by a conflict over the use of injunctions by

the federal courts in labor disputes (Chapter 23). Profoundly stirred by the course of affairs, leaders in the Democratic left wing protested vehemently against the income tax decision and the injunction and carried their objections to the convention.

In response to their demands, the chairman of the committee on resolutions brought in a platform containing two sharp attacks on the federal judiciary: "We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the Court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the government." Then referring particularly to the recent railway strike in Chicago, the platform added: "We denounce arbitrary interference by federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which federal judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges, and executioners."

In vain did Senator Hill of New York protest against these planks, denouncing them as foolish, ridiculous, unnecessary, revolutionary, and unprecedented in the history of the party. With spirited directness, William Jennings Bryan replied to Hill in defense of the party's position: "They criticize us for our criticism of the Supreme Court of the United States. My friends, we have made no criticism. We have simply called attention to what you know. If you want criticism, read the dissenting opinions of the court. That will give you criticisms."

With this turn in fortune's wheel, Republican leaders now assumed the role of defenders of the Supreme Court. Democratic attacks on the decision in the income tax case they denounced as assaults on fundamental American institutions. The proposal to reconstruct the Court and secure a reversal of the opinion they assailed as an attempt to drag the judiciary into the mire of politics. Although for a time after the victory of McKinley the sound of the conflict died away, the issue did not disappear. In fact the question remained open until the Sixteenth Amendment to the Constitution displaced by orderly procedure the barrier set by the Court.

Conflict Between President Roosevelt and the Supreme Court over New Deal Legislation. The next great judicial controversy arose shortly after the Supreme Court declared substantially all the National Industrial Recovery Act null and void in 1935 on the ground that the act was an unconstitutional delegation of legislative power to the

Executive.[7] President Roosevelt, at a press conference, spoke with "some asperity" of the Court's recent decision and expressed the opinion that the Court had interpreted the Constitution in the light of a "horse and buggy" philosophy. Immediately a lengthy discussion of this decision and the Court's position in the American system opened in Congress and outside.

The controversy over the judiciary and the Constitution was widened by other decisions of the Supreme Court invalidating New Deal legislation, especially the Agricultural Adjustment Act early in 1936, and it was carried into the campaign of 1936. The Republican candidate, Alfred M. Landon, declared that he would press for a federal amendment empowering states to regulate the working conditions of women and children if such regulation could not be effected within the Constitution as it now stands. In their platform the Democrats promised to continue their policies and to seek a "clarifying amendment" if necessary. Neither party, however, proposed any limitations on the exercise of the judicial power in accordance with historic practices.

President Roosevelt Challenges the Supreme Court. The growing tension over the actions of the Supreme Court broke into an open conflict on February 5, 1937, when President Roosevelt submitted to Congress a plan for the reorganization of the whole judicial system, including an authorization to appoint new justices (up to six) to the Supreme Court when justices after reaching the age of seventy fail to resign within six months. This plan was referred by the Senate to its judiciary committee which held hearings for several weeks and gave friends and foes of the measure ample opportunity to present their views. Meanwhile the general public engaged in an acrimonious debate over its merits.

At the close of its hearing the Senate committee by a small majority made a report condemning the project in severe terms. After a bitter debate the plan was dropped in the Senate and the House of Representatives refused to act on it at all. Congress did pass however a bill allowing justices to retire on full salary after reaching the age of seventy-five and another bill limiting the powers of lower courts to interfere with federal legislation and to pass upon the constitutionality of acts of Congress. Seldom in American history had a President received a more crushing defeat on one of his own measures.

In the meantime significant events were happening in the Supreme Court itself. On March 29, 1937, the Court sustained the validity of a state of Washington minimum wage law. In so doing it reversed, in

[7] *Schechter v. The United States*, 295 U.S. 495.

effect, its decision of 1936 in the New York minimum wage case. Furthermore it also expressly reversed the decision of the Court against the minimum wage law of the District of Columbia (1923). In April, 1937, the Court sustained the Labor Relations Act, and in May the Court upheld the tax provisions of the Social Security Act and the Alabama unemployment insurance law.

Shortly afterward Justice Willis Van Devanter, who was seventy-eight years old, resigned from the Court, giving President Roosevelt his first chance to nominate a Supreme Court justice. In August the President nominated and the Senate accepted Senator Hugo Black, of Alabama, to fill the vacancy. As Senator Black had been a stanch supporter of New Deal measures, his appointment, combined with the more liberal opinions of the Court, was regarded as a substantial offset to the President's defeat on his court enlargement plan. Resignation of Justice George Sutherland in 1937 was followed by the appointment of Stanley Reed who, as Solicitor General, had steadily defended New Deal statutes before the Supreme Court. By the end of 1943 seven of the nine Supreme Court Justices—Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, all Democrats of the New Deal persuasion—had been appointed by President Roosevelt. Only two Republican members remained from the old days—Harlan F. Stone, who had been elevated by President Roosevelt to the position of Chief Justice, and Owen J. Roberts. Not without justification was it said that President Roosevelt had lost the battle but won the war. On the resignation of Justice Roberts in 1945 a Republican, Harold H. Burton, was appointed to succeed him but when Chief Justice Stone died the next year, President Truman chose an experienced Democratic leader, Fred M. Vinson, as his successor—thus making a court of eight Democrats and one Republican.

Congress and Judicial Conflicts. To controversies between the President and the judiciary, Congress is nearly always a party. On some occasions, as in 1937, it may openly resist efforts of the President to bring direct pressure on the Supreme Court. On others, it may take the lead in criticizing and in giving instructions to the Court, particularly with regard to the interpretation of statutes. And the plain fact is that the Supreme Court may sometimes "defeat" what is called the will of the people expressed in congressional legislation as easily by the interpretation of a law as by declaring it unconstitutional.

The Court Instructed by Congress. This point is generally overlooked by critics of the Supreme Court and the check and balance system, who lay extreme emphasis on the invalidation of laws and neglect

the Supreme Court's no less important function as an interpreter of statutes. The matter was forcibly brought to the attention of the public in 1947 by Congress in connection with enactment of a labor measure known as the Portal to Portal Act, setting forth the meaning of and amending a law passed in 1938, which had been construed by the Court in its own way. At the opening of the new measure, Congress declared: "The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been judicially interpreted in disregard of long-established customs, practices, and contracts between employers and employees." Congress then listed in the new law ten specific ways in which the federal courts had, allegedly by misinterpretation, created evils that could have been avoided if they had adhered to the language of the Act of 1938. After administering this rebuke to the courts, Congress proceeded in effect to tell them precisely how the Fair Labor Standards Act was henceforth to be interpreted with regard to certain of its provisions.

Responsibilities of the Judiciary Still Intact. To some extent the troubles that befell the Supreme Court were due to stringent views expressed by certain justices in declaring invalid several pieces of New Deal legislation. In dissenting from the opinion of the Court in the case of the Agricultural Adjustment Act of 1936, Justice Harlan Stone had warned his colleagues against extremes. He said to them: "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," and he added: "Congress and the courts both unhappily may falter or be mistaken in the performance of constitutional duty."

If, however, the Supreme Court may occasionally go to extremes and make errors of judgment, its constitutional obligations still remain intact. In cases properly brought before it, the Court must pass upon the issues raised; its members are duty bound to give due consideration to claims that Congress, the President, or state authorities have transgressed private rights and civil liberties; and, if upon mature judgment the court finds such claims warranted by the Constitution, it must uphold them. The justices are not infallible; they may be mistaken; but they, like Congress and the President, have a constitutional duty to protect certain guaranteed liberties against official usurpations of power and to aid in maintaining a fair working balance in the Government of the United States.

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CHAPTER 14

The Fourth Department—The Administration

DIVIDED NATURE OF CONTROL OVER THE ADMINISTRATION

Theory of Presidential Dominance. Although the term "the national administration" is frequently used broadly to cover the Federal Government in general, it is employed here in a more restricted sense, as embracing the executive agents and agencies engaged in enforcing laws and rendering public services. So defined, the national administration is often regarded as *in* the Executive Department and almost entirely *subject* to the direction, supervision, and control of the President. This theory is widely accepted among many specialists in public administration. Indeed, an official committee of such specialists, appointed by President Roosevelt in 1936 to study and report on the reorganization of the national administration, defined it as "the organization for the performance of the duties imposed upon the President in exercising the executive power vested in him by the Constitution of the United States." [1]

This definition rests upon certain clauses in Article II of the Constitution which vest in the President "the executive power," make him Commander in Chief of the Army and Navy of the United States, authorize him to negotiate treaties, and grant to him important powers as to the appointment of officials of the Government. It is further supported by the fact that under the Constitution, Congress has no express right to remove (except by impeachment) any executive or judicial officials of the Government. Taken by themselves, the provisions lend color to the theory that the President has almost complete power to direct or manage all the administrative officers and agents of the Government.

For a long time, the national administration was so organized as to make the task of presidential control fairly easy. Until near the close of the nineteenth century, Congress in creating executive offices usually placed them in one or more of a few great branches of administration, each headed by a high officer who either had a seat in

[1] *Report of the President's Committee on Administrative Management* (1937) p. 2.

the President's Cabinet or was otherwise immediately under the President's supervision.

Limitations on the Theory of Presidential Dominance. If the provisions of the Constitution on which the doctrine of presidential control rests are examined, as they should be, in connection with the remainder of the Constitution, it becomes quickly apparent that there are important qualifications on the theory. The Constitution states that "the executive power" is vested in the President, it is true, but sharply restricts it in other sections of the same article and in provisions of other articles. The President's appointing power is qualified by Section 2 of Article II. There it is provided that the President shall nominate, and by and with the consent of the Senate, appoint certain specified high officers of the government and other officers of superior rank whose posts may be created by Congress. Of his removal power, the Constitution says nothing at all and, respecting this power, practices and judicial decisions have varied since 1789; but it is well established law that Congress may severely limit the removal power in certain respects (p. 216) and it can directly remove officers including the President, by impeachment.

How great is the President's power to *direct* administrative officers in the discharge of the duties imposed upon them by acts of Congress? As to this point Article II authorizes the President to "require the opinion, in writing, of the principal officer in each of the executive departments." Those words would seem to be surplusage if the framers of the Constitution intended to confer upon the President an unlimited power of directive management. Besides, it is obvious, that, since Congress has full power to create agencies and prescribe their duties, the President has no more latitude in shifting units around, or issuing orders to their heads, than Congress is willing to grant to him.

During the past fifty years or more, three striking developments in national administration have further shattered the theory that it is almost wholly in the Executive Department and subject to the President's direction. The first is the practice of Congress in placing many agencies of enforcement outside the few great branches headed by cabinet officers and in granting them a high degree of independence from the directing power of the President; for example, the Interstate Commerce Commission and the National Labor Relations Board (below, p. 280). The second is the enormous increase in the number and variety of the federal agents and agencies, inside and outside of the branches headed by cabinet officers, with the result that more than 2,000,000 civilian officers and employees are now engaged in administration—an army with which he cannot keep in close touch. The third

development is the enactment of civil service laws which materially restrict the President's power over appointments and removals, and give permanent tenure to a huge proportion of the officials and employees, including many of high rank in the Government.

As an outcome of these three developments, the national administration has acquired features utterly different from those of fifty years ago. Its dimensions are so great and its activities are so technical in nature that a large part of it is beyond the personal reach of the President, no matter how strong, competent, and diligent he may be. Another large part of it is deliberately put beyond his immediate reach by laws which restrain his appointing, removing, and directing power. Furthermore, nearly every part of the system depends for effective performances, not merely or mainly on the President's orders or vigilance, but on the technical knowledge and ability of thousands of highly trained and experienced civil servants who carry on the basic work of the Government amid the coming and going of Presidents, Congresses, and Supreme Court justices through the years.

To the main body of officials and employees the term "bureaucracy" is often applied in derision or contempt. But if all, or indeed a few thousand trained technicians among them, should simply walk out of the government service at a given moment, the Congress, the President, and the Supreme Court would be in a hopeless dilemma, despite all their power and prestige; and American society would be shaken from center to circumference. In effect, these little known and semiautonomous public servants, who do the work of administration in detail, constitute, by virtue of their responsibilities and position of influence in the system, what may be called for emphasis the fourth department of the National Government.

While there is a touch of hyperbole in this designation, it comes nearer to the truth of practice than the theory that all administrative agents are in the Executive Department and subject to the direction of the President. In any case, as a phrase of emphasis it serves as a warning to students who imagine that the offices and agencies of the administration can be readily classified as to powers and functions and grouped in hierarchical order under the Chief Executive of the United States; for, although there is some truth in this conception, it is by no means the whole truth; and if carried too far it is positively misleading.

Proposals for Strengthening the Position of the President. To offset the independence already achieved by what is called the bureaucracy, some publicists would materially increase presidential control over it. In support of this design, they cite the experience derived from the successful management of business corporations. Inasmuch as the

head of an industrial company, elected by the directors representing the stockholders, enjoys the general power to organize the work of the concern and hire and remove employees, so, the theory runs, the President should be the head of a hierarchy of officials; and he is best fitted to determine, within limits, the number and kinds of agencies which are to carry the laws into effect and to direct or supervise them in the discharge of their duties. Some specialists in administration even claim that the President has of right, and should have, a large power to prescribe, alter, and enforce general and specific policies to be applied in the execution of the laws. A few specialists go beyond this and maintain that the President should have the power, within broad limits, to create, transfer, and abolish agencies with a view to transacting public affairs in the most "businesslike" manner.

In behalf of the theory it is further argued that Congress by its very nature is unfitted to exercise any efficient and well-coordinated control over the arrangement of agencies in the administrative system or over the consistent discharge of their duties. Members of Congress, runs the argument, represent special interests—regional, agricultural, industrial, and labor, for example: they must get favors for their constituents from the chiefs of bureaus and other agencies, and, as they control appropriations, Senators and Representatives may use these high officers to serve their particular purposes. In contrast to Congress, the plea continues, the President represents the nation, is above district and other special interests, has a care mainly for general welfare or national policy in the large, carries responsibility for the whole administration, and becomes more experienced in the arts of management than members of Congress.

Objections to the Proposals. While in a sense the President represents the entire nation, he is certainly not above all special interests. He owes his election, partly at least, to a combination of interests, in which one or another may cast the marginal votes that put him into power; for instance the farmer vote in agricultural states or the labor vote in industrial states. If he is thinking of a reëlection, he may depend upon one or more "blocs" of such voters and in his management of administration he may, like members of Congress, conciliate or reward particular interests. Nor is it necessarily true that the President is a good administrator, cares mainly about the arts and sciences of administration, or devotes most of his time to them. No man has ever been elected President merely or chiefly on the ground that he has demonstrated great capacities as an administrator. Few, if any, Presidents have been primarily interested in the administrative phases of the office, and none has won his fame for achievements in administra-

tive management. Given the present posture of affairs and the jealousy between the President and Congress with regard to control over the administration, the prospect that the "fourth branch" of the Government will be completely brought under the dominance of the Executive Department seems slight indeed.

CONGRESSIONAL CONTROLS

Power to Create Agencies. Concerning the source of the power to create federal agencies there can be no doubt, for the Constitution vests in Congress full authority to establish, modify, and abolish administrative offices and agencies. It can determine the number, kinds, and duties of such units. It can fix the qualifications of all persons who are to serve as officers and employees in the administrative system and require high officers to report to the President or to Congress or to both. In the exercise of this authority Congress may go into elaborate details as to the names, structures, and functions of the agencies it establishes; or it may leave many details to the determination of the President or superior officers in particular agencies. It may even delegate to the President the power, within limits, to create agencies, abolish them, consolidate them, and otherwise regulate their organization, as well as their duties. Such delegations of power have often occurred in recent times but in making them Congress cannot divest itself of its constitutional responsibility for the proper exercise of the powers delegated or surrender its own authority to withdraw them at will by legislation.

Exercise of Control by Congress. Having established agencies or delegated the creative authority to the President for limited purposes, Congress retains strong control over them through the appropriation of money necessary to their existence, and has the obligation to maintain continuous scrutiny over them for the purpose of making sure that they fulfill the duties entrusted to them by law. In preparing the annual bills granting money to the several administrative agencies, the committees on appropriations in both houses must give attention to the use of money by such agencies; and the various standing committees which have charge of other legislative measures must consider the operations of the agencies in the execution of the laws. With a view to establishing a still closer and more persistent observation of the administrative agencies, Congress, by the Reorganization Act of 1946, created in each house a committee on expenditures in the executive department and assigned to it duties in relation to the following matters: reorganizations in the executive branch of the government; reports of the Comptroller General; the operation of government ac-

tivities at all levels with regard to efficiency and economy; the evaluation of laws respecting reorganizations of the legislative and executive branches; and intergovernmental relationships between the United States and the states and municipalities and between the United States and international organizations of which it is a member.

The committees on expenditures began their work after the opening of the Eightieth Congress in 1947. On May 2 of that year George Aiken, chairman of the Senate committee, in a report to that chamber, demonstrated that his group was taking its duties seriously. He presented to the Senate an organization chart showing detailed personnel assignments in the federal administration (not including the judiciary and Congress). In a supplementary statement he said that as of December 31, 1946, there were 2,285,570 employees in 2,369 units composing the federal departments, independent agencies, and emergency agencies of the Government. Senator Aiken informed his colleagues that his committee intended to present such a picture of the Government twice a year henceforward, so that members of Congress, administrators, and the public might keep reasonably up to date with regard to the immense and complicated structure of the federal administration in all its parts. The Senator also stated that his committee was at work on studies of emergency and independent agencies with a view to reporting proposals for reorganizations. At last, therefore, both houses of Congress have the necessary machinery for scrutinizing the federal administration in action, evaluating its performances, and preparing measures for making adjustments from time to time as required by changing needs.

THE PRESIDENT AS ADMINISTRATOR

Responsibility for General Direction. Despite the control exercised by Congress, from time to time in varying degrees, over the structure and affairs of the national administration, the President has large powers over parts of it and more limited powers over other parts. Furthermore, wherever the lines which divide the powers may fall at a given moment or period, a considerable proportion of the citizens ordinarily look to the President for the efficient, economical, and prudent conduct of the public business and for enforcement of the laws in accordance with announced policies. In major respects the quality and energy of the administration depend essentially on his exercise of judgment in selecting, directing, and removing his subordinates within the framework of the Constitution and pertinent legislation (Chapter 11).

Principles of Responsibility. If the President is to meet his obliga-

tions, he must have the organization and means necessary to keep the administration responsive to the decisions and directions he may properly make. First of all, the area of his personal responsibilities should be small enough to be within his grasp; that is, the number of the departments and agencies whose heads he must watch directly and consult must not be so large as to consume all his time in matters of minor importance. In the second place, the President needs a semimilitary chain of command from the top officials down through most of the hierarchy; in other words, he must have a small group of immediate subordinates subject to his direction, who in turn have the power to issue orders to a lower level of their own subordinates—a process repeated through the successively lower levels to the rank and file of employees at the bottom. Under such an arrangement, each official has a definite place in the hierarchy and can be held to account by his superior for his special sector in the administration. In the third place, owing to the amount and character of administrative business to be transacted, even under the best system of organization, the President needs a staff of personal assistants and advisers, free from all other duties, who can collect information for him and, under his direction, consult with officers in the various branches.

Practice. Only to a limited extent does the organization and equipment of the federal administration conform to these principles. The President does have at his command in the White House a large staff of secretaries, aides, and assistants, including the director of the Bureau of the Budget who maintains a certain degree of scrutiny over the functions and expenditures of all executive agents. The number of great cabinet departments—now nine—is small enough to come easily within the President's span of personal control, and if it were enlarged to twelve or fifteen it would still be small enough. But the number of independent agencies is so large that the President, heavily burdened by responsibilities in domestic and foreign affairs, cannot possibly exercise all the discretionary power over the actions of individual agencies granted to him by the many detailed statutes creating them and defining their duties.

Presidential Control in Times of Crisis. The above statements of principles and practice pertain mainly to what may be called the "normal" course of administration. During a time of actual hostilities, the constitutional power of the President as Commander in Chief of the armed forces is titanic; and his authority as the Executive over administration is materially enlarged by acts of Congress which delegate to him extraordinary authority over life and property. For example, to the authority which the President already possessed by congressional

delegation prior to the outbreak of war on December 7, 1941, were added powers indefinite in range—especially through the first War Powers Act, signed December 18, 1941 and the Second War Powers Act, signed March 27, 1942 (Chapter 18). In short, in war time the dominion of the President over the administration is vastly expanded and all the "normal" activities of the agencies are subordinated to the exigencies of winning the war. After the hostilities of World War II were terminated, the United States made new preparations for war on a global scale and many branches of the administration became more or less subject to considerations of foreign policy and preparedness, under presidential leadership.

DEPARTMENTAL ORGANIZATION

The Great Departments. A substantial portion of administrative business is distributed among nine great departments—if the merger of the Army and Navy in 1947 be regarded as more than nominal (Chapter 18). These departments are: State, Treasury, National Defense, Post Office, Justice, Agriculture, Interior, Commerce, and Labor. Eight of them are organized in hierarchical form under a directing chief. The new organization for national defense, though headed by the Secretary of Defense, really consists of three branches—Army, Navy, and Air Force—each called a department and placed under the direction of a secretary, more or less subordinate to the Secretary of Defense. Moreover, associated with this military organization are two advisory boards: the National Security Council and the National Security Resources Board.

The Departmental Heads. At the head of each department looms a chief officer, known as the Secretary of the department, except in the case of the Department of Justice, under the direction of the Attorney General, and the Post Office Department, under the Postmaster General. The department chief is essentially a political officer who represents the policy of the party in power in the White House, even if, as occasionally, he happens to be a member of the opposite party. Although the President's nominations to cabinet posts must be approved by the Senate, they are, save in rare cases, accepted without question and, since the President can remove incumbents at will, they are in a peculiar sense his agents. In making appointments, the President picks persons from various regions of the country and often spokesmen of various factions in the party, if such exist. In the circumstances, the head of a department is usually a politician of standing and influence, generally without any practical experience whatever in the management of the administrative affairs committed to his care.

The amount of time that a Secretary must give or does give to the technical management of his department depends on circumstances. He has the power to appoint numerous officers to serve under him but most of his appointments are limited by the requirements of the civil service laws and to some extent by established customs. As a rule the department head devotes a great deal of time to making political speeches, on his own motion or at the suggestion of the President, attending party meetings, taking a hand in quiet party negotiations, and otherwise promoting the interests of his party. As department chief and expert in politics, he maintains constant contact with Congress, especially the leaders of his party in that body and the committees in charge of legislation affecting his office. Not unless he serves a long time in his post, does he acquire expert knowledge of the manifold operations that are carried on under his headship but, even if this is the case, political burdens continue to occupy his attention.

The work of the departmental head is not prescribed minutely in executive orders, save in certain instances; it is defined more or less specifically by acts of Congress. He is responsible to the President for the faithful execution of the law; but the President cannot alter or diminish his statutory obligations or prevent Congress from formulating them in such detail as to leave little leeway. "The President," once declared John Sherman, a former head of the Treasury Department, "is intrusted by the Constitution and laws with important powers, and so by law are the heads of departments. The President has no more right to control or exercise the powers conferred by law upon them than they have to control him in the discharge of his duties. . . . If [a department head] violates or neglects his duty, he is subject to removal by the President or impeachment, . . . but the President cannot exercise or control the discretion reposed by law in . . . any head or subordinate of a department of the government."

Yet the President has the power of removal and may exercise it for the purpose of directing his subordinates. He must, of course, follow the statutes, but some of them expressly confer upon him discretionary authority and others are so general that he has a wide choice of ways and means. Accordingly in practice there are many variations from Sherman's theory, especially when a strong-willed President is determined to carry out a fixed policy. Indeed a logical application of the theory would amount to a decentralization of the administrative organization and a destruction of the President's responsibility for departmental policy within the framework of legislation.

Undersecretaries. Immediately below the department head are undersecretaries, assistant secretaries, and other aides bearing a variety of

titles. Like him, these immediate assistants are ordinarily chosen by the President with the consent of the Senate. Thus they are also political appointees and often have at the outset only a slight acquaintance, if any, with the technical business entrusted to them. Frequently, their chief qualification is their willingness to "go along" with the President in matters of policy, national or party. The President, in fact, frequently by-passes the department head, even secretly, and uses undersecretaries and assistant secretaries to carry on political negotiations for him at home and abroad.

Departmental Subdivisions and Their Chiefs. Every department is divided into a number of principal units, generally known as "bureaus," though they often have other names. To each of these large divisions is entrusted a certain group of functions, supposed to be closely related to one another and to the over-all work of the department. The division or bureau has a chief. Many chiefs are appointed by the President with the consent of the Senate, often subject to the provision that they must have had specified training and experience. Others are chosen by the President alone or by the head of the department. As a rule the department has numerous division chiefs who are well trained in the work they are doing, have served for years in their respective places, and are in every way technically fitted for their posts. It is upon the loyalty and competence of these expert "bureau chiefs" that the government and the country principally depend for the good management of administrative business in gross and detail. Yet paradoxically, these are the very "bureaucrats" so commonly denounced in Congress and by critics as "foes of the people." One thing is certain: without their attention to business and their competence, the administration would collapse.

Politics and Bureau Chiefs. As far as the law is concerned many bureau or subdivision chiefs may be mere political appointees—party workers rewarded by "spoils" of election victories. But the spoils system has never been as flagrant as legally permissible. Even Andrew Jackson did not put racoon hunters in charge of engineering work nor oust all expert incumbents to make room for partisans. The divisions subject to the merit principle are increasing in number; chiefs in this class are selected by promotion within the service, or after competitive examination, or after having demonstrated their capacity in kindred work on the outside. At present only a small number of the divisions may be called political—a class that now includes the bureau of the mint, the land office, and the patent office—and even they are by no means always entrusted to party workers. Almost all the technical divisions—entomology, plant industry, forestry, reclamation, chemistry,

public roads, engraving and printing, and agricultural economics, for example—are now established by law or practice on a merit basis. Experience has shown that it is possible to devise general examinations and other tests of achievement and capacity which guarantee reasonably well the selection of competent bureau administrators. It is not necessary to rely on "automatic promotion," which often brings dead wood to the surface.

Tendency to Long Tenure. How has this state of affairs been brought about in the upper ranges of federal administration? Not entirely by civil service rules. The highly specialized character of government functions in the modern age runs against mere job-hunting politics; the worst spoilsman in the White House would not put a real estate agent in charge of research in fixed nitrogen. If he were so inclined, the pressure of professional associations, organized outside of the Government, would cause him to hesitate. While the burden of administration becomes more complicated, the development of technical education steadily increases the supply of trained men and women. To reinforce these new influences, the demands of enterprises that are regulated by the government or make use of its various services tend to exclude partisan politics from the selection of the chiefs for scientific divisions. Hence technology brings some results which civil service reformers could scarcely hope to accomplish on moral and patriotic grounds alone.

Below the Bureau Level. The typical bureau or division is in turn divided and subdivided into units of diminishing size, according to the number and nature of the duties entrusted to it. From the bureau chief the chain of command extends downward through the heads of these successively lower subunits to the bottom level of employees. In this fashion, an administrative hierarchy is established utilizing numerous ranks of employees arranged in a semimilitary manner, to assure more or less clear-cut lines of responsibility.

Qualifications. Despite the extensive application of the hierarchical principle in the organization of the great departments, in none of them is it carried so far as to create a perfectly symmetrical system from top to bottom. There is no uniformity as to the names of high units; in the same department these units may be called bureaus, divisions, offices, services, branches, and departments. Departments even contain boards having regulatory powers which are exercised within the terms of special statutes rather than under the free direction of the department head.

INDEPENDENT AND SPECIAL UNITS OF ADMINISTRATION

Number and Variety. Entirely outside of the nine great departments is a long list of administrative units officially called "independent offices, agencies, and establishments," created by Congress, or by the President under special authority. The number of so-called independent units changes from time to time but in 1948 it was more than thirty. Some of them are transitory in nature; others have long been in existence and have the appearance of permanence. In terms of purpose, some are cultural; for example the Smithsonian Institute and the National Gallery of Art; while others wield extensive authority over life, liberty, and property in general—for instance, the Interstate Commerce Commission, the Federal Communications Commission, and the Federal Power Commission. With reference to their status and functions they are a miscellany.[2]

Three Special Agencies. Three units resemble departments: the Federal Security Agency in charge of administering social security legislation and other matters pertaining to health and welfare; the Federal Works Agency with jurisdiction over roads, public buildings, and kindred affairs; and the Federal Housing and Home Finance Agency (organized through the consolidation of various units by President Truman). These agencies were instituted by presidential orders under acts of Congress empowering the President to effect transfers and consolidations (p. 283). Each of the agencies is headed by a single administrator, even though it may include boards as well as divisions to which the general term "bureau" could be applied.

Commissions and Boards. Owing to the basic principles involved in the constitution of commissions, sometimes called boards, this class of independent agencies stands apart from all the others and deserves particular consideration. A commission, as the term is used here[3] is a small number of officials organized as a body and entrusted with functions that are regulatory and judicial, as well as administrative, in nature. In establishing such agencies Congress has chosen this form for the reason that the discharge of their duties calls for deliberation, discussion, and the reaching of mature judgments. To be sure, it has

[2] The more important independent agencies are treated in the following chapters in relation to their functions. Complete lists with outlines of their functions are to be found in the current editions of the *Congressional Directory* and the *United States Government Manual*. The list of these agencies and the outlines of their official duties fill nearly a hundred pages of the *Congressional Directory*. As the outlines cite numerous statutes under which agencies operate, "the fiend for facts" has here an almost unlimited field of laborious research.

[3] No clear distinction has been made by Congress between the terms commission and board.

vested powers of this character in the heads of some departments and placed some boards in departments or other agencies of administration where they may be subject to the influence of a single executive. But in many cases, it has resorted to the creation of independent commissions, on the theory that the rulings and the decisions of a few selected persons, freed from outside administrative pressures, are more likely to be wise and prudent than the orders and mandates of a single person at the head of a department or of a board within it.

Regulatory and Judicial Functions of Commissions. In several federal commissions Congress has vested the power to make rules enforceable against private parties and concerns—for example, the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, and the Atomic Energy Commission. These rules amplify general provisions in certain acts of Congress. Frequently it happens that the rules made by a commission, based on a few pages in a statute, cover hundreds of pages in its book of orders; and for the persons who have to obey the rules they are the same as law. The making of rules is thus in effect an act of legislation. The Constitution, however, vests all "legislative" powers in Congress. So to avoid what appears to be an inconsistency lawyers characterize the regulatory work of commissions as "quasi-legislative," that is, "almost" but "not quite" legislative.

Besides making and enforcing regulations, some commissions also exercise what amounts to judicial power. Since the federal judicial power is vested by the Constitution in courts of law, lawyers are accustomed to speak of certain functions discharged by regulatory bodies as being "quasi-judicial," that is, "almost" but "not quite" judicial. We may safely say, however, that some commissions have duties which are for practical purposes judicial in nature. They hear complaints, listen to arguments of counsel, read briefs, make decisions, render opinions, and issue to private parties orders based on law, their own rulings, and facts.

As quasi-legislative bodies, commissions may properly be objects of greater concern to Congress than to the President. If there is any reason for taking federal courts out of presidential politics and protecting them against control by the Chief Executive, there are also grounds for throwing similar safeguards around commissions as quasi-judicial bodies. In short, a commission cannot discharge its duties as a deliberative, impartial body and at the same time be subjected to management by the President at his discretion.

Methods of Assuring Independence of Commissions. In an effort to protect commissioners against presidential domination, they are some-

times given long, overlapping terms, and in some cases can only be removed by the President for definite shortcomings as prescribed by Congress. Occasionally the statutes specify that the membership shall be divided between political parties so that no party has more than a bare majority on a commission. Under these conditions, the President may name commissioners from time to time as vacancies occur but it may take several years for him to secure a majority of the members in a given commission and thereby impose his policy upon it. Even here, the President is far from being a free agent. His appointments are not effective until the Senate has approved them. This is no mere formality; nominations to quasi-legislative and quasi-judicial commissions are nearly always carefully considered by the Senate before it approves them. By refusing to confirm a successor to a commissioner whose reappointment is opposed by the President the Senate may, in fact, quietly compel reinstatement.

Government Corporations. For undertaking important financial and economic functions, Congress has created from time to time special administrative units known as government corporations. Such an agency is wholly owned by the Government and acts through a group of officers engaged usually in economic operations which may include borrowing, lending, and investing money. Outstanding among these establishments are the Reconstruction Finance Corporation, the Export-Import Bank, and the Tennessee Valley Authority. Some corporations are attached to a department or separate agency, but others stand on an independent footing.

In any case the managers of a government corporation have a larger range of discretion than do ordinary officers in a bureaucratic hierarchy; they can "cut red tape," move quickly under their own momentum, hire, fire, buy, sell, and issue lawful orders within their powers, subject to less bookkeeping control by financial officers and fewer orders from superior officers. The government corporation, as John McDiarmid says, reaches maximum administrative efficiency "when it is granted a large measure of freedom in management and in financial matters. If it is used for partisan purposes or is otherwise mismanaged, its very virtues become vices."

REASSERTION OF CONGRESSIONAL AUTHORITY OVER THE ADMINISTRATION

Complaints Against the Abuse of Power by Agencies. As the functions of the Federal Government increased, especially after 1933, and the number of commissions and other regulatory agencies multiplied, complaints were heard in Congress and elsewhere that several, if not all,

such establishments were becoming independent of Congress, the President, and the Judiciary. Certainly they were resorting to regulatory, judicial, and discretionary actions on a large scale—actions affecting, for example, railways, agricultural markets, drugs and foods, electrical utilities, wages and hours of labor, communications, and industries doing business with the Government. Scarcely a phase of life, liberty, property, labor, industry, agriculture, or commerce escaped the direct impacts of their control in one or more vital respects.

Among the objections to the conduct of administrative authorities four were outstanding: (1) the powers vested in such agencies are too broad and numerous; (2) often minor officers, without enough training or biased in their tempers, are allowed to conduct hearings at which "facts" are "found" to serve as a basis for rulings and decrees; (3) these hearings are frequently conducted in an arbitrary manner that denies to persons affected a fair hearing, perhaps any kind of hearing at all; and (4) numerous rulings and decrees of enforcement are founded on untrue or insubstantial testimony or evidence and hence are destructive of lawful rights.

The Administrative Procedure Act of 1945. These and other criticisms led to demands for remedial measures. The Attorney General's office made a study of them and offered recommendations for reform. Members of Congress took an active interest in them and prepared bills designed to effect drastic changes. At length in 1945 Congress passed a law, known as the Administrative Procedure Act, intended to eliminate what were regarded as the most objectionable features of "government by rule-making and rule-enforcing agencies."

The act is long and technical in its provisions but its primary principles may be briefly stated. First, such agencies are required to publish their rulings so that everyone can find out what regulations are actually in effect. This requirement is met by publication in the *Federal Register*. Second, the act seeks to standardize agency hearings, to make them more judicial in spirit, and to guarantee to all parties concerned due notice and a full opportunity to be heard. Third, the act makes "abuse of discretion" by an agency reviewable in the courts. Fourth, an agency must show that the facts on which any ruling is based are valid and substantial and, if it cannot, the ruling may be overthrown on appeal to the courts. Fifth, every legal question involved in a case is also subject to judicial review. Regulatory administrative agencies are, therefore, ordered to stay well within the law, transact their business in a fair, open, and judicial manner, and keep on guard against transgressing the legal rights of private persons.

Holding Corporations to Account. In an attempt to establish work-

able lines of responsibility between the independent corporations and the rest of the Government, several schemes have been tried. Occasionally the holding company technique so widely used in private industry is employed; that is, a federal corporation may hold stock in and select the directors of subsidiary corporations. An alternative is to put a federal corporation "in" a department or agency for more or less limited purposes. But no close managerial links can be established without hampering the initiative of the boards of directors and hence transgressing the chief merit of the corporate plan. Still a third attack on the problem of control has been made by the Government Corporation Control Act of 1945, which brings the financial activities of federal corporations under the scrutiny of the General Accounting Office which in turn reports to Congress. Two years later, Congress instituted a general investigation of corporative operations, cut down the amounts of money available to most of them, and indicated a disposition to abolish some of them as soon as their finances could be straightened out.

THE MOVEMENT FOR ADMINISTRATIVE REORGANIZATION

Early History. Before the second decade of the twentieth century opened, loud protests were voiced in print and in addresses against the size, complexities, costs, and operations of the federal administrative system. There were, it was then said, too many offices, boards, and other agencies, often with overlapping or conflicting duties; money was wasted in duplications and useless activities; public business was transacted inefficiently; citizens were confused by the multiplicity of orders and rulings; and the whole collection of agencies should be reorganized from top to bottom. Under every President from Theodore Roosevelt to Herbert Hoover serious efforts were made to bring about a more effective reconstruction of the administration—with meager results, often with none at all. Perhaps the most serious of these early efforts was made by President Hoover in 1932 but when he presented to Congress plans for accomplishing a reformation, Democrats in control of the House of Representatives took leadership in defeating them.

More Recent History. In 1933 Congress granted to President Roosevelt, for a term of two years, a limited power to reorganize and abolish administrative agencies, and he used it extensively. Three years later he appointed a Committee on Administrative Management which made inquiries and prepared reports that were laid before Congress. By a reorganization act passed by Congress in 1939—to expire in 1941—the President was granted limited power to prepare and submit plans for changes in administrative machinery and procedure—plans which were to become effective unless disapproved by Congress within sixty

days after it received them. Thus authorized to proceed President Roosevelt made an extended overhauling of the administration with the consent of Congress.

The new system had scarcely gone into operation when war came, with the Japanese attack on December 7, 1941. Then by the first War Powers Act, signed December 18, 1941, Congress gave the President a large authority over the distribution of functions among and within the administrative agencies. Subsequently, by other acts in support of the war, Congress granted to the President additional powers of the same nature. Hence during the war years he was free, within certain limits, to create, transfer, enlarge, reduce, name, rename, consolidate, and abolish administrative agencies. In that period the number of regular and special agencies multiplied with bewildering profusion, and the number of federal employees rose above three million.

After the fighting was over and the time for curtailment arrived, Congress, in response to a request from President Truman, passed a new organization measure, signed December 20, 1945, and scheduled to expire on April 1, 1948. Acting under the terms of this law the President prepared and submitted to Congress in 1946 more plans for administrative alterations, some of which Congress approved. Meanwhile many Democrats as well as Republicans in Congress were growing restive, if not wrathful, over the size and methods of what they called "the bureaucracy." In the elections of that year, the Republicans carried the country, and at the opening of the new Congress in January, 1947, they were in a mood to "use the axe" and make a wholesale reconstruction of the administrative system.

A New Reorganization Projected in 1947. By the Lodge-Brown Act, signed July 7, 1947, Congress established a commission to investigate all departments, establishments, and other agencies of the administration and make recommendations respecting modifications in the system. In constituting "the Commission on the Reorganization of the Executive Branch of the Government" Congress sought to make the inquiry nonpartisan and comprehensive in nature. It provided that the Commission should consist of twelve members: four appointed by the President, two from the executive branch of the Government and two from private life; four appointed by the President pro tempore of the Senate, two from the Senate and two from private life; and four appointed by the Speaker of the House, two from the House and two from private life. Furthermore it provided that of each class of two members named in the Act not more than one should be from either of the two major political parties. As another safeguard against partisanship, the

Act stipulated that the report of the Commission was to be made within ten days after the opening of Congress in 1949—not before or during the presidential campaign of 1948. In the summer of 1947 the appointments were duly made, Ex-President Hoover, from the Republican side, heading the list of commissioners.

By a declaration of policy the Act indicated the obligations of the Commission. The announced purposes were: (1) to limit expenditures in the executive branch of the Government to the lowest amount consistent with the efficient performance of essential services; (2) to eliminate duplication and overlapping of services; (3) to consolidate services of a similar nature; (4) to abolish services not necessary to the efficient conduct of government; and (5) to *define and limit* executive functions, services, and activities. Thus, it is evident, the inquiry and the recommendations were intended to cover the whole range of the administrative branch of the Government, and the majority of the Commission was to represent Congress, not the President of the United States. In these circumstances, citizens familiar with the forty-year conflict over the relations of Congress and the President and over the reform of the administration awaited with expectancy the outcome of the new investigation.

Relation of Administrative Turmoil to Citizens. Amid the whirlwind of legislation, executive orders, and reorganizations and the controversies accompanying them, the turmoil in administration has become greater, not less, than it was in 1910 when the first effort was made to effect an extensive reform. So rapid and bewildering have been the creation, transfer, abolition, and re-creation of agencies that plain citizens, whose rights, duties, and interests are subjected to administrative actions and decrees, cannot possibly keep track of the shifts in offices or readily discover where and to whom they must appeal for information and decisions respecting their privileges and responsibilities. Often a skilled and experienced lawyer is unable to find out with certainty, even after years of litigation, the standing of a client in relation to any particular agency or group of agencies or his duties and privileges under their jurisdiction.

Yet presumably administration and the reforming of administration are carried on for the benefit of citizens, not members of Congress and administrative officers. At all events citizens are at the receiving end of the line, inasmuch as they must bear the brunt of the administrative rules, decrees, and actions that impinge upon their lives, incomes, and property. And if the requirements of plain citizens are taken into account, two needs, generally neglected by legislators, administrators,

and reformers, deserve primary consideration: a high degree of stability in the arrangement of offices and agencies and a high degree of exactness in the laws and rulings to be obeyed.

It has been demonstrated by forty years of experience that neither Congress nor the President in their reorganizing operations has been able, or willing, to achieve the degree of order and stability in the administration, which is necessary to efficient conduct of private affairs affected by its activities. Accordingly, whatever may be accomplished as a result of the latest inquiry into the subject, it is highly probable that, unless Congress, the President, the judiciary, and the administration give greater attention to continuity and exactitude in the management of public business, the difficulties of citizens in relation to their government will be augmented rather than diminished by new "plans for reorganization."

THE CIVIL SERVICE AND EMPLOYMENT METHODS

Number of Employees. In the discharge of their functions, the departments, commissions, and other agencies of the Government have at their command a huge corps of subordinate officers and employees ranging in types from highly skilled technicians—masters of all branches of science—to unskilled laborers. In recent years, particularly since 1933, the number has been increasing almost steadily. During World War II there was an extraordinary expansion; near the end of 1944 the Government had 3,335,000 civil officers and employees, of whom approximately a million were directly engaged in activities connected with the war. In November, 1947, the personnel employed inside and outside the United States numbered 2,330,467, despite the amount of demobilization that had taken place by that time.

Two Types of Appointments. Considered with respect to methods of appointment, the offices and employments of the civil administration may be divided into two broad classes: (1) those which are "political" in character, that is, filled at the pleasure of the appointing officer, often, if not usually, with a view to rewarding ardent workers in the party to which he belongs; and (2) those which can only be occupied by persons who have complied with the requirements of certain examinations or preëstablished standards.

There was a time when all positions in the executive service were theoretically and to a large extent practically treated as "political." In other words, they were subject to the spoils system and given to party workers without special regard for their competence and without applying any regular test to their abilities.

The Civil Service Act and Extensions. After some tentative experi-

ments with reform, Congress passed in 1883 the Civil Service Act, which is still the fundamental law governing occupations of the second class just mentioned. This Act provides for a Civil Service Commission of three persons, no more than two of the same party, appointed by the President and Senate. The Commission aids the President, at his request, in preparing suitable rules for competitive examinations designed to measure the fitness of applicants for offices already classified or to be classified. In addition it renders general assistance to the President in dealing with problems arising under the Act.

With a view to immediate application, the Civil Service Act ordered the Secretary of the Treasury and the Postmaster General to classify certain positions within their respective jurisdictions for transfer to the merit régime. At the same time it provided that the heads of specified departments and establishments should, at the direction of the President, apply the merit system to their employees. In other words, the Act itself brought a few offices under the system, and left the extension of it to the discretion of Congress and the President.

From time to time extensions were made either by new legislation or executive order. By an act passed in 1938, for example, Congress placed the first, second, and third class postmasters in the classified civil service; and by two orders issued that year President Roosevelt widened its scope, by prescribing that all positions in the executive branch not already in the competitive class must be placed there on and after February 1, 1939, save those appointments expressly excepted by statute and those requiring ratification by the Senate.

When the Civil Service Act went into force in 1883 it covered only about fourteen thousand places. After the turn of the century, the number was greatly increased, mainly by executive orders, and it reached approximately 530,000 by 1938. By the Ramspeck Act which went into force on January 1, 1942, many New Deal positions that had been outside the merit system were brought within its scope—a number estimated at "well over 100,000." At that time the chairman of the Civil Service Commission stated that more than eighty per cent of the regular civil employees of the Government belonged to the competitive class.

Appointments Exempt from Merit System. Notwithstanding this extraordinary development, thousands of federal employees are still on a political basis, some of them, it is true, only nominally; that is to say, their appointment is made without reference to the competitive examinations of the Civil Service Commission. Two groups of federal positions are exempt from the merit requirements for testing applicants. One embraces a number of places within the classified service which are

not put on the competitive list for various technical reasons. The second group lies entirely outside of the classified service and may be called "political" in the strict sense of the term. In its distinctions the federal appointment system is not severely logical.

There is indeed no uniformity of practice even in the case of the so-called political offices. In certain instances new men are chosen for partisan reasons whenever there is a change of administration and in others the incumbents really enjoy permanent tenure by virtue of tradition and necessity (p. 277). This is due to the fact that federal employments have never been systematically divided into classes that are truly political—or policy-determining—in character and those that are professional and technical. Some high posts are under the merit system and some minor positions are not.

Exemption of Technical Positions Criticized. Undoubtedly the exemption of purely administrative and technical positions from the operation of the competitive principle produces many unfortunate results. When the chief of a technical bureau or division is a political appointee, selected on account of his party views, it is almost impossible to exclude political considerations from the assignment of duties to employees and other matters essential to efficiency. Even though the head sincerely desires to improve the service, his actions on salaries and promotions are always open to suspicion. Being a political appointee he may have to give time to partisan affairs to the neglect of his official duties, and he may be drafted into partisan work by a superior. Perhaps more significant than these evils is the fact that the appointment of politicians to technical offices limits the career of ambitious subordinates who enter by the merit route: no matter how hard and intelligently they work, they cannot reach the top. Political appointments also usually exclude outside experts who are not partisans.

Classes of Employees under Merit System. Taking into account the nature of the work performed by federal employees coming within the scope of the civil service acts, the various positions are distributed among five great "classes," each containing a number of "grades." At the head of the list is the Professional and Scientific Service requiring for admission a special training equivalent to graduation from a college or university. It calls for the application of the principles of a profession or science in the performance of routine, advisory, administrative, or research work. Immediately below is the Subprofessional Service. As the name implies, places in this class carry with them subordinate duties connected with the work of the Professional and Scientific Service. The third group is the Clerical, Administrative, and Fiscal Service. In this division are to be found all minor posts commonly associated with

office, business, or financial administration. In the fourth class—the Custodial Service—are included occupations involving the care of public buildings, the transportation of persons and property, or the transmission of official papers. The fifth class is the Clerical-Mechanical Service, embracing all positions, outside of recognized trades or crafts, which require skill and experience either in machine operation or in the inspection or verification of products in the Government Printing Office, the Bureau of Engraving and Printing, and the Mail Equipment Shops.

Examinations. In applying the competitive idea to positions brought under its jurisdiction, the Civil Service Commission prepares a large variety of examinations to test the fitness of candidates for the different types of offices. To administer the system there has been established at Washington a division of examining and personnel utilization which has under its supervision local examining officials stationed at numerous points in the states and territories, reasonably convenient for persons in quest of federal employment.

Examinations, according to the law, must be practical in character and calculated to measure fairly the relative capacity of applicants to discharge the duties of the branch to which they seek admission. In preparing examination papers it is the custom of the Commission to invite the cooperation of the departments: if a technical position is to be filled, the department concerned usually notifies the Commission and indeed may furnish the specific questions.

Any citizen of the United States, except certain small classes, may offer himself or herself for an examination if he or she can meet the preliminary conditions. For a long time aliens were often admitted to government employment, but recently the requirement of citizenship has been rigidly enforced, save for very special reasons. Applicants for examination are not charged a fee, although the Civil Service Commission has recommended a nominal charge to exclude ill-prepared persons who try the tests in a gambling spirit—nothing to lose and possibly something to gain.

Lists of Eligibles. Through the periodical holding of examinations the Civil Service Commission maintains lists of eligibles for all positions coming under the merit system, so that it can furnish satisfactory candidates when called upon by the several establishments. On the same day, there may be demands for accountants, stenographers, expert chemists, patent examiners, draftsmen, interpreters, and postal clerks.

Appointment. When notified of a vacancy by an appointing officer, the Commission takes from the proper register and transmits to him the names of three candidates at the head of the roll, who are if possible resi-

dents of the state to which the appointment falls. From these three the appointing officer selects one and returns the other names to the Commission to be replaced upon the list. If he refuses to accept any of the three, he must give satisfactory reasons and is supplied with a new quota. The successful candidate is put on probation for a short period; then if his record is good he is given permanent tenure.

Exceptions. It should be noted in passing that there are important exceptions to the above rules. Preference is given to persons honorably discharged from the military or naval service. And, according to law, appointments in the departments at Washington must be apportioned among the states, territories, and the District of Columbia on the basis of population. Naturally the latter principle cannot be strictly followed, and departures from it afford pretexts for clamor by candidates and congressmen from states that fail to secure their share of places.

Promotion. Promotions in, as well as appointments to, the federal service are to some extent based upon competition. Examinations are held to test candidates for advancement and a list of eligibles is kept. In fact, however, no reasoned system of advancement has been worked out to inspire employees to develop their latent powers with a view to rising in the scale. As a matter of practice the appointing officer has a right to decide whether he will fill a given vacancy by open competition or by selection from within the service—a right often challenged as contrary to good administration.

Removal. The process of removal from the federal service, except on grounds of political and "subversive" activities, is relatively simple. The law provides that a person may be discharged from a competitive position "for such causes as will promote the efficiency of the service." When the President or head of an executive department is convinced that one of his subordinates in the classified service is incompetent, he may oust such employee after giving due notice. While the power thus conferred is broad, it is frequently said that incapable men are protected by the regulations against dismissal. In reply the Civil Service Commission insists that "the power of removal for unfitness is with the head of the office. The appointing officer being responsible for the efficient performance of the work of his office, it rests with him to determine whether such cause exists as to require the removal of an employee in order to promote the efficiency or discipline of his office."

In short, the administrative head enjoys great freedom in this respect. As a rule the courts will not interfere with him. They take the position that the power of appointment generally involves the right of removal and that the Civil Service Act limits the right in only one instance—an employee cannot be dismissed merely because he has refused to give

money or service to a political party. When, however, a large number of employees of the same political faith are discharged at the same time, partisan motives are suspected and the officer responsible for the action must convince the Commission that a just cause exists in each case; but even here the courts will not attack the discretion of directing officers.

Retirement Pensions. In 1920 a federal retirement system was established to provide pensions for all persons in the classified service and certain others who on account of age or disability are unfit for "useful and efficient" labor. Under this scheme as later modified the age of retirement in the normal course is fixed at various points according to the nature of the work done. Everyone to benefit from the arrangement must contribute a part of his salary to the pension fund, and on his withdrawal after a period of active employment he receives a pension based on the length of his service and the amount of his salary. In addition to being an act of tardy justice to old and faithful public servants, the project contributes to efficiency. Prior to its adoption hundreds of aged people were kept on federal payrolls by warm-hearted department heads because their discharge would be an act of cruelty. Work was thus entrusted to employees whose competence had departed, while young and ambitious subordinates, finding their careers blocked, left to seek better opportunities in professional or business life.

PARTISANSHIP, POLITICAL ACTIVITIES, AND TRADE UNIONISM

Efforts to Exclude Partisanship. From decisions relative to promotions, removals, and reductions in rank it is very difficult to exclude all partisan considerations, but attempts are made to protect employees in the classified service against many party pressures and also to prevent them from engaging unduly in political activities. The original civil service law states that no person in the employ of the Government is for that reason under any obligation to contribute to political funds or to assume any political duties, and that he shall not be removed or otherwise prejudiced for refusing to do so. Moreover, no one in the federal service has a right to use his authority to control the political actions of anybody. No recommendation by a congressman, except as to the character or residence of an applicant, can be legally received or considered by officials responsible for conducting examinations or making appointments under the Civil Service Act. Members of Congress and executive, judicial, military, and naval officers are forbidden to seek or accept political assistance or contributions from employees in the classified service. The practice of soliciting campaign funds in buildings occupied by federal agencies is prohibited. However, as far as the law

is concerned, employees in the classified service may make contributions to persons or committees of persons who hold no office under the United States; in fact many of them do, either voluntarily or upon assessment by political managers.

Definition of Partisan Activities. By early legislation political activity in a general sense was placed under the supervision of the Civil Service Commission by a regulation providing that "all persons who by the provisions of these rules are in the competitive service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns." This rule has been construed by the Commission to forbid the use of official positions for the benefit of a political party; and since its adoption it has been interpreted to prohibit the following types of political action: "Service on political committees, service as delegates to county, state, or district conventions of a political party, although it was understood that they were not 'to take or use any political activity in going to these conventions or otherwise violate the civil service rules'; continued political activity and leadership; the publication of a newspaper in the interest of a political party; membership in a club taking an active part in political campaigns and management; the circulation of petitions having a political object; service as a commissioner of elections in a community where it was notorious that a commissioner of elections must be an active politician."

The Hatch Acts. By the Hatch Act of 1939 (Chapter 7), Congress laid many new restraints on the political activities of federal employees. No person deriving money from federal sources can belong to a political party or organization which advocates the overthrow of our constitutional form of government. With exceptions, no person employed by the Federal Government may use his official position to influence or interfere with elections or take an active part in political management or campaigns. The exceptions are the President, persons employed in his executive office, the Vice-President, heads and assistant heads of departments, and officers appointed by the President with the consent of the Senate, who determine policies in foreign relations or in nation-wide administration of federal laws. Federal employees, however, retain the right to vote and express their opinions on political subjects. In signing the bill President Roosevelt characterized its language as vague and sweeping, but the Act certainly has had a restraining effect on federal employees all over the country, and has put the fear of retribution into them. By resolution the Judicial Conference, held at the Supreme Court building in the autumn of 1943, warned judicial employees to observe the terms of the Hatch Act (Chapter 12). A second

Hatch Act, of 1940, applied the principles of the Political Activity Act to state and local administrative employees engaged in operations wholly or partly financed from federal funds. Substantial responsibility for the administration of the Hatch Acts is vested in the Civil Service Commission. One of the Commission's divisions coordinates the work of enforcement and conducts hearings on alleged violations.[4]

Organizations of Federal Employees. Efficient administration must also take into account another phase of activity among federal employees, namely, the formation of unions, the federation of unions, and the participation of such organizations in politics to secure higher wages and better labor conditions generally. Skilled workmen in federal employment have long been members of trade unions affiliated with the American Federation of Labor or the Congress of Industrial Organizations. Other federal employees are organized in special unions and associated with the National Federation of Federal Employees or the United Federal Workers of America. Through direct organization and through affiliation with unionized labor outside of the service, federal employees can concentrate heavy forces upon Congress in support of favorable legislation; but strikes by federal employees against the Government are unlawful.

EXCLUSION OF OFFICERS AND EMPLOYEES FOR "SUBVERSIVE ACTIVITIES"

Meaning of the Term. Far more disturbing to the administration of the civil service than partisan activities in the old style (conflicts of Democrats and Republicans over the spoils of office) are recent dissensions over what are loosely called "subversive activities." Judging by congressional hearings and charges in the press, subversive activities range from such offenses as reading *The New Republic* or *The Nation*, participation in the affairs of the Lawyers' Guild, or praising too ardently the New Deal, to membership in associations sponsored, supported, or in any way engineered by communists.

Exclusion of Revolutionaries from the Service by Statute. In the Hatch Act of 1939, Congress stipulated that no person employed in any capacity by any agency of the Federal Government, whose compensation or any part of it is paid from funds authorized or appropriated by Congress, may hold membership in any political party or organiza-

[4] In 1947 the Supreme Court upheld the constitutionality of the provisions of the Hatch Acts prescribing the removal of a certain large class of officers and employees for taking an active part in political management and campaigns. In a dissenting opinion, Justice Black contended that the provisions deprived them of rights belonging to them as citizens and reduced them to a low rank in the scale of citizenship. Ferrel Heady, "The Hatch Act Decisions," *American Political Science Review*, August, 1947, pp. 687 ff.

tion which "advocates the overthrow of our constitutional form of government in the United States." In the light of judicial decisions, it is difficult to discover just what constitutes in fact such advocacy; nor is the process by which such advocates are to be removed, as required by the law, specifically described. But vague as the language is, it seems to indicate that this particular exclusion applies only to persons who advocate overthrowing the present form of constitutional government by revolutionary violence.

Exclusion of "Subversive" Persons from the Service by Executive Action. By an order dated March 21, 1947, President Truman substantially widened the political grounds for denying employment in the executive branches of the Government to certain applicants and for ousting such persons already so employed. He declared that "the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes." He then furnished a list of activities coming under the head of disloyalty and subversiveness. It included sabotage, espionage, treason, sedition, advocacy of revolution, force, or violence to alter the constitutional form of government of the United States, and the performance of duties or otherwise acting in such a way as to serve the interests of some foreign government in preference to the interests of the United States. President Truman's list embraced also membership in, affiliation with, or sympathetic association with any organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or has adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution or which seeks to alter the form of government of the United States by unconstitutional means.

Enforcement of President Truman's Order. To the Attorney General, President Truman's executive order assigned the duty of designating organizations, groups, and movements to be deemed totalitarian, fascist, communist, or subversive in the sense that affiliation or sympathetic association with them automatically justifies barring entrance to, or commands removal from, the civil service. Later in the year the Attorney General issued a long list of such organizations and followed this by another list in 1948.

On the head of each department and agency, the President's order imposes responsibility for enforcing its terms, but the head is to appoint one or more loyalty boards for the purpose of hearing persons charged with disloyalty. The Civil Service Commission was instructed by the President's decree to establish and maintain a loyalty review board, to hear appeals from agency boards and heads, to review cases, and

to coordinate the loyalty programs of all agencies. Departments and agencies which had not already done so, were commanded to submit to the Federal Bureau of Investigation the names of all incumbent employees and the Bureau was in turn directed to check the names of these employees against its record pertaining to criminal, disloyal, and subversive activities. It was estimated at the time that the searching inquiries required by the order and measures for its enforcement would cost about $25,000,000.

Controversy over the President's Decree. The duties imposed by the loyalty order on the Attorney General and the heads of federal agencies were delicate in nature and difficult to perform with fairness to all officers and employees of the Government. They certainly involved fundamental questions of civil liberty as well as the powers of Congress to determine qualifications for employment in the service of the Government. On the one side, conservatives rejoiced in the occasion. It provided an opportunity to get rid of zealous "New Dealers" in the administration as well as actual communists engaged in open or secret tactics according to "the Moscow line." On the other side, advocates of civil liberty and persons attached to the New Deal tradition issued protests and objections. It was amid many violent dissensions that proceedings under the order were carried on by the officials responsible for its enforcement. In proportion to the size of the total administrative personnel, the number removed on grounds of disloyalty was very small; but the investigation of charges, accompanied by angry speeches in Congress and ugly rumors in the press, spread uncertainty and anxiety throughout the civil service of the United States.

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CHAPTER 15

Taxation and Finance

Public Finance Affects All Branches of Economy. Among the ancillary functions of the Government, namely, those necessary to the support of all its branches, is that of providing money—by laying taxes, making appropriations, supervising expenditures, and managing the National Treasury. This function is more than incidental to the conduct of government. Its exercise involves every phase of agriculture, industry, labor, and commerce, and affects fundamentally the distribution of wealth in society. In levying taxes, Congress may burden one class of the community for the advantage of another. In making appropriations it may use the money taken from one class or section for the benefit of another class or section. Besides, in regulating currency and banking, it controls the very lifeblood of modern industry and commerce and may in this sphere, as in that of taxation and appropriation, enrich one group and impoverish another or ruin everybody.

Not since the early days of the Republic under the Constitution have federal taxes been laid for the single purpose of securing revenue and providing for the bare expenses of the government. Nor has the power of Congress over the monetary system been exercised solely with reference to creating and maintaining a sound and stable currency for the transactions of private business and the operations of government, federal and local. Both the taxing and the currency powers have been deliberately utilized in the conflicts of economic and political interests with a view to affecting particular types of private enterprise and the distribution of wealth. At the present time taxing, banking, and currency powers are frankly used to promote, control, stimulate, and regulate numerous branches of the domestic economy with reference to the prevention of excessive inflation or deflation (Chapter 19). Indeed the Federal Government sometimes strives to bolster the economies of foreign nations through grants of money and other forms of financial assistance.

Special Exigencies of Contemporary Finance. Financial practice to-

day is basically different from that followed before World War I, when the national debt was only about $1,000,000,000, when federal taxes took a small proportion of the wealth annually produced, and the Government spent under a billion dollars a year. Now the national debt is more than $250,000,000,000; the interest on the debt is about seven times the total outlay of the National Government for all purposes in 1914; and the annual appropriations by Congress amount to more than forty times the appropriations of 1914. As late as 1933 a great political debate was raging over the question whether Congress had power to raise money and spend it for "the general welfare" of the American people, as distinguished from the specific objects mentioned in the Constitution; now it is commonly agreed, even by many who once opposed the exercise of such power at home, that Congress can spend money for the general welfare of peoples all over the earth; and the point of dispute is mainly over the amount to be so spent and the purposes thereof, not the power of Congress under the Constitution to appropriate it.

With a national debt amounting to about $1,850 for every person in the country, with taxes taking a huge share of its annual income, and with little or no prospect of any material reduction in the burden, the management of national finances is nothing short of staggering in its proportions. When the expenditures were small, the debt trivial in size, and the taxes light, poor management of finances could do some damage to the nation; today bad management can play havoc with the country as a whole. The most extravagant spendthrifts among the politicians are at least dimly aware of the difficulties and dangers in their course even as they demand and promise still larger expenditures for all kinds of purposes called beneficial to the people of the United States and the world. The problems of federal finance have not yet gone beyond the control of competence in the Government, but such competence is in these days more necessary than ever in the history of the United States. Such is the setting for consideration of taxation, appropriations, financial management, the currency, banking, and all that is involved in the fiscal operations of the National Government.

THE POWER OF CONGRESS TO TAX

Wide Scope of Taxing Power. Under the Constitution Congress has a broad and general 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." Subject to certain rules, considered later, there is apparently no legal limit to the *rate* of any tax which may be imposed. On one occasion, Congress put a tax of ten per cent on

state bank notes and drove them entirely out of circulation. In speaking of this drastic measure, the Supreme Court said that it was not within the province of the judiciary to prescribe to the legislative department limitations on the exercise of its acknowledged powers. If the taxing function is exercised oppressively, the Court declared, the remedy for the wrong rests with the people who choose the legislature. From various judicial decisions it appears that as long as Congress conforms to the restrictions mentioned below it can prescribe any rate of taxation—even one confiscatory in nature.

Limits on Taxing Power. But on the taxing power so generously conferred, the Constitution imposes some limitations. Three are prohibitive in character and protect the states against discriminations. Congress cannot lay any tax or duty on articles exported from any state. In the regulation of commerce and revenue it must give no preference to the ports of one state over those of another; nor can it compel vessels bound to or from one state to enter, clear, or pay duties in another. Owing to the explicit nature of the restraints thus devised, there has been little debate as to their meaning and extent.

Indirect Taxes Must Be Uniform. This cannot be said of two fundamental limitations of the Constitution respecting the taxes which Congress may lawfully lay. The first of them, dealing with "indirect taxes," provides that all duties, imposts, and excises shall be uniform throughout the United States. This leaves to the courts the task of deciding whether any particular tax comes within the class described and complies with the requirement of uniformity. As on other doubtful matters, the opinion of the Supreme Court has varied. At one time it held that a tax on income, gains, and profits by the year was in the nature of an excise or duty; but several years later it declared unconstitutional nearly all the income tax schedules contained in the revenue act of 1894, on the ground that they were direct in character and did not fall within the category of duties, imposts, or excises.

Yet it is fairly well established that indirect taxes include customs or tariff duties imposed on goods entering the United States, taxes on whiskey, tobacco, and other commodities, on the sale, transfer, or transportation of merchandise, on business transactions, on checks, mortgages, and other legal papers, and on inheritances. However, borderline cases are constantly arising, especially as the changing nature of modern industry, commerce, and property gives new facets to the forms and substances of capital and wealth.

In seeking to fix the metes and bounds of indirect taxes the Supreme Court, of course, must define the term "uniform." Generally speaking, a uniform tax, according to that tribunal, is one which falls with the

same weight upon the same object wherever found within the United States. For example, a tax levied on passengers coming from foreign countries to the United States was held to be uniform, although it was principally collected at a few ports. Again, an inheritance tax is uniform when it is imposed equally upon all inheritances of the same amount and character, though taxable estates of a given size may occur in only a few states.

Direct Taxes Must Be Apportioned. The second fundamental limitation on the taxes which Congress may lawfully lay applies to direct taxes; the Constitution stipulates that capitation and other direct taxes (except on income) must be apportioned among the several states according to their relative populations, excluding untaxed Indians. What taxes are direct? In answering this question the Supreme Court has not adhered to the terms of the economists. At first it was generally understood that there were two kinds of direct taxes—a capitation or poll tax and a tax on land. In 1895 the term was widened; the Supreme Court held that taxes on *income* from real and personal property were also direct and under the Constitution as it then stood, they had to be apportioned according to population. As large taxable incomes were concentrated mainly in a few states, such an apportionment was impossible; hence the decision amounted to a prohibition. The ruling was countered however in 1913 by the adoption of the Sixteenth Amendment authorizing Congress to lay taxes on incomes from whatever source derived, without reference to population.

No Tax on State Instrumentalities. In addition to the express constitutional limitations, there is an important implied restriction on the taxing power: Congress cannot tax the instrumentalities or the property of any state or of any of its political subdivisions. This principle was laid down long ago, in 1819, by the Supreme Court in the case of McCulloch *v.* Maryland, in which it declared invalid a tax imposed on a branch of the United States Bank by the state of Maryland. The theory of the decision was that the United States is an indestructible union of indestructible states, that the power to tax is the power to destroy, and that if one government could tax the instrumentalities of the other the federation could not be preserved under the Constitution.

In recent years, however, the Supreme Court has narrowed its interpretation of the term "instrumentalities" and declared that it will inquire whether any state or federal tax does in effect cripple the power of the Federal Government or the state government to carry on its necessary functions. Now the Federal Government lays income taxes on the salaries of state and local employees, and states may in turn tax the salaries of federal employees. But income from state and local

bonds is still exempt from federal taxes, and states cannot impose taxes on the income from federal bonds or on the bonds themselves.

Limits as to "Purpose" of Tax. Likewise controversial and also revealing tendencies in development is the question of purpose in federal taxation, and here are involved fundamental matters of economic and social policy. The clause of the Constitution which gives Congress the power to lay and collect taxes, duties, imposts, and excises adds the words: "to pay the debts and provide for the common defense and general welfare of the United States." Obviously this is a limitation in respect of purpose, but the term "general welfare" is broad enough to cover almost any tax and it disposes of the contention that taxes can only be laid to raise revenue.

After Congress put a heavy tax on state bank notes for the purpose of driving them out of circulation—not with any idea of raising revenue—the Supreme Court sustained the law. Again, when in 1902 in the interest of dairy farmers Congress imposed a high tax on oleomargarine colored as butter, to prevent its sale in such a guise, the Court said that this was a revenue measure and that it would not go into the motives of Congress in passing the Act. A similar position was taken with regard to a law of 1912 which laid a prohibitory tax on phosphorus matches, the manufacture of which is found dangerous to the health of workers engaged in it. A still more striking example is the Narcotic Drug Act of 1914, which subjected the sale of narcotics to close federal scrutiny through a merely nominal tax on dealers. This act was sustained by the Supreme Court. Subsequently, in 1937, the Supreme Court upheld the Social Security Act which uses the taxing power not to raise money but to induce states to establish old age and unemployment insurance systems. In its opinion, the Court went far toward sustaining the old doctrine of Alexander Hamilton that Congress may freely tax "for the general welfare." It merely warned Congress against displaying "arbitrary power" in this respect.

Taxes have also been freely employed to effect a more equitable distribution of wealth. For a long time Presidents have advocated income and inheritance taxes as a means of cutting down great private fortunes. Theodore Roosevelt defended them on the ground that they would promote equality of opportunity. Woodrow Wilson expressed similar views. While repudiating socialism, Herbert Hoover declared that "the present inheritance, income, and excess profits taxes tend to a better distribution of wealth." Franklin D. Roosevelt was still more emphatic and under his administration Congress materially increased the burden of income and inheritance taxes, especially in the upper ranges, even before war spending became heavy in 1940.

THE FEDERAL REVENUE STRUCTURE

For the purpose of realizing certain social and economic doctrines as well as of raising revenues, Congress has erected a complicated tax structure. The revenue laws are often changed with reference to the forms and extent of the taxes levied. But amid all the shifts four fundamental categories have survived.

Taxes on Consumption. First in the list come those taxes which bear on consumption. They include customs duties protecting American industry against foreign competition and miscellaneous internal taxes such as those on tobacco and alcoholic liquors, and manufacturers' excise taxes on a wide variety of articles. Though the tariff often attracts far the larger share of public attention and formerly yielded the main portion of the entire federal revenue, it has now dropped to a minor place in this respect. Miscellaneous internal taxes on consumption, the sale of goods, and business transactions far outrank it now as a source of money for the Treasury.

Income Taxation. The second principal category embraces taxes somewhat proportioned to the income of persons, corporations, and other parties liable to such taxes. These are of two general types: (1) taxes which take money from all payers and confer no immediate and special benefits upon them and (2) taxes on incomes and paytolls to provide for pensions, unemployment insurance, and other grants to classes of individuals.

In both letter and spirit, federal legislation laying income taxes of the first class is based on the assumption that the rates of the tax imposed on payers should be fixed with special reference to their respective abilities to pay. The controlling principles of such taxation as applied to individuals are as follows:

Persons with incomes below a certain level are wholly exempt.

Persons with families or dependents are allowed certain deductions in calculating their net income for tax purposes.

A relatively low rate of tax, called the "normal" tax, is applied to the total net taxable income of all persons liable for the tax.

The income tax rate is "graduated" or "progressive," that is, starting at a certain level of income, a surtax is added to the normal tax and the rate of the surtax rises rapidly with the amount of taxable income. Under the law of 1947, for example, ninety-one per cent of all such income over $200,000 was taken by the Federal Government.

In raising money for World War II the exemptions allowed to individuals and married couples were reduced to what amounted to a

bare living standard, and millions of people who had never before paid a federal income tax were brought within the scope of the law. Besides, employers in numerous cases were required to withhold, from the wages and salaries they paid, the income taxes due to the Federal Treasury. So, for the first time millions of people felt the direct burden of a tax on their incomes. Incidentally the bookkeeping transactions of the Treasury and its agents became enormously expensive and complicated.

Between 1913 and 1943 the income taxpayer each year reported, on March 15, on his income for the previous year and paid taxes on it in a lump sum or in quarterly installments at his discretion. In 1913 Congress altered this rule and provided that the payer must report on March 15 of each year on his estimated income for the current year and pay on the estimated income, subject to later corrections up or down. This alteration also added to the complexity of the Treasury's bookkeeping, but it levied the tax on income as earned instead of on the income of the previous year, all of which might have been spent long before tax day.

Income tax laws for organizations are most lenient toward certain groups. Cooperative or nonprofit making associations, such as labor, agricultural, fraternal, mutual benefit, and educational organizations, are exempt even though their "business" runs into large figures. The rates applied to taxable corporations are least for those with a small net income. During World War II Congress added to the regular tax on corporations a special levy on their "excess profits" rising with the amount of such excess profits—to ninety-five per cent in 1944; but shortly after the close of the war this special impost was repealed.

Estate and Gift Taxes. A third category of federal taxes embraces levies on the estates of deceased persons and on gifts. These taxes are also roughly proportioned to the amount of money involved. Estates and gifts below certain amounts—materially reduced in recent years—are wholly exempt. To estates and gifts above the exemption levels progressive rates, beginning at low percentages, are levied. Here again social principles are involved, especially the distribution of wealth, for it is an avowed purpose of such taxation to break up or materially reduce great estates, to force heirs from a life of idle enjoyment to a life of industry and self-help, and to curtail the power of the "plutocracy" in the affairs of the country.

Miscellaneous Revenues. In the fourth group are taxes imposed for regulative or prohibitive purposes (p. 301), and revenues derived from special sources, such as the sale of government property, canal tolls, and rentals of public lands or buildings. Relatively speaking the amount

normally drawn from such sources is small and does not affect the budget very much, one way or the other.

Funds from Sale of Securities. Between 1931 and 1946 the budget of the United States was "unbalanced," that is, the money annually collected from all tax and miscellaneous sources was not sufficient to meet the expenditures of the Government. Hence supplementary funds were necessary and they were obtained by selling federal bonds and other securities to banks, corporations, private persons, and other buyers. At the height of World War II the receipts from the sale of securities exceeded the amount derived from taxation.

ADMINISTRATION OF REVENUES AND DEBTS

Agencies of Collection. Revenues accruing to the Federal Government under the tax laws are collected by the Treasury Department through two great services—one in charge of customs duties and the other internal revenues. For efficient administration the country is divided into separate customs and internal revenue districts, each with its commissioner and force of agents. To facilitate quick decisions on controversial points special tribunals have been erected. The Court of Customs and Patent Appeals and the United States Customs Court make rulings on disputes involving the classification of imports and the rates imposed by customs officials—with appeal to the regular courts on problems of constitutionality and treaty provisions. Income and inheritance tax cases can be carried to the Tax Court of the United States for reviews and rulings, which are subject to judicial review on appeal in many instances. Federal revenues from postal operations and certain other sources are collected and accounted for by agencies outside the Treasury Department.

Custody of Funds. Tax revenues are kept in the Treasury at Washington and in banks belonging to the Federal Reserve System (p. 312) designated by the Secretary of the Treasury. Here they are held until paid out on warrants issued under congressional appropriation acts. The safety of federal deposits in banks is guaranteed by United States bonds and other prime securities placed in pledge.

The Federal Debt. Until the declaration of war on Germany in April, 1917, the United States was one of the few countries not staggering under the burden of a rapidly growing debt. In 1916, the total interest-bearing debt of the Federal Government was only $971,562,590, or $9.88 per capita. But in the financing of World War I the debt rose quickly; three years later it was $25,234,496,274, or approximately $238 per capita. After the war the Government began paying off the

debt, and by 1930 the gross debt had dropped to $16,000,000,000 in round numbers.

However, as revenues fell off and expenditures increased during the depression that followed the panic of 1929, the gross debt mounted rapidly again. By the close of the fiscal year in June 1934, it had risen to $27,000,000,000; in September, 1938, it was $38,400,000,000. In 1946, after World War II, it stood at $269,400,000,000 and in 1948 at $252,300,000,000 or about $6,000 on the average for every family in the United States.[1] By 1947, owing to the continuance of the high war tax rates, the national budget was in balance again; but new commitments for aid to foreign countries and for military preparations threatened another unsettlement in finances.

Foreign Government Debts. During World War I, the United States Government lent to the governments associated with it in the war large sums of money. All of those governments, except Russia and Armenia, later made arrangements to pay interest and installments on their respective debts. But soon after the depression began in 1929 all the debtors, except Finland, stopped making their payments; and efforts on the part of the United States to collect proved futile. By 1937 the unpaid total of this indebtedness, with accumulated interest, amounted to $12,400,000,000. It was finally "written off" as a total loss.

Foreign Obligations of World War II. Under the Lend-Lease Act of March 11, 1941, the Government began to furnish enormous amounts of money and supplies to foreign governments which were either at war with the Axis powers or were regarded by the President as helpful in "the defense of the United States," and this practice was continued until the close of the war. In his message to Congress in January, 1941, President Roosevelt said that "For what we send abroad, we shall be repaid within a reasonable time following the close of hostilities, in similar materials, or at our option, in other goods of many kinds. . . ." But this expectation was unrealized, for in the settlements at the end of the war, apart from materials and services supplied by these governments to the United States during its participation in the war, the amount received in return was relatively slight. After the nominal end of the war, the United States made large loans to Great Britain and other foreign countries directly or through the Export-Import Bank and the Reconstruction Finance Corporation. In addition the Government was committed by acts of Congress to participation in the In-

[1] The reduction from 1946 was due to the fact that the Government had on hand a surplus from previous borrowings, and an excess of revenues over expenditures for the two consecutive fiscal years that ended on June 30, 1948.

ternational Bank for Reconstruction and Development and the International Monetary Fund, which involved investments amounting to billions. During 1948 additional billions for the aid of countries in Europe and Asia were authorized by Congress.

PREPARATION OF THE BUDGET

Former Practices. No money can be paid out of the Treasury of the United States except under the authority of an act of Congress, and Congress alone can prescribe the taxes to be raised for the purpose of meeting the Government's bills. But until 1921 both spending and taxing were carried on in a haphazard manner. The President was not required to do anything at all about the preparation of financial plans, although the Treasury transmitted to Congress each year a collection of the estimated needs of the various executive departments and agencies. In Congress the work of preparing appropriation bills was divided among many committees; appropriation bills were pushed through both houses one after another; revenue bills were prepared by separate committees; and not until the end of the session was it possible to calculate with exactness how much money had been voted and the amount of the revenues which would be needed or received to pay the bills of the Government. As long as expenditures of the Government were relatively small and federal taxes were light, little attention was paid to this disorderly way of conducting business; but soon after the opening of the twentieth century protests against it began to mount in volume and in 1921 the agitation resulted in the Budget and Accounting Act.

The Budget Act Provisions. The act created a Budget Bureau, now in the President's Executive Office, headed by a director appointed by the President with the consent of the Senate. It imposes upon the President the duty of laying before Congress at the opening of each regular session a consolidated budget statement for the coming fiscal year which begins on the following July 1st. If his budget shows a deficit, then the President must recommend measures to meet the difference; if it reveals a surplus, then he may make suggestions with respect to tax reduction. The data for the President's budget are collected by the director of the Budget Bureau from the departments and other executive spending agencies. They are reviewed, consolidated, and revised by the head of the Bureau and laid before the President. After he has surveyed the estimates, and made his own changes, he lays the whole budget before Congress accompanied by a special message. From time to time, he may submit additional revenue and expenditure proposals to Congress.

Under this arrangement the President presents annually to Congress —in January of each year—a budget for the executive agencies which consists of three principal parts and such supporting or additional documents as he deems fitting and proper. The three parts are: (1) proposed appropriations in detail for the coming fiscal year; (2) proposed revenue measures to cover the outlays; and (3) proposed means of financing the expected deficit, if any, either by new taxes or borrowings. Congress is in no way bound by the President's figures as to expenditures or taxes, but at all events it does have before it near the opening of its annual session an official project of outlays and receipts to serve as a starting point for its work.

CONGRESSIONAL PROCEDURES IN FINANCIAL MATTERS

Preliminary Action in Congress—the Legislative Budget. For the purpose of securing a concerted review of the President's budget recommendations and an early decision as to balancing expenditures and revenues, a section of the Legislative Reorganization Act (1946) prescribes a definite procedure. It directs the four House and Senate committees on appropriations and revenues, or subcommittees thereof, to meet jointly at the beginning of each regular session of Congress, review the President's financial recommendations, and report by February 15 to their respective houses a legislative budget for the next fiscal year, including over-all federal receipts and expenditures. Such report shall recommend the maximum amount to be appropriated for the year, including reserves for deficiencies, and also a reduction or an increase of the public debt as the totals of estimated expenditures and revenues may require.

To induce formal action by both houses of Congress on the general program, the Reorganization Act makes further provisions. It stipulates that the report of the four committees shall be accompanied by a concurrent resolution adopting such budget and fixing the maximum amount to be appropriated. In case the committees meeting jointly find that the estimated expenditures exceed the estimated receipts, the concurrent resolution shall include a section to the effect that it is the sense of Congress that the public debt shall be increased to the amount required to meet the deficit for the year.

Lack of Unity in Congressional Actions. Although the Reorganization Act of 1946 calls upon both houses to study the budget as a consolidated program of expenditures and revenues, it does not compel Congress to treat and carry into force the program as a single piece of legislation. On the contrary, the over-all plan is broken into parts for detailed consideration. Instead of incorporating all appropriations for

all agencies of Government in one measure of expenditures, the appropriation committee of each house divides up the work and brings in ten or more separate appropriation bills; and the ways and means committee of the House and the finance committee of the Senate report tax bills from time to time at their pleasure.[2] The result is not unity but prolonged, piecemeal action.

Current Controversies over the National Budget. Despite all the legislation that has been enacted since the budget act of 1921 and all the efforts to introduce more order into federal finances, the United States still has no effective budget system designed to compel Congress to balance the budget in time of peace or openly to confess that in voting appropriations in excess of revenue it intends to borrow the money to cover the excess. Again and again in recent years, Congress has passed laws calling for huge, even indefinite, outlays without providing, in such legislation or in connection with it, the ways and means of paying the necessary bills. In other words, like the spendthrift in private life, it spends without at the same time making full provision for payments on the days of reckoning. Representatives and Senators who insist on coupling with the discussion of projects for spending money a consideration of how the bills shall be paid are characterized by colleagues or in the press as "reactionaries" or enemies of the public interest or foes of international welfare.

Convinced that Congress and the President would never mend their ways, Senator Millard Tydings, Democrat of Maryland, and Senator Styles Bridges, Republican of New Hampshire, introduced in the Senate in 1947 a resolution for the amendment of the Constitution to make reform obligatory. As framed the proposal does not limit the spending power of Congress but it does make compulsory a definite public procedure in that relation. It provides, in effect, that if Congress appropriates more money in any year than it raises by taxes, one of two things must be done. Either the President must make a uniform percentage reduction in all appropriations (except for certain purposes) and bring outlays in balance with revenues *or* Congress must by concurrent resolution declare that for some particular emergency it does not intend to live within its income but intends to borrow more money. Although the demand for such a self-denying and self-advertising ordinance is growing in Congress and outside, nothing has come of it yet. Even the less drastic suggestion that all appropriation bills be consolidated in one general measure, a practice followed in some states, has produced no concrete results in Congress.

[2] To assist in preparing tax bills, there is a joint committee on internal revenue taxation, staffed by specialists.

ACCOUNTING CHECKS ON SPENDING OFFICERS

The Office of the Comptroller General. Whatever may be the responsibility of the President as chief administrator for keeping a check on his subordinates in using the money appropriated by law, Congress certainly has the duty of making sure that it is spent for the purposes stipulated in legislation and appropriation measures. In 1921 Congress sought to effect this scrutiny of outlays by establishing the General Accounting Office under the Comptroller General of the United States. Under the statute he is appointed by the President with the consent of the Senate for a term of fifteen years and he can be removed only by impeachment or by a joint resolution of Congress for specified causes. The General Accounting Office is charged with the obligation of watching all the spending agencies and ascertaining whether the money is devoted to the ends prescribed by law. The Office is made independent of all executive departments and agencies; by the Reorganization Act of 1946, it is specifically declared to be a part of the legislative branch of the Government and the Comptroller General is required to make, for the benefit of Congress, expenditure analyses of the accounts in the executive branch so that the House and Senate can discover whether "public funds have been economically and efficiently administered."

Congressional Checks on Spending Officers. Furthermore, the houses of Congress have established their own agencies for scrutinizing the transactions of spending officers; namely, committees on expenditures in the executive department. On each of these committees is laid the duty of receiving reports from the Comptroller General, studying the operations of executive agents at all levels, arriving at judgments on the efficiency and economy of their activities, and evaluating the effects of the laws enacted to reorganize the legislative and executive branches of the Government. The committees also review budget and accounting measures, other than appropriations, and report to their respective chambers such recommendations as may be deemed desirable. Other committees of Congress are likewise bound to be informed with regard to use of moneys by the executive agencies over which they have jurisdiction.

MONEY AND BANKING

Conflicts of Interests. The Constitution says little about money and does not mention banking at all. It gives to Congress the exclusive power to coin money, regulate the value thereof, and of foreign coin. It forbids states to coin money, emit bills of credit, and make anything

but gold and silver coin a legal tender in the payment of debts. By implication, confirmed by practice, Congress enjoys the power to establish national banks, issue paper money, and do many other things connected with money and banking. The constitutional provisions relative to such matters were the subjects of hot disputes at the time the Constitution was framed and launched, and ever since that time conflicts of political parties and economic interests in the United States have raged around the theory and practice of money and banking. Indeed a large part of American political history can be written in terms of these controversies.

A "Scientific" Theory of Money and Banking. Abstractly speaking it is possible to construct a theory of money as a mere mechanism of exchange that should not be a matter of dispute and should remain outside conflicts of interests. Such a theory, widely favored in whole or part and to some extent applied in American history, runs as follows. The monetary unit should be based on the "intrinsic" values of the precious metals, gold or silver, or both in some ratio to each other. All paper money, whether issued by the United States Government, by national banks or by state banks, should be made redeemable in coin at face value, dollar for dollar. The banking business of receiving deposits, making loans, and carrying on other financial functions should be left in the hands of private concerns, chartered and regulated as to sound practices by the Federal Government or by state governments. In such a system, money is solely a medium of exchange; and neither the currency nor the banking business is to be in any way controlled or manipulated by government for the benefit of any classes or interests. In some respects American practice has conformed to this "scientific" theory, especially for a time after the establishment of the gold standard by act of Congress in 1900, but conflicts of interests have made consistent adherence to it impossible.

Increasing Control of the Government over the Currency. When all the measures of recent years are pieced together it becomes evident that the Federal Government is extending its authority over the currency. In former times the paper money of the United States was redeemable in gold—a commodity largely owned by private parties, stored in banks, and shifted from country to country with the movement of trade and the transactions of financiers. When in times of crisis the Government needed gold for the Treasury to meet the demands for that metal in exchange for paper currency, it had been compelled to go hat in hand to bankers to borrow the gold, perhaps only to have it withdrawn from the Treasury again by private persons demanding gold for paper. This state of affairs placed the Government more or less at the mercy of

large bankers who had gold in their vaults or could easily assemble it from various quarters, including Europe.

In 1933, the Government went off the gold basis. It ceased to make its own obligations and those of private contracts payable in gold dollars of standard weight and fineness. It called all gold coins and bullion, except for commercial purposes, into the Federal Treasury and stored this gold in its own vaults. Hence gold coins no longer circulate lawfully, and paper money is no longer redeemable in gold.

Under the above acts of Congress, the Government itself holds about all the gold in its own vaults, while the bankers have paper; and private parties can no longer take gold away from the Government at will. In other words the Government has emancipated itself from the grip of bankers, and as compared with the former state of things this constitutes a fiscal revolution. The Government may shake its own credit by loose financing, but bankers and hoarders of gold can no longer dictate to it or undermine its stability. Bankers may, to be sure, refuse to buy bonds from the Government in need of loans to meet deficits, but such a buyers' strike would be more likely to end in a nationalization of banks of issue than in a return to the gold standard of the old style. In that case the government would issue all paper money directly. Whatever the future may hold, it is improbable that the Government will soon, if ever, surrender the gold it holds and again base its currency on gold as a commodity owned by banks and private parties.

Efforts were made in 1933 and subsequently to force the coinage of another metal, silver, at the ratio of sixteen ounces of silver valued arbitrarily as equivalent to one ounce of gold. Members of Congress from farming and silver-producing states fought hard in Congress to compel the adoption of this policy but in vain. They were only able to drive through a provision directing the Treasury to buy and store large amounts of silver and issue silver certificates based on such purchases and redeemable in coin.

The metallic money of the United States now in circulation consists of silver dollars and subsidiary pieces, nickels, and copper cents. Apart from silver dollars and the fractional currency, the money provided for public and private transactions is composed of paper notes, varying, as we shall see, in sources of issue. Included among them, of course, are the silver certificates, mentioned above.

Central Control in the Federal Banking System. The fundamental law of the federal banking system and all local banks officially associated with it is the Federal Reserve Act of 1913 as amended many times since that date. At the apex of the whole structure stands the Board of Governors of the Federal Reserve System, composed of seven members, all

appointed by the President with the consent of the Senate. Theoretically private bankers as such have no influence over their selection or removal. The conflict of interests which entered into the enactment of the law is recognized in the provision that the President, in choosing governors, must have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests and geographical subdivisions of the country.

Centralizing Functions of the Board. The banking law gives to the Board of Governors high centralizing functions. It has a voice in choosing the governing board of each subordinate Federal Reserve Bank, described below, and may remove or suspend any of its officers or directors. It controls the issue of reserve currency. In connection with representatives of the Federal Reserve Banks, the Board of Governors controls the buying and selling of federal securities by member banks in the open market, with a view to checking, within limits, the expansion and contraction of credit. It may increase or diminish the proportion of cash reserves held by member banks against deposits which customers may withdraw at will, thus affecting the extension or restraint of credit, that is, loans. The Board also supervises the transactions of banks under its jurisdiction and scrutinizes their books and accounts in minute detail.

Federal Reserve Districts. If the concept of centralization prevails in the character and powers of the Board of Governors, there is an element of regional policy in the organization of local banks. Under the law the country has been divided into twelve districts, each with a Federal Reserve Bank and numerous lesser banks, known as members of the Federal Reserve System. All the old national banks desirous of keeping their charters had to become members; state banks and a few others may voluntarily join, with the consent of the Board of Governors.

With respect to the regional administration of the banks a curious blend of traditions prevails. Government banking and control by bankers themselves representing the opposing school are intermingled. Each member bank is managed by its own board of directors elected by the stockholders. Here immediate management by private financial interests is undisputed. On the other hand the Federal Reserve Bank in each of the twelve districts is governed by a body composed of different classes of directors, numbering nine in all. Three of them are chosen by the federal Board of Governors; three are elected by the member banks of the district to represent primarily finance; and the remainder are selected in the same way from among men "actively engaged in their district in commerce, agriculture, or some other industrial pursuit." In other words, banking and currency are not to be dominated wholly

by financiers, but by a combination of public officials, bankers, and spokesmen of business and agriculture.

The National Paper Currency. As things now stand the principal class of paper currency in general circulation consists of Federal Reserve notes issued in various denominations under the authority of the Board of Governors of the Federal Reserve system. These notes are the obligations of the Federal Government and are also secured by deposits of gold certificates and other prime securities, including United States bonds, put up as pledges for credits by banks in the Federal Reserve system. In addition to Federal Reserve notes there are in circulation—besides certain silver and other minor coins—silver certificates, United States notes, Treasury notes, some old National Bank notes, and Federal Reserve Bank notes now in process of retirement. Under present legislation all paper money in circulation is legal tender for all purposes, public and private.

The Government in the Banking Business. In addition to organizing the above system of reserve banks, engaged in receiving deposits and lending money, the Federal Government has gone directly into the banking business itself on a gigantic scale. It operates a nation-wide chain of savings banks under the auspices of the Post Office Department, at which sums strictly limited in amount can be deposited for safekeeping. It has created agencies for lending money to farmers at low rates of interest on farm mortgages. These institutions had been established before the great depression of 1929 disrupted the economy of the country. Then under President Hoover the Federal Government, through the Reconstruction Finance Corporation, began to lend money to banks, railway companies, insurance companies, and other financial concerns. Under President Franklin D. Roosevelt, lending operations were widened to include loans to industries, states, cities, towns, home owners and nearly every other class in the nation that could furnish security or at least some semblance of security for funds advanced. Through the Federal Deposit Insurance Corporation, the Government will insure bank deposits up to a certain amount on specific conditions.

Responsibility of the Treasury Department. Although the Department of the Treasury is only one among the many agencies of the Government which are engaged in operations pertaining to finance, it carries the chief responsibilities connected with the collection and disbursement of money under acts of Congress. Through the Bureau of Customs and the Bureau of Internal Revenue it collects nearly all the taxes laid for revenue purposes. It guards the public moneys, keeps accounts, and manages the paying out of money under appropriation acts. It supervises the minting of coins, the engraving and printing of federal

bonds, Federal Reserve notes, and other evidences of values issued under the authority of the United States. It maintains a secret service to discover persons who counterfeit United States bonds, notes, and other papers of value and to discharge other important police functions. The work of receiving and disbursing public funds is committed to the Office of the Treasurer of the United States in the Treasury Department. Upon the Secretary of the Treasury and his aides falls the burden of preparing plans for taxation and drafts of tax bills, and of defending and explaining them before the committees of the House and the Senate in charge of revenue measures. Upon the Secretary also devolves the responsibility for leadership in planning and managing campaigns for the sale of federal bonds and other securities issued to meet national outlays not covered by taxation.

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CHAPTER 16

Control and Direction of Foreign Relations

The Fateful Nature of Foreign Affairs. The manner in which the Federal Government conducts its relations with foreign powers is of deep concern to the American people. This has been the case from the beginning of our history. It was in a large measure the skillful work of Benjamin Franklin at the court of Louis XVI which drew France to the support of the United States and made certain the outcome of the War for Independence. It was by negotiation, or arms, or both, that the United States spread westward to the Pacific, through lands once claimed by France, Spain, Mexico, Great Britain, and numerous Indian nations, thence onward across the Pacific to the Philippines. If the country achieves security in which to develop its resources and enrich its civilization, if it benefits from the exchange of goods and ideas with other lands, such fortune will be ascribed, at least in part, to the successful conduct of foreign relations. Conversely, if the United States dissipates its resources generally over the globe, only to be faced in the end by an overwhelming coalition of hostile powers that finally brings it face to face with ruin, that misfortune, too, will be laid at the door of those who conduct foreign relations.

Definition of Terms. By official and unofficial usage, the term foreign relations has been taken to cover both deeds and words—both foreign affairs and foreign policies.

Affair, as its origin in the French phrase *a faire* indicates, is related to action. An affair is something which one has to do or does. It is a business, an operation, or transaction carried on by two or more persons or governments in relation to one another. It is usually concerned with practical and substantial matters such as the exchange of goods, or with particular activities such as immigration, emigration, or the handling of ships and goods entering or leaving the harbors of the United States. Associated with affairs are, of course, ideas as to how they should be conducted, but the essence of an affair is action of some kind.

Policy, on the other hand, is a principle, rule, or guiding doctrine for the management of affairs. Every affair is more or less controlled by previously formulated policy, formally announced or tacitly assumed; but every policy officially declared is not always followed in the direction of foreign relations. Indeed, a policy may be designed for foreign or domestic "consumption" rather than as a rule to be realized through concrete action or actions. Hence the foreign policies of the United States receive consideration here apart from the affairs (see Chapter 17).

Policies and Affairs Called Foreign Are Entangled in Domestic Policies and Affairs. Foreign affairs are often treated as if "external" to the United States, as if they lay somewhere beyond the borders of the country, in the Atlantic or the Pacific or in foreign countries, near or distant. Some foreign affairs of the United States do originate in the actions of foreign governments but by no means all so originate. Many affairs with foreign governments originate in actions taken in the United States in the pursuit of a policy deemed domestic. For example, the regulation of immigration has long been recognized in international law as a matter coming within the domestic sphere belonging of right to each nation; but acts of Congress excluding practically all Orientals from the United States have raised innumerable "foreign" issues for the Government of the United States to handle.

Again, the steps which the Government of the United States may take with reference to any action of a foreign government or governments are not determined by the mere nature of that foreign action. As President Wilson said on August 18, 1914, about the war that had just broken out in Europe: "The effect of the war upon the United States will depend upon what American citizens say or do. . . . The spirit of the nation in this critical matter will be determined largely by what individuals and society and those gathered in public meetings do and say, upon what newspapers and magazines contain, upon what our ministers utter in their pulpits, and men proclaim as their opinion on the streets." Foreign and domestic affairs are in fact parts of the same thing or, at all events, they are closely related.

LEADERSHIP IN FOREIGN AFFAIRS

Constitutional Provisions. Although the Fathers of the Republic well understood the significance of foreign policies and affairs, the Constitution which they framed does not state specifically how and by what agencies of the National Government all are to be determined and directed. It does not even mention "foreign relations." It provides for the exercise of numerous powers which bear directly or indirectly on

foreign policies and affairs, and distributes such powers among the legislative, executive, and judicial departments of the Government. It provides, for example, that the President shall have the power to make treaties, but with the advice and consent of the Senate, two-thirds of the members present concurring. It likewise declares that he shall appoint ambassadors, consuls, and other public ministers, with the approval of the Senate. Evidently the framers of the Constitution intended to make the Senate a kind of council on foreign relations. Other constitutional authority over foreign relations accrues to him in his capacity as chief executive and as supreme commander of the armed forces.

The President's Control over Foreign Relations. Out of these few constitutional provisions and out of practice has been evolved the rule that the President is the official representative of the United States in conducting negotiations with foreign governments. Only one power in this connection is vested in the President alone: "he shall receive ambassadors and other public ministers" from foreign governments. Practice and acts of Congress, not any explicit command of the Constitution, make him the agent of the United States for receiving official communications from foreign governments and sending official communications to them.

The President may take many actions coming under the head of foreign relations but Congress may refuse to support any of them by resolution of protest or by withholding appropriations of money if they are necessary for giving effect to such actions. The President may formulate foreign policies for the United States but the Senate or Congress and the people may reject them. Congress also may declare foreign policies by resolution—policies in line with or opposed to those of the President. Neither the President alone nor Congress nor the President and Congress together can, under the Constitution, make any foreign policy legally binding on subsequent Presidents or later Congresses.

Fundamental Powers over Foreign Relations Vested in Congress. While by tradition and practice the President's powers over foreign affairs are large, those explicitly vested in Congress are also fundamental. They include the power to

appropriate money for the support of the Government,
regulate foreign commerce,
control immigration and emigration,
provide for the naturalization and deportation of aliens,
raise and support armies and navies,
make rules for the government of the armed forces,

define and provide for punishing offenses against the law of nations,
make rules for captures on land and water,
declare war,
and make all laws necessary and proper for carrying the above powers into effect.

In the Senate alone are vested special powers over foreign relations. The President can make treaties only by and with the advice and consent of the Senate, two-thirds of the Senators present concurring. The President nominates ambassadors, other public ministers, and consuls, and with the advice and consent of the Senate he appoints them. The executive power is vested in the President but it is the power to carry laws into effect, not to make and enforce laws of his own.

Yet the President's Powers over Foreign Affairs Are Immense. Despite the language of the Constitution, the powers of the President in the conduct of foreign relations are very great. He has made many executive agreements with foreign governments far more fateful for the American nation than innumerable treaties that have been duly ratified by the Senate (p. 331); and until Congress stops him by positive action he may continue to do so. In negotiations over particular matters the President may proclaim policies and even take actions which make war highly probable if not inevitable or in effect force Congress to declare that war exists. President Polk ordered American troops into territory in dispute with Mexico; Mexicans attacked them as "invaders"; then Polk declared that war existed "by act of Mexico." Other examples can be found in American history. Whatever the Constitution may say, Presidents exercise immense powers over foreign relations.

THE DEPARTMENT OF STATE

Department Subject to the President. In the organization of the Department of State the position of the President as official spokesman of the Government in negotiations with foreign governments is expressly recognized. The Act creating it provides that the Secretary shall perform such duties as the President may entrust to him relative to correspondence, commissions, and instructions to the public ministers and consuls sent out from the United States and also pertaining to negotiations with public ministers from foreign countries.

Thus the Department is the legal organ of communication between the President and other countries and is recognized as such by foreign powers, for it is to the Secretary of State that they address their formal notes to the Government of the United States. When the French minister in 1793 directed a letter to the President, the Secretary made a rul-

ing to the effect that it was not proper for diplomatic representatives to institute correspondence immediately with the chief executive. Yet it would be a great mistake to lay too much stress on this ruling. Many questions, as we have seen, are taken up directly with foreign powers by the President himself or through their representatives in Washington or through his special agents abroad. About the only safe generalization is that the State Department is the agency through which foreign business is ordinarily transacted.

At any time, however, especially during a crisis or war, the President may take into his own hands the transaction of all important business with the heads of foreign governments and give to the Secretary of State such information concerning the policies and decisions settled in this manner as he deems proper. For example, after the United States became involved in World War II, President Roosevelt did not invite the Secretary of State, Cordell Hull, to attend any of the military conferences with the heads of allied governments at which crucial commitments of a diplomatic, as well as of a military, nature were made. Mr. Hull expressed to the President the opinion that the Secretary of State should be present at these meetings and referred to British practice in this respect but the President replied that the American system of government differed from that of Great Britain. Consequently, as Secretary Hull said later, he "learned from other sources than the President what had occurred at the Casablanca, Cairo, and Teheran conferences."[1]

The Secretary Is the President's Personal Representative. In a peculiar sense the Secretary of State is the President's personal selection; the Senate would be reluctant to reject any nomination for that office. Seldom has a Secretary been chosen from among the officials who have grown up in the service. Sometimes it happens however that the Secretary is drawn from the diplomatic ranks; Jefferson was serving as minister in Paris when President Washington called him home to take charge of the Department; John Hay was promoted from the American embassy in London. Generally some outstanding leader in domestic politics is made head of the Department as a reward for his services to his party rather than because of his knowledge of foreign affairs. Wilson selected Bryan partly because he could not be ignored and partly to enlist his support for a legislative program. The fact that Cordell

[1] *Memoirs of Cordell Hull*, Vol. II, pp. 1109 ff. Perhaps President Roosevelt regarded himself as acting in his capacity of Commander in Chief at these conferences. "Following Pearl Harbor," Mr. Hull states, "he preferred to be called Commander-in-Chief rather than President." *Ibid.*, p. 1111.

Hull had long served in Congress and possessed great influence in that body doubtless had weight with President Roosevelt in selecting him in 1933 to serve as Secretary of State.

The Organization of the Department. The number of officials and employees in the Department of State has grown rapidly in recent years. In 1939 there were 739 foreign service officers and 2600 other officials, clerical workers, and employees.[2] By November 1946, the number had grown to 22,789.[3] In the meantime the functions entrusted to the Department have expanded in various directions, and the divisions in the Department have been shifted, reconstituted, and supplemented many times. Perhaps no other department of the Government has had a relatively larger increase in the number and variety of its duties or undergone more "reorganizations" than the Department of State during the past decade. It takes about eighteen pages of fine print in the *Congressional Directory* to give a bare list of the Department's offices and other branches and a skeleton outline of their respective duties.

Through all the reorganizations, however, certain features have remained fairly constant. In the upper range are the undersecretaries, assistant secretaries, the counselor (legal adviser), and special assistants who are close to the Secretary of State. Separate divisions of the Department keep watch over affairs in the various regions of the earth, such as Latin America, Europe, and the Far East. Other divisions and services of more recent origin have charge of commercial economic and international organizational business. Among the newest are services to disseminate abroad information about the United States and to cooperate with other nations in the exchange of technicians and information on developments in education, the arts, and the sciences, under an Act of 1948. The administration of the foreign service personnel—diplomatic and consular—is entrusted to the Office of Foreign Service. Two divisions have control over the issue of passports to American citizens desiring to go abroad and over the granting of visas—by American officials in foreign countries—to foreigners seeking admission to the United States.

Other Departments Represented Abroad. While much emphasis has rightly been laid on the Department of State as the organ of communication between the United States and foreign countries it should be remembered that it is not the sole branch of the Federal Government which has agents abroad. The War, Navy, and Air Force departments

[2] Bertram Bulen, *Inside the Department of State*, p. 15.
[3] *Congressional Record*, January 10, 1947.

have their representatives in all important countries—military, naval, and air attachés—theoretically affiliated with American embassies and legations but practically enjoying a general commission to find out all they can and report directly to their respective heads at home. Though supposed to observe military, naval, and air affairs primarily, the most active of all the attachés cover a wider range—not overlooking politics and opportunities to sell goods. The Treasury Department also has both special and general representatives abroad.[4]

DIPLOMATIC AND CONSULAR REPRESENTATIVES IN FOREIGN COUNTRIES

Classes of Diplomatic Agents. The representatives of the United States in foreign countries who come immediately under the direction of the State Department fall into two general groups: diplomatic and consular.

According to ceremonial ranking, the first of these groups is divided into four classes: ambassadors, envoys and special commissioners, ministers resident, and *chargés d'affaires*.

For over a century the United States did not send ambassadors; it was represented abroad only by agents falling within the other three classes. But in 1893 Congress provided that our representative in any foreign country should have the same rank as the representative of that country in the United States. Therefore, whenever a nation sends an ambassador to us, we return the honor, subject to the consent of Congress.

Method of Appointment. All diplomatic representatives of the United States are nominated by the President and appointed by and with the advice and consent of the Senate. In spite of the thorough knowledge and experience necessary to efficiency in the diplomatic service, our official agents, especially ambassadors and ministers, are often selected without regard to such qualifications, in exchange perhaps for political service including contributions to campaign funds. As Secretary Hay once remarked, "A quiet legation is a stuffed mattress which the political acrobat wants always to see ready under him, in case of a slip." Besides, owing to the small salaries paid and the expenses of entertaining, only persons of means can afford the post in many a capital. The term of office is uncertain and liable to be brief; for, whenever a shift of party occurs at Washington, many changes take place in our representation abroad. While there is no automatic arrangement for prolonged tenure of office throughout this division of federal activities, as we shall see below (p. 324), by the Rogers Act of 1924 pro-

[4] J. R. Childs, *American Foreign Service* (1948), especially Chapter 4.

vision is made for a permanent group of "foreign service officers" from which the President makes many appointments, chiefly but not entirely to posts of minor importance.

In choosing diplomatic officers, the President always ascertains in advance whether each particular appointee is personally acceptable to the government of the country to which it is proposed to send him. After his confirmation, the ambassador or minister is given a formal letter of credence, and on arriving at his post he at once enters into communication with the authority in charge of foreign affairs. Ordinarily he is received in audience by the head of the government to which he is accredited, with the ceremonials dictated by the custom of the country.

Retirement. A diplomatic mission abroad may be closed by various methods. An ambassador or minister may exercise his constitutional right of resigning at pleasure, or he may be recalled by the President. In an extreme case, his retirement may be requested by the government of the country in which he is stationed.

Diplomatic Immunities. Every diplomatic officer enjoys, under the rules of international law, several peculiar privileges and immunities. Any injury or affront to him is an offense against the country which he represents and the principle of international comity. The house in which he resides may not be entered or disturbed by anyone against his will, and he is entitled to special protection while traveling on land or sea. He and his official family, including even his domestic servants, are exempt from criminal and civil processes.

Diplomatic Duties. The duties of an ambassador or minister are not confined to the transmission of instructions from his government. Official communications may indeed constitute a relatively unimportant part of his business. He should cultivate friendly personal relations with the officers of the country to which he is sent, so that on proper occasions he may have easy access to them and may converse freely with them. It is, therefore, necessary for him to adapt himself to the mode of life of the official classes in the nation to which he is assigned. To do this, he must study its sensibilities, prejudices, form of government, and spirit of public affairs. When issues arise between the United States and its government, he must endeavor to adjust matters as informally and genially as possible, without resorting to official representations. Thus the real successes of diplomacy may be unknown save to the few immediately involved in them. A diplomat does his duty by discharging innumerable daily obligations that attract no attention; and he may be regarded as successful just in proportion to the tranquility which he is able to maintain in the relations of his government with the country in question.

Long practice has established a certain code for the general guidance of the diplomatic representative. He is not supposed to act as an agent for the collection of private claims against private persons and companies abroad, but he often does press the claims of American creditors against the government to which he is accredited. While theoretically he is not primarily concerned with the advancement of American commercial interests, in fact more than one ambassador has devoted himself largely to that form of enterprise. It is the duty of the diplomatic officer scrupulously to abstain from interfering in local political controversies. It is thought inadvisable for him to make public addresses except on ceremonial occasions, and even then he should be extremely cautious in referring to politics in any form.[5]

Classes of Consuls. As we have said, the United States is also represented abroad by a consular personnel. Highest in rank are the consuls-general and consuls, the former having charge of entire consular systems in particular countries or in large portions of the same, and the latter handling affairs in more limited areas. Subordinate to the above executives are the various vice-consuls and consular agents. To make sure that consular officers are performing their duties properly, traveling inspectors visit them from time to time. All consuls are appointed by the President with the approval of the Senate, subject to the rules of the merit system provided by the Foreign Service Act discussed below (p. 324).

Consular Powers and Duties. The specific powers and duties of the consular officer are enumerated in the "Consular Circular of the United States." First and foremost, he is a commercial representative. He must certify the invoices of goods intended for exportation to the United States; and to do this correctly he must have a wide knowledge of the character and value of local commodities. He must, perforce, be an expert with respect to every detail of our tariff system in order that he may cooperate with officials at home in securing a correct valuation of imports and in preventing violations of the customs law. An equally important responsibility placed upon the consul is that of reporting trade opportunities and aiding in the extension and increase of Ameri-

[5] Every American diplomatic representative abroad has a staff of assistants, varying in number according to the quantity of business in the country to which he is accredited. The first secretary of an embassy or legation should be a person of long diplomatic experience, well acquainted with the officials and the customs of the country in which he resides. Owing to his special qualifications, he assumes, as *chargé d'affaires ad interim*, all the duties of the minister in case of the absence of that official. He enjoys also the privileges and immunities of a diplomatic representative in international law. There is a tendency to attach more importance to the office of secretary of a legation, and to make that branch of the public service more attractive. There are usually two or three additional secretaries and a number of clerks and interpreters.

can business through the promotion of sales, loans, investments, and concessions.

In connection with shipping the consul has many obligations. When an American vessel touches at a foreign port, the master must deposit his register with the local consul of the United States, and before clearing he must secure the return of his papers. The consul has a limited jurisdiction over disputes between the masters, officers, and men of American ships; he hears the complaints of American seamen and gives relief to them when they are in distress. With reference to important matters intrusted to his control, he is expected to make periodical reports to the State Department, some of which are transmitted to the Department of Commerce for publication.

The consul has numerous functions of a miscellaneous character. He administers oaths, takes depositions, authenticates public documents, acknowledges deeds and other instruments, acts as a witness to marriages which occur in the consulate, and administers, under certain circumstances, the property of American citizens dying abroad.

Application of Civil Service Principles. Owing to the technical knowledge required for the discharge of diplomatic and consular duties, it has long been realized that the use of the foreign service to reward party workers was open to pointed objections. After some experiments in subjecting consular and minor diplomatic offices to civil service rules, Congress, by the Rogers Act of 1924, merged the two divisions into "the United States Foreign Service." This Service is divided into classes and provision is made for admission by examination and for promotion from the lower to the higher ranks. Members of the Service may be assigned to duty in either branch at the discretion of the President. Theoretically the power of the President and Senate to appoint consular and diplomatic officials remains intact, but in practice a large proportion of the selections is now made under the civil service rules. Already many ambassadors and ministers have been taken from the "career men," as the members of the Service are called, and precedents are set for a more extensive use of the system.

Criticisms of Practice. This reform, of course, has not escaped criticism. Few there are, it is true, who can deny the importance of having trained and experienced individuals in consular and diplomatic work, where matters of marked complexity must be handled; but there is cogency in the argument that ambassadors and ministers to the great nations should be selected from citizens of wider business and political experience and larger economic independence than are usually to be found among civil employees even of long standing. When, however, concessions are made to the critical, it cannot be denied that the Rogers

Act of 1924 marked a signal step forward. If dangers lurk in the creation of a permanent bureaucracy, the President may break the routine by selecting citizens of affairs not subjected to its discipline, particularly when international situations calling for special qualities arise. It will not be forgotten that the diplomats who got Europe into World War I and World War II were all "trained" and "seasoned"; so-called "shirt-sleeves" diplomacy could not have done much worse.

THE TREATY-MAKING POWER

Constitutional Provisions. The Constitution of the United States provides that the President, by and with the advice and consent of the Senate, two-thirds of the Senators present concurring, may make treaties, and that treaties so adopted shall stand as the law of the land. No express limitations are placed on this power, and the question has been raised whether the Government in negotiating treaties with foreign countries may deal with subjects not specifically intrusted to it by the Federal Constitution.

Jefferson's Rules. With respect to this point Jefferson laid down four rules: a treaty must concern foreign nations; the treaty-making power is intended to comprehend only those matters which are usually covered by treaty and cannot be otherwise regulated; the rights reserved to the states are excluded from the scope of the treaty-making authority, for the President and Senate ought not to be allowed to do, by way of treaty, what the whole Federal Government is forbidden to do in any way; and finally the President and Senate should not negotiate treaties on topics of legislation in which participation is given by the Constitution to the House of Representatives.

Practice Expresses a Broader View. In practice these severe limitations are not recognized. Indeed the courts have sustained a number of treaties relative to matters which are entirely outside the immediate scope of federal legislative power. For example, many years ago a Russian died in Cambridge, Massachusetts, leaving personal property, and according to the law of that commonwealth a local officer undertook to settle the affairs of the deceased. Thereupon the Russian consul for the district intervened and claimed that, by a treaty between his country and the United States, he had the right to administer the estate in question. On appeal to the courts his contention was upheld.

It is also maintained on good authority that the Federal Government can intervene in the administration of the criminal law of a state whenever the treaty rights of foreigners residing within its jurisdiction are involved. In a message bearing on this point President Benjamin Harrison once said: "It would, I believe, be entirely competent for Congress to

make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts."

Invasions of State Power Perplexing. Undoubtedly the power of the Federal Government to make treaties pertaining to matters which are clearly within the sphere of state legislation may raise perplexing questions. An excellent example of the importance of the problem was afforded many years ago by a long dispute over the exclusion of certain Japanese from the regular public schools of San Francisco, which, Japan claimed, was an infringement of treaty provisions. There is no doubt that federal authorities usually have no power whatever to interfere with the public schools of a state; the state may prescribe such conditions of admission as it sees fit, subject perhaps to the due process clause of the Fourteenth Amendment (Chapter 25). President Theodore Roosevelt, however, declared that the action of San Francisco did violate the treaty rights of the Japanese in America and by a firm stand in the case brought about a settlement.

Another phase of the subject has been examined by the Supreme Court in a case involving a treaty with Great Britain framed to prevent local hunters from indiscriminately killing birds migrating between Canada and the United States. In this instance a state, Missouri, protested against the restriction, claiming that control over wild game within its borders belonged to the state legislature and not the President and Senate in the exercise of their treaty-making power. But in a clear-cut decision the Supreme Court supported the validity of the limitation inposed by the treaty on Missouri's authority.

Summary. Hence it may be said that while there are constitutional limits on the treaty-making power, they are indefinite in nature. Beyond question, the President and Senate may conclude with foreign countries agreements touching domestic matters over which the Federal Government normally has no jurisdiction. Such agreements have been sustained by the courts. But this does not imply that the judiciary would not intervene if some vital issue of American life or property were adversely affected by a formal treaty.

THE NEGOTIATION OF TREATIES

Initial Steps. In the negotiation of treaties, as well as executive agreements and conventions (p. 330), the President has a choice of many devices. He may go abroad and take part in the operation himself as did President Wilson when he participated in the formulation of the treaty of 1919 that concluded World War I. He may commit the undertaking to the Secretary of State; he may employ an ambassador, minister, or *chargé d'affaires*, or, if he likes, he may select a commission or some

private person believed fitted for the task by skill or acquaintance with the language and customs of the country with which the transaction is to be effected.

Right of Senate to Be Consulted Directly. The extent to which the Senate under its right to advise and consent may participate in the actual drafting of treaties is by no means settled. On the one hand, it has been maintained that it is the constitutional privilege of the President to direct this phase of the work without any interference from the Senate, and that he is merely bound to submit the final document for approval or rejection. On the other hand, it is claimed that the Senate should share in treaty-making at all stages, and may even advise the President to undertake a particular negotiation.

Certainly the framers of the Constitution believed that the President should or could consult the Senate at various steps in the procedure. President Washington once stated to a Senate committee that in all such affairs even oral communications were necessary. He contended that in the course of the business there must naturally arise many issues requiring not only consideration but sometimes an extended discussion which would make written exchanges with the Senate tedious and unsatisfactory. Early in his first administration, he visited the Senate to lay before it papers relating to the preparation of a treaty with an Indian tribe. He made a brief statement and then put several queries to the members, inviting them to reply in the form of affirmation or negation. Somewhat perplexed by the situation the Senate postponed action but finally drew up answers. Although Washington later ceased to make personal visits to the Senate, he frequently directed messages to it asking its advice in connection with the exercise of his treaty-making powers.

Practice of Consultation. In later times it became a custom for the Secretary of State to consult influential Senators, especially the members of the committee on foreign relations, respecting the advisability of opening conferences with the representatives of foreign powers on particular problems. The Secretary of State frequently asks Senators what they think of various propositions, whether the subject matter is a proper one for negotiation, and whether other provisions should be incorporated.

Whatever law or custom may prescribe, it is wise for a President to be sure of senatorial consent, if possible, before he commits himself to any significant agreement with a foreign power. The constitutional rule requiring the approval of two-thirds of the Senators present for ratification nearly always makes it necessary for him to go outside his own party for support. If the opposition can make an issue out of a treaty, it will almost certainly do so. As Woodrow Wilson once re-

marked: "The President really has no voice at all in the conclusions of the Senate with reference to his diplomatic transactions. . . . His only power of compelling compliance on the part of the Senate lies in his initiative in negotiation, which affords him a chance to get the country into such scrapes, so pledged in view of the world to certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscreet threats of the Department of State."

Long after he wrote these lines, President Wilson dramatically illustrated their truth during his conflict with the Senate over the treaty of Versailles. In the negotiation of that instrument he assumed full responsibility. He did not include among his associates on the peace commission any Senators, either of his own party or the opposition. And on his return with the document, he simply called a senatorial conference and explained to it in more or less detail the various sections of the historic paper. Had he limited the settlement to mere terms of peace, his Republican foes might have hesitated to prevent the formal ending of the war, but he insisted on including in it the Covenant of the League of Nations, involving important changes in future international relations. Even if the Covenant had been acceptable in all respects, the opportunity would have been too good for his critics to neglect. At all events, his treaty went down to defeat in the Senate. Profiting by this experience, President Harding put two Senators, a Republican and a Democrat, on his delegation at the Washington arms conference of 1921–22, and President Hoover followed this example in making up the American commission for the London naval conference of 1930. Discretion in this relation is evidently the better part of valor.

Congress May Propose Treaties. For practical purposes, therefore, we may say that the Senate must often be consulted informally during the course of treaty negotiations; otherwise its approval may not be forthcoming. It sometimes seeks to originate transactions with foreign countries; and a claim to the right of sharing in such initiation is occasionally made by the House of Representatives. For example, the two chambers once adopted a resolution requesting the President to open negotiations with foreign powers with a view to making arbitration agreements providing for the peaceful settlement of international disputes. With the suggestion the President later complied. Congress even passed an act in 1902 advising the President relative to the terms it wished to see incorporated in a treaty. In reality it is unwise for him to ignore the possible action of the House of Representatives in the case of any treaty calling for an appropriation of money or legislation to put it into effect.

In this sphere, as in so many others, the spirit of cooperation, barter, and compromise is necessary. However independent in theory the several branches of the Government may be, none of them can proceed entirely without reference to the rest. Doubtless serious inconveniences arise from the fact that the President cannot make treaties freely on his own authority; still, unless we are to believe in executive infallibility, mistakes of equal or greater magnitude might be made if he did not have to ask for senatorial approval.

Senate Action on Treaties. After the terms of a treaty are all adjusted with a foreign power, the final draft is laid before the Senate, and it may be approved, amended, or rejected. Like nominations to federal offices, such agreements were once generally acted upon in secret. But in practice, the transactions were invariably reported by the newspapers, and controversies arising in this connection led in 1929 to the adoption of a Senate rule providing for open sessions unless otherwise specifically decided (p. 140). A treaty rejected by the Senate may be returned to it by the President for reconsideration.

Final Steps. When a treaty is approved by the Senate, it is sent to the President, who ordinarily completes the process by the formal exchange of ratifications with a representative of the foreign country in question. If he sees fit, however, he may refuse to take the final step, and thus prevent a duly signed and ratified treaty from going into effect. This power of stopping the procedure rests on the assumption that, through agents of the Federal Government abroad, the President has access to sources of information closed to the Senate, and may discover at a late hour reasons for halting the business.

If a treaty is substantially amended by the Senate, the President may abandon it altogether or he may induce the foreign power concerned to accept the proposed changes and bring about the concluding ceremonies of ratification. Often the Senate approves a treaty with "reservations." On some occasions such declarations really amount to material alterations in the original instrument; at other times reservations merely exclude certain American rights from the scope of the treaty or interpret its provisions with more precision or make some high-sounding announcement pleasing to American ears. In cases of this nature the President and the foreign power engaged in negotiations must decide whether the Senate's action is important enough to call for a reopening of the whole matter. When a treaty is at last completed, it is made a part of the law of the land by an official proclamation.

Abrogation of Treaties. Once consummated, how may a treaty be broken if it does not provide for its own termination? Under international law, each party to the contract may put an end to it by formally

denouncing it. What branch of the United States Government can exercise that power? History gives a confused answer. One precedent indicates that the President may do it on his own authority; another, that he may take such action with the approval of Congress in a joint resolution; and a third, that Congress may abrogate a treaty in effect by legislation. Ordinarily a treaty which has the appearance of permanence and contains no word as to its life will be modified or nullified by the substitution of a new agreement through the regular channels of negotiation. Arbitrary action in the form of outright denunciation by one party, in the absence of specific provision for unilateral termination, is generally viewed as contrary to international courtesy.

Criticism of the Two-Thirds Rule. For many years vigorous objections have been filed against the constitutional provision that requires a two-thirds vote of the Senate to ratify a treaty. It is urged that the provision enables Senators representing a minority of the people to block the approval of a treaty favored by a large majority of the nation, and hence violates the first principle of democracy. But no proposed substitute for it commands general approval in the country. The substitute most generally accepted is a constitutional amendment providing that treaties may be ratified by a simple majority in both houses of Congress. Whether the Senate could be induced to cast a two-thirds vote for such an amendment remains however highly problematical. Nor is there any guarantee that, in view of the frequent deadlocks between the House and the Senate, any such procedure would work better in practice or assure better protection for the vital interests of the nation. Here, as in many other cases of constitutional government, it is not easy to find an ideal solution of the problem that will turn out as expected and always promote the general welfare.

EXECUTIVE AGREEMENTS AND OTHER INTERNATIONAL COMMITMENTS

Historical Practices. As we have seen (Chapter 11), every contract or understanding with a foreign government does not take the form of a treaty to be ratified by the Senate. The exceptions are known as executive agreements—arrangements made and put into effect by the President alone. The Constitution confers no such power expressly upon him but he frequently employs it. In some cases he acts under laws passed by Congress authorizing him to make limited agreements with other governments in particular cases; for instance in connection with international mails, protection of health, and police activities. In other cases, he may, on his own motion, reach understandings with the heads of foreign governments on subjects far more important to

the United States than any matter ever incorporated in a treaty since the Constitution went into effect in 1789. These agreements he may present to the public or keep locked up in his personal and secret files—or, indeed, never reduce to writing for the official records of the White House or the State Department. Such at least have been the practices of some Presidents, Republican and Democratic, as demonstrated by the historical documents now available to the people.

In the summer of 1940, President Franklin D. Roosevelt made an agreement with the British Government by which the United States acquired leases on naval and air bases in British possessions in this hemisphere partly in exchange for fifty "over-age" American destroyers. After the exchange had been consummated, President Roosevelt announced the accomplished fact to Congress accompanied by a legal opinion from the Attorney General, Robert Jackson, to the effect that "the proposed arrangement may be concluded as an Executive agreement, effective without awaiting ratification."

† At the Atlantic Conference in August, 1941, President Roosevelt reached certain understandings with Winston Churchill, the British Prime Minister. One of them consisted of enumerated principles later known as the Atlantic Charter, which was soon issued to the press from the White House and later laid before Congress by the President in a special message. Two other agreements were carefully kept from the public until 1945 when the Joint Committee of Congress on the Pearl Harbor Attack unearthed them. One of these secret agreements committed the United States to the occupation of the Azores by armed forces, with British naval protection—an agreement subsequently cancelled on British initiative. By the second, and far more significant agreement, President Roosevelt undertook to parallel a British notification to Japan, and to warn the Japanese government by a stiff note against further aggressive movements in the Far East. In veiled but diplomatically plain language, the President, on August 17, 1941, directed this note to the Japanese ambassador in Washington, without issuing any public statement to the press. Not until years afterward did this transaction become known to Congress and the public.

War-Time Executive Agreements. After the start of hostilities in a war, the President, in his capacity of Commander in Chief of the armed services, faces issues of strategy which he may attempt to settle by reaching agreements with other powers covering not only military but political questions. For example, at conferences with Marshal Stalin and Prime Minister Churchill at Teheran in 1943 and Yalta in February, 1945, President Roosevelt committed the United States not only to various measures of military strategy but also to fateful territorial

and political settlements to be effected during and at the end of the war. In the official announcements respecting the transactions at these conferences nothing was said about several important political agreements that had been reached. Later, some, if not all, of the agreements came to light—gradually, and President Roosevelt was criticized in various quarters for having made them, particularly the concessions to Russia in eastern Europe and in eastern Asia; but in defense of the President it was said that he had made them—as a part of military strategy—to spare the United States and assure victory by keeping Russia at war with Germany and drawing her into the war with Japan.[6]

Exercise of Executive Powers Challenged in the Senate. Before World War II came to a close so much was known about President Roosevelt's commitments to foreign governments that many Senators, Democrats as well as Republicans, grew alarmed over what they regarded as their constitutional right to discuss and approve or reject compacts with foreign governments. During the midsummer of 1943 their opposition to methods they deemed high-handed broke out in a definite protest. The occasion for the outburst was news that Secretary Hull intended to commit the United States to a large and expensive program of United Nations relief and rehabilitation. On June 22, Senator Arthur Vandenberg wrote to Secretary Hull asking whether the draft agreement for this project was to be submitted to the Senate for ratification. The Secretary replied: "It has been decided, after consultation with the majority and minority leaders of both Houses of Congress, that United States' participation in the United Nations administration should be through an executive agreement." In other words, without any more ado, Secretary Hull was about to make a serious commitment that would constitute a heavy drain on the treasury, and did not intend to lay it before the Senate for approval.

Senate Foreign Relations Committee Challenges the Secretary of State. When the Senate Foreign Relations Committee met to consider the issue thus squarely presented by Secretary Hull, the members, Democrats and Republicans alike, unanimously agreed that the business should be promptly explored and appointed a subcommittee headed by Senator Tom Connally, chairman of the full committee, to confer with the State Department and attempt a settlement. According to newspaper reports Secretary Hull was at first indignant but he met the subcommittee and came to terms with it. As a result both parties to

[6] For a critical treatment of President Roosevelt's measures, see William C. Bullitt, *The Great Globe Itself* (1946); on the other side, Elliott Roosevelt, *As He Saw It* (1946).

the conference came to an understanding that all such war settlements and postwar plans should henceforward be made subjects of mutual consideration by the Department and the Senate committee.

The Case Stated. On the floor of the Senate on July 8, 1943, Senator Arthur Vandenberg described the "affair." Referring to Secretary Hull's project for committing the United States to the United Nations' expensive world relief program, the Senator exclaimed: "We pay the bills—that is, the people do—but we have nothing to say about what the bills shall be. I respectfully submit that government by executive decree could not aspire to much greater totalitarian authority." The issue at stake he then briefly stated: "Bluntly, Mr. President, this episode poses the question as to the extent to which Congress is to be a constitutional partner in the plans and decisions which shall liquidate this war; to what extent, on the other hand, the President and his executive administration shall settle these war and postwar problems to suit their own discretion and their own purposes." [7]

A Limited Victory for the Senate. After this episode, Secretary Hull proceeded more carefully with regard to the Senate's prerogatives in making many other international commitments. Yet, on the whole, the Senate's triumph was only partial, to say the most for it. At secret conferences at Casablanca, Quebec, Cairo, Teheran, and Yalta with heads of foreign governments, including Russia in two cases, President Roosevelt approved sweeping commitments respecting territorial, financial, and political settlements to be effected in Europe and Asia, after hostilities had ceased. When the representatives of the United States later met with agents of the other great powers—Russia and Great Britain particularly—they were able to do little more than ratify those commitments, for their hands were tied in advance. As the settlements with a few former enemies were effected step by step, President Truman and the Secretary of State submitted the treaties to the Senate for ratification; but the Senate's power to alter their primary terms amounted to nothing. The boundaries of its authority had already been set by executive actions and it could do no more than confirm or reject—that is, choose between two alternatives, both grim and dubious in prospect.

Defense of Presidential Power over Agreements. Recently many American publicists have come to the support of the proposition that the President has the power to make, on his own authority, fundamental agreements with foreign governments and incorporate in them practically any contracts, terms, or commitments which might be included

[7] *Congressional Record*, July 8, 1943, pp. 7511 ff.

in a treaty subject to senatorial approval. Those who advance this theory argue that the Senate has often delayed action on treaties indefinitely and then refused to ratify them. They also contend that the requirement of a two-thirds vote for ratification may defeat the will of the people as well as the enlightened intentions of the President in the conduct of foreign affairs. While some of these critics urge an amendment of the Constitution substituting ratification by majority vote in both houses of Congress for the approval by two-thirds of the Senate, others by making use of precedents and dicta maintain that the President already has the constitutional power to ignore the Senate, if he so decides, and accomplish by an executive agreement almost any objective which he deems fitting.

The doctrine of executive supremacy in the determining of fundamental relations with other countries was set forth in extreme form by Wallace McClure, an official of the State Department, in his book, *International Executive Agreements*, in 1941. Mr. McClure argued that the two-thirds rule for the confirmation of treaties is not only undemocratic but also a peril to the national interest. Then bringing together an array of what he regarded as evidence, he concluded that the President has authority (1) to enter into any variety of international compact which is entered into by other states of the world, if it is not in violation of the Constitution, and (2) to make an executive agreement of any kind which is not contrary to the Constitution or acts of Congress. Such an executive agreement, he insisted, is binding on the executive and law-enforcing agencies of the Government and is the equivalent of law. In sum, according to the doctrine of Mr. McClure, the President by executive agreement can do almost anything that he can do by treaty, provided Congress cooperates when necessary by enacting appropriate laws; or without such aid "where Congress possesses no constitutional authority to dissent."

Distinction between a Treaty and an Executive Agreement. On the basis of various Supreme Court dicta and executive practices, it has been asserted that the difference between treaties and executive agreements has been obliterated in fact. The assertion, however, has evoked strong protests in terms of constitutional history and international law. After making an inquiry into the subject, Joseph O'Mahoney, Democratic Senator from Wyoming, who could not be charged with mere partisan opposition to President Roosevelt, drew the distinction in 1943, as follows: "A treaty is an international agreement which states a course of policy affecting public welfare over a period, whereas an Executive agreement is an international compact or convention to carry out a

policy which has already been determined by the proper legislative authority of the Government." [8]

Problem of Maintaining the Distinction. Theoretical arguments over the difference between a treaty and an executive agreement and who is to settle the issue in each case have covered "acres of paper with oceans of ink." At bottom the real question is whether the President alone or Congress has the ultimate power to determine the foreign policy of the United States and to make commitments for carrying it into effect. Congress controls the purse strings of the Government and, if it so wills, can decide to uphold the historic distinction or to acquiesce in its obliteration by the President. The Senate alone also has decisive powers in this respect. By protests it cannot prevent the President from committing the country to executive agreements but as a branch of the legislature it can withhold its consent from money bills and other measures necessary to make such commitments effective. Undoubtedly, therefore, Congress, by virtue of its power over the appropriations and the legislation required to enforce treaties and agreements, has important rights which it cannot lawfully surrender to the President.

COOPERATION WITH INTERNATIONAL ORGANIZATIONS

Through treaties, executive agreements, and other means, the United States has established working arrangements not only with individual countries, but with special international agencies supported by groups of powers. The following are examples of organizations in this category: the Pan-American Union, the International Office of Public Health, and the Universal Postal Union.

After World War I, a general international organization, the League of Nations, was created, largely under the leadership of President Wilson, but the Senate refused to approve, without reservations, the treaty containing the Covenant of the League and thus prevented the United States from accepting membership in the association. Although the United States subsequently, through agents or officers especially designated for the purpose, established relations with the League in respect of many international activities which were nonpolitical in nature, it never joined the organization. It did, however, assume leadership in forming the new association that supplanted the League at the close of World War II.

Origins of the United Nations. After the United States became involved in the armed conflict with the Axis powers, President Roose-

[8] *Congressional Record*, May 20, 1943, p. A2691.

velt, in January, 1942, brought into being an association of the countries then at war with one or more Axis governments, for cooperation in achieving victory. To this association he gave the name "the United Nations." In the preamble of the joint declaration which they signed, it was noted that the signatories "subscribed to a common program of purposes and principles" known as the Atlantic Charter. The next year in negotiations with Russia, President Roosevelt was able to commit Marshal Stalin to some kind of permanent association of nations. In the meantime, a group of officials in the State Department, assisted by outside advisers, began work on the draft of a constitution for the new world organization.

In 1944 the project prepared by this informal group was submitted to a conference composed of representatives of the American, British, Russian, and Chinese governments held at a country seat known as Dumbarton Oaks, near Washington. From this four-power conference emerged another draft to which the name "Dumbarton Oaks Plan" was given. At a convention of United Nations delegates in San Francisco in the spring of the following year, with the Dumbarton Oaks Plan as a basis, the final document, "The Charter of the United Nations" was framed and adopted. Shortly afterward it was laid before the Senate of the United States and ratified by an overwhelming majority—in fact, with only two dissenting votes. After other governments added ratifications, the organization of the new world association came into being on October 24, 1945.

The Over-all Structure of the United Nations.[9] With a view to realizing the broad principle of collective security (Chapter 17), maintaining world order by the pacific settlement of international disputes likely to eventuate in war, and promoting the general welfare of nations, the draftsmen of the Charter provided for six principal organs to serve the United Nations: A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, a Secretariat, and an International Court of Justice. By numerous provisions, the Charter vests powers in these organs and imposes limitations on their authority and methods of procedure.

The most powerful of all is the Security Council. It consists of eleven members of the United Nations. Five members have permanent places: the United States, the United Kingdom of Great Britain and Northern Ireland, Russia, China, and France—"the Big Five." The six other members are elected for two-year terms by the General Assembly. Decisions of the council on matters of procedure are made

[9] For the foreign policy represented by the membership of the United States in the United Nations, see Chapter 17.

by an affirmative vote of seven members; but decisions on practically all substantial issues before it can be made only by a vote of seven members, including the vote of *all* the permanent members. In other words, any one of the permanent members may block any important action of the council by voting in the negative—by exercising its "veto" power.

All members of the United Nations are members of the General Assembly and are represented in it by one or more delegates, in no case by more than five delegates. In the making of decisions each member nation has one vote, but by a special arrangement two states in the Soviet federation were made members, so that Russia has a total of three votes. In addition to Great Britain, other members of the British Commonwealth of Nations have one vote each. The General Assembly has extensive powers in bringing up issues for consideration, in carrying on discussions, and in making recommendations to the Security Council.

With the organization of the United Nations are associated a number of specialized agencies designed to further its purposes. Among them the following are the most important: the Food and Agricultural Organization, the International Labor Organization (taken over in effect from the League of Nations), the United Nations Educational, Scientific, and Cultural Organization, the International Bank for Reconstruction and Development, the International Monetary Fund, and the International Trade Organization. Membership in these subsidiary organizations is, however, voluntary; that is, all members of the United Nations are not *ipso facto* members of any or all of them. But the United States has accepted membership in all of them, and through representatives takes part in their respective proceedings.

Installation of the United Nations. Late in 1945, Congress passed an act providing for the participation of the United States in the United Nations and under this act President Truman chose five American delegates, headed by the Secretary of State, James F. Byrnes, to represent the United States at the opening session of the United Nations at London in January, 1946. Early in its session, the Security Council and Assembly instituted the Secretariat and selected the Secretary General. They also appointed the fifteen judges to serve as members of the International Court of Justice. Subsequently, they established the Trusteeship Council to take charge of certain territories which had formerly been mandated territories under the League of Nations, now extinct. After long discussions the Council and Assembly fixed the permanent seat of the United Nations in the United States—finally in New York City.

Operations of the United Nations. Like the legislative bodies of any representative government, the Security Council and the Assembly have committees or commissions on matters of economy, social welfare, civil liberty and other issues, to make studies and report findings. The Council and the Assembly hold periodical open sessions for discussing issues and measures brought before them in due form and for making decisions thereon, if possible. Although the Secretary General has no substantive powers, he acts as the chief administrative agent of the United Nations, helps to prepare the agenda for the Council and Assembly, supervises the staff of officers, specialists, and other employees of the organization, and serves as its official agent in communicating with the governments of the world. Since the United Nations have no chief executive, the Council and/or the Assembly, after passing resolutions that require enforcement, must appoint agents *ad hoc* to carry them into effect or employ for that purpose an appropriate subsidiary or affiliate of the organization.

The International Court of Justice. The high court established in connection with the United Nations consists of fifteen judges appointed by the Assembly on recommendation of the Security Council. The first meeting of the Court was held at the Peace Palace at The Hague in April, 1946. The Statute of the Court provides that the member nations may recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes respecting certain matters. The matters concern (1) the interpretation of a treaty, (2) any question of international law, (3) the existence of any fact which if established would constitute a breach of an international obligation, and (4) the nature and extent of the reparation to be made for the breach of an international obligation. Included also within its jurisdiction are questions referred to the Court by parties not formally bound to submit all such disputes to that tribunal. The Court may give advisory opinions on legal issues at the request of bodies specifically authorized to present them, under the Charter of the United Nations.

When in August, 1946, the Senate of the United States by resolution accepted the jurisdiction of the International Court of Justice it imposed qualifications on the acceptance. By a special provision, the Charter declared that the United Nations were not authorized to intervene in matters essentially within the jurisdiction of any state nor required to submit such matters to settlement under the Charter. What are matters essentially domestic? Who is to decide whether a particular issue is essentially domestic? These questions, with others, came up in the Senate debate over accepting the compulsory juris-

diction of the International Court and the Senate incorporated certain restrictions in its resolution. Among other things it excluded from submission to the Court "disputes with regard to matters which are essentially within the jurisdiction of the United States of America," and it added emphatically, "as determined by the United States of America." This proviso incurred opposition in the Senate but, with the vigorous support of Senator Tom Connally, chairman of the foreign relations committee, it was carried.

Relations of the United States to the United Nations Organization. In the conduct of affairs in and with the United Nations, the President is the highest official representative of the United States; and, under the United Nations Participation Act of 1945, he reports annually on the work and achievements of that organization. Ordinarily he acts through one or more of the delegates of the United States to the Security Council and the Assembly and through officers in the Department of State, particularly the Secretary. A special unit in the Department has responsibilities for formulating and coordinating all policies and actions pertaining to relations with the United Nations and other specialized and regional organizations of nations.

It is evident then that the direction of the foreign affairs of the United States which are carried on in and with organizations of nations stands on a different footing from the management of affairs conducted through the regular diplomatic channels with one or more sovereign governments. It is likewise clear that the two spheres of action may overlap in some respects and conflict in other respects. What actions properly belong in the organizational sphere? What actions should fall in the sphere of direct negotiations with individual foreign governments or groups of such governments? How is consistency or coordination to be maintained? These are challenging questions of our time which involve both methods and policies (Chapter 17).

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CHAPTER 17

American Foreign Policies

The Sanction for Foreign Policy. The foreign policies of the United States which deserve serious consideration in relation to public affairs derive their sanction from the authoritative agents of the Government who formulated them. Such agents include the President, his Secretary of State and official representatives stationed in foreign countries, the Senate, and the House of Representatives. When the meaning and effect of a treaty are called in question by an action at law, the Supreme Court may interpret policies. Sometimes Government officers differ among themselves as to what is or should be the foreign policy of the United States, so that it may be impossible at a given moment to discover the Government's precise position on matters of policy. Such was the general situation, for example, during President Wilson's second term when he was advocating American membership in the League of Nations and his opponents in the Senate were preparing to defeat it, at all events without reservations which he would not accept. Further to obscure the subject of foreign policy, a mere examination of official declarations and statements issued to the press may reveal only a part of the evidence in the case. There may exist in hidden archives secret agreements or understandings between the President and foreign governments far more significant for the interests of the country than any commitment disclosed to the public.

Classification of Policies. When vague pronouncements of officials on international peace, good will among nations, and friendly intercourse with all peoples are put aside and attention is given to foreign policies that have been or are being applied in practice, more or less, the following stand out in perspective: (1) neutrality in foreign wars and hemispheric independence; (2) imperialist expansion; (3) internationalism and collective security; and (4) the containment of Russian power. Although these policies followed a time sequence in part, they also overlapped in part. In any case they are four great concepts which enter into thinking about and discussing the foreign policies of the United States.

NEUTRALITY IN FOREIGN WARS AND HEMISPHERIC INDEPENDENCE

Washington's Formulation. During his second administration, President Washington framed one part of the pattern for American foreign policy. Shortly after the outbreak of a great war in Europe in 1793, he issued a proclamation declaring that the United States would pursue "a conduct friendly and impartial toward the belligerent Powers" and urged American citizens to avoid all acts and proceedings which might contravene this neutral policy. His primary care in the conduct of foreign relations was to protect the security and independence of the young Republic in its continental home, and to avoid entanglement in the war that began to sweep Europe during his first administration. Shortly before his retirement to private life, Washington summed up in his Farewell Address to his fellow citizens the policy which he thought they should follow. "Europe," he said, "has a set of primary interests which have to us none, or a very remote, relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. . . . It is our true policy to steer clear of permanent alliances with any portion of the foreign world."

Washington did not, however, put a ban on temporary understandings or commitments for limited purposes, if made with a view to strengthening the position of the United States in the western hemisphere. Neither did his early successors—Adams, Jefferson, Madison, Monroe, and John Quincy Adams. They, too, were ready at any moment to negotiate with England or France or to welcome and parallel any actions that either of these countries might take, if the interests of the United States in the New World were thus to be protected or advanced.

Washington's Policy Not Exclusiveness. The policy announced by Washington and long followed in practice did not mean insulating the United States from the rest of the world. On the contrary, it expressly accepted grave responsibilities for the United States in upholding international law and comity, in promoting commerce and friendship with all nations, and in maintaining close contacts with them through regular diplomatic and consular channels. It meant neutrality in the midst of their wars which did not jeopardize American interests in this hemisphere, and watchfulness respecting all European conflicts which were likely to be projected into the western world and imperil American security here. Otherwise there was to be abstention from

what Jefferson called "the eternal wars" of Europe and from European alliances and diplomatic contests in that ancient home of ceaseless rivalries.

The Monroe Doctrine Declared (1823). In line with Washington's policy and widening its range was the celebrated doctrine enunciated by President James Monroe in a message to Congress in 1823. This doctrine originated in a threat of Spain, with the aid of certain despotic powers of Europe, to gain dominion over her former American colonies which had become independent republics, and to reëstablish her monopoly over their trade. This was a double thrust at the United States. The restoration of the monarchical principle in Latin America would have been a challenge to republican institutions in both Americas. A renewed commercial monopoly centering in Spain would have cut into the lucrative business which citizens of the United States had built up with the former Spanish colonies.

Alarmed by the threat from Europe, President Monroe, in his message to Congress of December 2, 1823, dwelt upon the impending dangers, adding these significant words: "We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as a manifestation of an unfriendly disposition toward the United States."

In the same message there appeared another significant declaration, called forth by a decree of the Russian Tsar claiming the northwest shore of North America. With regard to this contention President Monroe said that "the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers."

While warning Old World powers against intervention in the affairs of this hemisphere, President Monroe reiterated the doctrine that the United States would in turn refrain from interfering in European wars: "In the wars of the European powers in matters

relating to themselves we have never taken any part; nor does it comport with our policy to do so."

Continuity in Neutrality and Hemispheric Independence. For more than a century, the Government of the United States, no matter what political party was in power, adhered to the policy of maintaining neutrality in European wars and insisting upon the independence of the New World, except for the dominions already held by Old World powers in this hemisphere. This is not to say that American citizens or the Government showed indifference to international wars in Europe or the struggle of its peoples, against oppressors, for independence and self-government. But the United States abstained from armed intervention in such wars and popular movements. At the same time it expected Old World powers to refrain from waging wars of conquest against independent republics in the New World.

Neutrality and Non-intervention Called "Isolationism." A sharp break with the Washington-Monroe policy came in 1917 when, during the second administration of President Wilson, the United States entered World War I against Germany and Austria. At the close of this war, it seemed highly probable that the United States would join the League of Nations as designed at Paris and henceforward cooperate permanently with the nations of the world in efforts to enforce universal peace. But many American citizens opposed joining the League, without material reservations, and, despite the urgings of President Wilson, defeated his wishes. These opponents, mainly Republicans, appealed to the doctrines of Washington and Monroe and objected to membership in the League as involving "permanent entanglement" in the vicissitudes of European politics and wars. For this they were called "isolationists" by their critics.

Isolationism on the Eve of World War II. As developed between 1919 and 1940, isolationism connoted certain definite principles: non-entanglement in the political controversies of Asia and Europe; non-intervention in the wars of those continents, neutrality and defense for the United States through measures appropriate to those purposes; and the freedom of the United States to determine its own foreign policy for all occasions. The theory of non-intervention on which it rested was, in effect, that the United States could not prevent wars and revolutionary upheavals in Europe or Asia or maintain permanent world peace by participation in the League of Nations or in the embittered controversies of those continents. This theory found expression in the refusal of the United States to share in the negotiations of the League; and it took the form of law in acts of Congress designed

to preserve American neutrality in case a new war arose among European or Asiatic powers.

During the administrations of Presidents Harding, Coolidge, and Hoover and, until 1941, of Franklin D. Roosevelt the policy of avoiding membership in the League and commitments in respect of political controversies abroad was followed with a high degree of consistency. In 1935 Congress sought to implement the policy by the Neutrality Act which was subsequently renewed and amended. This legislation as amended provided in substance that, when the President found a war in progress abroad and so declared, the sale of munitions and the lending of money to belligerents by American citizens must stop; that citizens could only travel and trade in war zones at their own risk; and that American ships must stay out of war zones in order to escape the kind of "shooting" incidents which had helped to involve the United States in World War I.

Republicans and Democrats in Relation to Isolationism. Although Republicans assumed leadership in rejecting American membership in the League of Nations, at least without amendments in the plan,[1] they were soon joined by the Democrats in upholding "isolationism." After its crushing defeat in the presidential campaign of 1920, the Democratic party gradually abandoned its position on the League as a national issue. While approving the League in its platform of 1924, it proposed to take the question out of partisan politics by submitting to a kind of popular referendum the proposition: Shall the United States become a member of the League "upon such reservations or amendments" as the President and the Senate might agree to accept? In its platform of 1928, the Democratic party made no reference to the League of Nations and endorsed a central principle of isolationism: "freedom from entangling political alliances with foreign nations." In his campaign for the Democratic nomination, in 1932, Franklin D. Roosevelt publicly declared that he did not favor American participation in the League of Nations, and in his campaign for election he indicated by silence on the League that he stood by his declaration against it.[2] Democratic Congresses passed the successive neutrality acts. President Roosevelt signed them and publicly approved their underlying purpose, although he objected to the clauses which put a mandatory embargo on the sale of munitions to belligerents. For instance, in signing the bill of 1935, he stated: "The policy of the Government is definitely committed to the maintenance of peace and the

[1] C. A. Beard, *American Foreign Policy in the Making 1932–1940*, pp. 11–14.
[2] Beard, *op. cit.*, pp. 72 ff.

avoidance of any entanglements which would lead us into conflict." [3] He also stood by this principle when he called upon Congress in September, 1939, to repeal the embargo on munitions.[4] And he repeatedly affirmed it in his campaign for reëlection in 1940.[5]

Isolationism and International Intercourse. It was often charged by critics that isolationists were "ostriches" who hid their heads in the sand and wanted to turn the United States into a "hermit nation" indifferent to the fortunes and misfortunes of other countries. The charge is not fully supported by the historical record. It is true that for a brief time after the League of Nations was established, the Government of the United States was curt in dealing with it; but this attitude was soon abandoned and as the years passed the United States played an increasing part in the business of the League that involved economic, social, and humanitarian interests—avoiding only "political entanglements." Under President Hoover such contacts with the League were numerous and important. President Roosevelt continued this line of policy and under his leadership Congress in 1934 accepted, for the United States, membership in the International Labor Organization, an independent association established by the League.

Isolationism did not preclude other efforts on the part of the United States to promote international understandings in the interest of good will among nations. For example, the Harding administration, called isolationist, initiated the Washington Conference of 1921–1922, and entered into covenants with several great powers for the reduction of naval armaments and the peaceful adjustment of disputes in the Pacific. During President Coolidge's administration the United States took part in forming, and signed, the Kellogg-Briand Pact of 1928 by which the great nations of the earth solemnly bound themselves to renounce war as an instrument of national policy and settle by "pacific means" all disputes "of whatever origin they may be." Under the auspices of President Hoover and later of President Roosevelt, American representatives participated in the international conferences held at Geneva in efforts to halt the armament race then threatening the peace of the world. Furthermore, during all those years, the United States maintained its corps of diplomatic and consular agents throughout the world and exchanged views with foreign governments on matters relevant to world affairs and menaces to world peace. In practice, therefore, isolationism was not national "insulationism."

[3] *Ibid.*, pp. 165 ff
[4] *Ibid.*, pp. 235–237.
[5] *Ibid.*, pp. 312–323.

IMPERIALIST EXPANSION

The Old Idea of Continental Limitations. Although by a series of bold strokes, opening with the Louisiana purchase in 1803 and closing with the Alaska purchase in 1867, the dominion of the United States was extended to the Pacific Ocean, it seemed to be generally assumed that the United States would never follow the example of other great powers in acquiring and ruling distant territories inhabited by peoples alien in race and traditions. But as the nineteenth century drew to a close, a new spirit appeared in various quarters. The continental domain had been settled, and nearly all the good free land had been taken up by farmers. Then voices were heard declaring that America had "grown up," had "come of age," must acquire trading posts overseas, must enlarge its foreign trade, and must assume "world responsibilities" as a "great power."

Reasons Offered to Justify Change in Policy. Why should the United States set out on this course so contrary to its traditions? Numerous answers were given by those who sponsored the new policy. It was claimed that the nation had "matured" and was under obligation to help backward peoples, establish order among them, civilize and Christianize them, and extend to them "the blessings of liberty and self-government." Great Britain, France, Holland, Belgium, and Germany were following imperial principles, it was said, and the United States should do likewise. Another clamant answer was "manifest destiny": the United States had expanded and was fated to keep on expanding. Chief among the answers deemed "practical" was the contention that American industry and agriculture must have more markets in foreign places or sink down in the scale of prosperity; that such markets could be won by annexing territories, colonies, and trading posts overseas.

Navy Officers Urge Expansion. The idea of colonial expansion for the United States was not entirely new, to be sure. American naval officers cruising around in distant waters had early advocated seizing islands and other places and using them as naval bases and points for the support of trade. They had pressed their views on the State Department and found some sympathy there. Yet the great majority of the American people, if they knew anything about such plans, gave little heed to them until near the end of the nineteenth century. But the idea of expansion was quietly circulating among citizens of prominence and influence. They urged Congress to prepare for the next steps by building a bigger navy; and in the eighties the New Navy was started, without much flourish or advertisement as to aims.

In this movement leadership was later taken by three young politicians, Theodore Roosevelt, Henry Cabot Lodge, and Albert J. Beveridge; by a naval officer, Alfred Thayer Mahan; and by an army officer, Leonard Wood. Politicians were often alarmed by it and yet were carried along on the tide of agitations raised by the advocates of a bigger navy and imperial expansion.

Senator Beveridge States the Case. Finally an opportunity to apply the expansionist doctrine came with the war against Spain "for the liberation of Cuba." Then the young advocates of the new course took advantage of the occasion to expound their larger plan. One of them, Beveridge, set it forth in the following language in 1898 to a group of Boston businessmen: "American factories are making more than the American people can use, American soil is producing more than they can consume. Fate has written our policy for us; the trade of the world must and shall be ours. And we will get it as our mother [England] has told us how. We will establish trading-posts through the world as distributing-points for American products. We will cover the ocean with our merchant marine. We will build a navy to the measure of our greatness. Great colonies governing themselves, flying our flag and trading with us, will grow about our posts of trade. Our institutions will follow our flag on the wings of our commerce. And American law, American order, American civilization, and the American flag will plant themselves on shores hitherto bloody and benighted, but by those agencies of God henceforth to be made beautiful and bright." [6]

Overseas Possessions Acquired. Under the impetus of the new ideas and interests, the United States embarked on the policy of "expansion" called by its critics "imperialism." To Tutuila (Samoa), acquired previously, were added in 1898 Hawaii; in 1898–1903 Puerto Rico, the Philippine Islands, Guam, and a protectorate over Cuba; in 1904 control over the Panama Canal Zone; and in 1917 the Virgin Islands, formerly owned by Denmark. To such operations there was a large articulate opposition in the United States all along; but it was at first overborne in elections. According to appearances, the United States had set out permanently on its new course as a world power, competing with other world powers for territories and trade. Although imperialism was criticized profusely by members of all parties, especially by Democrats, and the supremacy of economic motives in imperialism was denied by Republican leaders, there was in fact a strong growth

[6] Address in Boston, April 27, 1898. C. Bowers, *Beveridge and the Progressive Era*, p. 69. Mr. Bowers states that this flight of eloquence was cheered by "hard-headed businessmen" who had been a bit cynical over the sentimental project of freeing Cuba.

of "dollar diplomacy," as President William H. Taft called the new policy.

Open Door in the Far East. In connection with expansion across the Pacific Ocean, indeed shortly after the invasion of the Philippines, the Government of the United States enunciated a special doctrine of policy for the Orient, known as the "open door." This doctrine, old in origins, was given formal expression by John Hay, Secretary of State, at the end of the nineteenth century, in a note to the major powers then operating in China. The note suggested a solution of their conflicts over trade and concessions in China which would bring about permanent peace and safety in China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard the principle of equal and impartial trade with all parts of the Chinese empire. Though the doctrine had a fine ring, the great European powers really ignored it and in fact as Tyler Dennett, historian of far eastern policy, has said, it was a form of American "intervention" in China, for it insisted that Americans should have equal trading rights as against certain countries that had or were trying to get commercial monopolies in China.

Charles E. Hughes, Secretary of State under President Harding, deemed the doctrine so important that he had it incorporated in the Nine Power Pact of 1922 which bound the United States, Japan, Great Britain, France, and five other countries to "respect the sovereignty, the independence, and the territorial and administrative integrity of China," and refrain from seeking special privileges in China which would abridge the rights of other states.

Despite the solemnity of the treaty, Japan flouted it in 1931 by seizing Manchukuo and later by practically annexing other sections of China. When in 1938 the United States informed Japan that she was violating American rights set forth in the treaty, the Japanese government replied that it did not intend to exclude Americans from Chinese business but hinted broadly that changes in the Orient had made the open door doctrine obsolete for all practical purposes. Although Great Britain and France also addressed notes to Japan on the subject, they were unwilling to give the United States any effective diplomatic or military support in driving the Japanese out of China. Nor indeed was the Government of the United States then prepared to risk a war with Japan for such a purpose.

An Imperialist Turn to the Monroe Doctrine. As originally stated by President Monroe, the doctrine which bears his name expressed

respect for the sister republics in the Americas and contained no hint that the United States was entitled to interfere in their ordinary internal affairs. But President Theodore Roosevelt gave it a new twist. He held that disturbances in Latin America "may finally require intervention by some civilized nation" and that, since European powers are forbidden by the Monroe Doctrine to take a hand, the United States "cannot ignore its duty." Either under the sanction of this line of reasoning, or without formal justification, the United States sent armed forces into various Latin-American countries in the Caribbean region, particularly Nicaragua, Haiti, and Santo Domingo, under the administrations of Presidents Theodore Roosevelt, Wilson, Harding, and Coolidge, during the years from 1905 to 1929.[7]

CHANGING CHARACTER OF IMPERIALISM IN THE FAR EAST

Doubts About the Benefits of Imperialist Expansion. For many years after the United States had embarked on the policy of expansion, the national elections were generally taken to indicate that the American people approved the policy of "civilizing and Christianizing" backward peoples and entering into full naval and economic competition with the great imperial powers of Europe. No trend in American politics seemed to be more permanent. But a reaction set in. There had been from the beginning a strong opposition to this departure from long accepted tradition, especially on the part of Democrats and Progressives, and it was augmented by increasing discontent with results.

High hopes of securing ever larger markets for American industry and agriculture were dashed by bitter experience with imperialism. Instead of outlets for goods, competition was developed and intensified, especially in the Philippines. While some American merchants, shipowners, and manufacturers found a profitable business in those islands, American farmers cried out against the competition of Philippine cocoanut oil, tobacco, sugar, and other products, with domestic animal fats, tobacco, and sugar. Members of the American Federation of Labor objected to the flood of laborers from the insular possessions who entered the United States to work at low wages in competition with native labor. Many Americans of "Nordic" stock looked with alarm upon the immigration of "our little brown brothers" and the frequent race riots which flared up in various parts of the country as a result of this influx. "Imperialism" had not brought the promised "prosperity." It had brought serious troubles.

[7] For the use of American armed forces in Latin American and other countries, see C. A. Beard, *The Idea of National Interest*, pp. [illegible] ff. and pp. 470 ff.

Independence of the Philippines. In these circumstances Congress, which had once cheered "the new policy" to the echo, began to reverse itself in some particulars. During President Hoover's administration Congress passed, over his veto, a bill for granting independence to the Philippines. When the Filipinos rejected the terms of the tender, Congress passed a *modified* bill with the approval of Franklin D. Roosevelt, in March, 1934. This measure authorized the Filipinos to call a convention and draw up a republican constitution of their own. It then stipulated that at the expiration of ten years from the inauguration of their new government, the sovereignty of the United States shall be withdrawn. Despite the terrible damages wrought in the islands during World War II, the Republic of the Philippines was inaugurated on July 4, 1946. Its independence, however, was limited in important respects. By special legislation, which the Filipinos had to accept, Congress assured to American citizens economic privileges in the islands and, to sustain American strength in the Orient, obtained military, naval, and air bases in the Philippines. Thus, while Filipinos assumed responsibility for their own government, American economic interests were protected and small contingents of American armed forces remained in possession of a few areas.

Re-affirmation of the Open Door Policy. The movement for Philippine independence, largely under Democratic auspices, was not accompanied by abandonment of the open door policy in China. When, for example, Japan in 1931 flouted that policy by seizing a Chinese province, Manchukuo, on a pretext of self-defense, Henry L. Stimson, Secretary of State under President Hoover, wanted to invoke the aid of Great Britain and France and bring coercion to bear on Japan in the form of a commercial boycott or economic sanctions of some kind. The governments of Great Britain and France, however, refused to accept Secretary Stimson's program. President Hoover also rejected it in an official paper read to his cabinet. He declared that economic sanctions meant war; that American interests in China did not warrant war over the Manchukuo incident; and that he would not advocate taking the country into war or sacrificing American lives in any such expedition.

Rebuffed by President Hoover, Secretary Stimson, in January, 1933, sought the aid of the President-elect, Governor Franklin D. Roosevelt, and at a long conference with him secured a commitment to "the Stimson doctrine" of coercion by economic sanctions.[8] During the early years of his administration, however, President Roosevelt took no drastic actions against Japan on account of her aggressions in

[8] Henry L. Stimson and McGeorge Bundy, *On Active Service*, p. 288 ff.

China, even though Japan opened an undeclared war on China in 1937. After Japanese aggressions in China became more extensive and brutal and Japan became associated with the Axis powers in Europe, President Roosevelt appointed Mr. Stimson to the post of Secretary of War in his cabinet—in June, 1940—and soon began to take a firmer stand in diplomatic negotiations with the Japanese government. In the summer of 1941, the President imposed stringent economic embargoes on Japanese trade and finance, with a view to bringing Japan to book on American terms.

The Roosevelt-Hull Memorandum of November 26, 1941. As the negotiations between the United States and Japan dragged on through the year 1941, the Japanese government, on November 20, presented a proposal for a kind of truce, or modus vivendi, as the basis of a possible settlement in the far east. At first President Roosevelt and his Secretary of State, Cordell Hull, worked at a counter project calculated to effect a compromise of some sort; but on November 26 they abandoned this effort and Secretary Hull handed to the Japanese agents in Washington a memorandum that in effect reaffirmed the open door policy in its suggested terms for a specific adjustment of the dispute. In addition to setting forth several general principles in the interest of international comity, the memorandum described specific steps to be taken by Japan. Among other things it stated: "The Government of Japan will withdraw all military, naval, air, and police forces from China and from Indochina," and "the Government of the United States and the Government of Japan will not support—militarily, politically, economically—any government or regime in China other than the National Government of China with capital temporarily at Chungking."

This program for Japan was, indeed, broader and more drastic in its terms than any demands that had been presented to Japan by the United States in the name of the open door at any previous time. The Japanese government treated it as an "ultimatum," rejected it, and on December 7, 1941, began war on the United States. Shortly after the Japanese attack on that day, the State Department made public the memorandum and thus laid before the country the principles which the Government of the United States had declared should control a settlement in the Orient.

Prospects of Imperialism in the Far East. It was ardently hoped by American opponents of imperialism that the establishment of the United Nations and the renunciation of aggressive policies under the Charter would put an end to it for the United States. But these hopes were not realized at the close of World War II. Defeated Japan

was forced to surrender her gains in China; but, with the approval of President Roosevelt, Russia was given a strategic position in Manchuria substantially equal to that from which Japan had been ousted by arms, and Russia closed the door of Manchuria to American enterprise. Chinese communist armies, pressing southward through China in 1948, extended the sphere of potential Russian influence over still vaster areas. Viewing these developments with deep concern, some Americans began to look upon the American-occupied main islands of Japan as a possible first line of defense against Russian aspirations in the Orient—as an outpost to be retained indefinitely under American control. Also, the Japanese mandated islands in the Far Pacific, taken by American armed forces during the war, were placed under American authority as trustee for the United Nations—for practical purposes as outright owner. Thus the prospects of a settlement in the Far East under the aegis of the United Nations which would close the era of imperialism for the United States grew dim.

REACTION AGAINST IMPERIALISM IN THE AMERICAS

The "Good Neighbor" Policy. Early in his first administration, President Franklin D. Roosevelt not only repudiated imperialist interpretations of the Monroe Doctrine but also inaugurated a policy of cooperation and amity with Latin America, to which he gave the name of "good neighbor." Soon he began to put it into effect. When in the autumn of 1933 a revolutionary upheaval in Cuba reached an acute stage, he did not send American troops to "restore order," as he was entitled to do under the Platt Amendment of 1901, forced on Cuba in 1903, authorizing the United States to intervene in cases of disorder. Instead of dispatching American armed forces to Cuba, he called the diplomatic representatives of Latin-American nations into conference and explained to them that it was the policy of the United States to keep them fully informed about the affair and that the United States had no desire to intervene in Cuba.

Subsequently President Roosevelt made three specific commitments bearing upon practices formerly pursued under the Monroe Doctrine. First of all, he declared that the definite policy of the United States "from now on" is one opposed to armed intervention. Second, he took the position that the maintenance of law and orderly processes of government in this hemisphere is primarily the concern of each individual nation within its own borders. Third, he asserted that when orderly processes of government break down so as to affect other nations in the western hemisphere, it becomes the concern of the whole region "in which we are all neighbors."

Actions Under the Good Neighbor Policy. The general policy so announced early in his first administration, President Roosevelt pursued with a high degree of consistency in conducting Latin-American affairs. Before he died in 1945, the essential principles of his policy had been worked out and incorporated in formal understandings. These were often summarized by Sumner Welles who, as Under Secretary of State during most of those years, had general charge of Latin-American relations.

Among the principles four are of primary significance. First, every American republic renounces all actions which directly or indirectly involve intervention in the "sovereign concerns of its neighbors." Second, all American republics are bound by common agreements registered in multilateral pacts to settle all inter-American controversies by peaceful means. Third, all American republics are bound to consult together whenever they or any one of them is threatened by menaces arising in other parts of the world, and to devise means of common defense. Fourth, the American republics are under obligation to cooperate "in all practicable ways in order to advance the well-being of the peoples of the Americas." [9]

After the United States became involved in World War II, the good neighbor policy bore fruit in terms of cooperation in war and hemispheric defense. Before the end of the year 1942 all Latin-American republics, except Chile and Argentina, took the side of the United Nations against the Axis powers, by breaking off relations with those powers and in some cases by declaring war. The following year Chile severed relations with the Axis and in 1944 Argentina joined the procession, at least nominally. In the meantime, the United States poured billions of dollars into Latin-American countries for the purchase of supplies and the promotion of social and economic welfare.

In 1945, before the close of the war, at an inter-American conference in Mexico, representatives of twenty American republics summarized and reaffirmed the principles of the good neighbor policy in a memorable document known as the Act of Chapultepec. At the same time they agreed upon measures designed to secure the territorial integrity and independence of the republics against aggression from every quarter. At another inter-American conference, held at Rio de Janeiro in 1947, plans for cooperation in the defense of this hemisphere were worked out in detail, reduced to writing, and published to the world in the name of inter-American solidarity. Again, at a special conference held in Bogota in 1948, attended by the Secretary of State, George C. Marshall, the principle of cooperation was elaborated and confirmed.

[9] Sumner Welles, *Where Are We Heading?* pp. 182 ff.

In all these efforts to establish closer relations among the American republics, however, one issue, always in the background or foreground, made difficulties for the negotiators. There was general agreement that the republics of the western hemisphere should remain independent and should be defended against attacks by any European or Asiatic power; but there were sharp differences of opinion over what was to constitute an attack. Frankly speaking, in powerful circles in Latin America it was believed that, among the aims of the United States, was the design to secure the full cooperation of all Latin-American countries in any war in which it might become involved, thus perhaps facilitating the spread of old world quarrels throughout the new world.

INTERNATIONALISM AND COLLECTIVE SECURITY

Origins. A search for the beginnings of the idea that nations could and should by a permanent organization, union, or federation maintain peace and security through collective action carries us far back in history—at least to the federations and leagues of Greek antiquity. Coming to modern times we encounter, near the end of the seventeenth century, William Penn's project for the peace of Europe and the settlement of international disputes by arbitration. During the next century more comprehensive and ambitious plans were put forth by Abbé de St. Pierre in France, Jeremy Bentham in England, and Immanuel Kant in Germany. By the opening of the twentieth century, the idea of upholding peace by collective measures had become so widely accepted that practical politicians gave heed to it.

Collective Security in Principle. The argument for collective security rests upon certain facts and postulates: Modern means of communication and intercourse have brought the nations of the earth close together and put an end to the former geographical isolation of the United States; permanent peace among nations is both desirable and possible; peace is indivisible; the United States cannot stand apart and maintain its neutrality in a warring world; to attain peace and security the United States must join and support a general organization of nations empowered to deal with incipient threats of war, designate breakers of the peace, and suppress disturbers of the peace, by armed force if necessary. According to this interpretation of human history there is no alternative, except ruin for mankind. Such in principle are the fundamentals of collective security. Those who accept the theory, however, differ widely among themselves over the form and nature of the world organization necessary to achieve the ideal thus envisaged.

The League of Nations (1919). Soon after the outbreak of World

War I in 1914, British statesmen and publicists began to speak and write on the need of establishing at the end of hostilities a system of international security for the purpose of preventing another general conflict among nations. Even before the United States entered the war, President Wilson and his advisers started to think about ways of preserving peace and subsequently they worked out the primary principles of an international organization. In a statement of war aims announced early in 1918, known as the Fourteen Points, the President included as the final point the declaration: "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." Concrete form was given to this declaration in the Covenant of the League of Nations as finally drafted at Paris and incorporated in the Treaty of Versailles (1919). But the Senate of the United States refused to ratify the treaty without drastic reservations; President Wilson rejected the reservations; and the United States did not join the League.

Breakdown of the League. What would have happened if the United States had joined the League belongs to the realm of conjecture. At all events after its establishment, Great Britain, France, and Italy pursued divergent courses and the sessions of the Council and Assembly were marked by disputes over power and advantages in European and world affairs. As President Roosevelt declared in 1933, in opposing American membership at that time: "Political profit, personal prestige, national aggrandizement attended the birth of the League of Nations, and handicapped it from its infancy." Instead of cooperating, either in the League or outside, in suppressing the growing menace of Hitler in Germany after 1933, Great Britain and France pulled at cross purposes until it was too late, until Hitler was about to attack Poland in September, 1939.[10] At its first supreme test of unity and will, the League of Nations collapsed.

President Roosevelt's Attitude Toward Collective Security (1932–1941). Although as candidate for Vice-President in 1920, Mr. Roosevelt had advocated membership in the League of Nations, he later abandoned this view and in 1932 he declared that he did not favor American participation in the League. Nor at any time before the United States became involved in World War II did he publicly and definitely reverse the position taken in 1932. He did, it is true, in his memorable "quarantine" speech at Chicago in October, 1937, call upon the peace-loving nations to make concerted efforts to stop the march of aggressors, meaning Germany, Italy, and Japan; but he then offered no

[10] C. A. Beard, *American Foreign Policy in the Making 1932–1940*, Chapters, I, II, and III.

program of action for achieving collective security; and from 1937 to 1941 he refused to make any commitments which bound him or the United States to take part in any organization of nations formed for the purpose of achieving collective security.[11]

At the Atlantic Conference in August, 1941, the British Prime Minister, Winston Churchill, proposed to President Roosevelt that they include in their public announcement, soon to be known as the Atlantic Charter, a declaration in favor of an "effective international organization" to maintain security for all states and peoples at the end of the war—in which the United States was not then a belligerent. The President rejected it, saying "that he did not feel that he could agree to this because of the suspicion and opposition that such a statement on his part would create in the United States." He added, moreover, that he was not in favor of establishing anything like a new Assembly of the League until after a transition period "during which an international police force composed of the United States and Great Britain had had *an opportunity of functioning.*" *The President also stated that during* the transition period "no such organizations as the Council or Assembly of the League could undertake the powers and prerogatives with which they had been entrusted during the existence of the League of Nations."[12] Nor did the President believe that the small nations could play any effective part in achieving a general settlement after the war. The phrase finally agreed upon for incorporation in the Atlantic Charter was "a wider and permanent system of general security"—not an "international organization."

Development of President Roosevelt's Views. Not until after the United States became involved in World War II did President Roosevelt or the Secretary of State definitely declare that the United States would pursue a policy of permanent cooperation with other nations in an organization formed for the purpose of maintaining security. Soon after that event, however, intimations of such a policy were officially announced. There were hints of it in the agreement signed by many governments, known as the United Nations, in January, 1942. In the Moscow Declaration issued on November 1, 1943, the governments of Russia, Great Britain, the United States, and China pledged themselves to cooperation "pending . . . the inauguration of a system of general security." No specific reference to a permanent collective security organization appeared in the Declaration signed at Teheran on December

[11] C. A. Beard, *op. cit.*, pp. 64 ff.

[12] Joint Committee of Congress, *Investigation of the Pearl Harbor Attack*, Part 4, pp. 1784 ff. The secret documents on the Atlantic Conference were not made public until December, 1945, when the Congressional Committee on Pearl Harbor brought them out of the State Department and spread them on its record.

1, 1943, by Roosevelt, Stalin, and Churchill; but in a "Statement on Iran" it was announced that the governments of the United States, Russia, and Great Britain "count upon the participation of Iran, together with all other peace-loving nations, in the establishment of international peace, security, and prosperity after the war, in accordance with the principles of the Atlantic Charter, to which all four governments have continued to subscribe." Subsequently, under President Roosevelt's direction, positive steps were taken in the drafting of concrete plans for a new world organization—steps which culminated in the formation of the United Nations and the acceptance of membership by the United States (see Chapter 16).

COMMITMENTS IN FOREIGN POLICY UNDER THE CHARTER OF THE UNITED NATIONS

In what ways and to what extent are American foreign policies limited and controlled by the Charter of the United Nations? A careful study of the document reveals that it grants to member countries a high degree of independence of action both under its general terms and in its specific provisions regarding such matters as self-defense.

Status of the United States in the World Organization. The Charter declares (Article 2, section 2): "The organization is based on the principle of the sovereign equality of all its Members." Section 7 of the same Article reads: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the jurisdiction of any State. . . ." Although the Charter contains no clause which expressly permits the withdrawal of members from the organization, it is definitely understood that the United States or any other country may leave it at any time and assume the position of independence which it previously occupied. Since the United States is a permanent member of the Security Council and can block by a veto any fundamental action by the Council vitally affecting interests of the United States, it follows that the United States is in a position to decide whether it will accept or reject any policy or policies proposed by the United Nations.

The Monroe Doctrine and the Charter. Article 52, section 1 states that nothing in the Charter "precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, providing that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." At a hearing before the Senate foreign relations committee on July 15, 1945, when the ratification of the Charter was under con-

sideration, John Foster Dulles, one of the chief advisers of the American delegation at the San Francisco conference where the Charter was drafted, testified: "It is my view—and so I expressed it to the United States Delegation—that there is nothing whatsoever in this Charter that impairs the Monroe Doctrine as a Doctrine which has been proclaimed, sustained, and recognized by the world as a doctrine of self-defense. . . . As a result of the Mexico Conference and the declaration of Chapultepec . . . the doctrine of self-defense was enlarged to include the doctrine of collective self-defense and . . . the view was taken that an attack upon any of the republics of this hemisphere was an attack upon all of them." This is a correct statement of the case: the Monroe Doctrine, so construed, stands intact as authorizing any kind of hemispheric organization in self-defense.

National Defense and Armaments Under the Charter. The Security Council of the United Nations may propose plans for the reduction and regulation of armaments but the United States, as a member of that Council, has the right to approve or reject such plans. It thus retains its independence with regard to its own armaments. The United Nations may organize an international armed force to maintain peace. It has not yet taken this step but when or if it does the United States has the right to determine whether it will furnish any contingent for that armed force and what disposition may be made of its contingent in common military actions. Under the Charter, the United States may establish and maintain armed forces of any size and nature and it has full control over all measures of self-defense. As Mr. Dulles said before the Senate committee in 1945: "There is nothing whatever in the Charter which impairs a nation's right of self-defense. The prohibition against the use of force is a prohibition against the use of force for purposes inconsistent with the purposes of the Charter. Among the purposes of the Charter is security."

Charter Provisions for Hearing International Disputes. Under Article 2, section 3, all members of the United Nations are bound to settle their international disputes by peaceful means. That covenant is definite. In this respect the powers of the General Assembly and the Security Council are extensive. The Assembly may call the attention of the Council to "situations likely to endanger international peace and security." This provision is evidently broad enough to cover any threat to peace. That is not all. Section 1 of Article 35 authorizes any member of the United Nations to bring to the attention of the Council or Assembly any controversy or situation "which might lead to international friction or give rise to a dispute" likely to endanger international peace and security. Even a State which is not

a member may make such an appeal relative to a contest to which it is a party, if it accepts in advance the obligations of a peaceful settlement as stipulated in the Charter. Furthermore, the Charter contains ample provisions for the discussion of such controversies by the Assembly and the Council. With regard, then, to notice of disputes and difficulties likely to endanger peace, no matter what their nature may be, the Charter is comprehensive in its range.

Powers of the Council to Act on Disputes. The Security Council may call upon parties engaged in a controversy to make a pacific settlement; it may at any stage in a dispute recommend appropriate measures for a peaceful adjustment; it may investigate, on application or on its own motion, any disturbance or situation likely to lead to international friction or give rise to a conflict; and it may decide when extraordinary measures shall be adopted to prevent a breach of the peace or to restore international peace and security, if broken. Among the measures of coercion not involving the use of armed force are complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

If such efforts prove ineffective, the Council may employ measures in the nature of military action, such as blockades and other demonstrations of armed force. When and if an international armed body is established in accordance with Articles 43–50 of the Charter, the Security Council may, as a last resort, authorize its military staff committee to use force in maintaining or restoring peace. Pending action by the Council, members of the United Nations may exercise the right of self-defense against attacks. At all stages in the development of the Council's program for dealing with a peace-breaker, however, each of five powers—the United States, Great Britain, Soviet Russia, France, and China—may bring into play its right of veto and stop any proposed collective action which it disapproves.

THE CONTAINMENT OF RUSSIAN POWER

On March 12, 1947, more than a year after the United Nations was inaugurated, President Truman, in a message to Congress, proposed a course of American policy which, in its commitments, was at variance with the collective procedures contemplated by the United Nations Charter and the older doctrines of President Washington and President Monroe. The immediate purpose of the message was an appeal to Congress for authorizations and appropriations in aid of Greece, then threatened by guerrilla warfare on its northern border, and Turkey, then in fear of Russian demands for special favors. President Truman

stated at the outset: "The foreign policy and the national security of this country are involved"; and it was with continuous reference to American interests that the ensuing discussions in Congress proceeded until the decision to support the President's program was reached.

Exposition of the New Policy. In his message President Truman advanced gradually to the substance of the business and the definition of the foreign policy involved in it. After devoting six paragraphs to the sufferings and sad plight of "industrious and peace-loving" Greeks, he declared that the very existence of their state was threatened by several thousand armed men led by communists in the northern part of the country, and that their government and army were unable to cope with the situation. Then he said that the United States must supply the needed assistance, adding that there was no other country to which Greece could turn for "the necessary support." As to Turkey, the President asserted that the maintenance of its integrity "is essential to the preservation of order in the Middle East." Not until near the end of his message, after calling upon Congress to provide assistance for the two countries, did the President indicate explicitly that military aid was also to be rendered. At this point he asked Congress to authorize the detail of civilian and military personnel to Greece and Turkey, with provision for "the instruction and training of selected Greek and Turkish personnel."

To put the case in short form: the United States was to furnish money, goods, military supplies, and military counsel to two foreign governments threatened by communist armed forces presumably under the inspiration, if not the direction, of Russia. In terms of policy, President Truman proposed, not a resort to the principle of collective responsibility for world peace, but to unilateral action on the part of the United States to block the advance of Russian power toward the Mediterranean.

Relation to the United Nations Commitment. But what of the United Nations Charter? It had been ratified by the Senate of the United States, made a part of the law of the land, and, with negligible dissent, accepted by the American people as a promise of durable peace. While ratification was pending, the people had been repeatedly assured by sponsors of the new world organization that it was to deal effectively with all threats to world peace and security. For example, Edward Stettinius, former Secretary of State and chairman of the American delegation at San Francisco where the document had been framed, in a report to President Truman on the Charter had said: "The Security Council is that agency of the Organization which is charged with the principal responsibility and empowered to take the

necessary action for the maintenance of international peace and security. . . . It is to be in continuous session . . . and is prepared to take appropriate remedial measures when the earliest symptoms of irregularity become apparent. The responsibility of the Security Council is two-fold: primarily to induce, by every conceivable method, peaceful solutions of international disagreements; and secondly, as a last resort, to apply force, even to the employment of military measures, in order to maintain peace or to suppress any breach of the peace."

President Truman took note of the United Nations at two points in his message to Congress on March 12, 1947. First, he said: "We have considered how the United Nations might assist in this crisis. But the situation is an urgent one requiring immediate action, and the United Nations and its related organizations are not in a position to extend help of the kind that is required." Second, the President argued, the objectives of the United Nations could not be attained unless the United States helped "free peoples" to defend themselves against aggressive movements by totalitarian regimes. "It must be the policy of the United States," he maintained, "to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures. . . . We cannot allow changes in the status quo in violation of the Charter of the United Nations by such methods as coercion, or by any such subterfuges as political infiltration. In helping free and independent nations to maintain their freedom the United States will be giving effect to the principles of the Charter of the United Nations."

Congressional Action on the Doctrine. The issues raised by President Truman's message were thoroughly discussed in the press, in public meetings, and in Congress. Although he had urged Congress to act immediately on his proposal, at least by the end of March, both houses devoted several weeks to debates on it and did not reach a decision until near the middle of May. In various respects the proceedings were unique in the history of the making of American foreign policies. Not only had the President of the United States proposed a new policy but Congress had been urged to adopt it at once by giving effect to it in legislation. Representatives and Senators took ample time to expound, debate, and weigh the policy and its implications in terms of action to be authorized by law. No significant phase of the policy was neglected by Representatives and Senators in their speeches and colloquies on the floor; and then both houses, by overwhelming majorities, carried a bill to implement President Truman's program as a foreign policy for the United States.

Reference to the United Nations. In the act of Congress, approved May 22, 1947, providing for assistance to Greece and Turkey, ges-

tures were made to the United Nations, for many objections were voiced in the House and the Senate against "by-passing" that world organization in the resort to unilateral action. In the preamble of the act it was declared that such assistance would contribute to the freedom and independence of all members of the United Nations in conformity with the principles and purposes of the Charter. In the body of the act it was further stated that the assistance would be withdrawn if the Security Council or the General Assembly found the continuance of the assistance "unnecessary or undesirable," the United States in this case to waive its right of veto. But such concessions did not satisfy ardent advocates of keeping the aid to Greece and Turkey wholly within the province of the United Nations.

The Marshall Plan—Origins. Akin to the Truman foreign policy in substance, though not exactly in form, was a plan for the rehabilitation of Europe, with extensive financial assistance from the United States, proposed by the Secretary of State, George C. Marshall, on June 5, 1947. As first projected, the plan invited the cooperation of Russia and her satellites but, after they refused to participate, it became in reality a phase of the Truman program for using American resources and power to block or "contain" Soviet Russia in her struggle for dominance in Europe and Asia. Secretary Marshall's proposal was originally made in no formal communication to Congress or the country but as if casually in the course of an address at Harvard University on the occasion of his receiving an honorary degree from that institution of learning.

In this address, Secretary Marshall said in effect that world peace and security could not be secured unless "normal economic health" was restored; and that the United States could not proceed much further in the way of assistance until the countries of Europe reached some agreement on their needs and on the actions they would take to improve their own production of wealth and general stability. Acting on the hint or semblance of a promise, agents of several European governments soon held a conference (with Russia and her satellites abstaining) and drew up a four-year program of work for themselves. They also listed their requirements in the way of financial assistance, which amounted to $22,440,000,000 for the period, nearly all of it to come from the United States in the form of goods, credits, and money.

The Marshall Program Before Congress. Late in 1947, President Truman laid the European Recovery Program (ERP) before a special session of Congress called to act upon it, and Secretary Marshall presented relevant documents, accompanied by a draft of a bill to be

enacted by Congress. In this program, the amount of money requested by the cooperating European countries was materially reduced. In his drafted bill Secretary Marshall asked Congress to authorize the appropriation of amounts not to exceed $17,000,000,000, including $6,800,000,000 at once to finance the ERP through June 30, 1949.

In an outline of ERP, which followed the drafted bill, the State Department expounded its terms and expected consequences. In a digest of the report made by the cooperating European countries, the outline showed that they rested their hopes for recovery during the four-year period on three general assumptions: (1) "favorable world conditions," (2) a restoration of the flow of cereals from eastern Europe to prewar levels by 1951 and of timber to seventy-five per cent of prewar levels at the same time; and (3) proper marketing conditions in the American continents which will allow European and other goods from abroad to be sold there in increasing quantities.

Congressional Action on the Marshall Plan. After a long discussion, in the course of which the policy and probable consequences of the new plan were thoroughly canvassed, Congress made many drastic alterations in the original project and adopted a modified and qualified program—the Economic Cooperation Act, approved by the President in April, 1948. The new law broadened the Marshall Plan to include the authorization of appropriations in aid of the International Children's Emergency Fund, Greece and Turkey, and China as well as the cooperating European nations, in an amount slightly exceeding $6,000,000,000. Congress refused, however, to commit the United States to a five-year program of appropriations under the Act, as indeed it was bound to do under the terms of the Constitution; it indicated that the law might stand in force until June 30, 1952, but reserved its authority to terminate the powers conferred in the Act by a concurrent resolution at any time before that date. Instead of entrusting the administration of the law to the Department of State, Congress set up an independent agency under the management of an administrator appointed by the President with the approval of the Senate. The central control system in Washington, with a large staff of officials and employees, was supplemented by the establishment of a separate economic mission in each of the cooperating countries of Europe. Provisions were made for cooperation with the State Department in matters of foreign policy but real control over the allocation and use of funds was vested in the Economic Cooperation Administration, subject to provisos and limitations bewildering in complexity and variety.

The Foreign Policy Reflected in the Economic Cooperation Act. Although the Marshall Plan as presented at Harvard University in 1947 offered Russia, as well as other powers, the privilege of sharing its economic benefits, the refusal of Russia and her satellites to accept the offer resulted in giving a new direction to it. Judging by the debates in Congress on the project and the declared purposes profusely set forth in the Economic Cooperation Act, the policy to be enforced under the law is substantially identical with the policy adopted in the case of assistance to Greece and Turkey in 1947, namely the containment of Russian expansion by cooperation with other nations opposed to it. It is true that the Act authorizes the President to request the cooperation of the United Nations in carrying out the purposes of the law; but it also stipulates that the Administrator in control of the funds shall not confer upon any international or foreign organization or agency any of his authority "to decide the method of furnishing assistance . . . to any participating country or the amount thereof." In short, the United States alone is to determine and direct the use of the money appropriated to effectuate the foreign policy incorporated in the statute.

The North Atlantic Treaty. The Truman policy of Russian containment has also found expression in the proposed North Atlantic Treaty, the terms of which were released to the press in March, 1949. This document would bind the United States and other nations bordering on the North Atlantic Ocean to build up their defenses in common and to consider an attack on any one or more of their number as an attack on all the rest, to be met by such action as each may deem necessary, including the use of armed force. Though Russia is not mentioned by name, the circumstances under which it was drafted make it plain that its object is to halt her expansion.

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CHAPTER 18

The War Power

War Power Subject to the Constitution. The war powers of the United States Government, though immense, are held within certain limits by the terms of the Constitution. Under the guise of war necessity, for instance, Congress cannot authorize the Army and Navy to commandeer the lands of private American citizens, without compensation, for use as military and naval posts. Nor can the President, to avoid the possibility of a change in the administration during a war, call off the regularly scheduled presidential elections required by the Constitution. During the Civil War, when the outlook was dark, President Lincoln insisted that the presidential election of 1864 be held in due form and prepared to cooperate, in case of his own defeat, with his successor. Even military tribunals in deciding cases under military law are not wholly emancipated from the power of the Supreme Court to inquire into the constitutionality of their proceedings.

Views of the Framers Relative to War. The provisions of the Constitution relative to war and preparations for war were written by men who were neither pacifists nor militarists. Judging by the document they drafted and by contemporary comment, they sought to reduce the chances of war, domestic and foreign; but they had no ardent expectations that war would disappear from the earth. They believed that a military establishment was necessary to a stable government and yet they did not look upon war as a good in itself, or upon military valor as the supreme virtue of men. Insight into the realistic attitude of the framers toward war is provided by several numbers of *The Federalist*, a collection of essays written in support of the adoption of the Constitution:

> Safety against dangers from foreign arms and influence and against domestic violence seems to be the first "among the many objects to which a wise and free people find it necessary to direct their attention" (*The Federalist*, No. 3).

War is among the persistent and constant features of human history. "To judge from the history of mankind, we shall be compelled to conclude

that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquillity, is to calculate upon the weaker springs of the human character" (No. 34). "It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it" (No. 3). "Seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body" (No. 28).

Given these fundamentals, preparations for war and the fighting of wars must be fully provided for in the Constitution.

Yet military establishments are heavy burdens on the productive activities of the nation and are dangerous to civil liberties and republican or popular government. "The liberties of Rome proved the final victim to her military triumphs; and . . . the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution." (No. 41).

In the exercise of this circumspection and precaution, provisions for military establishments and war must be accompanied by carefully devised checks against militarism, that is, against the triumph of military men over civilians, and the transformation of war power into an end in itself.

Large War Powers Conferred on the Government. With due reference to such basic propositions, the Constitution vests large war powers in Congress and the President. It gives Congress unlimited power to raise and support armies, to provide and maintain a navy, and to declare war. How far Congress can go in regulating the stationing and movement of the military, naval, and air forces is an unsettled question; but by the Neutrality Act of November, 1939, it forbade American naval vessels to enter the combat zones of the war then raging in Europe. The Constitution vests in the President the high power of commanding the armed forces in peace and war, and the militia when called into the actual service of the United States. Though not without limits, this power, as tested by experience in the Civil War and the two world wars of the twentieth century is so wide-reaching that none of the commentators on the Constitution has been able to describe the limits with precision. The Constitution twice refers to "defense" as an objective of the Government, yet it leaves Congress free to declare any kind of war, defensive or aggressive, without regard to purposes. In creating armed forces and waging war, the Government may draw upon all the human and material resources of the country,

not arbitrarily, but according to the due processes of law prescribed by the Constitution.

A War Power of Congress Challenged. The provision of the Constitution which vests in Congress alone the power to declare war, it is claimed by many military critics, is both obsolete and dangerous. Despotic executives in foreign countries do not have to call upon any popular legislature for authority to make war and thus in advance declare their intentions to their chosen enemies. On the contrary they can strike suddenly and secretly, catching their enemies unaware in the weakest spots, as good strategy demands. In its report made public in August, 1945, the Army Pearl Harbor Board dwelt upon the handicap imposed on President Roosevelt, in dealing with Japan, on account of the power of the Japanese war lords to make a swift and secret attack on the United States. According to a theory now widely held, the best "defense" against a would-be aggressor is a powerful surprise offensive, designed to give the "defenders" the initial advantage. To apply this conception of defense to American conditions, it would be necessary to deprive Congress of its power to declare war after open debate, and the President would have to receive authority to make war at his discretion. Whatever might be the strategic advantages of such a move, it would involve serious political risks. There would be nothing to prevent him from starting unnecessary conflicts according to his moods. To assume that he would never do this is to ignore centuries of experience with fallible one-man rule.

Civilian Supremacy in Respect of War Power. Aware that in times past liberty had often been destroyed by military dictatorships, the framers of the Constitution sought to establish firmly the supremacy of the civil branches of the Government over the military arm. This supremacy is asserted in numerous provisions. The determination of foreign policy, affecting peace and war is vested mainly in the President and Senate. The power to declare war is assigned to Congress. Likewise the power to raise and support armies is intrusted entirely to it, with an express condition that "no appropriation of money to that use shall be for a longer term than two years." To Congress is granted by the Constitution the authority to make rules for the government and regulation of the land and naval forces, to arrange for organizing, arming, and disciplining the militia of the states, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. In a word, the size of the military and naval forces, their structure, and their use in war are to be determined by Congress. Moreover, a civil officer, the President, is made Commander in Chief of the Army and Navy in war and peace.

OBJECTIVES OF PREPAREDNESS

The Idea of "Adequate Defense." It has long been customary for the President, Congress, and military and naval authorities to speak of preparations for war as solely in the interest of "adequate defense." The saying has acquired, indeed, the force of an accepted slogan. The statement settles nothing. Adequate to what? Adequate to overcome any enemy or combination of enemies which might conceivably attack the United States or against which Congress might declare war in the name of defense? Defense of what? The continental domain of the United States, occupied lands overseas, American merchant vessels throughout the seven seas, American citizens everywhere in the world threatened in their persons and property, one of the friendly United Nations attacked by another? Answers to these and similar questions, it is perfectly evident, depend upon the kind of foreign policy the United States intends to pursue. So definitions of "adequacy" and "defense" must always await determinations in respect of foreign policies which, despite heroic efforts at settlement, remain in a state of flux and reflux (Chapter 17).

Defense Under the Terms of the United Nations Charter. To illustrate, the defense requirements of the United States have been but slightly, if at all, clarified through its participation in the United Nations. Under the terms of the Charter which created that international body, the member nations bound themselves to organize and employ a joint armed force, if necessary, to deal with disturbers of the peace, a force to which they were individually to supply contingents. Yet so far the Security Council and the Assembly of the United Nations have failed to agree upon the nature and size of the armed forces to be thus established. Hence there is no "international police unit" available for the defense of any power that may be attacked.

Moreover, the Charter itself recognizes the right of every country to defend itself and to determine its defensive needs independently, in terms of armed forces and general preparedness. In an illuminating article published in the New York *Times*, May 12, 1947, Hanson Baldwin, eminent military critic on that newspaper, presented a startling study of independent actions under that escape clause. He showed that forty nations were spending more money for war purposes and had more men under arms than in the tense years prior to World War II. Of these, the United States was, owing to the higher costs of American preparations, the "biggest spender" of all.

Preparedness and War Not an Exact Science. Rendering the task of calculating requirements for defense highly complicated, neither

preparedness nor war is an exact science in terms of men, money, and machines. No doubt military preparations must bear some material relation to natural configurations: oceans, rivers, seas, and mountain barriers, but technology continually introduces new devices which may quickly render obsolete the old devices and reckonings. Inventions as yet merely imagined or in process of development may send to the scrap heap machines and equipment for which costly provisions are being made in the military budget for the coming year. Great distances, wide oceans, high mountain ranges still affect wars of defense or offense but new implements of transport and war reduce their significance.

It is not only research and invention that have introduced incalculables into the "science of defense." Modern wars are conflicts of civilizations as well as of men and military engines. Railways, industries, agriculture, finance newspapers, religion, propaganda, and even art are all involved in armed combats. Strength at the front depends upon organizing and productive abilities behind the lines, upon capacities of endurance among the people, and upon ideas circulating among them. The conduct of a civil government may undermine, even inadvertently, the strength of its military forces. In turn the methods of the military director may destroy the faith and economy of those upon whom he depends for support. The great care which belligerents in modern wars take in formulating moral "aims" to encourage their friends and disconcert their foes is proof that thought, no less than machines, figures in the conduct of warfare, especially in this age of literacy and institutionalized education.

CURRENT MEASURES OF PREPAREDNESS

The Security Act of 1947. After years of discussion in Congress and outside, the President and Congress, in 1947, took official notice of the fact that calculations for preparedness and war are uncertain at best and that continuous control over all human and material resources of the country is needed to cover all eventualities. In that year, on recommendation from President Truman, Congress passed the National Security Act, approved July 26. The Act declares that it is the intention of Congress to effect an integration of policies and procedures relative to national security and to coordinate and unify the armed services under a single directorate.

The Overhead Organization. From near the end of the eighteenth century to 1947, the administration of the Army and the Navy had been divided between two agencies—the War Department and the Navy Department—each headed by a Secretary, with a seat in the cabinet, and both under the direction of the President as Chief Executive and

as Commander in Chief. The act of 1947 put an end to that historical division of administrative authority. It created a new institution—the National Military Establishment. At the head of this Establishment is the Secretary of Defense, a civilian, appointed by the President with the consent of the Senate and given a seat in the cabinet. He is a kind of "super" Secretary and is the principal assistant to the President in all matters relative to national security. It is also his duty to develop general policies for, and exercise general direction over, all branches of the armed services.

Components of the Military Establishment. Under the Secretary of Defense are three distinct departments, each headed by its own secretary: the Department of the Army, the Department of the Navy, and the Department of the Air Force (composed of the former Army Air Forces). Under the Secretary of Defense, but directly linked to the President are the Joint Staff embracing officers detailed from the three branches of the armed service, the Joint Chiefs of Staff (Army, Navy, and Air), and a Chief of Staff to the Commander in Chief. Under the Secretary of Defense also are the War Council, with which the three Secretaries and three Chiefs of Staff are affiliated, the Munitions Board, and the Board of Research and Development.

Within the Military Establishment, immediately associated with the President, are three special agencies: (1) the National Security Council composed of the Secretary of State, the Secretaries of Defense, Army, Navy, and Air Force, the Chairman of the National Security Resources Board, and other persons designated by the President; (2) the National Security Resources Board, which is composed of heads of the several federal departments or their representatives; and (3) the Central Intelligence Agency under a Director. The Security Council has charge of coordinating foreign policy with military preparedness and war plans. The Resources Board, with representatives from other federal agencies especially concerned with economic functions, is charged with the duty of preparing, and having ready for war, when and if it comes, the plans necessary for mobilizing the human and material resources of the nation.

Spirit and Purpose of the Military Establishment Act. The enactment of the law for the reorganization of the administration of military affairs in 1947 was the result of conflicts and discussions extending over a long period of time. Judging by numerous official documents and by the debates in Congress over the subject three primary objectives entered into creation of the Establishment. The first objective was to insure the close and constant cooperation between the President and

the Secretary of State, as shapers of foreign policies and directors of foreign affairs, on the one side, and the heads of the armed forces responsible for waging war, on the other side. The second objective was to coordinate, not merge, the branches of the armed services for combined operations on land, on the seas, and in the air. The third objective was to guarantee continuity in the maintenance of plans and organizations for the mobilization of the human and material resources of the nation for war purposes and thus to prevent in the future the kind of dismantling that took place at the close of World War I and, to a less extent, World War II.

Passage of a law contemplating such concentration of power in a single establishment evoked, in the democratic manner, vigorous defense and no less vigorous protests. On behalf of the proposal, it was said, the United States is now committed to a policy of power politics on a world-wide scale, necessarily involving the risk of transoceanic wars, and this world policy, if it is to be effective in negotiations with foreign governments, must be supported by armed forces commensurate with the realization of its objectives. Against the proposal critics urged that it was a revolutionary departure from historic and constitutional traditions, that it would permit the supremacy of military interests over civil interests, and that it meant, in short, the militarization of the United States in the style customary among the warlike powers of Europe. During its initial year of operation, the Military Establishment failed to achieve the concentration of power that the debaters had praised or condemned. Old rivalries among the armed services continued, though some gains were made in limited sectors, such as purchasing and air transport. As 1948 closed, charges of friction, waste, and conservatism within the Establishment gave rise to numerous suggestions for changes intended to bring about closer integration.

Stand-By Facilities. One of the prime tasks of the Military Establishment is that of maintaining the large reserves of equipment inherited from World War II. This duty includes keeping watch on some 2,000 warships laid up by the Navy, which have been protected against corrosion internally by special air-drying apparatus and externally by the spraying of plastic webbing on otherwise exposed deck equipment. The Army has supplies of planes, guns, and other items, "canned" to prevent rapid deterioration in storage by being placed in large sealed containers or covered with plastic webbing. Retained by the Government and a matter of interest to the planners of the Military Establishment are numerous war plants which, together with quantities of machine tools, have been purposely kept off war surplus sales lists and

given a reserve status. Under legislation passed by Congress in 1948, the President is obligated to see that the country's synthetic rubber works are kept in running order.

Atomic Weapons. The most spectacular of all the efforts to preserve a war potential have been those relating to atomic weapons. An Atomic Energy Commission, consisting of five persons appointed by the President and Senate, was vested with stupendous powers in this field. It was authorized to establish strict control over the extraction of minerals, their conversion into fissionable materials, and the transformation of the latter into atomic weapons. When it deems such action necessary, the Commission may seize and condemn the atomic materials it requires. Much of the processing of such substances into atomic weapons must be carried on in government-owned plants, and the Commission may place a careful cloak of secrecy about its labors. Enough has been released to the press to make plain that the Commission has continued to develop atomic weapons and is experimenting with them at an atoll in the Pacific.

Other Means of Maintaining the Industrial Potential for War. By systematic buying, "stockpiles" of strategic war materials not otherwise available at all or readily in the United States have been accumulated. Lists have been prepared of industries easily convertible into munitions works and kept up to date by constant revision. Arrangements have been made for wartime allocation of materials and orders to these industries and for price, labor, and transport control. Hundreds of millions have been poured into public, private, and university laboratories for research in every kind of destructive and defensive weapon—from directed missiles to huge cargo-carrying submarines. The construction of underground and bombproof war plants has been studied, and mines and caves have been explored in this connection. Under the Selective Service Act of 1948, the President can order manufacturers to deliver goods needed for national security, and if they fail to give such requests the priority he demands, the Government may seize their plants. That statute also gives him power to ration steel, to meet the requirements of the armed forces for that material. In short, while the universal mobilization of human power has not been continued, plans have been laid for keeping a skeleton war production system intact and for putting it in full blast for war on the shortest possible notice.

The Armed Forces. The Selective Service Act of 1948 makes men between the ages of nineteen and twenty-six liable for twenty-one months of compulsory duty in the full-time federal armed forces, unless they receive exemptions or deferments for physical or other reasons,

or take advantage of special offers altering that assignment. By this means, or through the enlistment of men and women volunteers, or both, the Army, the Navy (including the Marine Corps), and the Air Forces seek to maintain their authorized strengths.

In addition to those serving on a full-time basis, there is the National Guard, composed of men who ordinarily devote only part time to training. The National Guard is recruited by the states and its officers are state appointed. Although each state retains a certain control over its own contingent, all contingents are organized, equipped, and disciplined according to national standards and are subject to the supervision of the War Department. At any time the Guard may be summoned to national service, and it is therefore to be considered as an integral part of the federal military system. Guardsmen may be used by state authorities to suppress local disturbances but "the state militia" has lost most of its former independence and is now subordinated to federal military requirements.

On a part-time or inactive basis are the reserves for the Army, Navy, and Air Forces, composed of volunteers and such draftees as may be automatically assigned to them upon completion of their regular full-time duty under the Selective Service Act of 1948. Reservists are, under that statute, subject to call for full-time duty whenever Congress finds that step advisable in order to achieve a better balance in the strength of the armed forces, during peace or war.

Training of Officers. To supply officers for the Army a Military Academy is maintained at West Point, while a Naval Academy at Annapolis performs a similar service for the Navy. For advanced work the Government conducts the Naval War College at Newport and the Army War College at Washington, D. C., which are supplemented by other specialized institutions.

In choosing men for training at West Point and Annapolis, provisions are made for avoiding favoritism to any section of the country or any single class. Civilian control over practically the whole selective process makes it impossible for military or naval authorities to confine the choice of recruits to their own circles, and thus prevents the erection of a hereditary caste. Many admissions to both places are assigned by quotas among the states, congressional districts, and territories, and in each of these instances the selections are determined by a Senator, Representative, or territorial delegate. For his guidance, he may prescribe a competitive examination or he may use his own discretion. Other appointments are made by the President and the Vice-President. Then come special arrangements. Under legislative enactment, a number of places are allotted to the sons of veterans who were killed

in action or died of wounds or diseases contracted in war. To encourage students taking military training elsewhere, certain openings are made at West Point for "honor graduates" from colleges and other institutions offering military courses under Army officers and for men selected from the enlisted ranks of the Regular Army and the National Guard.

West Point and Annapolis have been supplemented in recent years by officer training programs conducted in schools, colleges, and universities throughout the country. Those who qualify under such projects receive commissions in the reserves and are subject to call in an emergency.

NATIONAL CONTROLS DURING HOSTILITIES

At best definitions of war powers conferred upon the Government by the Constitution and descriptions of war preparations in time of peace give a pale impression of war powers in practice and war as actuality. Nor, indeed, does any particular war necessarily bring into being the exercise of all the war powers vested in the Government or all the utilities and practices of war that are potential in the Government and the nation upon which it depends for support. Every war has its own particular features—of enemy forces, terrain, waters, implements, requirements, and issues. What has been done in any past war or all past wars together is not a perfect indication of what may or will be done in any future war, with its unique forces, terrain, water, implements, requirements, and issues. But experience is one guide to what may be expected when the United States passes from peacetime preparations to a war footing and to war as actuality.

Increase in the Legislative Powers of Congress. Congress possesses constitutional authority to raise and support armies, to provide and maintain a navy, and to enact such laws as are necessary and proper for achieving these ends. As the demands of the armed forces for supplies and equipment increase during a war, Congress may establish correspondingly broader controls over the national economy, to keep goods moving to scenes of action. If the war achieves virtually global proportions, Congress may thus find itself in a position to regulate almost all phases of the national life.

Increase in the Power of the President. Even more marked is the increase in the power over life, liberty, property, and opinion which the President commands in time of war. This increase comes from specific sources. First come the provisions of the Constitution which vest in him the executive power and make him Commander in Chief, thus endowing him in wartime with all the indefinite and mighty authority of such a supreme official. A second source is special war

legislation enacted by Congress, assigning to the President as Chief Executive and as head of the armed forces huge grants of money, in lump sums to be spent at his discretion, and conferring upon him indefinite powers over life, liberty, and property to be exercised at his discretion.

The President's war power as Commander in Chief is nowhere defined in the Constitution and, being immeasurable, is the dark continent of American politics. This power he possesses in his own official right. A hint of its scope may be given by citing two illustrations. During the Civil War President Lincoln, by mere proclamation under his war power, declared free all the slaves in all places then under arms against the Government of the United States. In time of peace, neither the President nor Congress had possessed any right to interfere with slavery in any state where it lawfully existed. The second illustration is provided by the action of Franklin D. Roosevelt during World War II when, in the name of the United States, he authorized official participation in international military tribunals set up for the purpose of trying and punishing German and Japanese "war criminals."

Enlargement of the President's Powers by Legislation. Theoretically, under the Constitution, Congress cannot delegate legislative power to the President at any time; in practice, it does on a vast scale in time of war. The history of World War II provides abundant illustrations in two general acts and many special acts, too numerous to be listed here in detail.

By the first War Powers Act, signed December 18, 1941, Congress enlarged the President's powers in four general fields. It authorized him, subject to some limitations, to create, abolish, transfer, and reconstruct federal administrative agencies in the interest of war efficiency. It forbade trading with the enemy and made provision for taking over the property owned by Axis powers and their nationals within the jurisdiction of the United States, to be administered by an alien property custodian under the President's supervision. By abolishing competitive bidding on war contracts, Congress gave him a free hand in expediting the manufacture of war supplies. Finally, it authorized the establishment of censorship over cables, the radio, the press, and mails, managed by a censor under presidential direction.

The power thus granted was increased by the second War Powers Act, signed March 27, 1942. Among other things, the Act authorized the establishment of a system of strict control over the allocation of materials and supplies to the Army and the Navy and to the cobelligerents of the United States in the war against one or more of the Axis powers (under the Lend-Lease Act of March 11, 1941). The President

was empowered to allocate such materials or facilities "in such manner," "upon such conditions," and to the extent "he shall deem necessary or appropriate in the public interest and to promote the national defense." This authority he was to exercise whenever he was satisfied that the fulfillment of requirements for defense would "result in a shortage in the supply of any material or of any facilities for defense or for private account or for export."

In brief, all materials and facilities for the manufacture and transport of war supplies were made, in effect, subject to regulation by the President at his discretion. Inasmuch as war operations on a huge scale were likely to upset the currency system and money market, the act also authorized Federal Reserve Banks to buy Treasury obligations up to the amount of $5,000,000,000 for the purpose of preventing dangerous disturbances in public finances.

Direction of War Operations. In time of war the President, with such technical advice as he chooses to accept, may personally map out the strategy of the war—designate the places, lines, and objectives of combatant actions, and formulate the foreign policies appropriate to support his strategic decisions. For instance, in respect of World War II, President Roosevelt decided that the main emphasis should first be put on the war in Europe, that war in the Pacific was to be treated as secondary, that the continent of Europe was to be invaded as soon as possible, and that the war was to be waged until the enemies were forced to an "unconditional surrender." With reference to the treatment to be accorded to the enemies after the war, President Roosevelt fixed that policy also; by agreements with Great Britain and Russia during the war, he committed the United States to numerous terms relative to territorial and other settlements which were to go into effect after the war had been won.

Human Power for Combat Duty. It is now settled practice that in a war of any magnitude, the Government of the United States will resort to the conscription of able-bodied men for combat service. Conscription acts fix certain age limits for the men inducted, make certain exemptions, provide for the classification of men according to age, the number and nature of their dependents, their occupations in relation to war needs, and other considerations besides physical fitness for military duty. Forces raised under selective service legislation may be supplemented by volunteers, including corps of women, such as the women's military and naval units enrolled for World War II.

Command over War Production Industries. As matters now stand, the power of the Government to force the producing of war materials and to commandeer the output in wartime is limited only by the

physical and human resources of the country. The Government may compel peacetime industries to convert their plants into war industries, to build new plants, and turn out war materials in amounts and according to specifications fixed by official authorities. In order to expedite the process during World War II, the Government made loans to industrial corporations and financed the extension of old plants and the construction of new plants. Besides ordering and stimulating war production, the Government may take possession of and distribute all materials directly or indirectly useful to war production and war purposes—controlling every branch of industry, agriculture, business, and transportation. In case of strikes, delays, or neglect of duty the Government may seize and operate industrial plants directly, subject to safeguards for the rights of private owners.

Control over Man Power and Woman Power for War Industries. Although up to the present, the Government has not registered all men and every woman capable of work and forced them to labor in certain positions or jobs, it probably can exercise that power in wartime. Bills to effect such drastic control over labor have more than once been introduced in Congress. But a considerable variety of lesser methods of coercion have been tested out. During World War II, for instance, many men engaged in industries deemed essential to war efforts were given a deferred status in respect of conscription and men in nonessential industries were drawn upon more heavily for combat service. The "work or fight" rule was not made the law of the land but the coercive principle implied in it was widely enforced. Strikes by labor organizations were not absolutely prohibited; but by the Connally-Smith Act of 1943 penalties were laid on labor leaders who fomented strikes. By legislation and executive orders the conditions and terms on which labor could lawfully call and conduct strikes were also materially circumscribed. Strikes and threats of strikes frequently occurred, but the Government, keeping its ultimate power in reserve, usually resorted to negotiation rather than the use of force in settling disputes. Government seizure of strike-bound plants was relatively rare.

Control over Economy in General. A seemingly inevitable result of war activities is a severe dislocation of peacetime economy. The enormous outlays of the Government for war purposes induce an immediate rise in employment, wages, and prices. If this rise is allowed to take its "natural" course there will be alternate jumps in wages and prices until economy gets out of hand in a dangerous inflation. In recognition of this tendency various controls on wages and prices were established in World War I and, after it was over, advocates of new preparedness for war urged that Congress authorize the "freezing" of wages and

prices at given levels on the outbreak of the next war. But no such proposal was accepted and put into effect at the beginning of World War II in 1941. It is true that a general level of wages was fixed, subject to corrections designed to meet injustices in limited areas of industry, and that the prices of many prime commodities were fixed from time to time. It is true also that in connection with price controls provision was made for rationing numerous scarce commodities among consumers according to their needs. A "ceiling" was put on various wage and price schedules. But there was no agreement at the beginning of the war on fixed levels all around; and conflicts over price and wage adjustments continued throughout the war. Although government control proved to be very useful, it did not achieve the objective of complete "stabilization."

Control over Freedom of Expression. It is not only physical and material resources that are mobilized in wartime. Public opinion and agencies connected with the expression of opinions are also brought under regimentation. With the cooperation of the press, the publication of news respecting the war is controlled by the principle that nothing useful to an enemy or inimical to war activities of the Government shall be given to the public. Mails going out of the country and coming into it are scrutinized and censored. Telegraphic, radio, and other means of communication with foreign countries are placed under censorship. An official agency conducts propaganda on the home front in support of war efforts, and also abroad to weaken the enemy and rally friends to the American cause. The national police and detective forces, under the Federal Bureau of Investigation, are enlarged and ordered to keep track of activities called "subversive," to run down persons openly or covertly opposing the war or deliberately giving aid and comfort to the enemy. Prosecutions are launched by the Department of Justice and by local officers against the violators of laws enacted to control the expression of opinion and to prevent various activities deemed hampering to the prosecution of the war or favorable to the cause of the enemy.

Beginning with World War I and continuing the practice in connection with World War II, Congress enacted or kept in force special statutes covering sabotage, espionage, and sedition, as well as measures protecting the armed forces against outside interference and publications likely to stir up mutiny or disloyalty in the ranks. Sabotage legislation imposes penalties on persons who break machinery or in any way deliberately seek to stop or slow down production and transportation. Espionage legislation penalizes efforts (1) to convey information

to any foreign government for the purpose of injuring the United States; (2) to interfere with the operations of the American forces; or (3) to cause disloyalty or disobedience among the armed forces. While sabotage and espionage legislation to some extent involve freedom of press and speech, it is especially directed to the activities immediately affecting the production of war goods and the efficiency of the armed forces for war purposes.

Broader in scope are acts of Congress relative to sedition. In 1918 it departed from a long-standing custom by passing the Sedition Act, approved on May 16th of that year. This act penalized all persons "who use abusive language about the Government or institutions of the country . . . and who by word or act favor the cause of an enemy country." The Sedition Act was not renewed in its original form during World War II. But under Title I of the Alien Registration Act of 1940, Congress laid heavy penalties on persons who advocate the overthrow of government by revolution or are members of any organization or association engaged in the advocacy of such doctrines (Chapter 3).

Organization for Direction of War Activities. The overhead management of war activities falls into two broad divisions: (1) planning and conduct of war on land and sea and in the air, including the supply of materials to the respective fronts or war areas; and (2) control over all civilian affairs intimately related to the prosecution of the war. Both classes of activities, military and civilian, come under the general direction of the President as Commander in Chief and as the supreme executive of the Government, subject of course to provisions of the Constitution and laws of Congress duly enacted.

For the planning and conduct of hostilities, the President has at his command all the agencies of the National Military Establishment, and he may, according to law and practice, employ a wide variety of methods. He may issue directions through the Secretary of Defense or immediately through officers lower in the hierarchy of power. Indeed, as far as the Constitution is concerned, he may, as Commander in Chief, put on a uniform, go to the front, and direct hostilities in person. Although no war President has ever served as commander in the field, this function is latent in the power of his office.

For the direction of civilian activities in support of war, special units, in addition to the ordinary agencies of the Government, are usually established by law or presidential order, and charged with particular duties. Among such special agencies created for World War II, the following were the most important, their functions being indicated in general by their respective titles:

War Man Power Commission—wide control over the labor supply and, through the selective service system, the classification and calling of men for the armed forces.

Office of Production Management—supervision of war production industries with a view to maximum output.

Office of Economic Stabilization—control over rents, prices, wages, and other factors involved in stabilization of the economy.

Office of Price Administration—prices and rationing.

War Labor Board—adjustments of labor disputes.

Office of Lend-Lease Administration—allocation of supplies to foreign governments under the Lend-Lease Act.

Office of Defense Transportation.

Office of Petroleum Coordinator.

Federal Housing Administration—provision of housing for war workers.

War Shipping Administration.

Office of Civilian Defense—organization and promotion of citizen activities in the interest of local security and the war.

Office of War Information—information and propaganda.

Office of Censorship.

Office of Coordinator of Health, Welfare, and Related Defense Activities.

Financing the War. Modern warfare, of necessity totalitarian in nature and involving all able-bodied adults and all branches of economy, is expensive. The expenditures of the Government on account of World War I during the years 1917–1921 amounted to $26,300,000,000, and the total cost, including bonus grants and final pension payments, is estimated at about $100,000,000,000. In comparison the actual and prospective costs of World War II made those of World War I look trivial (Chapter 15).

In raising money for World War II, Congress resorted to the two historic expedients: direct and indirect taxes and the sale of government bonds or securities in various forms. The chief novelties in the new war taxes were three in number: (1) the reduction in the size of the exemptions allowed to single and married persons in respect of income taxes and the addition to the income tax roll of millions of persons who had never before been compelled to pay such taxes; (2) the withholding of income taxes on wages and salaries at the source and employer responsibility for collections; and (3) the special weight of income and other taxes on persons and corporations. In respect of weight, for example, the tax on the "excess profits" of corporations under the Act of 1943 ran as high as ninety-five per cent, and the unmarried person who had a taxable income of $200,000 that year had to pay a tax amounting to $160,589.80, subject, perhaps, to minor deductions.

RECONVERSION AND VETERANS' AIDS

Termination of Hostilities and War. How, under the Constitution of the United States, may war be brought to an end and peace restored? In former times, the process was fairly simple and definite. On conditions which he deemed proper, the President ordered the American armed forces to cease firing, thus stopping hostilities. Then he negotiated a treaty with the enemy country and submitted it to the Senate for approval. After the treaty had been duly ratified, normal relations with that country were restored; and general demobilization, military and civilian, already started, perhaps, at the close of hostilities, was carried to completion. But in recent times matters have become much more complex.

The actual shooting in World War I was stopped in November, 1918, by presidential order, but the legal state of war with the Central Powers long continued. The treaty designed to end it, negotiated by President Wilson at Paris, was finally rejected by the Senate in 1920. At length in July, 1921, Congress by joint resolution declared the war closed; and later in the year separate treaties with Germany, Austria, and Hungary restored peace. Although the "shooting war" with the Axis powers came to a close with the surrender of Japan in August, 1945, President Truman waited until December 31 of that year to proclaim "the termination of hostilities." Subsequently treaties were made with Italy, Hungary, and Bulgaria, but the legal state of war with Germany, Austria, and Japan, while modified by various actions, remained in effect.

Curtailment of War Powers. Both the termination of hostilities and the restoration of peace by treaty settlement have a direct bearing on the war powers of the President, as well as on domestic affairs and relations with former enemy countries. When President Truman proclaimed the termination of hostilities on December 31, 1945, he automatically put an end to certain temporary legislation and delegated powers, but many other powers still remained in full force. Meanwhile, the process known as demobilization and reconversion was under way.

Thus for a long time between the discontinuance of shooting and the restoration of peace the Government operates amid circumstances difficult to describe briefly in precise terms. In this period, short or long, it faces the task of reducing the armed forces, repealing war legislation, revoking executive orders, terminating war contracts, disposing of surplus war supplies, withdrawing officers and men from occupied regions of former enemy countries, and performing other operations necessary to reconversion to peacetime conditions.

The process is tedious and complicated. World War I had scarcely been "wound up" when the United States became involved in World War II. In fact important pieces of legislation enacted during the first war were still on the statute books when the second war began. Reconversion is marked by haste, waste, confusion, and unfortunately at least some scandals. In any case it involves actions by Congress, the President, and executive agencies, and considerable litigation in the federal courts. It is also accompanied by great public clamor, for experience clearly demonstrates that multitudes of officers and men want to return home as quickly as possible and that the people in general, though accepting war regimentation as a necessity, want to get rid of it as soon as they can.

The power over reconversion is divided between the President and Congress. Until peace is established by treaty or by resolution of Congress, the President, as Commander in Chief, has control over American armed forces in former enemy countries, subject of course to relevant acts of Congress. In many cases, as Chief Executive, he may at his discretion revoke war orders issued on his own authority and may terminate or discontinue the use of certain powers vested in him by Congress; with regard to minor matters, heads of departments and chiefs of other agencies may abrogate the controls subject to their discretion; and appeals may be made to Congress for a renewal of powers that have expired or are expiring.

On the whole, however, the principal responsibility for terminating the exercise of general and special war powers rests on Congress, acting alone or in cooperation with the President. Where, in grants of authority, it has fixed the conditions or time limits for automatic expiration, Congress may allow the powers to lapse, or by new legislation extend them. Three years after the actual hostilities of World War II had ceased, American armed forces were still stationed in Germany, Austria, Japan, and other places abroad; and by official action numerous sections and clauses of war-powers legislation were kept in effect—many of them apparently with a view to permanent retention. Indeed, it was then clear that the "liquidation" of the war would be indefinitely postponed.

Provisions for Veterans. In the generosity of its provisions for war veterans, the United States exceeds all other countries. This broad statement is illustrated by its practices in connection with World War II. Upon their separation from the service, veterans of that war received from the Government numerous aids in readjusting themselves to civil life. Immediate assistance was given in the form of mustering out and terminal leave pay. Veterans who wished to continue their education

were enabled to attend schools or colleges at public expense. Veterans in search of employment were aided by legislation (1) requiring certain concerns, in many instances, to reinstate their former employees just out of service, without loss of seniority or other benefits; (2) authorizing government subsidies to those who took "on the job training" with private concerns or in agriculture; and (3) providing for payment of employment compensation to veterans who applied to public employment offices for work and were awaiting suitable action in their cases.

Veterans who decided to go into business for themselves were entitled to priorities in the purchase of surplus war goods, to limited subsidies per month while starting a new venture, and to government guarantees on loans secured from private parties for specified purposes. Among the miscellaneous benefits were favors to veterans in seeking federal civil service appointments, buying farm equipment, securing homes for themselves and their families, and homesteading on public lands.

Other forms of government assistance to veterans are effective indefinitely. In this category come free medical care in government hospitals for service-connected wounds and illness and a few additional disabilities, and life insurance systems which provide low-cost insurance for veterans of both world wars. Pensions are granted to veterans disabled in war and to the dependents of those who lost their lives in service. It has long been a practice also to allow pensions to all veterans of a war after a lapse of time has thinned out the ranks of the survivors.

The management of the vast system of pensions, compensation, insurance, and other aids to veterans is entrusted to the Veterans Administration, in cooperation with the Public Health Service and other federal agencies. This administration is an independent office of the government, headed by an administrator appointed by the President with the confirmation of the Senate.

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CHAPTER 19

The Federal Government and the Nation's Economy

Constitutional Sources of Economic Power. Numerous clauses of the Constitution confer upon Congress powers that have a clear and direct bearing upon the conduct of the nation's economy. Of this type are the passages relating to taxation, to providing for the national defense, and to the regulation of interstate and foreign commerce. But governmental impacts on agriculture, business, commerce, banking, property, the professions and labor are not confined to the exercise of these obviously economic powers; nearly everything that the Government does under the Constitution has at least some economic implications. Thus by virtue of its power to establish post offices, Congress has provided for the carriage of books and magazines in the mails at especially low rates "to disseminate knowledge," a process of marked financial assistance to the publishing business. Through its power to dispose of property belonging to the United States, Congress has brought large revenues into the treasury by leasing mineral and oil lands included in the public domain. Though limited in the exercise of its economic powers by provisions of the Constitution relative to civil liberty, Congress nevertheless exerts an immense and varied influence upon the course of economic affairs.

CHANGES IN THE RELATIONS BETWEEN GOVERNMENT AND ECONOMY

Factors Making for Federal Intervention. Since its establishment, the National Government has regularly intervened in economic affairs —to an increasing extent in recent times. In writing about this process many publicists seem to regard the Government as if it were basically an independent body that freely interferes with economic activities merely to achieve purposes of its own. Undoubtedly at times some federal officials have resorted to interference in these affairs merely with a view to keeping or augmenting their own power; but operations of this nature by no means predominate. Often the initiative comes from outside interests. In any event, the theory that federal inter-

vention in economy is simply a politician's device, though widely held, amounts to a distortion of history and leaves out of account numerous other factors constantly at work.

It is a matter of common knowledge that the National Government, being broadly representative in character, responds to many interests, ideas, demands, and movements that appear among the people from age to age. These stirrings have increased in number with the revolution wrought by science and invention. For the limited range of economic interests that existed when the Constitution was written have been substituted a growing variety of groups—the American Federation of Labor and the Congress of Industrial Organizations, many corporations engaged in everything from generation and distribution of electricity to manufacture of tire pumps, and farming interests that include cooperative purchasing and marketing associations, as well as local and national organizations of farmers for special and general purposes.

Agents representing each of the major interests called business, labor, and agricultural, including subsidiary interests, are regularly engaged in trying to get the Government to undertake one or more functions on their behalf or to prevent it from doing something that it is already doing or may be proposing to do (Chapter 9). Often economic interests which are in conflict in numerous respects unite on common objectives in other instances. While railroads may oppose the expenditure of large additional sums on free waterways for their barge-line rivals, and the barge lines may advocate federal action in forcing railways into joint rail-water rate agreements, both parties may welcome governmental efforts to halt a coal strike that is cutting down freight for carriage and fuel for their engines.

The Drive for Public Action Not Wholly Economic. By no means all the pressure for an increase in the number and variety of governmental regulations is an effort to secure economic advantage. A great deal of the demand stems from new hopes, aspirations, and concepts of what may be done to alleviate human suffering and promote the common good. When, for example, the development of radio transmission and reception made possible calls for help from sinking liners and quick response from the crews of near-by vessels who might otherwise be unconscious of impending disasters, the public thought in terms of saving lives rather than costs, and demanded that the Government require installation and consistent use of radio apparatus on large ships at sea. The story of the Government is not all economics. Rather, it is a mixture of economics and human hopes and aspirations of many kinds.

The Shift from Community to National Economy. As a result of revolutionary changes in the mechanics of production and distribution, activities which were once almost entirely local in effects came to transcend state boundaries and become nationwide in interest. Before the end of the nineteenth century nearly every branch of industry and agriculture was depending largely for its existence and prosperity on markets and on exchanges scattered throughout the Union and to a considerable extent in foreign countries. Self-sufficing states, like self-sufficing farms and villages, disappeared with the expansion of manufacturing and transportation. Even the corner-store merchant buys goods from all parts of the Union—oranges from California or Florida, shoes from New England, cotton goods from South Carolina. All large-scale industries produce for the national market. Farmers specialize in raising cotton, corn, wheat, and other staples, and exchange their produce for manufactures turned out in distant cities. All are tied together by the railway, the telephone and telegraph, the radio, and aviation.

A major disturbance in one branch of economy affects all other branches. If, owing to a market collapse, two or three great factories close in a city and discharge thousands of employees, there is little, if anything, that the people of the city can do to set these industries in motion. A farmer may be industrious and prudent but a severe decline in the prices of his produce may put him in bankruptcy. As the United States Chamber of Commerce summarily described the situation in 1931: "We have left the period of extreme individualism and are living in a period in which national economy must be recognized as the controlling factor. Under our form of industry a large part of the national income is distributed through the instrumentality of industry and business, the distribution being in the form of wages, salaries, rents, interest, and dividends."

The Idea of Planning in National Economy. In the same year that the Chamber of Commerce issued its report on national economy, Gerard Swope, head of a great industry, the General Electric Company, in an address before the electrical manufacturers in New York City, deplored the plight of competent workers unable to find employment and suggested concerted planning on the part of industries in efforts to meet the problem thus presented. He said: "That this condition has ever been present in such periods detracts nothing from its wrongness. That industry must evolve and make effective those measures which will first ameliorate and ultimately eliminate these conditions must be the reaction of everyone who gives thought to what is taking place. I say that industry must do this thing, because it will be done."

In short, Mr. Swope intimated that unless business leaders could prevent the "unconscious and automatic" operations of the market from precipitating millions into unemployment and misery, government would try to do it. In keeping with this belief, he set forth a plan for stabilizing industry and making provisions against the hazards of panics and depressions.

In 1931 the United States Chamber of Commerce proposed an extended plan for accomplishing the same results with the aid and cooperation of the Federal Government; and the American Federation of Labor drew up a report calling for measures of "national planning" to steady industry and prevent unemployment. Three years previously leaders in agriculture had drafted and pushed through Congress a scheme of agricultural marketing and crop control which was in fact a form of government intervention in economy designed to overcome the effects of the depression in agriculture (Chapter 21).

Disputes over "Planning." The discussion of these and other projects since the great panic of 1929 has often made for confusion rather than for the clarification of thought. As usual extremists have taken part in the debate over "planning." To advocates of *laissez faire* (Chapter 4) the very word is anathema. They put their faith in what they call "the free market" and repeat the formula that if the Government would only "let business alone" prosperity at the highest possible level would be assured. On the other hand, a few persons, enamored of Russian "five-year plans," insist that, to maintain continuous prosperity all branches of economy must be nationalized, planned, and directed by government. In other words, it is a case of planning everything or nothing. On numerous occasions, attempts have been made to identify the major parties with these extremes. Democrats are called "planners" and set down as consistently favoring governmental intervention in the nation's economy while Republicans are represented as consistently opposed to such actions.

The Recognized Need for Coordination. The truth is that no such sharp discrepancy in outlook separates the two leading parties. Each of them has repeatedly put through individual measures that called for intervention in the nation's economy. Both of them have been well aware that a failure to coordinate these piecemeal actions leads to lost motion and waste. The Republicans have long demanded "more business in government" and have assailed the cross purposes and confusion said to be characteristic of the "Washington bureaucrats." Much of the New Deal defense centers around the claim that the Republicans will not carry coordination far enough to bring under government control all the disturbances normally accompanying the

business cycle. Both parties intervene in economic affairs and both call for more businesslike coordination of agencies engaged in economic actions, though they may differ as to the specific types of intervention that the times require and as to the exact character and extent of the superstructure of planning.

Early Examples of Intervention. Piecemeal intervention in the nation's economy is not a New Deal innovation. Years before the start of the New Deal in 1933, namely in the administration of President Wilson, Congress had created a Shipping Board with enormous powers over the business of shipping and shipbuilding and it had established a Farm Loan Board for rural banking, charged with the supervision of loans to farmers. Prior to 1933, Congress provided for national forests; in aid of agricultural marketing, it had enacted a cotton futures law, a grain standards law, and a warehouse law.

Promotion of Business Enterprise and Control over It. The list of federal statutes designed to promote industry, by protective tariffs, subsidies, bounties, and measures to expand domestic and foreign commerce, is long. For more than a hundred years such legislation has bulked large in the activities of the Federal Government. It was under the stimulus of grants of land and loans of money that transcontinental railways were built and put into operation. The regulation of railways and other utilities engaged in interstate commerce began with the Interstate Commerce Act of 1887. Alarmed by the growth of gigantic corporations on a national scale and the appearance of controversies over the concentration of wealth and the control of prices, Congress intervened by forbidding and penalizing combinations in restraint of trade. The first antitrust law was enacted in 1890 under Republican auspices and it was expanded under the administration of President Wilson. Convinced that mere prohibitions were not enough, Congress established in 1914 the Federal Trade Commission charged with certain regulatory duties. The creation of the Federal Power Commission in 1920 was followed by the extension of federal intervention in the production and distribution of electric power.

Growth of Intervention in Agriculture. Although direct federal intervention in agriculture did not begin in 1789 when federal promotion of manufacturing and commerce was started, it has been fairly continuous since the middle of the nineteenth century. The Government intervened in 1862 by throwing its entire arable domain into competition with Eastern agriculture under the Homestead Act which gave public lands, on certain conditions, to individuals as free homesteads. In 1865 it intervened in one important branch of agriculture by destroying its labor system—slavery. It established the Department

of Agriculture, fostered experiment stations, put tariffs on foreign agricultural produce, and at times sought to manage the currency with reference to agricultural prices. Later under Democratic auspices in 1916 it set up agencies for lending money to farmers—agencies which were modified and extended under Republican administrations. Finally in 1929, by the Agricultural Marketing Act, sponsored by President Hoover, the Federal Government put a climax on numerous statutes and executive rulings by attempting to control the marketing of farm produce and thereby to raise prices.

Labor Relations. The contacts of the Federal Government with labor have been fairly continuous, especially since the industrial crisis which opened in 1873. A whole volume would be required to describe these contacts and give a scant digest of the statutes, court orders, and executive measures coming under this head. The creation of the Department of Labor in 1913 was itself a recognition that certain important issues were here involved. From time to time Presidents intervened both officially and unofficially in labor disputes. Long ago Congress created agencies of mediation and conciliation. Judicial injunctions and anti-injunction legislation have marked the course of this development. With respect to labor employed in interstate commerce on the railways, Congress has intervened under both Republican and Democratic auspices by regulating hours, recognizing the right of collective bargaining, and providing agencies for dealing with strikes, threatened and actual.

Treatment of Natural Resources. The beginning of legislation relative to the conservation of natural resources may be placed in 1891 when Congress authorized the President to set aside and withhold from sale public lands covered with timber and underbrush. Up until that time, despite the protests of farseeing statesmen like John Quincy Adams, the Government had pursued the policy of selling or giving away its natural resources or allowing them to be stolen, and had created agencies of survey to assist private persons in locating and exploiting resources at their pleasure. Under President Cleveland, and still more extensively under President Theodore Roosevelt, the idea of conserving resources was developed and applied. Provision for the federal purchase of forest lands in the eastern states was made in 1911 during the administration of President Taft. The outright sale of public power sites to private concerns was stopped long ago. The policy of developing them under federal auspices was started as early as 1920. The statute for the development of Colorado River power at the Hoover Dam, enacted under President Hoover, marked a distinct step in the evolution of public ownership and control.

Responsibility for Relief and General Welfare. If any form of federal intervention in economy after the panic of 1929 could properly be called novel, it was provision for the relief of the unemployed and for particular types of "social security," such as old age pensions. In times past Democratic and Republican Presidents alike had opposed the very idea of federal action to overcome the calamities of great business depressions—none of them more than Martin Van Buren in 1837–1841 and Grover Cleveland in 1893–1897. Yet federal measures designed to relieve people in distress were not wholly new in 1933.

It is difficult to make an all-inclusive definition of "relief," but if the term is taken in the dictionary sense of giving aid, comfort, and satisfaction, then many of the laws enacted by Congress for the benefit of industry, agriculture, and labor before 1933 may be rightly called "relief" measures. If we take the term "relief" in its generic sense, we find that the appropriation of funds for the relief of American victims of droughts, floods, earthquakes, and other physical disasters had been practiced by Congress for years under Republican and Democratic auspices. Such relief had even been given to stricken peoples in foreign countries. The idea of affording relief to the unemployed through public works was accepted and developed at a conference during President Harding's administration, under the leadership of Herbert C. Hoover, as Secretary of Commerce. Indeed a complete program called "the Hoover plan" was formulated in that period.

The Idea of Mitigating Depression Evils. Nor can it be correctly said that efforts to overcome the stresses and strains of business depressions first came after 1933. The idea that the Government should do something to mitigate the evils of violent oscillations in economy had been put forward in President Harding's administration during an official conference on unemployment directed by Mr. Hoover, while he was Secretary of Commerce. And as President Mr. Hoover himself favored many measures in the interest of economic recovery during the early years of the crisis. Among them was the establishment of the Reconstruction Finance Corporation for the purpose of making loans to railways and banks in difficulty. Another was the attempt to speed public works for the purpose of providing employment. A third was an effort to save home owners from the loss of their property through the foreclosure of mortgages, by lending money from the treasury to building and loan associations.

Taken collectively these precedents set under President Hoover marked a stage in the development of a new attitude on the part of government toward the demoralizing effects of industrial crises. After the panics of 1873 and 1893 economic affairs were allowed to

follow their "natural course." Owners of railways, industrial plants, farms, and homes who were heavily in debt and could not meet their obligations were mercilessly "liquidated." They were put through bankruptcy courts and their property was sold at figures low enough to permit the new owners to operate it on some level of performance. Thus debts and "surplus" capital were scaled down or wiped out. There was no direct government interference with prices, wages, or unemployment. In their struggle for existence industries curtailed production or slashed the prices of their goods, as farm prices sank in the balance. It was wholesale interference with this "natural" process which made the recovery program begun under President Hoover a novel feature of governmental activities.

Apparent Departures in Social Legislation. If to persons who kept their eyes merely on the expanding functions of the Federal Government after 1929, the steps taken seemed "revolutionary," a little knowledge of American history would have corrected the impression. In numerous respects the new federal functions, particularly in the field of social legislation, were based on principles which had been gradually applied by states throughout large sections of the country during a period of more than fifty years, or were designed to aid states and communities in the discharge of functions which many of them had already assumed on some scale. Ideas carried to Washington by representatives in Congress, rather than "foreign" ideas imported by agitators or newly invented by President Franklin D. Roosevelt accounted for a substantial part of the legislation that appeared strange and startling to superficial observers in the fourth decade of the twentieth century.

CLOSER INTEGRATION OF GOVERNMENT AND ECONOMY IN RECENT TIMES

New Deal Measures (1933–1938). On his inauguration in 1933 President Roosevelt confronted an almost complete collapse of the banking system, a general stagnation in business, millions of people unemployed, and poverty haunting nearly every community in the land. Among all classes of the people opinion was almost unanimous, without respect to party affiliations, that the Federal Government must act boldly and on a broad front to promote economic recovery and overcome at least the worst of the social distresses. Leaders in business, banking, manufacturing, agriculture, and organized labor looked to the President for planning and proposing measures which would open the banks, create confidence, and restore prosperity. In these circumstances, President Roosevelt and his aides in Congress and outside de-

vised a series of laws and administrative actions which came to be known collectively as the New Deal. Considered as to its essentials the program consisted of six principal features:

Stimulating and stabilizing business and industrial enterprises by the National Industrial Recovery Act of 1933—a measure supported by great business interests. This measure provided for organizing all major branches of business and industry into self-governing associations—each with its code of fair practices, standard labor relations, and price practices, under the supervision of federal authorities. This represented a close partnership between business and government. Practically all the Act was declared unconstitutional by the Supreme Court in 1935 and the experiment was soon abandoned.

Controlling and subsidizing agriculture by the Agricultural Adjustment Act of 1933—a measure drafted to suit the demands of agricultural interests. At the time huge surpluses of agricultural produce had accumulated and prices were extremely low. The Adjustment Act was designed to curtail output and adjust supply to demand. This design was attained by organizing farmers, cutting down the acreage used for the production of several prime staples, and paying subsidies to farmers in proportion to the extent of land taken out of use for the production of such surplus crops.

The regulation of electrical and other public utility corporations, stock exchanges, and other forms of business enterprise with a view to reducing the charges for their services or preventing undue speculation, stock-watering, and other abuses which extracted large sums of money from the people.

Labor legislation empowering industrial workers to form unions, elect their own officers, and engage in collective bargaining with their employers. Similar legislation designed to limit the hours and increase wages in substandard industries.

Social security legislation authorizing the establishment of old age pensions, old age insurance, unemployment insurance, and various forms of assistance for certain types of dependents.

Aids to the unemployed by large expenditures for public works, federal and state; and for many kinds of "projects" ranging from the construction of forest trails to musical concerts—all under federal supervision and in conjunction with state and local authorities.

Failure of the New Deal to Attain Full Recovery. Under the New Deal program, the regulating, operating, and promotive activities of the Federal Government involved it deeper and deeper in the affairs of private economy and of the states, including their political subdivisions. From year to year federal expenditures far exceeded the tax revenues and the budget remained unbalanced. Although national economy rose substantially from the deepest trough of the depression, full production was not attained, and the number of persons

employed on government projects remained large. As late as January, 1937, the National Industrial Conference Board estimated the number of unemployed persons at 8,300,000. Whatever the merits of the New Deal, it was far from the goal of full production and employment in 1939, when war broke out in Europe.

Economic Consequences of War Functions. While preparing for war and especially after it became involved in World War II the Government of the United States, in the exercise of its war powers, so interlinked its authority and activities with industry, agriculture, labor, and finance as to produce consequences of a far-reaching nature. Many of the immediate results in the form of price, wage, and rationing regimentation proved to be temporary and were abolished or materially relaxed at the end of the war. But other outcomes in theory and practice were more lasting. War appropriations running into the hundreds of billions supplied private enterprise with such a demand for goods that in major branches it not only rose quickly to its full production capacity but was compelled to make plant extensions on a scale far outrunning anything of the kind achieved during its long history, in so short a time. Moreover billions of capital for plant extensions were supplied by the Government from taxes and borrowings. In 1939 the capital investment in manufacturing plants stood at approximately fifty billion dollars—the accumulations of decades; within three years new plants or extensions of plants represented an additional capital investment of about twenty-two billion dollars. By 1945 the dollar value of the national output had risen from about fifty billions, as it stood in the depth of the preceding depression, to about two hundred billions. "Full employment," the dream which the New Deal had not realized in time of peace, was now reached in the primary industries as a result of war and the country was actually short of man power and woman power for war production.

The Employment Act of 1946. At the close of hostilities in 1945 it was generally feared that the steep drop in the demand for war supplies would be followed by an economic crisis and widespread unemployment, such as had occurred after World War I. So, many members of Congress in sympathy with the late President Roosevelt's New Deal program urged the enactment of legislation to meet the crisis if and when it arrived. The more radical among them, supported by leaders in the labor movement, demanded that the National Government guarantee the "right of employment" and actually provide employment in so far as private industry and state and local governments failed to furnish it. Although Democrats controlled both houses of Congress

this demand was rejected and a watered-down compromise was incorporated in the Employment Act of 1946.

The new law declared as a continuing policy the purpose of the Government to coordinate and use its functions and resources in promoting maximum employment, production, and purchasing power within the system of free competitive enterprise. It provided that the President should present to each session of Congress an economic report on the state of, and trends in, employment, production, and purchasing power, and make recommendations respecting legislation to counter a serious decline in prosperity or a crisis, if necessary. To assist the President in preparing his report, the act created a council of three economic advisers; and, with a view to assuring legislative consideration of the President's report and recommendations, the Act also made provision for a joint committee of Congress on the economic report. The economic advisers were appointed, Congress created the joint committee, and President Truman submitted his report to the first session of the Eightieth Congress in 1947. The joint committee, after long delay, gave the report a cursory review, carried on investigations of its own, and the session ended with no specific action under the terms of the new law. It so happened that at the time production and employment were on a high level.

In its second annual report to the President, December 22, 1947, the Council of Economic Advisers emphasized the role of government intervention and the distribution of wealth in relation to full employment. It pointed out that existing production on a high level was due to public spending for military preparedness and foreign aid and to the accumulation of wartime shortages in various lines of consumers' goods. It called for a reduction in prices and profits and increases in wages at the bottom of the scale to enlarge mass buying power, while keeping the work week at the same number of hours. The council also made a confidential report to President Truman which he used as the basis of his annual economic report to Congress, January 14, 1948, as required by the Employment Act. In this document, the President asked for authority to engage in rationing and price control and otherwise intervene in private economic processes. Mass buying power he proposed to increase by a reduction of income taxes for people in the lower wage levels. The loss of revenue that might thus ensue he wanted to offset by a new tax levy on corporations. He also advocated the stricter enforcement of the antitrust laws as a means of inducing competition and price cutting. In short, President Truman's economic report, as well as his annual message to Congress,

argued for more government spending and intervention, not less. Although Congress greeted his domestic program coldly, it voted huge sums for foreign aid which intensified the demand for American manufactures and farm produce, while bolstering employment for industrial workers.

Theory of Compensatory Fiscal Policy. The employment law calls upon the Government to coordinate its manifold functions and resources to counteract declines in production, employment, and the purchasing power of the people. If put into practice, it would involve large expenditures of public money, in case private enterprise falls far below the level of general prosperity. Associated with such proposals is the theory of compensatory fiscal policy. In brief the theory holds that in a time of business depression, the Government should offset the deficiency in the people's purchasing power by spending money for public works and other undertakings which furnish employment; and that in highly prosperous times, the Government should lay heavy taxes to curtail the overexpansion of private investment and of consumer purchasing power that leads to a boom—and a bust. There are many practical objections to the theory; for instance the difficulty of planning and putting into operation enough public works projects to assure any large amount of employment. But it is an almost universally accepted principle that federal, state, and local spending for public works should be planned and carried out with specific reference to the state of production and employment in the domain of private economy.

That federal intervention in the interest of prosperity and employment is firmly anchored in American thought about economy was indicated after the Republicans returned to power in Congress in 1947. They undertook no sweeping abolition of the new functions that had been added to federal activities during the period of the New Deal, particularly those related to social security. They gave the National Labor Relations Act a thorough revision. They reduced some expenditures for the development of natural resources and for other undertakings in general and particular. But they left in force most of the primary functions that had been accumulated over a period of more than fifty years and, indeed, expanded some of them.

IMPACTS OF WAR AND FOREIGN AFFAIRS ON THE NATIONAL ECONOMY

Former Domestic Basis of Economy. Until well into the twentieth century, federal legislation, taxation, expenditures, and administrative regulations respecting national economy could be based with consider-

able certainty upon "normal" productive activities within the United States. All along, it is true, Americans had depended materially for their prosperity upon the sale abroad of agricultural commodities—after 1900, manufactured goods as well; and panics and wars in Europe had often been followed by grave repercussions here. Yet in peacetime between 1900 and 1929 the value of the annual exports never amounted to more than ten per cent of the value of the movable commodities produced yearly in this country.[1] Before 1914 the investments of American capitalists in foreign countries were negligible in comparison with the investments at home; and the Government of the United States had made no loans to foreign governments, or commitments, other than charitable, to furnish relief, money, and supplies to foreign countries. In other words, although American economy was by no means "self-contained" before 1914 it was not burdened by monetary and other obligations to foreign governments undertaken by the Government of the United States.

Priority of Foreign Affairs over the National Economy. The political and economic consequences of two world wars have marked nothing short of an upheaval in the prior foundations of American economy. By actions of the United States Government in the foreign sphere, particularly since 1911, American industry, agriculture, and labor have been compelled to depend upon "foreign markets" for the sale of their output to an extent that amounts to a definite break with the historic past of the country. As a result, for economic prosperity and a high level of employment the American people must rely to a momentous degree on the foreign activities of their own Government and on the policies and fortunes of foreign governments over which they have little or no control.

A few figures presented in an address by Dean Acheson while he was Under Secretary of State, in May, 1947, illustrate the nature of this novel situation. After calling attention to the fact that in the years before World War II American exports of goods and services amounted to around $4,000,000,000 annually, Mr. Acheson estimated the exports for the year 1947 at approximately $16,000,000,000, "an all-time peacetime high"; and he emphasized its significance by saying that this export business represented about one month's work for every man and woman in the United States, one month's output from every farm, factory, and mine. Mr. Acheson then warned his audience that nearly one third of these exports were financed by government loans and grants to foreign countries and that a continuance of such financing

[1] C. A. Beard, *The Idea of National Interest*, pp. 244 ff.

to support foreign "commerce" in the coming years was necessary to prevent a ruinous collapse in the national economy.[2]

The so-called "foreign markets," as far as they are sustained by federal financing, are obviously "artificial," in the sense that they are created by actions on the part of the United States Government and are not due to effective demands for American goods in foreign countries—demands which are supported by the ability of foreign governments and their nationals to pay for them in other goods and objects of value to the American people. These markets can only be maintained as long as the Government of the United States pays for a major portion of the goods exported and it can only secure money for this purpose by taxing and borrowing at home, thus adding to the stresses and strains in domestic economy. The swollen foreign commerce of the United States is not only heavily financed by taxing, borrowing, spending, lending, and giving; it is extensively controlled by government agents, as distinguished from private producers and merchants, and is largely managed with political ends in view—underwriting selected foreign governments, most of them instable, for the purpose of imposing restraints on the expansive energies of Soviet Russia.

Current Prospects. In these circumstances, both "free enterprise" and "planning" in the domestic sphere are materially subordinated to the overriding policies of the United States Government in the foreign sphere—the consequences of which are incalculable. Hence an increase in governmental control over the national economy appears to be more probable than an enlargement of freedom for industry, agriculture, and labor.

Soon after Republicans were returned to power in Congress at the elections of 1946 on pledges to reduce taxes, cut federal expenditures, and curtail government interference with "free enterprise," they found themselves almost powerless to alter the trend. They confronted acknowledged foreign commitments running into billions, rumors of secret commitments of uncertain amounts, and announcements from the Executive Department of new commitments yet to come. They also faced a huge war debt, augmented peacetime outlays for war preparedness, and the necessity of continuing many administrative controls over business and agriculture for the purpose of fulfilling domestic as well as foreign obligations. In stark fact, an entirely new setting had been provided for the discussion of the national economy and all public policies related to its operations and prospects.

[2] *Congressional Record*, May 13, 1947, pp. 5321 ff.

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CHAPTER 20

Natural Resources and the National Domain

The economy, strength, prosperity, and civilization of the United States depend immeasurably on the natural resources of the country—its forests and other vegetation, air, waters, land, and minerals. From these resources are derived food, clothing, shelter, and all the material goods required for living, comfort, and convenience. With the rapid development of science and machinery, the growth of the population, the increasingly destructive character of warfare, and the shipment of domestic resources to foreign lands for rehabilitation and other purposes, the country's substance has been consumed at a high rate in recent years, so high that the approaching exhaustion or critical depletion of certain prime materials is beginning to cause statesmen serious concern. The powers of government available to meet the grave issues lying ahead are divided between the nation and the states.

Constitutional Powers of the National Government. The Constitution says nothing directly about federal control over privately owned and managed natural resources. That document does, however, contain provisions which permit federal supervision of such resources. It empowers Congress to regulate interstate commerce and thus enables it to control interstate transmission of oil, gas, and electricity. It also declares that Congress shall have power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"—to determine the conditions under which private ownership of great areas may begin. Other provisions, such as the clauses conferring on Congress the power to tax, to appropriate money, and authorize compacts among states, though indirect in bearing, have been, and may be even more extensively, employed by the National Government in dealing with private ownership, use, conservation, and development of natural resources throughout the country. Even so, the states have most of the power to regulate the use, by private parties, of natural resources.[1]

[1] For state efforts to conserve natural resources, see pp. 718–721.

On the other hand, under the constitutional clause giving Congress power to dispose of and regulate property belonging to the United States, the Federal Government has general authority over the management of the lands, forests, and other resources to which it has direct title in the several states and in the territories and possessions of the United States. When the National Government was established in 1789 it held a huge area of land between the seaboard and the Mississippi River, and to this original domain wholesale additions were made later by purchase and conquest. In the course of its career the Government has owned an estate of about 2,825,000 square miles —an empire almost equal to the entire continent of Australia. Of this area only a fragment now remains in its possession, and in the meantime the states have disposed of nearly all their arable lands.

Classification of Resources According to Nature. It has long been a custom to divide resources into two classes: irreplaceable and replaceable, or exhaustible and replenishable. In the first class come minerals such as iron, copper, lead, and oil. In the replenishable class come vegetation including forests, fertility of the soil, fish and game, and waters.

The classification is convenient but may easily be misleading. Nature does not replace the minerals taken out of the earth; but, from metals not shipped out of the country, worn out in use, or shot away in war, a large amount of "scrap" may be derived and used over and over; in 1933, for example, the tonnage of discarded copper used in industry was larger than the tonnage of new copper brought from the mines. The fertility of the soil may be replenished by proper cultivation, if the soil is not allowed to wash out in floods to the sea; but the fertility of vast eroded regions is almost, if not entirely beyond recovery. A new growth in forests may replace the timber that is cut—in fifty, a hundred, or a thousand years—or it may not, according to circumstances. Water, strictly speaking a mineral, is called replenishable on the theory the supply is constantly renewed by rainfall; yet huge areas of the United States are arid and in large sections of the country the rainfall does not fully replenish the underground water reservoirs upon which millions of people depend for supplies.[2] In short, whether replaceable resources are actually replaced depends on their management and use by the people as well as on the processes of nature.

[2] In many parts of the United States the level of underground waters is sinking: in quest of new supplies well diggers must go deeper and deeper into the earth.

STAGES IN DEVELOPMENT OF FEDERAL POLICY RESPECTING RESOURCES

The Period of Rapid Disposal. With regard to the disposition and use of the domain originally belonging to the United States, the development of federal policy has been marked by certain rather distinct stages. In the beginning and for almost a century, the Federal Government proceeded on the theory that all its lands, forests, minerals, and water-power sites, except on navigable rivers, should be sold or given away as rapidly as possible to private persons and corporations, to be exploited as they might see fit, subject to little or no regulation and to light taxation. After the adoption of the Homestead Act in 1862 it began to give away, on specific conditions, arable land in 160-acre lots to actual settlers. It conveyed millions of acres of arable land to the states for educational and other purposes. It granted millions to railway companies and added more millions in stone, timber, and mineral lands. Other forests and mineral lands it sold at low prices to individuals and corporations. And its various agencies created to deal with surveying and studying natural resources were designed to facilitate this wholesale transfer to private hands. Besides the hundreds of millions of acres disposed of legally, other millions were seized fraudulently by prospectors, lumber concerns, and pioneers of westward advance.

Defense of Policy. The swift transfer of national property to private hands was defended on the ground that this was the quickest way to get the resources into profitable use. It was commonly assumed that each person or corporation acquiring a piece of the public domain would develop it rapidly and that the wealth and well-being of the whole nation would be automatically increased. To a considerable extent this was true but it was far from the whole truth. For example, as each farmer who received a homestead from the Government cut down the trees and planted corn, the annual production of corn was increased by so much. When, however, thousands of farmers in the same region did likewise, soil erosion began on a large scale and the water level was lowered, to the impoverishment of the region and the nation. Again when timber companies cut immature trees, ruined smaller trees, and left wastes to be burnt over by fire, instead of cutting only ripe timber, safeguarding small trees, and replanting, the wealth of the nation was diminished as individuals enriched themselves. At last these obvious facts, long pointed out by foresters and competent engineers, were recognized—near the opening of the twentieth century,

after much of the good arable land and of the heritage in forests and minerals had been granted away.

The Beginning of Conservation. About that time the second period of public policy relative to the national domain opened under the leadership of President Theodore Roosevelt. The new period was characterized by a growing concern over the waste of basic materials and a resolve to conserve resources and insure their economical use. Its beginning was signalized by withholding forest and mineral lands from sale to private interests, and by creating federal agencies to conserve them rather than to hasten their transfer to private parties. Step by step other features were added. Provision was made for reserving to the Federal Government all rights to mineral resources beneath the soil when arable and semiarable lands were given away or sold. Then water-power sites were withdrawn from sale and arrangements made for leasing them on a rental basis. Another stage was reached in 1911 when the Government began to buy lands for reforestation, in the east as well as the west.

Extension of Conservation. All this bore on the conservation and use of the lands in public ownership. But it was seen that the federal domain constituted only a small part of the national heritage in resources and that something more than mere management of this domain was necessary to assure a steady supply of timber, to prevent soil erosion, to stop the wasteful use of oil and natural gas, and to keep whole regions from drying up as the water supply diminished. If there was to be a real conservation of natural resources, policies covering both public and private property were evidently necessary. Official recognition of this fact came after the inauguration of Franklin D. Roosevelt. Then what may be called the third stage in the control of natural resources was commenced. This stage was marked by four general tendencies: (1) extended surveys of the great regions of the country, their resources, and their requirements; (2) the development, under federal auspices, of certain regions, such as the Tennessee Valley, bringing water power, forestry, and land uses under a common program; (3) more extended cooperation with state authorities in matters of planning and conservation; and (4) cooperation with private parties, in protecting and rebuilding resources, as through federal financing of soil conservation by farmers.

Present Demands for More Comprehensive Actions. Although it was recognized among experts in such matters before the close of the nineteenth century that the United States is not a land of "unlimited resources," it took the experience of World War II to make the fact

obvious to attentive laymen. In that war oil and other irreplaceable mineral deposits of the United States were so heavily drawn upon and depleted that it was questionable whether they were sufficient to keep its great industries going on an adequate level of production for normal domestic purposes for another generation, to say nothing of waging another war on a comparable scale. If millions of citizens were still indifferent to impending difficulties, the officials of the United States entrusted with the responsibility of national defense could scarcely overlook the plain truth that with regard to numerous strategic minerals the United States was a "have not" nation and with regard to others was rapidly becoming impoverished. At this point had the land of "limitless opportunities" arrived at the close of World War II.

Substitution and Self-Sufficiency. There are two ways of meeting such difficulties. One is to import the needed supplies, a step sometimes far from easy even in peacetimes and occasionally impossible under modern large-scale warfare; the other is to develop domestic substitutes for the missing items. The latter is now receiving widespread attention from the Government. In 1948, Congress ordered the President to maintain at all times a synthetic rubber production capacity of not less than 665,000 long tons a year and to see to it that at least a third this much rubber per annum is actually turned out. The Government owns a tin smelter for treating Bolivian tin ores to supplement the very meager domestic output. It operates a pilot plant in Colorado which has successfully produced oil from gigantic oil-shale deposits in that state and is now seeking improved techniques. The Government manages a large experiment station for the liquefaction of coal as a substitute for oil. It is striving to extract iron from poorer grades of ore than heretofore considered commercially useful, in anticipation of the exhaustion of high-grade ores. It was authorized in 1948 to conduct studies of the utilization of lignite in North Dakota. Through the Atomic Energy Commission, it is financing and supervising experiments with ways and means of generating electric power from fissionable materials as a practical utilization of atomic energy. In public and private laboratories government funds are being spent to usher in what promises to be the next great phase of governmental action in the field of natural resources—the quest for substitutes in a race against national impoverishment.

CONSERVATION OF FORESTS

Uses of Forests. Forests are highly valuable not only for their direct contribution to the welfare of the nation, but also for their indirect

bearing on the preservation of other resources. The primary use made of the forests is, of course, to obtain timber. Their utility does not end here, however, for they serve as reservations for livestock grazing as well as game life. They help to absorb the rain so that it seeps into the ground instead of rushing over the surface, eroding the soil and flooding the lowlands.

The Old Federal Domain. At present the forest resources of the United States are divided into two parts: publicly owned and privately owned. The Federal Government is the chief single holder of public lands, although some states and their subdivisions have embarked extensively on forestry projects. Land for the federal system was first secured by the reservation of public property from sale, not by purchase. In 1891 Congress delegated to the President the power to set aside as national forests those portions of the federal domain deemed suitable. By 1910 the total holdings amounted to approximately 172,000,000 acres—a figure which has been modified from time to time as new surveys have reclassified the public lands more nearly on the basis of their true economic character.

Federal Purchases of New Forest Lands. As long as it confined its work to the public domain, the Federal Government could develop forests on a large scale only in the West where almost all of its own land was to be found; but at length conservation burst sectional bounds. In 1911 the beginning of a national program was authorized by Congress with the enactment of the Appalachian forest reserve law, providing for the purchase of land for federal forests on the watersheds of certain navigable streams. Within a few years its scope was widened by an act authorizing the purchase of other lands useful for timber production and, more recently, by legislation authorizing the federal administration to buy huge blocks of submarginal land.

Forest Administration. The actual administration of the national timberlands is vested in the Forest Service, a branch of the Department of Agriculture. Having about 150 national forests embracing over 176,000,000 acres under its supervision and confronting a complex of problems brought on by the ravages of nature, the tasks of the Service are large and trying. It must wage war on plant and insect pests, cut fire breaks, fight fires, build roads, combat timber thieves, and keep out other intruders likely to damage the property committed to its care. It grows young trees and sets out new stock in denuded or burnt-over areas. It carries on research in forestry and the lumber industry, in part for the benefit of private enterprise and in part for the promotion of its own work.

Marketing Products. As one of its major responsibilities the Forest

Service, in a number of areas, seeks to replace current cutting with new growth so that local sawmills may be able to operate at uniform speed with assurance of a steady timber supply for an indefinite future. Neighboring business is thereby stabilized—affording a sharp contrast to the haphazard methods, often followed elsewhere, of cutting and sawing for two or three years until a district is "skinned off" and then shutting down—perhaps for fifty or a hundred years until a new growth has matured.

At present, an adoption of continuous and full production throughout the national forests is impossible as a normal policy, because it brings the Government into competition with the owners of private timberlands. Although the Forest Service turns out millions of board feet every year, it estimates that several times the amount could be obtained, without mortgaging the future, by cutting the existing trees as they mature and thus saving them from decay. Hence the country has long faced this anomalous situation: private concerns are sawing their timber faster than it grows and many of them are exploiting huge areas often by wasteful methods, while millions of feet of logs have rotted on the ground in the national reserves. At the same time the public is being taxed to buy and replant areas so denuded by private parties, in order to make provision against the coming shortage.

Grazing Rights. National forests are valuable not only for the production of timber but also for the grazing of livestock. At first the owners of animals were allowed to turn their herds into the public domain without paying for the privilege and subject to very little regulation. Gradually however the Forest Service has undertaken to control this practice and prevent the destruction of herbage by overuse. The number of animals admitted is limited to a figure determined by the capacity of the land. Cattle owners are now required to pay a fair price to the Government for their rights, and in certain circumstances they must possess an acreage of their own on which to produce supplementary forage.

Private Interests and State Action. Since the major portion of the timberland of the United States is in private possession and distributed among numerous owners, including small farmers, forestry is at present primarily dependent on the practices of private interests. Finding private owners naturally bent on gaining immediate advantages, federal conservationists sought the help of the states. Their appeals bore fruit. Joint national and state action has reached the point where federal money is supplied to furnish nursery stock at, or below, cost to residents of the several states for private planting. Congressional appropriations are also made for extension training in this sphere, in-

cluding field demonstrations of the best practices. To protect growth already under way, federal aid has been granted to states for the prevention and fighting of fires in both public and private forests.

Present State of Forestry. As things now stand, forestry—federal, state, and private—seems to be near the close of an epoch and at the opening of a new period. The battle to keep large areas in federal hands has been won and the question of efficient use of that heritage becomes pressing. Finding their resources declining, timber companies in many cases have stopped paying taxes on their cutover and poorer holdings and allowed them to go by default to state and local governments. Great regions which could be used to develop productive forests lie barren. The goal of balancing forest yield with timber cutting is yet far from attainment. Meanwhile conflicts of interests rage, within the lumber industry among competitors, between the industry and public authorities, and between the federal and state officials pulling at cross purposes. Accordingly the consensus of expert opinion is that more unified action on a national scale is necessary, with regional requirements taken into account.

FEDERAL MINERAL LANDS

Classes of Lands. Although most of the mineral resources of the country have been transferred to private parties, the Federal Government still holds large areas more or less rich in minerals.[3] A portion of this land is within the domain permanently reserved from sale, as forests and parks. Another portion, composed principally of arid and semiarid land, is still offered for sale for grazing, stone quarrying, and other purposes. Under the direction of the Geological Survey and the General Land Office a classification of the public domain has been made and the nature of its mineral resources indicated.

Subsurface Rights Reserved. Formerly it was the custom of the Government in granting away land to farmers, railway concerns, and other private parties to convey the subsurface minerals along with the surface of the soil. This practice has now been discontinued. Areas still offered for sale are subject to the reservation that federal ownership of all mineral rights beneath the soil is specifically retained. If there is evidence of valuable minerals on public property, the Department of the Interior may issue permits enabling private prospectors to carry on investigations. In case deposits are found, the Department may grant to private persons or concerns the privilege

[3] The United States Supreme Court has held that the tidelands, together with their mineral contents, belong to the National Government but the states are urging Congress to give them control over the use of tideland resources.

of exploiting them on a royalty basis, that is, on payment of a certain percentage of the returns.

WATER RESOURCES AND ELECTRIC POWER

How the Government Became Involved. The present relations of the National Government to water resources and electric power are the outcome of a long historical process. Under its constitutional power over navigable waters, it has been engaged for more than a century in the development of rivers and harbors for shipping purposes (Chapter 22) and in more recent times the construction of gigantic works in the interest of flood control (Chapter 24). For years Army engineers, exercising large powers vested in them by Congress, have regulated the building of bridges, dams, mill races, and other structures that affect the flow and use of navigable waters. In part to provide employment during the business depression that followed the panic of 1929, the Government went into the construction of dams and other major works on a large scale in various parts of the country, notably in the Tennessee Valley and the Columbia River Valley. It has also undertaken the generation of hydroelectric power as a by-product of its units designed to supply water for irrigation purposes. After the rise and growth of great companies engaged in the transmission of electric energy across state boundaries, Congress began regulating that part of their business which came under its jurisdiction over interstate commerce.

Federal Power Commission. Despite the number and complexity of the contacts between federal agencies and electric power interests, general legislation covering their relations is a comparatively recent development. Not until 1920 did the Federal Government commence the comprehensive regulation of hydroelectric construction on public lands and on locations affecting navigation. In that year Congress passed the Federal Water Power Act which created the Federal Power Commission—now composed of five members appointed by the President with the consent of the Senate. Among other things the commission is charged with the duty of developing well-balanced plans for the utilization of all waters affecting navigation or passing through the public lands; that is, waters subject to federal jurisdiction.

Under this authority the commission has prepared, in cooperation with other federal agencies and certain states, a number of valuable reports on the power potentials of specific rivers. To insure general conformity with the plans which it adopts, a system of compulsory licensing has been inaugurated. Before any organization, whether a city, state, or private concern, can erect a hydroelectric plant on a site coming within the scope of the act, it must secure a license for

the purpose. Such permits are issued by the commission only when it is satisfied that the project in question is properly designed. In every case preference must be given to states and municipalities applying for the right to construct their own plants, provided the commission is convinced of their utility. Licenses so issued run for definite terms, on condition that the site is to be developed within a fixed time; and the right of the Government to recover possession is specifically recognized.

Federal Regulation of Electrical Rates and Services. Federal control over the licensing and construction of power plants on the public domain and along navigable streams only touched the fringes of the problem created by the enormous growth of private companies engaged in interstate transmission of electric power and in consolidating local power concerns on a regional or national scale. In fact, after the passage of the Water Power Act in 1920 occurred an astounding development of the whole electrical industry. That industry began with the construction and operation of local plants to serve single cities or communities. As time went on local plants expanded the areas of their operations; they were often united in groups by outright purchase or by merger or through the agency of a holding company—a concern that buys control over local companies and supervises their finances and operations.

By 1930 the country was covered with networks of gigantic electrical corporations owning and managing plants in many localities. Through unions and mergers, these corporations achieved remarkable economies in operation; by building long power lines and tying local distributing plants into common systems, they were able to furnish steadier service and a more competent direction of electrical production. Yet this truly remarkable development was accompanied by many acts that aroused popular resentment: high rates, the issue of stocks and bonds that became worthless or of little value, propaganda against public control and ownership, and lobbying scandals. At the same time, it made the electrical industry largely interstate in character, for current was now transmitted in huge quantities across state boundaries, and interlocked companies controlled the rates in large sections of the country. Out of this situation grew a popular agitation for the regulation of holding companies and the interstate business of electric power concerns.

The Federal Power or Holding Company Act of 1935. The struggle which accompanied this agitation for federal control over electrical utilities culminated in the passage of the Wheeler-Rayburn Holding Company Act of August 26, 1935, after a spectacular battle—one of the most intense in the history of federal legislation. The act vests in

the Federal Power Commission the right to regulate rates, facilities, and the security issues of concerns engaged in the interstate transmission of electric power; the act also attacks the "holding companies," that is, companies that buy up and control other companies, which may also be holding companies. In fact, there were at the time holding companies that owned holding companies that owned other holding companies three or more layers above the bottom companies that actually produced and distributed electric current. Striking harshly at these combinations, the act provided that, within three years, superholding concerns were to be dissolved under the direction of the Securities and Exchange Commission. Thereafter holding companies had to limit their operations to "single integrated systems and the business directly connected with the supply of power service to consumers." According to this rule, called by its critics "the death sentence," a holding company may be allowed to continue in business if it is necessary to tie together a group of operating power plants in a single region and to promote efficient operation.

Rural Electrification. Despite the rapid expansion of power lines in rural regions by private enterprise, many sections of the country remained without electrical services. To promote the extension of such services to neglected areas, Congress passed the Norris-Rayburn Rural Electrification Act in 1936. This measure created the Rural Electrification Administration, headed by an administrator appointed by the President with the consent of the Senate. It authorized funds for a long-term program and empowered the administrator to make loans to persons, corporations, states and their subdivisions, and to cooperative associations prepared to construct and operate generating plants and distributing systems in rural districts, on a self-liquidating basis.

The Tennessee Valley Development. Almost inadvertently, the Federal Government has been compelled to face questions of public ownership. During World War I, it erected a large factory at Muscle Shoals in Tennessee for production of nitrates necessary to the manufacture of munitions. It also built hydroelectric and steam plants capable of supplying enormous quantities of electricity to the factory. At the close of the war, the disposal of this costly investment became a subject of national discussion.

Under the insistent leadership of Senator George W. Norris, Congress passed in succession two bills providing for public operation of Muscle Shoals only to have them vetoed—one by President Coolidge and the other by President Hoover. Finally, in 1933, with the hearty approval of President Franklin D. Roosevelt, Congress enacted a still more comprehensive measure combining the development and operation of

the Muscle Shoals plant with the improvement of the whole Tennessee Valley. The Norris Act created a public corporation known as the Tennessee Valley Authority, composed of three directors appointed by the President with the consent of the Senate. It empowered the Authority to build dams, power plants, and transmission lines and to produce and sell fertilizer and electricity, either directly or through private contractors, to private persons and concerns, states, counties, and municipalities. In addition the Authority was given power to promote forestry, improve navigation, control floods, prevent soil erosion, and advance industry, agriculture, and welfare throughout the region. In a supplementary act Congress increased the power of the Tennessee Valley Authority by allowing it to lend money to state and local bodies for the purpose of acquiring facilities for electric distribution—in other words, for buying up private concerns in the region.

The Hoover Dam Project. A second federal project sought to use the potentialities of the Colorado River for power and irrigation in seven states: Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming. Owing to the extent and variety of the interests involved, both public and private, the enterprise was the subject of many hearings and debates in Congress. Advocates of public ownership insisted that the Federal Government should itself construct a dam and generating plant and distribute electricity through state and city agencies at rates calculated to cover merely the cost of production. Their opponents contended that the site should be leased to a private company under federal regulation. The outcome was a compromise in the Boulder Canyon Act of 1928, supplemented by a compact among certain states formally sanctioned by Congress in 1930.

Like most compromises this act was vague in its terms. It shifted a large part of the responsibility to the Secretary of the Interior. Subject to the approval of the states concerned, he was authorized to construct, operate, and maintain a dam and incidental works at Black Canyon on the Colorado River. The water so impounded he could by contract employ for irrigation, domestic uses, and the generation of electricity to be delivered at the switchboard to public bodies and private corporations at rates covering expenses of operation and upkeep. In making contracts for the disposal of water and the generation or sale of electrical energy, the Secretary, with due regard to the public interest, was required to give preference to states and local governments.

Applications for power filed by public agencies, particularly cities in southern California, were sufficient to exhaust the entire amount

assumed to be available on the completion of the project. But private utility corporations also demanded a share in the public interest. After due consideration the Secretary of the Interior allotted a small portion of the output to private companies and the remainder to states and cities. In the summer of 1930 work on the project was at last begun and by 1938 the plant was in operation.

"Recovery" Projects. In other ways the Federal Government was drawn into the direct development of power resources. As the business depression deepened after the stock market crash of 1929, the steel, cement, and building industries sank low in the scale of capacity operation and a demand arose for federal action designed to set them in motion and relieve unemployment. In this connection the Public Works Administration, established in 1933, allotted over $80,000,000 for the construction of two immense power plants—one the Grand Coulee on the Columbia River about seventy miles west of Spokane and the other at Bonneville, Oregon, east of Portland. Both projects were regarded as "yardsticks" for measuring the cost of producing electric power.

By 1947 the Department of the Interior, which had supervision over most of the federally owned power plants, could justly claim to be "the largest producer of hydroelectric power in the world." Among the plants under its authority were those at the Boulder, Shasta, Grand Coulee, and Bonneville dams as well as smaller dams in Oklahoma, Texas, and Arkansas. At the same time many additional projects were under way. Among them was a program for the Missouri Valley Basin, adopted by Congress in 1944, which authorized four agencies of the Government to cooperate in the construction of works for flood control, irrigation, and power production. Moreover, continuous efforts were made in Congress to increase appropriations for water and power undertakings. When the Republicans, commanding a majority in the House and Senate in 1947, tried to cut down rather than augment outlays for such undertakings, great outcries were raised by Representatives and Senators from the regions to be benefitted. One orator from Oregon exclaimed: "We are about to start on a program of squandering billions overseas . . . and we are going to deny to the people of our own country the necessary funds to carry on these great projects in the West that made it possible for us to win the last war." [4]

Loans for Building Plants. Still another relation between the Federal Government and the power industry was established as a part of the

[4] *Congressional Record*, April 25, 1947, p. 4174. On the general subject see this issue of the *Record*, pp. 4162 ff.

recovery program adopted in 1933. Under a general authorization of Congress, the Public Works Administration began to donate and lend money to municipalities for the purpose of building new plants. Despite the protests of existing electric power interests against such public competition, large grants for this purpose were made from the federal treasury and the practice was upheld by federal courts. Thus the Federal Government acquired an interest in power production entirely apart from the public domain, navigable waters, and interstate commerce.

FISH AND GAME RESOURCES

Fisheries. Despite the limited view, commonly held, that wild life exists merely to provide recreation for sportsmen, the fish and game resources of the country furnish a large amount of foodstuff, and if properly developed could become a still more productive branch of the national economy. To maintain the nation's fisheries, the Fish and Wild Life Service of the Department of the Interior conducts a number of hatcheries of its own and cooperates with the states in the management of others. Great quantities of fish from these sources are periodically used to stock natural waters throughout the country. In addition, the Service makes studies of the problems confronting the deep-sea fisheries and exerts its influence in halting destructive practices. The National Government has even entered one sector of the fishing business commercially, by owning and operating the valuable fur seal enterprises in the Pribilof Islands of Alaska, the output of which is auctioned off to private buyers from time to time.

Game Reserves. To conserve the diminishing supply of wild birds and big game, the Federal Government has established numerous national bird and game reserves in various parts of the country. Many of these areas are administered by the Fish and Wild Life Service but some are operated by other agencies in connection with their usual work. The Forest Service, for example, watches over beavers, deer, and other creatures in the national forests.

Game Protection. The Federal Government cannot, of course, provide for more than a small fraction of the country's wild life on its own preserves. Under the pressure of conservationists, however, it has taken steps to extend its supervision to wild animals on lands not federally owned, through the exercise of its jurisdiction over other matters. For example, its power over interstate commerce is employed in some instances to reinforce local legislation relative to hunting and fishing. To give an illustration, Congress has made it a federal offense knowingly to ship game out of a state if it has been killed contrary to the

state's law, and federal game wardens aid in tracking down offenders.

Protection of Migratory Birds. Besides supporting the enforcement of local game laws, the Federal Government assumes special responsibilities with respect to birds. The majority of our wild fowl breed north of the United States and probably ninety per cent of them winter in the southern part of the United States or in Mexico. In coping with this peculiar situation, the United States and Canada have undertaken by formal arrangement to protect migratory birds as joint wards. In conformity with this agreement federal game laws now control the shooting of wild fowl in the United States. States are not permitted to pass laws dealing with this subject unless their provisions are still more rigorous.

LANDS AND RIGHTS OF INDIANS

The Creation of Indian Reservations. Among the great areas of land subject to federal jurisdiction are the Indian reservations embracing approximately eighty-two thousand square miles. The practice of setting aside specific districts of the public domain for the Indians was gradually adopted as the rush of the white man across the continent made impossible their further retreat. In the conflict between modern civilization and tribal custom, this proved to be the only alternative to their extinction or assimilation.

As soon as the right to separate tribal existence on the reservations had been granted to the Indians, questions inevitably arose respecting their government and property. The simplest policy, at least for the moment, was to grant them a certain financial support and allow them to continue in their old ways.

Continued Supervision of Property. The management of Indian operations is vested in the Office of Indian Affairs in the Department of the Interior and for convenience five district offices are maintained in the West.

An important task of the Office is, of course, the supervision of the Indian reservations through the agency of local superintendents. These tracts, being classed as federal lands, are not subject to the jurisdiction of the respective states within which they lie, but are in effect treated as independent "colonies." As trustee, the Office scrutinizes the leasing of forests, water power, mineral lands, and other natural resources on the reservations, turning the income over to the Indians entitled to it or holding it in trust where collective ownership obtains. When the lands and revenues available for the Indians are not sufficient for their support, and sometimes in accordance with historic treaties, Congress

makes additional provisions for them in the form of supplies and grants, often pitifully meager or wholly inadequate.

In connection with the administration of Indian lands and resources, as in the case of the public domain in general, numerous scandals and frauds have occurred. Indeed, if the friends of the Indian are correct in their contentions, he has been the helpless victim of exploitation from the beginning. Yet it would be a mistake to overlook conscientious efforts made by the Federal Government to conserve the property of the Indians on their reservations and assure them the advantages of it. In the course of such efforts, there is an endless strife between the trustees in charge of their interests and white men eager to seize, distribute, and exploit their patrimony; and the struggle will probably continue indefinitely unless the Indians are absorbed into the general body politic.

Attempt to Individualize Indians. In time the Government evolved a definite policy looking to the final incorporation of the Indians in American society and the conversion of their tribal lands into individual and private property under the American system of law and rights. The controlling principle of administration in this connection was to prepare the Indians for life as regular citizens of the United States.

The development of this new program was marked by certain steps. In 1871 the practice of regarding Indian tribes as nations, by making treaties with them, was abandoned, and all Indians and their property were brought directly under the legislative power of Congress. By a series of laws beginning in 1887 the President was authorized to cause parts of reservations to be surveyed and to allot lands in private holdings to individual Indians, subject to certain restrictions as to inheritance and alienation. Finally in 1924, after experimenting with the process of gradual naturalization, Congress declared all Indians born within the territorial limits of the United States to be American citizens. Thus legal provision was made for the possible dissolution of tribal institutions and the absorption of the Indians, with their property, by the neighboring communities.

Breaking Tribal Habits by Education. For this outcome the Federal Government has long tried to prepare the Indians by educational methods. Under the authority of congressional legislation, a large but insufficient number of schools have been established to instruct them in elementary subjects and the crafts. As a stimulus to attendance, pressure may be applied to parents, by withholding rations and allowances for their children of school age who are not actually attending

classes wherever facilities for education are available—in state, private, or federal schools.

Failures in Individualization. It became apparent at an early stage in these educational experiments that Indians, on completing their schooling, were prone to drop back into their old modes of life. Obviously individualistic education could make little progress under such circumstances. Partly for this reason the practice of partitioning tribal lands into separate holdings was extensively adopted on a number of reservations. Then as an additional step in the promotion of independence, responsible Indians were given the right to sell their land freely just like other citizens. Thus the magic spell of individual ownership was cast over tribal institutions. But the spell did not produce the expected results. It was too easy for an Indian to sell his land for a small sum in "ready cash" and, after spending his money, seek public support. As it proved to be impossible to alter the ways of the Indians in a few "easy lessons," the Government had to reconcile itself to attempting to educate them gradually out of their ancient habits and, at the same time, to providing them with various aids and props against the buffets of fortune.

A Resort to Tribal Policies. Suddenly in 1933, with the advent of President Franklin D. Roosevelt and the appointment of John Collier as Indian Commissioner, a reversal of policy was announced. Efforts to destroy tribal institutions and industries root and branch, and to thrust the Indians as individual citizens into the main stream of American life, were diminished or discontinued. Instead, the attention of the Government was directed mainly to fostering Indian community institutions and industries, and to educating the youth in the handicrafts and arts long cherished by the elders. In short, an attempt was made to preserve and develop Indian community life on a higher scale, with the aid of technical resources provided by white civilization.

As a result of the experiments under Commissioner Collier (1933–1945), the basic program, though changed in some respects after his retirement, now includes both tribalism and individualism as objectives of the Indian administration. As officially stated it embraces "the economic development of the Indians, both tribally and as individuals, through the effective use of their resources and the acquisition of new resources necessary to provide subsistence; a land-use program, involving land consolidation, acquisition, and management, to the end that all Indians able and willing to work on the land will have the opportunity to do so; forestry and grazing, including sustained-yield forest management . . . ; irrigation, including construction, operation, and maintenance; construction and maintenance of bridges on

Indian lands; construction and upkeep of buildings on about 200 Indian reservations." The Indian Office also provides and maintains hospitals for the reservations and directs activities connected with the improvement of health and sanitation.

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CHAPTER 21

Business Enterprise and Agriculture

One of the prime purposes of the Fathers in framing the Constitution was to protect and promote American commerce and industry and, except for a brief time during the middle period of the nineteenth century when the country was dominated by Democrats under the lead of cotton planters, that purpose has been rather effectively realized. If, at the outset, agriculture received slight consideration at the hands of Congress, this was due to the fact that farmers and planters made no special demands upon the Federal Government, not to lack of power under the Constitution. As we have seen, President Washington recommended to the first Congress the promotion of agriculture as well as commerce and manufacturing, and about the middle of the nineteenth century Congress began a long chain of enactments conceived in the interests of agriculture. Public opinion in the United States now differs over the nature and extent of government action in the spheres of commerce, industry, and agriculture rather than over the antithesis between action and no action at all respecting those branches of economy.

PROTECTION OF DOMESTIC INDUSTRIES BY TARIFF LAWS

The Country Committed to Protection. The two major political parties are now in practice committed to the principle that imports which compete materially with American manufactures and agricultural commodities are to be taxed at the ports of entry or otherwise restricted for protective purposes. This means in effect that the bulk of commodities admitted free of duty consists of raw materials and other articles not produced in the United States or at least produced here only on a small scale.

Cost of Production Theory. One question remains: How shall the degree of protection—the rate of tax to be imposed on commodities imported—be discovered and determined? For more than a century each tariff bill was made by the dominant party in Congress under direct pressure from leaders in the affected economic undertakings,

without reference to any uniform principle. At length however a controlling formula was evolved: "The duty fixed on each commodity shall be determined by the difference between the cost of production at home and abroad." In other words, the tariff is simply designed to place American manufacturers on a level of equality with their foreign competitors; rates are not matters of mere opinion but can be automatically established when the difference in manufacturing costs is disclosed by scientific inquiry.

Though simple on its face, this theory is hard to apply. Costs in industry depend on many variable factors, such as ingenuity in management, the size of the plant, and the modernity of the machinery. What shall be included under the head of costs? Interest on imprudent investment? Expenses due to unwise management, inefficient labor, high freight rates, and unproductive advertising? At all events the cost-of-production formula does not provide exact criteria for fixing tariff rates and despite all efforts to "take the tariff out of politics" and make it "scientific," it is still entangled in matters of human interest and judgment.

Flexibility Theory. Correlated with the cost-of-production doctrine is a second principle: the tariff must be flexible; costs of production change, and provisions must be made for the continuous readjustment of rates to economic conditions at home and abroad. By the McKinley Act of 1890 the President was empowered to levy special duties on certain imports whenever he discovered that any country from which such commodities came imposed "unjust and unreasonable charges" on American goods. Since that time the creed of "flexibility" has been growing in favor. It was incorporated in the Tariff Act of 1922 and with modifications in the law of 1930. Under the latter measure, still in effect, as amended, the function of drafting suggestions relative to raising and lowering rates, on the basis of differences in the costs of production at home and abroad, is vested in the Tariff Commission, composed of six members, not more than three from the same political party, appointed by the President and the Senate for overlapping terms.

In applying the law the commission is to proceed upon request of the President, upon resolution of either or both houses of Congress, upon its own motion, or in its judgment upon application from interested parties. When it finds that a particular duty does not equalize the difference in the cost of producing a domestic article and similar foreign articles in the principal competing country, the commission proposes a change in the rate (within limits) to make up for the said difference. After concluding its inquiry, the commission sends its

recommendations to the President; if agreements made with other countries do not stand in the way and the President approves the proposed changes, they are made law by proclamation.

Reciprocal Trade Agreements. Operation of the Tariff Act of 1930 was materially modified by the Reciprocal Trade Act of 1934. Under the new measure, the President of the United States was authorized, for a period of three years, to make tariff agreements with other countries separately, to lower American rates not more than fifty per cent in exchange for concessions, with no necessary relation to comparative costs of production, and to put such agreements into effect without submitting them to the Senate for approval. After four extensions, the act was again renewed in 1948 for one year, the President being empowered to reduce any rate to twenty-five per cent of the figure fixed in the Tariff Act of 1930 passed by a Republican Congress.

In accordance with the terms of the Reciprocal Trade Act, elaborate machinery was set up in the Department of State for study of tariff regulations, and negotiations were opened with many countries with a view to effecting agreements and reductions. By the close of 1937 tariff agreements had been concluded with sixteen foreign countries, including Belgium, Canada, Cuba, France, Sweden, and Switzerland; and a treaty with Great Britain was signed in 1938. By 1943 the number had been increased to twenty-seven. Under these agreements rates were lowered on many classes of commodities in exchange for concessions by the other contracting parties. In principle, reductions in rates granted to one country under the law are extended to all other countries, unless otherwise specified or exceptions are made of countries that discriminate against the United States. On the whole the reciprocal trade agreements, despite numerous modifications of the old tariff rates, had not restored the former volume of foreign trade when World War II began in September, 1939, and international commerce was thoroughly disrupted.

Postwar Confusion in International Trade. World War II, which started in Europe in 1939, disorganized the international trade and economies of all nations, belligerent and neutral. When, at the close of hostilities in 1945, amid the wreckage or dislocations of economies in Europe and Asia, the Department of State began to work at the promotion of international trade, it encountered many difficulties abroad and at home. Great Britain, in desperate straits, sought to recover her former markets within the British Empire and elsewhere and was not inclined, or in fact able, to open her doors to an unrestricted influx of American goods, except as gifts. Nor were other

countries in Europe willing or able to engage freely and "normally" in a wholesale exchange of commodities with the United States. Russia, having made her foreign commerce a government monopoly, rejected entirely the very idea of free trade in the old style or in any style, and her satellites in eastern Europe took a similar position. There seemed to be only one way for the United States to maintain a large outlet abroad for American goods; that was by giving them away or lending American money to needy nations—so that they could "buy" the goods (Chapter 19).

The plight and disposition of foreign countries in respect of international trade became obvious early in 1947 when the representatives of many governments (not including Russia or her satellites) met at Geneva for the purpose of forming an International Trade Organization under the Charter of the United Nations and drafting plans for freer international exchange. After months of negotiation the Geneva conference agreed upon a general program of tariff relations, which was reviewed at a later conference in Havana.

Before the Geneva conference had advanced far on its way, rumblings of discontent appeared in the United States. Fearing that the American protective system might be entirely broken down, members of Congress, including many Democrats, filed objections to any indiscriminate cuts in American tariff rates. In response to such protests President Truman, on February 28, 1947, issued an executive order providing many safeguards against reductions through future trade agreements which might result in, or threaten, serious injury to domestic producers of articles like, or similar to, given types of imported goods. The President instructed the Tariff Commission to report on possible injuries. He created an Inter-departmental Committee representing the State, Treasury, Agriculture, Commerce, Labor, and other departments and empowered it to review the findings of the Tariff Commission and to make recommendations to him respecting actions to be taken on tariff reductions proposed in the future. The President also declared that all new trade agreements must include stipulations to the effect that if any party to an agreement with the United States gave tariff advantages to a third country, it must grant the same advantages to the United States.[1]

Some Republicans in the Senate, though not entirely satisfied with these new limitations on the negotiation of trade agreements with foreign countries, accepted them as steps in the right direction; but other Republicans, aided by a few Democrats, served notice on the

[1] Executive Order in the *Congressional Record*, February 26, 1947, pp. 1463 ff.

President and the State Department that all substantial cuts in the rates on important articles of American production would be contested.

Unfair Importation Forbidden. It is not merely against an influx of cheap goods that American manufacturers are protected; the law forbids "unfair methods of competition" and "unfair acts" in the importation of commodities, the tendency of which is to destroy or injure substantially any industry efficiently operated in the United States. It is the duty of the Tariff Commission to investigate complaints coming under this head, affording the accused parties an opportunity to be heard. If a foreign nation makes any "unjust discriminations" against commodities imported from the United States, the President may take certain steps in retaliation.

Tariff Commission Activities. To aid the President in enforcing the protection afforded by law, the Tariff Commission is given full power to investigate the tariff relations between the United States and foreign countries, commercial treaties, economic alliances, the effect of foreign export bounties and preferential transportation rates, and all conditions relating to competition of foreign industries with those of the United States. The Commission is also instructed to study, at home and abroad, the cost of producing articles imported into the United States, to describe commodities imported into this country, and to ascertain selling prices of such goods. It must cooperate with other federal establishments in developing information, and aid the President and the Department of State in the making of reciprocal trade agreements. In the discharge of its duties it may summon witnesses, call for papers, and take testimony under oath. It must report to the President, the ways and means committee in the House of Representatives, and the finance committee of the Senate with respect to subjects on which they wish enlightenment.

PROMOTION OF FOREIGN COMMERCE

Continuous Interest of the Federal Government. Since its establishment the Federal Government has promoted the interests of exporting, importing, and shipping enterprises. One of the objects of the American Revolution was to free the American colonists from British restrictions on their foreign commerce, so that they could trade as they pleased with all nations. Immediately after the Declaration of Independence, the Continental Congress sent diplomatic agents abroad for the purpose, among other things, of negotiating with foreign governments treaties of commerce favorable to American economic interests. Subsequently the Constitution vested control over foreign commerce in the Federal Government and, in 1791, Congress passed an act granting

special favors to Americans who engaged in trade with the Orient. It was under the auspices of federal agents, supported by the Navy, that the doors of China and Japan were finally opened to American traders. Half a century later, under the slogan "trade follows the flag," Republican imperialists contended that by annexing distant territories and acquiring "spheres of influence" in various parts of the world, outlets would be found for the "surpluses" of American goods. Although during the administrations of President Wilson, President Franklin D. Roosevelt, and President Truman, the imperialist philosophy of trade promotion was generally condemned by Democrats, the National Government continued to display an intense interest in the expansion of foreign commerce.

Current Democratic Theory of Trade Promotion. World War II and its aftermath were accompanied by the creation of new formulas respecting the enlargement of American foreign commerce. In his annual message of January 6, 1941, President Roosevelt set as a national objective the establishment of four freedoms for all peoples everywhere in the world, as "a definite basis for the kind of world attainable in our own time and generation." To freedom of speech, freedom of religious worship, and freedom from fear he added: "Freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world." Among the clauses of the Atlantic Charter (1941), formulated by President Roosevelt and the British Prime Minister, Winston Churchill, was an agreement, with due regard for the existing obligations of their respective countries, to further the enjoyment by all states, great or small, of access, on equal terms, to the trade and raw materials of the world which are needed for their economic prosperity. This theory of universal prosperity through world trade, cast in various forms, President Roosevelt also incorporated in subsequent statements; and it found expression in the Charter of the United Nations, particularly in Article 55 which declares that the United Nations shall promote "a higher standard of living, full employment, and conditions of economic and social progress and development."

Trade Promotion by the Department of State. Many offices, services, and divisions in the Department of State are engaged in carrying on activities relative to the promotion of American foreign trade, unilaterally or in cooperation with other nations. Indeed, practically all functions involving economic contacts with foreign governments and international economic conferences are vested in the Department of State. One noteworthy exception is the administration of the Marshall

plan for European recovery (Chapter 17). Through diplomatic and other representatives the department seeks to facilitate the opening of opportunities abroad for lending American capital and selling American goods. It aids in adjusting controversies between American capitalists and foreign governments which involve trade, investments, property rights, claims, and business undertakings within the jurisdiction of those governments. Under the guidance of the department, American consuls in all parts of the world collect information respecting commerce, industry, and agriculture in the countries to which they are accredited; and they supply to the department information on possible openings for American products and capital.

Department of Commerce Activities. It is also the duty of the Department of Commerce "to foster, promote, and develop" the foreign, as well as the domestic, commerce of the United States but its activities in this sphere are carried on mainly at home. The department is charged with distributing information with regard to foreign trade opportunities among American citizens interested in them. The details of such information it collects from numerous sources, including the State Department's reports and records. It keeps up to date a list of more than 800,000 foreign firms and individuals engaged in international trade; it compiles reports on opportunities for exporting and importing goods; it collects and classifies materials on trade disputes, the tariff rates of foreign governments, reciprocal trade agreements, and the banking, financial, and monetary conditions in foreign countries. Besides making this voluminous mass of information, general and particular, available to interested citizens at its offices, the department sends digests of it broadcast in documents and periodical publications. In the discharge of its duties the department also maintains regular contacts with the other agencies of the Government which deal officially with the promotion of foreign commerce.

Activities of Other Agencies. The Tariff Commission, while especially concerned with tariff adjustments and unfair practices in the import trade, assists the State Department in formulating reciprocal trade treaties, and advises the President on commercial policies. It supplies to the Department of Commerce and to Congress comprehensive information on the trade practices of foreign countries, with special reference to the effect of these practices on the industry and commerce of the United States. With funds provided by Congress, under general or special authorizations by law, the Export-Import Bank and the Reconstruction Finance Corporation make loans abroad which are supposed to be in the interest of American commerce, directly or indirectly. The independent Economic Cooperation Administration,

with a huge staff at home and abroad, while promoting recovery in Europe, seeks to increase the trade opportunities of American private enterprisers.

Private Activities under Government Supervision. With a view to encouraging formation of large American combinations and associations capable of dealing and competing with trusts and cartels in foreign countries, Congress, by the Webb Act of 1918, has exempted from the limitations of the antitrust laws all combinations formed for the promotion of export trade, provided that they do not restrain the business of any domestic exporter or interfere unduly with competition inside the United States. Associations created under this act vary from loose confederations of concerns bound together by temporary agreements to great incorporated companies. "One of the primary purposes of the law," reports the Federal Trade Commission under whose jurisdiction these establishments come, "was to enable American exporters to operate on an equal footing with foreign combines. . . . The Webb law association is also in a position to present a solid front to the buying combines which might otherwise play one exporter off against another and beat the price [of American goods] down to an unprofitable basis." On the whole, however, American business enterprisers have taken relatively slight advantage of the Webb Act. Indeed, many great American concerns have preferred making adjustments with foreign cartels and trusts rather than waging a competitive war on them.

REGULATION AND PROMOTION OF DOMESTIC INDUSTRY

Early Nonintervention. For a long time it was assumed in the official policy of the United States that domestic industries could take care of themselves and maintain a fair level of prosperity, if they were protected against foreign competition and subsidized in certain branches. With this assumption was associated another, namely, that competition among industries would hold the prices of their output down to a point near the cost of production and thus assure consumers the benefit of the lowest prices consistent with the continued operation of manufacturing plants. But it was found, well before the end of the nineteenth century, that industries tended to combine in great trusts and corporations, to fix prices by agreement, and to drive competitors to the wall by various practices. Then Congress sought to restore and maintain competition; by enacting antitrust legislation, it tried to give small business concerns a chance to flourish, on the theory that competition would promote production, prosperity, and employment.

Antitrust Legislation. The first of the antitrust measures, the Sher-

man Act of 1890, still in force, is broad and general in its sweep. It forbids, under threat of lawsuits and heavy penalties, all contracts and combinations, in the form of trusts or otherwise, in restraint of trade or commerce among the several states, in the territories and District of Columbia, and with foreign nations.[2] It lays open to suits for damages or punishment all persons who monopolize or attempt to monopolize or conspire to monopolize such commerce. By the terms of a law passed four years later, similar principles are applied to contracts and combinations in restraint of the import trade.

With great elaboration in detail, the Clayton Antitrust Act of 1914 sharpens the teeth of the Sherman law respecting the same spheres of commerce. It forbids discrimination in the prices charged to different purchasers of identical commodities, that is, discrimination not based on variations in quality, grade, and quantity. Likewise prohibited are concessions in the form of special reductions to buyers on condition that they do not use or deal in the goods of a competitor, where the effect of such an arrangement is to lessen competition substantially.

In addition, efforts are made to prevent interlocking relations among banks, industrial corporations, and common carriers. Recognizing the fact that banks, in financing industries on a large scale, may control their management, the Clayton Act stipulates that no person may serve as a director, officer, or employee of more than one bank organized under the laws of the United States and having above five million dollars in capital, surpluses, and undivided profits. No corporation may acquire stock in another concern where the acquisition lessens competition or restrains trade. Any person or concern injured by acts proscribed by the antitrust laws may bring suit and recover damages.

Course of Business under Antitrust Legislation. Although the avowed policy of the Government of the United States has long been that of dissolving, or breaking up, trusts and combinations in industry, action under it has been relatively meager. Several great combinations have been prosecuted and dissolved, but combination and concentration in industry have continued in defiance of the law. By 1930 nearly one-half the business wealth of the country (apart from banking) was concentrated in the hands of 200 huge corporations and controlled by a few thousand directors and managers.[3] Nor was the idea behind the policy of prosecution and dissolution universally accepted, even by federal officials. Indeed, it was widely held that the laws could not be enforced. It was alleged that the tendency to combination was a "nat-

[2] See modifications introduced by the Webb Act of 1918, above p. 427.
[3] Berle and Means, *The Modern Corporation and Private Property.*

ural" and "inevitable" tendency of great industries, and that acceptance of this stubborn fact was required by a sense for realism in politics. It was also asserted that harsh and merciless competition is not a good but an evil—an evil largely responsible for business panics and general instability in industry and employment.

Movement Toward Regulation. On these and other grounds a movement was started to substitute "regulation" for the prosecution of trusts, or at least to temper prosecution with discrimination. This trend found expression in 1914 when Congress established the Federal Trade Commission. It is true that the commission was instructed to apply the drastic provisions of the antitrust laws, but according to an understanding at the time, it was to supplement the prosecution of corporations by devices of regulation. It was authorized to prevent "any unfair method of competition" in interstate and foreign commerce by advisory and administrative operations, reserving actions in the law courts for special occasions. In the discharge of its obligations, the commission has held numerous trade conferences, each composed of the representatives of a separate industry (fur, heavy sheet glass, and varnish, for example) and aided them in working out "fair-trade practices" to be executed by self-discipline in the industry. Many such "codes" of fair practices have been established by mutual agreement, but the powers of the commission are limited and, despite official approval of such plans, parties to codes are still liable to prosecution under the antitrust laws.

Attempt at Large-Scale Regulation Blocked. Such was the posture of affairs when the great panic broke in 1929 and a cry went up for more stability in business and for a steadier employment of labor. The prosecution of large business concerns under the antitrust laws certainly had not guaranteed prosperity. Profoundly disturbed by the crisis Congress passed in 1933 the National Industrial Recovery Act which positively encouraged cooperation in business, under codes drawn up for the several industries, and conditionally suspended the antitrust laws during the life of the act. So a new experiment was made in the relation of the Government to business enterprise; but it soon ran into many difficulties and was definitely blocked in 1935 when the Supreme Court declared the main parts of the Recovery Act unconstitutional. Although President Roosevelt favored some kind of alternative, Congress decided instead, after many debates, to set up in 1938 a large committee to inquire into the monopoly problem—a committee composed of members of Congress and representatives from executive agencies. This organization, called the Temporary Committee on National Economic Policy, made an elaborate investigation of the

subject and issued voluminous reports on the concentration in American business, "less-than-perfect competition," and kindred topics. In general animus it followed the "trust-busting line" and produced no substantial results.

Another Season of Antitrust Prosecutions. In 1938 President Roosevelt appointed to the office of Assistant Attorney General, Thurman Arnold, a professor of law at Yale University who had previously written a book poking fun at trust busting. For five years Mr. Arnold waged a relentless war on combinations in restraint of trade, including in some cases trade unions. He operated apparently on the theory that, by breaking up such combinations and restoring "free" competition, prosperity would be achieved. In the course of five years he had instituted antitrust actions equal to forty-four per cent of all the proceedings arising under the antitrust laws between 1890 and 1913. His activities produced outcries in various quarters, and in 1943 he was gracefully retired. With a view to promoting war production, the prosecution of trusts was then relaxed. If anything more than the repetition of previous experience in "trust busting" lies ahead, it is impossible to discern its shape.

Regulation of Public Utilities. Transportation and communication in various forms stand in a separate class of business enterprises; all such concerns have special privileges and many of them are monopolies or quasi-monopolies whose rates and services cannot be held to "reasonable" standards by competition. They are, to use the lawyers' phrase, "affected with the public interest." Hence it is regarded as the right and duty of the Federal Government to regulate such utilities engaged in interstate commerce and compel them to provide reasonable rates and services for all users of their facilities (Chapter 22). In this field of government intervention, certain branches of national economy are regulated, in part at least, for the benefit of other branches; thus the railroads are regulated on behalf of manufacturers and farmers who produce goods for shipment.

Financing Corporations. The major branches of American industry are owned and operated by corporations large and small, and corporations obtain a considerable part of the money for their enterprises by the sale of stocks or bonds or both to investors. To permit the easy purchase and sale of securities, stock exchanges are maintained in the leading cities, the exchanges in New York City being especially famous.

If industries are to be financed according to their needs, the confidence of investors in methods used to float new securities issues must be maintained. If public confidence is to be preserved, then in-

vestors must be assured that their money is put to bona fide industrial uses and not channelled into the pockets of speculators, whether associated with the concerns issuing stocks and bonds or standing apart from them as mere operators in securities. This is obvious economics. Yet revelations made during a Senate investigation into securities practices in 1932–34 showed that a startling proportion of the securities business had been concerned with mere money-making or gambling rather than with the orderly financing of industries.

Regulation of Stock Exchange Practices. It was with a view to correcting such abuses that the Securities and Exchange Act was passed by Congress in 1934. Under this legislation every company (with certain exceptions) engaged in interstate commerce or intending to use the mails in selling stocks and bonds to the public must, before issuing new securities, give the Securities and Exchange Commission a statement showing the details of the company's organization, the nature of its business and management, the uses to be made of the money raised by the sale of its securities, and the conditions under which the securities are being offered. Such issues of securities must be approved by the commission in advance of the offering. The manipulation of stock prices and values is forbidden by the act, and the commission is empowered to regulate the operations of stock exchanges.

Control over Patents, Copyrights, and Trademarks. Bearing an intimate relation to competition are the activities of the Federal Government connected with patents, copyrights, and trademarks. Any person believing himself to be the inventor of a machine, process, or design, or the originator of a new plant species may, by application to the Patent Office in the Department of Commerce and the establishment of his claims, secure a virtual monopoly over the exploitation of his achievement for a term of seventeen years. Literary and artistic products, such as books, maps, paintings, and music, can also be protected —by copyright under federal auspices—for a period of twenty-eight years, subject to the possibility of one renewal. Congress has also enacted legislation providing safeguards in the form of registered trademarks, for words, signs, and characters employed by manufacturers to distinguish their goods in interstate and foreign commerce.

Weights and Measures. If business transactions in tangible objects are to be conducted honestly and precisely, they must be based on a single accepted system of weights and measures. A clause of the Constitution vests in Congress the power to provide such a system by fixing the standards for weights and measures. To the Bureau of Standards Congress has given the duty of developing and maintaining standards of measurement in many fields. Against these standards, state and

local officers in charge of weights and measures enforcement, private concerns, and other private parties may check their instruments and devices.

Promoting Preparedness. To the older forms of "governmental interference" with business have been added in recent times various new controls designed to promote preparedness. For example, Congress has established a system of priorities intended to assure the prompt filling of military and naval orders by private enterprise, and has fixed output quotas for the synthetic rubber industry.

Collection of Business Information. Congress has authorized the gathering and dissemination of information on many matters useful to business. For example, through the Coast and Geodetic Survey and the Geological Survey, the Federal Government is constantly engaged in surveying and charting, and has prepared an extensive series of useful maps pertaining to political and economic geography and to coastal, river, and harbor configurations. Through the Census Bureau and other agencies it collects statistics on population, wages, unemployment, agriculture, manufacturing output, and other topics of interest to the business community.

Scientific Research. In the interest of business enterprise and preparedness—now so closely intertwined—is the scientific research financed and carried on under the auspices of the Federal Government, often under the seal of secrecy. For this purpose approximately $625,000,000 was spent during the fiscal year ended June 30, 1947, through about fifty federal agencies. Of these activities some were carried on in public laboratories and the remainder in industrial and institutional laboratories. As the efforts made in 1947 to establish a national scientific institute failed in Congress, the major portion of this research is supervised by the National Military Establishment. In addition, at the close of World War II, American officials and technicians from private industries ferreted out the scientific secrets of German industries and laboratories in the American zone of occupation and made them available to American business enterprisers and also to their competitors in other nations "friendly" to the United States. Whereas scientific and industrial research was once supported almost entirely from private funds, it is now heavily financed by the Federal Government, with special reference to preparedness.

FEDERAL INTERVENTION IN AGRICULTURE

General Overview. By tradition, farmers are supposed to be stanch "individualists," able and willing to "take care of themselves" without any paternal aid from government officials. Thomas Jefferson thought

that the future of the Republic would be secure as long as the great body of the people were independent farmers who looked to the soil at their feet, the sun in the heavens, and the labor of their hands for their livelihood. Yet hundreds of pages of statutes enacted by Congress and supplemented by administrative orders, especially since 1916, testify to the decline of their independence.

When the dates of these statutes are taken chronologically and the votes of Senators and Representatives on agricultural bills are entered in the record, it soon becomes apparent that it makes very little difference which of the political parties holds sway at a given time. During their tenure of power in Congress from 1933 to 1947 the Democrats had expanded and added to the old forms of intervention in agriculture established by Republicans; when, in 1947, the Republicans returned to control, they continued and enlarged the federal program for agriculture and at the end of the first session they boasted of their labors on behalf of farmers.[4]

A mere digest of the statutes and administrative orders bearing on agriculture now in force would fill hundreds of printed pages. They run so deeply into, and ramify so widely throughout, all branches of agricultural economy that any classification of the functions for which they provide must be more or less arbitrary. Such duties range from improving home life on farms and protection against pests to insuring certain crops and providing a financial underwriting of markets and prices for various staples. For convenience, however, they may be placed under the following heads: (1) extension and promotion of agricultural production; (2) protection against natural hazards; (3) financing of farm ownership and operations; (4) regulation of marketing processes; and (5) production control and price management.

EXTENSION AND PROMOTION OF AGRICULTURAL PRODUCTION

Grants of Land to Farmers. The Federal Government early adopted the policy of turning its public domain as rapidly as possible into farms and plantations owned and operated by individuals. In the beginning it sold its holdings in large and small plots at low prices, and then under the Homestead Act of 1862 it practically gave land away in small blocks to duly qualified settlers. By 1890 almost all the good arable land which had come into its possession with westward expansion had been granted to individuals and corporations under various acts of Congress. No more farms of rich soil were now to be

[4] For a Republican summary of Republican aids to agriculture, see the *Congressional Record*, Appendix, August 15, 1947 (published after the adjournment of Congress), p. A4388.

had for the asking.[5] But there still remained on the public domain huge arid regions which could be redeemed for the plow by irrigation.

Irrigation Projects. At first the construction of the irrigation projects was left to private parties and to the states, with some national aid, but the technical difficulties and the economic uncertainty of the ventures proved to be serious deterrents. When at length it became evident that local and private capital was insufficient Congress was urged to undertake the work with public funds and on a large scale. The war-cry of "make the desert bloom," at government risk, stirred the imagination, rallying several influential interests to the cause. Under tremendous pressure, Congress authorized the Secretary of the Interior in 1902 to begin the construction of irrigation projects on a large scale. Money was provided from the sale of public lands, royalties from oil leases on the national domain, and certain other sources—to which have been added receipts from the sale of land and water rights on completed projects—making a kind of perpetual fund for the redemption of waste places.

Administrative duties connected with the irrigation program thus initiated are delegated to the Bureau of Reclamation in the Interior Department. Generally speaking the Bureau does not build units itself; it lets the work on contract to private concerns and merely supervises the construction processes in accordance with its specifications. Under its jurisdiction dams are erected on favorable sites and water is distributed by ditches to the parched soil to be reclaimed.

Improvement of Breeds and Crops. The Federal Government has sought to stimulate production by introducing new crops, improving old crops, and applying the scientific method to all branches of agriculture. Recognizing the fact that nature has not bestowed her favors equally on all countries, federal agents scour the world in search of plants which may prove successful in America. With materials gathered at home and abroad, the Department of Agriculture carries on a large amount of research and experimental work. Not only does it manage laboratories where plant and animal culture is studied, but it owns and operates farms where new ideas may be tried out. Since this work is highly specialized it is distributed among several technical bureaus.

Cooperation with State Experiment Stations. The department, however, does not have sufficient facilities for performing all the necessary tests at its own establishments. Accordingly arrangements have been made for subsidizing numerous state and territorial experiment stations and using them to fill the gaps in the federal undertakings. Owing to

[5] For land policy and railway grants, see pp. 404, 460–461.

their wide geographical distribution, these stations make possible the prosecution of studies under many conditions of climate and soil.

Spreading Information. The results of federal and state research are made available to the farmer through various agencies. They are taught, of course, in the agricultural and mechanical colleges founded principally under the land grant act of 1862 extending national aid to the states for educational purposes. Since only a limited number of men and women can attend the higher institutions in person, an extension system has been evolved to reach those who live in remote places. Under a carefully planned arrangement, local agricultural colleges send agents into the field to give instruction in farming and household management, with the advice, financial assistance, and supervision of the Department of Agriculture. Each year thousands of these agents and representatives of the Farm Bureau Federation—a voluntary organization—visit farming regions and conduct practical demonstrations in rural economics.

Control over Adulteration. But knowledge alone is not enough: those who possess it must have proper means with which to work. In recognition of this fact the Federal Government now regulates many vital agricultural supplies. For example, congressional statutes forbid the importation of, and all interstate traffic in, unsound or adulterated seeds. In this way an attempt is made to keep the planting materials of the country up to a minimum level. Kindred aid is afforded to the raiser of livestock, for national legislation forbids the adulteration and misbranding of animal feed entering into interstate commerce.

PROTECTION AGAINST NATURAL HAZARDS

While man attempts to improve farm plants and animals, nature contrives to offset his efforts in many ways by letting loose disastrous forces. Some of these are inanimate, such as frosts, floods, and hurricanes. Others are swarms of living creatures, ranging from mountain lions to worms and fungi. Modern means of rapid transportation have enabled many pests to spread far and fast. To meet these challenges the Federal Government has launched a strong counterattack. Now it wins; now it loses; with great uncertainty as to the future on many battle fronts.

Weather Bureau. One prominent type of natural hazard is fought through the Weather Bureau in the Department of Commerce. Inasmuch as the probabilities of snow, rain, frost, or hurricanes in a given region are dependent on conditions at a distance, the Bureau has developed a nationwide network to collect and distribute meteorological information. Federal observation stations are located at

strategic points throughout the country and are tied together by a communications system established in cooperation with private companies. Over these lines dispatches are rushed from the recording posts to central offices where they are rapidly analyzed and used as a basis for predictions. As soon as calculations are completed, forecasts are hurried out to distribution points where they are made available in many forms to the general public.

War on Destructive Animals and Pests. The depredations of wild beasts cause a huge economic loss to farmers every year. Wildcats and wolves, for example, devour livestock; rats and gophers destroy plant crops. Some of them act singly. Others descend in great swarms, stripping large areas of crops or decimating flocks almost overnight.

Through the Fish and Wildlife Service in the Department of the Interior, the Federal Government comes to the aid of the farmer in his battle with destructive animals. The Service supervises campaigns against such pests by means of an experienced field force working with local agencies.

Going down the scale in size from wild animals to insects, fungi, and bacteria, scientists have catalogued many destructive species. All along the line, the advance on these pests is led by the Federal Government. In the Department of Agriculture, two units are especially responsible for handling the problem. One is devoted to research in the economic effects of insects on farms. The other studies normal crops and searches for methods of dealing with injurious plant growths and diseases which assail them. After appropriate means of destruction are developed and thoroughly tested, they are described in pamphlets and the information is made easily available to farmers. The task of carrying the results of laboratory research into the field where they can be made effective is also a major federal responsibility. If a serious outbreak occurs, concerted steps may be taken quickly by federal agents to meet it.

Crop Insurance. By an act passed in 1938 Congress began to experiment with the insurance of crops against loss of yield due to unavoidable hazards. The experiment was started with insurance for wheat crops. Subsequently certain other staples were tentatively brought within the scope of the law, as experience was gained by trial and error. The administration of the law is vested in the Federal Crop Insurance Corporation for which Congress supplies the capital. To sustain the insurance fund and furnish reserves against unexpected losses, the growers of insured crops are required to pay premiums, while Congress provides administrative expenses by annual appropriations. The Federal Crop Insurance Act of 1947 continued the general practice, with modifications. It placed the program on a county basis

and extended insurance only to counties in which income from insured crops is of primary importance; and it stipulated that insurance for the 1948 crop should be handled through associations and cooperatives in the local insurance areas.

FINANCING OF FARM OWNERSHIP AND OPERATIONS

First Steps in Federal Financing. Farmers used to borrow from banks and private money lenders, often at high, even usurious, rates of interest. Frequently farmers without land, yet willing and competent to work land, could not secure farms on which to employ their energy. Sometimes farmers owning land under mortgage were unable to meet the high interest charges on their loans. This situation was officially recognized in 1916, during the administration of President Wilson, when Congress established a system of land banks designed to provide money for farmers, on mortgages, at low rates of interest. Later this scheme was supplemented by provisions for extending short-term credit to farmers, secured by crops and livestock on the way to the market. Such was the system prevailing when the great depression opened in 1929 and farmers by the millions faced bankruptcy.

Extension of Government Financing. To cope with the desperate plight of farmers, Congress commenced in 1933 to reorganize and extend the whole farm credit system, now directed by the Farm Credit Administration. The country is laid out into twelve districts, each with a Land Bank and various lending agencies. Under their auspices, old mortgages have been called in and new mortgages at lower interest rates substituted. In this way the Government has slowed down and reversed the process of foreclosures through which farmers by the thousands had been losing their homesteads. Money is also lent indirectly, through savings banks, cooperative associations, and other agencies, to farmers to provide short-term funds for production purposes: raising crops and livestock, for example. Loans are also made to farmers' cooperative associations for the purpose of enabling them to construct facilities for storing and marketing commodities.

Formerly it was the custom of farmers, usually in need of "cash," to rush their crops to market as soon as harvested, thus producing "gluts" and often steep, even ruinous, drops in prices. By short-term credits to farmers, loans to marketing associations on crops, and other practices the Government has established a high degree of control over marketing and helped to raise the prices received by farmers for prime staples.

An Attack on Tenancy. In granting land to settlers in relatively small plots under the Homestead Act of 1862, the Federal Government

was to some extent carrying out the old theory of Jeffersonian democracy, namely, that a mass of home-owning farmers is both desirable in itself and the firmest possible base for popular government. This policy also found expression in the irrigation acts, for the land made arable by irrigation was subdivided into holdings of the homestead variety. But, in spite of this solicitude, great estates in land form a striking feature of agricultural economy, particularly in the south and far west. Many of these estates owe their origins to the plantations so common in parts of the south during the days of slavery. Others, particularly in the far west, are traceable to the large railway grants made by the Federal Government and to accumulations made by buying up lands originally given to "homesteaders," often illegally. Still other accumulations are due to the failure of small cultivators to make ends meet, and the purchase of their holdings by more prosperous farmers and by land speculators. Between 1880 and 1930 the percentage of all farmers who were tenants, not owners, rose from 25.6 to 42.4 per cent and in 1930 thousands of nominal owners were heavily in debt or stranded on marginal or wasted land unfit to sustain a decent family life.

Taking account of this rise in tenancy and the distress that had befallen many small cultivators, Congress passed in 1937 the Farm Tenant Act, which empowered the Department of Agriculture to assist tenants and farm laborers in acquiring farms of "the family type" on easy terms and subject to strict conditions as to usage and sale. The act also authorized the department to lend them money to buy livestock, seeds, farm equipment, and other supplies for farm needs, so that they could get started on their way to farm ownership. By 1944 about 35,000 farmers had taken advantage of the new law. Moreover, the act of 1937 authorized the department to purchase and withdraw from tillage huge areas of submarginal land that could not be cultivated to advantage, thereby correcting maladjustments in land use. Although the Tenant Act produced no startling results, other forms of aid to farmers and war demands for farm produce about the same time were followed by a marked decline in tenancy.

REGULATION OF MARKETING PROCESSES

Recognizing the importance of marketing for farmers, Congress has enacted many statutes designed to curb speculation on produce exchanges, provide accurate knowledge of market conditions, classify farm commodities according to quality grades, and regulate commission merchants.

Control over Dealings in Farm Produce. Among the market prac-

tices giving rise to abuses was that of making contracts to buy or sell goods at a given price on some date fixed in the future—a practice known as dealing in "futures." The first attempt on the part of the Federal Government to control "futures" was in connection with cotton. By the Cotton Futures Act of 1916, Congress laid a tax of two cents a pound on all contracts for delivery of cotton at a future date, unless they followed a prescribed form. This law, however, merely insured fairness in trading; it did not halt any overspeculation that might injure the farmer.

A more stringent policy was adopted with reference to grain in 1922. By the Grain Futures Act of that year Congress declared that "transactions in grain involving the sale thereof for future delivery . . . are affected with a national public interest" and placed all such transactions under federal control. This measure was amended and expanded in 1936 by the Commodity Exchange Act, which gave the Department of Agriculture a wide power over all exchanges trading in various staple farm commodities. In spirit the act was designed to stop mere speculation in produce, to prevent unfair practices on exchanges, and to assure to farmers markets controlled by legitimate supply and demand, rather than by cliques and individuals engaged in "plunging" and creating disorders for personal advantage.

Collection and Distribution of Market News. The prosperity of farmers acting singly or in groups depends to some extent on their knowledge of market conditions and their ability to take advantage of the right opportunities for disposing of their crops. At one time information respecting the demand for commodities was obtained by a short trip to town, but today conditions have changed. With the problem of long-distance transportation successfully solved, the grower found himself confronted by a truly bewildering array of buyers, both large and small, scattered throughout the United States and foreign lands. In order that farmers and their associations might keep in touch with the complicated movements in demand and supply, something more was necessary than corner store reports and newspaper accounts arriving from a few scattered points one to three days late.

There was need for nationwide market and crop news emanating from some unbiased agency not interested in making money through fraudulent reports. Moved by the insistence of farmers the Federal Government at length established an information service in the Department of Agriculture. An administrative agency in the department now keeps a careful watch on growing crops, collects data on the areas under cultivation, estimates their probable yield, and makes other pertinent calculations. Its findings are then distributed in the form

of market news and reports. Arrivals of carload lots in the chief trading centers, prices of commodities at shipping and receiving points, and many other significant facts are ascertained and reported for the benefit of farmers with produce to sell.

Classification of Produce. Efficient marketing and fair price determination cannot proceed at random; physical standards for commodities are necessary if buyers and sellers are to know what they are talking about. Agricultural produce is in no sense uniform. Apples may be large or small, sweet or sour, red or yellow, juicy or pulpy, to mention a few variables in a single article. A customer buying apples in a store can judge of their quality by actual examination. But the situation is very different when a New York dealer orders a carload from an Oregon grower whose stock of goods cannot be inspected but can only be described in words. Here the merchant and the producer must have some sort of understanding as to the nature of the commodity in question; otherwise the shipment of an inferior quality is possible, resulting in ill-will and confusion.

Out of the extension of the market from the community to the world and out of bitter experience arose a demand for national produce standards, scientifically established and open to all. Responding to a justifiable agitation, the Department of Agriculture has undertaken, according to the terms of various statutes, the classification of farm produce. In preparing rules in this field it acts with caution, subjecting them to a process of trial and error extending over several years before making them obligatory. After principles of classification have reached an advanced stage of development it is then possible to make them compulsory in official markets, thus wiping out all conflicting private canons.

Control over Marketing Perishable Produce. Misunderstanding as to the grades of farm produce is not the only difficulty arising out of the distance which modern transportation has created between producer and consumer. For a long time it was a common practice for unscrupulous commission merchants to make false returns relative to the condition in which perishable commodities reached their destination. For instance, a dealer, after receiving a shipment, might report to the farmer who sent it that the goods had come in a state of decay which made it necessary to throw them away, whereas actually they were sound and had been sold at regular prices. Again, a buyer might declare that a consignment had spoiled when in reality it was all right but had arrived during a "glut" in the market which meant a loss instead of a profit, if duly paid for. In either case the grower did not

relish a long and expensive trip to headquarters to check up, and a trickster could usually assume that the victim would not appear.

Under extensive legislation enacted since 1927, the Department of Agriculture exercises broad powers over the handling of perishable and other farm commodities at exchanges and other places. It examines the books of traders in exchanges. It keeps track of food orders, purchases, sales, storage, and related operations. It has a staff of agents in Washington and in the field whose duty it is to prevent frauds, speculation, profiteering, and other manipulations which may deprive farmers of fair treatment in markets and fair prices for their produce.

Control over Warehousing and Packing. In its efforts to standardize and organize the whole process of marketing farm produce, Congress has also provided, under the Warehouse Act, for strict regulation of concerns engaged in the storage of agricultural commodities entering interstate or foreign commerce. It has also undertaken to regulate the marketing of livestock and meat products in great detail. Under the Packers and Stockyards Act, for instance, packers and dealers coming within the legal classification are liable to severe penalties if they attempt to monopolize business, manipulate prices, or discriminate unjustly against any person. In all cases involving stockyard rates, practices, or regulations which are alleged to be unjust, unreasonable, or discriminatory, the Secretary of Agriculture enjoys the power of preliminary review and may issue appropriate orders.

Continuity in Legislative Policies. It was under Republican auspices that a close regulation of marketing operations was initiated. Between 1933 and 1947 the Democrats in Congress extended and supplemented it. When they returned to power in Congress in 1947, the Republicans made no drastic changes in previous legislation. On the contrary, by the Marketing Agreements Act of 1947 they strengthened it. Their new act, they claimed, "provides more flexibility in the financing and administration of marketing agreements and provides for a continuity of operation not authorized by prior laws."

PRODUCTION CONTROL AND PRICE MANAGEMENT

The Special Position of Farmers in Economy. At all times manufacturers have a high degree of control over their operations. If the country is prosperous and the demand for their goods is strong, they can quickly extend their plants and engage more workers. If business is depressed they may curtail their production, stop machines, and turn their workers out in the streets to shift for themselves or live on grants of public and private relief. Thus they adjust their production more

or less roughly to the effective demands of the market. Farmers cannot accomplish this adjustment so readily. They do a large part of the work on their farms and when times are hard they cannot easily leave their homesteads to join the dole lines in cities. Nor are farmers well organized in great trusts and combinations capable of taking concerted action in maintaining prices and curtailing production. On the contrary, when prices fall, farmers are likely to produce still bigger crops with a view to keeping up their former money income. To cope with this state of affairs, Congress has adopted plans for (1) controlling the volume of farm production, (2) holding the prices of prime farm produce in line with the price levels for manufactured goods, and (3) supporting the annual incomes of farmers. Such plans are defended as "acts of justice to farmers," "saving farm homesteads," and "channelling buying power into the hands of the farming population."

Controlling Production on Farms. The first comprehensive plan for the management of marketing operations in agricultural produce was enacted into law during the administration of President Hoover—the Agricultural Marketing Act of 1929. As the depression in business and agriculture deepened, the principles of this act were extended and supplemented by the Agricultural Adjustment Act of 1933 which was designed to cut down farm surpluses by curtailing the production of certain great staples. When the latter act was declared unconstitutional by the Supreme Court in 1936, Congress quickly passed the Soil Conservation Act intended to accomplish similar results by another process. Two years later, after the Supreme Court had apparently modified its views, a new Agricultural Adjustment Act was passed, giving an indication that the policy of crop control was to be continued.

These and other measures revealed a resolve on the part of the National Government to maintain a comprehensive program for helping the producers of staple farm crops to raise or lower their output with reference to the prevailing demand for their produce. Until the rigor of the great depression was broken by preparations for and participation in World War II, the policy of strict control over agricultural production was kept in operation. During that war and for a time afterward, the enormous demand for agricultural produce brought prosperity to farmers and called for the expansion rather than the curtailment of the major crops in cultivation. But the machinery for crop and price control was not dismantled, despite the fact that demand outran supply for a time and low prices no longer menaced farmers' standards of life. On the contrary, by an act approved August 1, 1947, Congress amended and strengthened the Agricultural Adjustment Act

and the Agricultural Marketing Agreement Act of 1937 under which, in part, price controls are given effect.

Theory of the "Ever Normal Granary." The underlying conception of the Government's policy after 1933 was that of "an ever normal granary"—the maintenance of a farm production level which would meet the effective demands of the domestic and foreign markets, with reserves for special contingencies. When the amount of any one of certain staple commodities, such as cotton, corn, wheat, sugar, or tobacco, rose above the market demand, the producers of that commodity in given districts could by a two-thirds vote arrange with the Department of Agriculture for a curtailment of their next crop. In this case each producer was given a production quota, that is, he was assigned a reduced acreage of that commodity which he could produce —an acreage based upon his average production per acre over a certain number of prior years. If he complied with the terms of his allotment, he received a benefit payment, proportioned, within limits, to the extent of his crop reduction. Such is the system now partly in effect and ever ready for extension as the demand for particular classes of produce falls steeply.

Government Support of "Parity" Prices. Supplementing the idea of the ever normal granary has been the principle of "parity" prices for farm staples. Studies of the prices received by farmers for their produce showed that, during the agricultural depression which followed World War I, the prices of farm produce were in comparison far below the level of the prices of the manufactured goods which farmers had to buy. Then a new theory for leveling up farm prices was worked out. By the use of statistical methods the price level of prime manufactured commodities over a base period of years was established. With this level so fixed it was relatively easy to ascertain the prices for prime farm commodities which would place them on a "parity" with the prices of prime manufactures. Since capital and labor are highly organized and assured government protection in many ways, it is argued, the Government should assist agriculture in securing and upholding parity prices for prime farm produce; and in response to such contentions, Congress has undertaken to intervene with a view to guaranteeing to agriculture some measure of equality.

Among the agencies employed in this intervention is the Commodity Credit Corporation, originally established by executive order in 1933 and subsequently sustained and modified by acts of Congress. It is the function of this agency to buy, sell, store, transport, subsidize, and support the prices of certain agricultural commodities—partly by lend-

ing money to groups and individuals engaged in agriculture. For example, in 1945, the corporation was authorized to make nonrecourse loans to farmers, subject to specific conditions, on wheat, corn, rice, tobacco, and peanuts at 90 per cent of parity prices, and on the cotton crop at 92.5 per cent of parity. By other acts, the corporation was directed to support, by loans or purchases, certain other commodities at 90 per cent of parity or "a comparable" price. Expectations that the Republicans on their return to power in Congress in 1947 would stop this drastic interference with the market and prices were not realized. During 1947 and 1948, Congress extended the life of the Commodity Credit Corporation, restored its depleted capital funds, and empowered it to continue the program for the support of farm prices—at a time of great clamor against the soaring prices of foodstuffs.

Conservation and Production Management. Prior to 1933 conservation was directed chiefly to natural resources owned by the National Government and did not affect materially the enormous wastage of private land by tillage and erosion. Although the dangerous depletion of soil by crude methods of cultivation had long attracted public attention, it was not until the curtailment of farm production was put into effect after 1933 that systematic conservation of the soil on privately owned farms was undertaken on a national scale. Now it is among the important functions of the Department of Agriculture.

The conservation program is carried out in cooperation with state governments and with farmers organized by groups in specific areas or regions. Acting on a recommendation from President Roosevelt in 1937 many states have adopted a model zoning law for farm conservation, drawn up by the Department of Agriculture. This law permits the farmers within a given natural watershed or drainage area to form a special soil conservation district. By the close of 1945 farmers and ranchers had organized 1,440 soil conservation districts, involving 3,600,000 farms and 794,000,000 acres of land. In these districts, farmers work with federal and state agents in preventing soil erosion, rebuilding depleted soil, controlling floods, and promoting forestry. Besides, the Forest Service has bought up about 10,000,000 acres of eroded or submarginal land and is putting it to forest, grazing, and other uses.

Cooperation Among Farmers. By law the Secretary of Agriculture is required to encourage the formation of cooperative societies among farmers for the purpose of stabilizing market operations, effecting soil conservation, and promoting mutual aid among farmers. Money is lent to cooperative marketing associations by the Federal Government, and these groups receive the benefit of federal research into the

best ways and means of managing cooperative organizations. As a result farmers' organizations now rival trade unions in membership and political power, if not in economic strength. There are local and national associations of producers in each great branch of agriculture and these are crowned by the National Grange and the National Farm Bureau Federation. These organizations work with representatives of the Federal Government in the formulation and execution of farm policies and continuously exert great influence in state and national politics.

Summary. The record of recent events marks the end of the old-fashioned methods according to which each farm family raised what it pleased, in such quantities as it wished, then dumped its produce on the market at will, exploited the soil, borrowed money recklessly, and in an increasing number of cases dropped from farm ownership into tenancy or worse. The fall of agricultural prices after 1920 and the wastage of soil called for new policies and for concerted action. Now the Federal Government, which once gave land away to farmers and feverishly stimulated production, is working in conjunction with the states and with farmers themselves to accomplish definite ends—adjusting production to consumers' demands, fostering cooperative and orderly marketing, promoting the conservation and wise use of the soil, and raising the standards of farm life in huge areas of the country.

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CHAPTER 22

Communication and Transportation

Rapid communication and transportation have made possible the development of business and agriculture on a continental scale and the transformation of local enterprises into a national economy. They have facilitated travel, the circulation of literature, the spread of ideas, and a remarkable uniformity in customs. Although not foreseeing the inventions that were to revolutionize communication and transportation, the framers of the Constitution realized both were necessary for the westward expansion of the nation, and to give the country military strength. George Washington appreciated their significance and spent time and money on promoting the construction of the Potomac Canal. During Jefferson's administration, the Secretary of the Treasury, Albert Gallatin, made a national plan of waterways and roads, and Congress authorized the building of a national highway into the West. All through the years of the Republic, problems of communication and transportation have received the attention of inventors, occupied private energies, and attracted the interest of the government.

POSTAL SERVICES

Constitutional Provisions. Precedents suggested to the draftsmen of the Constitution that the power to control the carriage of mail should be placed in the hands of the Federal Government. For centuries before 1787 the transmission of mail, an offshoot from the dispatch of official messages and military orders, had been treated in Europe as a proper function of national governments. It was without controversy that a clause was inserted in the Constitution empowering Congress to establish post offices and post roads.

Post Roads. Although the meaning of the term "post offices" has seldom been called in question, it has been otherwise with the term "post roads." The interpretation of the latter phrase was at an early date drawn into controversy during a partisan debate over the power of Congress to build national roads. Advocates of a strict interpretation of the Constitution have contended that Congress can merely designate

the routes over which mails shall be carried. With equal logic others have insisted that the National Government may build and operate them. As a matter of fact during the first half of the nineteenth century it did construct a number of roads, although only in part for the avowed object of facilitating the carriage of mails. And in our own times the improvement of the postal service has been one of the arguments put forward to support federal aid for highways.

There is high legal authority for the broad theory illustrated by practice. Long ago a learned justice, Joseph Story, declared that there was no reason why Congress could not build and operate roads for the purpose of carrying mails. "If it be the right and duty of Congress," he said, "to provide adequate means for the transportation of the mails wherever the public good requires it, what limit is there to these means other than that they are appropriate to the end?"

Monopoly over Mails. Congress enjoys an undoubted monopoly over the operation of the mail service; private parties are forbidden to enter the business. But what is the mail matter that comes within the scope of the monopoly? The Supreme Court has answered by saying in effect that it is limited to letters, papers, and other things reckoned as mail when the Constitution was written. And in practice Congress has narrowed its range by excluding from the mails certain written and printed matter considered objectionable on various grounds. Books, papers, and articles thus denied admission may be carried, however, by private parties, unless otherwise forbidden by regulations based on congressional conceptions of morals and decency.

The Postal System. Under its authority over post offices, post roads, commerce, and foreign relations, the Federal Government has established postal communications throughout the United States and, by affiliations with the Universal Postal Union, all parts of the civilized world. Within the states and territories directly subject to its jurisdiction, it has built up a huge and complicated system of services, progressively keeping pace with the requirements of American life. It began in 1789 with seventy-five post offices, one for every fifty thousand inhabitants, in round figures; at the close of the nineteenth century it was operating more than seventy thousand post offices or about one for every thousand people—a number later reduced with the growth of the rural free delivery mentioned below.

Mail Delivery. Besides establishing post offices, the Government has brought its services to the doors of citizens. In the old days, every person had to go to the post office to get his mail. At length in 1863 free delivery was instituted in cities of fifty thousand inhabitants and upwards. Steadily the figure has been reduced. At the present time the law

authorizes this convenience in small communities where the receipts of the post office warrant it. To secure these advantages, however, a city or town must provide certain essential conveniences for postmen, such as house numbers and paved streets. In 1885 the "special delivery" of mail was inaugurated; on the payment of a small sum a letter will be delivered by messenger with extra speed after its arrival in the city to which it is addressed.

To balance the assistance given to urban dwellers, the Post Office Department inaugurated in 1896 free delivery in rural regions. Reaching millions of people daily, this service exercises a profound influence on country life. In addition to carrying letters to the boxes of farm homesteads, it has been a powerful factor in the improvement of roads and in increasing the circulation of newspapers and magazines as well as expanding the mail order business in remote regions.

Other Postal Functions. While widening the range of its deliveries, the post office has added steadily to the number of its functions. In 1855 it provided for the registry of mail; now it is possible for anyone, by paying a small fee, to secure the registration of a letter at every point in its journey, a return receipt from the addressee, and insurance, thus practically guaranteeing delivery. The registration of mail was supplemented in 1864 by a money-order system which now provides for the transmission of money throughout the Universal Postal Union.

If money as well as letters and papers can be carried by the post office at a low rate, why not parcels? For a long time this question was urgently asked. With the great increase in the commerce of the country, the demand for special arrangements for carrying parcels at low rates spread widely. Naturally it was opposed by the express companies and by country merchants who feared the competition of the huge department stores and mail order houses in the cities. But in 1912 Congress was forced by public clamor to establish a system for the transmission of packages at moderate rates.

Another radical departure was made in 1910 when Congress in response to a long agitation enacted a bill authorizing establishment of savings banks in connection with post offices. This proposition was strenuously attacked as unconstitutional, paternalistic, and injurious to private bankers. On the other hand, its defenders laid stress upon the encouragement of thrift and the importance of affording absolute security to small depositors. Within a short time after the opening of the first post-office banks, a large number of people began to use the new facilities, proving that Congress had met a popular need.

Methods of Postal Operation. In the discharge of its functions, the Post Office Department operates partly by direct methods—buying and

managing equipment and employing its own personnel—and partly through contracts with common carriers and private undertakings. In the case of some contracts competitive bidding is possible, but in others the Government must make the best terms it can with enterprises occupying strategic positions.

Use of the Post Office for Subsidy Purposes. Congress has used the power over post offices and post roads to promote the high-seas merchant marine and aviation, two branches of private enterprise which often profess inability to operate profitably without receiving grants of money from the federal treasury. Many investigations, wastes, and charges of corruption accompanied the appropriation of money to shipping concerns for the carriage of mail on the basis of miles traveled rather than the poundage transported. After startling disclosures had been made by a Senate committee, Congress abolished, as of June 30, 1937, all mail subsidies to shipping concerns and substituted straight grants of money to shipbuilders and operators. An inquiry into air-mail subsidies and the revelation of abuses connected with them also led Congress to make a wholesale revision of such legislation in 1938 and to pass the Civil Aeronautics Act. This measure created the Civil Aeronautics Board and empowered it to fix the air-mail rates which the Postmaster General is to pay.

Politics in Building Programs. Even in the erection or rental of the structures necessary to its operations, the Post Office Department is not always free to consider mere efficiency. As a rule, the moment a town begins to take on metropolitan airs, it demands a federal building appropriate to its pretensions, and brings pressure to bear on the local Congressman to secure an appropriation of money for the purpose. Inasmuch as such favors are often distributed among Senators and Representatives in return for party services, grants are not always made on the basis of strict postal requirements. In the smaller towns and cities, the post office encounters the renting problem and is fortunate if it can lease a building on sound economic principles without reference to politicians or to local manipulators in real estate.

Favors in Mail Rates. On the side of revenues, no less than on the expenditure side, the Post Office Department is subject to pressure from many directions. Hence it cannot easily put its operations on a paying basis. Thus, "to encourage the diffusion of knowledge among the people," Congress has fixed especially low rates for newspapers and periodicals and for journals issued by educational institutions, churches, fraternal orders, and certain social organizations not conducted for profit. In a similar spirit a reduction has been made in the postage on

books sent by public libraries on loan to readers—a concession also extended to publishers and other shippers of books.

This is not all. The Post Office Department handles two large groups of mail matter with no charge whatever. The first group consists of materials pertaining to official business sent by the officers and agencies of the Federal Government. The second group comprises special matter issued by private parties and state institutions. In the latter class fall literature for the blind which does not contain advertising, and the publications of agricultural colleges and experiment stations.

Postal Censorship. In carrying on its vast technical operations, the Post Office Department has to deal with many ticklish questions in business, ethics, and opinions. It is required by Congress to exclude from the mails the letters and papers of persons and corporations practicing fraud and deception and also all indecent, libelous, immoral, and treasonable matter. If an individual or company attempts, by dishonest methods, to procure money or property through the use of the mails, the department must intervene. It instructs the postmaster at the place where the imposture originates to stamp on all letters addressed to the offender the word "fraudulent" and to return them to the writers if their addresses are given. On issues of fact the decision of the Postmaster General in fraud order cases is not ordinarily subject to judicial review; but the question whether any particular scheme is in reality fraudulent under the law may be taken into the courts.

In time of war, of course, the jurisdiction of the Post Office Department over matters of opinion is even more extensive. Under the provisions of espionage and sedition legislation, the postal authorities open and read the letters of persons whom they distrust, and peremptory orders closing the mails to newspapers and magazines deemed "subversive" are issued by the Post Office Department.

ELECTRIC COMMUNICATION

Leadership of Private Enterprise. Electric communication has been developed in the United States by private enterprise. The first long-distance telegraph line—between Washington and Baltimore—was built and operated for a time at the expense of the Federal Government. But after a brief trial the Government refused to buy the patents and withdrew from the field, declaring that the business would never pay. Hence the promoters of telegraphy were compelled to rely mainly upon private capital. When, about thirty years after the introduction of telegraphy, Alexander Graham Bell invented the telephone, communication by telegraph had already been established by many com-

panies on a nationwide scale, and the new invention was developed by similar methods.

Federal Aid. Although our telegraph systems have been developed mainly as private undertakings, Congress has materially assisted by favorable legislation. For instance, it has authorized telegraph companies to construct and maintain lines through the public domain and along the military or post roads of the United States; but it has required companies taking advantage of such favors to give priority to government messages at rates fixed by the Postmaster General and has reserved the right to purchase such lines at an appraised value. In addition, railroad concerns to which the Government has given certain forms of aid must maintain telegraph lines and cooperate with telegraph companies on certain conditions.

Regulation. Since the more important telegraph and telephone lines cross state boundaries, this branch of communication comes within the power of Congress to regulate interstate commerce. The actual function of regulation is delegated by law to the Federal Communications Commission created in 1934. This regulation is controlled by certain general principles. Companies engaged in interstate and foreign communication by wire are designated "common carriers." The services and facilities they offer the public must be adequate and easily accessible. Charges must be "just and reasonable"; and there must be no discrimination between customers within any one class of service. Schedules of charges must be filed with the commission and made public before such carriers may participate in the communications business; and thereafter no changes in the rates or operations can be made except after notice to the commission and to the public. Whenever it appears that there has been unfair treatment or that unreasonable charges have been made, the commission may hold hearings, prescribe rules, and fix new rates. The commission has power to value the property of the carrier, to require inventories from it, and to inquire into its management. Extensions and new construction of facilities cannot be undertaken unless a certificate of public convenience and necessity is obtained from the commission. All carriers are required to render periodical reports, to furnish other information, and to permit access to books, papers, accounts, records, and memoranda.

Mergers and Consolidations. A separate section of the Communications Act vests in the commission the function of supervising the consolidation of communication systems. In the case of companies desirous of merging in such a way that the resultant company becomes subject to the Communications Act, the transaction must have the approval of the commission. Upon application, the commission grants

public hearings to interested parties, including the governors and public service commissions of the states affected, and only gives its permission when it finds that the proposed consolidation will be to the advantage of the persons to whom the service is rendered and in the public interest.

Cable Lines. Cable lines to foreign countries are supervised by the Federal Government. No submarine cable directly or indirectly connecting the United States with any foreign land or one portion of the United States with another through waters beyond its boundaries can be brought to shore or operated without a license issued under the authority of the President. He may withhold or revoke cable licenses, after due notice and hearing, whenever such action will assist in securing or maintaining rights for the landing or operation of American cables in foreign countries or will promote the security of the United States. In granting licenses the President cannot confer exclusive privileges and must take care to assure "just and reasonable rates and service." Jurisdiction over transmission of messages by cable lines is vested in the Federal Communications Commission.

Federal Wires. In addition to regulating telephone, telegraph, and cable companies, the Government has installed wires of its own. For example, the Coast Guard manages the telephone lines which tie together its widely scattered stations. While these wire facilities are primarily intended to aid the Government in performing its tasks, private citizens may use them for commercial messages, subject to the priority of public business, at rates prescribed by the federal agency in charge of the particular system.

Radio Regulation a Federal Matter. Radio apparatus may be utilized in a variety of ways, from guiding aircraft in foggy weather to flashing the latest news photo across the Atlantic. So great is the scope of this means of communication that the number of potential radio station owners exceeds by a very substantial margin the number of powerful radio stations that can be operated on the more attractive frequencies without producing destructive interference. If chaos is to be avoided on the air, some governmental agency must decide who among the multitudes of applicants shall be allowed to transmit and on what terms.

The range of modern apparatus is so long that thousands of signals can be heard daily far beyond the confines of the state or country of their origin, bringing many branches of radio communication definitely within the federal domain of interstate and foreign commerce. Small transmitters, though their messages cannot be picked up outside the own states, may nevertheless interfere with weak signals coming fr distance to near-by receivers and thus affect interstate and foreig

merce adversely to such a degree as to justify their regulation by the Federal Government.

Domestic Regulatory Practices. The duty of determining who may operate domestic sending stations and under what terms has been vested in the Federal Communications Commission. In the special case of broadcasting, this means that the commission may exert a very substantial control over what is said on the air. The commission classifies radio stations; it allocates frequencies; it issues, revokes, and modifies licenses, subject to the provision that no license shall run for more than a given term of years or be issued to aliens, representatives of foreign governments, or domestic corporations in which aliens possess a large part of the stock, or to any person whose license has been revoked by a court for violation of the antitrust laws.

Congress protects freedom of speech in two ways. It has provided that whenever a radio broadcasting station accords privileges to one political candidate, it must offer services on equal terms to rival candidates, a provision frequently called into use. In the second place, when choosing among applicants for the right to build stations, the commission is to be guided by the public interest, convenience, and necessity, and by evidence bearing on ways in which these ends may be served. Practically of course it is difficult to apply the latter rule. What does the average broadcast listener really want to hear? In the absence of any truly comprehensive and current survey, the commission can do little more than take samples and guess at the rest. Even if full data were at hand, the commission would still be under obligation to weigh public wishes against the ideas of advertisers and other propagandists who pay for broadcasting. What sort of compromise best serves the public interest? Obviously no precise answer is possible. Amidst such intangibles, the commission cannot entirely avoid the responsibility for putting into practice some of its own ideas as to what should be said over the air, thereby raising the hue and cry of censorship.

Many circumstances connected with the radio business conspire to make difficulties for the commission. The competition for licenses, which are necessarily limited in number, is fierce, owing to the amount of money that can be made out of advertising and the eternal quest of special interests for control over the making of public opinion. The large corporations which operate great chains of broadcasting stations are often engaged in conflicts among themselves and with the smaller stations over the more attractive frequencies. In the competition among newspaper owners and radio owners for the profits of advertising, the former in many cases have bought radio stations, and so protests arise against allowing newspapers to combine broadcasting with publishing.

As a chief source of revenue for radio concerns is the advertising of great business corporations, the heads of such corporations, not unnaturally, take an interest in the speeches and "entertainment" for which their money pays. Perhaps no other agency of the Federal Government is so continuously "in hot water" as the Communications Commission. If its members were supermen, they could not satisfy everybody.

International Radio Adjustments. While the Federal Government has a strong grip over domestic radio operations, it always plays a rather weak hand in the foreign field. Since, acting alone, it cannot prevent the penetration of its own territory by radio signals from other lands, it is compelled to do the next best thing, namely, to bargain with other countries in attempts to reduce outside interference. With this aim in view, it has made agreements with various foreign governments to the effect that certain wave lengths shall be reserved for specified services everywhere, and that other rules shall be observed in the interest of efficient radio operation.

Government Operation. Besides supervising the use of the radio by others, within the limitations set by international agreement, the Government employs this modern agency of communication itself. Under the law, the President of the United States has the power to set aside wave lengths by executive order for the use of the Government, and his decrees take precedence over other assignments. In this fashion, a series of federal stations has been put on the air to handle official messages, for instance army and navy business. To some extent, service is also rendered to the general public, notably through the transmission of time signals and weather reports. Indeed, certain federal stations are even available for the transmission of ordinary commercial traffic, when it can be handled without interfering with official business.

Communications in Wartime. In time of war all communications by wire and radio are subordinated to the use and control of the Government under the direction of the President. Whenever the President proclaims the existence of war or a threat of war or a state of public peril or disaster or other national emergency, he may suspend, use, or control, any station for radio communication "upon just compensation" to be ascertained by him and certified to Congress so that it can provide for payment to the owners.

INLAND AND COASTWISE WATER TRANSPORTATION

Constitutional Basis. The Constitution vests in Congress the power to regulate interstate and foreign commerce. Many years ago, the Supreme Court held that, since much of the country's commerce was conducted by water, Congress could reach out to regulate navigation. With

the passage of time, the authority to regulate navigation was in its turn broadened to permit the actual construction and improvement of waterways by the National Government. As a result of this chain of reasoning the United States has been able to spend millions of dollars on river improvements.

An Issue in Politics. Although for a time after the development of railroads there was a relative decline in the use of waterways, and public interest in that aspect of transportation fell off, navigation later came to the front again as a major topic. Carriage by water, especially of bulky freight, is in some circumstances cheaper than by rail and so may act as a regulator of freight rates. Moreover, when planned in relation to railroads, waterways may supplement them.

Federal Projects. Administrative leadership in the improvement of rivers, lakes, and harbors is vested in the Department of the Army. The Secretary of the Army has large powers over the planning and execution of federal projects for navigable streams. The immediate task of designing and supervising the making of improvements for navigation, flood control, and other developments on most of the rivers and in harbors is entrusted to the Office of the Chief of Engineers in the Department of the Army.

The Principal Undertakings. Outstanding among the numerous projects built and operated under federal supervision are the Panama Canal, the Mississippi River improvement, the Intercoastal Waterway along the eastern and southern coasts of the United States, and the Missouri River improvement. The first connects the Atlantic and Pacific oceans through the Panama Canal Zone; the second is intended to control floods in the Mississippi basin and to unite the Great Lakes with New Orleans; the third is designed to enable small craft to travel from Maine to Mexico with minimum exposure to the sea; and the fourth is carried on in the interest of flood control, irrigation, and shipping.

Of the three main developments the Panama Canal, opened in 1914, is of course the most spectacular. By forty-two miles of waterway this canal shortens the distance by ship from New York to San Francisco thousands of miles. It was built at a cost of $367,000,000, exclusive of military defense features, by army engineers, after a famous triumph over tropical diseases. A railway, repair shops, warehouses, drydocks, and other equipment are operated in connection with it, in large part by electricity generated on the spot by water power. Responsibility for the administration of the Canal is vested in the governor of the Canal Zone, under the supervision of the Secretary of the Army.

Efforts to Stimulate Water Traffic. Notwithstanding the immense

outlays for deepening and widening channels, the amount of traffic by internal waterways is relatively small. In discussing conditions on a single river which had been improved at great cost, President Harding publicly declared in 1923: "It is a very discouraging picture to contemplate the expenditure of fifty million dollars of public funds on an inland waterway when the tonnage on that waterway has diminished more than half, while the waterway itself is made better year by year. We have either wasted many hundreds of millions in blind folly or have been inexcusably remiss in turning our expenditures to practical account."

In response to such criticism, Congress has tried to show private citizens what they have missed by not making full use of the facilities furnished at such great expense. It has created the Inland Waterways Corporation in the Department of Commerce and vested the outright ownership in the Government. The corporation operates fleets of vessels engaged in the carrying trade between Minneapolis, Chicago, and Kansas City and the Gulf of Mexico as well as along the Gulf from Alabama to New Orleans.

Joint Water and Rail Rates. It is the hope of the promoters of internal improvements that shipping will serve not only communities located on the shores of waterways but also distant places, through a union with rail facilities. To insure the assistance of railroads in developing such traffic, Congress has enacted legislation which permits certain carriers by water to apply to the Interstate Commerce Commission for an order requiring cooperation between the two systems of transportation. If the commission finds the proposal to be in the public interest, it must determine the joint water-rail rates between specified points and enforce them.

Tolls. Congress has provided that, with one noteworthy exception, no tolls shall be collected from any vessel using federal canals, locks, or other improvements in the interest of navigation. The exception is the Panama Canal. But in fixing charges for using the Canal, Congress is subject to the terms of a treaty with Great Britain in which it is provided that no discrimination shall be made against any nation.

Certain Traffic Limited to American Ships. The national waterways improved and managed by the Federal Government may be traversed freely by American vessels, but can be used commercially by foreign shipping merely in going to and from foreign ports—unless special permission is obtained from Congress to take care of unusual conditions.

Control over Obstructions to Navigation. In connection with waterways, the Federal Government regulates the works of man that run counter to the interests of navigation. This responsibility is vested in

the Department of the Army and involves supervision over the erection of dams, dikes, bridges, and causeways which span the navigable waters of the United States. Before construction can be started on such undertakings, approval of the plans must be obtained from the department. Although primarily concerned with preventing the obstruction of traffic by bridges built under its jurisdiction, Congress has seized the opportunity to provide for the regulation of the use of these structures after completion.

Pressure Politics. The subject of waterway improvements should not be left without reference to the doubtful utility of many of the inland projects. Beyond question hundreds of millions of dollars have been wasted in enterprises of this kind and few, if any, really pay their way in an economic sense, that is, if all construction and maintenance charges are reckoned in any consideration of commercial shipping rates. Why then are so many undertaken?

The answer is not simple, but the activities of powerful interests account for some of them. Alleging the requirements of national defense and eager to keep in practice, army engineers are usually ready to approve river and harbor enterprises. Shippers, naturally seeking low freight rates, regard waterways opened at public expense as a means of creating competition with railways and forcing them to reduce their charges for carrying goods. Chambers of commerce in towns and cities located on real or potential water routes lend vigorous support to federal activity in this sphere, for it means large outlays of money in their respective communities and brings additional transport facilities. Finally, innumerable dredging companies, which make profits from federal contracts, for obvious reasons insist that the good work should go forward. Under the impact of these forces, members of Congress vote for costly undertakings that never could be justified on mere grounds of practical economy.

HIGH SEAS SHIPPING

Former Congressional Neglect. In the case of shipping on the high seas, as well as inland water transportation, other factors than mere economical freight and passenger rates and efficient services enter into consideration. There was a time, in the days of wooden ships, when American shipbuilders and masters could hold their own against foreign rivals in every part of the world, without recourse to government subsidies. But after the rise of steam navigation the situation was radically altered, and most of the carrying trade between the United States and other countries passed into foreign hands.

Federal Aid to High Seas Shipping (1916). After the outbreak of

World War I in 1914, the United States faced a dearth of ships to carry its goods to foreign markets. In 1916 Congress sought to overcome the handicap; it created the Shipping Board and endowed it with enormous powers—to purchase, construct, lease, and operate ships. After the United States entered that war, ships were built under government supervision with a speed that astonished the world. When the war closed, Congress granted financial aids in various forms, especially high rates for the carriage of mails, to private shipping concerns to keep American merchant ships in operation on the high seas.

The Ship Subsidy Act of 1936. Despite lavish assistance from the federal treasury, the American oceanic fleet declined relatively in strength and its share of world trade fell off. Senate investigations revealed that large sums of money set aside to sustain the American fleet had been wasted. At length Congress, by a law passed in 1936, abolished extra grants for the carriage of mail and attempted to put subsidies on a more business-like basis. Under this legislation, as amended, federal subsidies for the construction of American vessels for foreign trade are designed to cover differences between shipbuilding costs at home and abroad, up to a certain maximum differential, while operating subsidies offset the extra cost of running ships in international trade under American, as compared with foreign, registry.

Expansion of Shipping in World War II. In connection with World War II the Federal Government became more deeply involved than ever in the shipping business. A large number of ships in private hands were taken directly into government service. American shipyards were rapidly expanded, new yards were built, and new ships were constructed by the thousands, mainly with the aid of public credits and money.

At the close of hostilities in 1945, the American merchant marine comprised over sixty per cent of the world's tonnage, and about four-fifths of the American ships were owned by the Government of the United States. The demoralized state of international trade made it utterly impossible for the Government to keep a fleet of this magnitude in profitable operation, even if its ships had been of the very latest design. Actually, most of the vessels had been planned with a view to ease of manufacture and assembly, rather than with speed and operating costs in mind, hence they could not be used successfully in competition with the "crack liners" and the best freight vessels of foreign shipping concerns. Moreover the salaries and wages of American crews were far above those prevailing in other countries. Thus the gigantic wartime fleet faced a crisis.

By the Merchant Ship Sales Act of 1946, Congress, after long de-

bates, finally authorized the United States Maritime Commission to dispose of government-owned vessels; built during a specified wartime period, at as low as 31.5 per cent of their construction cost. The exact figure depended upon the type of vessel, the relation between prewar and wartime building charges at home and abroad, depreciation, and the work required to restore a ship to running order. If no American purchaser could be found within a reasonable time, the ship next came up for private chartering under the American flag. If Americans still were not interested in buying or leasing, the commission was permitted to make arrangement for its operation by foreign interests. As a last resort, many ships owned by the United States Government were assigned to a reserve unit and tied up for the indefinite future. By these processes, only a fraction of the wartime fleet was brought back into service under the American flag. Even the operators of some of these ships were merely marking time until more modern, economical, and efficient postwar equipment could be secured at a satisfactory figure.

Other Aids to Shipping. Besides helping Americans to secure ships below the cost of production and providing them with operating subsidies, the Federal Government bears other burdens connected with navigation. Through the Coast Guard, the Coast and Geodetic Survey, and the Department of the Navy, it maps the coasts and inland waters of the United States, marks shoals, reefs, and other dangerous points, operates lighthouses, lightships, and radio beacons for the guidance of mariners, supplies them with authentic maps and guide books, and calculates the tides for given periods in the future.

RAIL TRANSPORTATION

Extensive Federal Aid. It is sometimes assumed by superficial thinkers that the Federal Government has made no great contributions to the development of railways and merely interferes with them by regulating their rates and services. It is true that many lines, especially those along the Atlantic seaboard connecting the larger cities, were built by private capital at its own risk, but to the railways of the west and southwest the Federal Government, as well as state and local governments, made enormous gifts in the form of land, subsidies, underwriting, or special favors. To the first Pacific railroad companies alone, Congress granted more than one hundred million acres of land along their tracks, the free use of timber and stone for construction, and financial support in federal credits running upwards of sixty million dollars. On a conservative reckoning, the Federal Government had assigned to railway promoters prior to 1872 an area of land "almost

equal to the New England states, New York, and Pennsylvania combined; nineteen different states had voted sums aggregating two hundred million dollars for the same purpose." While aiding in construction, on various terms and conditions, the Federal Government at first gave railroad proprietors a generous freedom in operating as they saw fit.

Abuses in Railway Business. Numerous abuses appeared. Stocks and bonds were issued in fabulous amounts, often without a sufficient and proper basis in material values; bankruptcies were frequent, ruining thousands of investors and enriching inside speculators; in some cases it was more profitable to "wreck" companies than to operate railways. The highest possible rates were often charged on the theory that the companies should collect "what the traffic will bear." There were also discriminations in many forms. Freight rates were made high to one shipper and low to another, enabling the beneficiary to ruin his competitor. Frequently the money paid in freight rates by favored shippers was returned to them in whole or in part in the shape of secret "rebates."

Federal Intervention. These abuses were widely known and advertised, but Congress did not move until after the states had begun to close in on railways by stringent legislation. It was not until 1885, when the demand for reform forced action, that the Senate appointed a committee to investigate the whole railway situation. The report of this committee produced such a furor that two years later Congress enacted an interstate commerce law forbidding certain practices and providing for the regulation of others.

Interstate Commerce Commission. The administration of federal legislation respecting railroads is vested in the Interstate Commerce Commission, which is entirely independent of other agencies of the Government. The commission, consisting of eleven members, appointed by the President with the consent of the Senate for a term of seven years, is a quasi-legislative and quasi-judicial body, in that it hears complaints, makes decisions, and issues orders. In conducting inquiries it is aided by a large staff of accountants, engineers, and expert investigators. Under its control are all railroads and car and express concerns engaged in interstate commerce.

Prohibited Practices. A part of the law is negative in character and a part is positive. Common carriers are forbidden to issue free passes except under severe restrictions; they cannot grant rebates, drawbacks, and special rates, thus making lower charges to some persons than to others for the same service; competing lines are forbidden to combine, pool their receipts, and distribute among themselves the profits of such

an operation—save under the strict supervision of the commission. They cannot give any undue or unreasonable preference to any person, company, corporation, or locality. They are not allowed to transport any commodity in which they have a direct property interest, except timber and its products—a provision intended to prevent a combination of railways with manufacturing or mining corporations.

Positive Commands. On the positive side, the law requires all rates for services to be just and reasonable. The accounts of common carriers must be kept according to uniform principles prescribed by the commission. Companies must print and keep open for public inspection schedules showing rates, fares, and charges for transportation, and they cannot change such rates without notice to the commission. They must comply with the terms of the law respecting safety provisions, hours of labor for employees, compensation for employees injured in the course of duty, and pensions for superannuated employees. Finally they must render annual reports to the commission showing their exact financial status and the nature of their operations.

Methods of Enforcement. In the enforcement of these principles the Interstate Commerce Commission exercises extensive powers. It is required to investigate the manner in which business is conducted by carriers coming under its jurisdiction; and on its request any district attorney of the United States must prosecute, in the proper court, offenders against the law. The commission can summon witnesses and compel the production of books, papers, and other documents relating to matters under investigation. Any person, corporation, body politic, or municipal organization complaining of anything done or omitted by a common carrier, contrary to law, may apply to the commission by a petition stating the facts, and the commission must thereupon make an inquiry into the allegation. After full hearings on such a complaint it may determine and prescribe just and reasonable rates and charges for the services rendered by the common carrier in question, as well as fair and proper regulations and practices. Without its approval railroads cannot issue long-term securities, purchase or build extensions, or abandon old lines. The commission's orders are subject to review, however, by federal courts.

Controversy over "Reasonable" Rates. Exceedingly difficult in application is the provision that the rates of common carriers must be just and reasonable. What criterion is to be applied in passing upon the justice and reasonableness of any particular set of charges? Fundamental to the answer of that question is the stipulation of the Fifth Amendment of the Constitution to the effect that no person shall be deprived of life, liberty, or property without due process of law and that private

property cannot be taken for public use without just compensation. According to repeated decisions of the Supreme Court, rates for transportation cannot be set by the Government at a point so low as to make it impossible for the carrier affected to earn a fair return on the value of its property. But what is that value—the cost of construction, cost of reproduction at present prices, amount of money put into the enterprise as a prudent investment or amount of stocks and bonds outstanding against it? In passing upon the "reasonableness" of rates and services fixed by the commission, the Supreme Court takes into account many factors, such as original costs, prudent investment, and proper operating expenses.

Relations to Intrastate Rates. The problems confronting the commission in the matter of rates are complicated by the fact that each state has the power to regulate railway rates and services within its borders. This is not a mere theory. All the states have enacted elaborate laws pertaining to railways, and most of them have set up commissions with more or less drastic authority over intrastate business. Yet it is not easy to distinguish between shipments wholly within a state and those which "affect" interstate commerce. For example, can a state, through its railway commission, lower the rates on freight to some cities within its borders and raise them to other points still within its borders but close to cities in another state? A case of this character came up in 1914 involving the attempt of Texas to discriminate against Shreveport, Louisiana, in favor of Dallas and Houston; and in an important decision the Supreme Court of the United States declared that the federal Interstate Commerce Commission had the right to regulate even rates within a state when they clearly resulted in discrimination in interstate commerce. Furthermore, under orders of the commission and a decision of the Supreme Court, states are compelled to make all their local rates conform to the requirements of interstate schedules as fixed by the commission.

Financial Plight of the Railways. For more than half a century regulation of railroads has been an issue of politics. Congress has enacted numerous laws designed to put the railway business "on a sound basis"; but this objective has not been attained. Some companies are earning satisfactory returns on their capitalization; some have paid no dividend for years; and others are bankrupt, in the hands of receivers. Farmers, manufacturers, and local communities complain about freight and passenger rates. Railway labor unions periodically demand higher wages and easier operating rules. To make matters more difficult, many railroads encounter increasing competition from the automobile, the motor truck, aviation, and the waterways—all

aided directly or indirectly by grants from federal and state treasuries. Although railway companies would like to cut their operating costs by effecting combinations among lines that are competing wastefully, Congress has insisted upon limiting such mergers, partly to protect railroad workers in their jobs and partly to maintain competition as a kind of regulator of rates and services already under government control. In these circumstances railway managers find it hard to meet expenses, secure new funds for improvements, and expand their facilities in response to public demands for better services.

PIPE LINES

Also under the jurisdiction of the Interstate Commerce Commission are the thousands of miles of interstate pipe lines transporting crude oil and petroleum products. The rates and services of common carriers engaged in this form of business enterprise must meet standards of reasonableness and quality set by the commission. Interstate pipe lines moving natural gas, on the other hand, are controlled as to rates and services by a different federal agency—the Federal Power Commission.

MOTOR TRANSPORTATION

Evolution of Federal Highway Policy. As far back as 1810, the Federal Government was spending money on a road to connect the seaboard with the Mississippi Valley, and it continued the policy of lending assistance in this field until steam trains began to replace stage coaches. Thereupon enthusiasm for highway undertakings declined and remained almost dormant until the internal combustion engine appeared. Then it was revived and in 1916 Congress inaugurated a program of highway construction on an immense scale, this time with the support of the huge interests affected by motor transportation, and in a different form, namely, in close cooperation with the states. Within a few years all previous efforts had been outdistanced and a new era, of amazing significance to the social life of the entire nation, had been started.

Federal Aid to States. Through all the arrangements established by the Federal Aid Road Act of 1916, as amended, runs the cooperative idea. The Federal Government is committed to the promotion of a nationwide net of arterial highways. It prepares specifications, supervises construction, and, except in the states in which it is the owner of a large public domain, pays as a rule fifty per cent of the costs, up to a fixed amount per mile. Subject to the approval of the federal Bureau of Public Roads, the states initiate plans, carry out construction, assume the balance of the outlay, and take the responsibility

for continuous maintenance. In other words the Federal Government assures the application of standards and furnishes a part of the money while the states do the rest.

Bus and Truck Regulation. Having participated in the construction of a national network of highways, the Federal Government faced a new problem in transportation. By 1934, it was estimated, the highway transportation system, including cost of roads and motor vehicles, represented a capital outlay of more than $30,000,000,000—a sum greater than the book value investment in the tracks and rolling stock of steam railways. By that time highway traffic had become gigantic and was accompanied by accidents, rate-cutting, discriminations in rates, and other abuses. In response to a growing public demand, Congress, by an act passed in 1935, placed interstate bus and truck carriers under the supervision of the Interstate Commerce Commission. Before starting in business such common carriers must secure certificates of convenience from the commission, and submit to the commission's regulations respecting rates, the issuance of securities, hours of labor, safety appliances, and services. In short, motor transportation is placed on about the same footing as rail transportation and subjected to similar principles of supervision in the public interest.

AVIATION

Aviation. The Federal Government also assumes many responsibilities in the field of aeronautics. It helps to keep the airplane manufacturing industry going by purchasing planes for the armed forces. It lights, marks, and supplies emergency landing fields for numerous civil airways, and provides them with radio aids to navigation. It supplies charts and weather information for the guidance of pilots. It licenses planes and personnel engaged in interstate and foreign commerce by air, and makes inspections in the interests of safety. Through the Civil Aeronautics Board, it regulates the rates and services of interstate and international air carriers of passengers and freight. The board even determines the pay which the air lines are to receive for transporting mail.

Congress, by an act passed in 1946, authorized the Civil Aeronautics Administrator to pay up to one-half the cost of airport developments undertaken by states and municipalities, or by public agencies in Alaska, Hawaii, and Puerto Rico, during a period ending in 1953. Such assistance is available only for projects meeting federal standards and fitting into a "national plan" of airport development evolved by the Administrator.

Early in 1948, the President's Air Policy Commission, composed

of private citizens, reviewed the whole federal aeronautical program and suggested improvements. In respect of commercial aviation, it recommended that more air mail money be made available to the air lines, that competition between them be kept within closer bounds to improve their financial condition, and that greater federal expenditures should be made for safety devices along the airways.

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CHAPTER 23

Labor and Immigration

Rise of Organized Labor. When the Constitution was framed, mechanics and artisans had formed unions in some of the leading cities, but these little groups were of only local significance. At the time, labor did not play an important role in public affairs and unionism was in a rudimentary state. Only after the construction of railway lines and the formation of huge industrial corporations did labor take the continent for its sphere, by creating large unions in many fields and federating them on a national scale. In 1886, following a series of short lived experiments, a general union of crafts was effected by the establishment of the American Federation of Labor; and in 1938, after a split in the Federation, the Congress of Industrial Organizations was formally constituted. Outside of these two great associations are some other leading units, including four railway brotherhoods.

LABOR ACTIVITIES INVOLVING GOVERNMENT

Objectives and Methods of Organized Labor. From the early days of trade unionism in the United States, some unions have advocated radical, even revolutionary, changes in the capitalist system, but the avowed goal of much of the labor movement has been "trade unionism pure and simple." This means, first, the organization of employees in single plants and in national industries, such as railways, steel, oil, and automobiles, for the purpose of dealing with employers in determining hours, wages, and other working conditions. It involves, second, the use of certain methods in forcing employers to yield in case negotiations fail to produce agreements.

Among these methods, four have been outstanding. The first is the strike—mass abandonment of work or mass refusal to accept employment on terms offered by employers. The second is picketing the premises of an employer against whom a strike has been called with a view to advertising the strike, persuading workers to refrain from taking the places of strikers, and perhaps keeping customers away. The third is the boycott, or organized efforts to induce the public not

to buy the goods of, or otherwise patronize, an employer declared by a union to be "unfair to labor." The fourth is the "sympathetic strike"—a strike of a union against an employer with whom it has no dispute for the purpose of forcing him not to buy or handle the goods of another employer engaged in a labor controversy with a union.

Questions of Legal Status of Unions. Early in the history of trade unionism, some labor organizations in a few states were declared by courts to be "combinations in restraint of trade" and hence illegal; but long before the middle of the nineteenth century the right of labor to organize was generally recognized by the states and accepted as a matter of course by the federal authorities who had dealings with trade unions. Henceforward the organization of labor as such was lawful. But despite a huge volume of favorable legislation, state and federal, the rights of organized labor to conduct regular strikes, picketing, boycotts, sympathetic strikes, and other operations designed to bring employers to terms have been limited for many years by state and federal laws—and in various cases declared illegal.

Contacts of Organized Labor with the Federal Government. Although in the early stages of their development, trade unions were almost wholly within the sole jurisdiction of the states (Chapter 34), they later found their contacts with the Federal Government multiplying. In dealing with employers engaged in business extending beyond the confines of a single state, particularly in carrying on strikes, organized labor came under those clauses of the National Constitution which confer upon Congress the power to regulate interstate and foreign commerce, establish post offices and post roads, and provide agencies, including troops, for the enforcement of federal law. As the number of federal employees increased, many of them formed associations and became affiliated with regular industrial unions, thus raising practical issues regarding the Government's standards for hours, wages, and conditions of employment. With the multiplication of congressional appropriations for the promotion of business, agriculture, education, and general welfare, organized labor appealed for assistance in the collection of data bearing on wages, hours, employment, and relevant economic matters, and at length for the establishment of a separate Department of Labor in the national administration—a concession granted in 1913.

FEDERAL REGULATION OF WORKING CONDITIONS

In the course of many years Congress has enacted a large volume of legislation relative to labor in general, organized and unorganized. Some of this legislation owes its origins to the demands of trade unions,

but in application it affects unionists and independents engaged in the industries covered by its terms. In scope it pertains to safety, health, hours of work, wages, and other matters involving particular industries.

Railway Workers. For example, Congress has applied certain regulations to all common carriers in interstate commerce. It has forbidden railways normally to require or permit their employees to remain on duty for more than a given number of hours consecutively or to return to work after such a stretch of labor before enjoying a period of rest. It has also provided that train dispatchers and other workers concerned with directing the movement of trains shall not be allowed to serve for more than a fixed number of hours in any twenty-four hour period. This legislation was primarily due to revelations concerning accidents, causing great loss of life among passengers, as well as workers, that had occurred often when weary employees had fallen asleep at their posts.

Quite different in origin is the famous Adamson Act of 1916, driven through Congress by the railway unions. This law declares that eight hours shall be deemed a day's work and the measure of a day's work for the purpose of reckoning the compensation of all employees on interstate railways (with a few exceptions) actually engaged in the operation of trains. While considerations of public safety entered into the enactment of the statute in question, its prime purpose was to fix an eight-hour day for trainmen—to establish a fundamental trade union standard as the law of the land in this field.

Protection of Seamen. Since seamen must live on shipboard and cannot quit work in mid-ocean if dissatisfied, they could with even more propriety call upon the Federal Government for aid in fixing minimum standards. Taking their special situation into account, Congress has enacted an elaborate code of sea legislation. It has stipulated that American ships shall provide satisfactory food, water, and clothing for seamen and carry a suitable supply of medicine. With respect to food, the law establishes a "minimum diet" by enumerating the articles and amount of each to be supplied daily to sailors. Guarantees as to food supply Congress has supplemented by regulations as to living quarters, management, wages, and hours. On long voyages a safe and warm room must be provided for the seamen. Corporal punishment is forbidden on board American vessels. If perchance an American seaman is destitute in a foreign land, the local consular officer of the United States may require the master of an American vessel to transport the unfortunate person to the home port to which the ship is bound, at federal expense.

Labor Standards in Government Work. With regard to its own

operations the Federal Government has established a "normal" work day for most of its employees as well as for the employees of persons and concerns constructing public works under contracts with the United States. Moreover, Congress has laid down terms as to hours and wages for workers employed by contractors who supply the Government with large orders of goods.

Conditions in Special Industries. Every air carrier must comply with wage schedules, maximum hour rules, and other working standards laid down by the National Labor Relations Board. The working conditions of seamen on board vessels receiving government subsidies are subject to special supervision by the Maritime Commission.

Compensation for Disabilities. In spite of all precautions in the form of safety regulations and appliances and reasonable hours of employment, accidents happen. For a long time the Federal Government made no serious attempt to modify the ancient principle of the common law, which threw upon every employee all "the necessary risks" of his occupation and allowed him to recover damages for injuries only when the employer had been personally responsible, usually by a lawsuit likely to prove costly and tedious. But in 1908 Congress made all railway common carriers, subject to its jurisdiction, liable to an action for damages for death or injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." It also provided that employees of such concerns are not to be prevented from collecting reparation even when they themselves have been guilty of some contributory negligence. Similar rules were later applied to seamen on American vessels subject to federal jurisdiction. In 1927 Congress provided a system of compensation for longshoremen and harbor workers, on more modern lines than the arrangements for railway employees and seamen, and vested supervision over execution of the law in the United States Employees' Compensation Commission.

The latter body also administers a compensation system for federal employees, with the help of the medical facilities of the United States Public Health Service. Compensation is allowed in cases involving the death or injury of federal employees in the performance of duties, not due to willful misconduct or intoxication. Persons claiming compensation do not have to file suit in a court of law but are paid automatically when their claims are rightfully established before the commission.

Pensions. The prospect of eventually receiving a pension is one of

the prime inducements to men and women to stay on the job. A special act of Congress lays a tax on railways for the purpose of creating a pension fund, and out of this fund pensions are paid to employees who have reached the age of sixty-five or who have been retired for physical or mental infirmity, subject of course to a number of detailed specifications. Under the Social Security Act of 1935 contributions are made to the states in aid of old-age pensions and a system of old-age insurance, resting on payroll taxes, is provided for numerous classes of industrial workers.

The Fair Labor Standards Act. This measure, sometimes known as the Wages and Hours Act of 1938, is the most comprehensive law dealing with labor conditions ever passed by Congress. The product of many years of discussion, the law is designed to establish in numerous fundamental industries standards of wages and hours for all parts of the country. The act applies to employees engaged in producing, manufacturing, mining, handling, transporting, and in any manner working on goods moving in interstate commerce, or engaged in any process or occupation necessary to the production of such goods, or engaged in interstate transportation, transmission, or communication. According to a ruling already made, even a night watchman employed by a firm engaged in interstate commerce comes within the purview of the act. There are, however, several classes specifically excepted from the terms of the law. They include among others agricultural workers, persons employed in retail establishments mainly engaged in intrastate trade, and employees of interstate carriers whose working conditions come under other acts of Congress.

In making classifications, the Fair Labor Standards Act places an indirect ban on "oppressive child labor." The administrator of the act has defined this rule as applying to children under sixteen years of age, except children fourteen or fifteen years old in occupations other than manufacturing and mining, which, as determined by the chief of the federal Children's Bureau, do not interfere with their schooling, health, or well-being. The law provides that there shall be no special classification on the basis of sex.

Owing to the fact that southern representatives in Congress waged a strenuous fight on the bill, concessions were made to regions. In setting up classifications and making wage rates, the administrator must take into account competitive conditions as affected by transportation, living, and production costs. He must also consider wages established by collective agreement between employers and representatives of employees chosen freely. Under these provisions, wage scales may vary from place to place.

Detailed applications of the law have been vested in a special agency of the Department of Labor, known as the Wage and Hour Division. It determines in the first instance what classes of workers come within the scope of the act and what classes are still to be considered as local and within the jurisdiction of the several states. Employers and employees aggrieved by any wage ruling may appeal to the federal courts for review. At the outset the number of employees affected by the law was estimated at about 11,000,000.

INDUSTRIAL DISPUTES AND INJUNCTIONS

Direct Federal Powers Involved. Into that sphere in which labor and capital carry on controversies respecting hours, wages, and conditions of employment not fixed by law, the Federal Government enters in various roles. Over industrial disputes arising in interstate or foreign commerce, of course, it has authority by express constitutional warrant. Whenever a contest involves the execution of federal law or the discharge of a regular function, such as carrying mails, the Government likewise has a direct interest and full authority for intervention. Nor do labor conflicts within the jurisdiction of a state lie entirely beyond the scope of federal power. If a strike or lockout results in violence, the President, on appeal from the proper authorities of the state, may employ federal troops. If the struggle concerns persons or corporations of two or more states, the assistance of federal courts in the form of writs of injunction (p. 474) may be invoked. Finally state legislation relative to picketing, strikes, and other trade union tactics may be declared void by federal courts under the Fourteenth Amendment.

Transportation Disputes. As to common carriers by rail and air engaged in interstate and foreign commerce, the National Government has constitutional sanction for intervening in controversies between their managements and labor, and seeking to make equitable settlements. Ordinarily, in this respect, the Government merely extends its good offices to the contestants.

The Railway Labor Act of 1926, as amended, prescribes certain conditions and methods of negotiation for common carriers by rail. The actual settlement of specified issues is left in the first instance to carriers and employees on whom the act imposes the duty of making every reasonable effort to settle disputes by conciliatory methods, utilizing agencies of their own selection. If a settlement is not reached in this manner, the aggrieved party may refer the matter by petition to the National Mediation Board, an independent agency in the executive branch of the Government composed of three persons appointed by the President of the United States with the consent of the Senate. On its own

motion, the Mediation Board may offer its services without waiting for an appeal. In either case, the board seeks to bring the disputants to the conference table and to reach an agreement by mediation, that is, a compact which both sides will accept without being compelled to do so by law.

Should such mediation fail, arbitration is the next recourse offered by the statutes, although resort even to it is not made compulsory. The parties are entitled to choose their own private arbitrators, or, if the dispute is over the meaning of specific labor agreements, they may turn the matter over to the National Railroad Adjustment Board. The board is a federal instrumentality on which both carriers and employee organizations are accorded the same degree of representation.

If all such efforts prove to be vain, provisions in the act hold the controversy in abeyance for a time and the National Mediation Board may ask the President of the United States to appoint an Emergency Board, in case the dispute threatens to interrupt interstate commerce. The Emergency Board may investigate and report, but even the conclusions of this special agency are not binding. The total effect of the law is to preserve the independence of the carriers and their employees to act as their discretion dictates.

Government Seizure of Railroads. If the Government is unable to effect by negotiation a settlement between railway management and labor, it may resort to drastic action. Using special war powers, it twice took over the railroads during World War II, placed them under Army control, and called on the workers, in their new status as federal employees, to stay at their posts of duty. Again in 1948 the Government seized the railroads, this time under an old act passed in 1916, turned them over to the Army, and secured a temporary court order commanding the unions involved to keep their members at work.

Tender of Good Offices. Over labor conflicts which are purely local in character and involve neither interstate commerce nor the Constitution nor the enforcement of federal laws, the National Government has no coercive powers. But Congress early recognized the fact that many industrial disputes, whether under federal or state jurisdiction, might be prevented or settled by conferences if federal officials were authorized to tender mediatory services to the disputants on a purely voluntary basis. When the Department of Labor was established in 1913, the Secretary of Labor or his appointees were empowered to act as conciliators in labor controversies and they did so act with striking success in many cases by the use of mediatory methods; but in 1947 these functions of the Department were transferred to the Federal Mediation and Conciliation Service, an independent body

created by the Labor Management Relations Act of that year. On appeal and on its own motion the new Service aids the pacific adjustment of labor disputes. To strengthen the Service, Congress associated with it the National Labor-Management Panel, consisting of twelve members—six representing labor and six, management—with power to give advice.

Jurisdiction of Federal Courts. Federal courts have jurisdiction over cases involving interstate commerce and the enforcement of federal statutes, touching labor interests at many points. Under the Constitution they likewise have jurisdiction over suits between citizens of different states. Since great business corporations, which are "citizens" in this connection, usually have plants and offices in various parts of the country, they can as a rule find legal grounds for taking actions against trade unions and strikers into federal tribunals, even though no measures of national law are involved. Accordingly, the courts of the United States have numerous sanctions for hearing the causes of parties engaged in industrial contests.

The Injunction in Labor Disputes. The writ of injunction constitutes a powerful weapon which the federal courts can bring to bear in labor disputes. Such a writ may take various forms. It may be a decree ordering a specified person or persons to continue the performance of particular acts. Thus the employees of a railway may be commanded to continue handling the cars of a company on which they may wish to bring pressure by refusing to move them. Again, an injunction may enjoin a party from altering certain existing conditions until the merits of the case have been decided. Sometimes the writ instructs a party to desist from particular practices or committing any wrongs for which no legal remedy is available.

Early Protests. Against actions of the federal courts in this connection trade union leaders long protested. As early as 1896 they made the subject an issue in national politics. During the great Pullman railway strike two years before, the federal district court in Chicago issued a general command to all persons concerned, ordering them not to interfere with the transmission of the mails or with interstate commerce in any form. For refusing to obey the decree, Eugene V. Debs, director of the strike, was arrested, fined, and imprisoned. Thereupon Debs claimed the right to jury trial and contended that the federal judge could not impose a penalty which was not expressly provided by statute. On appeal, the Supreme Court upheld the power of the lower court to make the order in question, and ruled that imprisonment for contempt without jury trial did not violate the principle of due process of law. From that time forward, strong efforts were made by organized labor to pledge the major political parties to a reform limiting the use of the injunction.

Injunction Legislation of 1914. In the main, Democrats took a sympathetic interest in the restriction of injunctions. After they came into office in 1913 they gave extended consideration to the demands of labor and, in enacting the Clayton anti-trust law the following year, made numerous concessions to it. Since the Supreme Court had held that the Sherman Anti-Trust Act applied to trade unions as well as to other combinations in restraint of trade, Congress by the Clayton Anti-Trust Act of 1914 exempted labor and farmers' organizations from the operation of laws against trusts. The act provided that no injunction shall be granted by federal courts or judges in industrial disputes involving terms or conditions of work, except to prevent irreparable injury to property or property rights for which the law provides no adequate remedy. Furthermore, no such writ was to be used to prohibit persons singly or in concert from ceasing to work or from persuading others in a peaceful manner to take similar action. As an additional safeguard, Congress legalized jury trial in certain contempt cases. This law, which Samuel Gompers hailed as the "Magna Charta of Labor," in reality made little change in the use of the injunction.

The Anti-Injunction Act of 1932. Despite the terms of the Clayton law, federal courts issued subsequently many injunctions which laid stern restrictions on the rights of unions to carry on industrial disputes; and the American Federation of Labor demanded from Congress a new statute limiting the powers of the courts in this respect. The result was the passage of the Norris-La Guardia Anti-Injunction Act of 1932.

After defining the terms "labor dispute" and "persons participating or interested in" a dispute, the act declares that no United States court shall issue restraining orders or injunctions in labor disputes to prohibit any person or persons participating or interested in the dispute from taking, singly or in concert, a large number of actions, such as, (*a*) ceasing or refusing to perform any work or remain in any relation of employment; (*b*) becoming or remaining a member of any labor organization or any employer organization; (*c*) giving publicity to any labor dispute whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; (*d*) assembling peaceably in promotion of their interests in a labor dispute; (*e*) agreeing with others to do or not to do any of the acts specified. Concerted action in any of these cases is not to be deemed unlawful combination or conspiracy against which the courts can issue restraining orders.

After providing for full hearings in open court, the act prescribes that no injunction shall issue until after findings by the court to the effect that: (*a*) unlawful acts have been threatened and will be committed unless restrained, and then only against those responsible for the unlawful

acts; (*b*) substantial and irreparable injury to complainant's property will follow; (*c*) as to each item of relief granted, greater injury will be inflicted upon complainant by denial of relief than will be inflicted upon defendants by granting relief; (*d*) complainant has no adequate remedy at law; and (*e*) public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Notice of hearings in these cases must be given to all persons against whom an injunction is sought; but, upon an allegation of irreparable injury and by filing a proper indemnity bond, a complainant may secure a temporary order without notice, which will be good for five days. The act provides for a speedy review on appeal from cases where a temporary injunction has been issued. No injunction shall be issued for any complainant who has failed to comply with any law involved in the dispute, or who has failed to make every reasonable effort to settle the dispute by negotiation or with the aid of government machinery of mediation or voluntary arbitration. The act also throws a number of special safeguards around every person charged with contempt of court in labor disputes. But it is now limited by the Labor Management Act of 1947 which permits suits against unions for breaches of collective bargaining contracts and provides for the use of the injunction in special situations.

Despite the repeated attempts of labor to weaken the ability of the courts to issue injunctions, through the enactment of restrictive legislation on the subject, the judiciary is far from being shorn of authority. This was amply demonstrated in 1948 on two occasions. A federal judge, early in that year, issued a restraining order directed to the United Mine Workers and their head, requiring union members to cease striking and return to the pits. For failure to comply with the order in time, the union and its leader were penalized. Shortly afterward, the Government seized the railroads and secured an injunction forbidding the members of two powerful railroad unions to go out on strike for a specified number of days. Conscious of what had happened to the miners a few weeks previously, the railroad unions bowed to the injunction, but under protest.

THE POSITIVE POWER OF GOVERNMENT INVOKED BY ORGANIZED LABOR

Early Warning Against Government Intervention. Shortly after the American Federation of Labor was finally organized in 1886, its leaders sought to prevent governmental intervention by demanding limits on

the powers of federal agencies to deal with strikes, boycotts, and other activities connected with industrial disputes. In general, labor leaders were then inclined to the view that organized labor could take care of itself if the "rights" they sought were granted, and that invoking direct federal assistance in organizing unions and bargaining with employers would eventually lead to government control over the forms and methods of organized labor. Samuel Gompers, long President of the American Federation of Labor, summed up this view when he said: "The government can supply counsel and information on industrial problems but industries and all elements concerned must finally work out the solution." [1]

National Labor Relations Act of 1935. Until 1933, most leaders of organized labor held to the line previously laid down. When, however, Congress prepared in that year to allow industries to organize and establish codes of fair practices for themselves (p. 395), organized labor insisted on having similar privileges, which were finally incorporated in the National Industrial Recovery Act of 1933. After that law was declared unconstitutional, labor abandoned the older tactics of avoiding government interference with the organizational and bargaining activities of trade unions, and supported the passage of the National Labor Relations Act of 1935. This act classified as unfair and penalized a number of practices on the part of employers which interfered with the freedom of labor to organize and conduct campaigns for wage increases, shorter hours, and other objectives. It guaranteed to workers the right to elect their own agents and forced employers to bargain with these agents. It set up the National Labor Relations Board, composed of members appointed by the President with the consent of the Senate. It empowered the board to supervise labor elections held for the purpose of choosing bargaining representatives, to hear appeals by labor agents against employers, to make rules for collective bargaining, and otherwise carry out the terms of the law by administrative actions. In short, it provided for direct government intervention in the whole process of organizing unions, managing negotiations with employers, settling industrial disputes, and even collecting dues from the members of unions.

Under the government supervision and intervention afforded by the Labor Relations Act, unions enlarged their membership from approximately 4,500,000 in 1935 to more than 14,000,000 in 1945, and in many great branches of industry they acquired what amounted to a virtual monopoly over the relations of labor to management. Yet or-

[1] *Seventy Years of Life and Labor*, Vol. II, p. 521.

ganized labor was not entirely content with the outcome of the act. The Labor Relations Board had scarcely begun to hand down decisions under the law when controversies arose over their fairness to certain unions; and, owing to the split in the ranks of labor between the American Federation of Labor and the Congress of Industrial Organizations, sharp differences of opinion became manifest between labor leaders as to the justice of the board's rulings in particular cases. Nor did the Labor Relations Act in application reduce the number and bitterness of strikes. Although there was a lull in strikes after the United States became involved in World War II, under the Smith-Connally Act of 1943 which threatened with fine and imprisonment labor leaders who fomented strikes, industrial strife increased rapidly at the end of hostilities. In 1945 the number of man-days of labor lost through strikes was 38,000,000 and the next year it was 116,000,000.

Dissatisfaction with current conditions on the part of employers and members of the American Federation of Labor led to demands for changes in the act; and the House of Representatives passed by a large majority a bill making a number of modifications—only to meet opposition in the Senate. In 1946 President Truman called on Congress for drastic powers over railway disputes—in vain. As soon as the Republicans recovered power in Congress in 1947, they set to work on a thorough revision of the Labor Relations Act. At length, with overwhelming approval in both houses, Congress passed a new labor bill. President Truman vetoed it. Thereupon its sponsors mustered the necessary two-thirds vote and overrode his veto. On June 23, 1947, the Labor Management Relations Act, known as the Hartley-Taft Act, became law amid bitter outcries from labor leaders and their political supporters.

ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947

Responsibilities Imposed on Unions. Although the right of labor to organize and carry on collective bargaining activities is reaffirmed by the new law, certain responsibilities are placed on every union that desires to take advantage of the act and to appeal to the Labor Board for assistance. Such a union must file with the Secretary of Labor a report on its organization and management. The report must show how its officers are chosen, the salaries paid to them, how its money is spent, the grounds for the expulsion of members, and other matters relative to the conduct of its affairs. No union which has one or more communists among its officers can claim the privileges of the law in bargaining negotiations with employers; and officers of unions that seek these privileges must formally declare that they are not communists.

Excluded from the scope of the act are unions of foremen, on the ground that they represent management in plants and should not join forces with other employees' unions. All unions, whatever their form and purpose are forbidden to spend union money in federal election campaigns but union members acting as individuals may make contributions to campaign funds solicited by political parties for use in winning federal elections.

Nature of Permissible Unionism. The act authorizes establishment of what is known as the "union shop" on definite conditions. To secure such a shop, a union must be the recognized bargaining agent of its members, certify that thirty per cent or more of the members favor a union shop, and arrange for an election on the subject. If a majority of all the workers eligible to vote in the election cast their ballots in favor of a union shop, then the employer must sign a union-shop agreement, unless the law of his state forbids it. When a union shop is duly established all the old employees must join the union and new employees must become members within thirty days and pay the regular dues. While unions may lay down certain rules for admission to membership, they cannot compel the employer to dismiss employees for reasons other than failure to pay their dues. Nor in any case is a "closed shop" permissible: that is, a shop in which the employer must employ only union members who abide by all the operating rules and decisions made by their organization and officers.

Collective Bargaining. The principle of collective bargaining was reaffirmed by the act, and it is an unfair practice for either party in an industrial controversy to refuse to engage in such bargaining, when the demand for it has been properly made. The law declares that employers and employees shall have the right to choose their agents to represent them at the bargaining table. It materially modifies the restraints formerly imposed on employers during labor elections and gives to them, as well as to union members, freedom to express their views on matters connected therewith, provided that they make no threat of reprisal or of force and promise no benefits to anybody for voting one way or another.

The Strike. Organized labor retains under the act its right to use the ultimate weapon—the strike—in case it fails to obtain satisfactory terms by collective bargaining, but restrictions are placed on the exercise of the right. Some limitations are positive and immediately applicable and others are designed to delay resort to a strike until efforts at mediation have proved ineffective. "Jurisdictional strikes" are forbidden. If a dispute arises between two unions over the privilege of controlling employment in a given type of work and no controversy

with the employer is involved, then a strike to compel the employer to hire the members of one particular union in preference to another is unlawful. Strikes to enforce "secondary boycotts" are also forbidden; for example, a union which is on good terms with its own employer cannot strike against him for the purpose of forcing him to stop using the goods or services of another employer against whom another union has struck in a dispute over wages, hours, or conditions of employment. Strikes by federal employees against the Government are likewise forbidden by the act.

Delaying Strikes. Where a bargaining agreement is in effect between an employer and his employees, neither party can terminate or change it without giving sixty days' notice to the other party and offering to negotiate a new agreement. If an agreement is not reached within thirty days, one or both parties must notify the Federal Mediation and Conciliation Service or an appropriate state agency charged with conciliatory duties. If within the period of sixty days, employees strike against an employer, while negotiations for settlement are under way, they lose their bargaining status under the act. This provision of the law is particularly directed against "wildcat strikes"—that is, strikes "pulled off" by dissatisfied workers in defiance of agreements and their union officials. When, however, a union has failed to reach acceptable terms with an employer by bargaining or mediation according to the stipulations of the act, it may lawfully resort to the strike.

An important exception to this general rule respecting the right to strike is made by a special provision of the law. If national health or safety is threatened by a nationwide strike of employees or a lockout ordered by employers, the President of the United States may intervene. He may appoint a board to examine the facts of the case and report. He may also direct the Attorney General to apply to a federal district court for an injunction to run for eighty days against the party responsible for the stoppage of the industry in question. During this period a secret vote of the employees of every employer involved in the dispute must be taken for the purpose of finding out whether they are willing to accept the terms of employment finally offered to them by their respective employers. Should this delaying process fail, then apparently a nationwide strike becomes lawful.

Picketing. If a strike is lawfully called, the picketing of an employer's premises also becomes lawful. But the trade union concerned in the dispute cannot compel its members to do picket duty. Nor can those who volunteer to serve as pickets interfere with the right of any person to enter or leave the premises under patrol. If the right of ingress or exit is violated by a resort to coercion on the part of pickets, the

person coerced may apply to the Labor Relations Board for redress and, failing to secure it, may appeal to the courts for protection. Should a union engage pickets to commit acts in violation of the law, the Labor Board may call upon a court of proper jurisdiction for an injunction against it; and persons injured by such acts may seek damages from the union in a suit at law. Thus, according to the apparent intention of the Labor Management Relations Act, employees and others may use ordinary and orderly methods in picketing.

Administration of the Act. With regard to enforcement, Congress made significant changes in the Labor Relations Act of 1935. It enlarged the National Labor Relations Board by adding two new members, making five in all, and transformed it into more of a judicial tribunal. In hearing appeals from employees and employers in cases of elections held to choose bargaining agents and in numerous other matters, the board must act as a body and, like a court, must base its decisions on the law and substantial evidence. In the interest of semi-judicial procedure, the act provides for a general counsel, appointed by the President with the consent of the Senate, and vests in him the duty of deciding upon and prosecuting complaints before the board, as well as responsibility for passing upon legal questions that arise in proceedings.

Recognizing the widespread distrust of regulatory agencies under the control of the President of the United States, Congress placed limits on his power to remove members of the Labor Relations Board. It provided that he could remove them "upon notice and hearing, for neglect of duty or malfeasance" in office, and "for no other cause," thus depriving him of the power to oust them for dissenting from his policies. After stipulating that the board's finding of fact shall be conclusive, "if supported by substantial evidence," the act offers judicial protection to contestants by adding that either party can apply to a court of proper jurisdiction for leave to adduce additional evidence and show that it is material to the decision of the case in question.

Labor's Attack on the Act. Organized labor vigorously opposed members of Congress who had voted in favor of the Hartley-Taft Act and in the elections of 1948 defeated many of them. The Congress that met in 1949, therefore, faced the task of considering new legislation favorable to the unions.

IMMIGRATION

Reason for Labor Opposition. The prime force in the movement for the restriction of immigration has been organized labor. It has not been alone in its activities in this relation but it has been persistent and effec-

tive in its exactions. And the reason is not difficult to find. The raising of wages by concerted efforts and the maintenance of standards depend very largely on control over the number of applicants available for employment. In former times, whenever organized labor started a large-scale operation to increase wages or prevent reductions, it soon learned that its measures could be defeated by a tremendous influx of foreign workers who were willing to accept low wages. Again and again labor leaders built up strong unions only to find their projects nullified by a new wave of immigration.

Early Federal Policy. For nearly a hundred years the Federal Government kept the gates of the nation open to all comers. Business interests seeking cheap labor and land speculators seeking farmers to buy their holdings, approved and supported this policy. Indeed in 1864 Congress authorized the importation of laborers in large numbers bound by contract to work for specific employers. And under this legislation corporations were formed to collect workers abroad for the American market. Although the law was soon repealed the flood of immigration continued.

Against this free and easy immigration program American trade unions started to make noisy protests shortly after the Civil War. With growing determination they called for the abolition of the contract labor system, the total exclusion of Orientals, and the limitation of immigration from the Old World. They were aided by other interests demanding immigration restrictions. As a result bill after bill has been enacted by Congress. In their present form these statutes exclude from the United States five broad classes of immigrants.

Classes of Immigrants Excluded. In the first place, contract laborers are denied admission. This class embraces all workers who have been induced to migrate to this country by promises of employment, or in consequence of agreements to perform labor in this country; and also persons who have come in response to advertisements for laborers printed abroad. The provisions of the law, however, do not apply to members of learned professions, ministers, nurses, or entertainers such as singers and actors, even though they come to America under contractual arrangements.

A second group of immigrants, absolutely barred, embraces Orientals, other than Chinese and persons from India. The exclusion of such Orientals applies not only to laborers but all classes except "government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travelers for curiosity or pleasure," and their legal wives and chil-

dren under sixteen. But if any member of the exempted group fails to maintain the status which entitles him to residence here, he may be deported.

A third class of immigrants denied admission embraces illiterates. An act of Congress passed in 1917 excludes all aliens over sixteen years of age, physically capable of reading, who cannot read some language or dialect. There are a few exceptions, but on the whole the test is rigidly applied.

Persons excluded for political reasons constitute the fourth class. Originally designed to cover anarchists, assassins and saboteurs primarily, it was broadened in 1918 to include aliens known or believed by the Attorney General to be trying to enter the country to engage in any activity that will endanger the public safety of the United States.

Based on special considerations but still limiting the immigration of low grade labor are the provisions of law which debar, as undesirable, aliens who have certain physical or moral disabilities or are likely to become public charges. To this division belong all persons afflicted with epilepsy, tuberculosis, or any loathsome or dangerous contagious disease or who are of unsound mind, or suffer from physical or mental defects likely to affect adversely their power to earn a living. Aliens shut out on moral grounds include criminals, habitual drunkards, and prostitutes.

Quota Limitations. Going beyond the mere exclusion of special nationalities and classes, the American Federation of Labor demanded a still more drastic cut in the number of immigrants. In the effort it was aided by citizens interested in "Americanization" and developing a more homogeneous nation. As a result of pressure from many directions, Congress enacted in 1924 a sweeping measure which, as amended and applied, cuts the total number of immigrants from Europe, China, India, and certain parts of the Americas to about 150,000 a year.

In distributing this number among various countries entitled to send emigrants, Congress has provided an elaborate quota system. With certain exceptions the total population of the continental United States for 1920 was divided into classes according to "national origins." On this basis an estimate was made showing the proportion which the people of English, German, Italian, and other national stocks in the United States respectively bore to the whole number of inhabitants included in that census. Thereupon each of the countries involved was assigned an annual quota. This figure is the number bearing the same relation to one hundred fifty thousand which the number of in-

habitants of the particular national origin in the United States bears to the total population enumerated as just indicated—with the exception that no quota is to be less than one hundred.

Under the impact of World War II, several changes were made in the original quota system. After excluding Chinese for many years Congress, in 1943, made a friendly gesture toward a military ally by allotting to China a quota of approximately 100 immigrants a year. In 1946, Congress also authorized the admission of a small quota from "races indigenous to India," previously shut out along with other Orientals. Then in 1948 Congress permitted the quick admission of 202,000 displaced persons, over a two-year period, largely through advance borrowings from portions of the regular annual quotas for their respective homelands.

Exceptions. Two major classes of aliens are not under any quotas. One group, defined as nonimmigrant, is composed of government officials with their families and assistants; aliens, including seamen on duty, temporarily visiting the United States; legally admitted aliens who must pass through a foreign country while in transit from one part of the United States to another; and aliens carrying on trade provided for by existing treaties. The other group, defined as "non-quota immigrants," includes, subject to certain conditions, unmarried minor children and wives of citizens of the United States and husbands of American citizens; lawfully admitted immigrants returning to America from a visit abroad; students over fifteen years old entering the country for study at an institution officially approved; and persons of a few other special classes.

Entirely outside of the quota system are all immigrants born in Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, the Canal Zone, or any independent country of Central or South America and their wives and unmarried children under eighteen. In spite of the strong demand for additional limitations these persons may enter the United States, if they otherwise comply with the terms of the immigration laws.

Present Policy. It is evident from these facts that the once wide-open door of "the asylum for the oppressed of all nations" is partly closed, marking a new stage in the economy of the world. It is also evident that the immigration quotas favor Great Britain and Ireland above all, and then Germany, for according to the present allotment these countries have about two-thirds of the quota immigrants admissible. In fact, both the literacy test and the quota system, combined with specific exclusions, were designed to discriminate against immigrants from eastern and southern Europe and from Oriental regions.

Administration of Immigration Laws. For many years the enforce-

ment of immigration legislation was in the hands of agencies in the Department of Labor, as if to emphasize the interest of American labor in the restriction of immigration. In 1940, however, this obligation was shifted to the Department of Justice. To some extent the shift was due to growing agitations against the influx of foreigners supposed to be engaged in revolutionary or espionage activities dangerous to American security and institutions, particularly communists.

The commissioner of immigration has complete charge of administering all the laws bearing on the admission, exclusion, naturalization, and deportation of aliens. He inquires into violations of the laws and recommends prosecutions whenever they are deemed advisable. He supervises naturalization work in the specific courts authorized to naturalize aliens. To facilitate these operations, the country is laid out into numerous districts, each with its headquarters and staff of local officials. At each port of entry is stationed an immigration agent and a staff of examining and record-keeping officials.

Inspection of Immigrants. Formerly the work of examining immigrants was conducted entirely at American ports, with the result that great hardships were inflicted on people who had to be sent back as legally inadmissible. This was an evil which the Government attacked by stationing special officers at its consulates in several foreign countries for the purpose of making preliminary inquiries into the fitness of applicants for admission to the United States under the immigration laws. In so doing, it effected a substantial reduction in the number of immigrants rejected on arrival at ports of entry.

After running the gauntlet of inspectors in his native land and a scrutiny of his papers after his arrival here, the immigrant is questioned with regard to his probable usefulness as an American citizen. If for any reason he is denied admission, he may appeal to the Commissioner of Immigration and Naturalization in Washington and, in special circumstances, to the Attorney General. To assist the commissioner in hearing appeals, a Board of Immigration Appeals has been established in the Office of the Attorney General. When matters of "law," as distinguished from mere "facts," are in dispute a person excluded or ordered deported may carry his case into the federal courts.

Checks on Illegal Entry. Immigrants who find themselves debarred by the numerous regulations do not always give up the struggle for entry. Sometimes they make use of "loopholes" in the law; for instance, that proviso which permits alien seamen to go ashore while their vessels are in port. Once on land sailors bent on settling in the United States may vanish in the multitude. Not all aliens, however, can successfully pose as seamen, students, ministers, or other privileged immigrants for

purposes of taking advantage of some quirk in the statutes. But they may be smuggled into the country. Owing to the extent of our boundaries, intruders are frequently successful in escaping frontier guards.

Deportation. In view of such developments Congress has vested in the Commissioner of Immigration a broad power to deport aliens who gain illegal admission to the United States. To this duty it has added full authority to expel certain classes of objectionable aliens, such as revolutionists, anarchists, advocates of sabotage, violence and assassination, and all foreigners who aid and abet them. Upon aliens arrested and held for deportation is imposed the burden of proving that they are not in the United States in violation of law. With regard to the facts in such cases the decisions of the immigration authorities are final. Only when issues are raised which involve interpreting the law and constitutional rights will the courts review the conclusions of those authorities. If orders for deportation are suspended for certain reasons, they must be reported to Congress and Congress may by majority vote on a joint resolution prescribe a deportation without further hearing—a provision of law which apparently violates the bill-of-attainder clause of the Constitution.

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CHAPTER 24

General Welfare and Social Security

In the rural era when the Constitution was framed, it was assumed that most activities relative to public morals, public safety, and the care of incapacitated or aged dependents would be undertaken by the localities directly concerned. At that time states and communities were largely self-sufficing, that is, they produced most of the goods needed by their inhabitants. Foreign and interstate commerce was by no means unimportant and it was not overlooked by the draftsmen of the Constitution. But the dependence of each state upon the other states for the livelihood, employment, and security of its people was relatively slight.

As the largely self-sufficing state economies of 1787 were transformed into an interdependent, national economy, Congress exercised various powers to promote the health, safety, convenience, and welfare of certain classes of persons, such as sailors on the high seas, obviously under federal jurisdiction, and to achieve certain objectives, such as prevention of accidents on interstate railways, also clearly within the scope of federal powers, even though narrowly interpreted. Through the years this stream of national legislation pertaining to human welfare broadened, as enlightenment and sympathy widened, to include many measures designed to promote public health, security, and safety.

HEALTH

Broadly speaking, the health functions of the Federal Government may be divided into four main groups: prevention of the spread of disease, maintenance of hospitals for the sick and injured of certain classes, cooperation with the states directly and through grants of money in promoting public health, and the conducting of research into health problems.

Control over Immigrants. In connection with the regulation of foreign commerce, steps are taken to insure the country against introductions of human disease by incoming passengers, ships, and commodities. One phase of this defense is authorized by federal statutes excluding immigrants suffering from certain disorders, physical and mental. Origi-

nally medical inspection to enforce this legislation was made only at ports of entry but now federal consular officers are directed by act of Congress to refuse passport visas, or permits for travel to the United States, to everyone whom they deem ineligible for admission. By its broad terms the statute sanctions exclusion of "doubtful" persons at the source instead of allowing them to puzzle government agents on reaching America.

Control over Shipping. Mere elimination of unhealthy passengers from ships leaving foreign ports for the United States does not, of course, solve all the problems connected with keeping diseases from our shores. Bubonic plague, for instance, is carried by fleas on rats. If a steamer is infested with these pests or is otherwise in an unsanitary condition it may transmit diseases to the United States. Consequently Congress has provided that ships sailing for the United States from foreign ports, with few exceptions, must obtain a bill of health from the federal consular officer at the point of departure, or be liable to penalties on reaching America. The bill of health is a document describing as satisfactory the sanitary conditions of the port in question and of the vessel to which it is issued, as well as the state of health among the passengers and crew. For practical purposes it is a guarantee that American standards have been met prior to sailing.

International Health Cooperation. To cope more efficiently with difficulties resulting from the rapid spread of disease among the countries of the earth by rail, steamer, and airplane, several international agencies have been formed and world-wide standards have been evolved by periodical conferences. With some of these organizations federal health authorities are affiliated, and maintain contact for exchanges of information respecting the outbreak of epidemics. By wire and wireless quarantine officers are kept currently informed about communicable diseases all over the world and are put on their guard against vessels coming from zones of danger.

Inspection and Quarantine. Work in and with foreign countries is merely the first line of defense maintained for the protection of American citizens. On our shores, at many points of entry, quarantine stations serve as the second line of inspection and exclusion. At these domestic posts of scrutiny vessels, immigrants, crews, passengers, and cargo are given a final examination before admission. Persons coming within the ban of the law are temporarily held for observation and treatment, and those who do not meet the medical requirements for admission are deported.

Development of Domestic Health Activities. If the framers of the Constitution intended to confer upon the Federal Government a wide

jurisdiction over public health in connection with its control of foreign commerce and intercourse, they did not foresee the need or possibility of extensive national activities in the medical sphere at home. In their day science was in a rudimentary stage; moreover, interstate trade and travel formed no considerable part of American economy, owing to the immature condition of transportation and manufacture. In the beginning, therefore, Congress deemed it sufficient to instruct federal officers, by an act of 1799, to obey the health laws of the several states.

But new aspects were given to the problem by technology and science, the introduction of the locomotive and the automobile, and discoveries pertaining to the sources of disease. Keeping step with the development of commerce and medicine, Congress has progressively conferred upon federal authorities important functions pertaining to public health in its interstate relations. By numerous laws it has sought to prevent the spread of epidemics among the states by passengers, by the instrumentalities of transportation, and by commodities.

Interstate Travel. While as a matter of current practice the traveler from one state to another is not subjected to physical examination, except in times of serious epidemics, this does not mean that he is entirely overlooked. On the contrary, if he is suffering from a communicable disease, he is subject to elaborate restrictions imposed by federal law. All common carriers engaged in interstate commerce are compelled, by acts of Congress, to observe certain precautions against the spread of disease. To make sure that the rules are properly observed, representatives of the Public Health Service periodically inspect the facilities of common carriers.

Commodity Production and Sale. Far more extensive are the health activities of the Federal Government with respect to the manufacture and sale of commodities entering interstate traffic. Here again the change of jurisdiction from local to national authorities has been the result of technical developments. For the few fresh vegetables and medical herbs once raised in near-by gardens, the machine age has substituted an elaborate array of foods and drugs grown in remote regions or prepared in distant factories. While the industrial revolution, by increasing the average length of haul, has brought an ever mounting percentage of these articles under the commerce power of Congress, it has had another significant effect. It has increased the demand for regulation on behalf of the average consumer who, though ordinarily able to judge the value and purity of new potatoes or corn on the cob at the corner grocery, has no way of discovering the worth and composition of prepared substances such as jellies, canned goods, or

evaporated milk. Left to his own devices he may easily be imposed upon.

The Control of Food, Drugs, Cosmetics, and Medical Devices. In 1906, after the country had become alarmed over the extent to which adulterated and injurious articles were being circulated in the general market, the National Government undertook to regulate the food and drug trade. Little by little the federal program has been extended until today comprehensive statutes forbid manufacture and sale in interstate and foreign commerce of adulterated or misbranded foods, drugs, and cosmetics, and of certain virtually untested medical devices. To the Food and Drug Administration in the Federal Security Agency has been given the task of amplifying this basic statute by setting standards of purity and performance for these articles, standards which must be met by those who would keep within the law.

Obviously it is not an easy task to establish many of these standards, owing to legitimate differences of opinion regarding the true nature of many articles, especially compounds. What, for instance, constitutes "pure" sausage or mayonnaise? If definitions were broad enough to satisfy everybody, they would be well-nigh useless in practice; if narrow, they would be irksome to legitimate business. Hence conflicts between manufacturers and federal authorities are continuous.

Nor is the task of applying scientific standards to actual commodities taken from commercial channels an easy one. The increasing complexity and variety of foods, drugs, cosmetics, and medical devices, multiplying the difficulties of detecting fraud, tax the expert to the limit. For instance, he must resort to ingenious laboratory manipulations to determine whether coumarin, the active principle of the Tonka bean, and caramel, a coloring matter, have been employed to adulterate vanilla extract. Evidently then the Government is doing more than relieve the consumer of responsibilities; it is daily performing for him highly skilled operations which he is not in a position to undertake for himself. At bottom the purpose of scientific checks on articles affecting health is threefold—to prevent injuries to the human body, to block the offering of inferior ingredients under false guises, and to stop the vending of worthless commodities.

Poisons and Adulterants. The first of these functions can scarcely be overemphasized. Serious disease and death may result from the use of infected, putrefied, or poisonous foods. Adulterated, no less than poisonous, foods come within the proscriptions of the law. Intended as a rule to cheapen the manufacture of products by addition or use of less expensive materials, adulteration is not an accident but a deliberate expedient employed in the interest of profits. Although it may not affect

the wholesomeness of a commodity, it defrauds the consumer by making him pay more for the article than it is worth. It also penalizes honest business by subjecting it to unfair competition.

A few examples of practice, from hundreds that might be cited, illustrate the possibilities of the "art": chicory and clay molded in the form of coffee berries, colored and flavored to represent coffee but containing no trace of the latter; vinegar tinctured with sulfuric acid; milk made synthetically and not containing one drop of the genuine substance; artificially colored sawdust ground and added to cayenne pepper. If the watchfulness of the federal authorities and their promptness in seizing adulterated goods tend to reduce the number of such old frauds, the ingenuity of scientific schemers constantly provides new types of cheating to tax their defensive organization and skill.

"Quack Medicines." Allied to the work of the Food and Drug Administration in the suppression of adulteration are its activities directed toward the elimination of "quack medicines." Worthless "cures," of course, are not always harmful in themselves; they may contain only water, sugar, and tea leaves. Yet they waste the money of consumers and often give them a false sense of security, leading them to delay in seeking the advice of physicians until serious damage is done.

Whenever the federal authorities discover a fraudulent preparation circulating in interstate commerce, they remove it from the market. Among the products which have been withdrawn from the channels of trade by this process are the following items: a cure for pernicious anaemia consisting largely of ground granite; a cure for cancer in the form of a bread and milk poultice; and an Epsom-salt compound "guaranteed" to cure diabetes.

Serum Control. One group of bona fide medicines, distinctly marked off from other types by the peculiarities of its uses and manufacture, calls for special supervision. This class includes serums, viruses, antitoxins, and related products employed in inoculations against certain diseases. Unsanitary conditions of preparation or improper testing of strength may result in serious injury to the users.

Awakened to the need for care in this branch of pharmacy, Congress has enacted a law making all such "biologic products" subject to federal control insofar as they enter interstate commerce. In the execution of this statute federal agents collect samples of these articles in factories and other places and examine them for purity as well as strength. As a further protection to the public, every manufacturer of vaccines is required to procure a license before engaging in interstate business. To maintain checks on manufacturers, federal authorities make peri-

odical inspections of the sanitary conditions under which production takes place. So much for the prevention of disease.

Hospital Services. The second great branch of federal health activity —provision of medical care for certain classes of sick and injured civilians—is entrusted to government hospitals scattered over the United States. Among the private persons who may now use such hospitals are members of the crews of merchant vessels flying the American flag. For this there are good reasons. Often far from home and possessing scanty funds, seamen have a special claim to public assistance. Often they cannot receive adequate attention on shipboard where medical facilities are limited and space is at a premium. If they go ashore they may readily become a liability to the community in which they land. For more than a century, therefore, federal authorities—now the Public Health Service—have provided free hospital treatment for the sailors of the American merchant marine. Besides sailors, longshoremen and harbor workers are entitled to the advantages offered at the hospitals maintained by the Public Health Service.

Without any direct sanction like that supplied by the commerce clause of the Constitution, Congress furnishes hospital care for lepers. For these unfortunates two homes are maintained under the Public Health Service—one in Hawaii and the other at Carville, Louisiana, the latter accepting lepers who voluntarily present themselves, those apprehended under the quarantine laws, and others committed by state authorities.

In addition to the above classes of private citizens entitled to the hospital and medical privileges provided by the Federal Government, thousands of public servants enjoy similar benefits. The latter include officers, nurses, men and women in the armed forces, and war veterans under certain conditions. Also permitted to use federal medical facilities are civilian employees of the Government injured in the performance of their duties.

Public Health Research. Once conducting research into public health problems on a relatively small scale, the federal Public Health Service is becoming a major investigating unit. Through a branch known as the National Institute of Health, it is engaged in general medical research and in the dissemination of knowledge on health topics, while through two newer subdivisions, the National Heart Institute and the National Institute of Dental Health, it specializes in more limited fields of study. In 1948, the Public Health Service was also authorized to investigate interstate stream pollution problems, and to bring pressure to bear on states found responsible for creating them.

Aid in Time of Disaster. Most of the functions described in the preceding pages, except those connected with epidemics, have to do with a normal course of affairs, but it is well to remember that fires, floods, hurricanes, and earthquakes are also common enough to call for vigilant preparedness against disaster. When a terrible calamity suddenly strikes a community, local health and safety authorities often find themselves face to face with responsibilities far beyond their powers and their equipment. In these circumstances Congress may come to their aid with a special appropriation. In furtherance of such work, the army and navy likewise render signal service, for they are so organized that they can supply a police force, hospital outfits, and food to sufferers on the shortest possible notice. Zealous in the discharge of its duties, the Public Health Service likewise springs into action and cooperates with official and private agencies, such as the Red Cross, in devising measures of control, relief, and rehabilitation.

PUBLIC SAFETY

Technological Dangers. For convenience, the term "public safety" is employed here to cover federal functions designed to protect life and property from dangerous things rather than dangerous persons. As in many other branches, these activities are in the main the outcome of a public response to the mechanical inventions and scientific discoveries which have revolutionized the modern world. When people travelled in ox carts or stage-coaches at a few miles an hour, they needed little or no guarantee against faulty or obsolete equipment. But in this age of high-speed travel on complicated machines—with automatic couplings, air-brakes, and electric signals—the "layman" cannot form a correct judgment concerning the risk involved in choosing any particular vehicle. Although he may sue for damages if he is injured in a railway accident, that is little consolation for his pain and losses. Nor is the ordinary employee, outside of his special responsibility, in any better position to arrive at a correct opinion concerning the soundness of the apparatus with which he works.

Taking into account the requirements of the technical era, Congress has, under its power to regulate interstate and foreign commerce, set up standards of safety for certain common carriers and prescribed the adoption of special devices or practices to protect both the public and its servants. The general provisions of law are supplemented by orders of the Interstate Commerce Commission and other agencies.

Railway Safety. As major operators in the field of transportation, of course, railroads are subject to extensive supervision in the interest of safety. Locomotive boilers and appurtenances, power brakes, automatic

couplers, and automatic train-stop devices on interstate lines must comply with government prescriptions, which are enforced through inspection by federal agents. If it does not meet official requirements, any car, locomotive, or other piece of equipment may be ordered out of service pending suitable repairs.

In connection with its safety work, the Interstate Commerce Commission is required by law to investigate all serious railway accidents that come to its attention. This function serves a double purpose. "Coroners' inquests" over damaged apparatus develop information of value in drawing up and revising regulations. And the mere certainty that they will be held also acts as a stimulus to the adoption of precautions and the observance of law.

Transport of Dangerous Commodities. Standard equipment and competent operators do not remove all dangers from transportation. Explosives, gases, and inflammable materials hauled by the railroads offer perils to life and property. Within the limits of its jurisdiction Congress has made the moving of dangerous items by rail subject to regulation by the Interstate Commerce Commission. According to the directions of this body, high explosives may not be conveyed on the same vehicle as passengers; and all articles of this general class must be suitably marked, packed, and handled in conformity with specific rules.

Safety on Water. Common carriers by water, especially on the ocean, are subject to a detailed scrutiny similar to that maintained over the railroads. The need for this circumspection is evident. In fact and fiction the perils of the deep have been brought home to "landlubbers" too often to need description here. Taking cognizance of their frequent presence, the Federal Government has provided that all American ships engaged in interstate or foreign commerce and those of other nations using our ports must meet certain safety requirements. Some of these regulations affect the number of passengers and crew that may be carried; others dictate the physical equipment of the vessels; and a third group deals with the licensing of officers and crew.

With respect to the physical equipment of vessels federal laws and orders go into great detail. Boilers on steamships, fire-fighting equipment, hulls, steering gear, and other mechanical devices must comply with official standards and are subject to periodical inspections. In fact, the number of matters to be checked is so large that a complete description of the specifications for ocean and coastwise vessels alone fills a volume of about two hundred and fifty pages.

By no means subordinate to proper equipment is the necessity that every ship be manned by a competent crew. Here too Congress has

intervened. No marine officers can be placed in posts of authority on American vessels subject to federal control until they pass examinations showing that they have had the requisite training and experience to qualify them for the responsibility they are to assume. Yet prolix as is the legislation in this field it falls far short of the highest standards, losses at sea occur with distressing regularity, and efforts are repeatedly made in Congress to bring the law and its execution abreast of the latest scientific knowledge.

Coast Guard Services. Year after year, serious accidents occur from defects, storms, fire, fogs, and carelessness. To alleviate suffering and reduce material losses from such sources, Coast Guard vessels stand ready at all times to assist ships in distress on the high seas. As an aid to those wrecked or in trouble on our coasts the Government operates a chain of lifesaving stations which serve as headquarters for a patrol of watchmen. When a vessel in distress is discovered, Coast Guard men and equipment are sent to the scene. Employing special boats, rockets, lifelines, and other devices these workers often perform feats of signal bravery in saving life and property. Nor do their efforts cease when all on board are landed. Sufferers from accidents receive temporary medical treatment, shelter, and nourishment until they can be carried to the nearest settlements.

Safety in Aviation. From land and sea federal control over transportation has spread to the skies. With the growth of interstate aviation the Federal Government was moved to erect safeguards for the general public in this branch of transportation. As a result, the Civil Aeronautics Administration now stands between the nontechnical passenger and the aircraft business, enforcing certain fundamental regulations touching equipment, operation, and management. In accordance with these rules, airplane engines are subjected to rigid tests before their design is approved. Planes themselves must be properly built, formally licensed, and periodically inspected. Only mechanics who have demonstrated their expertness can be put in charge of maintenance; only pilots who have proved their ability through physical, written, and flight examinations can be entrusted with operation. Supplemented by investigations of accidents, such official activities seek to minimize the hazards of aviation.

Dangerous Industries. Departing from the well-defined channels of interstate and foreign commerce, Congress has employed its power to tax in the interest of public safety. A clear example of such action is afforded by the levy on matches made with white phosphorus. In the present state of scientific technique this chemical, once widely used in their manufacture, is a menacing poison which may inflict on workers

exposed to it in factories, a distressing and often deadly malady known as "phossy jaw." For more than half a century the evils of the match industry had been well understood, but since they were regarded as under state jurisdiction, Congress apparently had no power to deal with them by adopting measures openly restrictive in character. At length, it struck at them indirectly, by imposing on white phosphorus matches a tax high enough to be prohibitive in effect, and the action was upheld in a decision of the Supreme Court.

Safety Codes. Through a second indirect route—under its power to appropriate money—Congress has gone into other matters of safety once supposed to be reserved to the states. Sustained by grants from the Treasury, the Bureau of Standards, in cooperation with public and private bodies, has worked out a number of "safety codes" covering such subjects as woodworking machinery, logging, and sawmills. On their face, these proposals merely set up rules of practice for construction and operation, with a view to eliminating physical hazards wherever possible. While they have not been transformed into federal law and enforced by the Government, they have nevertheless been observed by numerous manufacturers and voluntarily adopted by several state legislatures.

Safety in Mines. With respect to one particular enterprise over which its explicit jurisdiction does not extend, the Government has gone far beyond the mere suggestion of standards. Moved by repeated tragedies in mining, Congress established the Bureau of Mines and authorized it to devise rules and instruments for the elimination of risks in this industry. With assistance from many quarters, the bureau operates along two lines: prevention and rescue.

In the former relation it carries on researches in the explosives used in blasting and in the electric apparatus employed underground in mining, lighting, and hauling—both sources of frequent disasters. On the basis of its studies, it has prepared a long list of "permissible" materials and equipment calculated to reduce perils to a minimum. Convinced of their practicality, manufacturers produce them for the market and many mine owners install them in their plants

With a view to bringing pressure on mine owners and managers within the jurisdiction of the states, Congress, by an act passed in 1947, to be effective for one year, ordered the director of the Bureau of Mines or his representative to notify the owners and operators of certain classes of mines, and likewise the state agency in charge of enforcing safety measures, whenever he found violations of safety standards. It further ordered the owner and operator of any mine in question to report to the bureau on actions taken with regard to findings and

recommendations. It also provided for publicity of the facts in respect of findings, orders, recommendations, and actions. Though temporary in nature, the act indicated what the Federal Government might do indirectly to compel the enforcement of safety standards even in mines otherwise subject to the control of the states.

Notwithstanding such precautions, awful disasters still occur underground, demanding prompt, skillful, and energetic measures of relief. To promote efficiency in rescue work, the Bureau of Mines, aided by the industry itself, has developed special apparatus to cope with gases, fires, cave-ins, and floods. This equipment is installed in railway cars and automobile trucks and held in constant readiness at convenient points in mining regions. As soon as a call for help in a catastrophe reaches the nearest headquarters, the car or truck, with its corps of expert operators, is rushed to the scene of trouble, to help in saving life and property. But even in the most fortunate circumstances a certain interval of precious time must elapse before the bureau's agents can reach the spot. Therefore it is important that officials and workers at mines should be trained to grapple at once with calamity of every sort. This first-aid talent the bureau fosters by conducting courses in mine-rescue technique in various parts of the country.

Flood Control. Another outstanding problem in the field of public safety has attracted the attention of the whole country—the prevention of floods and the amelioration of suffering from such disasters. The most conspicuous attempt to forestall such catastrophes has been made on the Mississippi. In their eagerness for homesteads, settlers along its banks, singly or with public assistance, have gradually confined the river to a narrow channel by means of levees. As a rule these dykes serve very well, but when a superflood occurs, the mighty stream pours over the restraining walls. For years individual farmers, city governments, and states attempted to wrestle with such periodical crises without marked success. After the great disaster of 1927, Congress, aroused to the necessity for federal action, authorized a large expenditure to carry out a comprehensive scheme for controlling the waters of the Mississippi. Under the direction of the engineer corps of the War Department, projects for this collective enterprise, costing almost as much as the Panama Canal, were immediately launched.

Subsequent disasters in other parts of the country, occurring with startling regularity, led Congress to take up the whole subject in a comprehensive manner. By the Flood Control Act of 1938 it authorized the construction of flood-control works on rivers and harbors extending from the Merrimac River area to the lower Mississippi valley and westward to the Willamette River area, and made a huge appropriation for

a program to extend over five years. It also empowered the War Department and the Department of Agriculture to make general and specific surveys of flood-menaced regions and prepare reports on their findings.

Aids to Victims of Disasters. In time of floods, fires, and other great domestic disasters, Congress usually appropriates funds to aid the victims and the various agencies of the Government concerned with safety and health, including the armed forces, assist states, communities, and the Red Cross in the work of rehabilitation.

PUBLIC MORALS

Morals and Mails. Under its power to control the mails the Federal Government has dealt with a number of schemes which are supposed to run counter to public welfare. The use of the post office for the promotion of frauds and lotteries is forbidden. A large amount of matter which does not affect the pocketbook is also banned. Many things tending to incite to crime are excluded from the mails. But psychologists are far from agreement on the extent to which detective stories or newspaper accounts of homicides and burglaries act as a stimulant to law-breaking. And in reality federal authorities display no little confusion in devising and enforcing laws of this type. The mails are likewise closed to matter containing libelous, scurrilous, defamatory, or threatening statements on the outside of envelopes, wrappers, or post cards where they may be seen by any person other than the addressees. Also banned are all obscene pictures and publications—presenting many thorny issues for postal officials to consider.

Immoral Imports. Restrictions of such a character are not limited to domestic sale and transportation. Congress has sought to keep "dangerous and wicked" thoughts and objects out of the country. By law it has banned importations of printed matter and drawings advocating treason or insurrection against the United States, resistance to law, or threats of bodily harm to any person in the country, and everything else which is "obscene or immoral." The Secretary of the Treasury acts as the supreme censor of imported literature; he may in his discretion admit questionable "classics or books of recognized and established literary or scientific merit" but only when they are "imported for noncommercial purposes." If protests are filed, customs officials, however, cannot destroy "objectionable" books and materials until a federal district court has passed upon their merits.

Control over Alcohol. On the border line between morals and health come alcohol and narcotic drugs. From 1920, when the Eighteenth Amendment went into operation until its repeal in 1933, the Federal Government sought to enforce nationwide prohibition with results

that were decidedly unconvincing to the mass of the American people. On the adoption of the Twenty-first Amendment repealing the Eighteenth, control over the manufacture and sale of intoxicating liquor was returned to the states, with power to prohibit or regulate as they might see fit. But one explicit responsibility in this connection was given to the Federal Government by the provision forbidding the importation of intoxicating liquor into any state in violation of its laws controlling the liquor traffic. In an age of airplanes and automobiles this responsibility is exceedingly difficult to discharge effectively.

Another federal responsibility in relation to manufacture and sale of liquor is a product of taxation. Federal, state, and local taxes on the liquor business are so heavy and so varied in form that they put a premium on illegal manufacture and "bootlegging," and federal law enforcement officers still have many of the troubles they had in the days of "total prohibition." The higher the taxes, the more ingenious and baffling the evasions. The Treasury Department and the Department of Justice therefore have their hands full in dealing with the liquor business which has been "returned to the states."

Control over Narcotics. While similar difficulties arise in connection with the control of narcotics, there is far less difference of opinion on this subject. It is generally agreed that governments should put a curb on the free manufacture and sale of such drugs. Under its power to regulate commerce and to tax, Congress has subjected all traffic in narcotics to strict federal supervision. By special legislation it has prohibited their importation in excess of the amount actually needed for legal purposes as determined by the Government. Violators are punished and contraband goods are seized. Kindred restraints cover shipments to other countries. As a check on the smuggling of narcotics, provision has been made for international distribution of information relative to the business. Many countries, including the United States, now cooperate in the interchange of news and evidence dealing with illegal traffic. For the purpose of expediting these mutual services, ordinary diplomatic methods are discarded and exchanges take place directly between the enforcing agencies of the several governments.

Within the United States the power to levy internal revenue taxes has enabled the Federal Government to exert a high degree of control over the narcotics business. Manufacturers, wholesalers, and retailers of narcotics are required to register with the collectors of internal revenue in their respective localities and pay a yearly tax for the privilege of engaging in the business. Every purchaser of any drug on the prohibited list must either show a doctor's prescription for it or receive it while under medical care.

Going far beyond mere imposition of restraints, Congress has authorized establishment of federal farms for the care of drug addicts. To be "eligible" for treatment in one of these institutions a person must have been convicted of violating the national narcotics laws and be a victim of the drug habit.

RELIEF AND SOCIAL SECURITY

Original Local Responsibility. Although the Constitution originally gave Congress power to lay and collect taxes and provide for the general welfare, the function of relieving the poor and unfortunate was long left in the hands of states and communities. Congress did from time to time appropriate money for aiding the victims of fires, earthquakes, floods, and other calamities in the United States and even in foreign countries; but such actions were regarded as generous and occasional gestures. When the great depression opened in 1929, President Hoover insisted that responsibility for relief of the unemployed should be placed squarely on local agencies, public and private. His successor, Franklin D. Roosevelt, also contended at first that state and local authorities should carry a large share of the burden.

Federal Aid. Both Presidents, however, agreed that no one should be permitted to starve in the United States, and by 1933 many sources of state and private charity had been seriously curtailed. At the same time the number of unemployed had mounted to more than 12,000,000. The states could not, or would not, lay taxes sufficient to cope with the rising distress. So the Federal Government stepped into the breach with indirect and direct measures of relief.

Indirect Measures. Among the indirect measures were provisions for lending money to farmers and home owners, with a view to keeping them in possession of their property and out of the homeless class. Under this head likewise may be included loans and gifts to states and communities enabling them to create employment on public works, and also expenditures for federal public works directed to the same end, thus relaxing the local tensions.

Direct Grants in Aid. It was soon decided that indirect measures were not enough. In 1933 the Federal Emergency Relief Administration was established in Washington and Congress appropriated hundreds of millions to aid the states in meeting relief problems. In the beginning the states and communities were required to provide three dollars of relief funds for every one tendered by the Federal Government, but in time this was abandoned. The Relief Administration then adopted the policy of getting as much as possible out of state and local treasuries, while trying to prevent actual hunger and suffering by the use of federal

funds. As states and communities defaulted in providing relief, the burden of the Federal Government increased. By the close of the following year, practically all the cost of relief in more than one-third of the states came from federal sources, and the proportion covered by state and local funds was diminishing in other states.

The dilemma was very great. If the Federal Government had not intervened in many sections distress would have become starvation, owing to failure or inability of state and local authorities to cope with it. On the other hand, the very fact that federal funds were available gave many of them an excuse for evading their responsibilities. The peril of general demoralization by "doles" was obvious. Recognizing evils inherent in such practices, Congress sought to work out a regular system of social security in cooperation with the states.

Backgrounds of Security Legislation. For nearly a hundred years state legislatures poured out special statutes pertaining to public health, safety in industries, and the welfare of wage workers; and, after 1900, laws pertaining to workmen's compensation, widows' pensions, old-age pensions, and the rehabilitation of persons injured in industries. At length Congress began piecemeal legislating in respect of social matters within the federal sphere, sometimes in cooperation with the states.

To coordinate efforts of this kind and make certain minimum standards prevail in all parts of the country, President Roosevelt in 1935 suggested a reconsideration of the prime objectives in social legislation and summarized them as follows: "1. The security of a livelihood through the better use of the natural resources of the land we live in. 2. The security against the major hazards and vicissitudes of life. 3. The security of decent homes." It was with these objectives in view that many statutes and executive orders were promulgated in and after 1933. Several of them have been reviewed elsewhere in this volume, especially in the sections dealing with agriculture and labor. Here we shall consider particular measures related to old age, unemployment, and other handicaps.

Protection for Old Age. In an attempt to universalize the principle of old-age pensions already adopted in many states, Congress passed the Social Security Act of 1935, later amended. This legislation authorizes grants of money for pension purposes to the states which comply with federal terms. It matches, dollar for dollar, state grants to all needy persons over sixty-five years of age, up to twenty dollars per month per person, thus making possible a standard federal-state pension of forty dollars a month throughout the country. By 1938 every state had made provisions for pensions, at varying rates, under these conditions.

This system is supplemented by a separate old-age insurance plan

for large classes of persons, which is financed by tax contributions from the workers and their employers. Out of the fund accumulated in the federal treasury, pensions, at varying rates, are paid to the beneficiaries. By 1944 about 63,000,000 persons were entered on the insurance rolls kept by the Bureau of Old-Age and Survivors Insurance in the Federal Security Agency. To get a complete picture of guarantees for old age we must associate with these pension projects special pensions for war veterans, railway workers, and federal and state employees. Yet large classes of persons, among them domestics, farm workers, and industrial workers in small establishments, are excluded from the insurance provisions.

Unemployment Insurance. In addition, Congress has provided for a restricted form of unemployment insurance. Federal legislation under this head, however, only covers limited grants for limited periods to certain classes of workers, and is not uniform in its operation throughout the country. It leaves the states free to adopt plans of their own or no plans at all, but it penalizes them if they do not establish an unemployment-compensation scheme of some kind. This virtual coercion of the states Congress has achieved by laying a tax on the payrolls of each employer of eight persons or more and then crediting against this tax ninety per cent of the amount which the employer contributes to the funds of any unemployment system established by his state and approved by the federal authorities. All the states, the District of Columbia, and Hawaii and Alaska as well, have set up unemployment-compensation schemes. Although the schemes all follow certain principles laid down by federal authorities, they vary widely in the benefits paid to unemployed persons, and all leave out of account millions of workers in special classes.

Other Special Aids. A variety of federal measures, often administered in cooperation with the states or supplementing state legislation, provides assistance to persons suffering from accidents or disabilities of some kind. In this field come pensions and services for veterans of wars, compensation for injured federal employees and transportation workers, grants for vocational rehabilitation, and special aids to victims of floods, droughts, and storms. Under the Social Security Act grants are made to states in aid of needy children, maternal care, child health work, homeless and crippled children, the blind, and public health services. When all such provisions are combined with similar provisions in states and communities, it becomes evident that numerous hazards of fortune are more or less covered by existing legislation, although many persons are still excluded from its scope.

Sickness Insurance Proposed. The major hazards of sickness are not

yet brought within the range of federal control. The importance of the subject is not to be doubted. In its report to President Roosevelt in January, 1935, the Committee on Social Security emphasized it: "Illness is one of the major causes of economic insecurity which threatens people of small means in good times and bad. In normal times from one-third to one-half of all dependency can be traced to the economic effects of illness. The money loss caused by sickness in families of less than $2500 of income per year has been estimated at a total of $2,400,000,000 per annum, of which $900,000,000 represents wage loss and $1,500,000,000 the expenses of medical care. . . . The figures cited explain why many millions of American families live in dread of sickness. Families with small incomes are compelled to sacrifice other essentials of decent living when serious illness strikes some member, go without needed medical care, or depend upon the gratuitous or near gratuitous services of doctors and hospitals. A mere statement of this situation is sufficient to show that it is both unfair to the medical profession and very costly to the public."

While it did not urge immediate enactment of a national sickness insurance law, the Committee on Social Security recommended further study and set forth the goals of such a project: "(*a*) The provision of adequate health and medical services to the insured population and their families; (*b*) the development of a system whereby people are enabled to budget the costs of wage loss and of medical costs; (*c*) the assurance of reasonably adequate remuneration to medical practitioners and institutions; (*d*) the development under professional auspices of new incentives for improvement in the quality of medical services. . . . The insurance benefits must be considered in two broad classes: (*a*) cash payments in partial replacement of wage loss due to sickness and for maternity cases; and (*b*) health and medical services."

By general admission the difficulties of setting up, administering, and financing national health insurance are immense, but as England has demonstrated not insurmountable. How far should the Federal Government go in laying obligations on the states and in providing funds? How much freedom should the states enjoy in making various plans and experiments? In what ways should health insurance be associated with public health activities, public hospitals, and existing facilities for furnishing free or inexpensive medical services? In what relation should private practice stand to practice supported by insurance funds? These are troublesome questions, but there is a decided movement in favor of health insurance in some form, despite all the managerial problems foreseen by the medical profession.

A Greater Social Security Program. President Roosevelt laid before

Congress and the people, in 1943, a study of the National Resources Planning Board calling for revision of the social security program, not only in the field of health but in other areas as well. The board recommended a more complete and better organized system of old-age and unemployment insurance; health and medical services at low cost, with disability insurance for workers suffering from sickness or accidents; more grants to the families of persons out of work; and a long-term program of public works geared into the operations of private business to serve as a kind of "flywheel" for economic stabilization.

Congress, although controlled by members of President Roosevelt's party, not only rejected his program but also abolished the National Resources Planning Board itself. The issue was revived by President Truman. In his annual message of 1948 to Congress, he recommended a long series of new measures under the general head of social security. Then Congress was even more hostile in its attitude. Republican Representatives and Senators charged him with making a bid for votes in the coming election; and Democratic members, at the time playing a minority role, were almost as chilly in their reception of his proposals. On both sides of the two houses, the principal question was not additional social reforms but how to raise enough money to pay past war bills, meet growing expenditures for war preparedness, and provide support for the foreign policies of the administration.

A Demand for Employment Guarantees. Another approach to the problem of economic distress was the suggestion made in 1946 that the Federal Government should guarantee full employment as a matter of right; but the Democrats in Congress, well supported by Republicans, refused to commit themselves to any such program. Nor could any agreement be reached, in Congress or among labor representatives, respecting ways and means of financing it, in view of the big war debts and the heavy taxes required to meet the ordinary expenses of the Government. As a result, the Employment Act of 1946, passed in reply to the demand for employment security, contained no guarantee of any kind but merely provided for systematic study and consideration of the problem by the President and Congress on the theory that the Government should take countermeasures when and if another grave depression produced widespread unemployment (Chapter 19).

During the discussion of the employment bill in 1946, in Congress and the press, it was argued that no program could guarantee full employment to all workers on their own terms, and that any such pledge on the part of the Government must be accompanied by limits on the right of labor to restrict hours and wages, as well as to bargain and strike. When communists and their sympathizers contended that

Russia provided employment for everybody, critics replied that Russian workers could not strike, openly resist the terms offered to them by the Soviet Government, or engage in picketing without incurring the risk of arrest and imprisonment in labor camps under the eyes of armed guards.[1] Yet the Employment Act of 1946 and practices entirely apart from this measure make it highly probable that the National Government will not allow another depression to take "a natural course," but will endeavor to cope with unemployment by various means.

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PART V

STATE GOVERNMENT

CHAPTER 25

Position of the States in the Federal System

It was long the fashion of orators to speak of the Federal Government and the states as "sovereign in their respective spheres." Writers on the American system, for the sake of convenience, usually treat the governments of the Union and the states separately, thus accentuating the distinction of the orators. But in reality (Chapter 1), there is no sharp dividing line between the Federal Government on the one side and state governments on the other.

For example, states may be created only with congressional approval, and once established their powers under the Constitution are subject to definition by the federal judiciary in many cases. State officials engaged in spending congressional appropriations for highways, the promotion of public health, and other purposes, must often comply with extensive rules laid down by federal authorities. Though the states organize and direct their militia under ordinary circumstances, during an emergency the state militia may be incorporated into the Army of the United States. On the other hand, balloting for President of the United States and for members of Congress is governed largely by state election legislation, and Congress cannot amend the Constitution of the United States without the consent of the states. In studying state government, therefore, it is desirable at the outset to consider the states, not as isolated entities, but as a part of the general web of government in America.

ADMISSION OF NEW STATES

Constitutional Provisions. With regard to the creation and admission of states, the Constitution is simple in its terms. It merely provides that new states may be admitted to the Union by Congress and that no new state shall be formed out of another state or by a junction of two or more states without the consent of the state legislatures involved in the operation, and of Congress as well. This clause is of current interest in view of the efforts being made to win statehood for Alaska and the Hawaiian Islands.

Practice. In nearly all cases the states added to the original Union passed first through a stage of government as territories. Texas, however, was an independent republic when admitted by a joint resolution of Congress; and the people of California, a region acquired from Mexico by war and a treaty, also escaped the territorial stage. As a rule the process of admitting a new state has followed a somewhat regular course. The people of an eligible territory present a petition to Congress. If so moved Congress then passes an enabling act authorizing the voters of the territory to elect a convention for the purpose of framing a constitution and thus to prepare the way for taking their position among the other commonwealths. When the document is drawn and approved, Congress then adopts a resolution declaring the said territory to be accepted as a state; the fact is generally announced to the country by a formal executive proclamation. In certain cases, Utah and Arizona, for instance, Congress has entertained objections to the constitution drafted by the territorial convention and has delayed admission until suggested amendments were adopted.

Can Congress Impose Restraints on New States? The only constitutional question of any importance which arises in connection with the admission of new states is whether Congress has the power to impose any limitations in addition to those laid down in the Federal Constitution. In theory all states in the Union are equal in rights and privileges. The famous Northwest Ordinance declared that the new states created in that region should be admitted "on an equal footing with the original states in all respects whatsoever." But on the admission of Ohio in 1802, Congress forced that state to agree not to tax for a period of five years any public lands sold within its borders by the United States.

When called upon to discuss the point of restraints on new states, the Supreme Court declared, in a case involving restrictions imposed on Illinois, that "whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any operative force except as voluntarily adopted by her after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them."

Nevertheless, the Court upheld a limitation on Minnesota by which that state, on its admission, was bound not to impose any tax on lands belonging to the United States, or any higher tax on nonresident proprietors than on residents. The Court said in this instance: "The case before us is one involving simply an agreement as to property between a

state and a nation. That a state and a nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this Court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history." Such is the controlling rule now.

THEORETICAL BOUNDARIES BETWEEN FEDERAL POWER AND STATE POWER

Powers Clearly Denied to States. In their nature and their operations states are limited by the powers which the Constitution confers on the three branches of the Federal Government. In one case, "exclusive" authority is given expressly to Congress; namely, in respect of legislation concerning the District of Columbia and places purchased with the consent of state legislatures for erection of forts, arsenals, dockyards, and other needful buildings. In other cases, the exclusive jurisdiction of Congress is clearly implied, because the states are definitely estopped from acting in connection with the subjects covered. For example, the power to coin money and regulate the value thereof is assigned to Congress and at the same time states are forbidden to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. In still other cases, the right of the states to act is not explicitly denied but is obviously incompatible with the very language employed in conferring a specific prerogative on Congress. For instance, Congress is authorized "to establish an uniform rule of naturalization" throughout the United States.

Borderline Cases. If many questions of power are well settled, there is still a "border line" of uncertainty where practice and judicial rulings must constantly be determining whether the states are entirely excluded from acting in specific ways on subjects placed under the jurisdiction of the Federal Government. In this connection, the commentator, Story, has laid down a rule of interpretation. "Wherever," he says, "the power given to the general government requires that, to be efficacious and adequate to its end, it should be exclusive, there arises a just implication for deeming it exclusive. Whether exercised or not in such a case makes no difference." The significance of this language lies in its very vagueness. With reference to innumerable practical matters therefore nothing precise can be said about the powers which may be ascribed exclusively to Congress and hence withdrawn from the states. The needs of each age must be considered in the light of what appears to be efficacious and adequate.

Concurrent Powers of States. In that wide range of operations in which the states possess a "concurrent power," they are materially

limited in the exercise of the rights they enjoy. Both Congress and the states, for instance, have the power to tax; they may even tax the same objects, let us say, incomes. Yet, by judicial interpretation, states may not burden with a discriminatory tax "the instrumentalities of the Federal Government" although this principle is no longer held to exempt from taxation the incomes of officers derived from their salaries. Nor may a state levy a tax that lays a burden on interstate commerce. To cite another case, Congress has made laws on bankruptcy; but, subject to their limitations or in the absence of congressional action, states are free to legislate in this connection.

To some extent federal statutes in such concurrent spheres supersede state statutes; how far and in what degree, as Story remarks, is a question of "delicate nature." With good reason does he conclude that "it would be impracticable to lay down any universal rule as to what powers are, by implication, exclusive in the general government or concurrent in the states; and in relation to the latter, what restrictions either on the power itself, or on the actual exercise of the power, arise by implication. In some cases, as we have seen, there may exist a concurrent power and yet restrictions upon it must exist in regard to objects. In other cases, the actual operations of the power only are suspended or controlled when there arises a conflict with the actual operations of the Union. Every question of this sort must be decided by itself upon its own circumstances and reasons." Evidently the states are afloat on the sea of experience in this respect.

ORIGINAL LIMITATIONS ON STATES

Nevertheless certain positive restrictions are imposed on the states by the original Constitution. These rules, as expounded from time to time, bind the states, and if necessary will be enforced by the appropriate department of the Federal Government, especially by the judiciary on appeal in cases at law.

Limits on State Taxing Power. The first set of limitations pertains to the taxing power. States cannot, without consent of Congress, lay any imposts or duties on imports and exports, except what may be absolutely necessary for executing their inspection laws; and all such laws are subject to revision and control by Congress.

Duties on imports, said the Supreme Court long ago, include levies not only on the act of importation itself, but also on the commodity imported. "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while re-

maining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." Thus foreign commerce is evidently protected against impediments in the form of taxes devised by state governments.

Analogous to this provision is the rule which forbids any state to lay a tonnage duty *without the consent of Congress*. States may tax the ships of their citizens as property; but it is clear and undeniable, the Supreme Court has held, "that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state, as the prohibition is general."

No Discriminatory Taxes on Federal Instrumentalities. No state can lay a discriminatory tax burdening the property, lawful agencies, and instrumentalities of the Federal Government or franchises granted by it. This principle, as we have seen (Chapter 15), is not expressly incorporated in the Constitution. It was derived by Chief Justice Marshall from the nature of the federal system itself. According to Marshall, the power to create implies the power to preserve; the power to tax is the power to destroy, and if wielded without restraint by a different hand is incompatible with the power to create and preserve; therefore, if the states could lay a penalizing tax on federal instrumentalities, they could destroy a union which was meant to be indestructible.

However, the strict rule laid down by Marshall has been modified. As applied today the principle means merely that the states cannot interfere with a federal instrumentality in such a manner as to impair its efficiency in performing the function for which it was designed. A state, for example, cannot tax income from federal bonds, at least as yet, but it may tax buildings and other property of a national bank chartered by the Federal Government. "It is manifest," the Supreme Court says, "that exemption of federal agencies from state taxation is dependent not upon the nature of the agents or upon the mode of their constitution or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

Interstate Commerce. In another important department of economy the states are still more severely restricted. They cannot regulate or in any way seriously interfere with interstate commerce. To be sure they may pass laws relative to local matters which to some extent bear on commerce of that character. For example, the Supreme Court sustained a law of Kentucky providing for inspection of illuminating oils and imposing a penalty upon persons selling oil branded as unsafe by state officers; this statute was evidently in the interest of public safety, although it certainly interfered with the right of citizens of other states to sell oil freely in that commonwealth. States may also prohibit the running of freight trains on Sundays, forbid the employment of color-blind engineers on interstate as well as local trains, regulate speed within city limits, and compel guarding of bridges and protection of crossings. But legislation of this type must be clearly intended to afford local police protection. If it passes beyond that object it is likely to be set aside by judicial process as a trespass on the authority of Congress.

State actions which constitute invasions of federal power over interstate commerce may likewise be illustrated by concrete cases. A law of Minnesota requiring inspection of all meat twenty-four hours before slaughtering—in substance a pure-food measure—was declared invalid by the Supreme Court because it necessarily prevented importation of meat from other states where, of course, no such scrutiny could be enforced by Minnesota officials. To cite another example, Illinois passed an act regulating railway rates within the state; when it attempted to apply the rule to a shipment starting in Illinois and destined to another state, the Supreme Court of the United States on proper application interfered, and declared that control over such a shipment from beginning to end was vested exclusively in Congress. Again, a state cannot tax all freight carried by an interstate railway, but it can levy on its franchise, using its total income, including receipts from interstate and foreign commerce, in determining the taxable valuation.

Migration Within the United States. American citizens have a constitutional right to move freely from state to state for purposes of pleasure, sight-seeing, engaging in business, or searching for employment. They may transfer their movable property from one state to another, settle there, and enjoy there the privileges and immunities of other citizens in the state where they take up their residences. States are powerless to impede the exercise of this right, even on the part of persons without property or means of a livelihood. For instance, during the great depression that followed the panic of 1929 trains and roads were crowded with unemployed persons hunting work; and at the same time all the states were supporting out of public funds thousands

of the poor and unemployed. Claiming that it was unfair for them to be burdened with indigent immigrants from other regions, a number of states, including California, forbade by law any person, firm or corporation to bring such migrants across the borders into their jurisdiction. But legislation of this kind was declared invalid by the Supreme Court. Although a majority of the justices maintained that it interfered with interstate commerce, two contended that the right to move about freely is one of the privileges of national citizenship which no state can deny. At all events the right stands and cannot be lawfully impaired by state action.

Monetary Control. When a state comes to that high prerogative historically associated with all governments, namely, control over the monetary system, it confronts insurmountable barriers. Here it is, for all practical purposes, powerless. It may charter and regulate state banks, but it cannot coin money, emit bills of credit, or make anything but gold and silver coin legal tender in the payment of debts. Although theoretically it may authorize a state banking association to issue notes for circulation, the exercise of this right is really prohibited by an act of Congress, in effect since 1866, laying a ten per cent tax on such currency. On account of the weight of the tax, state-chartered banks simply cannot afford to issue notes designed to circulate as money.

Criminal Legislation. Even in the matter of criminal legislation—a subject peculiarly reserved to them—the states are limited by provisions of the Federal Constitution. No state can pass any bill of attainder; that is, a measure which inflicts punishment upon some person by legislative act without ordinary judicial trial. Nor can any state pass an ex post facto law: that is, one which prescribes a penalty for an act which was legal when committed; or imposes a penalty in addition to that in force when the act was committed; or changes the rules of evidence to the serious disadvantage of an accused person, allowing conviction on testimony less rigorous than was required at the time of his alleged offense.

Obligation of Contract Protected. More extensive than these restrictions on what may be called the "normal" legislative powers of the state are the provisions of the Constitution curbing its right to interfere with the use and enjoyment of private property. In explicit language the original Constitution stipulates that no state shall pass any law impairing the obligation of contracts. The obligation of a contract, as judicially interpreted, is the body of law existing at the time an agreement is made, defining and regulating it and making provision for its due enforcement. For example, one Crowninshield, on March 22, 1811, gave a note for a sum of money to one Sturges; shortly afterward the legislature of New

York, in which the note was made, passed a bankruptcy act; somewhat later Crowninshield became a bankrupt, paid Sturges a portion of what he owed, and then claimed the right to be discharged from the remainder of his obligation under the terms of the new law. On appeal the Supreme Court declared invalid the New York bankruptcy measure, in so far as it applied to debts contracted *before* its passage, on the ground that such retroactive legislation was a clear impairment of the obligation of contracts.

Definition of Contract. As employed in the Constitution, the word "contract" has a far wider meaning than in ordinary law. It covers not only agreements between private parties with respect to property but also grants, charters, and franchises issued by a state to individuals and corporations. In one of its most celebrated cases, decided in 1819, the Supreme Court established the broader interpretation by holding that a charter granted to Dartmouth College by the King of England was a contract which New Hampshire, as his successor in interest, was bound to honor after securing its independence. Having announced this ruling the court then declared that a law of the state in question designed to control the college and its funds was void as an impairment of the obligation of the contract. Under a literal application of such a doctrine, a state legislature having once granted a privilege to a person or corporation would be bound to maintain it unimpaired forever if no specific provisions were made in the grant as to time limitations or other conditions.

Exceptions. The Supreme Court, however, has refused to extend the term "contract" to several forms of agreement between a state and its citizens. An appointment to a public office even for a fixed period at a definite salary is not a contract and a legislature may abolish the position without impairing any obligation. From the category of contracts are also excluded such measures as a legislative grant of power to a municipal corporation and a bounty law offering to pay from the public treasury a specific rate on the production of certain commodities.

State Power to Revise Laws Governing Contracts. Additional power is secured to states by another device. If a state provides in its constitution or laws that all future charters and franchises granted under its authority may be amended or repealed, it thereby makes the very reservation a part of the obligation of such contracts and thus leaves the legislature free to alter or abolish them without running counter to this provision of the Constitution. Hence, it is no longer possible for private corporations to secure, either honestly or by corrupt means, priceless concessions and then defend them against withdrawal or modification by taking shelter under the sacredness of contract. In their

general tenor the provisions freeing state legislatures from the strangling effect of this clause are illustrated by the following extract from the constitution of Wisconsin: "All general laws or special acts, enacted under the provisions of this section [dealing with corporations], may be altered or repealed by the legislature at any time after their passage."

Yet there is in truth more shadow than substance to such declarations, for the Fourteenth Amendment, adopted in 1868, has radically altered their legal effect by forbidding states to deprive any person of life, liberty, or property without due process of law. The state may still rescind charters granted to corporations, if it has previously reserved the right, but it cannot alter, interfere with, or revoke them in such a manner as to deprive stockholders of their property without due process. In other words, a legislature may extinguish a corporation but cannot destroy all the tangible rights which the latter has developed under its franchise.

Exceptions in Time of Emergency. Another turn was given to the contract clause of the Constitution in 1934 when the Supreme Court of the United States upheld a Minnesota law giving property owners the right to apply in court for a two-year extension of the time in which to redeem their property about to be taken under foreclosure of mortgage —an emergency measure enacted during a depression in business. The Minnesota Supreme Court had conceded that the statute in question did impair the obligation of mortgage contracts but held that such impairment was within the police power of the state as called into exercise during the economic emergency which the legislature found to exist. This view was substantially confirmed by the federal Supreme Court. In stating the opinion of the court, Chief Justice Hughes said that as constitutional restrictions could not be interpreted to prevent temporary interferences in times of fire and earthquake, so public needs arising from economic and other emergencies required similar consideration in the application of such limitations. He quoted with approval Marshall's statement that the Constitution was intended to endure for ages to come and to be adapted to the various crises of human affairs.

LIBERTY OF PERSON AND PROPERTY IN THE STATES UNDER THE FOURTEENTH AMENDMENT

Wide Scope of the Fourteenth Amendment. The most significant phase of federal control over the activities of states is authorized by the Fourteenth Amendment. For practical purposes, this clause of the Constitution places in the hands of the federal judiciary a veto power over important matters. According to the first section of that Amendment, no state can make or enforce any law which abridges the privileges or immunities of citizens of the United States; and no state can deprive

any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Substantive and Procedural Due Process. In practice, the Amendment affects two kinds of operations vital to state and local government, called substantive and procedural; that is, it bears on the substance of all state and local laws and on the methods employed in the making and enforcing of such laws. In the first place, it positively forbids the state and its organs of government to cover certain subjects; for instance, to establish an official religion and compel people to accept it and pay taxes to support it (Chapters 3 and 4). In the second place, the Amendment requires the state and its organs of government to follow certain rules of due process, or methods, in doing everything that they may lawfully do in respect of life, liberty, property, and other interests within their jurisdictions. Thus the Amendment controls the making and enforcing of laws relative to all such fundamental matters as civil liberties, crimes and punishments, the ownership and use of property, the regulation of industries, transportation, and communication, the practices of organized labor, and taxation in all its forms.

Reservation of Police Power to the State. Despite all the limits imposed on it by the Fourteenth Amendment, the state (including all its organs of government) retains, under judicial interpretation, the police power. The Supreme Court decides in cases properly brought before it whether any particular act of a state or any of its governmental organs is or is not within the scope of that power. Doubtless a broad interpretation of this elastic phrase would authorize the state to pass and enforce almost any kind of legislation designed to promote the general welfare as opposed to special interests or privileges. Indeed, the Court once said that the police power includes full authority "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and its prosperity."

However that may be, a state, under its police power, certainly may do many definite things. It may, for example, restrict dangerous and objectionable trades to certain localities; it may provide for dividing cities into zones; it may regulate, to a limited extent, railways and other common carriers; and it may fix the hours of women and children in industries. It may declare a moratorium on mortgages and extend the time allowed for home owners to redeem property about to be seized under foreclosure. According to the decision of the Supreme Court in a New York milk law case in 1934, a state legislature may establish a milk con-

trol board and empower it to fix the price of milk sold to the public.

General Effect of Federal Judicial Control. If it be said that, after all, relatively few state laws are set aside by the Supreme Court under the various constitutional clauses cited above, the answer is that it is not their number but their implication which counts.[1] Moreover, cases of this character are now increasing. That is not all. Whenever an act of one state is declared void, legislation of the same type in all the other states falls to the ground with it and future experiments of a kindred nature are barred. When, for instance, doctrines are laid down in connection with the valuation of public utilities or the regulation of their rates, legislatures throughout the Union must take note of these instructions from high authority.

CONSTITUTIONAL RELATIONS AMONG STATES

Privileges and Immunities Made Common to All Citizens. The Constitution requires the maintenance of certain relations among the states. By a specific provision it guarantees to the citizens of each state the privileges and immunities of the citizens in the several states, and the federal judiciary enforces the pledge by proper processes. In substance this means that there are certain great legal rights necessary to free migration throughout the American nation, to the successful conduct of business and industry, and to the enjoyment of property, which no state may take away from a citizen of another commonwealth coming within its borders. It means also that the civil rights which a state confers on its own citizens may be claimed by citizens of other states taking up residence in its territory.

Under the vague language of this clause a number of interesting questions have arisen.[2] Within its meaning, are corporations citizens? The courts have answered in the negative. Subject to the limitations of the interstate commerce clause, a state may impose on outside corporations seeking to do business within its borders some restraints to which its own corporations are not subjected. What privileges and immunities are included in the guarantee? No exhaustive list or all-embracing definition is to be found anywhere. Many years ago, when Maryland tried to compel nonresidents to take out licenses before offering for sale, in certain districts, goods not manufactured in the state, the Supreme Court held the law invalid. Evidently a certain freedom of trade throughout the Union is among the privileges and immunities enjoyed by the citizens of each state although it may be and is hampered by many

[1] For a list of state laws and actions declared unconstitutional by the Supreme Court in 1944–1947, see *The Book of the States, 1948–1949*, pp. 147 ff.

[2] Bates and Field, *State Government*, pp. 55 ff.

state laws. Equality of taxation is likewise assured. New York, for instance, cannot lay a heavier rate of tax on property owned within its borders by a Connecticut citizen than it levies upon a similar property belonging to its own citizens. The right of the citizens of each state to acquire property in other states is also well established.

State Records Given Effect Throughout the Union. A kindred arrangement for facilitating intercourse among the several states, especially in the conduct of legal business, is furnished by the clause of the Constitution which declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Congress has provided by law the form in which legal transactions shall be authenticated. When they are so verified, such faith and credit shall be given them in every court within the United States as they have by law and usage in the courts of the state from which they are taken.

In practice the system operates as follows: A brings suit on a debt against B in a court in Ohio, of which state they are both residents; after trial, the court decides that B owes A one thousand dollars and gives judgment accordingly. B thereupon moves into New York, taking his property along, before it can be attached for the debt. When A in quest of his money goes after B into New York, it is not necessary for him to bring another suit in that state in order to get the proper process to recover the amount due him. All he has to do is to show in the New York court of proper jurisdiction the authenticated judgment of the Ohio court. B may contend that the records are not correctly transcribed, or that the court which rendered the original opinion did not have jurisdiction, but he cannot secure a reopening of the case on its merits. He is bound in New York by any decision properly rendered against him in the Ohio court.

Although the general effect of the "full faith and credit" clause is to induce each state to honor at face value the acts of other states, the courts sanction numerous exceptions. Thus a White and a Negro, forbidden to marry in their home state, traveled to another where the marriage was legally performed, only to find in court, upon their return, that the marriage was not accepted as binding within their home state.

Respecting the validity of divorces, there is also confusion, and the Supreme Court has contributed to it. For a time the question seemed to be settled by a case decided in 1942.[3] Two years previously a man and woman, residents of North Carolina, went to Nevada, established residences there, divorced their respective spouses, married, and then returned to North Carolina. They were charged with bigamy, and the

[3] **Williams** *v.* **North Carolina, 317 U. S. 287.**

North Carolina court declared that the Nevada divorces were invalid. On appeal the Supreme Court of the United States overruled the decision of the North Carolina court. But the case was raised again, and the North Carolina court held that the parties were in fact not properly domiciled in Nevada (although the Nevada court had held to the contrary) and that North Carolina would not recognize the validity of the Nevada divorces. On second appeal the Supreme Court of the United States sustained the view of the North Carolina court and declared in effect that the court of one state may disregard and treat as unlawful a divorce which the proper court of another state has duly granted and recorded. But many other states have recognized as valid divorces obtained in Nevada and it would appear that persons held bigamous in one state merely have to move into another state which gives "full faith and credit" to Nevada divorces, in order to be treated as lawfully united in the bonds of matrimony.

Rendition of Criminals. Another phase of interstate relations, the extradition or rendition of criminals is covered by the Federal Constitution. An express provision stipulates that any person charged with crime, fleeing from justice and found in another state, shall be delivered up for trial on demand of the executive authority of the state in which the alleged offense was committed. This language Congress has amplified by an act declaring that on proper application "it shall be the duty of the executive authority of the state to which a fugitive has fled" to cause him to be seized and handed over to the agent of the state making the requisition.

But the words "it shall be the duty" have been interpreted by the Supreme Court as merely announcing a moral, not a mandatory, obligation. "The act," explains the Court, "does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power." Hence the governor of a state may use his discretion in every case brought to him for consideration and decline to accede to a requisition if he sees fit to do so, as far as federal law is concerned.

Process of Rendition. The detailed process to be followed in the rendition of criminals is prescribed in federal legislation. In addition most states have statutes providing that an accused person can be arrested when information of the charge against him is duly received, and held until an official demand is made for him. Suppose that A commits murder in Ohio and escapes into Texas. As soon as his place of refuge is discovered, the authorities of the community in which the crime oc-

curred will call for his arrest, and he will be taken into custody by the police or the sheriff of the locality where he is found. Thereupon the governor of Ohio will issue to the governor of Texas a formal request for the surrender of A, appending to it a certified copy of an indictment or affidavit. If the governor of Texas finds that the papers are regular and that A is in fact a fugitive from Ohio and was there at the time the alleged murder took place, he will, in the ordinary course, issue an order for the surrender of the accused to the agent sent from Ohio to assume charge of him. On the other hand, if for any reason whatever the governor refuses to accede to the demand, the issue is closed, for no appeal can be taken to any other authority against his decision.

This elaborate process for capturing and returning offenders against the law has been modified, however, by a majority of the states voluntarily, through the enactment of uniform laws relative to the subject. According to these laws, the officers of a given state in actual pursuit of criminals fleeing to other states may cross their borders and arrest fugitives from justice on their soil. Another law, accepted by many states, waives the formal requirements for rendition proceedings in the state of arrest and permits the easy transfer of an offender to the state in which the crime was committed. These changes reflect a growing appreciation of the fact that the airplane and automobile have made obsolete the application of the historic rendition rules to the states of the Union—rules originally devised to operate between sovereign nations. Meanwhile the Council of State Governments continues its campaign to obtain uniform state laws for crime control with respect to arrest, interstate and intrastate pursuit, extradition, rendition, and summoning of witnesses.

Compacts Between States. Relations established among the states under the constitutional clauses just considered may be supplemented by special understandings created by negotiation and agreement. Article I of the Constitution declares that agreements or compacts among the states must have the consent of Congress, but practice is not so strict. In minor matters states often enter into arrangements without asking Congress for its formal approval, but if significant political and property rights are involved the constitutional requirement is observed. Notable examples of arrangements coming under this head are the New York Port Authority and the Hoover Dam Project. Evidently there are great possibilities in this half-explored realm of interstate relations. Without changing a line in the Constitution sectional and regional plans, required by special economic and technological con-

ditions—for instance, pertaining to metropolitan New York reaching into three states—have been carried into execution.

TENDENCIES IN THE RELATIONS OF THE UNION AND THE STATES

The Original Conception. In recognizing the value of and in making provision for the dispersal of power in the American system, the framers of the Constitution divided governmental authority between the Union and the states. To the former they assigned powers that are general in nature, such as control over interstate commerce and the relations of the United States and foreign countries; and to the latter they left extensive authority over the management of their internal affairs. For a long time after the Constitution went into effect, the system worked as the framers expected, while the Union was relatively weak and the states were strong. In time, however, the Union gathered strength at the expense of the states and for many years the major tendencies in government have been in the direction of a concentration rather than a dispersal of power, despite many strong countervailing forces in the states.

The Growing Weight of Foreign Affairs. In a large measure the centralization of power in the National Government has been due to the spread of American commerce and other economic undertakings in all parts of the world and to American participation in world politics and wars (Chapters 17, 18, and 19). War itself is one of the greatest of all centralizing and regimenting forces in history, and the war power is vested in the Federal Government alone. Although some relaxation occurs after each war, the making of immense preparations for war in time of peace prevents a complete restoration of the previous balance between the Union and the states.

Nationalization in Economy. Changes in domestic economy also account in part for centralizing tendencies in government. Railways, buses, airplanes, telegraph lines, and the radio cut across all geographical borders within the Union. The growth of great corporations controlling industries in many states and selling goods throughout the country makes it almost impossible to separate the business transacted within a state from the general mass of interstate commerce subject to national regulation. The rise and spread of powerful labor organizations operating in all industrial regions have likewise contributed to the strength of centralizing forces (Chapter 23). In efforts to protect the public health a similar tendency appears, for modern science shows that human maladies, particularly contagious diseases, are not confined to localities but spread far and wide without regard to state

"sovereignties." Nor is it true to say that even in social relations the affairs and policies of one state do not concern its neighbors. Illiteracy, unemployment, poverty, and low labor standards in one state or section tend to lower the level of civilization in other parts of the country, and such conditions give rise to demands for national legislation and national agencies designed to cope with them.

Enforcement of National Laws by States. In many cases federal legislation is voluntarily accepted and enforced by the states. For instance, the National Government regulates interstate aviation and licenses aircraft and pilots engaged in interstate commerce. Instead of setting up rival and perhaps conflicting systems of licensing, most states now require planes and pilots flying solely within state borders to hold federal licenses even if their operations are purely intrastate. In this fashion national law relative to aviation is made to reach flying in general, regardless of whether it is interstate or intrastate.

Federal Appropriations for State Functions. Under the Constitution Congress may appropriate money for operations over which it has no express powers whatever. By this means, the National Government deals with many matters of crucial importance which fall within the competence of the states. Such activities may be divided into two broad classes. The first embraces research and standardization; and the second, the use of grants of money and assistance for the purpose of encouraging, if not actually compelling, states to undertake important functions or reforms.

Federal Research Assistance to the States. In many cases, states and their subdivisions face common research problems which can be most effectively attacked by studies conducted on a national scale. Federal appropriations often make possible an approach on such a broad front. For example, the funds supplied by Congress to the Office of Education enable it to conduct surveys of state and local education throughout the country, collect data, issue publications, and give advice and counsel to state and local authorities. Somewhat in the same way, the Department of Labor compiles statistics, analyzes laws, and disseminates information relative to labor questions falling entirely within state jurisdiction. Even more striking is the work of the Bureau of Standards which carries on investigations in various fields of science, evolves regulations, and makes them available to local as well as federal officials. Some of its standards, for instance those dealing with heat and light units and model ordinances for zoning cities, have been adopted by many states as binding within their respective jurisdictions. As soon as new scientific questions arise and begin to receive local consider-

ation, the interest of the National Government may be enlisted and its powerful assistance invoked.

Federal Financial Aid to States. The second type of responsibility assumed by the Federal Government under its power to tax and appropriate money for general purposes, namely, that of rendering financial and administrative assistance to the states, has its origins partly in the unequal distribution of wealth. (The costs of governmental services are mounting and the states with meager economic resources find it increasingly difficult to carry their burdens. Having a voice in Congress, they appeal for federal funds derived from the wealthier states.) There is some justice in this request for a large part of modern wealth is intangible, namely in stocks, bonds, and mortgages, which enable owners in wealthy states to drain off income from the less favored areas. Through its income tax legislation the National Government may reach a part of the private incomes derived from such intangibles and distribute some of it among the poorer states to aid them in operating their public services. Nevertheless, federal aid, as a whole, represents at best a rough justice. For instance, several states receiving this assistance are encouraging industrialization by exempting new factories from taxes and at the same time shifting a portion of the burden of supporting their local government to the richer states from which they are attracting plants, enterprises, and managers.

Grants in Aid of Education. The practice of granting subsidies to states from the federal treasury began long ago. By numerous laws starting with the Land Ordinance for the Northwest Territory in 1785 and running down to our own time, Congress has made grants to the states for schools, roads, and canals. The most outstanding of the earlier measures was, perhaps, the Morrill Act of 1862, which set aside for the benefit of each state, in proportion to its representation in Congress, an extensive tract in the national domain and provided that the proceeds were to be devoted to the maintenance of one or more colleges engaged principally, but not exclusively, in teaching branches of learning related to agriculture and the mechanical arts. This act, although attacked by a Senator from Virginia as "an unconstitutional robbery of the Treasury for the purpose of bribing the states," attempted to impose no federal control over them in the use of the money. Congress simply made the gift and trusted them to employ it wisely. Later, however, amendments to the act went into some detail as to the management of the land-grant colleges, and authorized the withholding of the allotment of any state which did not comply with the terms of the concession.

With a view to improving the work already started in this field, Congress began in 1887 to make an annual lump sum appropriation to each state to assist in the development of an agricultural experiment station in connection with the agricultural college. In 1906 it materially increased the appropriation and laid down additional rules for the use of the money. Nine years later it took another step in the direction of closer control by reorganizing, in the Department of Agriculture, an administrative division charged with the duty of supervising the agricultural colleges and experiment stations. At the present time the whole field of relationships created by these subsidies is covered in minute regulations reached by agreement between state and federal authorities. In fact the cooperation is close, continuous, and helpful to both parties. Federal supremacy is unquestionable, because funds can be withheld if rules are not complied with, but resort to this drastic action is seldom if ever necessary.

Enlarging its historic interest in the subject, Congress commenced, with the Smith-Lever Act of 1914, to make appropriations for extension work in agriculture to be undertaken by the Department of Agriculture and the state agricultural colleges. At the outset a small lump sum was assigned to each of the states and the remainder of the annual allotment was distributed among them on the basis of their respective proportions of rural inhabitants; in other words, farming population, not geographical units as such, was used as the standard to measure needs. The gift was conditional; the statute provided that national funds should not be given to any state until it accepted the terms of the act and appropriated or otherwise secured a sum equal to that granted to it by federal law. Under this act the agricultural extension work of the entire country is conducted according to broad and uniform principles adopted by the Secretary of Agriculture and state officials.

Another type of federal aid to education was initiated by the passage of the Smith-Hughes Vocational Education Act of 1917, to promote technical training. It appropriated money from the federal treasury to assist the states in teaching trades, industrial subjects, and home economics. At the same time it kept an eye on general supervision by arranging for the execution of the act under the direction of a federal agency.

Forestry. If education, primarily a state function, can receive assistance from the federal treasury and be brought to some extent under national administrative control, why not forestry, a branch of economy also within the jurisdiction of particular states, except where the Fed-

eral Government holds domains of its own? In spite of forceful protests on constitutional grounds, Congress decided that action was imperative in this field and in 1911 it passed an act which made appropriations for the purpose of enabling the Forest Service in the Department of Agriculture to cooperate with any state or group of states, when requested, in protecting the forested watersheds of navigable streams against fire. Though falling nominally under the power of Congress to regulate interstate commerce and hence navigable waters, this measure in effect established a system of cooperative forest protection by federal and state administrative authorities.

Grants for Highways. With this extraordinary precedent accepted, it was comparatively easy for Congress to find warrant, in its authority over post roads, if nowhere else, for enacting the highway law of 1916. In that year it inaugurated the practice of granting annual sums of money to the states for road-building programs and established close federal scrutiny over construction. Under the terms of the Act, modified by later amendments, uniform specifications have been forced upon state highway engineers, common working agreements have been formulated by federal and state officers, conferences of state highway officers have been held under national auspices, and states that forbade their governments to appropriate money for such public improvements were in effect asked to change their constitutions. Under the control and stimulus of the Federal Government the highway legislation of the states has been multiplied many times in volume and construction raised to high standards in quality.

Grants for the State Militia. If by advancing into the fields of education, forestry, and highway construction Congress "invades the sovereignty" of the states, it certainly goes still deeper into that reservation by legislation which virtually incorporates their militia forces in the national army. Doubtless Thomas Jefferson and Patrick Henry would be astounded and alarmed by the very idea. Nevertheless, Congress has, to all intents and purposes, made the militia of each state a cog in the military machine of the Union. In this case, as in others, federal aid is extended; and federal standards for equipment, drilling, administration, and service are strictly applied. The very name "militia" has been dropped and the term "National Guard" substituted for it. Thus the ancient symbol of independence—armed force—passes from the states to the nation. Once it was contended that militiamen were obligated to fight only within the borders of the country and in defense of its territory; now they are included in expeditionary forces and sent across the seas in time of war. Under a

law passed in 1934 the National Guard may be called into federal service by the President whenever Congress declares a "national emergency."

Labor, Social Security, and Housing. Under extremely liberal interpretations of the interstate commerce clause of the Constitution, Congress has intervened extensively in the relations of labor and management in industrial activities once deemed intrastate. Formerly, too, the care of persons suffering from misfortunes of all kinds was considered a purely local function; later the central governments of the states took over a part of the obligation; then the National Government entered the scene. Now that government, by legislation and grants of money, coupled with innumerable federal agency regulations, induces, if it does not quite compel, the states to establish and maintain what amount to social security systems, including old age pensions, unemployment insurance, and care of various classes of sick and dependent persons. It also encourages state and local authorities, by legislation and grants of money, to set up housing agencies and engage in building and operating low-rent dwellings.

Common Action in Legislation. In attempts to carry out its numerous plans, the Federal Government has called upon the states to enact similar or identical laws that dovetail into federal legislation. When the Supreme Court declared in 1935 that the regulation of agriculture belonged to the states, Congress passed the Soil Conservation Act providing for close federal cooperation with the states, and the states with alacrity enacted laws complying with the terms of the federal statute. The National Housing Act would have been ineffective without state legislation, and a large number of states quickly passed laws enabling communities to take advantage of the loans and gifts proffered by the act. It has become a common practice for departments in Washington to draw up standard bills for states and to secure their enactment by state legislatures. It is a roundabout process for attaining uniformity of procedure throughout the country but it works, especially when many state governments are in the hands of the party in power at Washington, D. C.

Federal Coercion of States. When the Federal Government offers money to a state on condition that it will furnish a certain amount itself or do certain things prescribed by federal law, the state is free to accept or refuse. But in some cases the inducement becomes almost, if not actually, coercive. The unemployment insurance provision of the Social Security Act lays a heavy tax on employers' payrolls and then offers to remit nearly all the tax if employers are making payments in

support of a state unemployment insurance plan. That practically amounts to coercion in fact if not in theory.

Federal-State Administrative Cooperation. Once federal officers were federal officers and state officers were state officers. Now the distinction has become blurred in many respects. Federal officers lay down rules for state and local officers to follow in such fields as forestry, housing, agriculture, and flood control. In various connections the two sets of officials work side by side in cooperative undertakings. In some cases state officers may be shifted to the services of the Federal Government for particular purposes. For example, the Wages and Hours Act authorizes the administrator to "utilize the services of state and local agencies and their employees and . . . reimburse such state and local agencies and their employees for services rendered."

Federal and Municipal Relations. In numerous cases the Federal Government goes past the state government and, with or without explicit state authorization, forms connections with communities or renders services to them. In his *Federal Services to Municipal Governments*, Paul V. Betters has supplied a whole volume of illustrations, in such matters as health, safety, crime, and civil engineering. Under state legislation, the Federal Housing Authority deals directly with communities empowered to cooperate with it. As Charles E. Merriam has said: "In many instances . . . the state will neither grant autonomy to cities nor will it assume the burden of administrative supervision over them." In such circumstances, the Federal Government often steps in.

RECENT DISCUSSIONS OF FEDERAL-STATE RELATIONS

Federal Aid and Intervention Appraised. The rapid development of federal and state interconnections, especially the expansion of federal grants of money and regulatory activities, has awakened a widespread debate over the future of the states in the Union. Ardent champions of states' rights contend that the increase of federal activities within the states is destroying their initiative, crushing the spirit of self-government, "regimenting" free-born citizens. In their alarm, some critics declare that America is being subdued to a federal bureaucracy and is on the way toward totalitarianism. On the other hand, if all communities were left to themselves, some of them would inevitably sink to low levels in education, health, and culture. How to combine local energy with high national standards, to stimulate the weak without oppressing the strong, is really the problem which the states and the Federal Government are attacking in the extension of their cooperative functions.

In some relations, to be sure, the Federal Government is coercive; it was intended to be; and has always been since its establishment in 1789. But in most of the newer activities that penetrate state and local areas, it offers assistance, leaving to the states and communities the privilege of cooperating or not as they see fit. And as a rule the spirit of give and take, teach and learn, controls the relations of state and federal officials in working out their joint undertakings. After all, federal officers are not imposed on the country by force, and they are not aliens. They are American citizens usually well acquainted with American ways in states and communities.

Looking at these newer activities from the side of the states, we find that nearly all the functions for the discharge of which federal aid is offered were originally undertaken by states in some form on their own motion; and federal activity has merely tended to make such functions more general and more effective. Most of the so-called newer activities are not so very new, as anybody can see who will examine the successive editions of this volume which have appeared since 1910, tracing the changes of the years. The newness consists rather in their spread from state to state, in variations, and in federal cooperation in the process of extension and development.

Another pertinent fact can scarcely be overemphasized. Paralleling the penetration of state and local governments by federal agencies has been an extraordinary growth of interest in state and local government, a drive for reorganization and improvement in machinery and methods, an expansion of state civil service, and an amazing extension of interstate and intercommunity cooperation. The competence of state and local officers has been raised by an interchange of ideas and demonstrations of more efficient practices. And the citizens of states have more to do, not less, more power to achieve results, not less, and more encouragement to participate in public affairs, not less.

Economic Checks on the Expansion of Federal-State Functions. Whatever may be the plans of national and state authorities for the future expansion of state and local functions under the stimulus of federal assistance and supervision, the realization of these plans is and will be materially restrained by the sheer lack of sufficient revenues to pay the bills. The cost of carrying the gigantic national debt and the burdensome taxes required to meet federal expenditures for existing purposes, particularly military preparedness, put severe limits on the power of the National Government to borrow and tax for the purpose of promoting an increase in the number and variety of state and local undertakings in the name of the general welfare. Already the states,

cities, and rural communities are about at their wits' end in devising ways and means of raising revenues to cover their expenses, including the outlays for matching the grants of money made by the National Government in aid of state and local functions.

In many instances the necessity of paying for particular functions imposed on states by the system of federal aid compels them to neglect other activities more important for state and local well-being; for example, the cost of building and maintaining magnificent highways often makes such a drain on state finances that education, public health, and other vital functions must be curtailed. It may happen, therefore, that financial stringency, if not a fear of centralized power in government, will block the enlargement of national control over state affairs and throw the states back upon their own resources. In other words, a crisis in interlocking federal and state finances may force a redistribution of powers.

Utility and Value of the States Challenged. Many able students and practitioners in the field of government and administration have concluded that the current system of federal and state relations, whatever its financial future, offers no lasting solution for the problems of government touched by it. They argue that the states themselves should be drastically reformed, reduced to the level of administrative subdivisions in the Union, regrouped in larger units, or abolished. Among the outspoken critics of state government are Charles E. Merriam, Edward S. Corwin, William Y. Elliott, James T. Young, Roy V. Peel, and William B. Munro, whose studies and experiences entitle them to be heard.

Summary of Criticisms. The burden of the arguments against the states is summarized by W. Brooke Graves as follows: "In general, it may be said that the criticisms leveled against the states through the years have centered around the fact that their boundaries were not determined in accordance with any guiding principles, the claim that they constitute an obstacle to effective local government, and that they have often failed to deal adequately with many of the pressing responsibilities with which they have been confronted. They have failed to adjust themselves, structurally and functionally, to the increased responsibilities imposed upon them, and upon all government, by the developments of modern civilization. They have often failed to cooperate effectively with each other in the development of common policies, and because of restrictive clauses in their constitutions have frequently been unable to coöperate with the Federal Government." Or as Charles E. Merriam tersely stated his case: "Most states do not

now correspond to economic or social unities, and their validity as units of organization and representation may be and has been seriously challenged."

Regional Commonwealths as a Way Out. Calling attention to the manner in which the Federal Government has districted the country for military, banking, agricultural, conservation, and other purposes, some critics of the states have proposed a new subdivision of the Union on regional rather than state lines. For example, William Y. Elliott proposes to divide the country into a few great regional commonwealths, retaining the states as units for some administrative purposes, and giving each commonwealth representation in Congress. This arrangement, he argues, would bring strong regional governments into existence and make less necessary the creation of a large federal bureaucracy. What a new national crisis in economy may produce, no one can say with certainty, but at the moment state attachments are so fervent and state political machines are so strong that any radical consolidation of states into regional commonwealths seems to be beyond the range of "practical" politics.

Interstate Actions on Common Problems. Deeming such projects impracticable or undesirable, other critics of state governments hold that the way to meet the challenges of the times is for the states to make fuller use of existing means of cooperation. Compacts have been signed by groups of states covering such fields as the construction of bridges, the control of floods, the production of oil, the regulation of wages, the restraint of crime, the abatement of water pollution, and the conservation of marine fisheries. Without asking the consent of Congress, states may and do draft uniform laws extending concessions to one another or providing for uniform treatment to their respective citizens in specific matters. By legislation thirty-two of the states have agreed to waive the historic requirements for the interstate rendition of fleeing criminals. By common action, a number of states have established reciprocal regulations for motor vehicles. From year to year the practice of enacting uniform laws on important matters entirely subject to state control is extended.

Interstate Administrative Agencies. In various forms states have entered into agreements which create joint agencies to carry their common designs into effect. Such agencies now in existence manage bridges and tunnels, take care of adjoining park areas, and supervise flood control works. These are in effect regional authorities which are neither federal nor state in the strict sense, and their success in many undertakings points to the possibility of a more extended use of such regional govern-

ments for dealing with matters that transcend state boundaries and yet are not national in scope and interest.

Interstate Associations. Also helping the states to meet their common problems by themselves are numerous professional groups including: (1) the Council of State Governments officially representing all states, with headquarters in Chicago and branches in New York City, Washington, and San Francisco, a clearing house on interstate activities, that promotes research in state problems; (2) the Interstate Assembly, held annually and attended by a large number of delegates; (3) the Governors' Conference, held periodically; (4) the American Legislators' Association, officially representing state legislatures and in charge of conferences and research respecting questions of common interest; (5) special interstate associations, numbering forty or more, such as the Civil Service Assembly, National Association of Attorneys General, National Association of Secretaries of State, and organizations of public health officials, public service commissioners, and state auditors—all concerned with the exchange of ideas and the improvement of standards; (6) the American Municipal Association representing some 7,000 municipalities and receiving the cooperation of officials in many states; and (7) the American County Association, devoted to better county government.

Cross Currents. In portraying this growing affiliation of states and communities, it is to be noted, however, that there are also conflicts among states which seriously interfere with freedom of commerce and intercourse. States bid against one another for industries by offering tax exemptions and other favors, including in substance assurance of docile labor; they discriminate against the products of other states by imposing taxes on them or by applying sanitary regulations against them; and they erect other barriers against the movement of goods. Such actions bring retaliations and ill will in their train.

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CHAPTER 26

The State and Its Constitution

Varied Use of the Term "State." Loose usage of the word "state" in customary practice is responsible for no little confusion about the American system of government and liberty. The word itself is essentially political in nature. To the specialist in political theory the general term "state" signifies the person or persons possessing the ultimate power of controlling the government in any society, anywhere. To others, a state is a geographical area shown on a map. To still others, mention of the word state brings to mind the government of one of the forty-eight states of the American Union. Additional difficulties arise from constant reference to "state and local governments" as if they were entirely separate entities, whereas both may have been created under a single "state constitution."

POWERS POSSESSED BY THE INHABITANTS OF A STATE

The Constitutional View of the State. From the standpoint of the American constitutional lawyer, the most useful concept of "the state" is that it is a body of people occupying a definite geographical area, also known as a state, and enjoying all powers over their affairs that are not vested in the Union or denied to them by the terms of the National Constitution. To avoid confusion between the idea of the state as a group of persons and the state as a geographical expression, some writers apply the term "commonwealth" to the inhabitants of a state. In this chapter, we shall use "commonwealth," the inhabitants or people of a state, and the constitutional lawyer's concept of a state interchangeably, to mean the source of governmental authority at the state level.

The Exercise of the State's Reserved Powers. The people of the state, or more concretely the enfranchised and active portion thereof, may determine what powers are to be allocated to their governments—central and local—and how these powers are to be exercised. As far as the National Constitution is concerned, they may vest all their reserved powers in the hands of central and local agents of government,

making among them such a distribution as they see fit; or they may, and do in practice, entrust only limited powers to such agents and keep the other powers, that is, rights pertaining to persons and property, in their own hands.

How are the powers yielded by the people of the state to their agents of government to be exercised? For this question the people of the state may provide their own answers, subject to the mandate of the federal Constitution that the government they establish for themselves must be "republican" in form. Thus the states have a wide choice of means in creating agencies of government and endowing them with powers. For instance, they may vest great power in the governor alone or require him to share the executive authority with other elected agents; and they may even provide for their own direct participation in the legislative process through the initiative and referendum (Chapter 27).

Madison remarked more than one hundred and fifty years ago that the powers reserved to the several states "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." If the people of a state are unimaginative, negligent, unwise, or inefficient in the use of the powers they possess, that is no fault of the National Constitution: the fault, if there be any, lies at their own doors.

Responsibilities of the State as a Commonwealth. Coupled with the state's large reserved powers are also heavy responsibilities for the management of its internal affairs and, let it be emphasized, the working of the federal system itself. The Union depends upon the states and their economic resources for its very existence. It is as much the duty of the state to resist federal encroachment as it is the duty of the National Government to resist state invasions of its domain. Under state laws, delegates to the national political conventions for the selection of presidential candidates are chosen, nominations for the House of Representatives and Senate are made, and elections of Representatives, Senators, and presidential electors are conducted. If the states fail to discharge their own duties effectively, they put in jeopardy the security of the Union and likewise their own welfare. Although the activities of the state may not present the imposing aspects of "great affairs" handled in the national capital, they are nonetheless essential to the perdurance of the Union.

States as Experimental Laboratories. Possessing large powers in their own right, states are veritable laboratories for making political, economic, and social experiments. The people of each state draw up

their own constitution and thus give to their central government and local governments such forms and powers as they deem fitting. Owing to the relative ease with which their state constitution may be amended, they may readily effect those alterations in the structure and functions of government which they regard as necessary to meet changing conditions of life and economy.

Each state is so organized in township, village, city, county, and other local formations, that new projects may be tried out in a small unit and, if successful, adopted in neighboring communities and finally throughout the commonwealth. In local and state affairs many members of Congress and Presidents have received a fundamental training in politics and government that prepared them for action on the national stage. Through them, valuable ideas concerning social and economic legislation make their way upward into the National Government. Hence it comes to pass that state and local offices seemingly small in their influence and ideas originating in response to the needs of minor areas may eventually produce an important effect on the well-being of the whole nation.

THE NATURE OF THE STATE CONSTITUTION

Fundamental Law for the Commonwealth. It is in the making of their constitution that the people of the state decide upon their form of government, the powers over life, liberty, and property to be bestowed on governmental agencies—central and local—and the personal rights to be kept in private hands. This constitution, subject to the limits imposed by the Constitution of the Union, is the supreme law of the state. It binds all central and local authorities in conducting the public affairs of the commonwealth—legislative, executive, and judicial. If any of these agencies oversteps the boundaries of the powers vested in it or denied to it, individuals whose rights are so violated may not only petition for a redress of grievances but also appeal to the courts for orders nullifying the trangression.

Tendencies in Constitution Making. As the fundamental law of the state, the constitution was once supposed to contain only the basic principles of government and of liberty. If this concept were followed in practice, it would be a short document, at least as brief as the Constitution of the Union. In former times such was indeed the case. The Virginia Constitution of 1776, apart from some passages from the Declaration of Independence, filled less than six printed pages; and the New York constitution of 1777, including the Declaration of Independence, was kept within the limits of sixteen pages. Now a state

constitution that covers no more than twenty or thirty pages of print is a rarity. The most voluminous of all is that of California, which in 1948 had an estimated length of 72,000 words.[1]

Explanation of Tendencies. What accounts for the growth of the state constitutions in bulk? Many factors, no doubt. One has been popular dissatisfaction with the conduct of state legislatures, in passing special or objectionable laws that serve particular private or local interests. To curtail such actions, constitution makers generally supply a long list of things that the legislature may not do at all. Another factor has been the refusal of legislatures to enact laws for which there is a popular demand; and so it has become the fashion to incorporate such legislation in the body of the constitution.

In some measure, the enlargement of state constitutions has been due to judicial decisions respecting the powers of the state legislature. Whereas the Congress of the United States has only the powers delegated to it by the National Constitution, state courts have held as a rule that the state legislature has "inherent" powers, that is, may wield all powers *not denied* to it by the national and state constitutions.[2] The task before the people of a state, then, is not primarily that of framing a formal list of the powers to be exercised by their state legislature but rather that of indicating at length what it may not do and of specifying in detail just how it shall conduct particular transactions.

Illustrations. Amazing examples of the way in which constitution makers have blown small documents up into confused and confusing volumes may be found in nearly every part of the country. The constitution of Louisiana adopted in 1921 devoted several pages to highways, even going so far as to designate state highways on a map which formed an integral part of the text. The New York constitution of 1938 forbade the removal of any timber from state forests; later the people of the entire state, in their assembled might at the polls, had to adopt a special amendment for the purpose of permitting the removal of enough trees from a single mountain to allow the building of some trails. In the West, the California constitution, as it stood in 1948, forbade the legislature to increase the duration of ordinary commercial prize fight rounds beyond a three-minute maximum, and

1 For effective dates and lengths of state constitutions, see *The Book of the States*, 1948–1949, pp. 84 ff.

2 For instance, in State *ex rel* Du Fresne *v.* Leslie, 50 P. (2nd) 959, the court ruled that "except for the limitations placed upon the power of the legislature, first, by the Constitution of the United States and, second, by the constitution of the state, the will of the legislative body may be freely exercised in all legislative matters unrestricted." Many other citations are to be found in *American Jurisprudence*, Vol. 11, pp. 894–895.

prohibited the passage of legislation taxing nut-bearing trees under four years of age.

Constitutional Details Divert Attention from Fundamentals. As a result of these constitutional trends the difference between the fundamentals of government and the petty details of slight significance has been almost, if not entirely, lost to sight in many states. Hence it is necessary for the people of these commonwealths to be constantly tinkering with their constitutions—devising, discussing, and voting on amendments to meet current needs. Hard thinking about the first principles of government and liberty thus tends to disappear, and squabbles over minor matters to occupy the attention of the people. The tendency also helps to distract interest from choosing the right kind of public officers to the business of agitating for minor amendments of the constitution. Popular government has come to a strange pass when the people cannot trust their elected representatives in the legislature to provide for the cutting of a few trees, the regulation of prize fights, or the taxing of young nut trees, but must achieve such "reforms" by constitutional processes. Moreover, since in most cases a constitutional amendment may be carried by a majority of the citizens who take the trouble to vote on it, an active minority may in fact sometimes override the majority as represented in the legislature.

THE CHIEF FEATURES OF A STATE CONSTITUTION

Bills of Rights and Related Provisions. Reflecting in part popular fear of what the legislative body may do in the exercise of its "inherent powers," the state constitution includes, at the outset, numerous safeguards on behalf of personal liberty and property rights. These stipulations are usually incorporated in what is termed a bill of rights, but some of them may be treated elsewhere in the text of the document. The ordinary bill of rights pays homage to the ancient provisions on behalf of private rights famous in the constitutional history of England and the United States: indictment by grand jury; trial by jury; freedom to worship as one pleases, without discrimination or preference; the privilege of the writ of habeas corpus save in case of rebellion, invasion, or public danger; prohibition of excessive bail and fines, and cruel and unusual punishments; compensation for private property when taken for public use; the right of the people to speak freely and to write and publish their sentiments on all matters, subject to responsibility for libelous publications; and the privilege of the people peaceably to assemble and to petition the government or any department thereof.

Rights Enforced at Law. These broad principles are not, as some-

times imagined, mere platitudes or pious wishes; they are rules of law interpreted and applied by the courts, especially in passing upon the constitutionality of the acts of state agencies and agents. Important legislative measures seriously affecting the rights of private property or the franchises and charters of corporations are almost certain to be brought before the courts and tested against one or more of the provisions of the state constitution as well as provisions of the National Constitution (pp. 68–69). The bulk of such legislation declared invalid is large.

Limitations on Freedom of Opinion Generally Upheld. Laws affecting liberty of religion, press, and speech are less often carried into the courts. Measures of this character are not so numerous and the state courts seem more loath to declare them unconstitutional. The legislatures of several states, nearly all in the north, have passed sedition acts laying heavy penalties upon all persons who publicly advocate violent revolution or any doctrine calculated to affect the state and National Government injuriously or bring them into contempt. Under these statutes arrests have been made wholesale, and penalties of fine and imprisonment imposed.

Again and again "sedition" statutes have been attacked in state courts on the ground that they violated one or more provisions in the bill of rights but, except in a few cases, without avail. The general attitude of the courts may be summed up in the language of a state judge speaking on liberty of opinion: "The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of any other action includes an injurious use of one's occupation, business, or property." Perhaps the most striking of the many decisions touching liberty of opinion is that of the Connecticut Supreme Court of Errors holding that aliens were not entitled to the privileges and liberties set forth in the state's bill of rights. This rather startling dictum was based upon an old Connecticut case in which it had been declared that the said privileges and liberties were not formerly guaranteed to slaves, the assumption being, therefore, that aliens in this respect have at present the status of slaves.[3]

Appeal to Federal Courts. When a state court rejects the contention of a convicted person that a legislative act in question violates provisions in the state's bill of rights, he may appeal to the Supreme Court of the United States, if he has also claimed that it is contrary to the

[3] See Chafee, *Freedom of Speech*, especially the tables in the Appendix. For the Connecticut case see R. E. Cushman in the *American Political Science Review*, Vol. XVI, p. 469.

National Constitution (pp. 43–44). While appeals are expensive, if large property interests are involved litigants defeated in the state courts are likely to present their cases before the United States Supreme Court, where possible.

Newer Doctrines of Private Rights. To the historic passages relating to the rights of property, person and opinion, that have come down from old English origins, have been recently added some new concepts of privileges and immunities. The New York constitution of 1938 declares that "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." Somewhat in the same vein, the New Jersey constitution of 1947 states that no person shall be "segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." The Georgia constitution of 1945 stipulates that protection to person and property shall be impartial and complete, and that "the social status of the citizen shall never be the subject of legislation." Both the New York and Missouri constitutions also specify that employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Expressing a special concern with the problems of justice are other clauses in recent constitutions. The 1945 constitution of Georgia provides that no person shall "be abused in being arrested, while under arrest, or in prison," and that "the cost in the Supreme Court and Court of Appeals shall not exceed $15 until otherwise provided by law. Plaintiffs in error shall not be required to pay costs in said Courts when the usual pauper oath is filed in the court below." The constitution of Missouri reads that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial, or delay." It adds that no law "shall delegate to any commission, bureau, board or administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation." Missouri's constitution also contains the warning that "when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public."

Structure of Government. A second part of the state constitution sets forth the framework of the central government in considerable detail, and makes some provision for local government (Chapters 36–

38). The basic feature of the structural passages relative to the central government is the formal institution of three great branches—legislative, executive, and judicial. The legislative authority is vested in the state legislature elected by popular vote; the executive branch includes the governor and usually certain other elective officials; and the judicial branch consists of a system of courts, outlined in some detail in the constitution.

Separation of Powers Emphasized. Most state constitutions plainly proclaim the doctrine of the separation of powers. In this respect, Massachusetts is unusually emphatic: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." If other states are less explicit in their declarations, still there can be no doubt that they provide for the separation of powers and their courts will take cognizance of the fact.

Origins of the Practice. This creed was by no means universal in the beginning of our constitutional development, although Massachusetts included it in her first fundamental law. On the contrary, in several states the legislatures were almost supreme; in some they elected the governor, created courts at will, and controlled the whole process of government. In general, the separation of powers was a later development. To some extent it was in imitation of the National Constitution, but perhaps more fundamentally the outcome of a reaction against abuses and corruption on the part of the state legislature—an effort to introduce checks on it in the form of an independent executive and judiciary. At all events, for one reason or another, it has become a universal rule.

Separation of Powers in Practice. As in the case of the National Government, the separation of powers in the state government is not absolute. When the governor as the chief executive vetoes a legislative measure, he exerts legislative power in reality; and when he pardons a criminal he wields judicial authority, whatever may be the niceties of legal theory. Moreover, state courts are as a rule liberal in interpreting the doctrine. In some states the legislature is allowed to choose certain administrative and judicial officers, thereby wielding what is commonly regarded as executive power. Occasionally a legislature vests in the judicial department the power to appoint one or more administrative officials. The principle that the legislature may

delegate quasi-legislative powers to boards or commissions is universally accepted.

The Principle Prevents Extreme Abuses. Yet the principle of the separation of powers affords a convenient instrument for combating gross excesses.[4] A governor of Oklahoma, for example, once announced his unyielding opposition to capital punishment and proceeded to commute one death sentence after another, despite the clear language of the law imposing the supreme penalty on murderers. While the power of the governor, as chief executive, to issue pardons and commute sentences on a limited scale is unquestionable, this was an extreme form of such action. So convinced, the Oklahoma Criminal Court of Appeals intervened in a case brought before it, pointing out that the governor had no legislative power and hence he could not "repeal" a valid statute by the circuitous process of commuting sentences in a wholesale manner. It flatly refused to honor his orders for any such releases of offenders.[5] In Indiana, the state legislature passed a statute under which it proceeded to appoint and control the members of the Indianapolis city board of public works. On appeal the appropriate Indiana court struck down the statute, ruling that it represented a usurpation of executive duties by the legislative branch, in violation of the constitutional provision for the separation of powers.[6] In Texas, the legislature by law freed certain debtors from part of their obligation to pay prior court judgments, for the purpose of helping them through the depression of the 1930's. On an appeal, a court responded by declaring that the act was an attempt to upset judicial orders by legislative fiat and was an unconstitutional intrusion by the legislative branch into the judicial sphere.[7]

It is with regard to the ordinary administration of justice by the courts that the separation of powers is observed with special care, as a matter of general acceptance. There are few citizens, if any, who would grant to the legislature not only the power to define crimes and prescribe penalties by law but also the power to act as judge and jury and carry its own judgments into execution. Judges are not infallible or devoid of strong prejudices, but where life and liberty are at stake in specific cases, calm and orderly procedure in the courtroom is a mighty safeguard against injustice.

Financial Limitations on the Legislature. In view of the wide range

4 For a very full and carefully organized discussion of court decisions regarding the separation of powers in the states, see *American Jurisprudence*, Vol. 11, pp. 876–966.

5 Henry *v.* Oklahoma, 136 Pac. 982.

6 4 L.R.A. 79.

7 Langever *v.* Miller, 96 A.L.R. 836.

of inherent powers possessed by the state legislature, the public has just cause for concern over the expenditures that may be authorized by it and the taxes laid to meet them. This fear finds expression in numerous provisions of state constitutions imposing fundamental restrictions on the spending and taxing powers of the legislature. Such clauses are usually designed to control the character and degree of taxation, indicate for what purposes money may be borrowed, perhaps impose some kind of limit on debts to be incurred, at least in certain fields, and insure that adequate provision shall be made for paying interest and principal as they fall due.

Control of Corporations. Since the economic base of the country has changed from relatively self-sufficient farms and small workshops to large-scale technological and business enterprises, the people have found it desirable to protect themselves against another type of excess —financial abuses on the part of large corporations—by adding sections to their constitutions, covering corporate affairs. Numerous state constitutions forbid the legislature to enact special laws creating and favoring individual corporations and thus raise barriers against the granting of valuable rights, sometimes corruptly, to private parties that have "friends" at the state capital. As a rule state constitutions generally provide that corporations must be established under general acts. Moreover, the public is often protected by clauses forbidding corporations affected with the public interest, such as railroads, to engage in discriminatory and unfair practices. The constitution may, indeed, make provision for the agencies and procedures of public utility regulation in considerable detail.

General Welfare. Another part of the average constitution contains a set of miscellaneous provisions designed to promote the general welfare. It usually includes sections relative to the public schools and the state educational system. The Nebraska constitution, for example, requires the legislature to provide free instruction in the common schools of the state for all persons between the ages of five and twenty-one; it sets aside certain revenues for educational purposes; and creates a board of regents for the University of Nebraska, a state institution. Under the head of general provisions, also appear clauses authorizing legislation relative to workmen's compensation, providing for the care and maintenance of the poor, exempting homesteads from forced sales for debt except under prescribed conditions, safeguarding public health, and giving a broad sanction to social legislation.

To settle all doubts respecting the power of the legislature to enact social legislation, clauses containing express authorizations were inserted in the constitution of New York in 1938. The sections on con-

servation were enlarged and strengthened. In response to the growing demand for public housing, new sections explicitly empowered the legislature to provide low-rent housing for persons of low incomes, to clear, replan, reconstruct, and rehabilitate substandard and insanitary areas, and to deal with sickness, old age, and unemployment insurance. In order that New York City might unify and municipalize its system of rapid transit, a special amendment authorized the metropolis to issue a large block of bonds outside its debt limit, for that purpose. If the older state constitutions may be called political documents, the New York constitution as revised in 1938 may be characterized as a social and economic document.

Provisions for Popular Control. State constitutions also contain numerous passages designed to insure continuous popular control over all phases of the state government. Every state constitution, for example, places some minimum qualifications on the right to vote and indicates how it may be employed in selecting state officers. Within the broad limits imposed by the National Constitution, state constitutions may set their own standards for the exercise of the franchise (Chapter 5). In a majority of states the vote is given to most citizens over 21 years of age, who have satisfied local residence requirements. In other states, there may be additional prerequisites, such as satisfactory passage of a literacy test, payment of a poll tax, or formal registration prior to election day (Chapter 27).

THE REVISION OF STATE CONSTITUTIONS

Joint Legislative and Popular Action on Amendments. As a rule, state constitutions allow the legislature and the voters to participate in the revisions of their fundamental law. In a majority of cases amendments may be proposed by a single session of the state legislature, while in others affirmative action must be taken by two successive sessions. The number of members required to carry a proposal ranges from a mere majority of a quorum of each house to a two-thirds majority of the entire elected membership of each house.[8] Ordinarily, measures proposed by the state legislature do not take effect until they have received the approval of the people at the polls,[9] either by a majority of those voting on specific propositions or by a favorable vote equal to a majority of all the votes cast in some general election.

[8] For a thorough survey of amendment procedures, see J. E. Reeves and K. E. Vanlandingham, "Amending and Revising State Constitutions," *Kentucky Law Journal*, January, 1947, pp. 119-128.

[9] In Delaware (Constitution, Art. 16, Sec. 1), approval by two-thirds of the members elected to each house, at two successive sessions of the legislature suffices; no popular approval is required.

The method of amendment by simple legislative action plus popular approval is relatively easy to operate and almost destroys the distinction between constitutional and statutory law. Especially is this true if nothing is required beyond a resolution by one session of the legislature and the approval of a majority of those persons who take the trouble to vote on the proposition. In fact the distinction is a mere fiction in Oregon where the legislature may submit statutes as well as amendments to the voters—both exactly in the same manner. If, however, the number of popular votes necessary to carry an amendment must be equal to a majority of all the votes cast in some state election, then it may become in practice difficult to make any change in the constitution.

Amendment by Constitutional Conventions. Most states provide for the amending or reconstructing of constitutions by conventions composed of delegates elected for the special purpose by popular vote. Although able constitutional lawyers contend that the legislatures of the remaining states may call conventions at will under their general legislative powers, there are some doubts on the point. Some states provide that the question of whether a constitutional convention shall be held must be referred to popular vote at stated intervals. Others merely authorize the legislature to submit the question to the voters whenever it thinks a convention is desirable. In such cases the constitution may provide that a proposition to call a convention must receive an extraordinary majority in the legislature before it can be laid before the electorate; and sometimes a majority of all those voting at some state election is necessary to put the proposition into effect. While all state constitutions do not require the convention to submit its amendments or the new constitution to the people, in practice, however, nearly every state convention has laid its proposed changes or revised document before the voters for ratification. Only a few exceptions have occurred in the past fifty years and most of them have been in the South where suffrage controversies explain the variations.

What is a state constitutional convention like, and how does it elicit popular support? W. L. Bradshaw and C. F. Chute take us behind the scenes of the Missouri constitutional convention of 1943 and provide a valuable insight into this special type of institution.[10] That convention was composed of fifteen delegates at large, and one Republican and one Democrat from each of 34 state senatorial districts. Its personnel of eighty-three delegates included a majority of lawyers, to whom were added some farmers, journalists, college professors,

[10] W. L. Bradshaw, "Constitutional Revision in a Southern State," *Tennessee Law Review*, Feb., 1947, pp. 734–745; C. F. Chute, "What Is Needed to Secure Public Support for Constitutional Change," same issue, pp. 746–758.

housewives, labor leaders, a banker, a lumber merchant, and representatives of other callings. Most of them had held public office previously. After it assembled, the convention was divided into twenty-six standing committees which held hearings on the respective subjects assigned to them. Before the committees appeared agents of many groups, such as the League of Women Voters, to express their views on various propositions. From the committee rooms drafts of constitutional clauses were taken before the whole convention, for final study, discussion, and decisions. Out of the convention emerged a complete new constitution.

Strenuous efforts were then made to secure its adoption. The delegates wrote to the leaders of major organizations, asking for their support; and the courtesy with which these associations had been heard by the several committees of the convention brought a generous response. A publicity bureau was instituted; many speakers were recruited and trained; and field agents were given designated areas to cover. By these and other techniques, sufficient popular support was secured to win the ratification of the constitution at the polls.

Similar methods of cooperation with civic and economic associations of citizens were followed in 1947 by the delegates of the state convention in New Jersey, in striving to recast a constitution more than a century old, over which previous conventions had labored in vain. The committees of the convention, as work proceeded, not only heard the pleas and arguments of interested citizens but made public tentative drafts of their proposed revisions. Delegates addressed public meetings in various parts of the state during the sessions of the convention and explained their problems and objectives to the people. In effect, all the people of the state were invited to share in the making of the constitution, and before the final document emerged general agreements had been secured on the most controversial points. At the polls, a heavy majority was cast in favor of the new constitution, with all but one of the twenty-one counties indicating their approval of it; and according to reports, leaders in citizens' organizations, rather than party managers, brought out the record vote.[11]

The Constitutional Commission. Departing from the convention method, Georgia employed a commission in revising her constitution in 1943. The legislature, fearing that the rural counties would be outvoted in a convention, if called, created by resolution a special commission of twenty-three members to revise the constitution. The commission consisted of the governor, the attorney general, and the auditor;

[11] Letter dated November 6, 1947, from Spencer Miller, Jr., a member of the New Jersey convention, to Charles A. Beard.

two judges, three practicing lawyers, and three laymen appointed by the governor; one justice of the supreme court designated by the court; one judge of the court of appeals chosen by the court; the president of the senate and the speaker of the house; three senators selected by the president of their chamber; and five members of the house appointed by the speaker. The commission was divided into subcommittees, each in charge of specific subjects, and public hearings were held, at which representatives of groups and organizations appeared. The governor, the president of the senate, and the speaker of the house were constituted as the committee on final revision of the drafted document. From their hands it went to the legislature, where some alterations were made; and then to the voters of the state, who gave it their approval.[12]

Amendment on Popular Initiative. The third mode of amendment, by the initiative and referendum, is to be found in several states (Chapter 27). For example, the constitution of Oregon expressly reserves to the people the power to propose amendments to the constitution and to approve or reject them at the polls without the intervention of the legislature in any form. It provides that eight per cent of the legal voters may initiate an amendment by petition and that if the proposal, on submission to popular ratification, receives a majority of all the votes cast thereon, it becomes a part of the fundamental law of the state.

There is an element of special significance in the amending of constitutions by the initiative and referendum. Members of state conventions and legislatures are elected by districts; and usually the rural regions have more representatives in proportion to their population than do the cities. Thus farmers may block the proposals of townspeople. When, however, amendments may be initiated by petition and carried into force by a majority of those voting, distinctions between town and country disappear; geographical districts are ignored; the idea of numerical democracy is carried to its logical conclusion.

Frequent Use of the Amending Process. As a striking result of the increase in the bulk and prolixity of state constitutions it has become necessary for voters to be continually amending them. Broad principles may stand unaltered for generations; details must be frequently modified. Hence the voters of a state may be called upon to approve as many as thirty amendments at a single election. Sometimes as high as two-thirds of the states are found voting on one or more amend-

[12] A. B. Saye, "Georgia's Proposed New Constitution," *American Political Science Review*, June, 1945, pp. 459 ff.

ments in a single year. Correlatively, of course, thoroughgoing revisions by constitutional conventions become more necessary and more frequent. The manufacture of fundamental law has thus become one of the major industries of state politics, resulting in many varieties of doctrine and prescription.

INTERPRETATION OF THE STATE CONSTITUTION

Who Interprets? In seeking to adapt the work of state and local governments to novel conditions and needs, many persons in each state have occasion to study the state constitution and its amendments and to interpret them. Among the parties so engaged are agents of government—legislative, executive, and judicial; political leaders and, to some extent, their followers; the spokesmen of numerous interests —economic, social, and moral; and the people at large concerned in the conduct of public affairs.

Where conflicts arise over interpretation, the state courts of proper jurisdiction often exercise the power, in duly instituted legal proceedings, to settle the points at issue. These tribunals, with the highest state court having the final word, are bound to hold void any act of any state authority that violates the letter or spirit of the state constitution.[13] Indeed the Georgia constitution of 1945 definitely states that "legislative acts in violation of this constitution, or the constitution of the United States, are void, and the judiciary shall so declare them."

"In exercising this high authority," it has been said, "the judges claim no judicial supremacy; they are only the administrators of public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution and because the will of the people which is therein declared is paramount to that of their representatives expressed in any law." Yet owing to the vagueness of many constitutional provisions, the courts really exercise a wide discretion in disclosing "the will of the people."

The influence of the state courts over the interpretation of their state constitution is not limited in every state to the decision of regular cases. In some states the supreme court judges may give to the governor and the legislature, at their request, what are called "advisory opinions" as to the constitutionality of proposed measures and actions. Thus many of the delays and confusions that arise at the national level from the necessity of enacting statutes and allowing them to be

[13] State judges, in proper proceedings, are also bound to declare void a state act or any provision of the state constitution which violates the Constitution of the United States.

tested by the courts afterward, piece by piece, are avoided at the state level.[14]

Methods of Interpretation. There is great similarity between the methods employed by judges and others, when engaged in expounding state constitutions, and the processes followed by those who interpret the National Constitution (pp. 24–29). In both instances reference is made to the meaning of the words in specific constitutional passages, to "the general spirit" of the constitution, to the theory that the constitution is an enduring instrument, and to the principle that the legislators' interpretation of the constitution is worthy of great respect.[15]

While the interpreters of the National Constitution and of a state constitution alike refer to the "intention of the makers" of their respective documents, the problem of arriving at intent is different in the two instances. Only one federal convention has been held—at Philadelphia in 1787, but many state constitutional conventions have met in recent times, and their proceedings have been elaborately recorded, so that a search for the will of the framers often produces illuminating results. When the quest is broadened, however, to include the intent of the people who ratified the constitution or amendments to it, the inquiry may be unproductive. For example, the supreme court of Missouri, in expounding a constitutional clause, reviewed the arguments which had been presented during a campaign on a referendum and concluded that "we cannot tell all that was in the minds of . . . the voters who voted for it"; then the court modestly confessed: "We do not say that any of the things we have suggested" were definitely in the voters' minds. In the same general vein, the court of another state remarked that voters are as a rule "unlearned in the law" and that hence their interpretation of a constitutional clause might not be identical with that of a judge skilled in the law.

With respect to the canons to be applied in passing upon the constitutionality of acts of the state legislature, the courts of New York have laid down certain other principles which are now commonly observed throughout the United States. The constitution should be so construed as to promote in the best way the objects for which it was made, avoiding the two extremes of a wide and a strict construction; statutes are presumed to be constitutional; an act must be constitutional in substance as well as in form; the constitutionality of statutes is not to be passed upon unless necessary to the decision of the case in question; no statute should be declared unconstitutional unless it is in direct, clear, and necessary conflict with the constitution; a law, unconstitu-

[14] For details on this point, see *Corpus Juris Secundum*, Vol. 16, pp. 48 ff.
[15] *Ibid.*, Vol. 16, pp. 48 ff.

tional in part, may be enforced as to its constitutional provisions. A statute evading the terms or frustrating the general and clearly expressed or necessarily implied purposes of the constitution is as certainly void as if expressly forbidden; in the case of an act susceptible of valid or invalid construction courts should lean to the construction of validity; if an act is corruptly administered, this is no reason for holding it unconstitutional.

Recent Tendencies in State Judicial Reasoning. For many years after the opening of the twentieth century, state courts showed an inclination to invalidate laws dealing with questions of social welfare and to uphold laws restricting civil liberties. Popular protests against decisions of state courts voiding legislation passed "in the interest of social justice," to use Theodore Roosevelt's phrase, led to demands for restrictions on the powers of the higher state courts over the lawmaking authority of state legislatures. Three proposals to effect this end were brought up for discussion. The first was a plan for applying the recall to judges as well as other state officers, and thus allowing the people to oust judges whose decisions ran counter to popular views. This plan was adopted in a few states. The second proposal took the form of a project for permitting the voters to determine at an election whether a law declared void by a court shall stand or not, in other words, to approve or "recall" the court's decision.[16] The third scheme provided that no state court should declare a state law unconstitutional except by an extraordinary majority; two states—Ohio and North Dakota—have put into force an amendment requiring the concurrence of all except one of the supreme court judges in every decision which declares void a state law.

Although the movement to restrict the powers of state courts over state legislation did not result in many changes in judicial systems, state judges soon revealed a greater hesitancy in setting aside legislation relative to questions of social welfare. Agitations against them undoubtedly had some influence on their minds. The growth of a more liberal spirit in the country likewise affected them. In common with other enlightened citizens, state judges were, no doubt, influenced in their legal thinking by the liberal opinions of such distinguished members of the Supreme Court of the United States as Oliver Wendell Holmes, Louis D. Brandeis, Benjamin Cardozo, and Harlan F. Stone.

State courts have also been forced to revise their opinions on the constitutionality of state laws restricting freedom of person, speech,

[16] This arrangement, in Colorado, was in turn struck down by the court as unconstitutional, in People v. Western Union Telegraph Co., 196 Pac. 146, and People v. Max, 198 Pac. 150.

press, and religious worship. Once they freely upheld state laws of this character as valid under their respective state constitutions. In the third decade of the century, however, the United States Supreme Court began to declare many such laws void as contrary to the National Constitution. Now state judges, whether they like it or not, are compelled to bow to federal rulings against infringements of civil liberty that arise within the jurisdiction of the several states (pp. 42–44).

REFERENCES

Current sources: for state constitutional law, see cross-head "Constitutional Law" in *American Jurisprudence* (revised annually) and *Corpus Juris Secundum*, to be found in large law libraries. State constitutional amendments are noted annually in *The American Year Book* and biennially in *The Book of the States*. For guidance in tracing recent development *The Book of the States* is a most helpful work, for it contains tables and notes on constitutional changes and a bibliography of current publications. Texts of state constitutions are often available in the codified state laws found in law libraries, or in the legislative manuals issued by the states.

Usually when a state holds a constitutional convention valuable studies are made of constitutional provisions and tendencies in other states, and occasionally these studies are mimeographed or published; for example, the studies made for the New Jersey constitutional convention of 1947 (mimeographed) covered the most important problems of constitutional interest at the time. Moreover, several scholarly textbooks on state government have chapters dealing with constitutional principles and tendencies.

H. F. Gosnell and M. J. Schmidt, "Popular Law Making in the United States, 1924–1936," on pp. 314–355 of the New York State Constitutional Convention Committee's volume, *Problems Relating to Legislative Organization and Powers* (1938), and Chap. XI, "The Constitutional Initiative," in the same volume; New York State Constitutional Convention Committee, *The Constitutions of the States and the United States* (1938), contains texts of state constitutions as of 1938, indexed for reference as to suffrage, initiative, and amending provisions; National Municipal League, *Model State Constitution* (1941); V. A. O'Rourke and D. W. Campbell, *Constitution-Making in a Democracy* (1943), on the New York convention of 1938; J. E. Reeves and K. E. Vanlandingham, "Amending and Revising State Constitutions," *Kentucky Law Journal*, Jan., 1947, pp. 119–128.

CHAPTER 27

Methods of Popular Control in the States

Mention was made in the preceding chapter of two important methods for assuring popular control over state and local governments, namely, the review of constitutional changes at the polls, and the election of public officers. To these devices, others have been added in recent years. The voters of many states may suggest legislation by petition, and adopt it by majority action at the polls; in some jurisdictions, voters may also remove elected officers before the expiration of their regular terms, by means of the recall.

THE SUFFRAGE

How "popular" a given method actually is, of course, depends upon how generously the privilege of voting is granted. Subject to a few limitations laid down by the National Constitution (pp. 82–83), the states determine the qualifications for voting in local, state and national elections and embody these prescriptions in their respective constitutions. For convenience, the qualifications may be grouped under six heads—age, residence, citizenship, property, education, and miscellaneous.

Age, Residence, and Citizenship. The ancient English rule of fixing the minimum age limit for voting at twenty-one years is followed by all states except Georgia, where the electorate in 1943 set the limit at eighteen through an amendment to the state constitution adopted by a vote of two to one.

A period of residence in the state is always required. It varies from a few months to two years, but the most common term is one year. It is also a general practice to require a period of residence in the county and election district in which the voter wishes to cast his ballot. In operation this apparently simple provision disfranchises thousands of voters every year, especially in cities where there is a relatively small proportion of home owners and the amount of migration among renters is large. Particularly does it affect working people who must of necessity move about a great deal on account of changes in their

places of employment. On the other hand, it eliminates many frauds and prevents the importation of "floaters" into close districts where a few voters may turn the tide.

Formerly many states, especially in the west, conferred the suffrage on aliens who had declared their intention to become American citizens. Now in every state the voter must be a citizen of the United States.

Property and Literacy Tests. Although ownership of property is no longer an absolute requirement for the general suffrage, it is occasionally employed for special purposes or as an alternative to other qualifications. The payment of a small tax, such as a poll tax, is sometimes prescribed.

About one-half the states impose some kind of educational test, either as a general or alternative qualification.[1] In details such provisions vary widely but a typical rule requires the voter to be able to read a passage from the federal or the state constitution and to be capable of writing his own name. Usually the application of the test is left to election officials but New York has arranged for the issuance of certificates of literacy under the supervision of school authorities—certificates declaring that the holders can read and write English.

Miscellaneous provisions respecting the suffrage exclude persons of unsound mind, criminals, and paupers maintained at public expense. These vary as to details from one part of the country to another.

Special Suffrage Devices in the South. All the above qualifications and some in addition are employed by southern states with a view to reducing or eliminating the Negro vote. The following are included among their devices. Sometimes the voter must own a certain amount of property or have paid all the taxes legally required, including a poll tax—an arrangement that frequently disqualifies Whites and Negroes at the bottom of the economic scale. In other cases, sometimes as an alternative, the prospective voter must be able to understand a section of the state constitution and give a reasonable explanation of it to the election officials. By selecting easy lines for Whites and difficult passages for Negroes, these officials may admit or bar applicants almost at will. Since devices of this kind do not exclude Negroes as such by name, they do not run counter to the Fifteenth Amendment of the National Constitution, which forbids disfranchisement on account of race, color, or previous condition of servitude.

By the employment of such provisions of law, an almost total exclusion of Negroes from the polls has been effected in some southern

[1] See *The Book of the States*, 1948–1949, pp. 96 f.

states—South Carolina and Mississippi, for example. Elsewhere in the south the degree of Negro exclusion from voting varies from state to state.

Rights of Negroes Under the Federal Constitution. For a long time after the Civil War, Congress sought to enforce the provisions of the Fourteenth and Fifteenth Amendments to the Constitution, relative to male Negro suffrage, by enacting appropriate legislation. But the enforcement legislation was strongly resisted by the Whites in several southern states and in 1894 Congress repealed most of the laws, leaving on the national statute books only a few clauses bearing on the political rights of Negroes.

Even without the aid of supplementary legislation, the two amendments carry some weight in the conduct of elections. At first, to be sure, the Supreme Court refused to apply them in overriding state laws and practices respecting the suffrage, elections, and primaries, which in effect worked the disfranchisement of Negroes. Once, for instance, it avoided the issue as "political" and referred Negroes to the governments of the states and to the political departments of the Federal Government for relief if any wrong had been done to them. More recently, it has taken another view. In 1939 the Court held unconstitutional an Oklahoma statute which, by a complicated provision for the registration of voters, in effect disfranchised many Negroes. Still more recently, attempts to exclude Negroes from primary elections in the south have been banned by the Court (pp. 583–584). Theoretically any state that imposes special restrictions on adult manhood suffrage should suffer a reduction of its representation in Congress, as prescribed by the Fourteenth Amendment, but this rule is not likely to be enforced.

SIMPLIFICATION OF ELECTIONS

Number and Frequency of Elections. The popular choice of numerous officials, as required by the Jacksonian theory of democracy (p. 85), meant electing many of them on one long ballot at a single election or holding distinct state and local elections. Sometimes the practice of separating state and local elections was followed, thus increasing the number of elections in which voters were supposed to take part. Coupled with the theory of popular election was the idea that the terms of officials should be short—one or two years—so that they could not become "entrenched in power." In application, this idea increased the frequency of elections. After the direct primary was introduced, nominating elections were added to the regular elections. In nearly all parts of the country, therefore, are to be found primary

elections, regular elections, and special elections—state and local—almost bewildering in number. The political calendar of California, for example, in 1944 listed sixty-five dates between February 2 and December 16 on which citizens were called upon to take some action relative to the vote—including the election of officials of various types and passing upon "referenda."

Professional Politicians Take Charge. In such circumstances the management of primaries, elections, and related operations became a highly complicated business. If government was to go on at all, at least some persons had to know when and how primaries and elections were to be held, how the complex election machinery worked, how to get up petitions, how to call party nominating conventions, how to form committees, and how to pick officials to take charge of polling places on election days.

Since most citizens were busy with their private affairs or little informed about election laws and methods, the control of election processes passed largely into the hands of experts known as "bosses" or "professional politicians." They are aptly described by Richard S. Childs, as persons "who know more about the voter's business than the voter does himself." Thus, in seeking to establish popular control through popular elections, the American people have brought into existence an elaborate party organization, largely dominated by the regulars or professionals who, as a rule, earn a living by their work in politics—either as officeholders or in some other way, sometimes corruptly serving special interests that derive favors from government.

Protests Against Machine Government. Long before the close of the nineteenth century, it became apparent that popular control through the ballot was not working according to theory. Many scandals, inquiries, and investigations showed that in various parts of the country governments were really dominated by managers or bosses behind the scenes, who picked candidates for the voters to approve and controlled them after their election. The situation was eloquently described in 1915 by Elihu Root, a statesman accustomed to speak with caution, out of wide knowledge:

> What is the government of this state? What has it been doing the forty years of my acquaintance with it? The government of the constitution? Oh, no, not half the time or half way. [For about forty years] the government of the state has presented two different lines of activity; one, of the constitutional and statutory officers of the state and the other of the party leaders; they call them party bosses. They call the system—I don't coin the phrase—the system they call "invisible government." For I don't know how many years Mr. Conkling was the supreme ruler in this state. The governor did

not count, the legislature did not count, comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down. Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was Mr. Platt. And the capital was not here [Albany]; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give. . . . The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by law. . . . The party leader is elected by no one, bound by no oath of office, removable by no one.

The Short Ballot Movement. How could the power of "invisible" government by party managers and special interests be broken and government by openly responsive and responsible agents be substituted? The answer which Elihu Root offered was a reduction in the number of elective officials, so that the floodlight of public interest and scrutiny could be turned squarely upon a few outstanding leaders held to account for the performance of their duties. For this proposal Richard S. Childs had already coined a caption: "The Short Ballot." The principles of this reform may be summed up as follows:

1. Only policy-determining officers should be elected by popular vote.
2. Popular election should be restricted to officers important enough to deserve and attract public attention and interest.
3. The number of officers chosen at any election should be small enough to permit the voter to scrutinize carefully the policies and character of each candidate.

Simplification, it is urged, will permit the electorate to bring steady and persistent pressure upon the great agents of government in the broad daylight of interested public discussion. Only in this way can issues be joined and public opinion be made to prevail over the will of professional politicians. To put the argument in the language of President Woodrow Wilson:

Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect on it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this country, by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. . . . What is the moral? . . . The remedy is contained in one word: *simplification*. Simplify your processes, and you

will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! simplification! simplification! is the task that awaits us; to reduce the number of persons to be voted for to the absolute workable minimum—knowing whom you have selected; knowing whom you have trusted; and having so few persons to watch that you can watch them.

Simplification in State and Local Government. Efforts to attain the simplicity that makes for responsibility in government were early concentrated on the reorganization of state administration. This meant making the governor the chief executive of the state in fact, placing the principal departments directly under his control, and vesting in him the duty of preparing and supervising the state's budget of finances. In the cities simplification has taken the form of increasing the mayor's power or substituting a city manager for the mayor and authorizing the manager to appoint and direct the work of the administrative officers of his municipality. The attempt to achieve simplicity in the counties has brought about the appearance of the county manager form of government, which concentrates nearly all administrative responsibilities in the hands of a single executive officer.

The Search for Competence in Government. Associated with the simplification of state, city, and county government has been a search for institutions and methods which will assure competence as well as responsiveness on the part of public authorities. Evidences of this search are scattered through all the chapters that follow. Signs of the general movement appear in the consolidation of state boards and offices under a few department chiefs headed by the governor. They are to be found in the introduction of budget reform, in the substitution of the merit system for the spoils system in recruiting public officials, and in the extension of state control over local finances and administration. In a resolve to diminish the power of mere politicians and secure better legislators, Nebraska abolished the double-chamber legislature and created a small unicameral body of forty-three members—after effecting a partial consolidation of the state administrative system. Still the demand for a more extensive overhauling of state and local machinery is heard among specialists in the subject and in popular discussions. On the outcome of this quest for ways and means of combining popular control with competence at all levels of government, local, state, and federal, may well turn the fortunes of the American experiment in democracy. At all events the effective handling of the problems calls for the wisest statesmanship, the highest talents, and the finest energies the nation can command.

DIRECT POPULAR GOVERNMENT

Town Meetings. From colonial days, in New England, voters have been accustomed to managing local government directly at town meetings (Chapter 38). In these little assemblies, voters choose local officers, discuss town policies and problems, and make ordinances, or by-laws, all in open forum. To some extent this practice spread westward into other communities but there it lost most of its momentum.

Growth of the Initiative and Referendum. The government of a state by open meetings of the voters was, of course, out of the question, but during the latter part of the nineteenth century it became a general rule to submit new state constitutions, constitutional amendments, and other propositions to the voters at elections for approval or rejection. Gradually the idea spread that the voters should be given the right to initiate and pass upon ordinary laws of every kind, thus by-passing their representatives in legislatures and engaging in "direct legislation." The project for effecting this idea was called the initiative and referendum. In 1898 South Dakota, by a constitutional amendment, made the initiative and referendum state-wide in application, permitting the people to propose and adopt laws by direct action. Since the idea had been associated with Populism, the regular leaders of the old parties were suspicious; but during the opening years of the twentieth century, when the revolt against "political bosses" was running high, the system spread rapidly, especially in the west.

By 1948, the privilege of using the initiative or the referendum or both in some form had been granted to the people in more than one-half the states, scattered from Maine to California.[2]

Definition of Terms. In principle the initiative is a system which permits any person or group of persons to draft a bill or proposal of law and, on securing the signature of a certain number or percentage of voters, to force the submission of the same, with or without legislative intervention, to the voters for their approval or rejection. If the requisite majority is cast in favor of the proposal, it becomes a law. The referendum is a plan which makes it possible for a certain number of voters to demand that any bill passed by the legislature (except emergency measures) shall be submitted to the voters for approval or rejection. If the requisite majority is cast against it, the bill does not become a law. Note should be taken, however, of the fact that the term "referendum" has still wider connotations; there is, for example, "the optional referendum"—a device which permits the legislature to submit measures to

[2] For a detailed survey, see *The Book of the States*, 1948–1949, pp. 157 ff.

the electorate at will; and, as we have seen, the practice of "referring" constitutional matters to the people is widely followed. But as here used "referendum" means compulsory action on the demand of petitioners.

Variations in Practice. Such are the broad principles. Applications of them take a bewildering variety of forms.

1. The uses to which the initiative and referendum are put may be general in character or closely restricted. They may be employed in adopting both statutes and constitutional amendments or limited to statutory enactments (which state courts may set aside if they violate the state constitution).

2. The initiation of measures may be made easy or difficult. The percentage of voters necessary to propose a law varies. Usually it is eight or ten. A larger number may be required to initiate a constitutional amendment than an ordinary law. For example, in Oklahoma eight per cent of the voters may propose an ordinary law, while fifteen per cent is necessary to originate a constitutional amendment. It may be made easier to force the submission of a bill passed by the legislature than to propose a new bill; that is, a smaller number of signatures may be required in the former case.

3. Provision may be made for the intervention of the legislature in the process of initiating laws and constitutional amendments. In Ohio, for instance, three per cent of the voters may propose a bill to the legislature; if the legislature passes the measure, that ends the matter; if the legislature defeats it, then an additional three per cent of the voters is necessary to lay the proposal before the people. In Massachusetts, the approval of one fourth of all the members of both houses of two successive legislatures is required to lay before the voters a constitutional amendment after it is proposed by petitioners. In a few states, the legislature is authorized to draw up and submit a competing measure so that the voters may choose between the initiated bill and the legislative bill.

4. The adoption of a measure referred to the people may be made easy or difficult. The law may require only a simple majority of all those voting for and against the bill—the easiest method of all. It may require a simple majority, provided that it is equivalent to a certain percentage of all the votes cast at a particular election. A differentiation may be made between the vote necessary for the approval of an initiated measure and the vote necessary in case of a bill referred to the voters by the legislature itself. For example, in Oklahoma, a project laid before the people by the initiative goes into force only when approved by a majority of all those voting in the general or special election in which it appears, while a legislative proposal becomes a law when it receives a ma-

jority of those voting thereon. When a majority of all the voters in a specific election is required, it is often difficult to carry a referendum, because many voters may be indifferent and fail to register any opinion on propositions referred to them in that election.

The Oregon System. Since a complete and thoroughgoing system of initiative and referendum was adopted first in Oregon and has been extensively tried there, something may be said of the details of that plan. It was established by a constitutional amendment approved by the voters in June, 1902. This amendment provides that any statutory or constitutional measure may be initiated by a petition bearing the signatures of eight per cent of the voters and containing the proposed measure in full. The petition must be filed with the secretary of state not less than four months before election day; when the formal requirements are met, he must submit the proposal to popular vote and, if it is approved by a majority of all the electors voting thereon, it becomes a part of the law of Oregon. With special exceptions, any act passed by the legislature must likewise be referred to the electorate if five per cent of the voters file a duly executed petition within ninety days after the adjournment of the legislature, demanding such a referendum.

The most noteworthy feature of the Oregon system is the statute providing for the publication and distribution of arguments for and against the propositions submitted to the decision of the voters. Under this provision the supporters and opponents of any particular measure may prepare arguments at length and have them printed by the state (at the expense of the private parties concerned) in the pamphlet containing transcripts of the measures to be referred to the voters. A copy is then sent to every elector. Friends of this system contend that it has an immense educational value; it arouses the interest of the people; it insures some consideration of each proposition on its merits; it turns the searchlight of publicity on the important political issues of the state; and it gives to citizens who do not have a long purse an opportunity to address their fellow citizens at a small cost. Professor James D. Barnett, after giving the subject careful study, expressed grave doubts whether one person in a hundred really reads the entire pamphlet issued in connection with an election or examines any considerable part of it even in a cursory manner.[3] Nevertheless it forms the basis of newspaper discussions and affords information and misinformation to those who take leadership in making opinion.

Claims and Counter Claims. While the popular movement in favor of the initiative and referendum was spreading and indeed long after

[3] *Operation of the Initiative, Referendum, and Recall in Oregon*, pp. 94 f.

the adoption of the system was checked, violent discussions of the subject raged among politicians. On the one side there were the usual hopes and promises of better government; on the other side were the usual alarms over the safety of the Republic. On behalf of the project it was said that corruption in legislatures and boss rule would be thwarted, that the people would secure measures of reform long blocked by legislatures, that bills sponsored by "special interests" would be defeated, that government by minority cliques would be prevented, and that citizens would be moved to take more interest in public affairs. Counter allegations were equally positive: the initiative and referendum will "overthrow our system of representative government," facilitate the adoption of "radical" measures attacking property rights, introduce legislation by laymen incapable of properly drawing up laws, transfer the function of making laws from responsible legislatures to irresponsible crowds at the polls, enable agitators to keep the people in turmoil by initiating measures, and permit small minorities voting in favor of bills to govern.

A Critical Survey. To what extent have the praise and condemnation bestowed on lawmaking by the initiative and referendum been justified by experience in the years that have passed since it was put into practice? Seeking information on this subject for the use of the New York State Constitutional Convention of 1938, Harold F. Gosnell and Margaret J. Schmidt surveyed the history of direct legislation in the United States for the period from 1924 to 1936 and summarized their findings. Their report, supplemented by later materials, now supplies a basis for the formation of judgments.[4]

Extent of Direct Legislation. In the first place, it had been prophesied that the adoption of the initiative or referendum would deluge the country with measures, seriously overtaxing the strength and patience of the average voter. The aforementioned survey reveals that there is an element of truth in the contention; in South Carolina 52 propositions were submitted at a single election in 1924, while in California 173 measures were voted on during the thirteen-year period under review, the highest total of any state in the Union. In these instances, conscientious citizens would seem to have valid grounds for complaining that they have to study too many propositions to do their duty at the polls. On the other hand, the prophecy of excessive use is certainly not borne out by experience in the nation as a whole. According to the

[4] New York State Constitutional Convention Committee, *Problems Relating to Legislative Organization and Powers* (1938), pp. 314–335. For the checkered career of the initiative and referendum in Arkansas, see D. Y. Thomas, *American Political Science Review*, February, 1933, pp. 66 ff.

New York report, a total of 1,493 constitutional and statutory measures were voted on in 47 states from 1924 to 1936, or an annual average of less than two and a half per state. Indeed, in each of nine states the average fell below one measure per year. From 1938 to 1941 inclusive 616 measures were submitted to the voters—an average of 154 a year or an annual average of about three per state. In 1946, a total of 157 issues were referred to the voters of the entire Union; among them were 127 constitutional amendments, twenty-one statutes, seven proposed bond issues, and two official public opinion polls.

Few Radical Measures Adopted. What may be said about a second claim, namely that the initiative and referendum would lead to the adoption of radical laws? Proposals to abolish the state senate, set up a cabinet system of government, and apply the single tax have been defeated. A grand scheme for the public ownership of a state power system went down in a crash in California in 1922 and again a few years later. Some of the laws obtained by this method in North Dakota are deemed radical because they apply the principle of state ownership rather widely, but the politics of North Dakota must be ascribed to agrarian conditions rather than to the existence of the initiative and referendum.[5] No drastic change, as prophesied, has yet been made in our form of government by the direct method, unless we include the adoption of the single chamber in Nebraska in 1934 under this head. No revolutionary economic devices may be laid at the door of that institution, unless the measures relative to the public ownership of utilities adopted in Oregon, Washington, and Nebraska in 1930 or the old-age pension law adopted by Colorado in 1936 may be so characterized. Between 1911 and 1944, proposals to establish the "single tax" in California were defeated six times at the polls; and the voters rejected three times a plan for large old-age pensions (so-called "ham and eggs" measures). By a majority of over 500,000, California voters repulsed an effort to write into the law of the state a guarantee of the "right of employment" as a matter of public policy.

Variations in Popular Interest. A third point in the debate over the initiative and referendum has been whether enough people would vote on proposed measures to make their participation in the legislative process worthwhile. The answer given by experience is that it depends to a high degree on the attractiveness of specific propositions. According to the New York survey mentioned above, the subjects which have produced the heaviest balloting in California, where the initiative and referendum are most widely used, include Sunday closing, Bible read-

[5] The North Dakota program was adopted by the legislature and state officials, and the referendum and recall were used against it by the conservatives.

ing in the schools, the gasoline tax, the repeal of prohibition, boxing legislation, cruelty to animals, daylight saving time, and unemployment relief. Those which drew the least attention included a proposal for a judicial council, amendments to local charters, and certain questions relating to private corporations. Yet advocates of direct legislation point out with satisfaction that through the initiative and referendum the people of California were able to effect five basic reforms in state government: a state budget plan; the ineligibility of legislators for other public offices; an improved method of selecting judges; a carefully devised system for financing public education; and a reapportionment of representation in the legislature.

When the country as a whole is considered it is found that Americans are most deeply disturbed over matters affecting public morals, education, highways, and the limitation of taxes, and are least aroused over minor constitutional points—issues affecting some small subdivision but voted on throughout an entire state—and the public debt. Not only is the volume of voting affected by the character of subject matter; it is also influenced by the amount of work to be done at the polls. The New York study reveals a tendency for the enthusiasm of voters to wane when they are confronted with ten or more measures on a single ballot, as evidenced by the fact that propositions near the top of the page to be marked by the voter receive more votes than those at the bottom. In California, there may be a variation of from 25 to 35 per cent in the votes cast on different projects at the same election. To attain the most satisfactory results in terms of voting volume, then, only certain matters should be offered, and not too many even of them.

How Critical Are the Voters? The size of a vote, of course, is of little significance unless it represents an intelligent weighing of arguments. Now how critical is the average poll? Perhaps one favorable sign is that there are relatively few landslides either for or against measures, taking the country as a whole. The New York survey reveals that in general the "yes" votes predominate over the "no" votes. But the proportion varies. Of the 197 measures submitted in 1940, 105 were defeated, whereas in 1941 only 3 measures out of 87 were rejected. This seems to show the exercise of some discrimination.

Old Abuses Remain. Have the initiative and referendum eliminated the old abuses associated with lawmaking by legislatures? Here the answer is definitely in the negative. For many years the typical state legislature has been the object of attack by advocates of direct government on the ground that it is amenable to the lobby of "the interests," but the said interests may become just as active and influential in referendum elections as at the state capital. Under the system of direct govern-

ment, Professor Barnett points out, "every man is his own legislature;" he can initiate any bill that suits his fancy and spend immense sums of money promoting it. In the fight over a public power act submitted to popular vote in California in 1922 the public utility companies were very active and a committee of the legislature which investigated their operations reported that they had spent about half a million dollars opposing it. In the contest over the "right of employment" measure in that state its sponsors reported an expenditure of $176,435 in favor of the bill and its opponents, $757,375 in opposition to it.

The legislature is assailed by its critics for engaging in "log-rolling" but representatives of different sections and interests also indulge in that practice in operating the initiative and referendum. The legislature is accused of passing confused, even conflicting, laws; yet in Oregon the voters on a referendum once approved two conflicting bills and the next legislature was compelled to repeal both of them. The passage of badly drawn bills by legislatures has long been a matter of comment, but the initiative and referendum also offer their "horrible" examples.

An indictment has been brought against legislatures to the effect that it is impossible to fix responsibility for the drafting and enactment of laws where a hundred or two hundred members or even more, divided into two houses and different parties, all have a hand in the business, besides the lobbies, citizens' committees, and party bosses who throw their weight into the scales. But what is to be said of direct government on this score? Professor Barnett calls attention to the fact that, under direct government, legislators may submit bills; that legislators, governors, party bosses, and anybody else may take part in getting up petitions and securing their adoption; that it is often impossible to discover who is supporting any particular measure or why it is laid before the voters. He cites the amusing instance of the owners of a private road who drafted a petition under the name of "a committee of farmers," asking the state to buy the road and throw it open to the public! Finally legislatures are often charged with defeating progressive, enlightened, and necessary measures; it would be equally easy to make a long list of enlightened measures "snowed under" by popular vote.

Summary. After fifty years of experience with the initiative and referendum, what verdict is to be rendered on its merits as an instrument of government? As usually is the case, neither the extravagant prophecies of early advocates nor the dreadful alarms of critics have been fulfilled. It does not appear that the legislation of the states having direct government is necessarily more or less enlightened than that of the other states which pursue old methods, or that its quality, if im-

proved, is mainly due to enactment by direct action. If the balance tips to one side or the other, there is no way to prove that the direct system is the "cause." Certainly the representative form of government has not been overthrown by "mob rule," as prophesied by opponents long ago, but whether it has been strengthened or weakened by the existence and use of the initiative and referendum yet remains a matter of debate.

THE RECALL

Nature of the Recall. Along with the right to participate in the making of laws and nomination of officers (p. 580), the voters in several states have won another important power—that of removing public officials before the expiration of their terms, by using the "recall." The principle upon which it is based is simple, namely that elected officials are merely agents of the popular will, and that the voters should have at all times an opportunity to pass upon the conduct of their representatives. The device itself is a plan whereby a certain number of the voters, whenever they are dissatisfied with the services of a public officer (usually elective officers only), may, by petition, force a new election and thus submit his right to continue in power to the judgment of the electors.

Rise and Growth. For practical purposes, the recall began its career in the city of Los Angeles, California, where it appeared in the city charter of 1903. At first it attracted little attention; then suddenly it sprang into prominence. A state-wide form of the plan was incorporated in the Oregon constitution in 1908, and it was seized upon by the makers of commission charters for cities as a useful check on the large powers conferred upon the commissioners. California adopted it for state-wide purposes in 1911; Arizona, Idaho, Washington, Colorado, and Nevada in 1912; Michigan in 1913; Louisiana, North Dakota, and Kansas in 1914; Wisconsin in 1926.

Variations in Plan. Although apparently a simple institution, the recall is susceptible of a large number of variations which affect its character as a practical instrument:

1. The number of signatures that is required to force an election to recall an officer may be high or low. It is usually about twenty-five per cent of the votes cast in a previous election, as in Oregon.

2. Signatures to petitions may be gathered by solicitors or citizens may have to appear before a local official if they are to affix their signatures.

3. The recall may be used only once against an officer under some of the provisions, and under others it may be employed many times against

the same officer, if the sponsors for the second and following petitions pay the expenses of the preceding elections.

4. The vote required to remove an officer may vary. It may be equal to a majority of all the votes cast at the election at which he was chosen in the first instance, or it may be simply a majority of those voting at the recall election. Moreover, the recall election may be divided into two parts: the question of removal may be submitted first to popular vote and this process followed by an election to fill the vacancy; or the vote on the recall may simply take the form of an election at which the officer against whom the petition is filed may run against other candidates, if he likes.

5. The recall may be restricted to certain officers and not applied to the judiciary at all, or it may apply to many officers.

Experience with the Recall. The recall has not been used as extensively as the initiative and referendum. It has been applied, however, to mayors, councilmen, county judges, commissioners, county attorneys, school boards, and other local officers. It was used for the first time on a state-wide scale in 1921 when the governor, attorney-general, and commissioner of agriculture were recalled in North Dakota.

Although the data bearing on the use of the recall in the country as a whole are meager, there is fortunately available a searching and illuminating study of its operation in California where it was adopted by Los Angeles in 1903 and for state-wide purposes in 1911.[6] This work must be examined carefully by anyone who wishes to speak with authority on the subject, but the upshot of the inquiry may be roughly summarized in the following fashion. Up to 1930 there were only 155 cases in which recall petitions resulted in elections or resignations and only seventy-two ejections from office—certainly a small number in view of the fact that there were about one thousand political subdivisions entitled to employ the recall and that each of them was free to resort to the device practically at any time. It had not been brought into action against any state officials elected at large. Apart from three senators serving in the state legislature, the recall was, in this period, directed against municipal, county, and irrigation district officials alone. While the courts as well as other authorities come within the scope of the law, "only three judicial officials above the rank of justices of the peace"—three municipal judges of San Francisco—were removed by popular verdict. During the past decade there has been an increase in the use

[6] F. L. Bird and F. M. Ryan, *The Recall of Public Officers: Study of the Operation of the Recall in California* (1930). For a valuable study of Oregon, made many years ago, J. D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon*, published in 1915. For the vain attempt to recall the mayor of San Francisco in 1946, see *National Municipal Review, October*, 1946, pp. 465 ff.

of the instrument and a growing appreciation of its possibilities. In 1938, for instance, the mayor of Los Angeles was recalled and a reform administration installed in office.

Conclusions from California Practice. With respect to the merits of the recall as an adjunct to popular government, definitive judgments are, of course, impossible, but with cautious reserve the authors of the survey under consideration draw certain rational conclusions from the experience they survey. Judges in California do not operate as a rule under any fear of reprisal at the polls; they seem to be sure that their decisions will not be traversed by appeals to popular passions. For the expulsion of the three municipal judges in San Francisco there was "ample justification." In some instances the officials recalled were evidently corrupt or guilty of malfeasance or of doubtful integrity; in others, they had apparently flouted the desires of their constituents or had been arbitrary or negligent in the discharge of their obligations. For example, a county supervisor was dethroned for inattention to his duties, unbusinesslike methods in conducting his office, and general unfitness for such an important public trust. There are, in addition, some borderline cases in which the popular verdict of recall may be justly open to criticism—not a surprising report when the fallibility of human nature comes into consideration.

Narrowing the issues, the authors conclude that "the recall has found its most satisfactory application . . . in making possible the retirement of political officials who have arbitrarily run counter to the opinion and wishes of their constituents." It has permitted an increase in official terms and a consequent reduction in the frequency of elections, without risking the creation of a bureaucracy. "It has established the principle of responsibility and responsiveness with a value limited only by the capacity of the public to understand it and benefit thereby. Finally it serves a useful purpose in helping to maintain public interest and confidence." In details the system might well be modified to correct abuses which have arisen in practice, but speaking broadly it may be reasonably defended on the same grounds as democracy itself and tends to strengthen rather than weaken popular government. No one expected the recall to give intelligence to any constituency or to escape the perils of popular prejudices and tumult, and experience with it confirms the correctness of such anticipations. Still, whatever follies and irritations may have accompanied its use, the people of California apparently are convinced that it is an agency of security against official betrayal of public trust and an excellent weapon of defense against autocratic bearing and malfeasance in office.

Summation on Direct Government. Impressive as the numerous

actions under the initiative, referendum, and recall may seem when considered *en bloc,* they constitute, in fact, only a minor fraction of all the activities which make up the work of state and local government as going concerns. Whatever its merits and utility, direct government does not and cannot take the place of representative government in any fundamental respects. Nor can it be truly said that, when tested by what is called "progressive legislation," the laws of the states which have the initiative and referendum set those commonwealths off in a class by themselves in favorable contrast to all other commonwealths. With regard to social and economic legislation in particular, it is easy to draw up general bills declaring that great reforms must be made and cast ballots in favor of them, but success in carrying them out can only be achieved by competent and honest officials, held to accountability by responsible chief executives and legislatures. If all the praises of direct government be taken at face value, it still remains true that the maintenance of the American system depends primarily and basically on the effective operation of representative government in the states and their political subdivisions.

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CHAPTER 28

Regulation of Party Machines and Operations

The Struggle against Party Managers. Paralleling in time the extension of the suffrage, the attempts to secure responsive government in states and communities by simplification, and experiments in "direct democracy," have run continuous efforts of reformers to widen popular control over state and local party committees, directors, and operations. This movement has had two general objectives. On the one hand, it has intervened in elections to prevent gross partisan frauds, violence, and intimidation at the polls, so that voters may cast their ballots freely and have them counted honestly. On the other hand, it has striven, through favorable legislation, to give party members a larger share in choosing party officials and committees, in nominating party candidates for offices, and in keeping party management out of the control of corrupt or disreputable "bosses" operating behind the scenes. No small part of the reforming energy of the past fifty years has been devoted to these ends in the states and their communities.

Relation to the Federal System. While the national committee and the congressional committees of each party work hard to carry national elections, the main task of winning elections, federal as well as state and local, falls on state and local party committees and agents. The failure of these party managers to bring out the voters in a few key cities, counties, villages, and towns may mean the defeat of the party's candidates for President and a radical shift in national policies and measures. Often in history a national election has turned, not primarily on great national questions, but on state and local issues, sometimes on the outcome of petty quarrels among local leaders and interests.

Awareness of this fact moves candidates for President frequently to bid high for the vote of economic, racial, and religious groups in the great urban centers and in rural regions. Local managers and machines having the power to "deliver" votes may then make terms for the Government of the United States. In recent years, however, their authority in this respect has been diminished by the growth of federal intervention in state and local affairs. Now millions of dollars are

poured from the national treasury into the states and communities in the form of grants in aid for old age pensions, highways, public works, and numerous other purposes. Everywhere in the states the number of federal officeholders and employees has been increased. As a result, leaders of the party in power at Washington may at times give orders to, instead of taking orders from, state and local party managers. Here in politics, as well as in government, centralization of power proceeds. In any case, whatever may be the influence of national party leaders in given situations, decisions crucial to their interests are made in voting precincts and here political processes are regulated by the states.

STATE CONTROL OVER ELECTIONS

From Freedom to Regulation. In the early days of American history, elections were simple affairs; in some parts of the country they were held in the open air and voting was registered by a show of hands or in case of doubt by a calling of the roll. The organization of parties and the conduct of their affairs were determined by party members. Nearly everything was left to custom and practice. As a general rule, even the printing of ballots for regular elections was entrusted to party directors. But later, owing to abuses, legislatures began to enact statute after statute, laying down rules for the preparation of ballots, procedure at elections, and the counting of votes. Now the whole election process from the enrollment of voters, through nominations and elections, to the making of official reports on results is subject to elaborate provisions of law. Outstanding among the arrangements currently made to insure fair elections are the following:

Principles of Election Regulation. 1. Certain officers—the secretary of state, county clerks, and in some instances special election boards—are placed in charge of the election process, and give notice of forthcoming elections to the public.

2. Polling places are established near the voter's residence, and each polling place has its own bipartisan board of poll clerks, ballot clerks, and election inspectors.

3. Duly authorized watchers from each party may be present at each polling place to secure a fair count of the ballots or make sure that the figures recorded by voting machines are correctly reported.

4. Standard and official tally sheets, or records, on which to make the returns of each polling place, are furnished, and all returns must be certified by the proper officers in charge.

5. Special arrangements are made to police polling places.

6. In order to assure to every citizen entitled to vote the right to

cast his ballot, official registers of voters are prepared, and each qualified citizen is given the privilege of entering his name so that on election day his right may be realized. Advanced legislation on registration requires the voter to give his true name and place of residence and to write his name in the register. When on election day he appears to cast his ballot he must again sign his name, opposite the first signature. By a comparison of the signatures, the election officials are able to detect frauds and thus exclude from voting a large number of "floaters" and "repeaters." Beyond doubt such legislation has been salutary in its effects. In case of a contested election, a review of the balloting may be had before a regular court of law.

7. Finally, there is a long line of important legislation bearing on the ballot—designed to prevent intimidation by giving secrecy to the voter and to foster independence rather than the "herd instinct."

Former Methods of Balloting. When the ballot was substituted for the historic system of voting by a show of hands, one aim was to secure secrecy, but the purpose was generally defeated, for it was customary for party organizations or candidates to furnish their own ballots. Usually each party chose its own color of paper so that even when the ballot was folded anyone could see what party ticket was being voted. Since the voter could be watched from the moment a ballot was handed to him somewhere outside the polling place until he deposited the same in the ballot box, it was easy to find out whether he had, according to the modern phrase, "delivered the goods." The result of this was to facilitate and encourage bribery. Persons economically dependent, being deprived of the protection of secrecy, were readily coerced into voting as others bade them, or punished if they disobeyed. The expense of printing the ballots, moreover, while not a heavy burden on the party organizations, was large enough to act as a deterrent on independent candidates. Such tricks as the distribution of ballots bearing the emblem of one party and the candidates of another, or of ballots containing the wrong candidates for certain offices, although usually forbidden under the penal law, were common.

Elements of Australian Ballot System. The growth of such abuses led many states to adopt the so-called "Australian ballot system." The principal features of this system may be outlined as follows:

1. All ballots used in elections of public officers (except, perhaps, certain minor local elections) are printed under the direction of public officials, at public expense, and are distributed by officials to the various polling places prior to the election.

2. Each ballot contains on a single sheet the names of all dates nominated by all the parties and by special petitions, and protected against counterfeit by a number and an official endorseme on the back. Spaces are left on the ballot for writing in names that do not appear in print.

3. Ballots can be obtained by the voters only within the polling places, on election day, from the regular election officials. They are to be marked in absolute secrecy in voting booths provided for the purpose, folded so as to conceal the marking on the face and yet leave exposed the official endorsement on the back, and returned to the election officers to be deposited in the ballot box, before the voter leaves the polling place.

4. Special safeguards are usually provided to make sure that the official ballots shall not be lost or stolen; that none but official ballots shall be cast or counted; that the number of ballots counted shall correspond exactly to the number of persons voting; that the ballot actually cast by each voter shall be the identical one given to him by the election officers (these two objects are attained by a system of detachable, numbered stubs); that no official ballot shall be left unaccounted for when the election is over; that no electioneering shall be done in or around the polling place; that only the election officers, the duly appointed watchers of each party, and a specified number of voters shall be allowed within the polling place at any given time; that no voter shall divulge, while in or near the polling place, how he has voted; and that no election officer or other person shall attempt to discover, or having discovered shall disclose, how any person has voted.

When voting machines are substituted for ballots, the safeguards of the Australian ballot are made even more effective. There is no possibility of using fraudulent ballots. The names of duly nominated candidates are placed officially on the machines. The voter can only register his will by pulling the appropriate levers beside the symbol of his party or the names of his candidates. There is no chance to commit frauds in counting, since the votes for each party or candidate are automatically registered and totalled by the machine itself. All that election officers have to do is to read the numbers, set them down on the reporting sheets, and make certain that the total corresponds to the number of voters who entered the polling booths.

The Old Party-Column Ballot. Numerous devices have been invented to encourage the voter to act independently in expressing his choices. When the Australian ballot was first introduced it was the general rule to print the names of the candidates of each party in a separate column

with the name of the party at the top in large letters and also the party emblem for the benefit of illiterate voters. Immediately under the emblem was placed a circle and by merely making a mark within that circle the voter could cast his ballot for all the candidates of the party at one stroke. Obviously this called for no discrimination or intelligence. Moreover, it placed great obstacles in the way of the voter who wished to choose freely among the candidates of the various parties. If he did not mark in the circle—that is, vote a "straight ticket"—he had to make a mark beside the name of every candidate for whom he wished to vote and thus incurred the risk of becoming confused as he looked from column to column.

The Party-Column Eliminated. With a view to stimulating independence, a large number of states have abolished the party column ballot and substituted for it the Massachusetts ballot, adopted in that commonwealth in 1888. On this ballot or on the voting-machine face, the names of the candidates of all parties for each office, except of course presidential electors, are grouped in alphabetical order under the title of the office. There is only one way of marking this kind of ticket; the voter must put a cross or pull the voting-machine lever opposite the name of each candidate for whom he wishes to vote. But he is frequently aided in his tendency to stick to his party by the practice of printing the name or emblem of the party on the ballot near the name of each of the candidates. Thus "regularity" is distinctly favored.

Nonpartisan Ballots for Local Elections. Even this party prop is taken away in the municipal elections of a large number of states by laws forbidding the nomination of candidates for certain offices by political parties and excluding the names and emblems of all parties from the ballot or voting machine. In this way an attempt is made to establish a nonpartisan primary and a nonpartisan election.

After the nonpartisan idea spread among cities, it was carried over into the election of state officials, particularly judges. By 1911 the process of electing judges under the nonpartisan system had been adopted in one form or other in sixteen states.[1] A common type of law authorizes designation by petition; the names of the persons so designated by petition are placed without party signs or names upon a separate ballot at the official primaries; the two candidates for each judgeship receiving the highest vote appear without party signs upon the official ballot at the regular election. Minnesota in 1912 adopted the nonpartisan primary not only for certain county offices but for the selection of members of

[1] Kansas, Iowa, Missouri, and Pennsylvania, after trying the system, abandoned it.

the state legislature as well. This action is credited with being the first case of the abolition of party labels in the election of state legislators. Nebraska later followed Minnesota's example by prescribing that members of its unicameral state legislature must be elected on a nonpartisan basis.

There are evident limits to the application of the nonpartisan principle. Party organizations are too well grounded in American political life to be uprooted by the mere abolition of symbols. In municipal and judicial elections, where partisanship is ordinarily not so strongly manifest, the exclusion of party designations and signs frequently works for independent voting and hampers somewhat the operations of the party "boss," but in large cities it is difficult to divorce elections from partisan methods.

Provisions for Absent Voters. Modern industrial and commercial life makes it necessary for voters to be away from home frequently, in distant cities or states, and thus, in effect, deprives them of the franchise, as long as physical presence at the polling place on election day is necessary to the exercise of the suffrage. To meet this condition of affairs, nearly all states, beginning with Vermont in 1896, have enacted laws which permit electors to vote at primaries or elections or both without appearing at the polls.

Absent-voting laws cover (1) how far from home one must be, and (2) what reasons for being absent (if any) one must give, in order to receive an absentee ballot; (3) the method of applying for the ballot; (4) the marking of the ballot and the affidavit required to authenticate it; (5) the transmission of the ballot to an election official in the home precinct of the voter; and (6) how the acceptance, rejection, and counting of such ballots is to be handled. In the carefully drawn laws, such as those of Indiana, Illinois, and Minnesota, all these points are covered with such precision that collusion and fraud are almost impossible; the right of the absent voter is fully safeguarded, while the possibility of misuse of the privilege of absent voting is reduced to the minimum.[2]

Use of Money in Elections. The extensive use of money in elections by candidates and committees and notorious gifts of huge sums by corporations and individuals to campaign funds, especially during the closing years of the nineteenth century, led to a great popular outcry against "government by a plutocracy." As a result, the control of money in elections became a fundamental concern of those interested in regulating

[2] For a review of the situation in 1938, see Paul G. Steinbicker, "Absentee Voting in the United States," *American Political Science Review*, October, 1938, pp. 898 ff.

the operations of political parties, and state legislatures enacted voluminous statutes dealing with the subject. The general principles embodied in this legislation may be briefly summarized as follows: [3]

1. The amount of money which candidates for office may spend is limited to specific sums varying according to the character of the offices. Candidates must file with certain public authorities sworn statements of their expenditures.

2. Political committees must keep a record of their receipts and expenditures even to minute details and must file complete statements with appropriate officials designated by law.

3. Corporations are absolutely forbidden to make any contributions in aid of any political committee or candidate.

4. The objects for which candidates and political committees may spend money are defined by law. They include such items as rent of halls and expenses connected with public meetings, preparation and publication of various kinds of political "literature," compensation for agents who prepare and supervise articles and advertisements for the press, payment of newspapers for publishing materials, rent of offices and club rooms, compensation of clerks, agents, and attorneys managing the "reasonable business of elections," preparation of lists of voters, personal expenses of candidates, traveling expenses, compensation of workers at the polls, and the hire of automobiles.

NATURE OF PARTY MACHINES AND MANAGERS

General Character. In a broad sense, a party machine consists of a relatively few persons in a state or community who devote a large part or all their time to politics—the business of nominating candidates, electing them, and controlling them, more or less, in the conduct of their offices. Such persons may be members of state and local party committees; usually some of them are; or they may hold no office in the party or government. Their immediate business is personal and economic. They strive to get "the right kind" of party members elected to places of power in government and to make sure that government jobs, contracts, and other lucrative perquisites are awarded to loyal party favorites and contributors, as far as the law permits and sometimes in spite of the law.

A machine may have a powerful manager, to whom the colloquial name "boss" is given. He may or may not be a member of a party committee. Often he is a quiet, obscure adept who devotes days and nights to party affairs. Indeed, he may have absolute control over

[3] See L. Overacker, *Money in Elections* (1932). Also H. R. Bruce, *American Parties and Politics* (3rd ed., 1936), pp. 438–449.

the machine and dictate the distribution of offices, jobs, contracts, and other favors among party supporters or workers. If the division of the voters into parties is evenly balanced, he may cooperate with the boss of the opposition party in holding down reformers and efforts to establish third-parties.

It is a matter of historical record that bosses and machines have frequently indulged in corrupt and even criminal practices. This fact has been demonstrated again and again by legislative investigations in all parts of the country and by trials and convictions in courts of law. On the whole, however, party bosses and machines operate within the forms and limits of the law, although they may sometimes "cut corners." While they are by no means always oblivious to the currents of enlightened public opinion, they are practical rather than idealistic. Their main objective is to get into power or stay in, if already established there. At all events, they are the principal active agents in directing politics and government as going concerns, in spite of the complicated legislation which now hampers their operations.

Tammany Hall. The oldest and most famous machine is Tammany Hall, the Democratic organization of New York County. It began as a benevolent and fraternal society sometime before the adoption of the Constitution. Its name was derived from an Indian chief of William Penn's time, Tammany, celebrated for his virtues, who had been canonized by the soldiers of the Revolution as their patron "saint." It also took the name of Columbus and called itself "the Tammany Society or the Columbian Order." The society entered politics in 1800 in support of Thomas Jefferson for President and was henceforward active in promoting the interests of the Democratic party, as it came to be known. In later years, the Democrats formed a separate county committee; but the leading members of this committee were at the same time leading officers or members of the Tammany Society and its sessions were held at Tammany Hall.

In the course of its long history, Tammany Hall several times came under the dominance of notorious bosses. Among the first of these was William Marcy Tweed who rose to power shortly after the Civil War, ruled the City and the County with a high hand, looted the public treasury, and finally ended up in prison, where he died in 1873. Near the end of the nineteenth century, Richard Croker emulated Tweed's example and, after more than one exposure of his corrupt actions, was overthrown. About twenty years later another Tammany boss and his mayor of the City, James J. Walker, indulged in a saturnalia of spending and wasting public money. After a time, they were investigated by Judge Samuel Seabury and Governor Franklin D.

Roosevelt; Mayor Walker fled the country and the boss was ousted—and subsequently sent to prison. In a popular "uprising against Tammany," Republicans and dissatisfied Democrats united in electing F. H. La Guardia as mayor in 1937 and again in 1941. By this time New York County had been overshadowed in wealth and population by the growth of the other counties within the city, and the voting power of Tammany Hall materially reduced.

Chicago Machines. Although in some respects Chicago politics is fairly comparable with New York City's worst, that metropolis has never had a single, long-lived machine like Tammany Hall, in almost undisputed dominance for many years at a time; nor has it ever been shaken by storms of reforms such as have made periodical upheavals in New York. No boss equal to Tweed or Croker has ever ruled Chicago with an iron hand by use of strategy, without resort to stark gangsterism. Its party managers, whether Republicans or Democrats, have been unable to keep steadily in line its polyglot population of Irish, Czechs, Poles, Negroes, Jews, and Italians. But they have never lacked in ingenuity.[4]

In recent times, members and bosses of the Chicago machine have "adjusted" the taxes of people who vote "right" and "fixed" traffic tickets in the expectation that such favors would be gratefully remembered on election day. To please selected voters who had no property, grocers and butchers were once forced to contribute food to a free lunch enterprise run by a notorious gangster, Al Capone, and were allowed to make up for the reductions in their stock by "short-weighting" their regular customers—while the city inspector of weights and measures politely overlooked this violation of law. Politicians induced friendly judges to appoint them receivers of bankrupt hotels and thereby made sure that the occupants and employees did "the right thing" at the polls. Saloons that had no licenses, gambling joints and houses of prostitution, and other unlawful "enterprises" contributed quotas of loyal voters, and money as well, in return for careful police "protection."

Of the outstanding party managers, Frank Kelly was long the most imaginative. For the city election of 1935, homeless drifters were told to register under bogus names and vote as instructed. Often they registered under the names of dead persons and as a result the election day was appropriately called "Resurrection Day." But Mr. Kelly was elected mayor by an overwhelming majority. It was estimated that more than one-fourth of his 800,000 odd votes were fraudulent, but

[4] H. F. Gosnell, *Machine Politics: Chicago Model* (1937); *Fortune*, August, 1936.

proud of his large vote, he had the number put on the license tag for his automobile. A loyal supporter of President Franklin D. Roosevelt and dispenser of an enormous federal patronage, he was able to defy all challengers until 1947 when he was forced to make concessions to Democrats discontented with his management of municipal affairs, and retire to the side lines.

Machines in Other Cities. Although it has long been a practice of Republicans to point to Tammany Hall as a "horrible example" of Democratic politics, their record in cities under their own control scarcely entitles them to boast. It is true that the great urban masses in the low-income brackets have generally rallied to the Democratic party in elections and that Republicans have been weak in many cities. But where they have been in power they have often measured up to their opportunities. For example, Philadelphia under the management of William Vare was not far behind New York under the dominance of Richard Croker or William M. Tweed. Vare began active life as an ash and garbage collector, rose to power as the boss of the city, and when death closed his career left an estate worth more than $1,500,000. Near the end of his days, he was elected to represent Pennsylvania in the United States Senate but the Senate excluded him on charges of corruption.

St. Louis, San Francisco, New Orleans, Kansas City (Missouri), and many smaller cities have given the nation startling exhibitions in machine politics. Certainly Tom Pendergast, of Kansas City, ranks high in the calendar of bosses containing the names of Tweed, Vare, and Kelly. By dint of hard labor in politics and the collection of much money from gamblers, houses of prostitution, vested interests, and other venal sources in his city, Pendergast built up a municipal empire all his own and dictated the election of his henchmen to offices. Reform uprisings could not break his power but finally he was caught with charges of corruption and failure to pay federal income taxes and sent to prison. Even his death a short time after his release from jail did not break up his machine nor stop its corrupt methods. In the elections of 1946, congressional and local, it followed the old lines and a grand jury investigation showed that Pendergast's political heirs were not far behind him in cunning.

EFFORTS OF STATES TO GIVE PARTY MEMBERS CONTROL OVER THE PARTY MACHINERY

Former Practices. For more than a hundred years parties were practically free from state intervention and ran their affairs in their own way. Active members held meetings, caucuses, and conventions—local,

state, and national—whenever they pleased. They chose committees and party officials and nominated their candidates for government offices by methods of their own devising—by caucuses or conventions composed of party representatives, often "hand-picked" by bosses. They made rules for the conduct of their party assemblies; and, before the introduction of the Australian ballot, they printed their own ballots containing the names of their nominees for the use of voters at regular elections. It was this freedom that helped to make possible the rise of corrupt machines and bosses, which in turn induced state legislatures, under the pressure of popular protests, to enact regulatory legislation in the interest of party members and the general public (Chapter 7).

Variations in Degrees of State Control. In few if any branches of state legislation are more variations to be found than in the laws relative to party machinery and practices. In Connecticut, parties are still left largely to their own devices in providing for caucuses, conventions, committees, and party offices and in nominating their candidates for government positions. At the other extreme are states, such as Oregon, California, and Wisconsin, which go to great lengths in prescribing the constitution of party committees, ways of electing the members of committees, the manner of selecting party officials, and other political practices of the kind. In these states, control over party organization is usually vested in party members by law. At all events, this is the intention of the laws; and, since the principal objective of each party is to nominate candidates for government positions, the regulation of nominations bulks large in the statutes.

Beginnings of Nominations by Direct Primaries. The practice of nominating candidates by party conventions, which had become general in the Jacksonian age, soon came under a fire of criticism from discontented politicians and reformers. As early as 1868, local leaders in Crawford County, Pennsylvania, abandoned voluntarily the convention in favor of the selection of candidates by a direct vote of party members in what came to be called party primaries. As the scheme worked very well, it was tried for local purposes in many other states, especially in the middle west.

Growth of the Movement. By the opening of the twentieth century, a profound distrust of the convention had appeared in all parts of the country, because it was often a tool of special interests seeking control of the government for private ends. At best it was composed mainly of professional politicians bent on monopolizing offices and emoluments and excluding disinterested citizens from any effective role in party councils. In the course of time new political leaders, who had appeared

with the growth of popular distrust, became discontented with the convention system and demanded its destruction. As a substitute they proposed the direct primary or election within the party as the official system for the nomination of candidates; and by 1948 every state, except Connecticut, had adopted the new institution for either state or local purposes or both.

Elements of the Direct Primary. Generalizing from a survey of the statutes, we may say that the direct primary involves the following elements:

1. A primary election within each party held at a stated time prior to each regular election for the purpose of enabling party voters to choose, from among the several aspirants, the persons whom they wish to stand as the candidates of the party for various offices in the coming regular election.

2. A method by which party members seeking nomination to offices may have their names placed upon the official primary ballot used at the primary election—a process usually called "designation." Although the mere payment of a fee is sufficient in some states, the most popular method is the petition plan which permits anyone to obtain a place on the primary ballot by securing a certain number of signatures to a petition in his favor. Sometimes the number of signatures is a fixed quantity and sometimes (more generally) it is a certain percentage of the party voters within the city, county, district, or state, as the case may be. Objections have been made to this system largely on account of the expense attached and the burden which it places upon the poor man unable to employ persons to collect signatures; but no satisfactory substitute has been found.

3. A scheme for determining the order in which names shall appear on the primary ballot. At first glance an alphabetical order seems reasonable enough, but it has been found by experience that those who get at the top of the list simply because their names begin with A or B have an actual advantage over those who, through no fault of their own, happen to be named Xantippe or Yontz. The discovery of this fact has led, in some states, to the practice of "rotating" the names, that is, allowing each aspirant to appear at the top of a portion of the ballots to be determined by the number of aspirants and the number of ballots. Another method is to place the names of aspirants on the ballot in order of the time of the filing of their respective applications or petitions, but this is objectionable because it introduces an unseemly scramble for places outside the office where such petitions are filed. Still another plan is to determine the position by lot.

4. The rule has now been generally established that the ballots for

direct primaries shall be printed at public expense and made as "official" as the ballots used at regular elections.

5. It is necessary to determine what vote shall be required to constitute a choice at the primary. Most of the direct primary laws in the United States provide that the person who receives the highest number of votes shall be declared the party candidate for the office which he seeks. Under this plurality rule a person representing a minority may become the standard bearer of the whole party, thus violating the first principle of the democratic order.

Often attempts are made to obviate the evil. (*a*) In some instances, a rule is introduced to the effect that an aspirant at the primary must receive an absolute majority of all the votes cast in order to win. In the south, where nomination is usually equivalent to election, it is a general practice to require an absolute majority and if no aspirant receives such a majority, a second or "run off primary" is conducted for the two candidates standing highest on the list. (*b*) A second method for overcoming the objection to plurality nominations is to provide that, unless the candidate standing highest on the poll at a direct primary receives at least a certain fixed percentage of the total vote, a convention shall be held for the purpose of making the nomination in question.

6. If the convention is entirely abolished provision is made for an assembly of some kind to formulate the principles and issues of the party as a platform preparatory to the election.

7. In order to carry out the theory of equality among candidates for nomination at the primary, Oregon has devised a publicity pamphlet (issued and sent to party members by public authorities), in which each aspirant may lay before his fellow citizens his claims to the nomination, by paying a sum, proportioned to the importance of the office which he seeks, for the use of a certain amount of space. This is supposed to offset, in part, the publicity which the press affords to candidates able to pay for advertising.

8. The extent to which the principle of the direct primary is applied to offices varies from state to state. In the great majority of states the application is very nearly universal, that is, it covers all elective officers from the governor down to local officers, with only minor exceptions. Other direct primary laws are restricted to the nomination of local officers, the convention being employed for the remainder, as in New York, for example. Some primary laws specially exempt judges from their provisions and substitute nomination by petition without party interference.

Qualifications for Voting at Primaries. Who may vote in the primary of a given party? Four methods of deciding this question have received

widespread recognition: official enrollment in the party, personal declaration of allegiance at the party primary, determination of the test of allegiance by party officials, and the open primary—no test at all.

1. The first of these methods is concretely illustrated by the law for New York City. The voter, on registering for the coming election, must enroll in some party if he wishes to participate in any primary, and declare that he intends generally to support its candidates at the next election. From the blanks so filled out, the list of members for each party is prepared and the right of any particular individual to vote in its primaries can be officially determined. The chief objection to this system is that it makes public the party affiliation of every voter who enrolls and may subject him to the pressures incident to such publicity.

2. The second test of party allegiance, that is, personal declaration at the primary, is very generally applied, but it tends to approximate the New York plan because an official register based on such declarations is frequently compiled. According to this scheme, the voter at the primary asks for and receives the ballot of the party in whose nominations he wishes to take part; unless challenged, he marks and deposits the ballot in the box of the party he has chosen; if challenged he must take an oath to the effect that he is a member of that party, supported it generally at the last election, and intends to vote for at least a majority of its candidates at the coming election.

3. The third method—leaving the imposition of the test to party officials operating under organization rules—is prevalent in the south, where, for racial reasons, the dominant party has desired a generous freedom in this respect.

4. Wisconsin has attempted to avoid the problem of the allegiance test by a provision for an "open primary" in which all voters may participate irrespective of allegiance. Each voter at the primary is given ballots of all the parties; the ballots are officially prepared, are alike in form and color, and are sheets, perforated, and bound in a pad. On each ballot the names of the several party candidates are arranged under the titles of the offices to which they seek the nomination; the voter separates from the group of ballots the ballot of the party which he wishes to vote, marks it, folds it, and then deposits it in the regular box. All the other papers he puts in a separate box for blanks which are destroyed immediately after the canvass. Thus absolute secrecy is preserved for the primary as well as elections. The *Book of the States* for 1948–49 lists ten states as having tests of party membership lax enough to have their primaries classified as "open."

Primaries in the South. In several southern states, where the Democratic party has long been supreme, political contests are waged

principally at the primaries, for Democratic nominees are certain of victory in the regular elections. Soon after the direct method was instituted in these states, a question arose as to the right of Negroes to vote in primaries. The Texas legislature answered this question by providing that "in no event shall a negro be eligible to participate in a Democratic primary election held in the State of Texas." On appeal, this act was declared unconstitutional by the Supreme Court of the United States.[5] The Democratic party then adopted a similar rule of its own, contending that it was doing this as a purely private organization. Again an appeal was made; the Supreme Court held that in effect the party was a "state agency" and that the discrimination was, like the act of the legislature, void under the National Constitution.[6]

Later, a refusal of the Supreme Court to review the decision of a lower federal court which had declared invalid a Georgia law excluding Negroes from the Democratic primary reenforced a drive to end the "White primary" in the South. About the same time, South Carolina repealed all primary legislation and the Democratic party in the state took the position that it was merely "an independent, private club" and could, therefore, exclude Negroes from taking part in its affairs. This scheme, like that of the Texas Democrats, was held unconstitutional—by the United States Circuit Court of Appeals for the circuit; and early in 1918 it looked as if the Democrats of South Carolina would have to accept the view that "the white primary is a thing of the past." [7]

Power of the States over Minor Parties. Every state prescribes the conditions under which a political party can get a place for its candidates on the official ballot—for President and Congress as well as state and local offices. These conditions are laid down in state laws and are administered by state and local election officials. Legislation on the subject varies from state to state. In some states it is easy for minor parties and new parties to secure this privilege, but other states enforce severe restrictions which make it very difficult for such parties to put their candidates before the voters at the polls. As already indicated (see p. 112), twelve states by 1947 had outlawed every party that advocates totalitarianism, the overthrow of government by violence, or other "subversive" doctrines. In effect, by this legislation the two-party system is greatly strengthened.

Striking a Balance. Have the quality and efficiency of government

[5] Nixon *v.* Herndon, 273 U. S. 536.
[6] Smith *v.* Allwright, 319 U. S. 738.
[7] *The Charlotte Observer* (N. C.), January 15, 1948, p. 9-A.

been materially improved by all the legislation designed to reduce boss rule and make political parties more responsible to their members and to the general public? If so, to what extent must the improvement be attributed immediately to the flood of new laws? Although precise answers to these questions are not possible, owing to the complexities of politics, it is scarcely to be doubted that the whole election process has been raised to a higher plane during the past fifty years. Elections are no longer held in saloons. Brawls, drunkenness, disorder, and shooting affrays are no longer prominent features of election days; it is not often that voters have their heads broken at the polls. There seems to be more independence of spirit both within and outside established party organizations. While a large crop of scandals still appears each year, there is reason for believing that, in the main, public officers have better standards and more professional skill than half a century ago. But to a considerable extent this advance has been due to civil service reform, the spread of technical education, the work of associations for improvement of administrative and legislative methods, and the growth of societies for study, constructive criticism, and discussion of politics and government. Like other legislation that pertaining to party organizations and operations provides implements, not brains and character, for the people who make use of them.

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CHAPTER 29

The State Legislature

In the homage paid by the state constitution to the separation of powers, it is the lawmaking function that is assigned to the legislature; and under this assignment the legislature may and does play a prominent part in the government of the state. Its membership represents the dynamic forces of the commonwealth—the varied interests, classes, and groupings of society—which give impulse and direction to the formulation of policies, legislation, and administration. All work undertaken by the state government either originates in the legislature or, if ordered by the constitution, comes under its scrutiny, at least in the provision of supporting funds. Unlike the Congress of the United States, which possesses only the powers granted to it, the state legislature enjoys all powers not denied to it by the constitution of the commonwealth and the Constitution of the Union. Thus it has an immense jurisdiction and wide-reaching responsibilities; and the need for statesmanship and knowledge of public affairs in its councils is as great as in those of the executive department and the judiciary.

POWERS AND DUTIES

Constitutional and Administrative Functions. The legislature is more than a statute making body. It may propose constitutional amendments for popular ratification, and as a general rule it may summon a constitutional convention for the purpose of drafting a new fundamental law. It sets up a large part of the machinery of administration to discharge the numerous functions assumed by the state. Over administration as a going concern it exercises several major controls; through its appropriating power it may emphasize some agencies, curtail others, and determine the spirit of all; frequently the senate may accept or refuse to confirm the governor's nominees for important offices; by resorting to the process of impeachment the legislature may, as a rule, oust high state officials; and through investigations it may discover malfeasance in government establishments.

Powers over Economic and Social Affairs. In providing the money

for the support of government, it lays taxes, thus affecting the distribution of wealth among the people under its jurisdiction. Public education comes almost wholly within its dominion. The extent and character of the institutions for the care of the defective, delinquent, and dependent lie at its mercy. The legislature determines what enterprises, if any, the state shall establish and manage on its own account. Measures for the encouragement and regulation of industry, labor, and agriculture fall within the range of its authority. The development and use of the natural resources of the state are subject to its control. The legislature may cooperate with the National Government in the making and execution of policies on a large scale; and it is a laboratory in which are made political and economic experiments that may set models for the entire country.

Civil and Criminal Legislation. The state legislature has control over the whole domain of ordinary law, civil and criminal. It makes laws governing real estate and personal property, contracts, inheritances, mortgages, marriage and divorce, corporations, and other civil affairs. It defines crime; that is, names those actions of persons which are to be punished by fine, imprisonment, or death. It rules over that huge realm known as the police power, and can thus make regulations concerning public health, morals, and welfare. In short, there is scarcely a matter pertaining to life, liberty, property, occupations, or civic interest in the commonwealth that is wholly beyond the scope of the authority vested in the legislature.

Federal Limitations. Yet extensive as are the powers of the state legislature, they are not unlimited. To be considered at the outset, of course, are those restrictions laid down in the Federal Constitution, which are common to all states—limitations forbidding the legislature as an agency of the commonwealth to emit bills of credit, coin money, pass *ex post facto* laws or laws impairing the obligation of contract, or to make or enforce laws abridging the privileges and immunities of United States citizens, or to deprive persons of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws (Chapters 3, 4 and 25). These restraints are not fictions. As we have seen, such clauses of the Federal Constitution are frequently called into play to check state legislatures. Only by exercising great care in framing important measures affecting personal and property rights can legislatures escape the wide sweep of these provisions.

Five Classes of Limitations in State Constitutions. Next come the limitations imposed on the legislature by the state constitution, which fall into five general groups. In the first place, there is the bill of

rights guaranteeing jury trial, religious freedom, and liberty of press and speech, securing to the citizen the ancient right to the writ of habeas corpus, and forbidding the legislature to take private property for public use without compensation. In the second place, there are provisions that control the legislature in dealing with corporations, forbidding it to grant separate charters of incorporation or special privileges of any kind. Limitations of a third type curb the financial power of the legislature—restrict its capacity for incurring debts, compel it to make provisions for paying the interest and ultimately the principal of all money borrowed, and secure publicity for financial measures during their passage. In the fourth place, the constitution provides the framework of the state government, defines the terms and powers of various officials, and prescribes the qualifications for voters, thus placing these matters beyond the reach of the legislature. In the fifth place, the state constitution generally lays down some fundamental principles with regard to local government, public institutions, and education.

Special Legislation. The power of the legislature to pass special and local laws is usually curbed by many restrictions. Broadly speaking, general laws are those which apply equally to all persons or classes of persons throughout the state; for example, an act regulating elections, utilities, industries, labor, or public health throughout the state. A special law, in contrast, is limited in its reach to some particular person or corporation or locality—township, county, or city; for example, a law requiring a county to build a certain bridge or lay out a certain highway is a special law; so is an act exempting a single business corporation from state taxes.

The right to pass special laws, whenever it is freely given to a state legislature, has two drawbacks. It induces private persons, localities, and corporations to enter politics individually in the quest for favors, thus stimulating lobbying, bribery, and log-rolling. It crowds the legislative program with petty bills which obscure the more important public measures and occupy the time of members with trivial matters. These things, in turn, tend to reduce the quality of the candidates who seek to enter the legislature. Persons of high standards and more than average intelligence are not willing to waste their days trying to get an iron bridge over Duck Creek in Posey township or working for a highway through the town of Bad Angel. Business of this kind appeals to citizens of small caliber; sometimes to men deficient in integrity.

Restraints on Special Legislation. State constitution makers have tried to reduce the flow of special legislation by a variety of devices.

One method is to provide that no special laws shall be passed relative to matters which can be covered by general legislation. Another method is to forbid the legislature to do certain listed things by special laws, such as granting charters to corporations individually. A third practice is to prohibit all special legislation. It is frequently possible, however, to pass general legislation that serves the same purpose as special statutes. Thus a legislature may enact a "general" law classifying cities by population and regulating each class; where only one city is actually within the population range set for a certain class, it is thereby singled out for separate treatment. In some states, the law permits special legislation affecting particular cities, but requires the publication of such bills in the newspapers of the communities affected, thus giving the citizens notice and a chance to protest. Finally, pressure for special legislation can be reduced by giving cities and counties a large amount of self-government, namely, "home rule," which permits communities to legislate for themselves (Chapter 36). The problem of special legislation cannot be solved completely by such devices because there is in reality no sharp dividing line between general and special interests.

GENERAL STRUCTURE OF THE STATE LEGISLATURE

Uniformity of Type. The general structure of the legislature is prescribed by the state constitution and cannot be altered by mere acts of the legislature itself. Despite the diversity of titles applied to legislative bodies—ranging from "the legislature" and "the legislative assembly" to "the general assembly" and "the general court"—they reveal remarkable similarity in structure.

Two Houses. For example, the legislature is, save in Nebraska, divided into two houses. Everywhere the upper house of the legislature is known as "the senate"; and most of the states apply the term "house of representatives" to the lower chamber, although in some states it bears the name "assembly" and in others, "the house of delegates."

Origins of the Bicameral System. When the framers of state constitutions began work after the breach with Great Britain, they had before them as examples the British Parliament composed of two houses—Lords and Commons—and their own colonial legislatures, nearly all of them bicameral in organization. In these circumstances, only two states—Pennsylvania and Georgia—created legislatures with single chambers, and within a short time they abandoned the experiments. By securing special representation in the upper house for the larger property interests, conservative Americans sought to establish a strong bulwark against what was called "the levelling democracy."

Existing Differences Between the Two Houses. By the middle of

the nineteenth century, most of the property qualifications on the right to sit in the legislature and on the right to vote for members thereof had been abolished. In this way, the differences between the chambers became less fundamental but some still exist. The most obvious difference is in size. The senate is always smaller in number and the term of the senator generally longer than that of his colleague in the lower chamber. Very often the senate, like its greater counterpart at Washington, is made a continuous body by provision for partial, instead of total, renewal at each election. Since the senators are elected in larger districts, they are, as a rule, more prominent and more influential in party councils and public affairs. Their influence is frequently augmented by a constitutional provision that they shall have the right to approve or reject nominees to high state offices presented by the governor, and in some cases to concur or dissent when removals are proposed. This gives them a power over patronage, with all its by-products, which members of the lower house do not enjoy.

Considered in social and economic terms, another marked difference between the two chambers, which may be deemed fundamental, arises from the fact that the seats in one chamber are often apportioned mainly according to population while those in the other house are allocated primarily with reference to political units such as towns and counties.[1] Thus urban areas may be favored in one house and rural regions in the other. This is a favorite idea in New England. Connecticut, for example, provides that the senators shall be distributed largely on the basis of population, while the members of the lower chamber shall be assigned to the towns, giving one or two members to each. Several states do not permit any county to have more than one representative in the senate, regardless of the size of its population, while distributing seats in the lower house with greater respect for relative populations.

Such discrepancies produce a variety of results. They may be of partisan advantage. In the New York convention of 1894, Joseph H. Choate, an orator of commanding power, employed all his arts in defending the right of the county, no matter how small, to have at least one spokesman in the assembly of the state; in a telling speech, rich in allusions to the history of local government, he almost moved his auditors to tears. He saved the day for the Republicans; by giving the rural counties, except Hamilton, at least one member each, it assured them a larger representation in the assembly than they would have

[1] For a survey of the bases of apportionment for the several state legislatures, see the current issue of *The Book of the States*.

otherwise received. Sometimes the case is reversed and Democrats by the nature of circumstances must plead for the county.

More is involved than the mere fate of political parties. The urban-rural issue is also at stake.[2] In California no county may have more than one seat in the state senate, regardless of the number of its inhabitants; hence the three most densely settled counties containing the metropolitan regions of Los Angeles and San Francisco, with over one-half the population of the state, are entitled to but three of the forty senators, whereas these same counties have a majority of all the seats in the lower chamber. These inequalities are regularly reflected in differences of opinion between the two chambers on urban and rural questions.

Theory of Checks and Balances Examined. As things now stand, the chief defense of the double chamber system rests on the assumption that it helps to prevent hasty and ill-considered legislation and assures more deliberation and reflection. This pleasing theory, much lauded in orations, has seldom been put to the acid test of fact. There have been few detailed and searching inquiries into the working of the system in practice and fewer studies of the realities behind it.

One scrutiny of the data in a single case, a session of the New York legislature, made many years ago by D. L. Colvin, disclosed very little evidence of any checks imposed on legislation by the double review of bills. Mr. Colvin reported that only nineteen per cent of the bills which passed one house were killed in the other and that only fifteen per cent of all bills were amended after they passed from the house of origin into the hands of the other chamber. The measures blocked entirely or amended, moreover, were not fundamental acts which threatened "to shake the foundations of the commonwealth"; they were relatively insignificant proposals. Besides, a large number of them might not have been initiated if the chamber which devised them had known full well that in the end it would have to assume responsibility for the outcome.[3] A later study of the bicameral principle in operation, this time in Illinois, covering four legislative sessions, produced similar statistical results: about twenty per cent of the bills passed by one house were defeated in the other.[4] A third study of bicameralism—a single assembly in Ohio—by Mona Fletcher showed that "the senate passed 82 per cent of the bills referred from the house, while the house passed only 54 per cent of the bills which it received from the

[2] For discrimination against cities in apportioning seats in state legislatures, see D. H. MacNeil, "Urban Representation in State Legislatures," *State Government*, April, 1945, pp. 59–61.

[3] D. L. Colvin, *The Bicameral Principle in the New York Legislature* (1913).

[4] W. F. Dodd, *State Government* (1928), p. 146.

senate." In this case it would seem that the lower chamber acted as a check on the upper.[5]

An examination of the number of bills defeated or amended by the double review does not however go very far into the heart of the problem. If ten or fifty per cent of the bills coming out of one house are defeated in the other, what of it? Should they have been defeated? On what criteria can such a judgment be based? Would most of them have been passed in the original form if the house of adoption had known that it must assume full responsibility for them as drafted? Suppose that ten or fifty per cent of the bills passed by one chamber are amended in the other; what of it? Are the amendments wise? Who can answer? By what standards are they to be measured? Since important proposals subjected to "deliberation" in the two chambers are often determined in private council by party or factional leaders, under the pressure of various interests, it is difficult to discover in numerous cases the effect of double review upon the form and substance of bills.

Size of Each House. In determining the size of each house, constitution makers have arrived at no consensus of opinion. New York at one end of the scale with more than thirteen million inhabitants has fifty-six senators and one hundred and fifty assemblymen. Nevada at the other end with about 110,000 people has seventeen members in the upper house and forty-three in the lower; New Hampshire with under half a million inhabitants has more than four hundred members in its legislature. Is there any relation between the number of members in a legislature and the quality of the representatives? It often seems to happen that the larger the number, the narrower the horizon of the individual members. Men of capacious minds sometimes come from little districts but the chances of securing persons of small caliber are increased by diminishing the size of the constituencies.

The Laying out of Election Districts. Where population is made the basis for distributing legislative seats in one or both houses, a decision must be reached as to what classes of people are to be counted. The drift of opinion is in favor of apportioning representatives among the several divisions of the state on the basis of the total population, citizens and aliens, as ascertained by the federal census. The rule however is not universal. Other bases of apportionment are white population, adult males, legal voters, qualified voters, and all inhabitants excluding aliens.

In any event, the principle of numerical equality, when applied, requires the laying out of districts containing substantially equal

[5] *American Political Science Review*, February, 1938, pp. 80 ff.

numbers of persons of the type to be counted. Some state constitutions adopt this principle and order the legislature to effect a periodical redistribution to correct inequalities brought about by changes in population. But orders may not be obeyed. After the Oklahoma legislature had long refused to redistrict the state, a legal action in 1946, intended to compel a change, came to naught when the judiciary said it was powerless to make the legislature assemble and do its duty. In the same year, a Wisconsin court expressed its inability to force redistricting in that state.[6]

Rules Against Gerrymandering. On account of the natural propensity of politicians to draw district lines with a view to partisan or personal advantages, it has become a custom to put in the state constitution some protection against such practices. For instance, it is frequently stipulated that legislative districts for one house or both must be composed of areas compact in form and contiguous, that counties shall not be divided except into whole districts, that districts shall be so laid out as to be nearly equal in population, and that citizens may appeal to the courts against gerrymandering on the part of the legislature. Maryland and Ohio take the matter out of the hands of the legislature. The former provides that the governor shall make the periodical apportionment according to the principles laid down in the constitution; the latter vests the power in the governor, auditor, and secretary of state or any two of them.

An Exception from the Rule of Single-Member Districts. In the distribution of representation, the rule of one member to each district is generally applied. Only one state, Illinois, has made an attempt to avoid the inevitable inequalities of this system by introducing minority representation. This was done in 1870 by a constitutional provision that the house of representatives shall consist of three times the number of the members of the senate; that three representatives shall be elected in each senatorial district at the regular biennial election; and that in the election of representatives each qualified voter may cast as many votes as there are representatives to be elected, giving all his votes to one candidate or distributing them, or equal parts thereof, among the several candidates as he sees fit. The three candidates standing highest on the list after the votes are counted are declared to be elected.

Many years ago Dr. B. F. Moore made a careful study of the working of minority representation in Illinois during the period from 1870

[6] See F. Heady, in *The American Political Science Review*, August, 1947, p. 704.

to 1919 and presented certain conclusions relative to it.[7] He shows that in practice the system almost always secures for the minority party a representative from every district. It also prevents those gross inequalities in constituencies which are to be found in most other states. It reduces the evils of the gerrymander. It also guarantees a strong minority in the legislature to act as a check on the corrupt practices which are likely to ensue whenever one party enjoys an overwhelming supremacy for a long period. On other points Dr. Moore speaks with caution. He is not sure that cumulative voting improves the quality of the representatives or guarantees more independence on their part. Its effect upon the power of the political machine is an unknown quantity. Certainly the experiment has not led other states to follow the example of Illinois.

Terms of Legislators. How often should the voice of the people be heard in the election of representatives? There was once a firmly fixed tradition that annual elections were necessary to the safety of the public but it is now disregarded. Not one state still renews both houses every year. More than half the states have established a four-year term for senators; the remainder have limited it to two years. In all but a few states the term of the members of the lower house is fixed at two years; Alabama, Kentucky, Louisiana, Mississippi, and Maryland have raised it to four.

The personnel of the legislature is constantly changing. It happens frequently that three-fourths of the members are new to the business. Few there are who make a career in the legislature, for it offers in itself little opportunity. The ablest member cannot by any chance become a great party leader in state politics or a national figure by continuing in mere state legislative service.

Qualifications of Members. In the interests of character, loyalty and ability, various states exclude from membership in the legislature certain classes of persons. Among them are embezzlers of state funds, aliens, persons who have been less than a year in the state they are supposed to help govern, persons who cannot understand English well enough to know what is being done in the legislative halls, or persons below specified ages, ranging from twenty-one to thirty years.

Payment of Members. In all states members of the legislature are paid. Several constitutions prescribe the amount; others leave the matter of compensation to the legislature, forbidding incidentally any increase during the term of service. Some commonwealths provide an

[7] B. F. Moore, *History of Cumulative Voting and Minority Representation in Illinois, 1870–1919.*

annual salary; other states make a per diem allowance, combining this with a limitation on the length of the session or at least on the number of days for which payment can be drawn.

Kinds of Persons Elected. So far we have been dealing with the formal provisions of the law. What can be said of the human element—the kind of persons elected to state legislatures? In general many professions, trades, and crafts and occupations have representatives—lawyers, doctors, teachers, ministers, merchants, manufacturers, bankers, farmers, insurance salesmen, politicians, artisans and housewives. A legislator professed to be simultaneously "a furniture dealer, undertaker, miller, and dealer in grain and feed." Another reported that he was a composer of music "with a national reputation, being the author of many works on music and over 100 piano compositions, many of which had proven very popular." Lawyers however seem to be favorites, except in some agricultural states.

Legislators Fairly Representative in Character. All in all our legislatures seem to represent with a fair degree of precision most of the politically active elements of the population. Their members spring from the people and are in close touch with all interests, prejudices, and customs. Nearly every chief group in society except as a rule industrial workers has its spokesmen in one or both houses. The restless motion of American life, a phenomenon which has struck foreign observers from Alexis de Tocqueville to modern visitors, is reflected in legislatures, in the changing personnel, the ebb and flow of opinions, the violent actions and reactions. The voters often want senators and assemblymen to be "just folks" like themselves and frequently get their wish.

The Legislature as a Gateway to Political Careers. Although relatively few among the thousands of legislators ever rise to high positions in the state or nation, still in a number of cases Presidents, Senators, members of the House of Representatives, Supreme Court judges, cabinet officers, and governors and other state officials have opened their political careers in legislatures. A careful survey published by John Brown Mason in 1938 shows that more than two-thirds of our Presidents and one-half of the Supreme Court judges had gained experience as colonial or state legislators and about one-third of the members of five recent Congresses had been state legislators. Of the governors of Massachusetts from 1780 to 1938, thirty-seven or about three-fourths had served as legislators at one time or another. As a result of his painstaking inquiry, Dr. Mason is warranted in saying: "The state legislature presents a singular training and

tryout ground for the politician—as T. V. Smith calls him 'at once the hope and the despair of the American people.' " [8]

INTERNAL ORGANIZATION

State Legislatures Follow the Congressional Pattern. There is a marked resemblance between the internal organization of the state legislature and that of the national Congress. Except in the southern states where only one party is in power, both houses of the legislature are influenced by the two-party system and both provide for leadership and management through the caucus, the speaker, and committees. Even proposals for the reform of state legislative organization often bear a similarity to those made for the "modernization" of the national Congress.

The Caucus. Each chamber of the state legislature ordinarily has a party caucus. In the caucus of the majority party or faction the speaker of the lower house is chosen, subject to the admonitions of the party leaders on the outside; and by much "higgling of the market" the chairmen and members of the important committees to be named by the speaker are agreed upon. Here too controversies over the leading legislative measures to be sponsored by the party may be threshed out and settled, particularly at the opening of the session. Here it is that the party organization within the legislature does its work. Here members who fain would be independent are brought to realize that practically the only hope for securing a consideration of their own bills is a judicious submission to the will of the party managers. And usually the caucus is dominated by a small and experienced group of party workers. Indeed it may be controlled by forces outside its own ranks. In an amusing passage in his *Autobiography*, Theodore Roosevelt tells us that when he was governor of New York, the boss of the state, Senator Platt, asked him whether he wished to name any members of the assembly for committee positions; Roosevelt expressed surprise because the speaker had not yet been selected. Thereupon Senator Platt, "with a tolerant smile," replied that it made no difference, for the speaker when chosen would agree in advance to the appointments "we wish."

The Presiding Officer. Each chamber of the state legislature has a presiding officer who in most cases appoints committees in theory and to some extent in fact.[9] The lieutenant governor, where such an

[8] *Annals of the American Academy of Political and Social Science*, January, 1938, "The State Legislature as Training for Further Public Service."

[9] For methods of appointing committees, see *Book of the States*, 1948–1949, p. 110.

officer is provided for, usually presides in the state senate and occupies a position analogous to that of the Vice-President in the Senate at Washington, D. C. The speaker in the lower house is nominally chosen by that body, but in practice by, in, or for the caucus, depending upon the degree of party pressure there. Like the speaker at Washington he enjoys substantial power if he has tact and capacity—and more important still, the support of his party brethren. Like the speaker in the House of Representatives he has at his side a rules committee, or a group of his party colleagues who, acting in cooperation with him, determine ordinarily the course of daily procedure. He may kill bills by distributing them as introduced to unfriendly committees, and he may refuse to permit them to be called up for consideration if they are not reported favorably from the committees.

Committees. As at Washington, committees play an important role in the state legislative process. The names of these committees vary but they usually bear some relation to the following matters of legislative interest: finance, taxation, the judiciary, railroads, commerce, insurance, banks, affairs of villages, towns, cities, and counties, corporations, public education, public health, penal institutions, agriculture, trade and manufactures, labor, and roads and bridges.

The various legislative committees, of course, are not equal in importance. Perhaps first in the list ought to be placed the committees which deal with financial measures, commonly known as the committee on finance in the senate and the committee on ways and means in the house. If there are great cities in the state, the committee on cities is, naturally, high in rank. The judiciary committee also enjoys great power because, under the cover of questions of constitutionality, hotly contested measures, such as primary and election bills, are often referred to it. In addition, it frequently has to review proposed amendments to the existing statutes and the state constitution.

Methods. Basically the committee system in the state legislature does not differ much from that in Congress. The committee may report favorably or adversely on a bill, report it with amendments, or kill it by silence.[10] Committees in charge of important matters generally enjoy the privilege of reporting to the house for action out of the regular order of business. If, in a chamber that does not require automatic reporting, a committee refuses to bring out a bill, its sponsor may get it up for consideration by securing unanimous consent or a special vote in support of his request; but each powerful committee is directed by party leaders and a motion to take a bill out of its hands

[10] Several state chambers now require committees to report out all bills automatically.

is usually a revolt against party understandings which is not likely to meet with success. In other words, the presiding officer of the house and the committee chairmen possess most of the sovereignty that is assigned to the legislative chamber by party managers and the governor or the boss as party leader. It is in the committee that most bills are drawn, amended, or "smothered" with due reference to party or factional policies and plans.

Committee System in Massachusetts. In this respect the practice of Massachusetts offers some remarkable contrasts to the modes prevailing generally. There the committee enjoys no special privilege except that of scrutinizing bills referred to it. It must report on all bills to the legislative chamber which it serves. Bills reported are, as a rule, considered in regular order—an order that must run its course unless changed by a four-fifths vote. The leading committees of the two houses act jointly and hold public hearings on practically all significant bills placed in their hands. Accordingly there is little opportunity for "dark room" procedure—for smothering bills without public knowledge. The system has one great disadvantage, however; it prolongs the transaction of business because it offers no swift process for selecting a few measures and compelling legislative action on them.[11]

STATE LEGISLATIVE PROCEDURE

The Drafting of Bills. The elaborate legislative organization described above exists primarily to promote the enactment of laws. How are laws to be framed, phrased, and passed? Frequently the state constitution imposes certain requirements on the legislators. Among such limitations are provisions directing that laws must be passed in the form of bills and that each bill must cover only one subject clearly expressed in the title. In this manner the legislature is supposed to be estopped from making laws in the form of resolutions or prolix, rambling measures and from burying a vicious scheme in the text of a long bill dealing with some apparently harmless matter. There are commonly some stipulations to the effect that when an existing law is to be amended, the section changed shall be reprinted in the new bill with the emendations clearly indicated in some form. Most of these limitations are little more than pious wishes, for only a few "have teeth" and will be enforced by the courts if they are violated by the legislature.

Publicity for Bills. Other constitutional restrictions are designed to secure publicity in the consideration of measures. The constitution of

[11] See the description of the Massachusetts plan by J. Hunt "How Our State Legislatures Can Be Improved," *State Government*, September, 1911, pp. 400–403.

Michigan, for instance, provides that at regular sessions all bills must be printed and copies thereof must have been in the possession of both houses for at least five days before the measures can be passed and become laws. Moreover no bill is to be so altered in its passage through either house as to change its original purpose and thereby mislead the members and the public.

Formal Procedure for Considering Bills. While practices differ somewhat from state to state, the following methods are usually employed in the legislative process. A bill may be introduced in either house. If it is offered in the lower house, it may be presented by any one of four methods: by a private member who may deposit it with the speaker or the clerk, by the report of a committee, on the order of the house, or by a messenger from the senate. Once offered, a bill is technically supposed to be given three "readings," in nearly all states, presumably to acquaint the members of the legislature with the work at hand. Actually, the "reading" may be no more than a hurried mumbling of the title, serving little useful purpose. At any rate, after the speaker presents new bills for their first reading, he refers them to appropriate committees nominally with the consent of the house. If a bill is favorably reported and the report is approved by the house, the bill is then placed on the order of second reading. If the report is adverse and is approved by the house, the bill is in effect rejected.

When a bill is placed on the order of second reading, it is then, as a rule, subjected to debate, being considered section by section—unless, by unanimous consent, it is advanced to the third reading. If a bill passes the second reading and is ordered to the third reading, it is referred to the committee on revision; then it goes to the committee on engrossed bills, where it is put in finished form; thereafter it is laid on the desks of the members sometime before final action. When a bill is ready for the third reading, it is placed on the appropriate calendar and taken up at the proper time. Unless there is a demand, the bill is not read through. If some member wants to reopen debate on it, he moves to strike out the enacting clause; otherwise a formal vote is taken by yeas and nays, and the results are entered on the journal. The proceedings in the senate are very much like those in the lower house.

To prevent unnecessary delays various expedients are embodied in the rules of legislatures. For example, the amount of time which a debater may consume is usually fixed and he cannot exceed the limit without the consent of an extraordinary majority. In other words the practice of unrestricted discussion allowed in the Senate at Washington

does not prevail in the state assemblies. On the contrary, the motion for cloture is freely employed in both houses both before and after the expiration of the time allotted by the rules to debate on any particular question.

Bills passed by one chamber are submitted to the other chamber, where they follow very much the same course as in the house of their origin. Measures finally approved by both houses go to the governor who may ordinarily sign them, veto them, or perhaps kill them by taking no action (pp. 628–630).

Variations from Order of Procedure. The law and the rules are, however, as Mr. Dooley remarked in another connection, "triumphal arches" to experienced manipulators in American legislatures. In states such as New York where party conflicts are ardent and the business is voluminous and complex, the party organization in the legislature takes charge. The sum and substance of procedure in such circumstances may be gathered from the following account written many years ago but still true to life: "Before I came up here I had an idea that a legislator, after a profound study of the subject, would introduce a bill with a few words that would at once attract the attention of the press and through them the public. Presently, by some machinery which I never clearly understood, the bill would be taken up in its turn and after grave and serious argument would either be passed or defeated. But what really happens is this. You sneak up back of the desk and drop into a slot your bill, which half the time you don't know anything about yourself, because either your boss, or your senator, or some organization in your district, gave it to you. By bothering the clerk next day you can find out what committee it has been referred to. If you are a member of the committee, there is a good chance to get it reported, because the other members of the committee want your vote to get their own bills out. If not, you are a hundred to one shot, unless your senator comes over and sees Wadsworth [the speaker of the assembly] or Merritt [the floor leader of the majority] about it. The next thing you do is to ask for a hearing on the bill. You find out who is the chairman and hunt him up. When he sees you are only a first-year man, he insists in mistaking you for a doorkeeper or messenger, just to let you know your place. After you get that straightened out and tell him what you want, he pulls a long face and talks about the flood of bills they have to consider. That's all you can do. If the committee, or rather if two or three men on the committee, are willing to give your bill a chance, you may get it out after begging like a college president. Once on the calendar, instead of the chairman of the committee, you have one man, Merritt, the

Republican floor leader, to convince before you can get a vote on the bill at all. They say it's even worse over in the senate. But it's bad enough here. All a new assemblyman is good for is to vote as he is told. If he doesn't do that, never a bill of his will see daylight. The committee holds the power of life and death over a bill, and Wadsworth and Merritt hold the committee in an iron grip."

Confusion in Procedure. Nevertheless, legislative procedure in the American states is characterized by considerable confusion and drift, no matter how strong the party organization may be. There is no one person or group of persons openly responsible in law and fact for formulating a consistent program of measures to be laid before the legislature when it meets. On the contrary, every member can introduce as many bills as he pleases. No one is responsible for expediting business; no one is responsible for searching all the bills, for bringing unity into the grist of laws, for eliminating disorder, conflict, and favoritism. If there is a strong party machine, it may quietly take things in hand, particularly in pushing through special measures. If there is no strong party machine, then the confusion is still more confounded.

In other words, our legislatures are not organized to bring public opinion to a focus, to secure the definition of questions, to concentrate debate on issues, to formulate laws on clear principles of public policy. They are miscellaneous assemblies of citizens, chosen independently, subjected to local influences, often with little experience in public affairs, busily engaged in making a living, eager "to get things done and get home." Though generally zealous for the public good, members of the rank and file are often without the knowledge or power necessary to effect their purposes.

Amount of Legislation. From the legislative mills so constituted a huge grist of laws pours out in an apparently endless stream. The Library of Congress includes over 25,000 acts in a "partial" list of the measures passed by state legislatures in the single biennium of 1945–1946. Time after time, at bar association meetings, consideration has been given to highly alarming reports on the flood of laws and the menace of legislation to life, liberty, and property. But the amount of important legislation may be easily exaggerated. As a former Chief Justice of the United States Supreme Court, Charles E. Hughes, once said: "After you get through with private bills, local bills, amendments of charters of all sorts, relief of towns, villages, and cities, provisions for public improvements, and appropriations, you will probably find that the bulk of legislation of a general nature touching your lives

and property is much smaller than you thought, although much larger than it ought to be."

Limitations on the Frequency and Length of Sessions. Seeking to keep down the total volume of legislation, among other things, all but five states forbid the legislature to meet oftener than once every two years, in regular session. Massachusetts, New Jersey, New York, Rhode Island, and South Carolina have regular annual sessions. Even the duration of regular sessions is placed under close constitutional restraint in a majority of cases. Some states have fixed a definite period, varying from sixty to ninety days and have forbidden the legislature to sit longer; others seek to check legislative sessions by reducing the per diem wage of the members after the expiration of a certain number of days.

It is argued that where the time at the disposal of legislators is short they will devote their attention mainly to important matters, to the exclusion of local and special bills and the pet schemes of small politicians. Experience hardly supports the argument. It does not appear that the quality of the laws passed is improved by the attempt to reduce the span of legislative deliberations. The laws of states with the shortest sessions do not seem to be automatically the best; and the number of special sessions in such states seems to indicate that brevity for regular sessions does not always save money for taxpayers in the end. As a matter of fact, during the last decade special sessions have come so frequently as to mark a practical abandonment of the biennial rule.

THE REFORM OF STATE LEGISLATURES

Evidences of Dissatisfaction. No branch of American government, except possibly the city council, has been subjected to such merciless criticism as the state legislature. The charges brought against it are often based upon the statements of responsible persons. They are set forth in many official investigations into public scandals and expounded in the debates of state constitutional conventions. They are substantiated in clauses of constitutions, almost every line of which betrays an unwillingness on the part of the framers to trust the matter covered entirely to the honor and intelligence of the legislators limited by it. In fact convention after convention has almost exhausted its ingenuity in devising new restraints on the power of the legislature.

Types of Criticism. When these charges are sifted and classified, they fall into certain broad groups. The first has to do with the character of persons elected to the legislature, with the mediocrity of

talent displayed, the extent of corruption and petty trading that prevails, and the lack of experience in public affairs. The second pertains to the quantity of laws passed. Usually coupled with the subject of quantity is criticism of the quality of legislation: the loose language employed in statutes and the frequent absence of clear purpose and competent legal draftsmanship. The fourth group of criticisms bears upon the delays, haste, and confusion which mark the average legislative session. The charge is also frequently made that legislatures are prone to pass bills hurriedly, throw them upon the table of the governor or other executive officials for enforcement; and then pay little if any attention to results unless some scandal arises. Finally, and still more grave, is the accusation that many members, sometimes a majority, are either in the pay of, or under the direct or indirect influence of, private parties, and sacrifice the public good to special interests. Out of these and similar criticisms have grown many efforts at constructive reforms.

Lack of Experience and Character. In the bill of indictment brought against the personnel of the legislature, a chief article is that the members are often wanting in independence and experience, in character and intelligence. Touching the first point, James Bryce expressed the opinion more than fifty years ago that the nomination of candidates by political conventions was mainly responsible for the choice of mediocre men, subservient to political machines. Now the direct primary has generally taken the place of the convention. What changes has it effected? There is some reason for believing that it works for more independence on the part of legislators, especially in the states which permit any aspirant to seek the nomination of any or all parties. Still no revolution has been wrought in the composition of our legislative bodies. Experience is something more easily measured; it grows out of long service. The direct primary apparently does not lead to the more frequent reëlection of members; and it is questionable whether any mere device can accomplish this. Election machinery is only one element in the case and easily overemphasized in any event.

Intelligence and character are elusive factors, but in an industrial society like that of America they are most likely to be devoted to some business, professional, or industrial career. Men of talent who have built up great manufacturing concerns or organized powerful trade unions are seldom found in state legislatures. They cannot or will not spare the time necessary to become effective leaders in politics; they prefer to exert their influence through personal pressures, proxies, and criticism. Still more significant, perhaps, is the fact that, as our state governments are now organized, legislative service in itself offers no

career; years of loyal and intelligent work in a legislature seldom give a senator or assemblyman state-wide distinction. It is evident, then, that the problem of securing intelligence and character in legislatures runs deeper than matters of nominating machinery; it strikes into the nature of our civilization and the organic structure of our state governments.

Nevertheless, the state legislators, although far from infallible, are generally above the average among their constituents in the level of their intelligence. It seems safe to say that they are as a rule more alert to the varied currents of political thinking than the miscellaneous electorates which they represent. They appear to be reasonably well aware of the predominating features of American development and conversant with the growth of informed and humane opinion. It is significant that where the recall exists, as in California, few members of the state legislature are ever challenged for failure to measure up to the expectations of their constituencies.

Improving Legislative Personnel. A special committee of the Council of State Governments in 1946 made several concrete proposals for improving the quality of legislative personnel. It suggested that the terms of legislators be lengthened and staggered, to increase the experience and continuity of legislative bodies. It declared that legislative salaries were too low and should be raised to attract a higher type of candidate. The committee also called attention to the pre-session legislative conferences held in Arkansas, Colorado, Connecticut, Georgia, Massachusetts, and North Carolina and to the numerous state legislative manuals which help to acquaint new legislators with their impending responsibilities.[12]

The Last Minute Rush. Where the length of legislative sessions is closely limited by constitutional provisions, it often happens that members dawdle along during the opening weeks, only to make up for lost time by feverish activity as the close of the session looms before them. Once, near the end of the session, the senate of Pennsylvania rushed through one hundred appropriation bills in thirty-six minutes, while the house ground them out at the rate of two a minute. On only four of the four hundred odd appropriation measures then passed was a vote formally taken, and less than three per cent of the members took the trouble to record a protest. A study of the New York legislature shows that similar high-speed methods often prevail in the closing days of the sessions. In fact they are common throughout the country.

[12] L. K. Caldwell, "Strengthening State Legislatures," *American Political Science Review*, April, 1947, pp. 281–289.

Early Preparation of Bills. Numerous efforts have been made to reduce the last-minute rush. L. K. Caldwell reports that at least thirty-two states have made arrangements for the drafting of bills before a session opens, while Massachusetts, New Hampshire, Vermont and Nebraska even permit bills to be formally filed prior to the beginning of a session.[13] Several states require that all new bills be introduced during a limited period at the outset of a session. It seems desirable, however, to leave room for exceptions and this is done by permitting the introduction of bills during the "closed season," with the consent of all or a large majority of the members. In times of stress party leaders overwork this device. Aware of this fact, a few states absolutely forbid the legislature to consider any new bills at all during the closing days of the session.

The Split Session. Representing a marked departure from these expedients is the plan adopted in California in 1911, known as the "split session." The ordinary session of the legislature is divided into two parts. During the first thirty days the budget and bills are supposed to be introduced. Then follows a recess of at least thirty days, intended to give the members and citizens an opportunity to examine with care proposals to be enacted into law. At the expiration of the recess, the legislature reassembles to act upon the business before it. During the second part of the session no new bills can be introduced in either house except with the consent of three-fourths of the members, and no member may introduce more than two such bills. Somewhat later West Virginia and Georgia tried similar experiments but subsequently gave them up. In 1940 New Mexico adopted a constitutional amendment requiring the legislature to convene for 30 days during which bills must be introduced (with few exceptions), recess for 30 days, and reconvene for 30 days.

The bifurcated plan is not as impressive in practice as it is on paper. In California it has often been circumvented by the "skeleton bill," consisting of a number, a title, and an enacting clause but little or no text. Introduced in quantities in the period preceding the recess, such bills are "amended" after the recess so as to complete the text, thus delaying the real task of writing measures to the usual last minute. True, many bills prepared in this manner have been vetoed, and an attorney-general has ventured the opinion that perfectly blank skeleton bills are invalid, but such sporadic action has not prevented the practice from surviving in the form of incompletely written bills. In the

[13] *American Political Science Review*, April, 1947, p. 237.

presence of such legislative ingenuity, it is scarcely possible to say that the bifurcated session is a complete success.[14]

Legislative Reference Work. Along with the above attempts to improve the quality of the legislative output have gone efforts to attain the same result by very different means—by supplying bill drafters with fuller and more accurate information. As early as 1890 New York established a legislative bureau which keeps a careful record of the legislation in all the states and maintains a well-equipped library. In 1901 the Wisconsin legislature appropriated a small sum of money for the organization of a legislative reference library. That body now has at its service competent experts and files of papers and documents bearing on measures likely to come before the legislature for consideration; any member is at liberty to make the widest possible use of the library and technical assistance at his disposal. Since the launching of the Wisconsin experiment the idea has spread widely. At present all but two states have legislative reference bureaus of one kind or another, usually in connection with their central libraries.[15] Their efficiency has been increased by the services of the American Legislators' Association which holds annual meetings and has created a central clearing house in Chicago.

Specialized Committee Inquiries. Supplementing the work of the reference agencies is that of legislative committees appointed for special investigations and empowered to employ outside experts. To deal with complex matters such as education, housing, banking, taxation, local government, natural resources, water power, and social welfare, our legislatures are relying more and more on such scientific inquiries.

Legislative Councils. In 1933, Kansas went beyond the use of such specialized agencies by creating a "legislative council"—a general legislative research committee for examining and meeting the lawmaking needs of the entire state. From Kansas, this approach to improved legislative action spread until today about one-fourth of the states have similar institutions. Usually, such councils are composed of members of the two houses of the state legislature, chosen by the presiding officers, who also frequently serve on the council. Meeting periodically during the intervals between regular sessions, these leaders concentrate on major matters of importance to their commonwealth, often with the aid of permanent research staffs. Out of their continuous investiga-

[14] W. W. Crouch and D. E. McHenry, *California Government, Politics and Administration* (1945), pp. 58–59.

[15] *The Book of the States* 1948–1949, pp. 118–119.

tions flow reports and recommendations, even formally drafted bills. Where the results of these between-session labors are presented a few weeks before the next meeting of the legislature, law makers and citizens are afforded an opportunity to acquire the broad background they need to take informed and effective action on bills.[16] Legislative councils have achieved a measure of distinction. Their proposals have a better than average chance of passage by the legislature. Of twenty-four bills prepared by the Kansas council for a special session in 1933 fifteen were adopted. Of 118 measures introduced by the Maryland Council in 1941, ninety-nine, or 83.9 per cent were enacted into law.[17] In Kentucky, where the council membership includes a few executives appointed by the governor to work with the legislators on that body, an integration of executive and legislative policies may be achieved.

Pooling Experience on a National Scale. With the broadening of the legislators' outlook has come a movement for the better pooling of experience among the states. In this way the enormous waste of effort that arises from having numerous bodies engage in independent investigations and experiments relative to the same topic can be materially reduced. Leadership in the new practice has been assumed by the American Legislators' Association, with the substantial assistance of the Library of Congress and the Interstate Reference Library. The Congressional Library, for instance, inaugurated in 1947 a systematic effort to secure copies of all new state laws as rapidly as possible; it lists and digests them quickly, and soon makes its materials available to each state thus enabling it to discover how other states are handling difficult questions.[18] If all investigating committees created by a state legislature would turn to the Legislative Reference Service of the Library of Congress before embarking upon separate enterprises, great savings could be effected in time and money.

Expert Draftsmanship. After the pertinent information has been accumulated comes the actual drafting of bills. Many statutes are drawn up in a haphazard fashion by irresponsible persons. Some important public acts, designed to achieve large reforms of one kind or another, are prepared by private zealots without adequate advice. Other bills are drafted in a careless fashion by members of the legislature who may be without sound legal knowledge, and sadly deficient in their understanding of the English language as well.

Heroic attempts are being made, however, to remedy technical de-

[16] See "Legislative Councils" in *The Book of the States*, 1945–1946, pp. 114–115.
[17] *Book of the States*, 1943–1944, pp. 149–150.
[18] *American Political Science Review*, April, 1947, p. 290.

fects. About one-half the states now have special staffs charged with the duty of assisting in drafting bills, examining proposed measures, and advising legislators with respect to the form, substance, and legal implications of new bills and amendments to existing laws. Most of these agencies are associated with the reference libraries mentioned above and make use of the library facilities. But their powers are limited and legislators are still free to call on the bill drafters or not as they please.

Reconstruction of the Committee System. From whatever source derived, bills must ultimately pass into and through the hands of the committees of the legislature. After discovering by a survey that there was an average of over thirty-two senate, and over forty house committees in the state legislatures,[19] a committee of the Council of State Governments recommended a careful reduction through consolidation. It urged that the fields of committees in one house be made to correspond with those of committees in the other house. New York, which has created various parallel bodies of this type, is the scene of numerous joint hearings by committees of both houses, saving time, energy, and expense to all parties concerned.

In Massachusetts, the integration is still more complete; many joint committees have been created, composed of members of both the upper and the lower houses, which hold common hearings on bills.[20] For its fairness and usefulness in producing discrimination in lawmaking, the plan is justly held up as a model. "In Massachusetts," says Professor Reinsch, "committee hearings are a very important part of legislative action. Notice of all hearings is given in the public press, and the committee meetings are well attended, not only by people who have an axe to grind, but by citizens of the state who interest themselves in legislative reforms. All testimony brought before the committees is carefully weighed; in fact, the legislature and its committees assume rather a judicial attitude. Petitions are brought before them, testimony is given, arguments are made, and they can generally decide the matter impartially upon the basis of all these considerations." [21] Naturally the recommendations of the committees carry great weight in the legislature.

Legislation Against Special Interest Lobbies. Legislatures and committees are besieged by private interests in search of special favors. "There is hardly one of the many and widely diversified interests of

[19] *State Government*, June, 1947, p. 164.

[20] For details, see J. Hunt, President of the Massachusetts Senate, "How Our State Legislatures Can Be Improved," *State Government*, September, 1944, pp. 400–403.

[21] *American Legislatures*, p. 174.

the state," said Theodore Roosevelt of the situation in New York, "that has not a mouthpiece at Albany, and hardly a single class of these citizens—not even excepting, I regret to say, the criminal class, which lacks its representative among the legislators." [22] Organized lobbies bring every kind of influence to bear in the enactment or defeat of bills. These associations maintain representatives at the state capital for the purpose of forming contacts with those members of the legislature who may be reached by devious means—by social considerations, money, or fear of being defeated for reëlection. On the other hand, corporations often employ lobbyists to defeat special bills introduced with a view to extorting money from them.

Harvey Walker's investigation of the source of measures passed by the lower house of the Ohio Legislature in 1939 revealed that twenty-five per cent were initiated by private members, twenty-four per cent by state officers, seven per cent by local officers and thirty-seven per cent by lobbyists. "It is a commonplace," observed Professor Walker, "that legislators usually no longer have time to consult individual constituents unless they represent an organized vote, that is, a conscious group. Pressures by these groups upon the legislature produce the resultant forces of legislation. The function of the legislator has changed from that of a producer to that of a judge. His task is that of weighing conflicting claims as to the merits of proposed laws and arriving at a conclusion as to their desirability." [23]

Well aware of these subterranean manipulations many states have sought to suppress undesirable operations by anti-lobby legislation. New York, for example, has provided that every person employed for compensation as a counsel or agent by any person, firm, corporation, or association, to promote or oppose, directly or indirectly, the passage of any bill or resolution, by either house, or to influence executive approval of any such bill or resolution, must be registered every year (before entering upon any such service) in the office of the secretary of state. Each such legislative agent must give the name of the person, corporation, or association by which he is retained, and at the same time furnish a brief description of the measures for or against which he is working. The law also requires every person or corporation to file in the office of the secretary of state a complete account of all the money spent in influencing legislation during the immediately preceding session. Duly accredited agents of counties, cities, towns, villages, public boards, and public institutions are exempted from the provisions of the statute, but penalties are imposed upon all others who

[22] *American Ideals*, pp. 63-66.
[23] "Who Writes the Laws," *State Government*, November, 1939.

fail to observe its terms.[24] About one-half of the states require the registration of lobbyists.[25]

Limited Usefulness of Lobby Laws. It is doubtful whether such laws exercise any considerable restraint upon undercover lobbying, and it is in fact difficult to draw the line between proper and improper activities in this sphere. The bills pending in legislatures affect vitally the rights and property of citizens and especially important groups of citizens, such as farmers, manufacturers, real estate owners in cities, trade unions, dairymen, insurance companies, railway corporations, and so on throughout our complex society. Most of these groups are well organized and have skillful counsel to advise and represent them. Their prominent members cannot be ignored by political managers. No one can rightfully deny that they are all entitled to be heard. Who can say just what shall be the nature and measure of their influence? Legislation in the abstract without reference to their needs and interests is impossible. Loose declamations about "driving them from the state capital" are futile. Far more to the point is the discussion of ways and means for bringing the whole legislative process and the social forces that control it out into the broad daylight of popular knowledge and understanding.

The Unicameral System—Nebraska. The inadequacy of minor remedies offered for legislative ills has led to proposals for more radical changes in the structure of the legislature—changes in the nature of simplification. Outstanding among these current projects is the substitution of a single-chambered legislature for the usual bicameral system. This suggestion, however, has been carried beyond the blueprint stage only in Nebraska, where a single-house legislature was installed in 1937. Nebraska's experience indicates that the unicameral plan does make for greater simplicity in legislative organization and for clearer lines of responsibility to the people. The entire legislative business of the state is transacted in a single body, so small in number that all members are known to one another, the press, and the public. The legislators cannot lay the blame for their failures on a second chamber, for there is none. Nor are their achievements lost to sight in divided responsibilities. They cannot escape criticism by claiming that their good intentions were defeated by party bosses, for they are chosen at nonpartisan elections; and each member is the only person in the legislature to whom the voters of his district look for the faithful representation of their ideas and interests. If the member succeeds, the honor belongs to him; if he fails, the responsi-

[24] Consolidated Laws of New York, Book 31, section 66.
[25] *Book of the States*, 1948–1949, pp. 129–130.

bility is at his door. In these circumstances, the membership of the Nebraska legislature has risen in quality, as judged in terms of better education and higher status in professions and occupations.

Legislative procedure under the unicameral system reflects the spirit of simplicity and responsibility. Preliminary business is handled by only eleven committees and hence is not beclouded by distribution among forty or more committees divided between two houses. Every bill is accorded a public hearing duly announced in advance, thus laying affairs open to interested parties and the press. Bills reported from committees to the legislature are first debated in the committee of the whole; and every measure that passes its first reading follows a regular course on the second and third readings. The closing days of a session are not marred by a mad rush in which scores, even hundreds, of bills are jammed through in a few hours; on the adjournment of the legislature in 1943 only seven bills remained to be reviewed by the governor. The average number of bills passed at each session has been reduced under the unicameral regime, and fewer laws are held invalid by the courts.

According to competent observers in Nebraska, the new system is a success.[26] It does not produce "hasty and ill-considered" legislation, as prophesied by critics. On the contrary, the legislature avoids methods that make for confusion, and proceeds in a grave and orderly fashion under the light of open publicity. Yet the unicameral movement in other parts of the country, which was strong a few years ago, seems to have lost most of its momentum and no other state has followed the example set by Nebraska in 1937.

The Main Question in Legislative Reform. Whether specific plans for "modernizing" state legislatures, just reviewed, are to be deemed sufficient for the times depends, in last analysis, on the position that is taken with respect to the proper rôle of these legislatures in American life. If the narrow and critical view is accepted, namely that the legislatures are "necessary evils" to be hedged about with more stringent restraints in the interests of honesty, economy, and publicity for procedures, then one type of reform is appropriate. If, on the other hand, state legislatures are regarded as major instruments for preserving local autonomy, for slowing down or reversing the trend toward

[26] H. T. Dobbins (journalist), "Nebraska's One House Legislature—After Six Years," *National Municipal Review*, September, 1941, pp. 511–514; J. P. Senning (university professor), "Unicameralism Passes the Test," *Ibid.*, February, 1944, pp. 60–65; E. F. Carter (judge, Nebraska Supreme Court), "The Unicameral Legislative System," *Florida Law Journal*, May, 1947, pp. 112–115. See also New York State Constitutional Convention Committee, *Problems Relating to Legislative Organization* (1938), pp. 125–141; and F. E. Horack, Jr., "Bicameral Legislatures Are Effective," *State Government*, April, 1941.

a top-heavy concentration of power in the National Government, then the legislatures must be made more competent to match their strength with Congress. They must be given new strength, higher standing in civic opinion, and more effective tools for discharging their obligations and doing their work.

Such a revitalizing of the legislatures involves innovations more drastic than minor expedients. It includes better pay for the members, annual sessions, special organs for the continuous study of public questions, adequate staff services, a reduction in the amount of petty business in the form of private and local bills, a radical simplification of procedure and an increasing concentration of legislative talents on the great issues of the respective commonwealths. Provisions of this character must be adopted, if the state legislatures are to hold their ground against the forces of national centralization.[27] Fortunately for the future, careful surveys by legislative bodies in Massachusetts, Connecticut, and New York and by the Council of State Governments, on a larger scale, show stirrings in the direction of a thoroughgoing reconstruction of legislatures and their practices.

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[27] For arguments along this line, see *State Government*, September, 1944, pp. 400 ff.

CHAPTER 30

The Governor

Stages in the Evolution of the Governor's Office. Having suffered from what they regarded as the high-handed and often corrupt conduct of royal and proprietary governors in the colonial era, Americans were in no mood during the Revolution to set up powerful governors of their own in the independent states. Nearly all the first state constitutions provided that the governor—to whom the modest name of "president" was sometimes given—should be chosen by the legislature and enjoy few powers over commonwealth affairs. In the course of time, however, the pendulum began to swing in the opposite direction.

Before many years passed, the idea of the separation of powers in the interest of liberty, fostered by the national example, spread everywhere in the Union, and state after state made provision for the election of governors by popular vote, and endowed them with substantial authority. Yet fear of "the strong man" continued and it was customary to vest certain executive powers in other state officials, also elected by the voters. This was the type of state executive department that prevailed generally at the opening of the twentieth century.

After the turn of the century, a movement was started to make the governor the real head of the state executive department, by reducing the number of other elected officials and extending his powers. In part this movement owed its strength to the growing importance and complexity of the functions undertaken by the central government of the state, which called for unified control. At all events, the enlargement of the executive branch, with the governor as its central figure, is a noteworthy feature of state politics in our times.

ELECTION AND GENERAL POWERS

Method of Nomination. At the inception of the Republic only New York and Massachusetts provided for the choice of the governor by popular vote. Now the people of every state elect their governor. The process begins with the nomination of candidates. In a few states, New York, for example, candidates for the office of governor are

nominated by party conventions. In nearly all the states, however, the convention has been abolished by law; and each major party is compelled to select its candidates for governor by the direct primary. The "direct primary" is, as we have seen, an election within the party. For example, any Republican who wants to be a candidate for the office of governor must get his name on the primary ballot of his party either by securing the signatures of a certain number of voters to a petition or by some other process of designation; on primary day, each person entitled to vote in the primary may select one among the several aspirants as his choice for the Republican candidate for governor. Similar rules apply to the aspirants of other parties. The victorious aspirants at the primaries are declared to be the official party candidates.

The Election of Governors. The names of the successful party nominees for governor are inscribed on the ballot for the general election at which the choice of a governor is finally made. In every state but one, the governor is elected by direct popular vote. The lone exception is Mississippi, where the governor must not only receive a majority of the popular vote, but must also obtain a majority of the "electoral vote" under a plan resembling that for the choice of the President of the United States.[1] In a large proportion of the states, the successful candidate must be at least thirty years of age. Citizenship and a term of residence in the state (for instance, five years immediately preceding election, in Indiana) are now common qualifications.

Term of Office. Twenty-seven states fix the governor's term at four years, and twenty-one at two years. The tendency of recent years has been in the direction of the longer term. This is the result of the recognition of the patent fact that the governor must have time to master the details of the complicated system over which he presides if he is to be an efficient administrator. On the other hand, there is a certain fear that the governor, if allowed to continue in office year after year, may entrench himself in power politically and otherwise. Reflecting this dread, some states stipulate that the governor cannot be reëlected to succeed himself, at least immediately; Indiana, for example, provides that he shall hold office for four years, but shall not serve during more than four years in any period of eight years. Many states place no limitation whatever on the number of terms a governor may legally serve; but custom often decrees that it shall not be more than two. It is also usual to forbid the governor to hold any federal office during his period of service.

[1] Art. V, Sect. 140, Mississippi Constitution.

Salary. The salary paid to the governor is sometimes fixed by the state constitution, but many commonwealths leave the amount to the discretion of the legislature. In a majority of the states the governor's salary is $7,500 or more. In one state it is as low as $4,500, while the top salary is the $25,000 paid the governor of New York.

Removal. As a rule, the governor may be removed from office by impeachment. The process in the states generally follows the principles laid down in the Federal Constitution with differences only in detail. Usually the lower house brings the impeachment charges and the upper house hears and judges (pp. 662–663). In the long history of our republic only a few governors have been ousted by this humiliating process: Sulzer of New York in 1913, Ferguson of Texas in 1917, Walton of Oklahoma in 1923, and Johnson of Oklahoma in 1929, for example. In the states which have adopted the state-wide recall that radical device has been used only once in this connection—in the case of Governor Frazier of North Dakota during a partisan conflict in 1921.

The Governor as Chief Executive. The high degree of political independence which the governor achieves through popular election and the protection afforded to him against easy removal place him in a strategic position for making his influence felt throughout the commonwealth, especially whenever his legal authority to act is broad enough. At first glance, this authority may appear almost limitless, for nearly every state constitution formally vests the "executive power" of the state in the governor. Actually, this clause is of slight consequence. It seems to confer no power which is not explicitly conferred elsewhere by the written instrument itself. According to Frank J. Goodnow, "Little if any power is to be regarded as vested in the governor as a result of the grant to him of executive power. . . . The state courts have not derived, as has the Supreme Court of the United States, any very large powers from such a general power or duty as the duty to see that the laws be faithfully executed. In other words, the principle of narrow construction is more commonly adopted with regard to the powers of the governor than with regard to those of the President."

It is through specific grants of power, such as the right to appoint and remove subordinates, suggest or veto legislation, and pass on budgets, that the governor secures most of the legal authority he needs to lead in the management of public business and achieve distinction for qualities of statesmanship. While these detailed grants vary widely from state to state, in general the governor now enjoys constitutional powers of a high order. He is, at least in the public mind, responsible for administrative work of vital significance to public

welfare. Nearly every new constitutional convention seeks to enlarge his prestige and power.

The Lieutenant Governor. A majority of the states provide that if the office of governor becomes vacant on account of death, resignation, removal, or some other reason, a popularly elected official known as the lieutenant governor shall succeed him. In case no such event arises, the lieutenant governor ordinarily serves merely as the presiding officer of the senate. Although he may wield considerable influence in that body through his nominal right to appoint committees,[2] he is in fact a minor official—a kind of "fifth wheel" in the government. Indeed several states regard the post as superfluous and make other arrangements for filling the governor's office in case of a vacancy.[3]

THE GOVERNOR AS A POLITICAL LEADER

Popular Appeal of the Governorship. Politics, even more than the law, tends to exalt the position of the governor. Next to the President of the United States, it is the governor who engages the interest of the voters of the state. Thousands unacquainted with the names of the members who represent them in the legislature know the name of the chief executive and have some idea of his personality and opinions. As a rule the number of votes cast for governor rises far above that cast for any other state officer. So great, indeed, is the popular interest in the office that even the most powerful party managers, in making or promoting nominations, must be on their guard; they may choose or support a nonentity or even a man of doubtful reputation for auditor or treasurer, but seldom for governor. They may even be forced by public opinion to lend their strength to someone whom they dislike or distrust. In the old days in New York, when Senator Thomas Platt was "boss" of the state, he was compelled to take Theodore Roosevelt as the Republican candidate for governor in spite of himself. "Senator Platt picked me for the nomination," said Roosevelt. "He was entirely frank in the matter. He made no pretense that he liked me personally; but he deferred to the judgment of those who insisted that I was the only man who could be elected, and that therefore I had to be nominated."

Such popularity is partly due to the fact that the governor is expected to interpret the vague desires and drifting opinions of the people of the state, especially the voters of his party, and transmute

[2] R. F. Patterson, "The Lieutenant Governor in 1944," *State Government*, June, 1944, pp. 348–349 ff.

[3] For a lieutenant governor's own arguments in favor of abolishing the post, see R. B. Crosby, "Why I Want to Get Rid of My Job," *State Government*, July 1947, pp. 193 ff.

them into a concrete program of legislation and administration. It is true that this function of concentrating and defining opinion is supposed to be discharged by the party and the results are supposed to be expressed in the party platform. But in actual practice the voters pay little attention to platforms and a great deal of attention to the personality, speeches, and declarations of candidates for governor. They know from experience that the victor, rather than his party platform, will set the tasks of the legislature.

Political Experience as a Prerequisite. In view of the prominence and responsibilities of the governor, it might be expected that the office will rarely be bestowed on a rank newcomer in the field of politics. To a large extent, detailed surveys bear out this assumption. A study published in 1943 revealed that many of the state governors at the time had previously served in one or more public offices. Twenty-five were former state legislators and five had been members of Congress; eight had been lieutenant governors; eight had served on state commissions; five were ex-mayors; one had been auditor general; another had been a treasurer; and still another a secretary of state. Service in a legal capacity with some unit of government was a frequent feature of the governors' backgrounds.[4]

Spectacular Elements Required. Since in the campaign for election an appeal is made to a large constituency, there must be something rather spectacular about the personality of a candidate for governor. There are, it is true, quiet days when the managers of the majority party find little difficulty in electing an obscure or reserved man; but in close contests no reliance can be placed on such an expedient. More often elections are exciting; an electorate that loves baseball games, boxing matches, and every form of sport demands more "ginger" than is afforded by a school teacher or banker of a retiring disposition. The occasion calls for a man who has "fought" something or somebody. A survey made in 1943 revealed that six governors had been attorneys-general; ten, county attorneys; six, former city attorneys; and six, United States district attorneys or assistant district attorneys. Twenty-six governors were listed as attorneys by profession and six as newspaper men.

Reformers Often in Demand. Speaking of his effort to win the Republican nomination for governor in Wisconsin long ago, R. M. La Follette, Sr., said: "It was clear to me that the single issue against boss rule would be more immediately effective than a program for legislation which would necessarily require much more time for

[4] "The Governors of the States," *State Government*, July 1943, pp. 154–155.

educational work." Charles E. Hughes, of New York, had hardly been heard of in political circles when as counsel for a life insurance investigating committee he "grilled" some of the financiers and political bosses of the state, held them up to public scorn, and called for drastic reforms. In a few months he was nominated for governor by the Republican party, some of whose leaders he had exposed as lobbyists and "grafters." Thomas Dewey, as prosecutor in New York City, had sent a Tammany politician to prison before he was elected governor of New York in 1942. Dwight H. Green had prosecuted racketeers in Chicago before he was elected governor of Illinois in 1945. There are times, too, when the advocate of some outstanding issue of political or economic reform must be chosen. At all events, as a politician of the old school once remarked, "you can't elect a dead one."

Types of Governors. As in the case of the President of the United States, constitutional provisions and statutes give few clues to the rôle a governor will play after he is installed in office. Nor do they determine the influence he may exert as the highest political personality in the commonwealth. Much depends upon his character, the bids he has made to the voters during his campaign for election, and the degree of his interest in and competence for efficient administration and leadership in the promotion of the general welfare. If he has practiced the arts of the demagogue and made extravagant promises to the people in securing his office, he is likely to override the legislature in efforts to fulfill at least some of his pledges. Even though his campaign vows may indicate otherwise, he may discharge his official duties in a perfunctory manner or worse, reward favorites, and strengthen the political machine of his party. On the other hand, if so minded and so moved, the governor may display an intense concern in the affairs of the commonwealth, private and associational as well as public, and by prudent leadership raise the tone of government and society.

It may transpire that a governor assumes his duties at a critical time in the history of the state and espouses a well-rounded program of reforms. Such was the fortune and record of Ellis G. Arnall, of Georgia, who was inaugurated governor in January, 1943. During his administration an appeal was made to youth by a reduction of the voting age from twenty one to eighteen years; harsh legislation enacted at the behest of his predecessor was repealed; the penal institutions of the state were remodeled; the notorious chain-gang system of prison labor was abolished; the poll tax was abrogated; public education was freed from domination by politicians and restored to accredited standing; and an overdue installment of labor legislation

was enacted. Believing that Georgia's constitution of 1877 was outmoded, Governor Arnall led in the drafting of a new document, which was approved by the voters. Convinced that the railway rates fixed by the Interstate Commerce Commission in Washington discriminated against the south, he argued the case before that body and won a favorable decision.

On occasion a governor may exercise a moderating influence on a state torn by bitter partisanship by steering a middle course. Elected governor of California in 1942 on the Republican ticket, Earl Warren chose able men from both major parties to fill state offices, cooperated with the leaders of both parties in the legislature, and succeeded in securing the passage of numerous measures long demanded by the public but delayed by factional bickering. Having risen above ordinary political wrangling, Governor Warren broke precedents in 1946 by winning the Democratic as well as the Republican nomination and was reëlected in "a landslide"—the second governor to receive a second term since the admission of California to the Union in 1850.

Although the work of state administration and financial management is not spectacular, except when scandals occur, achievements in this field sometimes bring distinction to governors. Among state executives who have attained eminence by the efficient management of public business, Thomas E. Dewey of New York may be regarded as outstanding. After his first inauguration in 1943 he began to give close attention to the administration and finances of the state and continued to urge that the success of popular government rested on sound methods in the direction of fiscal affairs and in the enforcement of the laws. He did, it is true, show marked qualities as a political leader and in the formulation of legislative measures; but, unlike many prominent "reformers," he insisted that the best of plans, without money to pay for them and brains to carry them out, are bound to fail in the end.

From a Governorship to the Presidency. In strategic states which count heavily in national elections, for instance, New York and Ohio, the office of governor may well be a stepping stone to the Presidency. It is assumed that one who can conduct an effective election campaign on a small scale within a state, may be able to handle a campaign on the national stage as well. At any rate, it was as governor of New York that Grover Cleveland arrested the attention of the country and secured the prestige which sent him to the White House. William McKinley had been governor of Ohio as well as a Representative in Congress before he was elevated to the presidency. As governor of New Jersey Woodrow Wilson drew national attention to his program,

his personality, and his spirited leadership; while occupying that office he toured the country from Massachusetts to Oregon, from Michigan to Texas, and stimulated the growing sentiment in his party which won the presidency for him. The spectacular victory of Franklin D. Roosevelt in New York, in the election of 1928, and his progressive leadership as governor of the state, made him immediately "available" for the presidency. In four years he left the Executive Mansion in Albany for the White House in Washington.

THE GOVERNOR AND STATE ADMINISTRATION

Two Types of Executive Departments. There was a time, not very long ago, when it was possible to draw a general sketch of the office of governor as administrator, which was fairly applicable to all parts of the Union; but this simple bit of artistry is now out of the question. In a number of states constitutional amendments or statutes or both have consolidated, more or less, the offices and boards of state administration into a few departments, placed them immediately under the governor's supervision, enlarged his appointing, removing, and directing powers, made him responsible for the preparation of the budget, and given him a substantial administrative control. In other states this process of reconstruction is under way, with prospects for gains in the near future. Yet many states still cling to the historic custom, evolved during the nineteenth century, under which the executive power is distributed among many independent officers and establishments and the governor himself, while titular head of affairs, is merely one of the high authorities responsible for state administrative performances (Chapter 32).

New Jersey as an Example of a Consolidated Type. The most striking example of the consolidated type is New Jersey, where a high degree of centralization has been effected. In this state the office of governor indicates perhaps the general form toward which all other states of this class are tending—that is, all the states that are now seriously engaged in reconsidering their executive departments.

Under the terms of its new constitution of 1947, New Jersey has but one popularly elected administrative officer—the governor. To make him in fact as well as in name the chief executive, the constitution requires that, except for temporary commissions, all administrative offices and agencies shall be consolidated in not more than twenty departments, as far as practicable on the basis of their major purposes. These departments are expressly placed under the supervision of the governor. The men and women in charge of all these departments, whether serving as single executives or members of

boards and commissions, are, without exception to be appointed by the governor with the advice and consent of the senate. If the boards and commissions choose single executives to carry out their will, these appointments are subject to approval by the governor alone. To round out the governor's control over appointments, all state judges are appointed by the governor with the advice and consent of the senate. Thus the governor of New Jersey has been given authority to pass on the appointment of every high executive and judicial officer of the state, the first governor to be in such a strategic position.

What may the New Jersey governor do after appointments have been made to insure that high administrative officers fall in line with the governor's concept of state policies? With two exceptions, the single executives in charge of departments hold office for the same term as the governor and until their successors qualify, but may be removed at his pleasure. Those exceptions are the secretary of state and the attorney general, whose terms are identical with that of the governor. The constitution provides that members of boards and commissions in charge of departments may be removed "in the manner provided by law," permitting the legislature to deny the governor sole power to replace them. However, when such boards or commissions select a single executive officer to do their bidding, that officer is subject to removal by the governor, after notice and an opportunity to be heard, thus giving the governor a large degree of influence over the execution of the laws by such agents. To round out the governor's removal and supervisory power, the constitution stipulates that he may investigate the conduct of any state executive officer; and after notice, the presentation of charges, and an opportunity to be publicly heard, the governor may remove any such officer for cause, the party so affected then being given the right to appeal his case to the courts, "in such manner as may be provided by law." Thus the governor's removal powers are extremely broad.

Position of Governor in Consolidated Type. In states with centralized systems of administration the governor occupies a unique position. He is made responsible for the discharge of numerous functions assumed by the government of the state. If they are inefficiently or corruptly administered, the evil can be laid at his door. Of necessity he is compelled, in some measure at least, to think of the work of the state as a whole, to plan for it, to bring its fragments into harmonious relations, unless forsooth he betrays his trust. His power is great and his responsibility is commensurate. He may, of course, still play petty politics, use his appointments to reward mere party hacks, and resort to favoritism in every direction; but when he does there can be no

dispute as to accountability. If that is the kind of government the people of the state prefer, no constitutional device known to mankind can prevent it. But if they wish efficient and enlightened administration they do not have to find their way through a maze of independent and often conflicting establishments; under a system of centralization all trails, good and bad, lead to the chamber of the governor.

Decentralized Type—Place of Governor. In the states where little consolidation of executive functions has taken place, there is a wide domain of executive or administrative action over which the governor has no control or slight control. Where this condition prevails, a large amount of executive work is distributed under constitutional mandate among a number of state officials elected by popular vote, endowed with special powers, and substantially independent of the governor. The state treasurer, for example, is usually elected by popular vote, and is in no way responsible to the governor. The auditor or comptroller generally occupies the same independent position. Often the control over tax assessment and collection is vested in special agencies operating in spheres defined by acts of the legislature. To supervise properly state financial administration, the governor has not merely to watch the treasurer, over whom he has little or no authority; he must watch various independent officers and commissioners, some of whom he has not chosen in the first place and few of whom he can remove at will.

There are many offices that the governor can fill with persons of his own choice but as a rule their duties are prescribed by law, and the consent of the senate is necessary to appointments and perhaps removals. If the governor is of one political party and the senate of another, conflicts and division of responsibility inevitably ensue. In this case the senate may dictate to the governor in the selection of officials, and compel him to retain subordinates who dissent from his policies by refusing to approve the appointment of any nominees to succeed them.[5]

The executive power in the states with a decentralized administration is further dissipated by the practice of making the terms of certain state officers longer than that of the governor and providing that the terms of members of commissions and boards shall overlap so that a new governor can seldom, if ever, appoint a majority of the incumbents. On coming to power he finds his hands tied by officials thoroughly entrenched in their posts. He may, it is true, invoke the help of the legislature, if it is dominated by his party, and abolish positions right and left with the aid of "ripper" laws but this is a

[5] For a comprehensive table on the extent of the governor's appointing power, see W. B. Graves, *American State Government* (3rd ed., 1945), p. 378

procedure not conducive to administrative efficiency. As a rule he must do the best he can by bargaining and huckstering.

Lack of Cooperation in Administration. In any event extreme decentralization precludes harmonious cooperation among the various administrative officials. Of course, at times, all these officials are of one political party or represent a coherent section of that party; but often the governor, having been the "drawing card" on the party ticket in the election, finds himself associated in office with obscure machine bosses who have no administrative capacity and perhaps little integrity. There is one instance in our history of a governor who was afraid to trust the legal advice of the attorney general of his state on account of the strong factional feeling which existed between them, although both belonged to the same political party. This form of antagonism is likely to be even more marked when the governor represents one party and his immediate associates represent the opposition.

Increased Burdens of the Governor. Another primary result of administrative decentralization, curiously enough, is to increase the administrative responsibilities and burdens of the governor. As he is compelled by law to appoint the heads of many minor offices, bureaus, and divisions, he is personally responsible for their conduct in matters of little importance. They can go directly to him with problems and complaints, whereas in states with well-centralized administration such questions go to the heads of the departments, who do not trouble the governor with them except in cases of urgency. So it comes about that the governor is often loaded down with trifling details of business which should never come to his attention, while at the same time he is deprived of many of the large powers befitting his position as chief executive.

Special Powers Sometimes Conferred. As if to atone for the severe restraints placed upon the governor's administrative authority, several states authorize him to make special inquiries into the working of the various executive departments. The constitution of Montana, for instance, provides that "the governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required; he may also require information at any time, under oath, from all officers and managers of state institutions upon any subject relating to the condition, management, and expenses of their respective offices and institutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution." The governor of New York, under an act of the

legislature, may order an investigation of any department; and in several states, the chief officers are required to make periodical reports or render opinions to the governor. Occasionally, but not often, the governor is given power to suspend certain state officers during a recess of the legislature. Arrangements of this character are, at best, means of preventing gross excesses rather than of insuring thorough and continuous control over administrative details.

Other Efforts to Increase Governor's Powers. When attempts are made to counteract the evils of dispersion by methods other than that of consolidation under the governor, it usually happens that his authority may be diminished or at least subjected to further control by some device. A few states, notably Alabama, West Virginia, and Kansas, have organized commissions to scrutinize phases of state administration, thus trusting to pluralism rather than unity as a means of bringing about efficiency and economy in administration. Whatever may be said for such expedients, they do not conform to Burke's theorem that responsibility prevents abuses.

Yet on the whole recent times have witnessed a steady growth in the governor's powers of overhead management. Among the factors contributing to this trend are administrative reorganization and consolidation, an increase in the number of officials appointed by the governor, the adoption of the executive budget system, and the additional controls over state expenditures vested in the governor.

LAW ENFORCEMENT

Limited Control over Enforcing Agencies. Besides assuming certain administrative duties, the governor must undertake responsibility for law enforcement, including maintenance of order and suppression of crime. As a rule the state constitution vests "the executive power" in the governor and instructs him to take care that the laws are faithfully enforced. But in the ordinary course of things he does not have a free hand. Except in a few cases, he does not appoint the attorney general or any of the law officers scattered throughout the territory under his jurisdiction. On the contrary the state's attorney general is ordinarily elected by popular vote, while local prosecuting attorneys, sheriffs, constables, and police officers are locally elected or appointed. The governor may instruct the state's attorney to institute proceedings against particular offenders but often he is without power to compel action even here.

Use of Armed Forces. If a riot or disorder becomes too serious for the regular processes of the courts or for local authorities to control, the governor may call out the state militia, or the state police force.

Nearly everywhere he may suspend the writ of habeas corpus, thus staying the hands of the courts and placing the regions affected in care of military authorities, if this is deemed warranted by invasion, rebellion, or public necessity.

As many disorders today arise in connection with labor disputes, the position of the governor in this regard is very delicate. A reckless state constabulary may interfere with controversies lawfully conducted and by arbitrary action bring about violence. It may, in fact, help employers to "break" strikes by interfering with labor meetings and arresting strike leaders on flimsy pretexts. Such cases are not unknown. On the other hand, when an outbreak occurs in connection with an industrial contest, the governor is nearly always urged not to interfere; and he may be threatened with a loss of "the labor vote" if he does employ state forces. So in this sphere, particularly in the great mining and manufacturing states, the governor often has momentous decisions to make. There are matters of fact to be ascertained in times when the truth is difficult to discover. Hasty and harsh measures may work injustice; timidity and hesitation may result in the loss of life and property.

Special Powers in Local Law Enforcement. In certain states, the governor's power of law enforcement permits him to control, to some extent at least, local agencies. In a few instances, for example, he appoints and removes city police commissioners. The exercise of such powers over local officers may have great political significance. It was a story of his action during a police strike in Boston that made Governor Calvin Coolidge a national figure and contributed powerfully to his nomination and election to the office of Vice-President of the United States in 1920.

Pardoning Power. In one relation to law enforcement, the governor may stand above all other authorities, for he generally enjoys the quasi-judicial power of issuing reprieves, commutations, and pardons. But it may be limited. In some states he shares it with a board of pardons or a high court. Pennsylvania for instance, while conferring upon the governor the power to remit fines and forfeitures, and to grant reprieves, commutations of sentence, and pardons, except in cases of impeachment, also provides that no pardon shall be granted nor sentence commuted, except upon the recommendation in writing of the lieutenant governor, secretary of the commonwealth, attorney general, and secretary of internal affairs, or any three of them, after full hearing, upon due public notice and in open sessions; and such recommendation, with the reasons therefor at length, shall be recorded and filed in the office of the secretary of the commonwealth. New York, on the other hand,

has accepted the great argument of Hamilton, that a single person is the best depository of such an important power because, being alone responsible, he dreads charges of weakness or connivance and is not likely to be so obdurate as a group of men. That state gives the governor alone the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason, and in cases of impeachment, with such restrictions and limitations as he may think proper.

RELATIONS OF THE GOVERNOR TO THE LEGISLATURE

Decline of Legislatures. Although public sentiment in many parts of the Union has prevented the centralization of administrative powers in the hands of the governor, it has commonly conceded to him, by law and custom, leadership in important legislative matters. In a certain measure this is due to the state-wide character of many issues up for legislative action—issues of general interest. To some extent it may be ascribed to weaknesses in the legislature itself. Often that body is inefficient or dominated by special and hidden interests. Frequently it is a center of log-rolling and trading in which great grists of laws and appropriations for local benefits are turned out at the sacrifice of larger and more vital concerns. The existence of two houses, often at cross purposes, and the absence of unified legislative leadership may also work against establishment of public responsibility in the legislature itself. In these circumstances, some provision for leadership by the governor seems imperative.

The Message. It is a regular practice to confer upon the governor the duty of communicating with the legislature on the state of the commonwealth and of recommending to it such measures of legislation as he may see fit.[6] This right, like that enjoyed by the President, may become a powerful instrument in presenting issues to the people and in forcing the legislature to act on them. "It is not," said Charles E. Hughes, speaking as the governor of New York, "his constitutional function to attempt, by use of patronage or by bargaining with respect to bills, to secure the passage of measures he approves. It is his prerogative to recommend and to state the reasons for his recommendation, and in common with all representative officers, it is his privilege to justify his position to the people to whom he is accountable."

Financial Powers. It was long a practice for the governor to include in his regular message to the legislature a statement on the finances of the commonwealth; now the law in a majority of states requires him to

[6] For sample messages, see "Governors' Messages—1947," *State Government*, Feb., 1947, pp. 35–74.

present to it a distinct program of revenues and expenditures—that is, a budget (pp. 686–689). The governor may discharge this duty in a perfunctory fashion or he may assume genuine leadership in the formulation of fiscal policies. Taken in connection with the right (which most governors have) to veto single items in appropriation bills, the budget may become an important instrument in the hands of a strong executive who is determined to carry out a definite policy of his own.

Special Sessions. The power of calling extraordinary sessions of the legislature is usually conferred on the governor by the state constitution, and in that connection he is bound to submit to the legislature the matters to be considered at such sessions. The governor may "on extraordinary occasions," the constitution of Ohio provides, "convene the General Assembly by proclamation and shall state in the proclamation the purpose for which such special session is called." The Nebraska constitution expressly stipulates that no subject shall be acted upon by a special session except such as the governor may recommend; it may, of course, reject the measure or measures which he proposes, or it may adjourn without taking any action; but at least the governor can lay at its door the clear responsibility for failing to meet pressing problems.

The Veto. Also of great significance for executive leadership is the governor's right to veto bills. This is a two-edged sword. It may be used either to defeat bills that are opposed by the governor or as a threat to compel the passage of measures advocated by the governor. It is easy for him to inform members of the legislature that their favorite bills will be vetoed if they do not accept his recommendations on other matters. Indeed, more than one governor has openly announced his intention to veto certain bills which the legislature favors if it fails to adopt his leading proposals.

With one exception, North Carolina, all states give the governor the power to veto bills enacted by the legislature and also permit the legislature to override a veto by repassing them. About two-thirds of the states, at the present time, require a majority of two-thirds in both houses to overcome an executive veto; others fix the number at three-fifths; and a few at a mere majority vote.[7] In the hope of checking the extravagance of the legislature, a majority of the states authorize the governor to veto single items in appropriation bills.

It is customary, in case of an exercise of the veto power, for the governor to return the bill to the house in which it originated with a

[7] *The Book of the States*, 1948–1949, p. 112.

statement of his objections. Like the President, the governor may veto measures which he thinks contrary to public policy as well as measures which he deems unconstitutional. "The plain intent of the constitution," said Governor Charles E. Hughes, "is that the governor shall express his judgment upon legislative measures before him and that his judgment shall control unless the measure is so strongly supported that it counts in its favor two-thirds of the members of the legislative houses after the objections have been formally stated."

Extent of Veto Practice. In actual practice the number of bills vetoed by governors varies greatly; in the aggregate it is enormous. In some states it amounts to as high as one-sixth or one-fifth of the bills passed at each session, especially where the governor enjoys the power to veto items in appropriation bills. The number of vetoes is also likely to be large if the governor and the legislature are of different parties; for the legislature may try to embarrass him by submitting bills which he is known to oppose, or he may veto measures on purely partisan grounds. When the governor assumes leadership and arranges his program with the party directors in the legislature, perhaps on a give and take basis, there are few vetoes. The veto in such circumstances is not an evidence of merit, but of bad management or inside manipulation.

Veto after Adjournment. Before taking leave of the veto, we should examine an important matter that is usually passed over lightly, namely, the exercise of the veto after the legislature has adjourned. Most legislatures are in the habit of passing a huge grist of laws during their closing hours. Hence it is often provided in the constitution that bills shall become laws unless vetoed by the governor within a certain period subsequent to the adjournment of the legislature. This means that after the legislators have gone home and cannot call him to account for his conduct the governor may slash measures at will. In case he enjoys the right to veto items in the appropriation bills, he may punish districts and administrative officers for incurring his displeasure or failing to support his policies. He may cripple public services for political reasons and no one can hold him to account. The next legislature may be composed largely of new members representing another party. The general public, not usually exercised over such matters, has forgotten. Quite rightly this procedure has been termed "dark-room finance," even though it sometimes produces salutary results.

The New Jersey constitution, adopted in 1947, offers a unique remedy. It allows the governor a certain length of time in which to act on the measures left in his hands when the legislature adjourns, but it does not give him a free hand to "pocket" bills at his pleasure. It provides

that at the expiration of forty days, the legislature shall reassemble for the consideration of the bills he vetoes and thus take full responsibility for repassing them or allowing the governor's adverse verdicts to stand. Hence both the governor and the legislature must, in this respect, proceed openly under the public scrutiny.

Managing the Legislature. Far more important than the letter of the constitutional provisions with respect to the message, the budget, special sessions, and the veto may be the spirit and practice of state politics. The governor is the outstanding figure of his party, even though a "boss" may wield great power over him behind the scenes. The condition was neatly described by Woodrow Wilson when he was governor of New Jersey: "inasmuch as it is next to impossible to determine who is running the legislature from the inside, there is an instinctive desire that there should be some force directing and leading it from the outside; some force which shall be obvious and therefore responsible, open to the view of everybody and subject only to the restraints of public opinion. Public opinion must by hook or crook get into the business. If it cannot get into it through the committee rooms, it may possibly get into it through executive leadership." Acting on this theory, Governor Wilson laid a complete program before the legislature and made a national reputation in a spectacular battle that accompanied his driving it through. "More than half of my work as governor," wrote Theodore Roosevelt of his experiences in New York, "was in the direction of getting needed and important legislation. I accomplished this only by arousing the people, and riveting their attention on what was to be done. . . . My success depended upon getting the people in the different districts to look at matters in my way and getting them to take such an active interest in affairs as to enable them to exercise control over their representatives."

Evidence on Executive Leadership. This direct testimony of two eminent governors has been confirmed by statements from a number of governors not as well known to the nation at large. When Finley and Sanderson, many years ago, prepared their work on the American executive, they addressed an inquiry to the state governors asking their views on the point of executive influence over legislation. It appears that, with few exceptions, the legislatures generally follow the suggestions of the governors with regard to particular matters of legislation, but not merely because the proposals come from the chief executive. The legislatures really respond to an imperative public opinion which is reflected in the policies of the governor, who, by virtue of his special position, is able to gauge the popular temper. One governor stated that whenever the executive of a commonwealth

desires a certain law, he should lay his plan before the legislature in the form of a carefully drafted bill, and then interest influential members in the measure, acquainting them with the arguments for and against it. Another governor replied: "The legislature of the present year enacted into law practically all the measures suggested by the governor in his message to that body." [8]

Sometime later the subject of executive influence over legislation in Indiana during a period of twenty years was examined with great care and in a scientific spirit by Burton Y. Berry. His conclusions are as follows: the platforms of the political parties did not exert any appreciable influence on the great majority of the bills proposed or enacted into law; in fact the platforms mentioned only about one-fourth of the principal measures considered by the legislature during the two decades under examination. Of the platform planks which actually suggested legislation, about one-half were carried into law without the support of the governor; of the planks approved by the governor nearly three-fourths were incorporated in law, in one form or another. On the other hand, the major portion of the measures offered by the governors during the period were not mentioned in the platforms at all; they were bills sponsored by governors as party leaders. The projects drawn up by the chief executives independently outnumbered the platform proposals two to one, and one-half of them became law. At the special sessions of the Indiana legislature called during the two decades in question, every measure proposed by the governor was passed —probably because the consent of the party leaders was secured in advance.[9]

Conclusion. Thus from the testimony of distinguished governors, from the testimony of less-known governors, and from intensive studies of political practice emerges the conclusion that the governor, like the President of the United States, often leads the legislature while serving as the chief executive. This, it should be noted, is not a confirmation of Bryce's dictum that the merit of the governor is "usually tested by the number and boldness of his vetoes." It is rather the more positive concept that the merit of the governor is tested by the character of his administration and his legislative program.

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[8] Finley and Sanderson, *The American Executive*, pp. 181 ff.
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CHAPTER 31

The Judiciary and the Law

Contacts of the Citizen with Courts. It is to the third great branch of the state government, the judiciary, that a citizen or an alien can always appeal when he believes that his personal or property rights have been violated by public authorities or private parties. If he has a case and able counsel, he can usually obtain a hearing. It is to the courts that persons are summoned when they have violated the legal rights of other persons or transgressed the criminal law. As a business man, the citizen may have to resort to a court to collect a debt or settle a dispute with some other business man. If injured in an accident, he may sue the responsible party for damages. He may be compelled to appear as a witness in a civil suit involving the claims of neighbors to land or other property or to testify in a criminal case about matters known to him. Practically every man, and in several states every woman, not legally exempt, is liable to be called upon to serve on a jury, and thus become a part of the regular judicial machinery. These are only a few of the numerous ways in which the courts directly affect the lives of individuals. Less obvious is the fact that the safety of life, limb, and property for everybody depends in a large measure upon the efficiency and honesty of the courts.

Under the American system of government the great mass of law cases is handled exclusively by state and local courts, for the business of the federal courts is rather closely defined by the Constitution (pp. 230–232). Moreover, in many cases the state courts have a concurrent jurisdiction with the federal courts and a litigant thus has a choice of tribunals before which to carry his case.

STRUCTURE OF THE COURTS

The Lesser Courts. In every state the courts are arranged in a progressive series. At the bottom of the scale in rural and semirural regions stand the justices of the peace, who have jurisdiction over civil cases involving small amounts of money and over petty offenses. In large cities the criminal and civil jurisdiction elsewhere exercised

by the justices of the peace is often divided between two sets of courts: the police courts and the municipal civil courts.

In many states there are county courts, generally of limited jurisdiction. They have cognizance of civil actions involving considerable sums of money and usually review appeals from judgments of justices of the peace. They also have jurisdiction over serious criminal offenses. Occasionally, they have certain administrative functions in addition to their judicial duties.

Often immediately above the county court is a superior, circuit, or district court which possesses broad original and appellate jurisdiction in civil and criminal matters and may try cases over which the lower courts have no authority. The judges of this tribunal serve districts larger than the county but generally hold terms of court successively in the several counties of their circuit.

The Highest Court. At the head of the judicial system of each state stands the court of last resort, known by such names as the supreme court, the court of appeals, or the supreme judicial court. Usually this tribunal handles only cases brought up on appeal and as far as purely state controversies are concerned, its rulings are final. Since grave questions regarding the constitutionality of important actions come before these courts, their influence on law in their respective commonwealths is high.[1]

Special Courts. In addition to the regular hierarchy of courts, there are sometimes special tribunals for particular purposes: chancery courts, which administer equity (p. 639); probate or surrogates' courts for the settlement of estates of deceased persons; children's courts dealing with offenses committed by minors; courts of claims for hearing claims against the state; and administrative courts, such as industrial commissions, which hear and decide cases within their respective fields.

Judges. Each court has a judge or judges who preside over the conduct of its business. Where a court has two or more judges, they may either sit as a body or, if law permits, divide and sit separately to try cases simultaneously. After hearing the issues brought up for settlement, the judge or judges announce their decisions. Where three or more judges hear a case, they reach decisions by majority vote.

Terms of Office. Judges of lower courts usually hold office for short terms; those of the higher courts, for a long period, often ranging from six to twelve years. A few states have experimented with even longer terms. Thus judges of the Maryland court of appeals are elected for

[1] For examples, see "State Constitutional Law in 1946-47" *American Political Science Review*, Aug., 1947, pp. 700–732.

fifteen years; while in the neighboring state of Pennsylvania the term of the judges of the supreme court is twenty-one years. In Massachusetts and New Hampshire the judges of the higher courts enjoy practically life terms unless removed for cause. In general it may be said that the tendency is toward the longer terms.

Election and Appointment. In most instances, judges are chosen by popular vote—on a partisan ballot in more than one-half the states. However, a few states do not vest the selection of judges (especially of the higher courts) in the people. In New Jersey, for example, the justices of all state courts are nominated by the governor and appointed by him with the approval of the senate. A unique arrangement prevails in New Hampshire, for there all the judges are named by the governor with the approval of his council—a small, popularly elected body which is distinct from the state legislature. Other states, including Rhode Island, Vermont, and Virginia, leave the choice to the legislature.[2]

Argument over Election vs. Appointment. There is a difference of opinion respecting the three methods of choosing just mentioned—namely, selection by the legislature, the governor, and popular vote. Which is the most likely to advance the cause of justice? It is generally agreed that the first is not at all desirable; the choice is too often made by log-rolling tactics when it is entrusted to the legislature. On the other hand, there is much to be said regarding the merits of the other methods—popular election and appointment by the governor, subject to confirmation by the state senate.

Friends of popular election insist that choice by the people is the only really democratic way of selecting important judicial officers—that appointment by the governor renders the judges too independent of the popular will and tends to make them arbitrary. They point out too that, in the case of local judges, the people of the district are likely to know more about the qualifications of the candidates than the governor who is obliged to depend on recommendations of third parties—that is, on the recommendations of a local political machine. Also, the champions of the elective system contend that on the whole it has worked successfully and that excellent judges have been obtained under it. The higher courts of states like New York with elective judges have generally been composed of members well known for their integrity and legal standing; there the judges who have served well are often renominated by both parties and thus reëlected without a con-

[2] For details as to methods of selection, see "Judicial Selection Roundup," *Journal of the American Judicature Society*, December, 1947, pp. 112 ff., and *The Book of the States*, 1948-49, p. 501.

test. Finally, advocates of popular election point out that in so far as judges have the power to declare laws void their functions are political, and therefore they should not be removed from popular control.

To offset these arguments, those who favor appointive judges say that where good judges have been obtained, they have been secured in spite of popular election, not because of it. Massachusetts, whose judges are highly esteemed by lawyers for their character and learning, is usually cited as the state in which the appointive system has proved eminently successful. It is argued that the people do not have the capacity necessary to pass upon the qualifications required by a competent judge and often select the most popular man rather than the one most fit. Where the judge is an elective officer, advocates of the appointive system continue, he is actually dependent on political leaders; if they play politics of the baser sort, the public suffers grave injuries. During prohibition, a report to the American Bar Association declared that gangsters "are often able to elect to judicial office their own attorneys, and when charged with crime waive a jury trial and place their case before their own judge, who acts as judge and jury." Of broader application and more fundamental significance is the argument that if a constitutional form of government is to be maintained, the judiciary must preserve a certain independence of spirit; if the judge is afraid to render an unpopular decision, though fully warranted by existing law, because it might interfere with his chances of winning reëlection, he cannot do justice without fear or favor.

A Compromise. Ingenious attempts have been made to combine the merits of the elective and appointive systems. Under the California constitution, the governor nominates the justices of the supreme court and of certain inferior courts. His nominees must pass the scrutiny of a commission on qualifications before they can take office. At the expiration of their initial terms, the justices may become candidates in an election for a second term. In this election, the people are given the simple privilege of deciding whether or not such justices shall be retained in office. Any justice who refuses to stand for election or is defeated at the election if he runs, is replaced by a new appointee designated by the governor. In Missouri a similar scheme is employed, except that the review of qualifications comes first. That is, nonpartisan committees nominate justices for certain courts and the governor makes his appointments from these lists of nominees. On the expiration of their initial terms, these justices, if they wish to continue in office, must, like similar judges in California, face the people at the polls.

Recall of Judges. Sometimes judges may be recalled before their terms expire. This practice, found in a few states, is due to popular dissatisfaction with decisions of the courts which invalidate acts of the state legislatures, particularly those dealing with labor and social reforms. The machinery for the recall of judges is the same as that employed in the case of ordinary administrative officers. Arguments over the question of the recall of judges are almost identical with those employed when the question of popular election of judges is discussed.[3]

Compensation. The salaries of judges are usually rather low in comparison with the compensation afforded to first-class practicing lawyers. There has been, however, a tendency in recent years to increase the salaries of judges, and in some states they are well paid. The top salary is the $25,000 a year paid to the highest ranking judge in New York State. In about one-half of the states, the judicial salary scale goes up to $10,000 or more.

Other Court Officers. In addition to a judge or judges, all courts, with the exception of the very lowest, have clerks to keep the record of their proceedings and to perform ministerial functions such as the issue of processes and writs. In many states, the offices of county clerk and court clerk are combined in one person, an elective official.[4] In others, however, there are separate clerks for the courts, who are appointed by the judges or elected by the voters for short terms.[5]

Prosecutor. An account of the judicial system would not be complete without some consideration of the prosecuting attorney (p. 789). As a rule he is an elective county officer, but in some instances he operates in larger districts.[6] He represents the state in criminal cases and conducts the prosecution. He makes preliminary inquiries into crimes and determines whether a prosecution should be instituted against persons suspected of guilt. If he decides in the affirmative, he presents the case to the grand jury.[7] If the grand jury returns an indictment—that is, declares that the accused should be held—the prosecuting attorney takes charge of the prosecution at the trial. In one respect, his functions are similar to those of the counsel for the plaintiff in a civil suit. Yet, in another way, he is much more than that. He should not be interested in securing a conviction at any cost.

[3] Beard and Shultz, *Documents on the Initiative, Referendum and Recall*, pp. 55 ff.

[4] A clerk is chosen for each county, even in cases where several counties are grouped in one judicial district, for it is desirable for each to keep its own records.

[5] There seems to be little reason for making the court clerk an elective official. His duties are generally purely ministerial and are performed under the direction of the judges, who ought to have the power of appointing and removing him.

[6] He is known variously as prosecuting attorney, district attorney, state's attorney, attorney for the commonwealth, county attorney, and county solicitor.

[7] For a discussion of the grand jury, see p. 644.

He is a quasi-judicial officer and is, or should be, interested in getting at the truth and doing justice. In addition to performing his functions in criminal trials, he also represents the county in civil cases and is the legal adviser of other county officials.

THE CLASSES OF LAW APPLIED IN STATE COURTS

Constitutional and Statutory Law. State courts of all types are charged with applying "the law" to concrete situations. On close inspection, the law is found to consist of certain more or less distinct parts. First of all, there is the constitution of the state and various statutes passed by the state legislature. It is for the courts to decide whether state statutes conform to the superior law—the state constitution—and to declare null and void those that do not.

For the convenience of the courts and the general public, many statutes have been organized by the more advanced states into well-coordinated codes. Thus a state may have a penal code, consisting of a single volume embracing all the statutes defining crimes and prescribing their punishment, or a code of civil procedure containing the statutes covering the handling of ordinary lawsuits. Some states have codified and indexed all their general statutes and have provided in the bargain for their continuous and orderly revision.

The tendency toward codification has been expedited by the National Conference on Uniform State Laws consisting of commissioners appointed by the governors of various states. It has made model codes on many subjects, particularly those relative to commerce, and has recommended its proposals to state legislatures for adoption. For example, years ago the commissioners drafted a negotiable instruments law, which has been adopted by all the states. Further evidence of their success is seen in the fact that a large majority of the states have adopted, by statute, the commissioners' drafts for uniform stock transfer, narcotic drugs, and veterans' guardianship laws.

The Common Law. Where constitutions, statutes, and administrative rules do not cover a given situation, the court must seek guidance elsewhere, frequently falling back on what is called the common law.[8] The common law began its development in medieval England. When a case came before the royal justices in the Middle Ages they tried to ascertain the prevailing custom of the community bearing on the subject and decide the question in accordance with it. Theoretically they did not make the law but merely formulated the practices of the community into legal rules and gave them an official sanction.

[8] Louisiana is an exception.

As a matter of fact they often did make law, for they interpreted the customs and had the power to select some and discard others, especially if there was a conflict. When another case involving the same point was brought before the judges, they generally followed the rule laid down in the decision of the first case. If, however, they thought that the original finding was incorrect or that conditions had changed, they would override the previous decision and work out a new doctrine. Thus flexibility was always possible—one of the best features of the common law.

Equity. As the common law developed, it gradually became more and more crystallized. The judges tended to be technical, and any litigant whose case did not fall within a certain well-defined class was liable to be denied the relief really due him. In numerous instances in which obvious injustice was done there was no remedy "at law," meaning under the common law.

These deficiencies of the common law were countered by the development of a new body of jurisprudence—a system known as *equity*. It was customary for a person who felt that he had been wronged and could obtain no remedy "at law" to petition the king, or the king's chancellor, for special consideration. The granting of this favor was at first considered an executive act and purely a matter of grace, but gradually the chancery evolved into a regular court with its own body of equity principles, which were much more elastic and far less technical than the ordinary law. Equity, therefore, gave relief when none could be had "at law"; and in many instances where other remedies were inadequate, equity accorded the satisfaction that was really demanded by the plain justice of the situation.

For example, the only redress granted "at law" for wrongs done to persons or property is money damages, but equity goes much farther and will command a person to do something which is for the benefit of the plaintiff. Thus, in some kinds of contracts, a court of equity will compel the party in default actually to perform his part of the agreement on pain of imprisonment. Again, equity will command a person, by an order called an "injunction," to refrain from doing something which is injurious and unjust to the plaintiff.

English Law Adapted to American Conditions. The English system of common law, based on sources as diverse as ordinary civilian customs, merchant law, principles of Christianity, and church law, and as modified by various old English statutes, was brought to the New World. Here it has undergone drastic changes designed to meet American conditions. The English system of equity was likewise imported into many parts of America. When the colonies cast off allegiance

to Great Britain, some of the state constitutions provided that the common law and equity should continue in force; but even in the absence of such provisions, courts in most states viewed them as binding, except as modified by local statutes. They are still applied with varying force, subject to that limitation. Very few commonwealths, however, have retained an entirely separate system of equity, administered by distinct chancery courts.[9] Today, the same court usually administers both "law" and equity, and the distinction between them has, in some jurisdictions, been virtually extinguished. Hence it happens that the term "common law" is sometimes loosely used to include equity.

State Variations. Although the common law as administered in the various states constitutes a single system of jurisprudence, it has undergone some divergent modifications. In each state the interpretation which is binding is that made by its court of last resort; and, as different courts hold diverse views on what is or ought to be the law on a particular topic, the rules applied in different commonwealths will vary. But the courts of each state by no means disregard the decisions of sister states. While the latter are not considered as authoritative as the precedents of the state in which a particular case is tried, they are treated as advisory statements of the law and have a great moral weight, especially in matters which have not been passed on in that jurisdiction.

Efforts to Codify the Common Law. In many states, statutes have been enacted to replace the common law in respect of certain situations. This is a process also known as "codification." Most lawyers consider the codification of the whole common law undesirable. In the first place, they contend that a statutory code fails to accomplish the only purpose for which it is enacted; namely, that of making the law more definite and certain. It is conceded that no code can provide for all contingencies in detail and, therefore, its rules must be made sufficiently general and elastic to allow their application to novel cases. Quite as much litigation is likely to arise over the interpretation of the code's terms as over the application of common law rules to concrete subjects.

In addition, it is contended that a civil code increases the diversity of law among the various states. As long as the development of private law is in the hands of the courts, the tribunals of one state are guided to some extent by the precedents of other commonwealths, and at times they modify their views in accordance with the general weight of authority, thus working toward a desirable uniformity throughout the

[9] Tennessee, Delaware, and Mississippi are examples of states with separate chancery courts.

Union. But the moment that the law is codified by a number of states, the diversities among them are crystallized and they may increase under subsequent legislative amendments.

The greatest objection, however, brought against complete codification is its tendency to make the law rigid. Where the common law is in force, at least to some extent, the courts, by distinguishing new cases and at times by overruling former precedents, may adapt its rules to new conditions and keep them more or less in accord with the needs of the community. But as soon as the law is codified, this power is taken away from the courts; henceforward the terms of the law can only be altered by legislative action, which may be slow.

CRIMINAL LAW

Crimes as Public Wrongs. Numerous reprehensible deeds against persons and property are defined as crimes by law, and those who commit crimes are subject to penalties varying in nature and degree. Crimes are regarded not only as offenses against individuals, but as injuries to society as a whole, that is, as *public wrongs*. Hence every person accused of crime is prosecuted by a public officer, not in the name of the victim but in the name of the people of the entire state. That is why, in criminal trials, some such formula is employed as "The People of the State of New York *vs.* John Doe."

Classes of Crimes. Crimes are divided into two broad classes, on the basis of their gravity. The more serious crimes, known as felonies, are often punishable by death or confinement in a state's prison. Lesser offenses—misdemeanors—constitute the second class; they are usually punished by fines or imprisonment for comparatively short periods in a county or city jail.

Types of Felony. One of the gravest felonies is that of "causing" the death of a human being. On the average, law enforcement officers report, from twenty to thirty persons are daily slain in the United States. This type of felony is commonly divided into two classifications: murder and manslaughter. Murder is the willful killing of another person, planned well in advance, or, to use the language of the law, with malice aforethought. In some states, it is divided into degrees, according to the amount of premeditation. Of less severity is the crime of manslaughter. It may be involuntary, as when the driver of a car negligently runs over a pedestrian. If "in the sudden heat of passion, caused by reasonable provocation," one person slays another unintentionally, the plea of self-defense may be sufficient justification to establish innocence or a material mitigation of the penalty imposed.

Another major group of felonies has to do with stealing property.

Burglary consists of breaking open and entering the house or building of another with the express design of committing an offense therein, such as seizing and carrying off jewelry. The mere breaking and entering are sufficient to constitute burglary, though the offender does not actually commit a crime in the building. Robbery is the taking of another's property in his presence, by force or by arousing fear, as by holding a man up at the point of a pistol and relieving him of his wallet and watch. Larceny, by contrast, is the stealing of personal property by any means. The surreptitious picking of a person's pocket or the removal of bank funds by a teller to bet on horse races, comes under the head of larceny. Larceny is often divided into grand and petty, on the basis of the amount stolen, with the former being classed as a felony and the latter, as a misdemeanor.

In the list of crimes as defined by law are various other felonies. Arson, for example, is the willful and malicious burning of a building, in whole or in part. Forgery, generally a felony, consists of making or altering a written instrument to defraud another, as by writing another's signature on a check or raising the amount of a check. Kidnaping, too, is usually made a felony. So is perjury—the willful giving of false testimony, under oath, by a witness.

Misdemeanors. Other offenses are known as misdemeanors. They vary in enormity and from state to state. As a rule bribery is a misdemeanor though at times it is made a felony. The same is true of knowingly receiving stolen goods. Assault and battery, disturbance of the peace, violations of the pure food laws, the use of false weights and measures, spitting on the floor of a street car or other public conveyance, and innumerable minor offenses are misdemeanors.

Attempts and Accomplices. It is not alone for offenses actually committed that punishment is inflicted. It often happens that a person conceives the design of committing a certain crime and takes steps toward carrying out his purpose but is, for some reason, prevented from effecting it. In that case he may be punished for the attempt to commit the crime.

Not only the principals who actually commit a crime are punishable for it; their accomplices are liable as well. Accomplices do not directly participate in a crime but further it. They are divided into two classes: *accessories before the fact* and *accessories after the fact*. The former category includes anyone who in any way advises or assists in preparations for a crime which is afterward committed by others. In some states, accessories before the fact are put on about the same level as principals and are punished as such. An accessory after the fact is an

accomplice who assists in the escape of an offender or helps to cover up a crime.

Element of Intention. To be convicted of a crime, a person must usually have a criminal intent. This is ordinarily presumed. A small child cannot have such an intent and his wrongful acts do not constitute crimes. On similar grounds an insane person is not to be held responsible for his acts. But legal tests of insanity are stricter than medical tests, and often persons considered lunatics by physicians are held to be sane in law. An intoxicated person is responsible for his crimes, voluntary drunkenness being no excuse, though it may be regarded as a mitigating circumstance.

CRIMINAL PROCEDURE

Arrests. Actions against criminals may begin with arrests. When a crime is witnessed by a police officer or when he knows that a crime has been committed and has reasonable grounds for believing the one whom he is taking into custody is guilty, the officer may make an arrest, in most instances without a warrant. A private person can also make a valid arrest, summoning bystanders to assist, if he sees a criminal at work and no officer is in sight. When an offense has been committed, but the party or parties guilty of it are not swiftly apprehended on or near the spot, a police officer or a private person may file against them a complaint with a magistrate who will thereupon issue a warrant or order commanding the arrest of the person or persons accused. The exact rules defining the cases in which an arrest may be made without a warrant vary in the several states.

Preliminary Hearing. After a person is arrested, he is supposed to be brought before a magistrate [10] as soon as possible. The proper judicial officer holds a preliminary examination and hears any evidence that may be produced; but neither at this nor at any subsequent stage of the proceedings may the accused person be questioned at length, unless he himself desires to testify. This is a cardinal principle of English and American criminal procedure and is one of the main distinctions between the Anglo-American system and that in vogue on the continent of Europe where the accused may be and usually is subjected to questioning; but in many places in the United States it is a pious fiction owing to the use of "third degree" methods by the police.

Bail. If the magistrate before whom a prisoner is arraigned finds that there is probable cause for holding him for trial, he commits the

[10] For the writ of habeas corpus, see pp. 51–52.

accused to jail or allows him to give bail unless the offense is especially grave. By giving bail is meant that one or more individuals, called sureties, sign a bond obligating himself or themselves to pay a certain sum of money to the court if the accused person fails to appear when his case is called for trial. If bail is arranged, the person is released until his trial begins.

Indictment by Grand Jury. Frequently the next stage in the proceedings of a case involving a major crime opens with an indictment by a grand jury to which the matter is presented by the prosecuting attorney. The grand jury is one of the oldest institutions of the common law and for a long time it was cherished as a safeguard against needless and oppressive prosecutions. It is a body of citizens drawn from qualified inhabitants of the county. Its duty is to pass on all charges involving important crimes; if it decides that there is at hand sufficient evidence, it finds an "indictment" against the accused and the case goes to trial. If the grand jury determines that the evidence is insufficient, the matter is dropped and the prisoner is released from jail or his bondsmen are discharged, as the case may be.

The proceedings of the grand jury are secret. Generally evidence is presented by the prosecuting attorney, who also prepares the bill of indictment and, if the grand jury approves, it indorses the bill. The grand jury is not limited to passing on matters presented to it by the prosecuting attorney; it may undertake investigations of its own but in practice it seldom takes the initiative. If the accused in a particular case has not been already arrested, grand jury proceedings may be one of the preliminary stages in conducting a criminal action.

Indictment by Information. In some states indictment by grand jury, even in serious crimes, is not necessary to bring a person to trial. There the end is accomplished by "information"; that is, by an accusation lodged in the proper court by the prosecuting attorney. This procedure gives more power to the prosecuting attorney, as he then has the sole right to determine whether a case shall be brought to trial or not. As a general rule, prosecution by information is employed for minor offenses in all parts of the country.

Charge and Pleading. After a person is indicted, he is brought before the court, the charge is read to him, and he is directed to plead. If he pleads guilty, no further proceedings are had and the judge imposes sentence either at once or at some later date. If he pleads not guilty, a trial is accorded to him.

Selecting the Jury. When the date set for the trial arrives, the case is formally called by the presiding judge. A jury is empaneled, usually

twelve in number.[11] The various citizens summoned for jury duty are examined in turn by the prosecuting attorney and the defendant's counsel. At times the process is a long one, particularly in important and sensational affairs. Anyone who states that he has formed a definite opinion about the case is incompetent to serve, and this rule always excludes most intelligent persons if the crime has attracted much attention and has been extensively discussed by newspapers. In addition to this, each side may challenge a certain number of jurors peremptorily without giving any reason.[12]

Case Developed by Prosecutor. After the jury has been selected, the prosecuting attorney opens his case, inasmuch as the defendant is presumed to be innocent and the burden of proving him guilty rests on the state. In his opening speech, the prosecutor generally describes the circumstances in which the alleged crime was committed and indicates the line of evidence by which he expects to convict the prisoner. The attorney then summons his witnesses one by one, and examines them about the facts of the case. After he finishes with a witness, the defendant's attorney may cross-examine.

The questions put to each witness are limited by rules of evidence; no irrelevant matter may be introduced, and his testimony must be confined to facts with which he is personally acquainted. In principle the purpose of these rules is to prevent the jury from being misled or prejudiced by opinions and allegations unconnected with the merits of the issues. If either lawyer believes that the other is asking an improper question, he may object, and the judge then decides whether the objection should be allowed. If the defendant's lawyer is dissatisfied with a ruling against him he takes an "exception," with the thought of an appeal should he lose. If he believes that grossly prejudicial questions have been asked of witnesses, he may ask the judge to declare a "mistrial," which means stopping the proceedings and starting a new trial.

The Defendant's Side Presented. After the prosecution completes the presentation of its side of the case, the attorney for the prisoner presents the other side in about the same manner. He first makes an opening statement to the jury, and then calls and examines his witnesses one by one, the prosecuting attorney being given a chance to cross-examine as soon as each direct examination is finished. The prisoner is not questioned at any stage of the trial unless he wishes to go on the stand

[11] Less, in some states, for particular types of cases.

[12] The old process of selecting jurymen has been severely criticized within recent years on account of the great expense and waste of time.

as a witness in his own behalf, and in that event the prosecuting attorney may cross-examine him in the same way as the other witnesses for the defense.

Charging the Jury. On the completion of the testimony, the prosecuting and defending lawyers sum up their respective cases in speeches to the jury. Then the judge delivers his charge. He reviews the evidence brought out by each side, and outlines to the jurors the law applicable to the case before them. Thus, he tells them what must be shown in order to constitute the crime with which the defendant is charged, describes the different degrees of that crime (if the particular offense happens to be divisible into degrees), and states how much proof is necessary for conviction under each. The jury must feel convinced beyond a reasonable doubt that the defendant is guilty before it decides against him; otherwise it must find a favorable verdict or report inability to agree.

The Verdict. When the judge finishes his charge, the jurors retire to deliberate. They must, as a rule, arrive at a unanimous verdict one way or the other, and often that takes many hours.[13] If they are unable to agree, they are discharged; and the prisoner may be tried again, should the prosecution so decide. When the jury comes to an agreement, it returns to the courtroom and the foreman announces its verdict. If the defendant is found not guilty, he is discharged at once. If he is convicted, the judge imposes sentence either immediately or at some future date.

Punishment. The punishment for serious crimes is usually death or imprisonment. For minor offenses a fine is often imposed, but sometimes the sentence consists of a combination of fine and imprisonment. The term of imprisonment varies, according to circumstances, from a short confinement to imprisonment for life at hard labor. Generally the law lays down minimum and maximum limits of punishment for the various offenses and the trial judge has discretion within those extremes. In a few states convicts are compelled to work in the open air in chain gangs. Formerly it was a common practice to let them out on contract to private employers; but this system has awakened great opposition and is being abandoned.

Rewards for Good Behavior. For good behavior the prisoner usually receives a substantial reduction in the term of his sentence, and it often happens that he is pardoned by the governor before it ends, if there are extenuating circumstances warranting mercy.[14] To encourage reform

[13] In a few states a verdict by less than the whole number of jurors is allowed in some cases.

[14] On the pardoning power, see pp. 626–627.

among convicts, several states have devised a new scheme of punishment known as the "indeterminate sentence." Where it is in effect the judge imposes a minimum and maximum term, and the actual period of confinement within those limits depends upon the conduct of the prisoner himself. If he is liberated before the close of the maximum term, he is generally kept on parole and obliged to report to prison officials or to special authorities at stated intervals until the end of the period.

Death Penalty. For murder the death penalty is inflicted in most states, and in a few commonwealths it is also imposed for other crimes such as rape and arson. Execution is sometimes carried out by hanging, but in a number of commonwealths electrocution or lethal gas has been substituted as more humane. Several states—Maine, Michigan, Oregon, Wisconsin, Minnesota, and North Dakota—have abolished capital punishment entirely. Opponents of this extreme penalty claim that the fear of death does not diminish the percentage of crimes and that juries are reluctant to convict where they know that the result will be death, often choosing a lesser degree so that the accused may be punished by imprisonment. Although it rarely occurs that innocent persons are, by a miscarriage of justice, put to death, still several cases of that kind are on record, and a mistake may be made at any time on account of the circumstantial evidence frequently admitted. If the reformation of the offender is the true end of enlightened punitive justice, then the death penalty makes impossible the realization of that purpose.

Appeals. When the prisoner has been found guilty and sentenced, his resources are not yet at an end. He may appeal to a higher tribunal if serious mistakes have been committed in the trial court. Alleged errors in the admission or exclusion of evidence or incorrect statements of the law applicable to the case made in the judge's charge afford legal grounds for reversal. If the appeal is decided against the prisoner, he may, in some instances, carry the case still higher, until finally it is passed upon by the highest court of the state or by the Supreme Court of the United States, should a federal question be involved, especially due process of law under the Fourteenth Amendment. If he wins on the final appeal, a new trial is usually granted and the case is sent back for a rehearing to the court in which it was originally tried, unless the prosecutor decides to drop it. If he loses his appeal, the defendant must acquiesce in the sentence, unless the governor can be persuaded to pardon him.

Problem of Appeal Abuses. A great deal of criticism has been evoked against liberality of appeals in criminal as well as civil procedure and the consequent failures of justice. It cannot be denied that the verdicts

are too frequently reversed for purely technical reasons, involving few, if any, issues of justice, but there are enough instances of palpable wrongs righted by higher courts to put us on our guard against rigid restrictions. There have been many cases of innocent persons rushed to trial in lower courts by ambitious prosecutors, hounded by community and press clamor for a victim, wrongly accused or identified by witnesses, and condemned by excited juries, as Edwin Borchard has shown in his vivid volume, *Convicting the Innocent*. If a prisoner has virtually no right to appeal, many serious mistakes will go uncorrected.

A middle ground is possible. Appellate courts could adopt the practice of automatically confirming each verdict unless they are convinced that alleged errors at the original trial could have actually prejudiced the minds of the jury.

CIVIL LAW

Special Features. The line between the substance of criminal law and civil law is not sharp, for both pertain to human life and action in society. But there are certain striking distinctions between the two branches of law in the matter of responsibility for enforcement. In theory and practice crimes are treated as wrongs committed against the public, although individuals suffer from them; and agencies of the state take the lead in tracking down, prosecuting, and punishing offenders. While government agents may be involved as plaintiffs or defendants in civil suits, most civil trials pertain to actions brought in the courts by individuals (or associations) against other individuals (or associations) for the purpose of determining some property or personal right at issue between the contestants. In other words, the main responsibility for the enforcement of rights and duties in civil law rests upon private persons whose privileges are violated.

Rights in Real and Personal Property. One of the primary functions of civil legislation is to define what shall be deemed objects of private property, to determine how such objects may be lawfully acquired, to guarantee possession to rightful owners, and to regulate their use of property as well as business transactions in relation to property. For convenience, property is divided into two broad classes: real and personal. Real property consists of land and buildings or other structures more or less permanently attached to land. Personal property embraces tangible things such as furniture, clothing, watches, pianos, and other "movable goods" and mere intangible claims to property—for example, a note for a given sum of money payable at some time in the future (an I O U) or a mortgage on a farm or house to secure the payment of money due on a given date.

Contracts. Many rights in relation to property or matters of value arise from agreements freely made by individuals—agreements known as "contracts." All persons of "sound mind" over a given age may enter into contractual relations with one another to buy and sell, employ and render services, and to carry out almost any kind of arrangement that is not contrary to good morals or public policy. A contract to be enforceable at law must result from an offer made by one party and an acceptance of the offer by the other. If Smith says or writes to Jones, "I offer to sell you my house for $10,000," and Jones replies "I accept your offer," in legal terminology their minds have met and there is a contract between them. Smith is then bound to convey the house, and Jones to accept and pay for it. A contract, to be valid, must usually be made for a "consideration"; that is, each party must give up something. In the illustration above, one promises to convey the house, while the other agrees to pay for it. A mere promise made by one party, when nothing is offered in exchange for it, is not, as a rule, binding. A contract need not always be expressed in so many words but is often implied by the transaction itself. For instance, when one orders goods from a store, a promise to pay their reasonable value is implied.

If one of the parties to a contract fails to perform his obligation, the other may sue him and get such damages as were caused by the breach. But in some cases the injured party may bring a suit in equity (p. 639), and the court of equity will order the other party to carry out his part of the contract. This relief, which is known as "specific performance," is limited, however, to certain classes of contracts, such as agreements for the sale of real estate.

Torts. Some violations of private rights are called "torts," wrongs for which the law provides remedies. A person guilty of a tort may be sued for damages by the person whom he injures. For convenience, we may subdivide torts into three classes: those directed against the person, those aimed at property, and those which are invasions of both personal and property rights.

(1) False imprisonment—one of the torts in the first class—consists of arresting or detaining a person without sufficient cause. Somewhat akin to false imprisonment is malicious prosecution. Another tort directed against the person is assault and battery; putting another in fear of personal injury is an assault, while inflicting violence upon him constitutes a battery. All the various forms of disturbance in family relations are torts, such as abduction of a wife or child or alienation of affection. Finally, there is the tort of defamation of character. It occurs in two forms: libel, which is expressed in print or writing; and slander, or oral defamation.

(2) Of the torts directed against property, the most important is trespass or disturbance of another in the possession of his property; for example, entering the land of another person to fish or hunt without permission.

(3) Some torts affect both person and property. The first of these is nuisance. In law any disturbance of another's reasonable use and enjoyment of his own property constitutes a nuisance. Thus the maintenance of chemical works which give out unpleasant odors, unreasonable ringing of bells, noises which interfere with sleep, and numberless other acts are called nuisances. Finally, there is the tort of negligence, which consists in failure to perform a duty with the care required by law. For instance, the reckless running of a railroad train which results in an accident, and injuring a person by negligent driving on a highway are actionable torts.

Although a person may be guilty of a tort, there are circumstances under which no recovery is allowed against him. If the injured party was himself guilty of negligence and his negligence was one of the causes that led to his injury, ordinarily he cannot obtain damages by suing the other party to the affair.

Domestic Relations. One of the important branches of the civil law deals with marriage and all the relations growing out of it. At common law no particular formality was necessary to constitute a valid marriage. An agreement to live as husband and wife was sufficient. This rule is now generally modified by enactments requiring a formal license and solemnization of marriage and in some places a satisfactory passage of a medical test. But no marriage may be consummated anywhere between close relatives or by persons below a certain age.

According to the old common law, if the husband and wife have no contracts or agreements to the contrary, all personal property belonging to a woman becomes the property of the husband on her marriage and her real estate passes under his management; the husband is obliged to support his wife, and for this reason he is liable for all necessaries furnished to her, if he fails to provide them himself; he is also liable for debts contracted by his wife previous to their marriage; a married woman is incapable of making a binding contract, unless her husband has abandoned her; the husband may be sued for any torts committed by his wife, and at the same time he may recover for any injury done to her. These ancient law rules, however, have been abolished or materially modified by legislation throughout the United States. In the most advanced commonwealths the married woman now has substantially the same property rights as the husband.[15]

[15] See "The Legal Status of Women," *The Book of the States*, 1948–1949, pp. 379 f.

Marriages may be brought to an end by two types of court actions under civil law—annulment and divorce. A marriage may be annulled on the grounds that it was legally defective in some respect from the outset—as where one spouse was under the minimum legal age for marriage or was already married to another. Sometimes the annulment declares that the marriage was void from the beginning; at other times, it merely recognizes the marriage as no longer effective.

Where a marriage was legally valid at the start but has been upset by the subsequent actions of the partners, recourse may be had either to a legal separation or to the more extreme action of an absolute divorce. In 1945, the number of divorces per 1,000 population was almost a third as great as the number of marriages, throwing heavy burdens on the courts. Requirements for divorce differ widely among the states. At one extreme is South Carolina, where no divorces are granted; at the other, are states where mere incompatibility of temper and a brief term of residence suffice. In an effort to circumvent the more rigid requirements of their home states, persons sometimes move temporarily or permanently to states which permit an easy divorce. As the Supreme Court of the United States does not absolutely require one state to honor a divorce granted in another, this situation produces many serious complications (pp. 520–521).

Inheritance. Another great branch of the law bearing on family or domestic relations, covers inheritances. If a deceased person has left a valid will naming his heirs or beneficiaries, the law provides for its enforcement and the disposition of the property in accordance with its terms. Usually a person designates in his will an executor or executors, who administer the property and distribute it to those who are entitled to it. If disputes arise over the intent or effect of the will, as often occurs, rival beneficiaries or would-be beneficiaries may carry their claims into court, where a settlement may prove to be a long drawn out and expensive affair. Where there is no will, the property is divided among the surviving relatives of the decedent according to rules laid down in the law of the state.

CIVIL PROCEDURE

Starting a Suit. If a person wishes to enforce some civil law which he thinks has been violated in such a way as to transgress his rights, he must bring an action against the offender in a civil court.* Ordinarily a suit is started by the preparation of a statement, called the complaint or petition, setting forth the facts on which the plaintiff's grievance is based; this is filed in the proper court and served on the defendant, together with a summons calling upon him to answer within a certain

time. If the defendant admits the facts but believes that the plaintiff has no lawful grounds of action, he may enter what is called a "demurrer." An argument is then had before a judge on the question whether, granting the facts alleged in the complaint to be true, a sufficient cause of action has been established. The other alternative before the defendant is to challenge the facts alleged in the declaration. He must then serve on the plaintiff what is called an answer or plea, either denying the whole or a portion of the complaint or acknowledging its truth and making some affirmative defense.

Wherever the original common law procedure prevails, an interchange of pleadings, as these various statements are called, can go on more or less indefinitely until an issue is reached, one of the parties affirming some fact or set of facts and the other denying it. But the statutory codes of civil procedure now in operation frequently limit the number of steps to two—the plaintiff's complaint and the defendant's answer; sometimes, however, they also allow the plaintiff to reply to the answer.

Judge and Jury. As soon as its turn on the court calendar is reached, the case comes up for trial. If it is a suit in equity, it is ordinarily tried by a judge alone. If it is a suit at law, it is generally tried before a judge and a jury, unless the amount of money involved is small or jury procedure is waived by agreement of the opposing sides. In a jury trial, the principal duty of the judge is to supervise the conduct of the proceedings and to pass on matters of law, while the function of the jury is to decide questions of fact under the guidance of the judge.

If a jury is to be employed, several possible jurors are summoned; they are examined by the lawyers of the litigants; and if it is shown that any one of them is legally exempt or incompetent to serve on account of bias or otherwise, the judge may excuse him. Besides this, each side may challenge a certain number of jurors without stating any cause. When the jury of twelve members—in some states, a smaller number—has been secured, the actual trial begins.

Presentation of the Case. Usually the plaintiff's counsel opens by describing the nature of the case to the jury and stating the main facts which he expects to prove. He then calls his witnesses and examines them one by one, the defendant's attorney being given an opportunity to cross-examine at the close of each direct examination. The questions that may be asked are regulated by rules of evidence, and a substantial error on the part of the judge in the admission of improper evidence or the exclusion of competent testimony is ground for reversal of the judgment on appeal to a higher court.

After the plaintiff's side of the case has been laid down, the de-

fendant's side is presented in the same manner. His attorney makes a statement to the jury and then examines his witnesses, the counsel for the plaintiff being allowed to cross-examine. The plaintiff and defendant may be witnesses if they wish. After the defendant rests, the plaintiff may introduce evidence in rebuttal, and then the defendant may bring forth testimony in sur-rebuttal. When the development of the evidence is completed the attorneys for the opposing sides may sum up their cases in addresses to the jury.

Action of the Court. If the plaintiff has failed to make out a prima facie case, the judge may dismiss the complaint without sending the issue to the jury. Or if from the evidence that has been presented only one conclusion of fact is possible, the judge may instruct the jury to return a verdict in accordance with that conclusion. If, in such circumstances, a verdict for the plaintiff is directed, the only question to be decided by the jury is the amount of damages or the award. But when there are controverted matters of fact, as is usually the case, decision with regard to them is left to the jury, subject to instructions from the judge with reference to the law to be applied.

The jurors retire to consider the evidence and reach a decision; if they favor the plaintiff, they must assess the damages. As a rule, the verdict must be unanimous; but some states allow decision by less than the total number. If the members of the jury are unable to agree upon a decision, the case, unless the plaintiff drops it, will be tried again with another jury. If a jury is not employed, the procedure is practically the same, except that the judge passes upon all questions himself.

Verdict and Execution. Since the remedy at law in numerous cases is money damages, a judgment for the amount assessed is entered against the defendant. If he does not pay voluntarily, an "execution," or an order to the sheriff, may be issued. Armed with this writ, the sheriff or one of his deputies takes possession of the defendant's property and sells enough at auction to satisfy the award to the plaintiff and perhaps all the costs of the suit. Of course, if the defendant is found to be a person without property, the plaintiff has no redress. In litigation over title to real estate, the usual judgment for a plaintiff simply authorizes him to enter upon the premises in question. If the defendant then resists the plaintiff, he may be evicted by force.

Decree in Equity. In equity cases the decision of the court is called a decree. It does not award money damages, but directs the defendant to do or not to do something. The decree may, for instance, command him to carry out his part of a contract and convey to the plaintiff land which he agreed to sell to him or, to cite another example, it may

enjoin him from maintaining a nuisance. In fact, a decree in equity may take on any one of innumerable forms but it always is in essence a command to do, or not to do, some specific thing. If the defendant fails to obey the decree, he is guilty of contempt of court and may be fined or imprisoned until he complies with the order.

Grounds for Appeal. After the case is decided, the losing party may appeal, alleging (a) that errors of law have been committed by the judge, or (b) that the verdict was contrary to the weight of evidence. The party that loses an appeal may sometimes carry the matter still higher, until it finally reaches the supreme court of the state or of the nation. Usually an appellate court passes only on questions of law.

If the highest court which the case can reach affirms the judgment of the trial court, that ends the litigation. If the judgment is reversed, the matter is ordinarily sent back for a new trial. Then the party that loses on the second trial may compel his adversary to run the gantlet of the appellate courts. If the judgment is again reversed, a third trial may be had and the same process may be repeated. If the party that loses at each stage desires to appeal, there is no way of ending the litigation until a judgment of the trial court is affirmed on the highest appeal.

Appeal Abuses. In some instances this freedom of appeal results in practical injustice. There is one case on record in New York which was in the courts for twenty years. In 1882 a brakeman who was injured while in the service of a railroad brought suit against the company.[16] In 1884 he recovered $4,000 damages, but two years later the verdict was reversed on appeal. On a new trial he got a verdict for $4,900. This was appealed to two courts successively. The first affirmed and the second reversed the judgment. The company was successful at the third trial in 1889. Two appeals by the brakeman followed, the court of last resort deciding in his favor in 1897. The case was then tried for a fourth time, and the brakeman recovered $4,500. The company then appealed and met with success. A fifth trial was necessary and the jury awarded the plaintiff $4,900 damages. The judgment was again set aside on appeal. A sixth trial followed with the same result. In 1902 the seventh and last trial took place. The plaintiff recovered $4,500. Again the company appealed, and was defeated. Thus the chapter was closed.

This is, of course, an extreme case. Appeals are generally taken only when the counsel in charge feels that there is a fair chance of success or of wearing out the opposing party. Most appeals are unsuccessful, so that only a minority of cases have to be tried more than once.

[16] Baldwin, *The American Judiciary*, pp. 366–367.

Criticism of Appeal Abuses. Nevertheless, freedom of appeal and long drawn out litigation have been made the subject of severe criticism. Delays in civil cases are far more frequent than in criminal cases and often amount to a denial of justice. But, on the other hand, it is hardly practicable to restrict freedom of appeals without making arbitrary rules that are bound to work hardship at times. To allow appeals only in controversies over large amounts of money would give unjust privileges to wealthy litigants. Moreover, cases involving small sums sometimes raise legal questions of great importance, which should be passed upon by the higher courts.

It has been suggested that appeals should not be made a matter of right, as they usually are today, and that no appeal should be allowed unless permission is specifically granted by the trial judge or by the proper appellate court. In reply to this proposal, it is pointed out that such a system might frequently result in a denial of review in cases in which injustice has actually been done and should be righted by a higher tribunal.

Generally, when an appellate court reverses a decision of a lower court it has the power to enter a final judgment for the other party. But this authority is rarely exercised; ordinarily the case is sent back for a new trial. In some instances, such action is inevitable, particularly when the proof of essential facts has been shut out at the original hearing or damages have been assessed on an improper basis. Yet very often the appellate court has sufficient data on the record before it to warrant making a final disposition of the case. If this were done whenever possible, one of the largest sources of delays would be overcome.

CRITICISM AND CONSTRUCTIVE TENDENCIES

Nature of Criticisms. There is undoubtedly a great deal of dissatisfaction with the administration of justice on the part of members of the legal profession and others interested in the matter. In addition to protests against delays and appeals and against the conduct of local courts, there is a growing criticism of the judicial system itself. It is said that there are too many separate courts having jurisdiction over the same classes of cases and that they make conflicting decisions and offer conflicting views respecting identical laws. Legal tradition, if not positive law, generally requires judges to abstain from rendering an opinion relative to the constitutionality or meaning of a law except when considering an actual lawsuit brought before them. As a result, the public in many cases cannot know what is lawful or unlawful without resorting to legal proceedings; and such proceedings are costly, besides being tedious. Disputes among businessmen even though slight

in nature, if their settlement is long delayed, may work inconvenience and hold up production and trade. Poor persons or persons of moderate means are often unable to obtain justice without a lawsuit for which they have no money to pay. Hence they suffer losses which are small in amount but ruinous to them. Finally, it is pointed out that state courts frequently set aside state laws by a small margin of four to three judges, or three to two, creating uncertainty and discontent among the people interested in the fate of the measures in question. All these matters are now vigorously debated by members of bar associations and other citizens and out of the discussions have arisen a number of constructive remedies.

Judicial Consolidations and Councils. To meet the criticism respecting overlapping and conflicting jurisdictions, it is proposed to create one consolidated system of high state courts over which the supreme court shall have general control. Louisiana, for example, gives its supreme court power to assign and distribute judges in such a manner as to secure a prompt administration of justice and also to supervise and coordinate the work of lower courts as by investigating them and demanding reports from them.[17] More than half of the states have created high judicial councils for the purpose of scrutinizing the operations of the courts, expediting their business, and generally improving court operations.

Declaratory Judgments. Of great importance is the reform that permits private citizens to appeal to the courts to find out what the law is on some point or points without resorting to expensive lawsuits; the answers of the courts in cases of this kind take the form of "declaratory judgments." Statutes authorizing such procedure have been upheld as constitutional in over thirty states. If, for example, under this plan, the heirs of a dead man are uncertain as to their rights under his will, without engaging in a lawsuit they may call upon the proper court to tell them just where they stand. Thus, as one writer has put it, the courts are made "authorized legal advisers to the people." Also making for simplicity and speed is the practice of allowing the highest court of the state to give "advisory opinions" to the governor and either branch of the legislature as to the constitutionality and general legality of any proposed act or law. This system prevails in numerous states.

Arbitration and Conciliation. To make it possible for businessmen and others to settle differences amicably, without the trouble, expense, and delays associated with trials in the regular courts, a number of states have created agencies of arbitration and conciliation. North

[17] Louisiana Constitution, Art. VII, Secs. 10 and 12.

Dakota affords a striking example. In 1921 it established a state-wide conciliation system which permits persons to adjust certain controversies involving small sums of money without going to the courts at all. The district judges appoint in each county a "debt adjustment board" from which contestants may choose conciliators. If a citizen has a claim against another, he can appeal to one of the conciliators, who will notify the opposite party to appear and will attempt to effect an "amicable settlement."

Extraordinary Majorities in Constitutional Cases. The complaint that state courts sometimes declare laws unconstitutional on doubtful grounds as evidenced by four-to-three or five-to-four decisions is met in a few states by a provision that an extraordinary majority shall be required to reach such conclusions (p. 551).[18]

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[18] For example, Ohio (Constitution, Art. IV, Sec. 2) requires a six to one decision, unless upholding a lower court decision; Nebraska (Constitution, Art. V., Sec. 2) requires a five to two decision.

CHAPTER 32

State Administrative Organization

Nature and Extent. The state administration not only faces the problem of enforcing many laws but must perform numerous other services, such as maintaining highways and parks. The average state administration is, nevertheless, comparatively small, judged by national standards or even by the size of the executive branches of the bigger cities. The largest state government in the country, that of New York, had 68,000 employees in 1947, far less than the number of persons working for the city of New York alone. According to Census Bureau findings in 1947, thirty-four states had fewer than 20,000 employees apiece and fifteen states, fewer than 10,000 each.[1]

Constitutional Prescriptions. Most state constitutions expressly create at least a portion of the state administrative structure, naming certain departments, offices, boards and commissions, prescribing their functions, and indicating how their chief personnel shall be selected. Occasionally a constitution even sets forth the general framework of the entire state administration. That of Missouri, adopted in 1945, establishes the offices of governor, lieutenant governor, state auditor, secretary of state, attorney general, and state treasurer, and provides for a department of revenue, a department of education, a department of highways, a department of conservation, a department of agriculture, and not more than five additional departments.[2] To the extent permitted by the constitution, of course, the state legislature fills in the details of the administrative organization by statutory enactments.

Similarities and Diversities. In using the liberty they possess under the National Constitution to establish any type of government they please, provided it is republican in form, the several states have done a great deal of divergent experimenting in the field of administration. While all of the state governments have certain common features, such as the single-headed department and the board, they have tied the

[1] United States Bureau of the Census, *Government Employment*, Vol. 8, No. 4, October, 1947.

[2] Constitution of Missouri, Art. 4, Sec. 12.

various agencies together according to their own local preferences—some favoring a loosely organized pattern reflecting fear of a strong governor, others preferring a consolidation of units under a governor vested with broad powers, and still others falling somewhere between these extremes.

BASIC TYPES OF ADMINISTRATIVE AGENCIES

Single-Headed Establishments. Every state has placed a single chief at the head of each of numerous administrative agencies. This arrangement is favored where the work to be performed is of a routine character, leaving the officer in charge with little room for making important choices of policy. Of the many single-headed establishments, a few are of such fundamental importance, and are so widespread, as to call for special notice. In this category are the offices managed by secretaries of state, treasurers, auditors or comptrollers, and attorneys general.

Secretary of State. All states have an independent secretary whose functions are very much the same everywhere. He is custodian of the state archives; he has charge of the publication and distribution of laws; he generally keeps the election records, issues notices for elections, and supervises the compilation of election returns for state offices. In some states the secretary issues certificates of incorporation to companies formed under the general laws, including banking and insurance concerns; he reports annually to the legislature on a large number of subjects as ordered by law or by legislative resolution; he is *ex officio* member of certain boards and commissions; and he is the custodian of the great seal of the state.

Treasurer. The treasurer is the collector and custodian of moneys accruing to the state from taxes, fees, and other sources of revenue. On proper authorizations based in due form upon legislative appropriations, he pays out the money of the state.

Auditor or Comptroller. In general, we may say, this officer audits all state accounts and authorizes the treasury to make payments of money as directed by law. Sometimes, as in Virginia and Massachusetts, a comptroller and an auditor are to be found, the former acting as the authorizing officer and the latter as a scrutinizer of payments after they are made. In case there is a central inspection of local accounts, the state's high financial officer may prescribe forms of reports to be made by local authorities and supervise the examination of their books and records (p. 698).

Attorney General. It is the duty of the attorney general to oversee the prosecution or defense of all actions in which the state has an

interest, to advise the governor and other state officers on legal questions, and to take charge of the legal business of the state departments and bureaus which need the services of counsel. Frequently, the attorney general has certain specific duties in addition to general supervision of the state's legal interests. When required by the governor, either he or one of his deputies must appear before any judicial court or a grand jury thereof for the purpose of conducting such criminal proceedings as the governor may specify; upon the request of the governor, secretary of state, treasurer, or other high state officers, the attorney general must prosecute any person charged with violation of the laws which these officers are especially required to execute; he must cause all persons indicted for corrupting, or attempting to corrupt, any member of the legislature, to be brought to trial.

Operating Boards. A large number of states intrust various functions, particularly those pertaining to higher education and the management of state institutions in general, to boards which assume responsibility for over-all policies and operate through designated superintendents. The board, it is argued, will bring to bear on the issues before it the views of diverse elements in the commonwealth and, hence, will reach more representative decisions than any single executive. Since the board meets only occasionally and is allowed no large expense accounts, the theory runs, politicians will take little interest in it; and places on it will be filled by public-spirited citizens. The degree to which the board actually undertakes to scrutinize the details of the work under its direction varies, of course, with its legal powers and the inclinations of its members.

Head with Consulting Board. An effort is sometimes made to combine the advantages of prompt action and clear responsibility inherent in the single executive, with the deliberative features of the board, by placing an administrator in charge of an agency and adding a purely advisory body, large or small. In this case, the administrator is the unquestioned chief of the division but he receives warnings, comments, and proposals from the advisory group composed of laymen, perhaps diverse in interests and political views.

The Regulatory Commission. The states, like the National Government, usually assign quasi-legislative and quasi-judicial functions to commissions composed of three or more members. In this category are state bodies which regulate public utilities and make and administer rules relative to factories, industrial accidents, workmen's compensation, and kindred matters. Such units frame and adopt regulations. They hold hearings and decide specific cases very much as the judges of courts do.

For example, an industrial commission, in administering the law providing compensation for those injured in accidents, will hear the employer and the employee in each contested case and award damages to the complainant according to its interpretation of the law and facts. This type of organization is advocated whenever the legislature is about to vest in the hands of some agency the power to fill in the provisions of a statute by devising rules covering details. It is defended as making for flexibility and reasonableness in the application of general principles to concrete cases.

What can be done to prevent regulatory commissions from becoming laws unto themselves and acting with too little regard for the rest of the state administration or the public? One method for keeping such bodies in check is to require them to publish their rules and regulations before attempting to put them into force. California, Connecticut, Pennsylvania, New Jersey, and Michigan have made this obligatory. In Michigan, for example, rules and regulations must ordinarily be approved by the attorney general as to form and legality, and be arranged and published by the secretary of state in the administrative code before they take effect.[3] Where this state version of the "federal register" program (p. 282) is in use, persons affected by regulations are protected against being caught unawares by mere typewritten decrees hidden away in distant files or posted on bulletin boards at the state capital.

Going a step further, California has established a permanent division of administrative procedure and charged it with studying and recommending the improvement of administrative procedure by state agencies. It has been supplied with a pool of hearing officers, available to other agencies that wish to avoid having their own officials serve as both prosecutors and judges. A statute also prescribes minimum standards of fair administrative procedure in licensing and disciplining cases.[4]

THE APPOINTMENT AND REMOVAL OF HIGH OFFICIALS

Popular Election of the Historic Officers. How shall single executives and members of boards be chosen? As far as certain historic officers are concerned, the general answer has been that they shall be elected by popular vote. As of the year 1915, according to a federal survey, forty-two states elected the attorney general, forty-one elected the

[3] Herman H. Dignan, "The Michigan Administrative Code," *State Government*, May, 1945, p. 85.

[4] Ralph N. Kleps, "The Reform of Administrative Procedure in California," *State Government*, November, 1945, pp. 200–203.

treasurer, forty the auditor or comptroller; and thirty-eight the secretary of state.[5]

Other Elective Officials. The survey also showed that as of 1945 in thirty-two states the superintendent of education was elected by popular vote; in fourteen, the agricultural board or commissioner or the public service or utilities commission was elected; in eight, the land commissioner; in seven, the insurance commissioner; in five, the board of regents; in four, the labor commissioner; in four, the mine inspector; in three, the tax or equalization board or commissioner; in three, the corporation commission; in fifteen, the district attorney or solicitor; and a scattering of other officials including one state printer, some highway commissioners, a surveyor general, a board of education, and members of the executive council.

Other Means of Selection. States receptive to the idea of a strong executive allow the governor considerable latitude in appointing major executives, either alone or with senatorial confirmation. Here, departmental heads also frequently appoint and remove their immediate subordinates, thereby completing the smooth flow of authority. But many states are still opposed to a strong executive, and place severe limitations on the governor's power of appointment. Thus the governor may be required to secure approval of his nominees by the senate or by both houses of the legislature. Occasionally the legislature has the power in its own hands; in Maine and Tennessee both houses, by joint vote, choose the secretary of state, and the governor does not participate in the process.

On the same board may be members chosen by two or more methods supplemented by members who hold other positions and serve merely in an *ex officio* capacity. In the case of boards and commissions a special effort is made to assure continuity by providing long and overlapping terms; only a part of the members may go out of office at a time. Hence it seldom happens that a new governor when he comes to power can make a clean sweep and assume full responsibility before the people for carrying on the work of the state; he must nearly always operate with the aid of many high officials who belong to some other political party or faction.

Removal of Officers by Impeachment. Fear of executive excesses finds common expression at the state level in provisions for impeachment. Many state constitutions provide that any civil officer of the state may be impeached; others make all executive officers liable to

[5] U. S. Bureau of the Census, *Elective Offices of State and County Governments*, issued December, 1946.

that procedure; and still others specially enumerate the officers who may be subjected to it. The causes of impeachment vary, but crime, misdemeanor, treason, bribery, drunkenness, malfeasance, gross immorality, extortion, neglect of duty, incompetence, and misconduct are among those enumerated in various constitutions. South Carolina, however, assigns no causes whatever; it leaves the matter entirely to the discretion of the members of the state legislature.

The process of impeachment, in general, follows the pattern laid down for federal cases by the Constitution of the United States. That is, the lower chamber of the state legislature ordinarily initiates the proceedings, after which the senate sits as a court of trial, sometimes in conjunction with one or more justices of the state supreme court. Obviously such a division of duties is not feasible in Nebraska, since it has a unicameral lawmaking body. There the single house has the sole power of impeachment, and may exercise it by majority vote. Upon the passage of an impeachment resolution, the clerk of the legislature proceeds to serve notice of the action on the chief justice of the state supreme court. He is, in turn, obligated by the state constitution to instruct his colleagues on the bench to meet with him at the capital within ten days for the purpose of conducting the formal trial of the person impeached. To prevent the court from passing judgment on itself, impeachment cases involving the justices of the supreme court are referred to the district court for the state capital area.

The effect of a successful impeachment action is generally to oust the offender from his position and to disqualify him from holding state offices in the future. Nor is this all, for a person who has been impeached may subsequently be tried for his offense, if criminal in nature, in the ordinary law courts, and may thereby receive additional punishment.

Removal by the Governor. The power of removal by the governor, acting alone, is not extensively granted by state constitutions. In several states—particularly Colorado, Maryland, Illinois, Nebraska, and Pennsylvania—he may remove those officers whom he appoints. In those states which have undergone an administrative reorganization, grouping the numerous bureaus, commissions, boards, and agencies in a few departments, the appointing and removing power of the governor has been materially enlarged. This is especially true in New Jersey (p. 670).

Other Methods of Removal. Rather than entrust the removal power solely to the governor, states sometimes provide alternate methods. Perhaps the governor must secure the consent of the senate. This is a

frequent practice with respect to state officers and members of commissions who are appointed by the governor with the approval of the senate.

Another method of removal is by the courts. In a few instances the judges of the higher courts may remove prosecuting attorneys and other public officers. For example, the constitution of Oregon provides that "public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law." [6]

Removal of elective executives by recall on petition and action of the voters is to be found in several states (pp. 566–568).

THE WEAK EXECUTIVE TYPE

The Two Major Types of State Administration. The many offices and agencies embraced in a state administration may be constituted and their directors chosen according to one of two principles. Fear or dislike of executive domination may lead a state to set up a long list of semi-independent agencies, boards, and commissions and permit the governor to exercise little or no control over them. This may be called the weak executive type of administration. On the other hand, in a quest for concentrated responsibility a state may consolidate nearly all offices and agencies in a few large departments and place them under the close control of the governor, thus creating the strong executive type. Between the two extremes are the states which combine elements of both plans, in varying proportions.

Diffused Administration. Among the more or less autonomous agencies to be found in the administration of a state with a weak executive system are, first, those concerned with what may be called the business management of the state: the collection of taxes, accounting, budget preparation and control, civil service administration, the purchase of supplies, and the operation of public buildings. Others are primarily devoted to carrying out functions assumed directly by the government: management of educational institutions, prisons, asylums, hospitals; operation of state fairs; administration of parks, forests, reservations, and waterways; and construction and maintenance of highways, canals, and other public works. A third group deals with promotion of agriculture and business enterprise. A fourth consists of boards engaged in enforcement of regulations governing factories,

[6] Amendment VII.

mines, public utilities, banking, insurance, corporations, workmen's compensation, and labor conditions generally. Trailing along at the end may come a state historian, a voting-machine commission, a statutory consolidation board, a superintendent of weights and measures, a forest, fish, and game commissioner, a state architect, a board for the equalization of local taxes, a farm loan board, a commission for the promotion of uniform legislation, a water supply commission, or an embalming board. In the aggregate, these scattered agencies range in number from fifty to a hundred or more; even in agricultural regions where government is relatively simple they often present a bewildering array. A survey made in 1945 revealed that Texas had 122 semi-independent administrative agencies, despite many years of agitation in favor of combination and consolidation.[7]

Origins. The multiplication of semi-autonomous administrative units is in part the result of the very understandable zeal of reformers for giving their favorite programs prominence and independence. When, for instance, an active group of citizens finally succeeds in inducing a state to adopt a policy of workmen's compensation or state police protection, it is very likely to press for the assignment of the new function to an independent agency, ranking in prestige with the older leading state agencies. A proposal to turn the function in question over to a mere bureau in a large department, perhaps having little interest in the novel project, is almost certain to arouse the hostility of the reformers who sponsor it. Given the rapid expansion of state functions during the last half century such human propensities tend to make highly diffuse administration almost inevitable, at least until the very multiplicity of offices makes over-all management impossible.

Other advocates of the weak executive type take broader grounds. They argue that if all administrative agencies are concentrated in a few huge departments and placed under the direct control of the governor two gross evils become immediately possible. Endowed with enormous powers over employees and money, the governor may use them to build up a political machine that will keep his party in office indefinitely and permit it to ignore the needs and wishes of the people. As a rule also, they contend, the popularly elected governor has had no large administrative experience and has neither the competence nor the training required for managing great establishments. The moral of these arguments is that the work of the state administration should be parcelled out among many offices, boards, and other agencies—each small enough to be within the mental range of the politicians available

[7] Dick Smith "Administrative Reorganization in Texas—A Reappraisal," *State Government*, May, 1945, pp. 86–87.

for the public services. Additional support for diffuse administration comes from the Jacksonian tradition in American politics. Although Jackson himself was a high-handed executive who ran over Congress roughshod, his followers thought that popular election of various state executives, in addition to the governor, would enable the people to hold large areas of administration to strict accountability. Indeed some of the opposition to a strong governor goes back to the days when royal governors were at odds with the American colonists.

Practical Difficulties. Whatever may be the theoretical gains from diffuse administration, as applied on a small scale, they tend to disappear as functions multiply. Where each independent agency, board, or commission thinks primarily of its own needs, the administration is likely to break up into quarreling factions, each vying with its fellows for funds, employees, and public attention. In this case agencies will seek and win support of political friends and private interests. In connection with each one of the great functions undertaken by the state—pertaining to health, education, charities, highways, industries, and labor, for instance—there usually appears some kind of citizens' organization or lobbying machine. It may be in theory disinterested, not formed for profit, or it may be directly interested in promoting operations which yield private gains. Often it has one or more paid secretaries who besiege state authorities in their offices. The people at large have only a vague idea of what is going on; the active agents of various societies at the state capital work day and night. Accordingly unity in government is dissipated; administration tends to pass more or less under the dominance of separate and specialized groups on the outside.

Where the weak executive type prevails there is little the governor can do about the resultant administrative disintegration. Some officials may be elected by popular vote and some appointed by persons other than himself, perhaps for a term that is actually longer than his own. Many administrative units operate under constitutional or statutory clauses, or both, which specify their powers so closely as to leave the governor little control over them. Even the sheer physical task of keeping in touch with a hundred or more offices is more than any one man can perform personally, with efficiency. Nor can a legislature, perhaps meeting for sixty to ninety days every other year, spare the time and energy to do much in the way of supervising and maintaining order. As a result agencies may duplicate one another's work, waste time, squander money, and exhaust the patience of citizens. Funds and employees may be distributed according to the relative political

strength of rival boards and agencies rather than according to any long-range, over-all view of the total needs of the state.

THE CONSOLIDATED ADMINISTRATIVE SYSTEM

Protests and Call for Reform. As state agencies multiplied and tax burdens mounted at the start of this century, protests were heard against the time-honored chaos of offices and boards. A demand arose for consolidation of the scattered and independent establishments in a few great departments, each discharging a group of related functions. As a result about half the states (p. 668) have materially modified the old array of agencies by grouping large numbers of units under a few high officers headed by the governor.[8] In other states projects for concentrating offices and functions are under consideration. So we are now in the midst of a nationwide movement designed to introduce order, economy, efficiency, and responsibility in state administration. This movement has followed the ordinary course: protest, plan, action, and evaluation.

Origins of the Movement. Leaving out of account minor events, the movement may be said to have begun as early as 1891, when the governor of Massachusetts analyzed the state administrative system in a message to the legislature, pointed out with great cogency the defects in it, and recommended a consolidation in the interests of economy and efficiency. About the same time other governors spoke on the theme. But these criticisms failed to bear fruit. Then followed a period in which the subject was discussed mainly in treatises on government and administration, such as the writings of Frank J. Goodnow and Herbert Croly. In 1909 the idea took practical form when a committee of Oregon citizens, known as the People's Power League, proposed and advocated state constitutional amendments reorganizing departments and centralizing responsibility in the hands of the governor. Comprehensive plans along similar lines were made by expert commissions in Iowa in 1913 and in Minnesota in 1914. In 1915 the New York Bureau of Municipal Research prepared for the New York constitutional convention a complete survey of the state government and suggested a scheme of reorganization and consolidation. The constitution as drafted went far in the direction of centralization, but it was rejected.

[8] A. E. Buck, *The Reorganization of State Governments* (1938), published for the National Municipal League. The great report of the Efficiency and Economy Commission of Illinois, under date of 1915, is a mine of information and wise comment on state administration. Of special importance also is the scientific study of the subject by J. M. Mathews, *Principles of American State Administration*, the first treatise of the kind to break away from the purely legalistic method of handling the question.

Action in Illinois. Two years later, Illinois adopted a general program of reorganization based upon a careful survey of the institutions and agencies of the state by a staff organized under the direction of Professor John A. Fairlie. The reform was effected by an act of the legislature. While it did not touch the elective officers of the state who stood on the same footing as the governor, it abolished more than one hundred statutory offices, boards, departments, and agencies, and consolidated their functions under nine great departments. Today, these departments, increased to thirteen in number are as follows:

1. Finance, charged among other things with the responsibility of preparing the budget for the governor's scrutiny
2. Revenue
3. Agriculture, including all agricultural and related activities such as food inspection
4. Labor, including an industrial commission in charge of arbitration and conciliation matters
5. Mines and Minerals
6. Public Works and Buildings
7. Public Welfare, having jurisdiction over all charitable institutions
8. Public Safety, including penal institutions
9. Public Health, including control over laboratories
10. Conservation
11. Aeronautics
12. Registration and Education
13. Insurance

Each department is headed by a single director appointed by the governor with the approval of the senate. In departments called upon to exercise quasi-legislative or quasi-judicial functions boards are to be found. Among these bodies are an industrial commission and a mining board. Each board is under the system of financial control to which other departmental agencies are subjected. In several cases advisory boards were instituted to serve as counselors to department heads and the governor.[9]

Action in Other States. After Illinois had broken the path, other states followed in rapid succession with administrative reforms more or less drastic: in 1919, Massachusetts, Idaho, and Nebraska; in 1921, Washington, Ohio, and California; in 1923, Maryland, Tennessee, Vermont, and Pennsylvania; in 1925, Minnesota and South Dakota; in 1927, New York and Virginia; in 1931, North Carolina; in 1932,

[9] *Blue Book of the State of Illinois*, 1945–1946.

Maine and Georgia; in 1933, Indiana and Colorado; in 1934, Kentucky; in 1935, Rhode Island; in 1937, Connecticut and Wisconsin; in 1939, Idaho and Minnesota; in 1945, Missouri; and in 1948, New Jersey. Few of the states, however, have an organization as symmetrical as that of Illinois. Moreover, some of them have made modifications since the first reorganizations went into effect, occasionally losing ground.

In all sections of the Union, the subject is a theme of lively discussion on the part of governors, legislatures, and interested citizens. Now that our states have assumed such extensive administrative functions, the quest for the best and most efficient way of discharging them will doubtless continue, with increasing influence on law and policy.

Essential Features of Consolidation. Generalizing from the tendencies revealed in the consolidation movement, certain principles seem to be widely accepted. All offices, boards, and agencies should be consolidated in a few departments. The number of departments to be established should be small enough to permit the governor to maintain close contact with their directors. All nearly related functions should be placed in the same department and the number of subdivisions within each department should be determined by the nature and multiplicity of the duties assigned to it. The responsibility for each major function should be vested in a specific officer and the lines of accountability from subordinates to superiors should be clearly drawn.

The governor should have the power to appoint, or at least nominate, and remove department chiefs, and direct their work within the limits of the law. He should also have a "staff" of investigators, independent of the operating force known as the "line," and require the staff to make inquiries and report on methods and results of administrative work. He should also be provided with a business division to assist him in checking expenditures, purchasing supplies, making appointments and removals, and preparing the budget. For the former tangle of offices, boards, commissions, and autonomous establishments described above such a setup substitutes a clear-cut structure of administration. In competent hands, it makes for orderliness, accountability, action, speed, and prevision. It throws the machinery of state government into bold relief so that the legislature and the people can readily see who is managing the several branches of public affairs.

EVALUATION OF THE CONSOLIDATED SYSTEM

Incomplete Acceptance of the General Principle. Many years have passed since the first state reorganized its administration and the gen-

eral movement for reconstruction began. To what extent have the sponsors of the movement achieved their original aims? The records show that as a rule reorganization has not been carried to a comprehensive conclusion. In state after state many important functions have been left outside of the administrative hierarchy headed by the governor; a great deal of the consolidation has been merely nominal—effected by attaching various independent agencies loosely to old departments; the governor's appointing power has not been extended to cover many offices which come theoretically under his authority; and the tendency to create new offices independent of the system or to tear old agencies away from it still appears in state politics.[10]

Yet in one state the movement has achieved an outstanding triumph. The 1948 New Jersey constitution makes the governor the sole state executive officer elected by popular vote. It requires consolidation of all executive agencies (except temporary commissions) in not more than twenty departments. All the chief officers of these departments are to be appointed by the governor with the advice and consent of the senate and many of them may be removed at his pleasure. The governor has a sweeping power to make investigations and, if they reveal unsatisfactory conditions, he may take formal steps toward the removal of administrative officers responsible for them. In short, the New Jersey reconstruction represents a substantial acceptance of the recognized principles of administrative consolidations.[11]

Gains in Economy and Efficiency. With reference to the advantages of administrative reorganizations, exact appraisals are very difficult to make, for standards of measurement are hard to establish and it is not often, if ever, possible to discover whether advantages to be noted are to be attributed to administrative changes, to the quality of the governors, or to other practices adopted about the same time. Perhaps the most satisfactory test is provided by comparing the costs of a state government just before and after consolidation. By applying this criterion, A. E. Buck found material reductions in the state outlays of Nebraska, Tennessee, Pennsylvania, Maine, Kentucky, and Georgia within a short time after they had overhauled their administrative systems.[12] For other states there is similar testimony. Indeed the weight of evidence seems to be on the side of gains in economy.

Leaving financial considerations we encounter greater difficulties in applying exact tests and reaching conclusions. There have been corruption, bribery, and spoils politics in the reformed states as well as in

[10] For details, see pp. 665–666.
[11] For the New Jersey system, see pp. 621–622.
[12] A. E. Buck, *The Reorganization of State Governments*, p. 35.

others, and nobody has yet tried to strike a precise balance sheet. Nor have informed advocates of administrative reorganization ever claimed that it would automatically introduce efficiency and economy wherever adopted. As Governor F. E. Lowden said in 1921: "There is no form of government known to man which is self-executing." The chief claim made by sponsors of the new system is that it simplifies and fixes responsibility in administration and enables the people to know who is to be held accountable for money spent and work done.

Demands for Protection Against "Politicians." On the other hand, some students of political science reject the very principles on which general administrative reorganization is based. According to one line of argument three sections of state administration should be kept out of the hands of transitory partisan governors. The first section includes technical activities that have little relation to politics, such as the maintenance of highways, the conservation of natural resources, and the enforcement of traffic laws. A second section is in effect legislative or judicial in character. Numerous boards are governed by general statutes and in fact make laws in detail by issuing orders and regulations. Some state agencies, such as public service commissions, perform functions that are judicial as well as administrative in nature. A third branch of state government, with features all its own, is the management of education; this function, it is claimed, should not be subjected to the fluctuating fortunes of party politics but should be more or less insulated against them. In all these divisions of administration, the argument runs, there should be continuity and competence and these can best be secured, not through department heads appointed by the governor for short terms, but through boards whose members serve for long and overlapping terms.

On these or similar grounds, Kirk H. Porter argues cogently against the general program of administrative reorganization which distributes all functions among a few departments, all headed by the governor's appointees and subject to his direct control.[13] Taking an opposition tack, Mr. Porter would vest the administration of all "service functions," such as education, conservation, health, and welfare, in independent lay boards serving for long and overlapping terms and endowed with power to appoint the operating heads of the departments. The governor's power, Mr. Porter would limit mainly to the direction of the chief staff agencies, concerned with finances, personnel, supplies, and other matters ancillary to the conduct of the service functions. In this scheme the governor is viewed primarily as a kind of overhead business

[13] *State Government* (1938).

manager rather than a political leader engaged in formulating public policies respecting the affairs of the state in general and carrying them out through administrative leadership.

Demand for Political Representation in Administration. While some writers advocate the use of the board to control each main department on the ground that this would take administration out of politics, other writers favor boards as means of bringing politics into administration, by allowing representation of interests in such agencies of control. If a department is under the direction of one man, it will of necessity be dominated by a Republican, a Democrat, or a partisan of some kind. If it is under a board, two or more parties may have their spokesmen and there may be a frank representation of interests in administration—a tendency which is steadily creeping into American government. "In Oregon," says Professor Barnett, "there is a statutory provision for the representation of various economic interests on ten state boards and one county board." Inevitably this practice runs counter to a strict organization of all state administration along departmental lines, and provides one of the cross currents in the development of American public law.

Call for a General Overhauling of State Government. There are broader grounds for rejecting the mere consolidation of administrative agencies under the control of the governor as adequate to the needs of our times. Administrative reorganization as originally conceived by Frederick A. Cleveland, who may justly be called its first militant sponsor, was to be accompanied by provisions for continuous legislative scrutiny. He proposed instituting a single-chamber legislature or at least a thorough overhauling of the bicameral legislature, so that it could watch the operations of the governor closely; and he urged that the governor and his cabinet officers be subjected to legislative questioning directly. But most administrative reformers have insisted on increasing the power of the governor without providing for legislative checks on his exercise of it.

A far more drastic reconstruction of state government was later proposed by Read Bain.[14] He would create a unicameral legislature composed of relatively few members and meeting almost continuously, vest most executive duties in a state manager elected by the legislature, place administration in the hands of a few department heads subject to the manager, and make the governor a kind of honorary official. "State government," Mr. Bain concludes, "may soon be in the midst

[14] *American Political Science Review*, June, 1938, pp. 495 ff.

of as fundamental changes as those which began in cities over thirty years ago."

At all events, surely, the reorganization of state administration does not stand alone. It bears a relation to the legislative system on the one side and to the position assigned to the governor, as leader or figurehead, on the other. Hence a comprehensive discussion of administration must go beyond the mere consideration of an official setup—departments, boards, offices, and divisions, their connection with one another, and the governor's power and duties. It must take into account the whole government of the state.

THE RANK AND FILE OF STATE EMPLOYEES—CIVIL SERVICE

Prevalence of Spoils System. If attention is turned to the occupants of minor posts and employees in general, two types of recruitment and management are found. One is the traditional spoils system which prevails in more than one-half the states. Here large numbers of employees, high and low, may be legally appointed, promoted, demoted, and removed by the victors who carry state elections. Yet even in the most spoils-ridden states many officers and employees are permitted to keep their places on account of special talents and knowledge, or of agreements among politicians to divide the spoils. But it is custom rather than law which prevents the making of a fairly clean sweep after every election.

States with a Merit System. By 1946, twenty-two states were operating under comprehensive merit systems—a group including such leading commonwealths as Massachusetts, New York, New Jersey, Maryland, Michigan, Ohio, Illinois, Wisconsin, and California. In the remaining states, at least those agencies that administer federal social security measures are under the merit system; congressional legislation leaves the states no choice in this matter if they are to receive the benefits of federal financial aid.

Nature of the System. Public offices coming under the merit system are classified into two types: competitive and noncompetitive. The competitive branch of the state civil service includes such officers and employees as factory inspectors, health officers, civil engineers, chemists, and accountants, as well as lesser ranks, including stenographers, cashiers, and building custodians. Positions in this group are filled by competitive examinations or promotions and transfers. The civil service laws require all such examinations to be practical in character and to relate to such matters as will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service

in which they wish employment. Applicants who are successful in the examinations are grouped according to the services which they seek to enter and are arranged in the order of their respective grades. When a vacancy occurs, the appointing officers must choose usually from the three names highest on the roll of candidates.

The noncompetitive class includes minor employees who belong to certain crafts, such as bakers, carpenters, stone-cutters, and picture-framers. Appointments to this class are made after noncompetitive qualifying examinations conducted according to appropriate rules.

Removals. As a rule, civil service laws provide that removals must not be made for political reasons, but only for incompetence or insubordination. Ordinarily, the employee affected has the right to be heard.

Administration of Civil Service. The administration of the civil service law is usually vested in a commission composed of three members, not more than two of whom may be adherents of the same political party. But there are exceptions. In Maryland the function is entrusted to a department headed by a single commissioner; it is his duty to prescribe and enforce rules carrying the civil service act into effect, to plan and hold examinations for the various branches of the service, to make investigations, to certify eligibles to appointing officers as called for, and to hold hearings in case of removals. The Maryland law is also noteworthy because it authorizes the commissioner to make a complete classification of the positions coming under the merit system and to assign the various officers to their appropriate classes. Furthermore he is instructed to make a study of rates paid for similar services in public and private employment and to recommend schedules of compensation for state officers to be put into effect on approval of the governor. The Maryland commissioner is called the director of the state department of employment and registration and has a place in the governor's cabinet.

Civil Service Reform Organizations. Although after more than fifty years of experimentation only twenty-two states have introduced the merit principle generally into their civil service, it would be a mistake to assume that little progress is being made.[15] The hands of civil service officials have been strengthened by the formation of a general Civil Service Assembly composed of their representatives. Its Bureau of Public Personnel carries on expert investigations and publishes a monthly journal reporting events, advances, and special researches in the field. And outside of the official world an association of private citizens, the National Civil Service Reform League, pro-

[15] See late issues of *American Year Book*, for recent trends.

motes studies of the merit system and seeks to develop public sentiment in its favor.[16]

Increase in Technical Positions. As in the Federal Government so in the states, whether they have a general merit system or not, there are many powerful forces operating against indiscriminate ousting of officials in favor of party or factional workers whenever there is a political turnover. If a century ago the duties of most public offices were so simple, as Andrew Jackson said, that any citizen could master them in a short time, that is no longer the case. The specialized functions pertaining to public works, health, housing, education, forestry, utilities, highways, and many other matters are not simple; they cannot be made simple; they are highly technical and require for efficient performance experience coupled with competence. Hence governors and other appointing officers must exercise discretion in "hiring and firing." As a result a large number of state employees nominally subject to a spoils regime enjoy in fact permanence in tenure.

Organizations of Technicians. With security of tenure comes zeal for an improvement in technique, a quest for new and better ways of administration, a search for light in all quarters. Inevitably therefore officials in different parts of the country engaged in identical or similar functions tend to draw together, to pool experience, and to promote a scientific consideration of their problems. Already there are forty or fifty associations of state, local, and federal officials, sometimes including in their affiliation private citizens particularly interested in their work. By way of illustration a few may be cited: National Convention of Insurance Commissioners, Society of American Foresters, National Association of Railroad and Utilities Commissioners, National Association of Comptrollers and Accounting Officers, Association of American Dairy, Food, and Drug Officials, American Association of Highway Officials, and Conference of State Sanitary Engineers.

These groups hold periodical conferences; some of them issue regular publications; they exchange the results of experience; they encourage specialized research by public agencies, private persons, universities, and private institutes. Certain of them are associated with the Council of State Governments. In some cases they are powerfully aided by branches of the Federal Government, such as the Office of Education and the Bureau of Standards, in arranging conferences, devising efficient practices, and distributing bulletins of information. Public service throughout the American system has entered the professional stage.

[16] F. M. Stewart, *The National Civil Service Reform League* (1929).

Employee Unions. Another type of state employee organization—the union—serves a different purpose. Such unions are interested in the economic advantage of their members and in improving working conditions, among other things. When engaged in winning their demands, these unions face some very special legal issues not encountered by the ordinary private industrial union. If a union of state employees is to achieve a closed shop, it may be necessary to give union membership precedence over the mere numerical results of competitive civil service examinations—a request that does violence to both the letter and the spirit of the civil service law. Or, if a union of state employees goes out on strike, thus actually serving notice on the people of the state that they must do the bidding of the strikers, it is placing the democratic process in reverse.

Already the clash between employees' unions and current governmental practices has received special attention at law. Through a statute enacted in 1947, the state of New York limits union activities among state officials and employees, by imposing penalties on those who strike against the government. It stipulates that by the very act of striking they automatically forfeit their positions and that they may be reinstated only at the option of their superiors in the state administration. Furthermore, reinstated persons must remain on probation for five years and may not receive any pay increases during the first three years of this term. Where employees are deterred from striking in this fashion, then in fairness to them there should be created appropriate grievance machinery for handling complaints by conciliatory methods.

CONTRIBUTION OF THE STATES TO ADMINISTRATION

Five Principles of Management. Out of the efforts of states to meet successfully the issues of administration have emerged certain broad principles, generally accepted by students of the subject. In none of the states are all these principles consistently applied but they constitute a goal toward which many administrators are working.

First of all is the concentration of large powers and responsibilities in the hands of the governor. These include preparation of the budget, appointment and removal of high officials, such as department heads, and the duty of scrutinizing finances and administrative results.

The second is the organization of administrative agencies in such a form that responsibility for work done, as well as for malfeasance, neglect, and inefficiency, can be placed squarely on the governor and a few administrative chiefs.

If the two previous goals are to be achieved, then special agencies of accounting and financial control must be established. These expert

agencies watch the spending officers of the state government and make sure that outlays of money are applied to the purposes fixed by law. They also have the duty of inquiring into the efficiency and wisdom of the expenditures. From their control figures and their studies of actual performances, they derive concrete information to aid in the preparation of forthcoming budgets. In Minnesota, work of this character is assigned to a commissioner of administration, appointed by and directly responsible to the governor. In the office of the commissioner, the budget is prepared, plans for administrative reorganization are reviewed, quarterly allotments of funds are made to spending agencies, state buildings are designed, and other steps are taken to insure expression of the governor's broad policies in terms of action.[17]

A fourth aspect of good management relates to standardization and purchase of supplies for the government and its institutions. Many states maintain central purchasing agencies which buy and distribute a large proportion of such supplies, thus preventing separate officers and boards from acting at random on their own account. This centralization is not only useful in acquiring goods of high quality at wholesale prices but also in collecting information, indispensable to the proper preparation of the budget.

Finally, management is extended, in the states having the merit system of recruiting personnel, to the selection, appointment, training, promotion, demotion, and discipline of the several classes of state employees. In this sphere the ruling principles are: the grouping of employees in a few broad classes on the basis of similarities in duties performed, the gradation of employees within each class on the basis of complexity of duties, training, and years of service, uniform rates of pay for similar work, and methods of control, promotion, and retirement conducive to the right *esprit de corps*.

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CHAPTER 33

State Finances and Financial Management

With regard to taxing, appropriating money, and incurring debts, state governments stand on a special footing. Whereas the national Congress can lay taxes on almost every form of property (pp. 298–301) at rates unlimited in weight, appropriate money at will for nearly all purposes, and incur debts without restrictions as to volume, the legislatures of the states are often severely restrained in these respects by the constitutions of their commonwealths. This situation gives the Federal Government a marked advantage over the states in the ceaseless competition for power and prestige.

Once the National Government derived nearly all its revenues from customs duties and excise taxes, leaving other taxable sources to the states and communities. Now it lays heavy taxes on incomes, inheritances, gifts, the sale of goods, and directly or indirectly nearly every object taxed by the states. Clearly the more the National Government takes from a given tax source, the less there is left for the states to extract, and the more stringent becomes their financial plight. Hence the states, hampered on the one hand by constitutional limitations and on the other by the necessity of sharing tax sources with the Union, face financial problems of the first magnitude.

NATURE AND CUSTODY OF STATE REVENUES

The Major Sources of Revenue. Whence do the states now obtain the money to meet their expenditures? For the fiscal years that ended on or immediately preceding June 30, 1946, the states received a total of $7,248,000,000 in general revenues, distributed as follows: [1]

Taxes	$6,013,000,000
Aid from other governments	767,000,000
Charges and miscellaneous	468,000,000

Types of Taxation. For the fiscal years that ended on or immediately

[1] U. S., Bureau of the Census, *State Finances: 1946*, Vol. 3 (preliminary), May, 1947, p. 3.

preceding June 30, 1946, the states received the following percentages of their total tax revenue from the indicated sources: [2]

Sales and gross receipts	47.2%
Unemployment compensation	17.4%
Income, gifts, and inheritances	16.3%
Licenses and privileges	13.0%
Property	3.8%
Other	2.2%

Sales and Gross Receipts Taxes. The most productive tax source, evidently, is the levy on the sale of goods and services or, what amounts to about the same thing, a percentage charge on the total gross revenue derived from sales, regardless of the profits involved. Such taxes may be collected directly from the buyer when the goods are sold, or the services rendered, or they may be gathered from the manufacturer or retailer. Whatever the mode of collection, the results are much the same—the ultimate burden is normally carried by the consumer.

Underlying Theories. Sales and gross receipts taxes have been the subject of many heated debates. The sales tax came into prominence shortly after World War I, in the form of a flat charge per gallon on motor vehicle gasoline. The levy was then advocated as a means of paying for state highways by charging users more or less in proportion to the extent to which they traveled over the roads. Subsequent sales taxes on liquor, tobacco, and horse-racing bets received popular support on the theory that the burden fell on luxuries and nobody had to pay unless he chose to do so. During the depression that followed the panic of 1929, however, as government expenditures in aid of the unemployed and for other purposes increased, sales taxes spread to goods and services generally. Now it is argued that the sales tax is the easiest and least painful way of bolstering weakened state finances—and of shifting burdens from property owners and recipients of taxable incomes.

On the other hand, sales taxes in general have been stoutly resisted for various reasons, real and pretended. Merchants object to the added burdens of bookkeeping which the sales tax involves and claim that it puts a brake on consumer buying. Many economists contend that it falls with greatest weight on men and women of moderate or small incomes, working hardships for them and reducing the volume of buying which sustains business and employment. Indeed, this contention is expressly recognized in some sales-tax legislation. For ex-

[2] U. S., Bureau of the Census, *State Finances, 1946*, Vol. 2, No. 1, August, 1946.

ample, food bought at the market for home use may be exempt entirely from the tax while meals eaten at a restaurant may be taxed—the theory being that whoever can patronize restaurants is more able to pay taxes. But, despite all arguments to the contrary, the march of the sales tax continues unimpeded, particularly since the Federal Government and many states have about reached the limits in heavy income taxes.

Unemployment Insurance Taxes. The second largest source of state tax revenue consists of unemployment insurance levies on employers (Chapter 24). This is a peculiarly painless type of tax, as far as the states are concerned. The National Government permits employers to deduct these state taxes from their federal unemployment insurance taxes, up to a high percentage, so that the state tax need not add much to the employer's total tax obligations.

Income, Gift, and Inheritance Taxes. Occupying a distinctly minor position in the list of state taxes are those based on relative abilities to pay—namely income, gift, and inheritance taxes. A large majority of the states tax individual or corporate incomes, or both, and a few states tax gifts. It is common practice to make the rates "progressive" in the case of individual income and gift taxes, that is, raise them in percentage with the size of the income or gift; whereas a flat rate is often employed for corporate income taxes. The amount of money that states can obtain from income and gift taxes is severely limited owing to the heavy competitive drain made on the same sources by the United States Government.

Property, or estates, passing from deceased persons to heirs—new owners—by inheritance are on a very different footing. The National Government encourages the states to collect from this source by the simple device of permitting deductions to be made from the federal levy, to cover at least part of the state tax. States may, and some do, lay an inheritance tax which is precisely proportioned to, and entirely deductible from, the federal tax, adding nothing to the total bill collected when the estate is transferred to the recipient or recipients. Other states are more independent, and proportion their taxes as they please. Every state except Nevada had some kind of inheritance tax in 1946, usually with provisions for increasing the rate of levy progressively—raising the percentage in relation to the amount of the estate.

License and Privilege Taxes. These taxes, as defined by the United States Bureau of the Census, are taxes on the right to exercise a privilege. They cover such items as a fee for a motor vehicle operator's license, a charge for issuing a liquor-selling permit, and a franchise tax on a

corporation. The number of trades, occupations, and businesses covered by such taxes varies widely among the states.

The General Property Tax. Once the chief source of state revenues, the general property tax has rapidly declined in importance until it now occupies a very minor place in state finance—bringing in less than four per cent of the total state revenue for the fiscal years that ended on or immediately before June 30, 1946. Indeed it has been abolished for state purposes in several jurisdictions.[3] Where it still exists, the state general property tax is a fixed percentage of the estimated value of the property to which it applies. The actual assessment or valuation of property for tax purposes is made by local officers, and the state's share of the total property tax collected by the local authorities is duly forwarded to state agents. To prevent local officers from deliberately undervaluing property to reduce the weight of the state tax, boards of equalization may review and correct local assessments.

What accounts for the striking decline in the importance of the state general property tax? In part, it reflects the widespread financial distress of property owners in both rural and urban areas, during the general depression prior to World War II. Numerically large and politically influential, property owners often deliberately set out to shift at least some of their load to other shoulders, through the imposition of such substitute levies as sales and income taxes. Other groups of taxpaying interests, eager to reduce the over-all costs of government by cutting off funds available for what they call "fads and frills," have joined property owners in pressing for a reduction in general property taxes. State after state, yielding to the influence of these forces, has imposed restrictions on the power of the legislature to lay general taxes on property for state purposes. For example, the Georgia constitution of 1945 forbids the state's General Assembly to levy taxes on property in any one year amounting to more than a half of one per cent of the taxable property value, for all state purposes other than "repelling invasions, suppressing insurrections, or defending the state in time of war." [4] Today, many legislatures simply do not have the legal power to restore the property tax to its old position of preëminence in state finance.

In the second place, the growth of intangibles has made the general property tax unfair and difficult to collect. When wealth consisted al-

[3] *The National Municipal Review* for July, 1947, p. 418, lists 19 states that have repealed the state ad valorem property tax, including such key states as New York, Illinois, Pennsylvania, and California.

[4] Art. VII, Sec. I, Par II

most entirely of tangible things—lands, houses, livestock, etc.—or mortgages on real property openly recorded, it was easy for the assessor to secure a fairly complete and accurate list of the goods and chattels owned by each resident within the district. But when corporations came into existence, investors could buy the bonds or stocks of companies organized in their own or distant states, or even in foreign countries, and could lock their papers in strong boxes, even outside the state; then the assessors could no longer evaluate fairly all the taxable riches.

In such circumstances, state laws "requiring" the assessment and taxation of intangibles on a par with tangibles proved impossible to enforce; yet to grant lower rates on intangibles to bring them out of hiding was manifestly unfair to holders of real property. The escape from the dilemma seemed to lie in reaching intangibles by other means—through the taxing of income from them, or their transmission in the form of inheritances.

Federal Aid. Next to taxation in importance as a source of state funds is the money derived by the states from other units of government. Of the total of $767,000,000 received from other governments for the fiscal years that ended on or immediately preceding June 30, 1946, $743,000,000 was federal aid—for highways, education, and other purposes. This figure was greatly exceeded, however, by the sums given by states in aid of local governments. In other words, if all intergovernmental financial assistance had been abolished for the fiscal period just cited, the state treasuries would have been richer by more than a billion dollars than they actually were.[5]

Charges and Miscellaneous Revenues. Under this heading come: (1) earnings from state businesses, with state liquor stores ranking high as income producers; (2) fines and penalties imposed by state courts for violations of the law; (3) interest on public funds deposited with the banks, and (4) a few other items.

Custody of Funds in State Treasuries. In each state custody of state revenues from all sources is vested in the treasurer. It would seem that this function could be readily controlled by the legislature and public opinion but as a matter of fact there have been numerous cases of defalcation and robbery by state treasurers. Quite generally this office was regarded as one of the choice spoils of politics, especially if the treasurer had the right to deposit state funds in banks of his own choosing. In such cases, it was sometimes possible for a few politicians to form a small bank and then secure from their friend, the treasurer,

[5] U. S., Bureau of the Census, *State Finances: 1946*, Vol. 3 (preliminary), May, 1947, p. 2. The remainder came into state treasuries from local units of government.

deposits of state funds which they could lend at good interest rates, sometimes to themselves for speculative purposes. Charles E. Merriam, in his study of the American party system, relates an interesting story of "Bull" Andrews of Pennsylvania, who, with some confederates, got hold of a small bank in that state many years ago, obtained a deposit of state funds amounting to more than a million dollars, and embarked on railway construction schemes in New Mexico!

Provisions for Security of Funds. Such abuses fortunately belong largely to history, for all states have taken more or less effective steps to stop them and protect public funds. For example, banks seeking state deposits may be compelled to bid for them by offering favorable rates of interest—the bidding and making of awards being open to the public; and banks obtaining deposits may be required to guarantee the state against losses by pledging bonds or providing other underwriting as security for the state deposits. In such cases, the treasurer's hands are tied; he cannot entrust money to unsafe banks or derive personal benefits from the manipulation of funds.

EXPENDITURES AND DEBTS

Early Abuses of the Spending Power. From early times it has been a general rule that no money shall be spent by agencies of the state government except in conformity to appropriation acts duly passed by the legislature; but at first the constitutions of the states placed few limits on the power of the legislatures to make appropriations for any purposes or on the methods to be followed in enacting money bills. Taking advantage of this liberty, many of the legislatures made lavish grants to private and local interests; they voted huge gifts or loans to canal, railway, manufacturing, and other concerns; with prodigal recklessness they approved spending money for favorite purposes, while neglecting other public interests; and often they degraded appropriating procedure to an unseemly scramble over the distribution of public funds.

Restraints on the Making of Appropriations. As a result of efforts to halt such practices and secure regularity and publicity in the making of appropriations, it has become the custom to embody one or more of the following principles in the state constitution. Money shall be paid out of the treasury only in pursuance of an appropriation by law; the yeas and nays must be taken on the final passage of a money bill and recorded; the governor may veto single items in appropriation bills; the general appropriation bill shall embrace nothing but outlays for the ordinary expenses of the state executive, legislative, and judicial

departments and for some other specific purposes; and no appropriation shall be made for a longer term than one or two years.

Former Lack of Plan in Making Appropriations. These checks did not eliminate confusion in the making of appropriations. Under the traditional "system," each member was permitted to introduce as many bills as he pleased calling for outlays of money. Administrative measures, such as changes in ballots and election procedure, which incidentally meant expenditures for printing and employees, were introduced without a thought as to the ultimate cost. Appropriation bills and other measures involving payments of money were referred to various committees, no one committee in either house having control over or responsibility for all projects making a charge on the treasury. These bills were taken up one after another by the separate houses, under the time-honored system of committee control and log-rolling, and passed seriatim without much attention as to totals. Finally at the very close of the session, scores of appropriations were rushed through at lightning speed and thrown upon the governor's table for approval or rejection. Where the governor had the power to veto single items, he could cut and slash the bills at his pleasure. Not until he was through with his review was it possible to know just how much money had been actually appropriated at the legislative session and how much revenue had to be raised to pay the bills.

Reckless Borrowing and Limitations on Debts. In view of the haphazard practices long followed, it is hardly surprising that states often spent far more money during the fiscal year than was raised by the treasury from revenues and that they piled up debts. Indeed, many of them accumulated debts at an alarming rate and at some time in their history at least twenty-one states have repudiated or scaled down some portions of their debts. Disturbed by prospects of wholesale bankruptcy, taxpayers and investors at last began to insist that definite limitations must be placed, by constitutional provisions, on the borrowing power and practices of the state governments.

As a general rule at present the state legislature is flatly forbidden to lend public money or credit to any private person or association—an echo of old days when states recklessly went into debt to construct canals and to aid railway companies. As a rule also, the state is forbidden to incur debts for, or assume the debts of, cities, counties, and other local subdivisions. A constitution may go further and actually enumerate the objects for which money may be legally borrowed. Under the Virginia constitution, for example, state authorities may contract debts only to meet casual deficits, to refund prior debts, to

pay for new capital outlays, and to suppress insurrections, repel invasions, or defend the state in time of war.[6]

Procedures Followed in Authorizing Debts. While in some states the legislature may authorize borrowing merely by passing a statute in the ordinary manner, in others the procedure is more involved.[7] Frequently the constitution stipulates that each bond issue shall receive not only the approval of the legislature but the sanction of a majority of the people voting in a formal referendum on the proposal. In more than half of the states there are limits on the total amount of the debt that can be incurred. The exact character of these debt limits varies considerably from one jurisdiction to another, but often the limit bears a percentage relation to the total assessed value of all taxable real estate in the commonwealth. In a majority of the states the constitution prescribes that the legislature, in proposing a debt, shall provide adequate revenues for covering the interest and amortization costs. Where constitutional strictures on new borrowing are very severe, as is sometimes the case, the constitution may have to be amended to permit the floating of a major loan. In any event, it is clear that the era of free and easy borrowing is at an end.

COORDINATION AND CONTROL OF FINANCIAL TRANSACTIONS—THE BUDGET

The Budget Movement. As long as taxes were light, citizens paid little attention to the loose, wasteful, and disjointed methods employed by state legislatures in voting levies and spending money. But as taxes and debts mounted, specialists in public finance began to urge the states to tie their revenue and expenditure forecasts together in a single financial plan, or budget, and to follow strict methods in balancing outlays against income. Shortly after the opening of the twentieth century, this proposal was sponsored nationally by the New York Bureau of Municipal Research (now the National Institute of Public Administration) and within a few years substantial results were produced in all parts of the Union. Since 1926, when Rhode Island finally swung into line, every state has had some kind of budget system.

Responsibility for Preparations. Through all budget laws run certain principles. First, an attempt is made to fix responsibility for the preparation, annually or biennially as the case may be, of a consolidated statement of proposed revenues and expenditures, to be laid before the legislature as a single program. Despite some variant practices, there is

[6] W. B. Graves, *American State Government* (1946), pp. 596–597.

[7] For a detailed analysis of provisions, with statistics as to the frequency of their use, see W. B. Graves, *American State Government* (1946), pp. 600–602.

a general tendency to make the governor of the state responsible for compiling the budget and presenting it to the legislature. This is called "the executive budget." An alternative method, diminishing in popularity, is that of setting up a budget board composed either of administrative officers alone or of such officers and members of the legislature.[8]

Where the obligation to prepare or present the budget is imposed on the governor, he must have skilled assistance in collecting, studying, and arranging the facts and figures which show the financial condition and requirements of the state. This assistance may be provided by placing at his disposal a budget bureau equipped with competent specialists and by giving them convenient access to all the offices connected with the collection, custody, and expenditure of state funds.

Contents of Budget. In the second place, a great deal of attention is paid in budget legislation to the contents of the budget which must be laid before the legislature. In this respect, the Maryland constitutional budget amendment is very specific. It provides that the budget shall contain a complete plan of the proposed expenditures and estimated revenues, with estimated surplus or deficit in revenues, for the coming fiscal period. The plan must be accompanied by a statement showing: (1) the revenues and expenditures for the last two completed fiscal years, (2) a balance sheet, (3) the debts and funds of the state, (4) estimates of the state's financial condition as of the end of each of the fiscal years for which appropriations are being made, and (5) some explanation of the budget by the governor who presents it.

Legislative Action on Budget. A necessary feature of orderly and open budget making is systematic procedure by the legislature in dealing with the consolidated program after it has come from the hands of the authorities who prepare it. Maryland provides that the legislature shall not consider any other appropriation bills until the governor's budget has been finally acted upon. This rule at least requires the members to concentrate their attention on a complete and balanced program before they take up individual money bills separately introduced.

Shall the legislature be permitted at pleasure to increase or add to the items proposed by the governor? This is a debated point. If the legislature cannot increase the proposed budget but can merely make reductions, then it is unable to enact new legislation calling for expenditures to enlarge functions already under way. Clearly that would seriously cripple the legislature and transfer to the governor all power

[8] For a list, see *The Book of the States*, 1948–1949, pp. 184 f.

over the initiation of new state functions. On the other hand, if the legislature can do as it likes with the governor's budget, it may ignore his program, rip it to tatters, or resort to discredited methods. This is the practice generally prevailing. Departing from the common rule, Maryland provides that the legislature cannot increase or add to the governor's items for the administrative branch; but after it has passed the governor's budget it may make additions and increases in the form of special bills, subject to certain conditions.

Shall the governor be allowed to participate at all in the legislative review and discussion of his financial plan? The New York Bureau of Municipal Research early urged that the budget be considered by the legislature in open session, as a committee of the whole, with the governor and his cabinet or chief officers present. In Maryland the governor and administrative officers may, and on call must, appear before the legislature to defend the budget or explain it. In Virginia the standing appropriation committees of the legislature, within five days after the receipt of the budget, must begin to hold joint and open hearings on the estimates; and the governor and his representatives have the right to attend these meetings and to speak there.

Balancing the Budget. Through carelessness or indifference on the part of the legislature, a budget document may be severely mauled, and a long list of appropriation acts may be passed with great haste at the end of the session. Thus gross discrepancies may arise between the total amount which revenue measures are designed to raise and the total expenditures finally authorized by the patchwork of appropriation acts. Maryland seeks to overcome this confusion by requiring the governor to present a balanced budget in the first instance and imposing on the legislature the duty of providing means of raising revenue to cover any supplementary appropriations. Texas goes about it in a different way: there, appropriation bills are referred to the comptroller of public accounts, and if he declares that the cash and anticipated revenues of the funds from which the appropriation is to be paid are insufficient, the bills can be passed only by a four-fifths vote of the legislature, accompanied by a declaration of an emergency, unless, of course, the legislature takes the alternative of raising more revenue.[9]

Results of Budgetary Legislation. The operating results of budget legislation vary widely from state to state. Where they have been most favorable in terms of careful and honest financing, two conditions are ordinarily found: (1) the use of one general fund for receipts and ex-

[9] Dick Smith, "New Financial Procedure in Texas," *State Government*, May, 1947.

penditures and (2) the consolidation of state financial and business management in a single agency. Under highly developed budget systems, there is a tendency to assign practically all revenues to one account or "chest," called the general fund, and to draw upon this fund for the money needed to meet virtually all the expenditures authorized by appropriation acts. Such a practice makes it easily possible to subject all financial transactions to one controlling plan of income and outgo, capable of variation in details to meet changing needs during the fiscal period. If, in addition, the budget is carefully prepared well in advance and considered as a whole by the legislature in conformity with the safeguards mentioned above, then the objectives of good over-all management can be attained.

In most states, however, no such unity, flexibility, and care are to be found.[10] Major sources of revenue are often assigned to special funds and permanently earmarked by law for designated purposes. Owing to the separate handling of large special funds and their omission from the general financial statement, the budget document may cover a mere fraction of the total state receipts and expenditures and hence be of comparatively slight significance. Some states do not even incorporate estimates of revenue in their budgets, but content themselves with a listing of a limited number of proposed appropriations. If, furthermore, the budget estimates are carelessly prepared and the legislature pays little attention to them, the state's "budget system" becomes scarcely worthy of the name.

CONSOLIDATED FINANCIAL MANAGEMENT

The Value of Centralization in Finance. A budget statement is at best a mere paper forecast. Since many legislatures meet only biennially in regular session, their budgets must attempt to predict conditions for a full two years in advance. Inevitably many things happen after the budget is adopted to upset their estimates of receipts and expenditures and throw the budget out of balance and out of line with public needs. But if the major services connected with the receipt of revenues and the distribution of funds to executive agencies are consolidated in a central department of finance and all accounts are integrated, a clear and continuous view of the discrepancies between forecasts and actual conditions may be maintained. Thus high state authorities may easily find at any moment whether they have a comfortable margin of safety or are headed for a big deficit.

Power to Adjust the Rates of Spending. What the governor may

[10] U. S., Bureau of the Census, *State Finances: 1945*, Vol. 2, No. 1.

do with such knowledge depends upon the state law. In a few cases, he is given the power necessary to keep receipts and expenditures in a fair balance during the fiscal period. The Missouri constitution of 1945 empowers the governor to reduce the allowances for state spending agencies below the appropriation levels, in case revenues fall short of the original estimates on which the appropriations were based. It is easy for him to do this, since the centralized department of revenue maintains a close check on receipts and operates a budget bureau which is in constant touch with the relative needs of various agencies.[11]

In Minnesota, the commissioner of administration, in charge of that state's centralized financial agency, is responsible for calling the governor's attention to instances in which receipts are failing to meet appropriations; and with the governor's consent, he may reduce allotments of money to state spending agencies in a corresponding degree. Conversely, if an agency really needs funds in excess of its appropriations, the governor may provide extra allowances from a contingency fund.[12]

Power over Personnel Management. The central financial agencies of a state may be granted the right to influence the rate of spending in a more indirect way, namely, by exercising authority over new appointments, offices, and positions. In Minnesota, for example, the commissioner of administration passes judgment on the creation of new posts, and, in New York, positions in the state service can be filled only with prior approval from the director of the division of the budget.

Control over Purchasing. Expenditures for supplies and materials form such a large item in the state budget that control over the purchase of goods and the making of contracts becomes an essential feature of effective management and honest administration. On the one hand, there is always danger that the state will be charged exorbitant prices; on the other hand, there is a risk that poor materials will be supplied and the inmates of state institutions furnished with food scarcely fit to eat. Those familiar with the history of asylums and penitentiaries know how frequent are the abuses in this sphere. If each important spending officer is permitted to do his own buying, political merchants will gather around him and there may be irregularities in one or more departments and a waste of money in spite of all legal precautions.

With a view to correcting abuses in this branch of government, Texas, as early as 1899, established a central purchasing agency to buy supplies for the various charitable institutions of the state. The example was widely followed and at the present time nearly all states

11 Constitution of Missouri, Art. 4, Sec. 7.

12 T. G. Driscoll, Commissioner of Administration, in *State Government*, May, 1947.

have provided for centralized purchasing in some measure. The laws dealing with the subject usually set up safeguards relative to correct specifications for goods, open bidding, and the testing of deliveries. Where purchasing is handled by an office in a single consolidated financial department, as is sometimes the case, the department's control over fiscal matters is greatly strengthened.

Examples of Consolidated Management. The extent to which the concentration of power over the execution of the budget may go can best be shown by concrete cases. In California, for example, the director of finance is really the business manager of the state government. He has broad authority to supervise all its fiscal operations; he is required to audit the accounts of all state agencies, to authorize—with the approval of the governor—expenditures in excess of existing appropriations, to maintain and operate all state office buildings, to invest certain state funds, lease or sell property belonging to the state with the consent of the agency involved, and to devise a uniform accounting system for all state agencies. The director also exercises a wide authority over the purchase of supplies, and assists the governor in the preparation of the budget. In Minnesota, the commissioner of administration prepares the budget, approves the disbursement of funds to other agencies, passes on the creation of new positions and on the letting of contracts, has charge of centralized purchasing operations, rents and leases land, and supervises the construction of new state buildings.

AUDITING

Nature of an Audit. All states provide for a regular examination of their accounts to discover whether the money appropriated by the legislature has been spent according to the terms of the laws, and to insure the accuracy of financial records. The auditor or controller charged with these duties is concerned, however, with the mere enforcement of law, not with the prudence or wisdom of the various financial transactions.

Independence in Auditing. If the review of outlays is to be searching and unbiased, the officer in charge of audits should be entirely independent of the spending agencies whose accounts he is called upon to check. Hence he should not be placed in any consolidated financial department but should occupy an entirely separate position in the state government. Moreover, he should not be appointed by the officers whose work he is to inspect. With this in mind, most states have provided for the election of their respective auditing officials.

Actually, it is questionable whether the desired independence is guaranteed by popular election, because the auditor is usually closely

associated in politics with the group represented by the governor and other state officers. In theory at least election by the state legislature seems better calculated to assure expenditure of funds in accordance with the law. On this assumption a few states provide that the legislature may or shall appoint an auditing committee or auditors to examine the accounts of state officers; and in many states the governor is required to make reports to the legislature on all state funds paid out by him.

Other expedients have been devised in the interest of accurate auditing. A few western states authorize the governor to make examinations of the accounts of state officers without previous notice to those authorities.[13] All states require the publication of financial reports in some form, although as a rule they are not detailed and specific enough to prevent concealment of frauds.

STATE SUPERVISION OF LOCAL FINANCE

Nature of the State's Interest. Almost one-third of all the money spent by the states during the fiscal year that ended on or just prior to June 30, 1946 consisted of financial aid to local governments, and the states have an interest in seeing that the money is not squandered. At all times, the state's ability to raise money for its own purposes by taxation is affected by the prudence or wastefulness shown by local governments in using the money they procure from such sources as sales, property, and other taxes. The state government, therefore, has a double interest in the careful and honest spending of money by the localities; and it is the only superior public authority to which citizens may turn for an independent check on their local financial officers.

Financial Difficulties of Local Governments. Except in the larger cities, the collection and disbursement of local revenues is, as a rule, in the hands of men whose technical experience in finance and accounts is, to say the least, somewhat restricted. To limited experience is added the bane of village and county politics which may make for extravagance and recklessness, and often for corruption. The history of American local government shows that many communities are prone to exceed their debt limits in borrowing money; that they sometimes fail to make provision for paying off their bonded indebtedness; that they may make unauthorized expenditures; that outgoing officers frequently leave big debts for their successors to pay; and that local

[13] A. F. MacDonald, *American State Government and Administration* (3rd ed.), 1946, p. 222.

accounts may be kept in a crude fashion which conceals trickery and peculation.

Forms of State Intervention. State attempts to improve the efficiency and honesty of local financial operations take numerous forms. In some cases, a central state agency is charged with the supervision of local finance; the bureau of municipal affairs and statistics of Pennsylvania or the division of local government in New Jersey, for example. In other cases, local units may be required to observe budgetary standards set up by state law, or forced to submit their budgets to the scrutiny of a state authority before putting them into effect. The handling of local funds may have to conform to a standard state accounting system and, in numerous jurisdictions, is subject to periodic state auditing. Among the miscellaneous features of state control are occasional requirements that proposed local bond issues be examined as to legality by state officers and that local financial reports be submitted annually to some state agency for review. New Jersey goes even farther—there the state has taken over the financial administration of certain municipalities in default, settled claims against them, and revised their debts in conformity with court orders.[14]

In some places, special intervention by the state may occur upon the initiative of local citizens, alarmed about the course of financial affairs in their communities. In Missouri, for example, the state auditor will, on petition of five per cent of the qualified voters in certain political subdivisions, conduct an audit of their records. In Iowa, a board, composed of the comptroller, the auditor, and the state treasurer, has been established to hear pleas from local sources. A mere one-fourth of one per cent of the voters in a city, town, or other subdivision endowed with financial powers may appeal to this board on the merits of a proposed budget, a tax, or an expenditure, provided the petitioners number at least ten and that three of them take the trouble to make a formal protest at the hearings on the budget items to which they object. The state board then designates a deputy to investigate the complaint and to approve, disapprove, reduce, or otherwise modify the budget in question.[15]

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[14] For a compact survey of current practices in three states, see "Watchdogs of Local Finance," *The National Municipal Review*, July, 1917, pp. 382–388.

[15] Chapter 24, *Laws of Iowa*.

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CHAPTER 34

State Promotion and Regulation of Special Interests

Growth of State Intervention. As indicated in Chapter 4, there has been a *laissez-faire* tradition of long standing in the United States, opposed to most forms of government interference in economic affairs, yet constantly violated in practice. When the United States began its career as an independent nation the overwhelming majority of the people were engaged in farming and the remainder were carrying on small business enterprises or small industries in which rather simple tools and machines were used. These farms, enterprises, and industries were generally owned and managed by individuals or partnerships. The major portion of the artisans either owned their own workshops or looked forward to such ownership after serving for a time as apprentices and journeymen. In all the land there were only a few corporations, or associations of individuals, in charge of economic undertakings.[1]

But with the industrial revolution, corporations appeared in ever increasing numbers, to establish and manage enterprises calling for large accumulations of capital, such as toll roads and bridges, canals, and, later, railways and manufacturing plants. Accompanying this development was the rise of an extensive class of industrial workers who soon began to band together in trade unions for the purpose of raising their wages and reducing the hours of the working day. Finally, in the opening decades of the twentieth century, farmers turned to mutual aid and founded cooperative societies to buy manufactured goods wholesale, handle the marketing of their produce, and otherwise advance their economic power. Thus there arose in nearly all parts of the country a conflict of interests, accompanied by pressures on government for favorable legislation and various forms of assistance. In response, state governments intervened in economic affairs on a large scale with a view to promoting particular interests, regulating them,

[1] Only twenty corporations were formed during the thirteen years immediately preceding the adoption of the Constitution of the United States. *Fletcher's Cyclopedia of the Law of Private Corporations*, Vol. 1, pp. 8–9.

and moderating strife among them. Ordinarily such interventionist activities are justified in politics on the ground of "the public interest."

THE CREATION AND POWERS OF PRIVATE CORPORATIONS

Corporations Usually Created Under State Law. *In attempting to* control economic organizations, the states have always had one important advantage: it is an accepted principle of law that private corporations [2] can be formed only with governmental permission, which normally means the consent of the state government.[3] Hence the state may, by laying down the conditions under which it will grant charters to private corporations, exercise a considerable degree of control over their forms and management.

Incorporation Under General Laws. In the beginning of our history, it was the practice of state legislatures to authorize the formation of individual corporations by special acts. Since only associations having substantial influence with the legislature could secure charters, private corporations often became objects of favoritism enjoying monopoly privileges. Gradually this practice has been abandoned; today legislatures are commonly forbidden by state constitutions to create corporations by special acts or are severely limited in the exercise of that power. As a result, each state now usually provides by general law that any group may automatically receive a charter upon satisfying standard conditions set forth for all corporations in its particular field of activity. This change has made the creation of corporations a common, routine affair, rather than an occasional act of legislative sanction or favoritism, and has done much to popularize the corporate system of business.

Methods of Incorporation. The exact procedure prescribed for the formation of corporations varies from state to state. Hence businessmen sometimes find it to their advantage to shop around for attractive terms; Delaware has become a favorite place for floating companies, owing to the leniency of its corporation laws. In general, it may be said that prospective incorporators must sign papers setting forth the objectives of the proposed organization and the manner in which it is to be capitalized and transmit these, together with specified fees, to the proper state official. If the papers are in order and the objectives are legal, incorporation normally follows.[4]

[2] Public corporations form a distinct class, including such entities as cities. See Chapter 36.

[3] Among the exceptions are the national banks and other corporations chartered by the United States Government.

[4] For a comprehensive survey of incorporation requirements, see U. S. Corporation Co., *The Corporation Manual*, latest edition.

Right to Alter the Terms of Incorporation. To prevent corporations once chartered from claiming perpetual rights under that clause of the Federal Constitution which forbids states to impair the obligation of contracts, nearly all states, by constitutional provision or statutory declaration, reserve the right to amend or repeal the laws under which corporations are formed. Some states expressly provide that franchises to certain types of corporations shall only run for a term of years fixed in the charter and thus authorize a periodical review.

Control Over Internal Management. Once created, a corporation is under the legal obligations to its stockholders set forth in the laws of the state of its origin.[5] It is frequently stipulated that corporations shall not issue stock except for money, labor, or property actually received. The corporation may be required to hold periodical meetings and to send proper advance notices of the same to all stockholders entitled to vote. It may be compelled to have certain officers and to file formal annual reports, open to public inspection. In some states, corporation directors are liable to creditors and stockholders for money embezzled or misappropriated by the officers of their concern.

"Foreign Corporations." A corporation chartered in one state may operate as a "foreign corporation" [6] in another state, upon complying with the laws of the latter. The foreign corporation must maintain an office in the state in which it proposes to operate, and an agent on whom legal processes can be served; and it may have to file annual reports, pay fees, and consent to specific types of regulation in addition. When the requisite terms have been met the foreign corporation receives a license or certificate of some kind, entitling it to do business in the state.[7]

The Preservation of Competition. Early in the history of incorporation laws, the states became alarmed over the propensity of certain domestic and "foreign" corporations to dominate particular fields of business at the expense of competitors. Left entirely to their own devices, the more powerful managements were able to destroy or drastically weaken rivals, fix prices, and otherwise set their own terms in the market place. Not content with the common-law rule that makes illegal "all combinations in restraint of trade," most states have enacted statutes forbidding combinations or conspiracies designed to restrain or monopolize business.

Supplementing such general antitrust measures are statutes regulating particular kinds of combinations. Thus, for instance, the consent of a

[5] For an annual survey of these requirements, see *ibid.*

[6] Concerns organized in other countries are sometimes known as "alien" corporations.

[7] See U. S. Corporation Co., *The Corporation Manual*, latest edition.

state board or commission may be required prior to the merging of two or more public utility companies; or the permission of a state superintendent of banking may be necessary before a number of banks may be united under one management. In the interest of "little business," many states impose a tax on chain stores which increases rapidly with the number of stores involved. In Texas, if a chain has but one store in the state, it pays an annual tax of one dollar on that store; but for every store operated by it in the state in excess of fifty, it pays not one dollar but $750. The obvious purpose of such discrimination is to offset the advantages of large-scale operation by applying to it an economic penalty on behalf of small, neighborhood-owned stores.

Fair Business Practices. Not only are corporations controlled in respect of size by state law; their competition is supposed to conform to certain ethical standards. State legislation often forbids corporations to conspire to fix prices on any substantial scale and to grant rebates to favored parties. Manufacturers—corporate and individual—are penalized for misbranding foods, drugs, and certain other articles in order to cover up their inferior quality. Every state, except Nevada, has a "blue sky law" intended to prevent the sale of worthless stocks and other securities—the very blue sky itself—to investors at fancy prices. These laws often require registration and licensing of security brokers and an official review of many kinds of proposed issues before they can be sold.

Limitations of State Control. Owing to the prevailing diversity in state legislation, a shrewd management may minimize supervision by obtaining a charter in a lenient state and operating elsewhere as a "foreign corporation." Thus, many of its features, such as its capitalization and relations with its stockholders are subject only to the loose or weak legislation of the state of its incorporation and are quite beyond the control of the other states in which it merely has the status of a foreign corporation. An alternative scheme is to form a holding company in a lenient state and to use it to acquire a majority interest in scattered companies incorporated in stricter states, thereby giving the overhead management a freedom of action denied to the component parts. In the presence of these practices, a state that tries to keep corporations under stringent supervision will find much of its work in vain; locally chartered corporations will merely be penalized in competing with outside organizations.

Federal Intervention. Efforts have been made to overcome some of the weaknesses in state control over corporations by applying federal remedies. The national Securities and Exchange Commission, for instance, now regulates the issuance and sale of stocks and bonds by

corporations, banks, and other concerns through the mails or in interstate commerce. Since the biggest corporations must ordinarily dispose of their securities in a nationwide market, or use the mails, this legislation has gone far to supplement state control. A more drastic scheme, proposed from time to time, calls for federal incorporation of all companies engaged in interstate and foreign commerce. If this were adopted, the balance of power in governmental control over corporations would be shifted from the states to the nation.

SEMI-PUBLIC BUSINESSES

"Businesses Affected with the Public Interest." In 1877, the United States Supreme Court, in the famous case of Munn *v.* Illinois (94 U.S. 113), held that when anyone devotes property to a use in which the public has an interest, he must submit to a corresponding measure of public control for the general good. In application, this concept means that a corporation engaged in such semi-public activities as operating a bank or electric light plant may be subjected to stricter state control than ordinary business or manufacturing enterprises, despite that clause of the Federal Constitution which forbids a state to deprive persons of property without due process of law. Precisely what form such state supervision may take, short of actually violating the due process clause of the Federal Constitution, is a matter for the courts to decide on the basis of the peculiarities inherent in each type of enterprise.

Financial Corporations. Prominent among concerns affected with the public interest are state banks, trust companies, building and loan associations, and similar organizations. State laws specify in detail the practices they must follow to maintain solvency and protect their depositors and customers. State officials supplement the laws by regulatory orders and periodically inspect their accounts and records. If a concern of this class becomes involved in financial troubles, state authorities may intervene, remove the officers responsible for the difficulties, and take charge of its affairs in order to straighten matters out or liquidate it. Distinct from the state banks are, of course, the federally chartered national banks, supervised by federal officers.

Insurance Concerns. Insurance is also, in the opinion of the courts, a business affected with the public interest and hence subject to special forms of state control. Having suffered grievously from frauds and irregular practices on the part of a few irresponsible fire, life, and other insurance companies, all states now bring such concerns under public supervision. In part, this control is exercised by the state in which the concern is incorporated, and in part it is imposed by other

states as a prerequisite for issuance of a license to do business locally.

An important feature of state control is the effort to make certain that the finances of insurance companies are in sound condition. To this end, states may determine the size of the reserves that must be maintained to cover existing policies, and the types of securities in which insurance funds may be invested. Companies must file annual statements of their finances with state officials and submit to state inspections of their books and records. With a view to guaranteeing fair treatment of policyholders, state laws may require insertion of definite clauses in all policies or specify the exact terms of each policy. Sometimes the rates charged by insurance concerns are also fixed by state authorities.

One of the chief difficulties with the prevailing system of regulation is the highly diverse character of state laws, producing many complications for the great nationwide insurance companies. Under a decision of the United States Supreme Court in 1944,[8] which suddenly reversed its earlier position and held that insurance is a form of interstate commerce subject to national regulation, the way was abruptly cleared for a single federal system of supervision; but up to the present time none has been provided. Pending appropriate action by Congress, the Court has ruled that states may continue to apply reasonable regulations to interstate insurance operations.[9] At the moment, then, control over the insurance business rests on a temporary basis.

PUBLIC UTILITIES

Special Nature of Utilities. A large proportion of the businesses affected with the public interest fall within a special subclass known as the public utilities. These concerns are deemed to bear such an intimate relation to the public and the government as to justify particularly stringent state regulation. If a bus company, for example, seeks permission to use the state highways, it may have to accept a certain measure of state supervision as a condition for receiving the grant. Again, a state authority or a local government acting under a general law may accord to a utility the exclusive right to provide a given service in a given area; and in return for this advantage, the utility is placed under legal obligation to provide standard services at reasonable or fixed rates to its customers.

Extent of State Regulation of Utilities. Every state but Delaware has some kind of regulatory body charged with supervising public utilities. The scope of their powers varies widely through the Union.

[8] U. S. *v.* South-Eastern Underwriters Association, 322 U. S. 533.
[9] Robertson *v.* California, 328 U. S. 440.

In about one-third of the states, the regulatory agency has control over electric light and power companies, manufactured and natural gas systems, steam railroads, street and interurban railways, motor carriers using the highways, water companies, telephone and telegraph lines, and oil and gas pipe lines. Elsewhere, one or more of these classes of concerns escape general state supervision.[10]

Franchises and Certificates of Convenience and Necessity. Ordinarily a public utility must have two types of official permits before it begins operation. One is a franchise authorizing it to make use of public property, as by laying water or gas mains in city streets. The other is known by some such name as a "certificate of convenience and necessity," wherein the government recognizes the need for the proposed service. The trend is toward a partnership between state and local governments in issuing these papers—the usual procedure being for local governments to grant local franchises and the state to issue certificates of convenience and necessity, but occasionally either local or state permission suffices.

Service Requirements. Once in operation, public utility systems must ordinarily meet certain service standards prescribed by state statutes or in state administrative regulations. Thus railroads may be under legal compulsion to heat their passenger cars in winter, install industrial sidings for factories on fair terms, and carry freight without granting special favors to particular shippers. Telephone companies may be restricted as to the maximum number of persons they may connect with a single rural party line. Gas companies may be checked to see that they are keeping pressures within a certain safe range, and that the heat content per cubic foot of gas is maintained within specified limits.

Rate Regulation. What should utilities charge customers for the prescribed types of service? State commissions usually have statutory authority to settle this question, but must be cautious in their actions. If they set rates too low, they may be overruled by the courts for taking private property, namely that of the utility company, without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution. Reduced to simple essentials, this means that a utility is constitutionally entitled to a fair return on a fair valuation of its property.

For many years hot disputes were waged over the "correct" valuation to be put on utility properties as the proper base for fixing rates. As prices rose utilities very naturally favored substituting for the original

[10] For the current status of regulation, see the latest issue of *Moody's Manual of Investments*, public utility volume.

cost of their plants the "reproduction cost," that is, the cost of constructing them anew at current prices. Reproduction cost, of course, fluctuates with the price index and is at best a mere estimate in the absence of the actual letting of contracts for duplicate facilities. Confronted by this difficulty, the United States Supreme Court long held that "weight" should be given to reproduction costs but would not say how much weight. Hence state utilities commissions were frequently compelled to face court actions in trying to enforce their rate decisions. For the arduous task of waging tedious and expensive contests in the courts the commissions were often poorly equipped; their membership was constantly changing; and their staffs usually lacked the competence of the lawyers and engineers employed by private concerns to fight rate orders.

Thus matters stood until the United States Supreme Court, in 1943 and 1944, gave a new turn to state rate regulation by overriding its earlier theories as to utility valuation and holding simply that, if a rate is equitable to consumers and investors, it is not necessary to argue about the precise nature of the rate base employed.[11] It now seems, therefore, that state regulatory commissions may at last standardize rates on concrete and reasonably exact principles, such as that of "prudent investment," according to which a utility is valued with close reference to the amount of money actually and prudently invested in it.[12] Under the new decisions, it also seems that state bodies may vary the rate of return allowed according to the type of securities involved—fixing a low figure for bonds and a higher figure for stock.

TRADE UNIONS

The Right to Organize. In their efforts to gain sufficient strength to win concessions from large concerns and corporations of all kinds, industrial workers have organized unions (Chapter 23). Attempts of employers to weaken this drive and the powerful reaction of the labor vote to such resistance have brought the issue of "rights of labor" squarely into the political arena. Among the early victories won by organized labor in this contest was the enactment of laws in numerous states banning the "yellow dog" contract, under which a workman had to promise that he would not join a union before he received employment in the concerns which insisted on agreements of this nature.

[11] 320 U. S. 591 and 324 U. S. 548, relating to Federal Power Commission rate decisions in the Hope Natural Gas Co. case.

[12] John Bauer, "State Utility Regulation," *Book of the States*, 1945–1946, pp. 385–392.

However, the abolition of the yellow dog contract was purely negative, whereas unions wanted positive aid in their determination to organize industry. Friendly help was secured at last in several states by the passage of state labor relations acts applicable to intrastate activities. Among states with such legislation are Colorado, Connecticut, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Rhode Island, Utah, and Wisconsin. As a rule, under these laws, company domination of unions and company discrimination in hiring and firing designed to discourage unionization are made "unfair labor practices." Complaints regarding unfair practices may be filed with the proper state officials, who, after hearings, may issue cease and desist orders bringing them to a halt.

Just how comprehensive is "the right to organize"? Does it legally authorize a union to compel the employer to accept a closed-shop agreement and thus hire only persons who belong to the union? Generally speaking, closed-shop agreements are lawful. But the states of Arkansas, Delaware, Georgia, Iowa, Maine, Nebraska, New Hampshire, North Carolina, South Dakota, Tennessee, Texas, and Virginia have recently put into effect laws restricting or banning the closed shop, and in 1948 popular referenda on the issue were held in both Arizona and North Dakota. Such legislation commonly forbids "yellow dog contracts" as well as closed shops, the two features being ordinarily embodied in a single formula known as "the right to work." The typical phrasing employed is that "the right to work" shall not be denied or abridged because of either membership or nonmembership in any labor union.[13]

May a union hold its organization together by the device of forcing an employer to deduct union dues automatically from the payrolls of all his union employees, regardless of their individual wishes? Usually this so-called "check-off" of union dues is legal, but a few states now forbid it unless the persons involved have previously and specifically given their consent.[14]

State Supervision over Internal Organization. Given the power wielded by modern unions, sometimes with the help of favorable state and national legislation, the question arises whether the public does not have a concrete interest in the internal organization of these bodies, just as it has in the organization of corporations and political parties. At all events, Colorado once sought to control the setup and management of unions by ordering them to incorporate, only to have the

[13] U. S. Department of Labor, *Monthly Labor Review*, September, 1947, pp. 279–283.
[14] *Ibid.*

measure struck down by the courts as unconstitutional. Other states try expedients of a different type; for instance, merely requiring unions to register with a state authority. Alabama demands an annual statement from unions, listing the names of their officials and the salaries of each, the number of members, the amount of property owned, and the sources and objects of expenditure of union funds. These reports are open to union members on request. Efforts of states to go further and compel union agents to take out annual licenses, besides proving themselves citizens of the United States, have been barred by the courts as either in conflict with national labor legislation or as violating constitutional rights of free speech and assembly.[15] In the presence of these uncertain beginnings, the future trend of state supervision over the internal organization of unions is hard to predict.

The Legal Status of Collective Bargaining. When union managers first tested their powers on a large scale, state courts often held that collective efforts on the part of labor to raise or fix wages and reduce hours were by their very nature illegal conspiracies in restraint of trade. That view does not prevail today. On the contrary, under a few labor relations laws (p. 703), state officials are positively authorized to encourage such bargaining practices; they conduct elections to determine what union, if any, is to be recognized as the formal bargaining agent for all the employees of a given intrastate enterprise; and, if an employer fails to bargain with the victorious agency, he may suffer the legal consequences of engaging in an "unfair" labor practice.

Mediation and Arbitration. Where collective bargaining occurs, either voluntarily or under the compulsion of a state law, there is still no guarantee that it will produce a settlement. With a view to promoting peaceful solutions of controversies, a number of states offer their services in the mediation or arbitration of disputes on a voluntary basis. This arrangement often proves effective. To facilitate conciliatory processes, a Minnesota law requires unions to give either ten or thirty days advance notice of a strike or walkout, the time depending upon the importance to the public of the business involved. During that period, the public has an opportunity to judge the merits of the case and the state has a chance to open negotiations for the purpose of bringing the parties together.[16]

[15] U. S. Department of Labor, *Monthly Labor Review*, June, 1947, pp. 1052–1056 and September, 1947, p. 279.

[16] L. W. Youngdahl, "The Human Element in Adjusting Labor Disputes," *State Government*, August, 1947, pp. 212–214.

A few tests have even been made of compulsory arbitration. Although a drastic Kansas experiment along this line was declared unconstitutional by the Supreme Court of the United States in 1923,[17] the newer and more limited types of control may win judicial approval. At all events, Florida, Indiana, Michigan, Nebraska, New Jersey, Pennsylvania, and Wisconsin require compulsory arbitration in public utility labor disputes—where the public at large has a recognized and clear interest in the matter.

Strikes. The chief instrument brought into play by trade unionists as a last resort in realizing their demands is the strike. As state laws now stand, union members may ordinarily strike against the plant in which they are employed, that is, cease working in it for the time being; or they may even leave their posts in a plant where there is no direct labor dispute, for the purpose of expressing their sympathy for the members of another union on strike elsewhere—a proceeding known as a sympathetic strike.

Frequent use of various types of strikes in recent years has been accompanied by a reaction in the form of limited antistrike legislation. For example, Michigan, Missouri, New York, Ohio, Pennsylvania, and Texas forbid government employees to go on strike, and most of them provide that, if such a strike occurs, it ends the employment rights of the individuals involved. In Minnesota, strikes by employees of charitable hospitals are forbidden.[18]

Owing to grave inconvenience or actual perils to the people at large, strikes occurring in privately owned utility plants[19] raise serious issues, and a few states make provision for bringing them to an abrupt end. The laws of Massachusetts, Missouri, New Jersey, and Virginia authorize state officials to seize and operate utilities in case of a strike against them and to forbid strikes after the facilities have been so seized. Making use of this grant, New Jersey seized gas plants on three occasions in 1946. During the same year, the governor of Virginia, facing a strike by utility employees, drafted the able-bodied strikers under fifty-five years old into the militia and furloughed them back to their jobs in a utility system, under threats of military penalties for refusal to work. When the new "recruits" agreed to arbitrate, they received honorable discharges from the militia. A few states regulate or prohibit strikes arising out of so-called "jurisdictional disputes"

[17] Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522.

[18] U. S. Department of Labor, *Monthly Labor Review*, September, 1947, p. 281.

[19] For example, there was a serious explosion in Milwaukee when at the termination of a strike the gas pressure was suddenly restored.

between unions over the right to choose an agent for collective bargaining or over the right to do a specific type of work for an employer. By the end of 1947, nearly one-fourth of the states had also forbidden secondary boycotts, involving such actions as the refusal of one concern's employees to handle or work on materials or supplies coming from another concern whose employees are out on strike.

Injunctions. During strikes of any kind, employers frequently turn to the courts to secure injunctions, namely, orders forbidding specified kinds of "unlawful" conduct by strikers. Since trade unionists who refuse to obey these commands may be fined and imprisoned for contempt of court, a sweeping injunction may break a strike. On this account, unionists have long sought limitations on the use of the injunction in labor disputes; and sixteen states, including such key industrial commonwealths as New York, New Jersey, and Pennsylvania, now have anti-injunction laws. Legislation of this nature ordinarily forbids the state's courts to issue injunctions designed to prevent persons merely from striking or peacefully publicizing a dispute; but it leaves the way open for injunctions aimed at fraud, violence, and intimidation. When tested for constitutionality, such legislation has been generally upheld by state tribunals; and the Wisconsin law has received the approval of the United States Supreme Court. Nevertheless, the restricted scope of the laws and the fact that two-thirds of the states have no statutes of the kind still make possible a wide use of injunctions in restraining labor activities.

Picketing. Historically, one of the common uses of injunctions in labor disputes has been to prevent picketing, namely, assembling in front of an establishment and by the display of placards, distribution of circulars, use of the voice, or other means, urging persons to abstain from entering it to work or transact business. It now seems to be established by the Federal Supreme Court [20] that peaceful, orderly displays of this type by parties having a fair and direct interest in a labor controversy are within the guarantees of free speech and a free press embodied in the National Constitution.

On the other hand, state courts have held that picketing is a privilege which may be easily abused and that when it is for an unlawful object it is not protected by any constitutional guarantee. At any rate, legislation in Delaware, North Dakota, and Utah allows picketing only if a majority of the employees of a plant have voted in favor of a strike; and Pennsylvania forbids anyone to picket a place where he or she is not actually employed. Connecticut bans picketing of homes and resi-

[20] For example, Thornhill v. Alabama, 310 U. S. 88.

dences. Some states prohibit mass picketing which may reach such proportions as to bar entrance to a structure or force people off the sidewalks.[21]

AGRICULTURAL ORGANIZATIONS

Individualism in Agriculture. The corporate and trade union devices so widely used in industry are relatively rare in agriculture. According to the 1940 census, the vast majority of American farms are small (with an average acreage well under 200) and either operated by the owning families or by tenant families. The number of large farms owned by corporations, though only indirectly referred to in the census returns, appears to be comparatively negligible and less than ten per cent of the labor on farms is hired. As a rule, the states have sought to preserve this individualistic pattern of operation. Since 1942, corporations other than farmers' cooperatives have been debarred by statute from engaging in farming or agriculture in North Dakota, and the counties of that state have been empowered to enforce the law by seizing and selling the land of recalcitrant corporations. The California constitution forbids sale of state land suitable for cultivation to any persons other than actual settlers, and even then in tracts of over 320 acres each. Idaho and South Dakota recently passed laws to forbid formation of unions among farm laborers, but both acts were declared unconstitutional.

Agricultural Cooperatives. Despite all the fanfare about individualism in agriculture, however, the fact remains that it places the farmer at a distinct disadvantage in dealing with the business world around him. Small farmers ordinarily buy machinery and supplies at retail prices, while selling their produce at wholesale. In disposing of their output, their usual inability to ship in full carload lots, to protect their interests upon the arrival of shipments in distant markets, or to can or otherwise process their own goods has left them at a marked disadvantage in the struggle to secure a "fair return" for their labors. To help them in overcoming some of these handicaps, nearly every state has enacted statutes expressly authorizing farmers to form and incorporate nonprofit cooperatives for mutual aid. These groups are generally empowered to buy machinery and supplies, process, ship, and sell their output, and perform such other services as extending credit to members. The associations may make marketing contracts and hold members liable for failure to live up to their agreements. In addition, cooperatives may be expressly exempted from the operation

[21] U. S. Department of Labor, *Monthly Labor Review*, September, 1947, p. 280; for current cases in the courts, see latest issues of same.

of the antitrust laws aimed at preventing restraint of trade. As a rule they are also exempted from taxes on their earnings or "profits." Taking advantage of such state favors, farmers have organized associations on a large scale. According to the 1940 census, nearly one-fourth of all the farm operators in the country reported that they made some use of farmers' cooperatives in 1939.

Fair Practices in Agricultural Trading. Further contributing to the downfall of "rugged individualism" on the farm are various purchasing and marketing safeguards thrown about farmers by state legislation. States now inspect seeds, fertilizers, animal feed, and nursery stock, to make sure that these products come up to specified minimum standards of quality. With federal aid, states supply farmers with current crop and market reports, by radio and other means. When engaged in disposing of his output, the farmer is aided by state inspection and grading of his commodities, state supervision of bonded warehouses, and state regulation of buying procedure intended to prevent sharp practices at the farmer's expense. Several states even have agencies that fix milk prices by law, thus drastically altering the old-fashioned competitive system in the dairy industry.

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CHAPTER 35

State Promotion of General Welfare

Constitutional Basis. As President Herbert Hoover said years ago, the dominant economic theory in the United States rejects the principle of extreme *laissez faire*, with its corollary of "everybody for himself and the devil take the hindmost." In positive terms, it asserts the duty, as well as the right, of government to protect and advance the public interest. This privilege is secured to the states by the Tenth Amendment of the Federal Constitution. It is sustained by judicial decisions to the effect that even the Fourteenth Amendment, imposing restrictions on the states, leaves them free to exercise "the police power," namely, the power to make and enforce laws for the protection and promotion of public health, public safety, and other phases of the general welfare.

States may go so far, under their police power, as to quarantine or otherwise confine persons suffering from contagious diseases and destroy, without compensation to owners, property duly condemned as firetraps or evidently perilous to life and limb. When these and other extreme exercises of the police power by a state have been challenged in the courts as violating privileges of person and property rights, it has been customary for the judges to uphold them as constitutional, unless they were found to be capricious, discriminatory, and unreasonable infringements of private rights.

HEALTH, SAFETY, SECURITY, AND MORALS

State Regulation of Medical Practice. Under their police power, states have set up strict standards which members of the medical and related professions must meet before they may secure licenses entitling them to practice medicine, dentistry, pharmacy, and certain other sciences or arts. When such legislation has been attacked as interfering with liberty of occupation, the courts have upheld it as a legitimate means of protecting the people against untrained and dangerous quacks, charlatans, and impostors.

State Supervision of Food and Drugs. It is also customary for state

governments to regulate manufacture and sale of food and drugs. State inspectors license and examine slaughter-houses, dairies, and other food-processing establishments and inspect their products. Where necessary, the state may remove from intrastate trade foods that are adulterated or are deemed unfit for human consumption. Supervision of the drug business is designed to insure the proper labeling, quality, and potency of drugs, and to prevent the free and easy sale and purchase of habit-forming narcotics. Though state regulation of food and drugs technically covers only intrastate operations, state officials may call the attention of federal inspectors to questionable products passing in interstate trade which are within the scope of national legislation.

The Control of Specific Diseases. It is now becoming a common practice for state governments to conduct direct campaigns against certain major diseases. Many of them now have regular full-time staffs devoted to the eradication of tuberculosis—often supplied with mobile X-ray units which travel about the state, making voluntary examinations of men, women, and children to detect signs of tuberculosis. Even the battle on cancer has become a state function in some sections. Where a major epidemic suddenly appears, the state may turn its scientific resources to effecting a prompt suppression. Pennsylvania, for instance, has a complete mobile state health laboratory, ready to go quickly to the assistance of stricken areas. If local governmental agents prove incapable of handling the situation, the state health authority may sometimes remove them and institute direct management until the danger has passed.

State Hospitals and Related Institutions. For indigent persons who suffer from disease or are maimed or otherwise partially or totally incapacitated, states provide aid in public hospitals and other institutions. The number of persons to be cared for increases rapidly as the spirit of science and humanity advance into this field. As skillful treatment moves forward by specialization, so state institutions tend to divide and subdivide in order to concentrate upon different classes of ills. An enlightened state will maintain institutions for feeble-minded children and adults, the mentally ill, and persons afflicted with tuberculosis, cancer, and other major ailments.

Marked impetus is being given to expansion in these fields by an act of Congress authorizing federal grants to the states for construction of hospitals and health centers. To qualify for such financial assistance, a state must first make a comprehensive survey of its existing institutions and of its unfulfilled requirements. Every state in the Union has now begun such a study.

The management of state hospitals, involving large outlays and the

command of high technical abilities, presents one of the gravest challenges in state government. The usual organ of administration has been a separate board for each institution, a board endowed with power to appoint employees, buy supplies, and control policy. At the present time, however, there is a strong tendency to place all of these institutions, at least of a given class, under a single board or agency, subordinate to the governor. This makes uniformity possible in their organization and administration. It promotes economy by eliminating duplicate officials and employees, by establishing a more rigorous supervision over expenditures, and by centralizing the purchase of supplies. It contributes to responsibility. A single central body giving its whole time to its public duties can be more easily held to account by the governor, the legislature, and people than a series of boards.

Whatever form of management is adopted, central or specialized, the administration of state institutions calls for constant watchfulness by the public. The purchase of supplies and the erection of buildings offer opportunities for peculation which are tempting to politicians of the lower order. Even positions of control which call for technical skill of superior excellence are frequently made subjects of political spoils, and institutions degenerate under the direction of superintendents who are often incompetent and sometimes brutal; then the inmates of institutions suffer from poor food, insufficient clothing, and cruel treatment. Scandal after scandal has marked the course of institutional management, and nothing but unremitting vigilance on the part of the governor, the legislature, and citizens can uphold high standards in personnel, materials, and services.

State Health Relations with Local Governments. State health officers have many points of contact with agents of local governments. The latter supply reports on the incidence of disease and the causes of death in their respective communities, from which the state authorities compile general statistics. As a rule, states rely on city officials to carry the chief burden of combating diseases, maintaining healthful conditions, and providing hospital care in urban areas. On the other hand, where arrangements of local governments on behalf of the public health are notably inadequate, as often is the case in rural areas, the state itself may take direct charge of many community health functions. Through this equalizing process, it is feasible to achieve some kind of a minimum health standard on a statewide basis, thereby truly promoting "the general welfare."

Safety Requirements. Offsetting in part the gains registered in the field of public health are deaths and injuries resulting from automobile collisions, mine explosions, railroad wrecks, and other accidents. In

an effort to minimize perils from this quarter, states have adopted hundreds of pages of statutes, rules, and regulations dealing with safety; and they keep large staffs of inspectors in the field to enforce them. Motor vehicle operators are examined for competency, and automobiles are required to meet certain equipment standards. Railroads are ordered to cooperate in grade crossing eliminations. Factories and workshops must be ventilated; dangerous machinery must be safeguarded; penalties are placed upon employers using unsafe and improper elevators; fire escapes must be provided for certain factories; boilers generating steam and heat for factory purposes must be kept in good order and periodically examined; and mines must be ventilated and provided with suitable outlets.

State Police. Safety has a double meaning—it covers the protection of the public—the security of persons—against criminals as well as against hazards and accidents. Every state now has regular uniformed state police to deal with lawbreakers. In some jurisdictions, these police officers merely enforce the motor vehicle code, but in the majority of states their authority is far more extensive. A state police force, if equipped with ample radio facilities and other aids, can be of great assistance in tracking down criminals who have eluded the toils of local peace officers or are fugitives from justice in other states.

The State Militia. Where the governor of a state deems public safety sufficiently endangered, he may go beyond the use of the state police and call out the state militia or national guard, to execute laws and suppress disorders. Ordinarily this act merely involves drawing already trained volunteers from their normal occupations but it is not necessarily so limited in scope. A governor may have it within his power to draft into the militia all, or nearly all able-bodied males between specified ages, such as 18 to 45. This is not purely theoretical; in 1946, the governor of Virginia, in effect, drafted prospective strikers under a given age into the militia and sent them to work—to avoid, in the name of public safety and convenience, a paralysis of public utilities.

The State Prison System. Individuals arrested by state and local officers, if duly convicted of serious offenses, are commonly committed to state institutions. The worst offenders are assigned to fortress-like penitentiaries, while those guilty of lesser wrongs may be sent to prison farms, reformatories, or other penal establishments. To assist in restoring offenders to normal life, as well as to reduce the cost of state maintenance, convicts are often released on state parole prior to the expiration of their full terms. While on parole, an individual is subject to supervision by special officers, and if he violates the conditions of his release he may be returned to confinement.

Morals: the Liquor Traffic and Moving Pictures. Ordinarily legislation expressing moral sentiments takes the form of general laws enforced by judicial processes. But there are exceptions. Some "moral" laws are largely applied by administrative officers. Of these exceptions two claim special consideration here.

When in 1933 the Eighteenth Amendment prohibiting manufacture and sale of intoxicating liquors for beverage purposes was repealed, the liquor business was returned to the states with the proviso that the transportation or importation of intoxicating liquors into any state in violation of its laws was to be prohibited. This action precipitated a sharp contest over the liquor traffic and saloons, which is still in full swing. Two states, Mississippi and Oklahoma, have "bone dry" laws limiting sale of intoxicants to beverages containing not over three and two-tenths per cent of alcohol. The vast majority of the states permit the sale of liquor by persons holding licenses—either on a state-wide basis or subject to local-option laws which allow counties, towns, or other subdivisions to prohibit it within their jurisdictions, by popular vote. Several states limit such sale to state-owned or state-licensed monopoly stores. Once it was contended that the monopoly plan would stop or diminish the "pushing" of liquor on the public by commercial interests, but the attractive revenues realized from these stores tends to make them highly popular with states in need of revenues to meet their bills.

Disturbed by moving-picture films portraying crime, vice, and other human degradation, some states have set up reviewing boards which censor films prior to release for commercial use. In New York the creation of such an agency was welcomed by the theaters as a means of avoiding litigation in the courts over morals. Though the number of states having film censorship is small, the size of their population and the activities of their boards in banning whole films or scenes make producers who aim at a maximum market extremely sensitive to their views of life, love, crime, politics, religion, and other matters involving moral sentiments.

PUBLIC EDUCATION

Stages in Development. From the early days of our Republic it has been widely believed that popular government and general welfare depend primarily upon a literate and informed body of citizens, and that such a citizenry can be obtained through compulsory education, provided privately or in free public schools not subject to the control of religious, political, or other private associations. A struggle to realize this ideal began soon after the Declaration of Independence and

still continues. In practical terms, its achievements fall into three broad stages.

By the middle of the nineteenth century, the battle for free elementary schools, supported by local taxpayers, had been won in most of the states. Then emphasis was placed on establishment of free public high schools, and during the opening years of the twentieth century they were founded in nearly all parts of the country.

While efforts were continued to widen and improve elementary and high school education, a movement was started to make college and university education freely accessible to all who desired it. To meet this demand, state-supported institutions of higher learning were enlarged, the number was increased, and local colleges were founded to bring facilities nearer to the people. Now the agitation over public education is extensively concerned with ways and means of securing more tax money to expand existing schools and colleges and to create additional institutions of higher learning.

Education as a Local Function. Historically, elementary and secondary education have been primarily regarded as functions of local governments, urban and rural. Even today, the vast majority of students attend schools operated by cities and special districts and managed by popularly elected boards of education. These agencies, close to the people, erect school buildings, employ teachers, buy supplies, and draw upon the taxpayers for the money to pay the bills (pp. 774 ff.).

Mounting Local Burdens. Educational bills have been rising rapidly in recent years. Between 1900 and 1943, the average number of children between the ages of five and seventeen attending public schools nearly doubled; in public high schools the number rose more than tenfold between 1900 and 1944. In part, the increase was due to legislation which limited child labor, thus releasing children to the schools. In part, it represented a lengthening of the period that children are required or allowed to attend school. In the meantime, the support of junior colleges, adult education, and other costly programs added materially to the financial load.

State Financial Aid. While the total annual expenditure for public schools through the high school level was multiplying over tenfold between 1900 and 1944, and the money invested in school plants was increasing even faster, local units of government were calling loudly to the states for help. Starting out on a small scale, state financial aid for local elementary and secondary schools grew apace, until by the school year of 1943–1944, the states were paying one-third of the total cost. In North Carolina, the state has even assumed the chief financial responsibility for the maintenance of the public school system. These

developments, by taking funds from the wealthier sections and distributing them in poorer districts, have brought about a greater equality in educational opportunities.

State Standards for Personnel and Equipment. The extension of state aid to the localities for public education has been accompanied by application of numerous state controls. Today, the majority of states require candidates for the teaching profession to complete prescribed courses of study and secure a state certificate before they may be legally employed in the public schools. As the states set the qualifications for these certificates and operate most of the normal schools in which teachers are trained, state officials are in a strategic position to prescribe the methodology and subject matter of education. Some states also require submission of plans for new public school buildings to state authorities for the approval of various features, prior to construction.

Curriculum Management. Especially important for intellectual life are state decisions as to what shall be taught in the schools. From time to time legislators express their views on the ideas and culture that should be imparted to those of tender years, by passing both general and random acts. For example, Wisconsin statutes, as they stood in 1947, required that children in the public schools be taught reading, writing, English grammar, arithmetic, the usefulness of birds, respect for the Flag, the principles of cooperative marketing, the effects of narcotics on the human system (unless their parents object), reverence for the Declaration of Independence, the conservation of natural resources, the nutritive value of dairy products (Wisconsin is an important dairy state), and "how to conduct themselves as social beings," whatever that may mean. Moreover, in some instances the state supplies the public school texts free of charge and occasionally even prints them in state plants. Such state determination of the books to be used brings the whole issue of what is to be taught to the next generation squarely into the political arena.[1]

State Universities. In the northeast, where there are many private colleges and universities older than the Republic itself, the states have not made elaborate provisions for higher education, such as are to be found in other parts of the country. In that region, to be sure, there are state colleges and universities, but they occupy no dominant position in higher education. On the other hand, in the south and west, where there are also many private institutions of higher learning, the state university is looked upon as the crowning institution of a

[1] Twenty-five states have state-wide uniformity of texts in the public schools. A. F. MacDonald, *American State Government and Administration*, 3rd ed. (1945), p. 473.

great popular educational system, beginning in the kindergarten and running through the elementary and high schools to the college and graduate departments.

State University Functions. The state university is making many kinds of knowledge available to a wider circle of the population than ever before. Extension departments are now conducted by the greater institutions. In Wisconsin, for instance, centers are established throughout the state, and university lecturers are sent out to deliver regular courses on general subjects such as literature, art, history, and social science; and a correspondence school is maintained so that any citizen with some leisure at his disposal may carry on systematic study under an expert's guidance. Other arrangements have been devised for those whose work makes it impossible for them to attend regular courses of instruction in the practical arts offered at the university. Wisconsin, for example, has established "short courses" for farmers, which they can take during the weeks when their farm labors are lightest. Thus the college, originating as a center for the fortunate few, may become the servant of the whole community.

State Charters for Private Institutions. Besides maintaining its own institutions, the central government of the state controls by special and general acts the incorporation of private colleges, seminaries, and schools for higher education. It is from the state that such establishments secure the power to grant degrees.

State Administration of Education. The supervision of the educational interests of each state is vested in a commissioner or superintendent of education, usually acting in conjunction with a board but sometimes alone. Generally speaking, the state commissioner of education is rather narrowly controlled by law and has very little discretionary power over the subjects taught in the schools or the methods of teaching. It is his duty to cooperate with county superintendents and other local educational authorities in developing higher standards; to collect statistics and other data; to devise plans for improvement of the system; and to make reports to the governor and legislature upon which new legislation may be based. Frequently normal schools and institutions for the training of teachers are placed under the supervision of the state superintendent, but the state universities stand on a more independent basis.

The powers of central boards of education vary greatly from state to state. In some instances, they are simply charged with the guardianship of school funds and school lands; in others, their function is merely to advise the state superintendent or commissioner on educational policies; in others, they are given a large authority over the

whole system of the state, including the power to make rules and regulations affecting the curriculum, books, methods of instruction, examinations, and appointment of teachers.

Federal Aid to Education. Since the states and communities are about at their wits' ends in raising revenues sufficient to support their present functions, organized efforts are being made to secure large annual grants from the federal treasury to the states in aid of education. A special commission appointed by President Truman reported in favor of this policy; and in a message to Congress in 1948 he recommended its adoption, despite many protests against adding to the financial burdens of the National Government. The Senate of the United States responded by approving a bill making a large grant of money to the states in aid of education, but the House of Representatives refused to adopt it. During the discussion of the measure in Congress and outside, fears were expressed that, judging by experience with other grants-in-aid, such financial assistance would be followed by some degree of federal dictation over state educational policies. In other words, hostility to further centralization of power in Washington found expression in opposition to federal grants to the states for educational purposes.

PUBLIC WORKS

State Highway Systems. It is customary for the states to build and operate certain "public works," presumably for the benefit of the whole people, although the sectional strife attending their location casts some doubt on the point at times. In this category are public roads and bridges. Originally, road construction was primarily a local responsibility, but owing to offers of federal aid and the increasing range of the motor car, a large part of the burden has been shifted to the states. Today, every state has a state highway system, much of it meeting national standards laid down as a prerequisite for federal aid funds (Chapter 25). In North Carolina, a marked degree of centralization in road administration has been achieved through incorporation of the former county roads in the state highway system.

State Parks and Monuments. Natural beauty spots and points of historic interest are preserved and made available to the public in many states by establishment of state parks and monuments. Where these units are properly coordinated with the state highway system, they afford to the public convenient recreational centers at low cost.

State Waterways Developments. On account of the extensive federal program for waterways improvement, the states have not ventured far in the direction of providing public shipping facilities. However, New

York owns and operates the Erie Canal, linking the Great Lakes with the Atlantic by way of the Hudson River, and state governments have harbor works at the ports of San Francisco, New Orleans, Mobile, and Savannah.[2]

NATURAL RESOURCES

The Need for State Intervention. In the past, the relative abundance of good topsoil, trees, minerals, and other resources, as compared with the limited demands made upon them by a pioneering population, permitted extravagant waste to occur without producing immediate injury to local economy. Today, however, the pressure of a growing population and of modern technology upon available resources is so intense in many areas as to make a more efficient use of what remains essential to the general welfare. One of the state governments after another has, therefore, undertaken conservation activities on a large scale.

Better Farming Methods. Among the most valuable of the state's economic enterprises is agriculture. To foster it, the states have, with national assistance, embarked on an elaborate program of research in a quest for ways of increasing fertility, improving crops and livestock, preventing erosion, and combating pests, diseases, noxious weeds, and predatory animals. Information on the new techniques is distributed among farmers by state agricultural colleges, extension services, and other means. Indeed, the state government may apply some of this knowledge directly, by conducting campaigns against pests and establishing plant and animal quarantines.

Forestry. The majority of the states have established official state forests which they manage and protect against fire and other hazards through their own staffs of experts. Assistance is also rendered to the owners of private timber tracts in the form of fire protection and supplies of seedlings from state nurseries. But the main problems of forest management are still primarily in the hands of private owners. Recognizing this fact frankly and determined to do something about it, the state of New York has provided for the formation of local forest practice boards, composed partly of private timber owners or their representatives. When standards of woodland management evolved by these local boards have been approved by state authorities, private owners of forest land within the areas served by the boards are offered valuable state technical assistance—in return for voluntary cooperation.[3]

[2] *State Government*, September, 1947, is devoted to state harbor works.

[3] H. C. Ostertag, "New York's Cooperative Forestry Program," *State Government*, April, 1947, pp. 120–121.

Fish and Game Administration. States seek to maintain a steady supply of fish and game for the benefit of commercial interests and sportsmen. To this end, they operate hatcheries and game raising farms, using the output to restock streams and wild regions. Fish and game laws, enforced by state game wardens, regulate the manner and amount of the annual take of fish and game. In recent years, states along the ocean front have signed formal interstate compacts, with congressional approval, intended to promote joint study and action in the sphere of deep-sea commercial fishing.

Water Resources. The growing demands upon the available water resources of many sections have led some states to serve as allocating agencies, dividing water among communities on the basis of their projected uses. In Arizona, for instance, applications for water rights are submitted to a state water commissioner who, in granting or denying requests, is required to think and act in terms of the overriding public interest. To permit the maximum reuse of water at successive points downstream, state health authorities may order cities to install suitable purification and sewage disposal works where needed. Occasionally, the state itself owns and operates water facilities. New York has river regulating reservoirs and South Carolina has state hydroelectric power units.

Petroleum and Natural Gas. Two other fluids subjected to close state regulation are petroleum and natural gas. With a view to insuring the utmost recovery of petroleum and natural gas from any given pool, many states have enacted conservation laws forbidding specified wasteful practices, and have instituted state agencies to carry the bans into effect. In this fashion, states control the spacing of wells, regulate well drilling operations in order to prevent the drowning of oil or gas pockets with water from other levels of rock, and supervise the management of wells in such a way as to avoid unnecessary release of the natural gas pressure required to force oil to the surface if it is ever to be recovered.[4]

The Beginnings of State Planning. Having become involved in the supervision of natural resources in a piecemeal fashion, the states began experiments in fitting various projects together in some over-all plan of action commensurate with a broad view of the general welfare. The need for such integration was seen years ago by Franklin D. Roosevelt when he was governor of New York. In a speech before the State Agricultural Society on January 21, 1931, he outlined a public policy which awakened echoes throughout the Union. He called attention to the

[4] For a complete survey of state oil and gas legislation, revised annually, see W. L. Summers, *The Law of Oil and Gas*. (Vol. 5 deals with conservation laws).

fact that a high percentage of the area tilled in his state consisted of poor land which should not be under cultivation at all. He thereupon proposed a survey of all the agricultural land in the state, the classification of it according to its fertility and uses, and the reforestation by the state of large areas too barren for profitable cultivation.[5] Thus production on poor land that yields only a paltry return to the tillers would be eliminated. At the same time employment on forest reservations would be increased. Collaterally, a long mileage of back-country roads could thus be abandoned, materially reducing the taxes on farms for maintenance. The curtailment of dirt roads could be accompanied by the extension of improved highways throughout the cultivated area according to a rational plan providing cheaper transportation to markets and raising the standards of country life. Along the improved roads high-voltage lines for the transmission of electricity could be built providing cheap power and light for farms—power to facilitate production, and light so indispensable to a civilized life. In these ways, Governor Roosevelt concluded, the regions really adapted to farming could be developed, the natural resources of the state enriched by new forests, the burden for highway maintenance reduced, and door-to-market routes established throughout the state.

Federal Intervention. After he became President in 1933, Franklin D. Roosevelt favored action on a wider scale. A phase of the recovery program involved the acquisition by the Federal Government of large areas of submarginal farm lands and their utilization for purposes of forestry, water power development, erosion prevention, and other devices of conservation. Another part of the program was direct federal action in an immense region covering all or parts of seven states—the Tennessee Valley—with a view to developing its land and other resources according to a general plan. A third step was the creation of the National Planning Board.

The Establishment of State Planning Agencies. Shortly after the National Planning Board (later called the National Resources Board) was appointed by President Roosevelt in 1933, it suggested to the governors of the several states the desirability of creating formal state planning boards "to coordinate and harmonize the work of many public bodies." Responding to federal pressure, within two years forty-three states had established official planning boards appointed by governors, and legislation was soon enacted in many states providing for permanent institutions of the kind, some with authority more or less nominal and advisory and others with substantial power to prepare plans having a

[5] By 1946, the State of New York had acquired 463,275 acres of abandoned and submarginal farm land for its forest system.

certain binding force on other departments of state government, especially those concerned with resources and construction.

Combined Planning and Development Agencies. A still more recent step has been the merging of state planning bodies with formerly separate development units established to lure industries and tourists—for instance, Florida's bureau of immigration and Idaho's board of publicity. Nearly half the states have now effected this combination.[6] Such a move makes possible the coordinated management of numerous and varied operations, starting with careful surveys of local resources and the preparation of detailed plans for their better utilization, and ending with efforts to secure their adoption by state agencies and their acceptance by private industry, through active paid publicity campaigns. For example, Mississippi's planning and development agency makes a deliberate effort to achieve a greater balance between agriculture and industry. Out of this trend emerge new concepts of the state's obligation to promote the general welfare of its inhabitants.

WORKING CONDITIONS AND STANDARDS OF LIVING

Growth of State Responsibilities. When the factory system and large-scale industries were started in the United States more than a century ago, ideas and practices that prevailed in agriculture were carried over into the new enterprises. On the farms, fathers, mothers, and young children worked long hours, and to a large extent shaped their own conditions of labor. For such protection as they received, children looked to their parents. So in the new factories working hours were at first long, and employees accepted conditions of labor as they found them. Gradually, however, state governments assumed responsibility for correcting many of the worst abuses. Beginning with minor legislation regarding child labor and the hours of work for women, they took an increasing interest in the economic well-being and living standards of their people. Once started, the trend gathered momentum until now it seems to be in the direction of giving the whole population a considerable measure of security against harsh working conditions, accidents, unemployment, and economic misfortunes in general.

Working Conditions for Children and Women. Recognizing the fact that forcing children eight or ten years old to work in factories at gruelling labor for long hours is dangerous to health, every state now has a child labor law applicable to certain industries. In more than one-half the states, a child must be at least fourteen years old before going to work in most occupations, and over one-fourth of the states

[6] John F. Durr, "State Planning and Development Agencies," *State Government*, June, 1947, pp. 172–178.

have set the minimum at sixteen years. Some states also limit the hours of work for women in a large number of employments and place restrictions on the labor of both women and children at night.

General Legislation on the Working Day. Although adult males were supposed to be better able to take care of themselves in the struggle for existence, they were not left to the mere free play of competition in all cases. Most states have now fixed the length of the normal day for men employed on public works undertaken by state and local governments. The hours of labor for men and women engaged in unusually arduous or dangerous occupations—such as mining, smelting, or railway work—are likewise often regulated by state laws. Oregon takes the position that substantially all industrial employments have a special character, and fixes the length of the working day for men, as well as women, in many kinds of enterprises.

Minimum Wage Laws. States were slow in interfering with rates of wages in private industries and business concerns. They did early provide that contractors engaged on public work must pay "the prevailing rate of wages," which meant in practice the trade-union rate in the locality. But it was a radical departure from custom when in 1912 Massachusetts began to experiment with a plan for voluntary cooperation between a state commission and employers in the fixing of minimum or reasonable wages for women. Attempts in other states to make mandatory minimum wages for women and children were blocked, however, by decisions of the federal Supreme Court; and not until that court reversed itself in 1937 was the way cleared for state action in this respect. Now many of the highly industrialized states have commissions empowered to establish by order the wage rates in various industries. To achieve a degree of flexibility, these commissions often base wages on cost-of-living surveys and revise them from time to time. In 1947, the wages in these states sometimes exceeded the standard set by the federal Wages and Hours Act of 1938 applicable to enterprises involving interstate commerce.[7]

Anti-discrimination Legislation. Some feminist groups strenuously oppose laws that fail to place men and women on exactly the same footing, and racial and religious groups persistently object to discrimination against them. Out of the women's agitations has come legislation in seven states forbidding all discrimination as to wages on account of sex; if minimum wages are fixed for women there, the rates apply also to men. Going still further, Connecticut, Massachusetts, New York, and New Jersey have enacted laws prohibiting discrimina-

[7] Above, pp. 471 ff. Bureau of National Affairs, Inc., *Wage and Hour Manual*, 1947. *Monthly Labor Review*, June, 1947.

tions as to employment because of race, color, religion, or ancestry and have created state commissions for their enforcement. During the eighteen months between June, 1945, and the end of 1946, the New York State commission investigated 710 cases of alleged discrimination, nearly two-thirds of them having to do with color. Both employers and unions have been ordered to cease certain practices, and the United States Supreme Court has upheld the principle that trade unions may be compelled to abandon racial discriminations.[8]

Industrial Accidents under the Common Law. In the early history of American industries, persons who were injured at work usually had to suffer loss of income and pay their own medical expenses; and, if they were killed, their families were frequently unable to secure any compensation. Under the common law, inherited from England (p. 638), employers had to pay damages in case of injury only when they were themselves personally responsible—that is, they were not liable when an accident was due to unpreventable causes or to the carelessness of the employee himself or one of his fellow employees. Studies of accidents revealed appalling conditions—that more persons were killed and injured in American industries in proportion to the number employed than in those of any other country in the world. It was shown also that more than half the accidents were not the result of carelessness on the part of the employees but arose from occupational hazards themselves. To make matters worse, when employees had legitimate claims for damages, they could only realize them by lawsuits which were frequently long, tedious, and expensive.

General Compensation Legislation. The injustice of this system early attracted the attention of labor leaders and reformers. After searching for a remedy they came to the conclusion that the human risks of industry should be borne by industry itself and that employers should be required to charge the cost of compensation for injuries to their operating expenses. As the outcome of long agitation, every state except Mississippi has now swept away or materially modified the old rules of the common law noted above, and requires employers to pay injured workmen compensation in certain amounts, according to the nature of the case, whenever accidents are due to the negligence of employers, their agents, or employees, or to the necessary risk or danger inherent in the industry.

Occupational Diseases. Accidents are definite and sudden, resulting in injuries that can usually be quickly detected. But some industries, owing to dusts, poisonous fumes, and other noxious materials, impair

[8] The Bureau of National Affairs, Inc. *Labor Relations Reference Manual* (1947), pp. 116–120.

the health of workers gradually and insidiously. Little by little, the states have extended workmen's compensation laws to reach occupational diseases. By the autumn of 1947, all but nine states had enacted such statutes.[9]

Industrial Insurance. Employers subject to legislation which orders compensation for accidents and occupational diseases are commonly required to take out compensation insurance, either privately or by means of an insurance fund established under state auspices. Under this plan a worker injured in an accident or suffering from an occupational disease may ordinarily appeal to the state industrial commission for compensation; and the commission, after examining the claim, makes the award specified by the law in the circumstances. An insurance fund then pays the bill. These arrangements permit distribution of compensation in a simpler and more expeditious manner than is possible under the system of damage suits in the courts, even where the common law has been modified.

Vocational Rehabilitation. The victims of industrial accidents and occupational diseases can be restored to usefulness, in a large number of cases, by a process known as vocational rehabilitation. If an expert watchmaker is suddenly blinded in an accident, of course he cannot make watches. His insurance fund will save him from poverty but by retraining for another trade he may become a useful wage earner again. Under the Industrial Rehabilitation Act of 1920, as we have seen (p. 503), Congress makes appropriations to aid states in providing reëducation for civilians injured in industry.

Labor Departments. Besides their special labor units many states have a state department, bureau, board, or office charged with the supervision of general labor interests. In some cases the board is maintained on account of the semijudicial and legislative functions which must be discharged, such as making awards in compensation cases and issuing orders expanding the principles of the state labor code. The duties of the labor department or office may include inspection of factories and mines, enforcement of labor laws, collection of industrial statistics, and mediation in industrial disputes.

Unemployment Insurance, Sickness Benefits, and Employment Services. Early in this century, states began to establish employment offices for putting workers in search of positions in touch with industries in need of more employees. During World War II these offices were taken over by the National Government but they were returned to the states in 1946. Under federal financial compulsion, every state has

[9] U. S. Department of Labor, *Monthly Labor Review*, October 1947, p. 415.

created an unemployment insurance system which manages a fund supplied by taxes on employers, supplemented in some instances by taxes on employees. Out of this fund sums are paid to specified classes of persons who are unemployed and, in California and Rhode Island, to those who are merely absent from work on account of illness.[10] By gearing an employment service and an unemployment insurance system together, a state may reduce insurance outlays by speeding up its job placements.

Depression Relief Measures. During the great business depression which opened in 1929, special measures were taken to furnish at least a subsistence level of income for the unemployed. To the states and their subdivisions Congress made large loans and grants for the construction of public works and for numerous minor projects, which provided jobs for tens of thousands of idle persons—until industrial prosperity was revived by the war boom. In anticipation of another crash to come, after World War II, the states, aided by grants from the federal treasury under an act of Congress, started to build up files of plans for future public works construction, to be available if and when the war boom subsided or exploded.

Dependent Children, the Blind, and the Aged. For the purpose of affording a measure of economic security to certain classes of persons unable to work, the states make special provisions for indigent children, and for the blind and aged. Money for dependent children and the blind, derived from federal and state sources, is usually distributed to the beneficiaries by agencies of local governments (p. 777). From colonial times, American communities were accustomed to assist poverty-stricken persons "without means of support" by granting "relief money" to them or by placing them in "poorhouses" or on "poor farms," often badly and cruelly administered. During the opening decades of the twentieth century, in response to a demand for more humane methods of dealing with this problem, states began to establish small pensions for the indigent aged. By 1934 at least twenty-eight states, including Wisconsin, California, Minnesota, and New York, had authorized payment of pensions to old men and women without other means of support. In 1935 the Federal Government came to the aid of the states by offering to pay a portion, up to a fixed monthly limit, of any old age pension they might see fit to grant. Such pensions are now paid in all states; and in June, 1946, one person out of every five then sixty-five years of age or older was receiving assistance of some kind from combined state and federal funds.

[10] The first important examples of sickness insurance by states, though of limited applicability.

State Departments of Welfare. Owing to the broad scope of the social security legislation now in force, as a result of state and federal actions, several states have created consolidated departments of public welfare to administer it. Under the scrutiny of these major departments, old-fashioned poor relief is being abolished, poorhouses are being abandoned or transformed, and the treatment of persons suffering from the misfortunes of life is being placed on a regularized and humane basis, increasingly under the direction of specialists in social work. As a rule recent laws on the subject provide for cooperation between the state welfare department and cities, counties, and other local subdivisions. Outstanding in this regard is New York's integrated welfare plan, for which provisions were made in 1946, whereby all forms of social aid are handled by consolidated county offices, supervised by state authorities.

General Pattern Set by Federal Officers. Since the Federal Government furnishes a large part of the money for state and local welfare, under acts of Congress couched in general terms, the methods, terms, and conditions of state and local administration of welfare work are largely prescribed by federal officials, particularly officials in the Federal Security Administration. Indeed, it is well within the truth to say that in the rulings, orders, books, and pamphlets issued by that administration are to be found the principles, theories, and directives under which state and local officers and employees actually work in allotting relief and other funds to beneficiaries and in designating the persons entitled to public assistance. Inasmuch as thousands of welfare officers, employees, and beneficiaries are voters, national politics, no less than centralization, enters into operations of the wide-reaching social security system.

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PART VI

LOCAL GOVERNMENT

CHAPTER 36

Organization and Financing of Urban Government

The Case for Local Autonomy. Since the National Constitution does not explicitly refer to local government, each state, as a commonwealth, is left to its own devices in dealing with the subject. It may authorize, modify, or create subdivisions within its boundaries and divide power between its central government and its counties, cities, towns, and other local units. In taking such actions, state lawmakers have been influenced by a strong tradition, inherited from colonial times, in favor of community self-government and by the following practical considerations: (1) A realization that local autonomy draws to the conduct of public affairs in the community the knowledge and interests of the people who are most immediately and steadily concerned with them and hence in the best position to appraise the methods and results of public action. (2) Where local autonomy permits variations in governmental institutions and practices according to divergent local needs and desires, it affords relief from the standardizing tendencies so characteristic of state and national activities. (3) Local autonomy permits creation of governments so small in size and simple in organization and function that they can be managed with a minimum of overhead supervision, red tape, and confusion. (4) By bringing government close to the people, where it may be directly observed, easily understood, shared, and managed on a convenient scale, local autonomy provides a valuable training for citizenship that can be obtained in no other way. (5) Vigorous local institutions of government help to preserve a balance between national, state, and local powers which is a check on autocratic tendencies and thus a safeguard for liberty.

Vital and Enduring Significance of Effective Autonomy. In these times when American citizens are daily, even hourly, told that they must "raise their sights" to envisage national plans or plans for world government, security, and liberty, the principles of local autonomy and multitudinous efforts to make them effective in community and individual life may seem of slight importance, indeed trivial. Actually, there is much to be said in favor of keeping one's sights lowered long

enough to gain a realistic understanding of the concrete problems involved in managing one's own community before looking at larger fields. It seems plain that if the inhabitants of a city cannot manage, or do not care to understand, their own community their ability to manage or comprehend the vastly more difficult operation of putting the entire globe under effective supervision is at least open to question.

In any event, American civilization is predominantly industrial and the industries are chiefly in the cities. Upon the ability of urban governments to educate children adequately in the public schools, to keep order, to maintain decent housing conditions, to handle traffic problems, and to remain financially solvent, depends in no small measure the effectiveness of industry and of the national economy that rests upon it. When municipal government is conducted with competence and imagination, costs are lowered and living standards are raised. When it is wasteful and negligent, the state, indeed the whole nation, has additional burdens to carry in taxation and finance.

Moreover, if dishonesty is rampant in many principal cities, if racketeers are allowed to prey on business and on trade unions, if fire and health regulations can be defeated by bribery of inspectors, if corrupt party machines dominate police departments, demoralization will spread into state and national affairs. Municipal bosses have more than once become masters of state governments through their grip on city affairs, as did Boss Tweed in New York long ago (p. 577); and their henchmen have been sent to Congress to make laws for the nation. Indeed Thomas Jefferson was once led to exclaim that the "mobs of great cities" are "sores on the body politic"—a menace to good government everywhere. When urban areas are well managed, corruption is put down, and the vital functions of government are properly discharged, beneficial repercussions are felt in the state and nation.

Special Difficulties of Urban Government. Many circumstances have prevented the easy and efficient development of government in crowded urban areas. One has been pell-mell growth in population, particularly during the past fifty years. When George Washington was inaugurated first President there were only three cities with more than ten thousand inhabitants—Boston, New York, and Philadelphia. The census of 1940 reported 416 cities and urban areas of more than twenty-five thousand inhabitants. There were five cities with more than a million: New York, Chicago, Philadelphia, Detroit, and Los Angeles. Nine other cities had above half a million. Chicago, an overgrown village of about 100,000 in 1860, has become a metropolis of over three millions. New York has far more inhabitants than the entire country had when

Washington first took the oath of office in Wall Street. Indeed that city alone in 1940 had more inhabitants than any save the three most densely populated states.

Nature of the Population. A large proportion of the people who crowded into the growing cities were without experience in urban government. Multitudes of Americans flocked in from farms, taking rural traditions with them. Millions who came from foreign countries had been peasants at home and had taken little or no part in the government of their native lands. For a long time the census continued to report that a large number of the inhabitants of many great cities were of foreign birth; the percentage is now declining, with the drop in immigration, but it is still large. To aliens of the major races and tongues must be added the Negro population in both northern and southern cities. As Negroes poured into urban centers they, too, carried with them no experience in the arts of self-government and the management of public affairs.

Technological Changes. Upon people little prepared for self-government of the urban type was thrust the task of dealing with unprecedented conditions created by a rapid technological revolution—for example, the uprush of huge factories and office buildings to and from which workers went in great masses, the swarms of shoppers moving about in search of consumers' goods, and at length the appearance of motor cars and trucks by the thousands in the streets produced traffic and transport conditions that almost baffled the best engineering skill. Novel perils arising from dangerous industries called for complicated and costly countermeasures. These and other impacts on former modes of relatively simple living and working in time awakened a sense of need for special knowledge and talents in the conduct of urban government. But ways and means of meeting the challenges were hard to find.

The old cities of Europe could furnish little guidance, for they began to cope with similar problems about the same time as American municipalities. When the situation became acute toward the close of the nineteenth century, American citizens in search of information could find no adequate scientific treatises on municipal organization and finance, municipal utilities, public health, and a thousand other technical matters of city government. There were no systematic courses of instruction in such subjects in colleges and high schools, and no great professional societies at work with zeal and competence on problems of city administration. In short, municipal affairs were generally managed by rule of thumb. So considering the state of things that long prevailed, it is indeed remarkable that waste, inefficiency, corruption,

and above all ineptitude in urban government have not been greater, and that progressive improvements have been so persistent and extensive.

STATE CONTROL OF URBAN UNITS

State Supremacy. As previously indicated (p. 535), the people of a state have almost plenary power to determine the form and functions of units of local government. In part, their will is expressed through the adoption of constitutional clauses dealing with local government, and in part through the enactment of statutes by the state legislature.

Units of Urban Government Authorized by State Law. State law, as a rule, authorizes operation of three distinct types of government in urban areas—cities, counties, and special districts. To cities are granted certain forms and general powers of government especially designed to meet their needs. Since all or part of the territory of one or more cities may lie within or across the boundaries of one or more counties, these latter units of government, though created originally for rural purposes, also function in regions almost if not entirely urban in population and economy. To special districts, as the name implies, are assigned particular obligations, such as the management of public schools and the operation of water works.

State Control. Subject to constitutional limitations, the legislature of the state may prescribe the organization and functions of government in cities, counties, special districts, and other local subdivisions. In the case of cities, the structure and powers of the government are usually to be sought partly in a fundamental law known as the charter. But the charter is only the beginning, for it is supplemented by innumerable legislative acts, general and special, affecting the form and responsibilities of municipal government. Anyone who will follow Arthur W. Macmahon through his ingenious analysis of *The Statutory Sources of New York City Government* will discover how tangled is the maze of laws in which a city must work; in a period of twenty years at least 550 amendments were made in the charter of New York City by the state legislature, and 1,002 special acts relating to the city were passed in addition to the formal amendments. With these statutes must be combined general election, education, transit, civil service, and other measures affecting the powers and duties of the city government.

Abuses in State Control. During the nineteenth century, the city everywhere was practically at the mercy of the state. Legislatures often granted franchises to utility corporations authorizing them to operate in cities contrary to the wishes of the inhabitants. They sometimes were brazen enough to take utilities away from municipalities and sell

them to private companies. They imposed financial burdens on cities to give employment and profit to politicians. In 1870, for example, the legislature of Pennsylvania created a commission for Philadelphia, authorized it to erect a city hall and other buildings, to tax the people to pay the bills, and to spend the money without consulting the government of the city. Where they were not corrupt, legislatures insisted on interfering constantly with the government of cities; at every session they poured out a stream of local, special, and general bills limiting the powers of municipal authorities, imposing new duties on them, and laying additional burdens on their finances.

Demand for City Autonomy. Before the end of the nineteenth century such abuses became so flagrant that there arose a popular movement to restrain legislatures on the one hand, and enlarge the powers of city governments on the other. Proposals in this connection ranged from minor limitations on the state legislative power to somewhat radical schemes for "home rule"—namely, the largest possible freedom for the city in choosing its forms of government and in determining the functions to be undertaken.

Arguments for Home Rule. Champions of municipal home rule insist that the state legislature is unfitted to exercise control over matters which affect only the dwellers in large cities. Often it is mainly composed of farmers or residents of small towns who are not familiar with the requirements of urban life. Owing to the general rule of constitutional discrimination against them in the apportionment of representation, cities are not even accorded the hearing to which the numbers of their inhabitants entitle them.[1] In such circumstances municipalities often have forced upon them legislation more suited to rural than urban life, and are denied the legislation demanded by their special conditions. Besides, the state legislature is always busy with other affairs and in cases of doubt respecting the demands of cities is likely to take the word of municipal bosses instead of making independent inquiries into urban problems. Apart from all this, it is contended by advocates of home rule that purely municipal questions cannot hold the continuing interest of the people of the state at large. With good reason they ask: What do villagers and farmers and even residents of other cities care about the need of any particular community for paving and lighting improvements, rapid transit, the establishment of markets, and other services essentially local in nature?

Counter Arguments. To these contentions the reply is made that

[1] In 1947, the great urban centers of Los Angeles and San Francisco, California, with a majority of the population of the state, had but three seats out of the forty in the State Senate.

there are few, if any, local functions that are not of some interest for the state as a whole. If a city wishes to establish water works, it must sometimes go, as New York City has gone, a hundred miles or more into the country and must secure watersheds by a state concession. With the growth of rapid transit, suburban regions have spread far beyond the boundaries of municipalities, raising issues with which single urban governments often are not competent to deal. A notable example of such a situation is afforded by New York City, which is really the metropolitan center for a huge district extending fifty miles or more in nearly every direction. Owing to the large number of voters in municipalities, the integrity of every state election may depend upon the effectiveness with which municipal officers uphold the election laws and secure an honest count. Disease and poverty among urban dwellers raise state and national problems of health and social security.

A Balance. When the arguments are weighed, it is seen that no sharp dividing line can be drawn between interests purely municipal in nature and interests that are state-wide, even national in scope. But it is also evident in the records of history that cities have suffered grave abuses at the hands of state politicians—abuses both positive and negative. Legislatures have often interfered with municipal functions, not with a view to urban welfare but at the behest of pressure groups, political and economic, bent on private advantage. Again and again, through indifference or under the influence of lobbyists, they have withheld from urban governments the power to deal effectively with matters of deep concern to them. In response to such experience special devices have been adopted to check legislatures and to enlarge the authority of cities, urban counties, and special districts to handle their own affairs. Broadly speaking, these devices fall under four heads.

Special Legislation Forbidden. An attempt has been made to cut off state interference by forbidding special legislation applicable to single cities. For example, the constitutional convention of Pennsylvania in 1873 sought to solve the problem by providing that the state legislature should not pass any local or special laws regulating the affairs of counties, cities, townships, wards, or school districts. Literally construed this meant that every law dealing with Pennsylvania cities had to be general, that, for instance, a law designed to improve the harbors or docks of any city had to apply to all cities whether they had any harbors or not. To escape this narrow construction, the Pennsylvania legislature resorted to the practice of classifying cities and then enacted laws for Philadelphia by making them applicable to all cities of more than 300,000 inhabitants, that is, at the moment Philadelphia alone. When this scheme was challenged at law a high court held it valid.

"If the classification of cities," said the court, "is in violation of the constitution, it follows of necessity that Philadelphia, as a city of the first class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For if the constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the state. . . . Must the legislation for a great commercial and manufacturing city with a population of more than a million be regulated by the wants or necessities of an inland city of 10,000 inhabitants?" Today, classification of cities and counties by population, and the enactment of laws for each class, is common procedure in many states.

Special Legislation Subjected to Local Approval. A second type of check on state interference with urban areas is a development of that just cited; special legislation is forbidden, except when approved by the city concerned. An example under this head is to be found in Illinois. Formerly the constitution of that state had a provision against incorporating cities, towns, or villages, and amending their charters by special law. This proved to be too rigid; so, for the purpose of permitting a separate treatment of Chicago, it was provided by an amendment in 1904 that the legislature could make changes in the system of government for that municipality, subject to the stipulation that all such special legislation, before going into effect, must be approved by a majority of the legal voters of Chicago voting thereon at an election. This amendment has worked well in a negative sense; proposed changes in the city's government have been defeated by the voters on several occasions. They can at least reject undesirable legislation even though they cannot get what they want. Negation is not a remedy; and attempts have been made in Illinois to establish effective local autonomy, thus far in vain.

Right of Urban Areas to Choose from Alternative Types of Government. A modification of the Chicago scheme is the "optional charter" device which gives a city or an urban county a choice between two or more projects of government, such as the commission form, the city-manager type, and the mayor-and-council plan. Several states now apply this system to cities and counties. While it does not satisfy the most ardent advocates of local autonomy, it at least grants to urban dwellers a voice in determining their form of government.

Home Rule. The fourth, and judging by current tendencies, the most popular method of controlling state legislatures is that known as home rule. This device was first adopted in 1875. The Missouri con-

stitution of that year gave each city having a population of more than 100,000 inhabitants the right to frame a charter for its own government consistent with and subject to the constitution and laws of the state. It stipulated that in every case the charter shall be drafted by a board of freeholders elected by the qualified voters of the city, shall be laid before the voters for their judgment, and shall go into effect on receiving at least four-sevenths of the votes cast in the election at which it is submitted. Some such plan has been adopted by California, Idaho, Oregon, Washington, Minnesota, Colorado, Oklahoma, Michigan, Arizona, Ohio, Texas, Nebraska, Maryland (Baltimore only), New York, Wisconsin, Utah, and West Virginia. It is even applied to a few urban counties.

Issues Left Uncertain. At first glance the matter looks simple but in fact it is the opposite. The people of a city may draft their own charter. Yes. But what may they include in the charter? What powers may they confer on the municipal authorities they create? It really does not mean anything very definite to say that cities and counties may frame charters for their "own government" and exercise "powers of local self-government." In the absence of appropriate court decisions it is impossible to make a comprehensive list of the legal functions which belong to urban local governments and those which belong to states. Ingenious attempts have been made to do it but they always end in litigation in the courts. A searching examination of the whole subject by H. L. McBain shows that home rule, in effect, takes the ultimate fate of the city out of the hands of the legislature and places it in the hands of the courts, which must define by endless decisions the respective rights of the cities and the legislature.[2] Whether the city fares well or ill under home rule, therefore, depends, in a large measure, on the opinions, prejudices, and reasoning of the courts. And as a survey by a highly competent authority, Harvey Walker, shows, home rule under the decisions of judges amounts to little in the eighteen states where it is "substantially available," and the other states have no good reason for adopting it.[3]

ORGANIZATION AND POWERS OF CITY LEGISLATIVE BODIES

Triumph of the Unicameral Plan. A primary feature of city government is a legislative body endowed with certain powers over municipal affairs. In the later colonial period, the urban legislature was generally known as the "city council." Ordinarily it was in effect a unicameral body; but after the Revolution bicameral councils grew in favor and

[2] *The Law and the Practice of Municipal Home Rule.* See also S. C. Wallace, *State Administrative Supervision of Cities* (1928).

[3] *National Municipal Review*, December, 1947, pp. 625 ff.

spread to all parts of the Union. In practice, however, they did not work satisfactorily at the municipal level; they contributed to confusion and irresponsibility in government. So the double-chamber scheme was gradually abandoned. Today, nearly all cities have the unicameral system.

Election by Districts. The fire of criticism which resulted in the adoption of the unicameral system was accompanied by an attack equally vigorous on the historic practice of electing councilors in small districts, or wards. This method favored the choice of "little" men who sought advantages and jobs for their own constituents. Consequently, councilors were often narrow in outlook, indifferent to general needs, and ignorant respecting larger questions of city-wide interest. After an official investigation, a committee in Boston reported in 1909 that membership in the legislative body of the city was a discredit rather than an honor. Yet in spite of similar verdicts in all parts of the country, many cities have retained the district plan of election. In 1948, of the 2,033 cities with populations over 5,000, 27.3 per cent elected their councilmen by wards and 16.1 per cent elected them by a combination of representation by wards and at large.[4]

Election at Large. In itself, the election of all councilors on a single city-wide ticket is supposed to encourage the selection of persons who place the interest of the entire municipality above the minor concerns of the several districts. Moreover, it avoids the necessity of giving representation to many little areas and thus makes possible a reduction in the size of the council, thereby providing for a more compact and businesslike body. By 1948, at all events, the majority of the cities having more than 5,000 inhabitants had broken with the district system and were governed by legislative bodies composed solely of members elected at large.

Partisan Politics and Unequal Representation. It is urged against both the district system and election at large, under the ordinary scheme of nominating and balloting for candidates, that they permit professional politicians to carry trivial party fights into city elections. It is also pointed out that neither system provides for the representation of minorities. If a victorious party in a municipal election carries its districts by small margins and the defeated party carries its districts by large margins, the victors may in fact represent less than one-half the active voters of the entire city. At all events, under the district system there is usually a considerable minority not represented at all. This is equally true of elections at large; if a party or group carries the city

[4] *The Municipal Year Book* (1948), p. 45.

by even the smallest possible margin, it secures all the seats in the council or commission as the case may be.

Nonpartisan Elections. For the purpose of eliminating or reducing the amount of petty party politics ordinarily found in municipal affairs, the nonpartisan election has been widely adopted. Although the system varies in many details, it presents generally two striking features. The nomination of candidates for municipal positions by political parties is forbidden; as a rule candidates are designated by petitions signed by voters, a preliminary sifting is made at a primary election, and then the names of candidates standing highest in the primary returns are placed on the final election ballot, without any signs or words indicating their party affiliations. Of the municipalities with a population of over 5,000, the majority had nonpartisan election systems in 1948.[5] It cannot be truly said, of course, that the nonpartisan scheme entirely prevents party manipulations, but it reduces the virulence of party factionalism.

Proportional Representation. With a view to assuring minority groups a fair share of representation on the city council or commission, reformers have long urged adoption of full proportional representation or at least some kind of preferential voting which assures representation to minorities. However, on the fiftieth anniversary of the formation of the Proportional Representation League only ten American cities could report the use of the system in some form: [6] Long Beach and Yonkers, New York; Cincinnati, Toledo, and Hamilton, Ohio; Cambridge and Lowell, Massachusetts; Boulder, Colorado; Wheeling, West Virginia; and New York City. But New York City abandoned it in 1947.

Many varieties of proportional representation are possible but the system most commonly urged in the United States contains certain general features. In the first place, the members of the city council or commission are elected at large on a single ticket. The voter on election day indicates by arabic numbers, "1," "2," "3," and so forth his first, second, third choices, and so on, among the candidates whose names appear on the ballot. At the close of the poll a "quota" is obtained by dividing the total number of valid ballots cast by one more than the total number of members to be elected, and adding one to the result thus obtained. This quota is the number of votes which any candidate must receive to be victorious. All candidates who have a quota of first-choice ballots are at once declared elected. The surplus votes not

[5] *Ibid.*, p. 45.

[6] For the first election in Lowell, see *National Municipal Review*, January, 1944, pp. 45–49.

needed by these successful candidates and afterwards the votes of the candidates at the bottom of the poll are distributed among the other candidates according to the other choices indicated on the ballots, until at length the total number of vacancies (commissioners or councilors to be elected) is filled by candidates having the required quotas. In practice, it seems to give all the important groups of the city representation roughly according to their respective numbers.[7]

Preferential Voting. Another device designed to obviate some of the evils of mere plurality elections and insure fairer representation is the plan of "preferential voting" introduced in Grand Junction, Colorado, in 1909, and afterwards adopted in some form in a number of towns and cities, particularly for direct primaries. Under an ideal preferential plan, as applied to the choice of city officials and councilors, the names of the candidates are arranged in one column on the ballot and after the names are three blank columns, headed "first choice," "second choice," and "third choices." The voter may thus specify one first and one second choice for the office in question and, if he has sufficient regard for other candidates, he may indicate any or all of them as acceptable by marking their names among the "third choices." If any candidate receives a majority of first choices, he is declared elected; if not, then the first and second choices of the candidates are added, the candidate with the highest number winning if he has a majority. If this second step does not produce a majority, then all the choices of each candidate are added together and the person standing highest wins whether he has a majority or not.

THE POWERS OF THE CITY COUNCIL

Powers Are Specific. The city council or commission, as the case may be, has no "inherent powers"; it can only exercise those powers that are granted to it by the constitution and laws of the state; but at the same time it enjoys the implied powers necessary and proper to carry into effect those that are enumerated. Indeed some state laws, following the language of the Federal Constitution, authorize the council to pass all ordinances which are essential to carrying into execution the powers expressly granted. In practice there may be a loose or strict construction of the law.[8]

Police Power. First among the general powers of the city council may be placed its "police power." The city charter usually provides

[7] R. P. Goldman, "Analysis of Cincinnati's Proportional Representation Election," *Political Science Review*, August, 1930.

[8] McBain, *American City Progress and the Law*, Chap. ii; McQuillin, *The Law of Municipal Corporations*, Vol. I, sec. 373.

that the council may exercise the "powers necessary to preserve the peace and good order of the community and promote the public welfare." Ordinarily the council may make, amend, or repeal ordinances relating to health, parks, fire protection, and buildings, except in so far as such power is conferred on other agencies or otherwise limited by state or federal law. The council may also make ordinances relative to beggars, vagrants, intoxication, fighting and disorder in the streets, public amusements, markets, gambling, bathing places, suppression of vice and immorality, the use of firearms and firecrackers in the streets, parades, steam vessels, advertisements, circuses, and obnoxious industries.

Finances. In the matter of finance—appropriations, taxation, and debts—the city council works under definite limitations. Nowhere can it make appropriations, lay taxes, and incur debts at will. In some instances the amount of money which it can appropriate is fixed at a certain percentage of the assessed valuation of the property within the city limits. Even methods of making appropriations—the time, form, and manner—may be prescribed in great detail by state legislation. Moreover mandatory state law usually compels the city to provide funds for interest on its debt, the support of schools, and many other objects.

In a few cities, the initiation of appropriations is taken out of the hands of the city council. In New York, for example, it is vested in the city's board of estimate. As to taxation, the council may lay only those kinds of taxes authorized by state law. As to debts, it can incur such obligations only for specific purposes and to an amount fixed by state law—often a certain percentage of the total value of the real estate assessed for taxation within the city.

Control over Administration. In administrative matters the council or commission wields a great deal of influence. Sometimes its members are themselves administrators (p. 745) or at least select and remove the chief executive of the city (p. 747). Even where it does not have these large powers, its authority is by no means negligible. Often it initiates the budget which provides the money for administrators, but even where it has lost the right of initiation it can exercise control over them through its power to approve the budget. At least it can cut salaries and allowances; and, by threatening officers with reductions, councilors can force the appointment of their friends and political adherents to posts in the city government. The city council may also appoint committees to examine the books and papers of departments and conduct investigations of a most searching character. Hence it happens that a belligerent council may exercise an obstructive or wholesome command over the course of municipal administration.

THE MAYOR-AND-COUNCIL PLAN

Extent of the Plan. Whatever its name, composition, or powers, the legislative body in nearly all cities, towns, and villages[9] operates as a part of one or another of three main schemes of government, known respectively as the mayor-and-council, the commission, and the city-manager plans. The first of these is still the most popular, being employed in 1947 in all the largest cities, namely those having more than 500,000 inhabitants; and in a majority of all places having more than 5,000 inhabitants.

Election of the Mayor. In the colonial era, the mayor-and-council plan provided for a city council which in turn chose the mayor, who was little more than a figurehead. Now, in mayor-and-council municipalities, the mayor is popularly elected as a rule, and occupies a post of importance as chief executive of his city. He is chosen by a partisan or nonpartisan ballot for a term of service fixed by law. His term varies from one to five years, the most common period being two years.

Legislative Functions. The powers of the mayor extend to legislative, financial, and administrative matters. He may recommend measures to the city council; in most cities he enjoys the veto power, including, as a rule, the right to strike out single items in appropriation bills. Following the example of the state constitutions, city charters generally provide that a vetoed ordinance can become law only when repassed by the council by an extraordinary majority, sometimes two-thirds and in some instances even more; but in a few smaller cities the mayor's veto may be overriden by a simple majority.

Financial Powers. The financial powers of the mayor vary from city to city. The mayor not only enjoys, as we have seen, the power of vetoing financial measures, but he also has, in a number of instances, a very large control over the making of the city budget. In Boston the drafting of the budget is vested in the mayor. In New York City, the mayor enjoys a very peculiar position with regard to finances. He is a member of the board of estimate which initiates the budget and as such he possesses three votes out of a total number of sixteen; he also has the right to veto financial measures passed by the board of estimate and the city council, and it takes a three-fourths vote to override his exercise of this power.

Appointing Power. As to the appointment of municipal officers and the direction of municipal administration, the power of the mayor is

[9] Exceptions are Washington, D. C., and certain New England communities with town meetings.

increasing. At the beginning of our history, municipal officers were generally appointed by the city council; in the course of the democratic revolution during the first half of the nineteenth century, many of the important offices, boards, and commissions were made elective. It was found, however, by practical experience that popular election did not really secure responsibility to the voters; for, owing to the number of offices and the complexity of the election operations, the actual selection of officials generally fell into the hands of expert politicians, who made the "slates" of candidates and thus secured possession of the municipal government. In order to check the knavery and corruption which resulted from this system, the device of "bipartisan" boards and commissions was sometimes adopted with the hope that the representatives of one party would hold in leash the representatives of the other party; but, in practice, it turned out that they often made combinations and divided the spoils of office.

Finding that the elective system did not really secure competence and that the bipartisan device did not block the spoilsmen, municipal reformers determined to try the experiment of concentrating appointing powers in the hands of the mayor—thus making him responsible before the people for the conduct of the administration. This development has reached a high degree in the city of New York, where the mayor appoints the heads of important branches of the municipal administration and enjoys the unrestricted power of removing municipal officers, except members of the board of education, judges, and a few others.

Nevertheless it is dangerous to generalize about the mayor's appointing power in American cities, so varied are the practices. Take, for example, the great cities having separate health executives: in some of them the mayor alone appoints; in a few he nominates and the city council confirms; in others the health officer is chosen by the director of welfare; elsewhere he is selected by the director of public safety, by the board of public safety, by the city commission, or under civil service rules. What accurate broad principle could be derived from these diverse cases? Besides, a large number of cities still have individual officers, boards, and commissions elected by popular vote and independent of the mayor and the city council.

THE COMMISSION PLAN

Origins. Many cities have substituted for the mayor-and-council plan an alternative known as the commission plan. The latter scheme originated in the acute emergency that developed in the port of Galveston, Texas, after the great storm of 1900, which destroyed a

whole section of the city. For a time, the municipal administration was paralyzed because the trying problems connected with restoration were too much for the old political machine in control. After a spirited contest, the government of Galveston was vested in a board consisting of a mayor-president, a commissioner of finance and revenue, a police and fire commissioner, a commissioner of streets and public property, and a waterworks and sewerage commissioner, each elected at large for his particular office. The mayor-president exercised a general coordinating influence over the board, whereas the four commissioners supervised the specific matters indicated by their titles. Each commissioner could appoint, with the approval of his colleagues on the board, the officers and employees who were to serve under him. The board met frequently for the transaction of public business, very much as the directors of a private corporation assemble to discharge their functions.

Spread. The commission form spread rapidly; within fifteen years approximately four hundred cities had adopted it. Then the tide began to turn. A few cities tried the plan only to return to the mayor-and-council form of government. A still larger number gave it up in favor of the city-manager scheme. Today, the commission plan is the least popular of the three major systems.

Nature. The commission plan varies somewhat from city to city but the fundamental principle is the same everywhere—the concentration of power in the hands of a small body elected at large by the voters of the municipality. Collectively, the commissioners serve as a legislative body, making ordinances for the city much after the fashion of the typical small city council under the mayor-and-council plan. Individually, all, or all but one [10] of the members of the commission serve in an executive capacity, as department heads.

From the standpoint of business administration, the commission form of government has many features to commend it. It centralizes power and responsibility in a small group of officers constantly before the public and subjected to the pressure of public criticism; it coordinates the taxing and spending powers, thus overcoming the maladjustment so common to American public finance; and it throws down that multiplicity of barriers behind which some of the worst interests in American municipal politics have screened their antisocial operations.

Log-Rolling in Commissions. Four decades of experience with the

[10] One of the commissioners may be designated solely as "mayor" and not serve as a department head. On the other hand, in some cities a department chief carries the added burden of "mayor." In any case, the mayor is largely a ceremonial figurehead; rarely does the mayor of a commission city exert any special influence over administration.

commission plan have revealed certain intrinsic weaknesses. In the first place, there is a diffusion of power. No one person can be made responsible for the entire administration of the city, with authority to check and control all branches in the interest of policy, economy, or efficiency. Instead, each commissioner is the head of a major department, is jealous of his prerogatives, and naturally seeks to conduct it according to his concept of its importance. He is likely to resent interference by his colleagues with the management of his affairs or with his proposed program. The result may be a degree of factional strife that interferes with everyday operations. If the commissioners are to get things done, they must often engage in log-rolling; that is, enough of them must agree to support one another's plans to provide the majority vote necessary to carry them through the commission.

Expertness. Whether the commissioners are chosen by the voters for specific offices or are assigned to their departments by the commission as a whole, they are likely to be plain businessmen, professional men, or labor representatives without actual experience in municipal administration. In the course of things, it may happen that an undertaker is made commissioner of public works, and a retired real estate dealer is made head of the fire and police department. In other words, the commission plan may militate against securing broad views and competence in administration.

Concentration of Power. Another important criticism of the commission scheme is based on the contention that, in the light of our municipal experience, it concentrates too much legislative and executive power in the hands of one small body. As a partial remedy, some commission-governed cities provide for popular proposal and adoption of ordinances, through the medium of the initiative and referendum (pp. 559–566), thereby enabling the public to take certain issues entirely out of the hands of the commission and settle them at the polls. A further means of keeping the commission within acceptable bounds is the recall—a plan used in some cities, whereby one or more commissioners, before the expiration of their terms, may be made to go before the people in an election called to decide whether they are to be ousted and, if so, who is to succeed them.

THE CITY-MANAGER PLAN

The Legislative Body. Although by its title the city-manager plan lays emphasis on a single official, it includes as an essential feature an elective body having special powers—a commission or council which acts as an ordinance-making agency and also elects and controls the

chief executive of the city. It may be small in size, with three or five members, or it may be as large or even larger than the council under other plans and have fifteen or twenty members. Whether it is a small commission or a large council, it exercises substantially the same legislative powers as the corresponding assembly under other forms of urban government.

The Distinctive Feature. The chief characteristic of the city-manager plan is the arrangement for the execution of laws and ordinances. This function is vested mainly in a single officer, the city manager. He is chosen by the council or commission, holds office during its pleasure, and, subject to its constant scrutiny, is responsible for direction of the city's administration. It is in this regard that the plan stands apart from the mayor-and-council system, under which the people elect the chief executive, and the commission type which divides administration among department heads of equal rank.

Position of the Manager. Endowed with practically all the executive powers, the manager appoints and removes the heads of departments and other city officers, subject to limitations imposed by the civil service rules and to certain other exceptions. He directs the various branches of municipal work under his authority, initiates the budget, and lays plans before the city council. He may attend meetings of the council to defend and explain his proposals. He may be summoned before it to render an account of his stewardship. The business of the council is to legislate and review; the business of the manager is to execute. In some cases the council is strictly forbidden to interfere with administration.

The manager is supposed to be a technician trained in the science and art of municipal government, an administrator, not a politician or manipulator of votes. In order that it may search widely for technical fitness, the council or commission is ordinarily not bound to choose the manager from among the residents of the city. Indeed, it frequently selects a successful executive from another city.

Spread of the System. The city manager plan received its first thorough test when Sumter, South Carolina, adopted it in 1912, though Staunton, Virginia, had begun to experiment with some of its features four years earlier. Gradually, it gained on the commission plan; then after World War II, it succeeded in outdistancing this competitor. In 1948, it was employed in 21.3 per cent of the cities of over 5,000 population—six per cent more than the number with commission government. The chief stronghold of the manager plan is the smaller city, but in 1948 six cities of over 250,000 inhabitants were operating

under it—Cincinnati and Toledo, Ohio; Kansas City, Missouri; Rochester, New York; Dallas, Texas; and Oakland, California.[11]

Advantages. Advocates of the city-manager plan summarize its advantages in the following fashion. It centralizes responsibility for administration. It overcomes the difficulty involved in obtaining technical ability for high office by the process of direct popular vote. It broadens the field of choice for the city to include the whole United States, thus placing national talents at the disposal of the council. A man may start in at the bottom in a small town and rise to the position of head of a great city. The profession is so well developed that it has formed the International City Managers' Association, which holds annual conferences, exchanges ideas, and promotes public interest in municipal administration. The plan blocks or at least checks partisan influences in technical administrative work where they do not belong. It shifts public interest in elections from personalities to issues, by eliminating contests over the possession of the mayor's spoils.

Lack of Political Leadership. More than one-third of a century has elapsed since the city manager system was inaugurated but a fundamental issue remains unsettled: To what extent should the manager assume leadership in the formulation and promotion of grand policies, and to what extent should he view himself merely as "a servant of the council," commissioned to carry into execution in a routine way ordinances and projects originated and adopted by that body? Managers have long been and still are divided over this question.[12]

If the manager conceives his role as that of a community leader, and is determined to bring imagination and brains into the formulation of municipal policies, he runs a risk of being forced to yield his post to a subservient routineer. Moreover, time spent in battles over policies is time taken from skilled administration; and efficient administration is supposed to be the chief end and product of the manager plan. On the other hand, if the manager is content to be merely a technical administrator, carrying out orders from the council, whence shall come the kind of dynamic leadership that may be desirable in the community? The manager plan, narrowly conceived, affords no concrete answer.

In practice, some sort of "working compromise" between the two extremes may be evolved, whereby the manager tries to influence the council to accept his ideas, yet strives to do so without arousing the kind of antagonism that might result in his removal. This delicate

[11] *The Municipal Year Book*, 1948, pp. 41, 51–52.

[12] See the series entitled "Relation of City Manager to Council" in *Public Management*, December 1945 to April 1946.

balance may or may not satisfy the needs of the city. In short, the manager plan leaves the issue of local political leadership more or less up in the air.

The Search for Competent Managers. Apart from these and other intangibles, the success of the city manager idea depends upon getting the right type of person into power. Theoretically, a city manager should be thoroughly experienced in municipal administration and have a practical skill for dealing with people. Too often, both of these elements have been missing. While the engineering profession has furnished the largest single quota of managers, the major portion, by far, have come from walks of life still less related to municipal administration; into the fellowship have been gathered real estate and insurance agents, druggists, veterinarians, merchants, mechanics, carpenters, plumbers, and undertakers. Part of the difficulty, too, lies in the tendency of cities to pick local men as managers rather than seek persons with long, distinguished service wherever they are.

Gains Despite Difficulties. Yet when all is said that can be said by way of criticism and adverse comment, it remains a fact that city managers have raised the efficiency and integrity of municipal government. They are steadily developing a wider vision of their responsibilities and opportunities. They have effected enormous economies in the construction and maintenance of public works; and many have displayed the soldier's devotion to their tasks, lifting the level of civic morality by their labors, enthusiasm, and sacrifices. Owing in no small measure to the achievements which may properly be set on the credit side of their ledger, the promise of urban life in many cities is more secure than ever before in our history.

A promising augury is the effort of the International City Managers' Association to raise the standards of the profession by new devices. Through a management information service, it makes the experience of the older, more skilled men available to newer managers; it distributes carefully prepared in-service training manuals; and it encourages managers to train understudies, to be sent out when ready, to become managers of other cities. Awareness of earlier shortcomings and a determination to overcome them speak well for the future.

THE ADMINISTRATIVE SYSTEM OF THE CITY

Prime Importance of Administration. Although the work of administration—carrying out laws and ordinances in detail—varies in some respects under the three plans of city government, its importance is fundamental under them all. There is little that is spectacular in the regular discharge of administrative duties but these hour-to-hour serv-

ices determine, in a growing measure, the excellence of the city's government. The making of laws is a relatively simple matter; the execution of them amidst thousands or millions of people with enormous personal and property interests at stake is the task which throws the greatest strain upon human nature. The council may speak its will and adjourn; the executive officers' work and responsibilities continue day and night. It is easy to make a model law relative to housing, for instance, but the condition of the homes of the people may depend upon the efficiency and policy of the department in charge far more than upon the details of the law. How to organize administrative departments and make them efficient and enlightened is one of the great perplexities of city government.

Haphazard Growth of Administrative Functions. The problem of organizing and making effective the work of administration has been rendered acute by the steady increase in the number of functions cities are called upon to perform. Special groups, bent on forcing municipalities to undertake new duties, have frequently fixed their attention on their own separate, narrow projects and insisted on the creation of new and distinct agencies to carry them out. For a long time, in fact, little or no effort was made to coordinate the newly created offices with the older branches of administration and as a result there grew up a jumble of semi-independent bodies often accompanied by duplication of work and conflicts of authority. Nor was there usually agreement as to how the various municipal activities should be directed: for cities, seemingly at random, tried ordinary boards, bipartisan commissions, single-headed departments with advisory boards, and plain single-headed departments.

The Departments. As their functions expanded, many cities were virtually forced to remodel their administrative structures or run the risk of a breakdown in competence and morale. To guide them in the process, they accepted certain principles of business management. First, all functions of the same nature should be placed within a single agency, to eliminate overlapping and conflict. Second, most agencies should be grouped in a few departments, such as finance and accounts, public safety, streets and public improvements, parks and public property, and public health. Third, except in special cases, each department should be headed by a single administrator.

Independent Agencies. Despite such general rules, various agencies remain outside of the regular departments and are loosely described as "independent." In this category are often a library board, a board of education, and a city planning commission. Board members may be selected by the mayor or some other city authority, or may be chosen

directly by the voters with a view to giving them a higher degree of autonomy.

Choosing the Chief Administrative Officials. Quite as essential to efficient government as the proper organization of departments and independent agencies is the task of securing competent directors. In dealing with the problem of the best methods for choosing higher ranking officials, our cities have tossed about in uncertainty. They have tried election by the city council, appointment by the mayor with the approval of the council, popular election, appointment by some state authority, and appointment by the mayor or city manager alone. The last of these methods was devised for the purpose of fixing responsibility to the public so that the citizens can know whom to hold accountable. The tendency of current practice is in its favor and the results of experience indicate that it is best calculated to promote both popular control and efficiency in the performance of official duties.

Recruiting Personnel. However well organized and staffed the overhead administration of a city may be, its strength and effectiveness in action depend upon a large body of lesser officials and employees. The function of recruiting and maintaining a loyal and efficient personnel from top to bottom is serious business, for the welfare of the city depends in a very large measure upon the skill and industry with which the rank and file of employees do the work entrusted to them.

In wrestling with this problem of personnel efficiency, our cities have made numerous experiments. The spoils system had its day and still holds sway to a considerable extent, but civil service reform has been gaining. The majority of all cities of over 10,000 population now have at least a portion of their employees on a civil service basis, often with civil service commissions to administer the rules for examinations and promotions. In a few states, on the other hand, the civil service law is enforced by a state agency which supervises the personnel systems of the major cities.

MUNICIPAL FINANCE

Appropriations. The funds required for municipal purposes are periodically supplied mainly by appropriations authorized by the city council or commission. Appropriations may be classified according to purposes: to meet current expenses for salaries, wages, supplies, and materials; to cover the cost of permanent improvements such as buildings and bridges; and to pay fixed charges such as interest on the municipal debt. In the detailed purposes for which expenditures are made the policies of the city government are given concrete form and

the culture of its people is reflected. It is scarcely too much to say that a history of urban civilization could be written in terms of appropriations, for they show what the citizens think is worth doing and worth supporting by taxes. In the methods of making these appropriations, the city government also demonstrates its business ability or lack of it.

In the beginning of our municipal history, city councils had no general budget plan. They authorized outlays from month to month as the members were moved to offer suggestions or the city officers made demands for money. No one could ever tell in advance how much would be spent in the year or whether the fiscal period would close with a surplus or a deficit. Appropriations were usually made in large amounts—lump sums—and spending officers were given a free hand in fixing wages and salaries, buying supplies, and signing contracts. Waste and corruption on a huge scale flowed from these loose practices.

Budget System. It was in the cities that the advocates of budget reform did effective work long before it was taken seriously by the states and the National Government. Since the principles of budget making have already been discussed (p. 686), they need not be reviewed here, for they are of general application. It may be said however that in all our larger cities there is to be found some kind of budget or systematic planning of expenditures and revenues for definite periods of time.

Initiation of Budget. As noted above (p. 713), there is a marked tendency to take the initiation of the budget out of the hands of the city council and vest it in some smaller body or the mayor. In New York City, for example, it is framed and adopted by the board of estimate and then it is submitted to the city council. The latter can reduce or strike out items, but not add to or increase them. In other cities, the mayor assumes leadership in financial planning. In city-manager cities, the manager usually discharges this duty.

Budget Hearings. It is customary for various civic bodies to take an active interest in municipal budget making. When the estimates for the coming year are first made public in tentative form, open hearings are frequently held. This may happen a second time when the consolidated budget is ready for final adoption. At these hearings private persons and organizations interested in special features of the proposed financial plan can present their claims and protests and can draw the attention of the city government and the public, through the press, to the points at issue. Thus the budget, as a program for community welfare, can be carried beyond the council chamber to the whole city.

Accounting. A budget is of little value unless it is scrupulously obeyed by spending agencies. Hence it has become customary to set up an elaborate system of municipal record-keeping and accounts.

whereby expenditures can be traced in minute detail to make certain that they conform to budgetary requirements. Comptrollers and auditors, independent of the ordinary spending agencies, review these records regularly, to see that the law is correctly carried out and that frauds are quickly uncovered.

Centralized Purchasing. Accounts not only provide a check on honesty; they form the basis for determining unit costs and hence give clues to efficiency. In an effort to cut unit costs as much as possible, many cities have created centralized purchasing agencies which, by lumping together the requirements of individual departments, may secure wholesale rates, establish standard specifications, test materials on a large scale, and distribute them efficiently from central warehouses.

Taxation. After a city government has decided upon its program of expenditures, it must provide the revenues. Its chief source of income is, of course, taxation, but in this respect its powers, as we have noted, are closely restricted. A survey of all the largest cities, namely, those having a population of more than 25,000, shows that in 1946 they derived over sixty per cent of their current revenue from the general property tax on real estate and personal property such as machinery, furniture, and merchandise.[13] Yet, despite progress in placing the assessment or valuation of such property on a more scientific basis, the general property tax still fails to supply as much revenue as most city governments would like.

Hard pressed for money, they are now experimenting with other forms of taxation. Some have imposed income taxes on individuals and corporations; while others tax cigarettes, liquor, and general retail sales. If the trend continues, the taxpayer will confront, in some fields, three layers of taxes on the same item, such as three income taxes—national, state, and local, and three sales taxes. However much this may "simplify" the financial problems of the city, it certainly does not make easy the life of the taxpayer.

Grants in Aid—Federal and State. Next to taxation in importance as a revenue source, and constituting about nineteen per cent of the 1946 current income of cities with over 25,000 inhabitants, are grants in aid—federal, state, and miscellaneous.[14] For a number of years cities have been receiving sums from states to support education and other special functions. Prior to the depression which began in 1929, federal grants for various purposes went directly to the states which in turn

[13] *The Municipal Year Book*, 1948, p. 196. Current revenue, in this regard, does not include the income from waterworks and other municipal business enterprises.

[14] *Ibid.*, p. 196.

distributed the allowances to the cities: such, for instance, was the procedure in the case of vocational education. But as municipal revenues began to decline sharply in 1932 and the burden of assisting the unemployed mounted, the Federal Government commenced to make loans directly to cities for public works and other purposes. Later it supplemented loans by huge grants directly or through state authorities, to provide food, clothing, and shelter for the hungry and homeless, and work for the unemployed. Under the Social Security Act (1935), the National Housing Act, and other federal legislation (p. 529), cities derive further direct or indirect subventions in large amounts from the Federal Government.

Other Sources of Revenue. Also important among the revenues of cities are earnings of public service enterprises, such as waterworks and electric light plants. These are supplemented by income from the renting or leasing of municipal property to private parties, earnings of departments from fees and license charges, fines and forfeitures, and levies on employees for pension funds. Among newer sources should be mentioned parking meters, and service charges for refuse collection and sewers. Some cities are augmenting their revenues by taxes on pinball machines, juke boxes, and other amusements.[15]

It is well known that public improvements, such as water mains, sewers, and pavements, add to the value of adjoining land. If such improvements are paid for by general taxation, then citizens who may receive no direct advantage contribute an unearned increment to those who do benefit. Hence there has come into favor the practice of laying all or part of the cost of public improvements upon the owners of abutting or neighboring property. This levy is known as a special assessment. The justice inherent in it is almost universally recognized, and it is applied with increasing frequency.

Debts—Practices and Reforms. Another division of municipal finances embraces debts. As a rule the amount of debt which a city can incur is limited, often to a certain percentage of the assessed value of the real property within its boundaries. Sound principles require that current bills, as for fire-hose, be met out of current income rather than with borrowed money—except in emergencies. On the other hand, major capital improvements having a long life, such as water works, should be paid for gradually over a period of years. In recognition of this fact, many cities issue serial bonds for such improvements—bonds falling due in annual installments that permit debt retirement as improvements depreciate. Sound principles likewise require the city to

[15] *The Municipal Year Book*, 1948, pp. 176–192.

make adequate provision for paying the interest on its debt and for laying aside a certain sum each year to discharge the principal amounts as they fall due.

The Debt Crisis. Many forces have conspired to pile up municipal debts. The pride of citizens has led them to embark on costly improvements lending distinction to their communities, such as parks and monuments, boulevards, airports, municipal auditoriums, golf courses, and yacht harbors. Cities have also spent millions of dollars in acquiring public utilities, such as water supplies, electric plants, and transit systems. During the depression that followed the stock-market crash of 1929, cities issued bonds to meet the problems of mass unemployment and poverty. Then came a crisis, as tax revenues fell off. By 1934 at least 3,000 units of local government had defaulted on a part or all of their obligations—failed to meet their debt payments. Some of them were able to make terms with the bankers and their other creditors; others tossed about in financial distress. Eventually Congress came to their aid by passing a municipal "bankruptcy" act, allowing federal courts to take jurisdiction over controversies between cities and their creditors under certain conditions.

THE ORGANIZATION AND FINANCE OF URBAN COUNTIES AND DISTRICTS

The Urban County. As a rule, American cities are located within the boundaries of one or more counties, each of which has its own governmental organization.[16] Since the work of these counties may overlap that of the cities, to some extent, the arrangement gives rise to a certain amount of waste and lost motion. In an effort to minimize difficulties from this source, Baltimore, St. Louis, and twenty-four Virginia cities have been formally separated from the surrounding counties and now perform within their limits the work elsewhere divided between city and county officials. In San Francisco and Denver, the city and county governments have been combined. The officials of the unit known as "The City and County of San Francisco," for instance, carry on the functions that were formerly assigned to separate city and county officers. Boston, New Orleans, New York, and Philadelphia have taken over many obligations formerly handled by counties but without achieving complete consolidation. There is much room for further creative experimentation in the simplification of the organization of urban government, along these and other lines.

Urban Special Districts. Besides cities and counties, many urban

[16] As most American counties are rural in character, the detailed description of their "normal" organization is deferred to pp. 787–791.

areas contain one or more special districts, each engaged in some single function, such as the administration of public schools. The boundaries of these districts are drawn with reference to their individual needs. For example, a water supply district may embrace cities able to receive water from a common source. Each district is normally governed by a board, which may either be elected by the people of the district, or appointed, depending on circumstances. Under the board there is usually a manager and a staff of responsible subordinates, in charge of detailed operations.

The Over-all Urban Picture. Urban dwellers who live within the boundaries of a city, a county, and one or more special districts are subject to the cumulative effects resulting from the activities of all the units. Since these activities are managed by separate officials—perhaps with divergent views—and under various sets of laws, the total outcome is likely to be confusion, waste, and burdensome taxation. The lack of financial planning alone may be serious; for each agency may levy its taxes with slight or no regard for what the others are doing. Often the total tax rate is oppressively heavy, particularly for citizens unfortunate enough to live in several overlapping and costly units.[17]

THE EFFICIENCY AND ECONOMY MOVEMENT

Local Origins. As the issues facing urban dwellers multiplied, with the increase of governmental agencies and functions, it became more and more apparent that a scientific study of urban institutions and activities was imperative in the interest of economy and efficiency. The impetus for action in this respect came from many sources. Critics of urban corruption and malfeasance, led by Lincoln Steffens, stirred the country by exposures of shocking offenses against civic decency. Students of business administration proposed practical methods for putting municipal affairs on a more economical basis. To such protests and suggestions, concrete direction was given in 1907 by the founding of the New York Bureau of Municipal Research, a privately financed and managed organization. Inspired by the example of the New York Bureau, public spirited citizens in other cities, far and wide, created similar associations.[18] At length some city governments took over the idea of scientific research and founded tax-supported bureaus of efficiency. As a result of growing interest in good management, local organizations of city, county, and district officials began to give more

[17] For a diagram showing variations in the total weight of taxation resulting from the presence of eight layers of local government in an urban county, see the Council of State Governments, *State-Local Relations* (1946), p. 194.

[18] N. N. Gill, *Municipal Research Bureaus* (1944).

attention to the improvement of community government and administration.

State Leagues. As urban governments face kindred problems, they can derive great benefits from an exchange of experiences. A growing recognition of this fact is recorded in the formation of municipal leagues and societies of municipal officers. In 1912 forty-two states had such associations composed of affiliated municipalities within their respective borders. Among those which have carried this cooperative movement to the highest pitch of success are Colorado, Florida, Illinois, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Virginia, and Wisconsin. In some cases, notably Minnesota, Wisconsin, and California, the leagues are connected with universities, and receive inspiration and direction from professors in the field of political science. Besides holding annual conferences, a few of the state municipal associations maintain a secretariat, prepare legislative proposals, and promote or carry on research.

National Societies. Crowning the state municipal leagues is a general federation, the American Municipal Association, with which are affiliated three other organizations: the National Municipal League, the International City Managers' Association, and the Governmental Research Association—the last named representing the various private bureaus and institutes of municipal research in different parts of the country. The American Municipal Association, representing more than 7,000 cities and villages, has become a powerful central agency for promoting the study and solution of municipal problems, for the pooling of experience, and for distribution of workable information to officials on the firing line of city government in every part of the Union—making the knowledge possessed by the greatest easily available to the least.

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CHAPTER 37

Functions of Urban Governments

Changing Place of Government in Urban Life. Since the opening of this century there has been a striking increase in community dependence on the services of urban governments, in response to the determined desire of citizens to make life in densely populated areas more convenient, healthful, and interesting. In the middle years of the nineteenth century, and indeed long afterward, as a general rule, streets were unpaved, fires were fought by volunteer companies, individuals dug their own wells at will, public parks and libraries were a rarity, and the death rate was high. By way of contrast, modern communities now rely on local governments not merely to pave streets, but to light and clean them; to fight fires with organized city departments; to supply water for domestic and commercial uses; to install sewers; to operate parks and libraries; and to serve citizens in countless other ways. This story of municipal improvements involves every branch of science, engineering, and esthetics and touches the health, safety, comfort, liberty, and property of citizens. It is marred, to be sure, by folly and corruption; slums, misery, poverty, and degradation yet remain as challenges to renewed energies; but considered in historical perspective it is a promise of greater work to be accomplished.

PUBLIC SAFETY—POLICE AND FIRE ADMINISTRATION

One of the oldest municipal functions is that of keeping order and protecting life and property. In smaller cities this function is often confided to a single department of public safety; in the larger cities it is divided between the police department and the fire department.

Variety of Police Duties. Historically, police control has usually been associated with arrest and punishment of criminals, but in the modern city the police authority performs many other duties. It directs traffic, operates ambulances, and deals with strikes and public meetings, for example.

Amount of Crime. Still, a prime task of the police is coping with

crime. Judging by the Federal Bureau of Investigation's survey of conditions throughout the nation during 1946, this is a gigantic responsibility. If all crimes had been evenly distributed around the clock during 1946, each day would have witnessed 36 slayings, 33 cases of rape, and 185 cases of felonious assault. Every 5.7 minutes would have produced a criminal homicide, rape, or assault with intent to kill. The day's toll would have included the stealing of 630 automobiles, the robbing of 172 persons, and 981 cases of reported burglaries.[1]

Racketeering. Especially vexing to the police is "racketeering." Gang leaders, for instance, choose a given industry, such as trucking or marketing. They make "rules" for the industry: persons engaged in it must buy from designated firms or employ members of a certain union. Those brought within a "racket" are told to obey the "rules" and to pay the gang for "protection." If they do not, they may find their places of business wrecked. Workingmen who refuse to join the trade union and pay big fees may be denied employment and even beaten or murdered. Racketeering has become a menace of ominous proportions.

Enforcing Moral Standards. Other provocative problems arise from attempts of state legislatures to impose upon urban communities moral standards which the majority do not accept. There are statutes forbidding card playing, tennis, and golf on Sunday. In some states the sale of soda water, tobacco, candy, and chewing gum is unlawful on that day. While such laws are rarely enforced, every now and then the police feel impelled to arrest luckless people who assume that the law is asleep.

Labor Disputes. The police commissioner of a city often has it in his power to make any strike a success or failure. The situation is thus summed up by Raymond Fosdick: "'We lock them up for disorderly conduct,' a chief of police told me when I asked him about his policy in regard to strikes and strikers. 'Obstructing the streets' is another elastic charge often used on such occasions. I asked the chief of police of a large industrial city on what legal ground he denied the privilege of assembly to the striking operators of an extensive plant. 'We assume that their meeting halls are disorderly houses,' he replied."[2] In 1938 Mayor Frank Hague of Jersey City forbade representatives of the Committee for Industrial Organization to hold meetings in the city. This high-handed conduct was rebuked by the Supreme Court of the United States in the declaration that the function of the police is

[1] U. S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States and Its Possessions*, Annual Bulletin, 1946, p. 113.

[2] *American Police Systems*, p. 322.

not to prevent speakers from expressing their views but to preserve order while they speak.[3] On the other hand, the mayor or commissioner may allow strikers a free hand verging even upon violence, if his sympathies are on their side—which seldom happens.

The course of even-handed justice is described by Arthur Woods in orders issued to his subordinates when he was police commissioner in New York City years ago. He held that the business of the police is to maintain public peace, to assume that the purposes of a strike are legal unless otherwise instructed, and to permit strikers to hold meetings or persuade other workers provided they do not block traffic, resort to physical violence, or use offensive language. As a further means of preserving neutrality, many cities forbid policemen to join unions, a rule that has been upheld by the courts.

Questions of Free Speech. Theoretically speech is free, but practically there must be limits on it. It is not desirable to allow a speaker to set up a soapbox in a crowded thoroughfare and block the traffic with his audience, or to permit the organizers of parades and demonstrations to fill the streets with banner-waving throngs whenever the spirit moves them. Accordingly it is the general custom to require those who wish to organize street meetings to secure a permit from the police in advance. Clearly here is an opportunity for the commissioner to express his likes or dislikes, and he frequently does so. In his control over public places, he may go even farther, and break up meetings and assemblies on flimsy pretexts.

On the other hand, police commissioners sometimes use excellent discrimination. Arthur Woods, to whom reference is made above, condemned his predecessor's habit of "smashing" radical meetings in Union Square. When a crowd gathered there, Commissioner Woods placed a large force within quick call, scattered plain-clothes men through the assembly, and prepared to halt any violence as soon as the first sign appeared. "The change of method," he reported, "was almost unbelievably successful. There was no disorder; the crowd was very large but well behaved, and at the end of the meeting when everything was over and many had gone home three cheers were proposed and given for the police."[4]

Departmental Organization. With such extensive and perplexing functions to discharge, police organization presents thorny problems. Should there be state or local administration of police functions? In Boston and Baltimore the head of the police is appointed by the gov-

[3] Hague *v.* C.I.O., 307 U. S. 496

[4] *Policeman and Public*, pp. 73–78. Chafee, *Freedom of Speech*, pp. 173 ff.

ernor of the state.[5] This expedient has been tried in many other cities, but it has been generally abandoned in favor of local autonomy.

In organizing the police, the usual experiments have been made with boards and single-headed departments. At the present time the greatest cities have single-headed departments, while many cities of second rank in population retain the board system. Among specialists there is some division of opinion on the subject, but the trend of thought favors the concentration of responsibility in one man. Such is the view of Mr. Fosdick and Dr. Graper, after carefully examining both the law and practice on this point.[6] As a rule the board or head of the police department is chosen by the mayor or manager of the city; in the commission-governed cities one of the commissioners assumes charge of the police.

Officials and Patrolmen. The operating police force under the police board, director, or commissioner consists of the chief, his subordinate officials, and the rank and file of patrolmen. The chief, or technical director of the force, is generally subject to the spoils system, and comes and goes with the changing fortunes of parties, but efforts have been made to give more permanence of tenure under civil service rules.

As to the rank and file of the force the principles of the merit system are often applied to appointments, promotions, and removals. Examinations for admission and promotion are designed to test the fitness of the candidate for the multifarious duties of a policeman, and in the most progressive cities well-equipped schools have been established in the police departments to give specialized training. As police work increases in complexity, separate squads are drilled for specific duties, and women police officers are employed to deal with certain classes of offenders. Where the merit system prevails, pensions for the police force are usually established.

Professional Police Administrators. Police administration is rapidly acquiring the dignity of a profession. Special courses in city police work are given by many municipalities, by the Federal Bureau of Investigation, and by a number of universities. Systematic methods of personnel selection and of keeping criminal records are other signs of the trend toward competence and efficiency.

Mechanical Equipment. On the side of technical equipment police departments are making rapid advances. Automatic lights give them control over the flow of traffic. The teletype and radio, by broadcasting news of crimes to police cars on patrol and to police authorities in

[5] *Municipal Year Book*, 1947, p. 382.

[6] Fosdick, *American Police Systems*, p. 158; E. D. Graper, *American Police Administration*, pp. 12–27.

distant places, enable the force to spread wider nets for catching offenders. Through the use of cameras, accurate records are made at the scenes of accidents and crimes.

Opportunities for "Graft." Police administration, whether good or bad, is conducted under difficult circumstances. Rich opportunities for "graft" are offered to members of the force, from the roundsman on his beat to the commissioner in the central office. The disorderly elements are often willing to share their gains with policemen in return for immunity. That some should succumb is inevitable, but it is well to remember that many other patrolmen perform honest, courageous service that sometimes costs them their lives.

Municipal Courts. Closely connected with the police force are the municipal courts in which the offenders are tried. The selection of judges for these courts is a serious matter. It is important that they be in close and sympathetic touch with the social and economic conditions under which the people who are brought before them are compelled to live. A kind word, a gentle rebuke, or a helping hand at the right moment may stay a new offender on his downward course, or may save from despair some unhappy person who may have been arrested without warrant by an ignorant policeman. Brutality or indifference in a police magistrate may fill the prisons with people who have no business there, may embitter a large portion of the population against what purports to be a system of "justice," and may add to the hopelessness which overwhelms thousands in their fight against poverty, unemployment, and dependence. In the best of circumstances, grave injustice is often done in our municipal courts, especially to the poor. This is a matter of fact established by careful inquiries.[7]

Choice of Judges. It is said that popular election of police magistrates will keep them in close touch with the life of the districts in which they preside. But it has been found in a number of instances that popular election brings police justices under the control of political bosses supported by the lawless elements which pay for immunity. The recognition of this danger has led some cities to abandon the elective system in favor of appointment by the mayor. Yet, as the New York City scandals of 1931 proved, district "bosses" may still continue to select judges.

Court Reforms. The reform of municipal judicial systems is receiving special attention at the hands of individual students and associations, such as the American Judicature Society. Prominent in the new trends is the creation of a consolidated central court com-

[7] R. H. Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching).

posed of an adequate number of judges who are assigned to tasks in the several districts according to current needs, thus preventing the calendar of one court from being crowded while another court has nothing to do. Among the new projects of reform is also the establishment of special courts or sections of the central court to deal with important classes of cases—for example, traffic courts to try offenders against traffic laws, domestic relations courts to deal with matrimonial and other family controversies, and women's courts.

Children's courts, operated by counties or cities, have been created in all the large urban centers, with a view to removing young offenders from contacts with old and hardened lawbreakers. Trials in these courts are informal, and usually conducted in a homelike chamber in which the judge holds consultation with the accused, parents, and witnesses. Ordinarily first offenders are not committed to institutions of any kind but are released on probation. Probation officers visit the homes of first offenders to see whether the instructions of the courts are being obeyed and the home environment is conducive to reform. The effectiveness of this system depends largely upon the tact, humanity, and wisdom of the probation officers, which may vary widely in practice.

Public Defender. Another attempt to promote the ends of justice is represented by the establishment of the office of "public defender." In every criminal case the accused is prosecuted by an officer of the state whose business it is in practice to secure conviction. The accused is defended by a lawyer. If he is rich he may summon to his aid powerful and clever counsel; if he is poor he must hire a cheap attorney or trust his cause to the mercies of a lawyer appointed by the court. The public defender, on the other hand, is a regular official charged with defending the poor and unfortunate with the same skill that is displayed by the prosecutor. This office was created first in Los Angeles in 1914. Since then, it has been set up in several other cities.

Extent of Fire Hazards. A second branch of work coming under the head of public safety is that of protecting the community against fires, explosions, and other hazards which tend to multiply as chemical and other dangerous industries increase in number and variety. As in crime, so in fires, the United States seems to lead all western nations. Each year two or three thousand persons are killed at fires and many more wounded. At intervals, the public is horrified by an appalling disaster like the Triangle fire in New York in which more than one hundred girls were burned to death or killed by jumping from the upper floors of a tall factory. In 1946, the losses of property by fire passed the half billion dollar mark.

Private Pressure for Efficiency in Fire Fighting. With good reasons, then, fire insurance underwriters have made a concerted drive to improve fire-prevention and fire-fighting methods in the cities. Acting through a common organization, the National Board of Fire Underwriters, the insurance interests make a practice of investigating the fire-fighting equipment and capacities of individual cities, offering concrete suggestions for improvement. By promises of material reductions in insurance premiums in return for specified improvements in city facilities and methods, they are often able to win the support of businessmen for better fire-fighting resources. All this pressure for efficiency in one unit of city government has had striking results; fire-fighting departments in America have been increasingly professionalized and furnished with the finest of equipment.

The Fighting Force. Cities customarily place the function of fire fighting in the care of a technical "fire chief." Where the city is highly industrialized and densely populated, this officer should be a skilled scientist, engineer, and manager of human beings in emergencies. Under him is a uniformed and closely knit force patterned along semimilitary lines, often selected and promoted under civil service rules—and in the larger cities, trained in special municipal fire schools. In compensation for the hazards involved, pension systems are usually created for the benefit of firemen and their families. Still, the spoils system prevails in some places, and smaller communities must often rely on volunteers to drop their work at the sound of an alarm.

Equipment. Municipal fire departments in America have a variety of modern apparatus which is the envy of other lands. Giant pumpers, engine-driven ladders extensible to great heights, searchlights, fire resistant asbestos suits, gas masks, means of pouring a smothering foam on fires, and other devices are available on quick call in big cities. Separate mains are laid in certain districts, such as those containing skyscrapers, to supply enormous volumes of water for fires at a high pressure, dangerous to ordinary users. Supplementing the historic fire alarm telegraph systems in providing fast communication throughout the city, advanced departments have installed two-way radio sets on fire engines, permitting instant contact between company units and central headquarters. Water towers reach fires far above the street and safety towers and chutes rapidly remove occupants of burning buildings.

Fire Prevention. Still, appalling losses of life and property have continued, so the attention of fire departments has been turned with increasing emphasis to the work of preventing fire. Here two special operations are carried on. One pertains to fires that are accidental in

nature or arise from defects in structures and industrial methods. The other is concerned with fires that are deliberately started, often for the purpose of collecting insurance.

To deal with the first type, strict regulations are made with respect to the fireproofing of buildings and other structures which present special hazards. The use of inflammable and explosive articles within the city limits is subjected to minute specifications. Theaters and auditoriums are required to have safety devices and proper exits. Fire prevention bureaus are established to study the causes of fires, devise remedies, and carry them into effect. Inspection forces pry into every nook and cranny where hazards may lurk and order the arrest of persons responsible for violations of fire-prevention rules and ordinances. Persistent programs of education in fire prevention are carried on through the schools and otherwise.

Different in nature and often calling for cooperation with the police are fires of an incendiary origin. Two conditions hamper the work of fire prevention in this sphere. One is the tendency of some insurance companies to allow property owners to take out insurance in excess of the value of their property. The other barrier in the way of reducing the amount of arson is the difficulty of securing evidence against offenders and then convicting them in the courts.

THE REGULATION OF PUBLIC UTILITIES

Early Regulatory Problems. Our cities began to wrestle with public utility questions long ago, without experience and without guidance. It was in 1823 that the first American gas plant was established, at Boston. The horsecar appeared in the streets of New York in 1852; Edison made his successful demonstration of the electric streetcar in 1880 and two years later established in New York City a central electric light plant, the first in America. By the end of the nineteenth century the capital invested in municipal utilities reached a total of more than three billion dollars.

In the meantime municipal utilities and municipal politics had become intertwined. The essential functions of supplying gas, electricity, and transportation to the public were, as a rule, placed in the hands of private capitalists usually organized as corporations. Before a corporation could use the public streets of any city, it had to secure a charter or franchise from the city council or some official agency; every time it wanted to make an extension of its lines or pipes or to renew its franchise, it again had to apply to public authorities. As such privileges were highly profitable and competition for them was keen, the unscrupulous city councilor or state legislator could often obtain money

in return for his vote in favor of a corporation applying for a charter. If the company did not approach the politicians in the first place, it might be "seen" by some of their representatives and "blackmailed" into making gifts of money in return for votes.[8] Among other early abuses were the granting of perpetual franchises without adequate protection for the public, the issuance of securities in amounts far in excess of real values, unfair charges for inferior service, and the juggling of accounts.

Growth of State Regulation. The ineptness and corruption connected with municipal management of franchises, the inability of smaller communities to maintain competent, full-time staffs for regulatory purposes, and the consolidation of utility enterprises into giant systems, all helped to shift a part of the burden of public utility regulation from the cities to the states. As matters stand today (Chapter 34), state permission must often be obtained before an enterprise can be launched and state commissions frequently regulate utility rates, services, the floating of securities, and accounting practices.

Extent of Municipal Regulation. Despite the strong trend toward state regulation of public utilities, a considerable amount of authority is still left in the hands of municipal officials.[9] For instance, Delaware had no state utilities commission in 1917, while numerous other states had not by that year vested in their commissions control over certain important kinds of utilities, such as telephone companies or waterworks. Where these conditions prevail, any regulation undertaken must be provided largely by the cities. Moreover, where state supervision actually reaches a given class of utility enterprise, authority may be shared between state and city agencies. A few states require each company desirous of starting a new service to secure both a state permit and a city franchise before commencing operations; while in several states the granting of franchises is a purely municipal function, and state control extends to other matters. Where rates and services are regulated by a state commission, city officials may appear before that body to urge reductions in utility rates or improvements in service or both, thus becoming active participants in the regulatory process. Some cities even establish their own utilities in competition with private enterprise—a type of rivalry that exerts a certain moderating effect on rates and services.

Principles of Municipal Regulation. Control over franchises continues to be a prime regulatory device for cities and one that has

[8] H. Zink, *City Bosses in the United States*, pp. 311–313, 355–357.

[9] For excellent annual surveys, see the Public Utilities Securities volumes of *Moody's Manual of Investments*.

received considerable attention. The newer trend is toward the issuance of short term, or indeterminate, franchises instead of the old-fashioned perpetual grants. Under this more modern practice, the city often reserves the right to take over and operate, on specified conditions, the privately owned utility, after a certain time or upon due notice. The possibility of having its property revert to the city, therefore, is an inducement to private operators to maintain efficient service. In addition, modern franchises may contain many detailed provisions as to services, rates, accounts, and other transactions. To help cities in preparing franchises, the National Municipal League has prepared a model plan, embodying tested principles of control.

In the most advanced franchises and municipal regulations certain great principles of utility control have been worked out. There shall be no overcapitalization; stocks and bonds issued shall represent bona fide property, not inflated values. The services rendered shall be adequate; the gas and electric power sold must comply with established scientific standards. Meters must be accurate. Companies must extend their lines or mains under certain prescribed conditions. Accounts must be kept according to uniform and exact principles and made public.

Finally rates must be "reasonable." The problem of rates is the heart of the matter, for it involves the charges made to the public and the profits of the companies. Hence many a bitter battle has been waged in politics and the courts over this point. In determining reasonable rates, it is necessary, under the Fourteenth Amendment to the Federal Constitution, to allow the companies a fair return on their capital. What is the true capital of the company? What is a "fair" rate of return? In passing on such questions, municipal utility commissions often become involved in long and expensive legal contests which may be carried to the Supreme Court at Washington.

Conflicts over Rate Regulation. Millions of dollars have been spent by utility companies and public service commissions in battles over the "valuation" of plants for rate-making purposes and over other phases of utility regulation. In times of changing costs for materials and labor, disputes of this nature multiply. If prices are rising, utility companies naturally demand an increase in their rates. If prices are falling, communities naturally demand a reduction in rates. In an effort to escape from needless litigation, experts in the field are trying to provide for adjusting rates in accordance with changes in prices as reflected in price index numbers. This is a radical departure from the old practice of placing a permanent "value" on a plant and then fixing the rate for service in such a way as to yield a fair return on the capital sum thus established. If price fluctuations continue, as

during the past twenty years, some such regulatory device will be necessary to cut down the volume of bickering and litigation which disturbs communities and burdens the utility business with uncertainty.

PUBLICLY OWNED URBAN UTILITIES

Pressures on Behalf of Public Ownership. Many cities and special districts own and operate public utility systems themselves. This practice, obviously, eliminates the conflicts, delay, uncertainty, and expense connected with the regulation of private concerns. Sometimes it is the product of a drive to reduce rates; for if a city can borrow money at lower interest rates than a private company, avoid the payment of taxes on its utility investment, and perhaps even get a federal cash gift besides, it can cut operating expenses substantially. Even investors in private utility companies may become ardent champions of public ownership if it means that the municipality will purchase their defaulted utility bonds at attractive figures—as the sale of bankrupt rapid transit lines to the City of New York and a similar experience in Chicago vividly demonstrated.

Water Supplies. Today the great bulk of the urban population is supplied with water from either municipal or special district works.[10] The special district device is often employed in congested areas where several cities seek a common source of water at a distance. Extensive public ownership in this field, it should be recorded, is due in a large measure to the need for costly water supplies to meet fire-fighting emergencies and to protect the health of the public.

Electric and Gas Plants. Less common are city or special-district electric light and power systems. While one city out of five, having a population of over 5,000, was served by a municipal or special district electric system in 1948, most of these works were in small places. Such developments in more populous centers were encouraged during the administrations of President Franklin D. Roosevelt, through federal offers of cheap power, loans, and gifts of cash to cities undertaking the establishment of municipal electric plants. Memphis, Chattanooga, Knoxville, and Nashville are among the municipalities that took advantage of such assistance. Other large public-owned electric works served Cleveland, Columbus, Detroit, Jacksonville, Kansas City (Kansas), Los Angeles, San Antonio, Seattle, and Tacoma, in 1948.[11] A few cities even own gas works, including in 1948 Memphis, Knoxville, Richmond (Virginia), Houston, San Antonio, Duluth, and Long

[10] For annual statistics, see *The Municipal Year Book*.
[11] *The Municipal Year Book*, 1948, pp. 47 ff.

Beach (California). Omaha, Nebraska, is served by a publicly owned gas system, operated by the Metropolitan Utilities District.[12]

Transportation Facilities. A few urban areas have invested heavily in publicly owned transit facilities. Starting out on a small scale with bus lines and a subway, New York City finally acquired a vast private system of subway, elevated, bus, and street car lines. Today, that City's investment of about $1,500,000,000 in transit facilities represents one of the most elaborate adventures in public ownership to be found anywhere in the country. Recently, a special district governed by an urban transit authority undertook the acquisition and operation of rapid transit lines on a huge scale in metropolitan Chicago. Not far away, Detroit and Cleveland both have city-owned street car and bus systems. Out on the Pacific Coast, San Francisco and Seattle own and operate their local street car and bus lines.[13]

Provisions for Public Ownership. There is undoubtedly a great deal of sentiment in the United States in favor of municipal ownership—sentiment which finds expression in statutes and constitutional amendments empowering cities to buy, construct, and operate utilities. For example, the Colorado constitution was amended in 1902 to authorize Denver to own and operate "waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities." Michigan six years later conferred this power generally on all cities and villages, subject to the proviso that bonds issued by any city for such a purpose in amounts beyond its debt limit should constitute a lien merely on the property and revenues of the utility in question—not a liability imposed on the taxpayers in general. Provisions authorizing municipal ownership are found in other state constitutions; but usually they are not necessary because the state legislature under its general powers may confer on cities the right to own and operate utilities.

Difficulties in Way of Public Ownership. Whatever the powers conferred upon units of urban government, there are numerous obstacles in the way of embarking upon municipal ownership on a large scale. The streets and other public places are generally occupied by existing utility concerns operating under long-term, perhaps perpetual, franchises. If a question of buying up an old company arises, there is sure to be an almost interminable legal battle over the amount of money to be paid for its property and rights. Seattle and Detroit learned this by bitter experience. If the city can get over these legal hurdles,

[12] *The Municipal Year Book*, 1948, pp. 51–53.

[13] For descriptions of municipal systems, see individual cities in *Moody's Manual of Investments, Government and Municipals*, published annually.

it then confronts the problem of finance. It may already be so heavily in debt that it has difficulty in floating the bond issue required to purchase a private plant.

Results Under Public Operation. What happens after a city or special district acquires a public utility system of any type? Usually, the action frees the management from many of the limitations placed on private enterprise by regulatory bodies. For instance, a city may use revenues derived from its electric light plant in defraying general municipal expenses without being called before a commission and ordered to reduce its rates. City officers may perform legal and accounting services for a municipal plant without making any charge for the work and without having their books examined by the state. If the voters insist on such low rates that city transit lines must run at a heavy loss, the deficit may be met out of other city revenues, and no one can successfully raise in the courts the issue of deprivation of property without due process of law. These and other differences between the conditions under which public and private operation are conducted make a precise comparison of operating results difficult.

Yet there are indications that such discrepancies may some day be narrowed to the point where a reasonably accurate comparison of public and private operation may be possible. By 1946, there were several states in which the state public utilities commissions had power to regulate the rates, or both the rates and services, of municipal electric plants.[14] Massachusetts, for example, limits the return on municipal electric plant investments to eight per cent, placing them on a footing comparable with private plants.[15]

SANITATION AND HEALTH

Congestion and Health Problems. The very congregation of large masses of human beings in urban centers creates menaces to health, well-being, and convenience. An enormous volume of varied wastes constantly accumulates in dwellings, industries, and mercantile establishments and, if not disposed of quickly and efficiently, places the health of every inhabitant in jeopardy. Congestion in the streets, office buildings, stores, and factories, in theaters, and in public conveyances contributes to the spread of diseases. Slum tenements, with inadequate sunlight and impure air, are potent sources of physical ills and deficiencies. That in spite of such threats to welfare the span of life in the United States has been substantially increased during the

[14] *Moody's Manual of Investments*, Public Utilities Securities, 1946 edition, pp. a51 ff.
[15] *Ibid.*, pp. a51 ff.

past fifty years is indeed a high tribute to the quality of the sanitary and health activities of urban governments.

Sewage Disposal. One of the most extensive city and special-district operations in the field of urban health and sanitation is that of providing adequate sewage disposal facilities. Yet there are many cities with well-paved streets that do not have sewers at all or are inadequately supplied. New Orleans and Baltimore did not complete sewers until the twentieth century was well advanced. Even in the heart of great cities there are still to be found primitive sanitary arrangements which are a danger and a disgrace. In many smaller cities where health administration is lax, citizens may connect their houses with sewers or not, as they please, and thousands of them prefer the ancient way. Since crude methods of disposal endanger adjacent water supplies, state health officials and the courts sometimes compel cities to install adequate purification facilities, if necessary by the formation of sanitary districts. The growing practice of making service charges for sewers promotes this development by placing operations on a more self-supporting basis.

Street Cleaning and the Disposal of Refuse. The collection and disposal of wastes falling on the streets is now a highly mechanized function of all the larger municipalities. Frequently cities employ their own forces to collect garbage, ashes, and rubbish, and haul them away for disposal, but in many cities householders and business concerns make arrangements with private contractors to perform the service. After collection wastes may be merely dumped at some outlying place, or the more advanced methods of reduction and incineration may be utilized at large plants which, under skilled management, may produce a certain amount of revenue.

Smoke Control. At long last, the irritation to eyes, throat, and lungs and the general filthiness resulting from the free release of smoke and chemicals into the air is beginning to receive the attention that it deserves. Chicago, where formerly an estimated seventy tons of soot fell every month on the average square mile of surface, has adopted a smoke and chemical control ordinance and put inspectors in the field to enforce it. So have the municipalities of St. Louis, Missouri, and Cleveland, Ohio.

Health Departments. Other activities related to health are undertaken by a distinct unit of urban government, known as the health department. A committee of the American Public Health Association in cooperation with the Federal Public Health Service, after a survey of American conditions, has outlined an ideal health department, for

a city of more than 100,000 inhabitants, embracing eight bureaus. The names of the proposed bureaus indicate the range of enlightened health work: (1) administration, to include office routine and public health education, (2) sanitation, (3) foods and milk, (4) communicable diseases, (5) child hygiene, including infant and school hygiene, (6) nursing, (7) laboratories for research, and (8) vital statistics.

Preventive Functions. Prevention of disease is an outstanding feature of city health administration, a task involving the use of special agencies for child hygiene, milk stations for the sale of pure milk, work in the schools, visiting nurses, mothers' clinics, and dental clinics; public control over the quality of milk, meat, and other foodstuffs; public supervision of markets, restaurants, and other public places; and campaigns against communicable diseases such as tuberculosis, and against flies, mosquitos, and impure water that spread germs far and wide. As many diseases, such as lead poisoning, arise from the nature of the industries in which people are employed, there has sprung up a science of industrial hygiene which looms larger and larger in the great battle with disease. Finally, the warfare is carried into the schools, homes, and factories by campaigns of health education which inform and warn the people, young and old, preparing them to take precautions that will improve or protect their health.

Municipal Hospitals. All progressive cities and urban counties own and operate one or more hospitals or clinics to which public-spirited doctors often contribute free service. In the larger communities, separate institutions are sometimes provided for special classes of cases. Seeking to improve hospital technique in such institutions, the American Medical Association has investigated many of them and registered those for which it finds no evidence of irregular or unsafe practices. Superior institutions are declared qualified by the Association for the recognized training of internes. This outside professional pressure for better hospital services marks an important step forward in a great humanitarian movement.

Relation to Medical Profession. The wide-reaching activity of urban public health agencies has a profound effect upon the medical profession. It stimulates scientific research in ways and means of combating disease. It summons the whole profession, too likely to be engrossed in the routine and profits of private practice, to a sense of social obligation. In public esteem it places beside the eminent surgeon and skilled physician, the trained leader in public health nursing and the trained director of public health administration. It has led universities to give attention to public health.

PUBLIC EDUCATION IN URBAN AREAS

Rise of Popular System. Education is essentially a local function in America, although state and federal aid are given to raise standards and augment municipal resources. It is along educational lines that our urban centers have made some of their greatest advances during the past fifty years. Although the United States was supposed to have put stress upon universal education early in its history, practical application lagged far behind the theory. It was not until about the middle of the nineteenth century that the foundations of universal and free elementary education were securely laid, but since that time there has been an almost steady growth in the percentage of children of the elementary school age enrolled and attending classes. The development of high schools belongs to a still later period, for even in 1880 there were only about one-half as many children in public high schools as in the private academies; in less than twenty years, however, the former outnumbered the latter four to one.

Yet illiteracy was not conquered. The multitude of negroes in the south and foreigners in the north made the struggle against it especially difficult; but during World War I, citizens who had been indifferent about the matter were startled out of their apathy by official reports that more than one-fifth of the men in the draft army could not read a newspaper or write a letter home. Then a national campaign was launched to increase the number of schools, teachers, and pupils—a campaign that was intensified after World War II.

The Independence of School Authorities. So important has the subject of public education become that a continuous struggle is waged over the power to direct it in urban areas. In some cities administration of the schools is in effect a branch of the municipal government, although even there it is customary to accord it more or less autonomy. New York City provides an example; the mayor appoints the members of the board of education and the city council passes on the budget. In many cities, large and small, the public schools are operated by school districts, each having a board elected by its inhabitants and partly, if not entirely, beyond the effective control of the city government. However selected, the board usually can lay taxes up to certain limits or draw upon the city treasury for specified sums; and whatever its source of income, it can spend money without much interference from the city government. It erects buildings, employs teachers, buys supplies, and arranges the courses of study on its own authority. Even where it must submit its budget to the city government for approval, both law and custom give it a high degree of autonomy. If the city coun-

cil should attempt a deep cut in a school appropriation, a storm would break over its head.

This independence for school authorities, established mainly to secure freedom from political influences, has in fact been carried so far in many instances as to interfere with efforts to make comprehensive financial plans for urban areas. School outlays for current purposes often exceed the current expenditures for streets, health, and welfare combined.

Improvement of Facilities. Whatever may be the effects of such independence on government generally, there certainly has been, through the years, a substantial improvement in educational plants and services. The advanced design, construction, esthetic features, and conveniences of modern urban schools will be appreciated by one who contrasts a building of 1949 with one of 1850 or even 1900. The standards of scholarship required of teachers have also been raised and the notions of popular education have extended far beyond the mere routine of the three "R's." Indeed, urban schools are becoming social centers; playground and recreational features are being developed; vacation schools, affording social life to the children of the congested areas, have been established; and there is a constant searching among educators for better methods of instruction and for more effective ways of raising, through the school system, the levels of intellectual, physical, and moral life in crowded urban districts.

Extension of Responsibilities. Special attention is being given to the problem of fitting pupils for their double task as breadwinners and as citizens. Vocational schools, to prepare them for efficient work in some trade or profession, are now operated all over the country, and instruction in citizenship has an important place in every curriculum. The care of the health of children is no longer entrusted entirely to their parents; medical inspection is becoming a regular adjunct of public education; in order that the bodily ills discovered by this scrutiny may not go unheeded, dental and medical clinics are frequently set up in schools. For the weaker pupils, particularly those affected with tubercular troubles, open-air rooms are provided; and many schools maintain lunch rooms where undernourished children may obtain food free of charge or at a nominal cost.

Adult Education. Perhaps the most striking developments in American education during recent years have been in the field of "adult education"—in projects for the promotion of knowledge and taste among the multitudes beyond school age. Ordinarily such activities spring from private enterprise, from the interest and enthusiasm of trade and correspondence schools, Chautauquas, religious associations,

university extension societies, and trade unions, which offer courses of instruction, practical and cultural, at hours convenient to people regularly employed. But city governments aid and encourage such undertakings when they are not conducted for profit. They also maintain night and continuation schools, they lend the use of their school buildings to educational associations, and some of them support or furnish facilities for free public instruction to adults in science, art, literature, history, and political economy.

Libraries. Adult education has been especially aided by the establishment of public libraries. It seems that Boston led the way, for as early as 1847 the city council at the suggestion of Mayor Quincy passed a resolution asking the state legislature for permission to open a free library supported by taxation. Our great cities not only maintain central libraries well stocked with books for general reading and research work, but they are developing branch libraries which make the books easily available to the inhabitants of every section. Some, too, have founded special reference collections for the use of municipal officials, in an effort to promote efficiency and economy in the work of government.

PUBLIC WELFARE

Scope of Municipal Welfare Activities. In a broad view, "public welfare" is a synthesis of all activities designed to improve the physical and moral standards of the people. In a narrower sense, it is used to cover a number of specific activities in urban areas designed to alleviate the conditions of the blind, the aged and infirm, orphaned children, the destitute, and others requiring public assistance. Part of the burden is carried by private charitable organizations; the rest by official agencies. Since actual distribution of help to individuals requires close personal contact, the conduct of public welfare work is essentially a local responsibility, handled in urban areas by city or county authorities (p. 794).

Changing Concept of Public Assistance. From the earliest times there has been a certain amount of publicly financed charity in American cities. Formerly the stigma of pauperism was generally placed on all recipients of such relief and the aid they received was viewed as an act of generosity, not of legal or moral right. But today city governments employ skilled "case workers" who investigate the requirements of individuals and families, discover the reasons for undeserved poverty, and give public assistance as a matter of justice and obligation, not as a mere act of charity.

Why this shift in public policy? It is due in part to the magnitude

of the problems raised by changing economic conditions which have subjected city dwellers to new hazards and deprived them of sunlight, air, outdoor exercise, and certainty of employment. With the progress of democracy, moreover, there has come a demand for a higher standard of individual enlightenment, comfort, and welfare, at the sacrifice of that exaggerated notion of private rights which would allow every person to do as he pleases as long as he does not positively deprive his neighbors of life and limb.

Forms of City or County Assistance. There are two prime types of assistance to indigent persons. One, known as "indoor relief," consists of the housing, feeding and care of individuals in publicly supported institutions, such as charitable hospitals, homes for the aged, municipal lodging houses, and orphans' homes. The other type is "outdoor relief," meaning aid extended outside of the confines of the city or county institutions—such as the provision of food, fuel, money, nursing services, and other necessities to the blind, the sick, and the infirm, in their own homes or the homes of relatives. Outdoor relief, besides holding families together, helps to keep the load on public institutions within workable bounds.

Housing Control. Vitally related to decent living in crowded urban areas is the enforcement of certain standards as to light, air, sanitary conditions, and fire protection in tenements. This is a relatively late development in municipal administration, for it was not until several investigations, near the opening of this century, disclosed the horrible housing conditions in New York, Chicago, and other cities that the state legislatures could be brought even to recognize the need of action.

In the movement for reform, New York took the lead in 1902 by enacting a comprehensive law and establishing a tenement house department. The example was followed rapidly by other states; and a National Housing Association was founded to promote model housing laws throughout the Union. Such a law usually includes several features. Under the head of light and ventilation, the percentage of the area of a lot which a tenement may occupy is stated and the height of new tenements fixed. In the interest of sanitation and ventilation, a proper water supply for each apartment is ordered and the size of the rooms and the window space in each is prescribed. Owners of tenements are required to keep the courts, areaways, halls, and yards clean and to comply with the standards set up by the tenement department. A corps of officers is provided to inspect tenements periodically and to report violations of the law and the rules of the department.

State of Housing in Cities. Despite legislation respecting the construction and maintenance of private houses and tenements, all great

cities and many smaller places have areas of so-called "residential property" which are scarcely fit for human habitation—where overcrowding, filth, diseases, and vile sanitary conditions mock our boasted civilization. It is also well known that even in times called "prosperous" the wages of a considerable portion of urban workers are so low that they cannot afford to rent the good dwellings provided by ordinary private enterprise, particularly when ground values and building costs are taken into consideration.

Public Housing. Recognition of such facts led to a campaign to "end" slums by public action." Tentative steps were taken in New York years ago by the creation of limited dividend corporations empowered to buy land and erect low-rent houses, on condition that profits were to be limited to a fixed rate. But these institutions, though often successful in a small way, scarcely touched the fringes of the problem.

Later, beginning in 1933, the National Government encouraged urban areas to set up independent "housing authorities" empowered to carry out low-rent housing projects with the help of federal loans and operating subsidies. After World War II, it also made barracks and other war surplus buildings available to cities which were prepared to convert them into veterans' homes. With federal and state assistance, municipal and county housing authorities have provided shelter for thousands at comparatively low rentals. Yet such public enterprises have accomplished relatively little in meeting the total housing needs of our great urban areas.

City Markets. Food, as well as rent, is a costly item in the budget of city dwellers. In efforts to reduce food bills, a number of municipalities have provided public markets. In this field, New York, Cleveland, Pittsburgh, Indianapolis, New Orleans, and Milwaukee may be counted among the leaders. In character, municipal markets vary greatly. At one end of the scale are rather primitive shelters to which farmers may bring their produce and retail it to consumers; at the other end are splendid modern buildings, equipped with refrigerators which are rented to citizens for storage of commodities bought in large quantities.

When it is remembered that owing to traffic congestion the cost of transporting a pound of butter a few blocks in a city may be greater than the cost of shipping it four hundred miles by rail, the significance of such market facilities becomes apparent. Here is a field of municipal economy in which the city, without affecting adversely the genuine services rendered by private enterprise, can assist in materially reducing the cost of marketing and delivery within its own boundaries. Indeed, under the auspices of state marketing agencies, it may reach

out into the countryside and cut deep and direct channels of communication between the producer and the consumer.

Public Recreation. As another means of improving the living conditions of urban dwellers, all large cities provide facilities for recreation, free or at a nominal charge. Pioneer efforts consisted largely of the provision of "nature spots" in the form of beautiful parks and boulevards. Now the emphasis has shifted from municipal "decorations" toward practical utility, and the parks are thrown open for many kinds of popular use. Athletic games, such as baseball, tennis, golf, and skating are permitted in special areas, and playgrounds are built in the parks and on school lands, thus drawing children from their crowded homes and off the streets. City recreation departments organize band concerts, dancing classes, pageants, and schools of handicrafts, for people of all ages, to make the leisure hours of the shorter working day "recreative" in the true sense of the word.

URBAN PLANNING AND ZONING

Wasteful Nature of the Unplanned Community. If private real estate interests are permitted to develop an urban area in a haphazard manner, attempts to provide adequate governmental services result in needless outlays; moreover, private investors in land and buildings will suffer heavy financial losses. To illustrate, if a city installs streets, schools, parks, water mains, and fire stations in a given area on the theory that it will remain essentially residential in character, and, in fact, it develops into an industrial or railroad center, costly changes will be necessary. The city may have to rebuild the paving to bear heavy trucking, replace the water mains by larger pipes, and provide new facilities for fire protection. An area of homes invaded by boiler works or foundries may lose most of its value in a short time. Again, if subdividers lay out narrow, winding streets at will in a suburb, a rapid growth in population may produce such traffic jams in them as to require huge expenditures of the taxpayers' money in reconstruction. In short, unplanned urban growth may lead to appalling wastes in terms of dollars and public inconvenience.

Furthermore, nearly all functions of city government, which increase with the growth of the population and business, are so interrelated that none of them can be conducted efficiently without reference to the others. The success of the health program, for example, depends upon the purity of the water supply, the cleanliness of the streets, and the character of the local housing facilities. The protection of life and property by the police and the safeguarding of the same interests by the fire department are not only interrelated but are also dependent in

part for efficiency upon the layout of streets, the control over industries, and the regulation of tenement housing. Hence, if officials in charge of each municipal function proceed without regard to what those who carry on the other functions are doing, confusion, conflicts, and loss of time and money will result.

The City Planning Movement. Gradually, out of a growing recognition of such facts, emerged the idea that immense economies could be effected, and that life and business in the city could be made safer and more convenient, if its physical layout and its functions were all carefully coordinated under a common conception of their relationships—an idea to which the name city planning was finally given. It is true that a few of our older cities, Washington, D. C., for instance, were constructed with some reference to plans made in advance by competent engineers, but not until the opening of the twentieth century was the idea of city planning in a broad sense taken up and seriously discussed in the United States by engineers and specialists in municipal government. In 1907 Hartford created the first city planning commission. City after city followed this example, until nearly every major city today has such a body. In the beginning, the idea of "planning" entertained by such commissions was narrow. It covered mainly the layout of streets, especially boulevards, and included showy places, prominent among which were public buildings and parks. Gradually the view of city planning broadened beyond "beautification" to cover the entire range of economic, social, and governmental activities in the municipality.

Zoning. A basic feature of a comprehensive urban plan is a zoning ordinance, which is to be found in most of the major cities and some urban counties. Such an ordinance assigns single-family residences and apartment houses to certain zones; department stores, offices, and theatres to others; and factories to still others. Often the nature of land use is prescribed by legislation which specifies the percentage of the area of a lot that can be occupied by buildings and limits the height of structures. It is customary, however, to allow the continuance in each given zone of nonconforming enterprises that were there when the zoning law went into effect. Notwithstanding the drastic nature of such governmental intervention in the rights of property, the courts have sustained it as in the public interest.

Other Features of Urban Plans. When comprehensive zoning has fixed the nature and intensity of land use in an urban area, it becomes possible for city and county planners to lay out effective programs for the development of highways, parks, schools, transit lines, and other physical works. In the best of circumstances and with strong public

support, a planning commission may be able to rectify mistakes in the existing portions of a city and forestall errors in new sections on a large scale. Every city that has broad through streets lined with trees, an attractive civic center containing important public and semipublic buildings, modern schools well located, strategically scattered parks, homogeneous residential and commercial areas, and efficient transit facilities, is a tribute to the vision of the local planning agencies.

INTERGOVERNMENTAL RELATIONS IN URBAN AREAS

The Need for Cooperation. Officials of urban counties, special districts, and cities, when engaged in their separate duties, frequently find that their work overlaps or duplicates the work of other units of government and requires their cooperation. Perhaps several cities find it desirable to form a common water supply district to serve their joint needs. Perhaps police officers in adjoining cities discover they must operate together better if roving criminals are to be caught. Perhaps a city is hard pressed to support unemployed factory workers in a grave national crisis and must seek federal aid. In numerous ways, units of urban government are moved to establish connections with other units of government—national, state, and local—in order to perform their functions effectively.

Intergovernmental Relations at the Local Level. Some of the means for handling such issues are discussed in the preceding chapter; for instance, the organization of consolidated cities and counties. But there are other methods. Two or more cities or a city and a county may make a contract for joint financing and management of a common enterprise, such as waterworks, a sewer system, or an airport. Again, a small city or unincorporated urban community may contract with a larger city or with an urban county for use of the latter's facilities. There is room for much ingenuity in the extension of services by establishing cooperative and contractual relationships of this kind.

The Cities and State Governments. As indicated in preceding passages on municipal organization and functions, cities also have many points of contact with state governments. Indeed, the very form of government employed by a city and the functions it undertakes may be strictly controlled by state law. States may regulate public utilities in cities, prescribe standards for their schools, require the installation of municipal plants for sewage treatment, and offer financial assistance in carrying on various obligations, such as education. To a limited degree, projects for general development laid out by state planning agencies take into account the special requirements of cities.

Growth of Federal Contacts. There was a time in American history

when the Federal Government had little or nothing to do with municipal affairs as such. It maintained a post office in each city and, perhaps, some other federal establishments but these institutions were merely designed to serve federal purposes. Shortly after the opening of the twentieth century, this isolation was broken down. At length, the National Government began to help finance cities indirectly through grants for certain educational services, and during the depression that followed the panic of 1929, directly through cooperation in many activities. By 1931 there were "over five hundred more or less informal contacts between the various departments of the Federal Government and the municipalities. For instance, the Department of Commerce has for some years aided cities in preparing zoning and planning acts, the Office of Education has conducted numerous educational surveys for municipalities, and the Public Health Service not only makes health surveys but has carried on a wide range of public health work directly touching municipal health work." [16] In 1941 Albert Lepawsky found about seventy federal agencies, bureaus, and divisions providing urban services.[17]

Federal Emergency Functions. As the depression deepened after 1930, the Federal Government went to the aid of cities in many parts of the country to prevent them from sinking into bankruptcy and ruin. It lent them money for public works to aid in providing jobs for the unemployed. It gave hundreds of millions outright to them to feed the hungry and house the homeless and transient. In doing these things it exercised a certain scrutiny and control over city finances. In 1934, after more than a thousand cities had defaulted on their debts, Congress passed a municipal "bankruptcy" act [18] authorizing federal courts to take jurisdiction over cases involving cities heavily in debt and unable to straighten out their financial affairs by their own efforts. After the Supreme Court declared the law unconstitutional, Congress enacted another in a different form to take its place. In 1934 Congress added legislation which aids cities in catching kidnapers, bandits, and other criminals. The National Housing Act of 1937 and supplementary measures have also drawn cities into closer relations with the national authorities.

A New Stage in Municipal Development. When all the contacts of cities with higher units of government are taken into account, it becomes evident that municipalities have reached a new period in their

16 P. V. Betters, *The Municipal Year Book*, 1934, p. 38.

17 "The Future of Our Cities," *State Government*, Dec., 1941.

18 By 1934 about 3,000 local units were in default on debts. See C. W. Ham, *National Municipal Review*, June, 1934, pp. 296 ff.

history. For discharge of the heavy obligations now assumed with regard to housing, health, education, public works, and general welfare—all involving large outlays of money, cities can no longer rely almost entirely on revenues derived from ad valorem taxes on real estate and personal property within their borders. Having come, apparently, to the limits of their financial resources, they insistently seek state or federal aid or both. Apart from financial considerations, efforts at municipal improvement and planning often overleap urban boundaries, even state boundaries. Therefore, while local autonomy and home rule are still rightly emphasized, relationships with state and federal authorities multiply as the years pass.

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CHAPTER 38

Rural Local Government

Extent and Nature of Rural Population. In 1870, the census showed that 74.3 per cent of the population of the United States was rural. By 1940, this figure had dropped to 43.5 per cent. On the basis of sampling studies of subsequent population trends, the Bureau of the Census estimated that by 1946 only 40.0 per cent of the civilian population was rural. Nevertheless, over 50,000,000 people are still living in the country or in villages with less than 2,500 inhabitants, most of which are essentially rural in economy. The government of these millions is growing more complex, not simpler, for those who live on farms or in rural villages display an increasing determination to win for themselves advantages formerly associated with urban life, and use rural governments as tools in accomplishing their aims. Moreover, it is widely recognized in places high and low that grave dangers, civil and military, lurk in the concentration of people in great cities, and that national well-being, as well as safety, calls for a balanced economy in industry and agriculture, and for immense effort to develop the communities close to the soil whence come raw materials for food, clothing, and shelter.

Responding to these new tendencies and the demands of their own constituents, thousands of rural governments have bestirred themselves in establishing modern facilities for farmers, villagers, and suburbanites. Full-time health departments have replaced primitive or haphazard health work in many rural counties; better fire-fighting facilities have been installed in farming communities; sheriffs' prowl cars have been equipped with two-way radios to bring them up to date; schools are being improved; some efforts are made to rehouse low-income farmers; and in other ways the gap between town and country is being narrowed. Such changes in emphasis have been followed by experiments in revising old forms of rural government; for example, the city-manager plan has been adapted to counties and small towns in some instances. In turn, all this activity has attracted the increasing attention of political

scientists, previously little concerned about rural affairs.[1] A long-neglected sector of American government appears to be coming at last into its own.

TYPES OF LOCAL GOVERNMENT[2]

Historic Forms. All the states, with the exception of Louisiana, are laid out into counties, and the one exception is divided into parishes. In many states, the county is divided into townships. The more thickly populated centers in rural districts are, or may be under certain circumstances, erected into separate corporations, known as villages or boroughs. These local subdivisions are units for specific financial, judicial, police, and local improvement purposes. Legally, subject to a few general provisions in the state constitution, the county and its subdivisions are under the control of the state legislature, which can create and abolish offices, distribute functions among the various authorities, and in other ways regulate by law even to the minutest detail the conduct of local government. In practice, however, local units are often accorded a large measure of self-government.

The main differences that occur among these local institutions relate to the manner in which functions are divided between the authorities of the county and of the town or township, and to the manner in which the inhabitants of the county subdivisions, where such units exist, participate in the conduct of their local affairs. On this basis of differentiation our states have been classified into three groups: (1) those of the New England type in which the town and its open meeting overshadow in importance the county; (2) those of the south and far west where the county predominates and the township is absent or appears only in the most rudimentary forms; and (3) those of the middle type, like New York and Pennsylvania, in which the town, or township as it is sometimes called, has an important place, but is subordinate to the county administration. All three types of local government were first established in the east but as the stream of settlers moved westward beyond the Alleghenies they were spread, with various modifications, into vast new regions.

Special Districts. Supplementing the historic divisions of the state—counties, towns, townships, villages, and boroughs—is a relatively new device, the special district, created for particular public purposes under state and federal legislation (p. 444). In swamp-infested regions will

[1] See bibliography at end of the chapter.

[2] William Anderson, *The Units of Government in the United States* (1942), an important descriptive and critical study. U. S., Bureau of the Census, *Governmental Units in the United States, 1942* (1944).

be found drainage districts; in arid regions, irrigation districts; in eroding areas, soil conservation zones; in Washington, Oregon, and other states, special districts erected for the production and distribution of electric power. With the development of modern technology, the tendency to establish separate regions for the assumption of special local functions becomes more marked.

THE COUNTY

The Historic Pattern. Virtually the entire area of the continental United States is divided into counties, each with its own government.[3] The majority of these are predominantly rural in character[4] and in most cases bear the imprint of precedents dating back to medieval England.[5] Counties following the traditional pattern are relatively small in size, often in recognition of the difficulties of travel to the county seat in the days of the horse and buggy, when they were laid out. Their government is normally controlled in detail by state law. The historic type of county is characterized by an elective board supplemented by several elective officials engaged in particular tasks and by appointed personnel to round out the working force.

The County Board. The popularly elected county board is normally small in size; ordinarily it consists of from three to five members. In the majority of counties, all or a portion of the board is either elected by districts arbitrarily created for the purpose, or by towns, townships, or cities. Somewhat the same effect is achieved in certain other areas by requiring members elected at large to be residents of particular portions of the county in which they serve.[6]

More than one-half of the county boards bear the title of board of commissioners, board of supervisors, or board of commissioners of roads and revenue. This is not surprising when it is remembered that ordinarily the board acts as an administrative agency, engaged in supervising the management of the executive branches of the county government in some detail. But it would be a mistake to assume that these units are, despite their titles, exclusively administrative in character. Actually, most county boards have important legislative responsibilities —enacting laws for the governing of the county.

[3] In Louisiana, the parish is the equivalent of the county elsewhere. In Rhode Island, the county is merely a judicial and law-enforcement area.

[4] According to the 1940 census, less than ten per cent of the counties have one or more cities of over 25,000 inhabitants within their borders.

[5] For the historic origins of county institutions, see J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930).

[6] E. W. Weidner, "The Confused County Picture," *National Municipal Review*, three successive articles, April to June, 1946, summarizing a U. S. Census Bureau survey of local government throughout the Union.

In some cases, board members perform still other types of work. A limited number of county boards are composed of town or township officials who must concern themselves with both the duties of town management and county affairs. The members of a board may even be judges. In 1945, about 350 counties had boards that were composed entirely of officials acting as judges, while a similar number had one judge on the board. Such practices account for the custom in almost a third of the counties of calling the boards county courts, commissioners' courts, fiscal courts, or police juries. The southern states are especially partial to this arrangement.[7]

Criticisms of the County Board. Criticisms of the existing county boards are as diverse as the boards themselves. In certain states, boards may be attacked with some justification as being too small in size to insure the type of deliberation and group representation widely viewed as desirable in a legislative assembly. At the opposite extreme are a few boards of fifty or more members that are criticized as unwieldy and unduly expensive. The National Municipal League recommends a board of five members. County boards are also condemned for undertaking too many kinds of work. Obviously an official who, as a board member, serves simultaneously as a legislator, an administrator, and a judge, or as both a county and a town agent, may scatter his energies over more fields than those for which he is fitted by training and temperament to cover.[8]

The County Court. The practice of having a distinct court to handle the judicial matters of the county obtains in certain areas. Sometimes the county board, as indicated above, serves as this court; an alternative is to create an independent court, distinct from the county board. Where the amount of business arising in particular counties fails to justify maintenance of a full court for each, counties may be grouped into larger judicial districts, each with a judge who "rides a circuit," that is, travels from county to county, holding court. To give those affected by local justice a direct control over the manner in which it is administered, a majority of the states permit selection of all judges, district and county, by popular vote for varying terms—often six to twelve years. In other states they are selected by the governor in conjunction with a council, the senate, or, as in Connecticut, the legislature. In a few states, they are chosen by the legislature.[9] There may be associated with the county judge a special officer, usually known as the probate judge, who is charged with the settlement of estates.

[7] E. W. Weidner, *op. cit.*
[8] See E. W. Weidner, *op. cit.*
[9] *The Book of the States*, 1948–1949, p. 501.

Prosecuting Attorney. Of vital importance to the judicial business of the county is the prosecuting attorney, known in New York as the district attorney and in some other states as the county attorney.[10] He is generally an elective officer, and is charged with instituting and conducting criminal prosecutions and with representing the county in civil suits. Sometimes he derives his salary from fees—a device which furnishes an incentive to activity but has been discarded by many counties in favor of a fixed salary, as less likely to encourage useless prosecutions.

The chief function of the prosecuting attorney is enforcement of the law against criminals of every kind—from the petty thief to the murderer or the defaulting or dishonest public officer. Clearly, therefore, the good order of the community and the efficiency of its government depend in a large measure upon the character of the prosecuting attorney; and it is small wonder that heated political contests are sometimes waged over selection of a man to fill this position. There is *nothing so important to a county political "machine" as the office of* the prosecuting attorney, for it is practically within his power to decide whether corruption and malfeasance shall be tolerated.[11]

Grand Jury. The prosecuting attorney, however, does not always have sole control over the institution of criminal proceedings, for in most states there is a grand jury which may take the preliminary steps in hearing evidence and bringing indictments. The prosecutor has no legal power to force or prevent action on the part of the grand jury; but, in practice, he materially influences its choice of cases to be considered, and his advice as to the proper line of action is generally taken. In a few states, he may dispense with the grand jury and start legal proceedings by an "information," or complaint, filed against an alleged criminal.

The Sheriff and His Duties. The chief police officer of the county is the sheriff, who is elected by popular vote in every state except Rhode Island, which has no self-governing counties. The sheriff always has power to appoint one or more deputy sheriffs. His term is usually two years, but in some states it is four years. The sheriff receives either a fixed salary or fees or a combination of both. He is custodian of the county jail; he summons witnesses, arrests indicted persons, sells the property of private persons for taxes or debt under judicial order, and executes the processes of the court.

The sheriff is also conservator of the peace in the county. He may

[10] This latter term is applied in some states (including New York) to an attorney appointed to represent the poor in courts.

[11] See Goodnow, *Principles of the Administrative Law of the United States*, p. 416.

cause the immediate arrest and imprisonment of anyone caught in the act of committing or attempting to commit an offense, and is required to pursue suspected lawbreakers and bring them to justice. When necessary, he may summon any and all males in the county to join his posse (company of aides) and assist his regular staff in preserving order or making arrests. Persons refusing to heed such a summons may be indicted.

The sheriff is to a large extent the guardian of life and property in the rural county. The zeal or laxity with which he takes precautionary measures will often determine the gravity of local disturbances; on many occasions sheriffs allow their fears or sympathies to outweigh their strict obligation to execute the law. Hence in disorderly communities the contest over the election of sheriff is likely to be waged with great vigor on account of its significance to the lawless elements. But if he is negligent and violence breaks loose, the governor of the state may take matters temporarily out of the hands of the sheriff and employ the state police or militia in quelling outbreaks.

Coroner. Closely associated with the sheriff is the coroner. Usually there are two or more coroners in a county, and except in a few states they are elected by popular vote. It is the duty of the coroner to view the body of any person killed by accident or in whose death there is involved a suspicion of crime. The inquest is made by a jury, generally of six, empaneled by the coroner; witnesses are summoned; all facts relating to the death of the person which can be ascertained are recorded; and at the conclusion of the inquest the jury returns a verdict to the effect that the deceased met his death in some particular manner; if foul play is unearthed, the offender or offenders may be named.

Treasurer. Other county officials are engaged in financial activities. Among them is the treasurer. He generally collects taxes and transmits to central authorities that portion of the revenues, if any, which goes to the state. He is the guardian of the county funds, and chooses the banks in which to deposit them. Unless the law forbids it, he may select banks at will and retain the interest accruing on the accounts. Even in those states where the law requires the treasurer to deposit his balances with the banks which offer the best terms, he may enter into secret negotiations with them and receive a reward for accepting a low rate of interest. This is an evil which can be cured by specific legislation requiring open bidding for county deposits and providing for state supervision over treasurers' accounts. Naturally, county politicians do not look with favor upon the loss of such a "choice plum."

Auditor. About one-third of the states, particularly in the north

central group, have a county auditor whose business it is to scrutinize the accounts of county officers, prepare a periodical statement of finances, and issue warrants on the treasury. For a long time, county auditors were allowed to keep their books in almost any fashion; as a result, all kinds of irregularities crept into their practices. But during the opening years of the twentieth century, legislatures began to enact laws providing for state supervision of local finances.

Assessor. In a number of states, especially those in which the township is only slightly developed, there is a county assessor, who is usually elected. It is his duty, with the aid of local assistants, to make out or compile the roll of all the taxpayers residing in the county and the value of the property assessed against each person. Generally the taxpayers list their own property for the information of the assessor but, of course, he may alter valuations as he sees fit, subject, perhaps, to a review by higher authorities. Associated with the assessor there is sometimes a board of equalization whose duty it is to pass upon the assessments of the entire county, correcting inequalities and hearing appeals from taxpayers against the valuations placed on their property.

Registrars and Recorders. Besides enforcing the law, and financing local government, the county usually serves the public by providing an official recorder of valuable documents. Often there is a county clerk, who may combine the custody of court documents with other work, such as recording deeds and mortgages, administering election laws, distributing ballots, and compiling election returns. In about one-half the states there is a separate recorder or register, who enters in official books copies of instruments respecting titles to property.

Other County Officers. Additional administrative functions of a service nature are vested in a number of special officers. Among them are included, with exceptions for certain regions, the county engineer or surveyor, the superintendent of schools, the manager of the county poor farm, the director of the county hospital, and the health commissioner. Some of these officials are elected by popular vote and others are appointed, frequently by the county legislative board.

The Consolidation of Counties. Such, in general, is the historic pattern of county government. How may it be "modernized"? Students of government have pointed out that the advent of concrete highways and motor cars expedites travel to the county seat to such an extent that many older counties can now be combined to form larger units, without serious inconvenience to their inhabitants. Such mergers offer a promise of effecting economies and improving efficiency, as by reducing the number of top county officials in the area. Some states authorize

such consolidations by popular action of the people in the counties affected,[12] but very little advantage has been taken of this legislation —for county officials scheduled to lose their jobs, tradition and public apathy stand in the way. An alternative is to preserve the geographical identity of a county but assign the detailed task of governing it to the officers of an adjacent county. Under this so-called scheme of county "disorganization," several South Dakota counties have been attached to neighboring counties for administrative purposes.[13]

County Home Rule. Another reform, successful in operation, is that of freeing counties from the rigid historic mold by allowing their inhabitants a chance to experiment with new types of government. Seven states—Georgia, Missouri (smaller counties only), Montana, New York, North Dakota, Oregon, and Virginia—permit the voters of individual counties to decide, at an election held for the purpose, which of two or more alternative and prescribed plans of county government they wish to have. Missouri counties of over 85,000 population, Texas counties of over 62,000 inhabitants, and the counties of California and Ohio may go even farther; they may draft their own charters providing for a scheme of county government, within certain limits, and adopt the same by popular vote. The state legislature may reserve the final right to accept or reject such plans. California, the pioneer in the county home-rule movement, now has several county governments set up under locally drafted charters.

Consolidation of County Offices. Home rule legislation makes possible a drastic reduction in the number of elective officers in counties, thereby promoting the centralized management and operation of administrative services. To illustrate, a North Dakota law permits the voters of a county to adopt a "consolidated office" form of government under which the small county board appoints the auditor, attorney, sheriff, treasurer, county superintendent of schools, and coroner, thus fostering clearer lines of responsibility in areas formerly dominated by independent elective officers. Los Angeles County, California, in a charter of its own devising, abolished all elective officers except members of the county board, the sheriff, the district attorney, and the assessor, and thereby concentrated control to a high degree in the hands of a small county board composed of five members.

Spread of the County-Manager Idea. Further integration of the executive branch in county government is made possible under the

[12] North Dakota, for instance.

[13] One of the disorganized counties is Armstrong, with a 1940 census population of forty-two persons, obviously insufficient to sustain a full-scale county government of its own.

county-manager plan, a scheme patterned after the city-manager plan discussed above in Chapter 36. All of the county home-rule states either give the voters of counties the right to adopt a prescribed type of manager plan as one of two or more optional plans, or permit counties to frame and adopt manager charters. By 1947 a few counties had a comprehensive county manager or county executive arrangement.

Nature of the Plan. In its essential features the county-manager project is like the city-manager scheme. A county board is elected by popular vote. It selects the manager of the county, and he in turn chooses the chief administrative officers, such as the county engineer, the administrator of county institutions, the treasurer, and the tax collector. Among the officers sometimes excluded from manager control may be found the sheriff, the district attorney, the auditor, and the school superintendent. Leaders in education usually oppose a union with other branches of administration; they prefer to stand outside of "politics," so called, and to have financial and administrative independence. But as the burden of educational support increases, they are finding it difficult to maintain their autonomy.

Results Under the Manager Plan. A survey of ten years' experience with the county-manager system in three Virginia counties shows large financial savings and the installation of such improved practices as better budgeting and centralized purchasing, as among the benefits.[14] In the rural county of Petroleum, Montana, containing about 1,000 inhabitants, expenses had been running far ahead of tax collections under the traditional county government. But with the advent of the manager plan, eight elective posts were abolished, and the total of county officials and employees was halved. The heavy debt inherited by the manager was replaced, in a few years, by a substantial cash surplus.[15] These are the kinds of results which are needed to spur other communities to action.

Other Reforms.[16] Among the other new developments aimed at the improvement of county government are: (1) adoption of the merit system among the counties for recruiting employees; (2) institution of modern systems of budgeting, recording, centralized purchasing, and accounting; (3) organization of college training programs for newly elected or appointed county officials at Michigan State College,

[14] G. W. Spicer, *Ten Years of County Manager Government in Virginia*, University of Virginia Extension Bulletin, Sept. 1, 1945.

[15] R. R. Renne, "Too Small to be Efficient?" *National Municipal Review*, February, 1947, pp. 78–82.

[16] See the annual summaries of developments in county and township government by C. F. Snider, in *The American Political Science Review*.

the University of North Carolina, and other places; and (4) growth of organizations among county officials, in the interest of elevating the standards of their professions.

County Functions. Efforts to modernize county government have been made necessary, in part, by the substantial growth of county functions in recent years. According to the United States Bureau of the Census,[17] the three most expensive line functions of American counties in 1945 were public assistance, roads, and hospitals, in the order named. Public assistance consisted largely of the support of the aged, the blind, and other needy persons in private homes; a relatively small percentage of the total cost in this field was for county poor farms and other institutions. Somewhat less expensive, in 1945, was county road work—construction and maintenance of bridges and a very substantial mileage of rural roads. The third major function in order of cost was the operation and maintenance of county hospitals, an item amounting to over $125,000,000 in 1945.

Of the remaining county functions, one of the most universal is the assessment and collection of taxes, a task undertaken by county governments nearly everywhere in the United States. Also very common, and highly important to the citizen, is county registry of births, deaths, deeds, and marriage licenses. The maintenance of law and order, the operation of jails, and the trial of legal cases are also standard county obligations. Many county governments have important responsibilities in connection with the holding of elections. In rural areas, counties often undertake duties of special benefit to farmers—such as aiding soil conservation, paying bounties for destruction of predatory animals, and encouraging agricultural extension activities.

Some counties have undertaken functions resembling those assumed by city governments, thereby extending to residents outside of incorporated cities many of the advantages heretofore confined to urban dwellers. In this category of county undertakings are electric light and power systems, parks, airports, auditoriums, schools, rehousing projects, fire-fighting installations, libraries, recreational facilities, and planning and zoning. Over half the counties now have full-time health departments.

TOWN AND TOWNSHIP GOVERNMENT; VILLAGES

Peculiarities of New England. In the field of local government, the New England states stand in a group by themselves. In that section of the Union, nearly every county is divided into towns. Many diverting

[17] U. S., Bureau of the Census, *County Finances: 1945, Preliminary Survey* (issued July, 1947).

attempts have been made to trace the origin of these communities to that "great cradle of liberty, the forests of Germany," and as a matter of fact they do have a very long and interesting history. In the more sparsely settled districts, they have remained almost unchanged in their form of government amid the political revolutions of the modern age. It is customary to call them pure democracies because they are governed by assemblies of all the voters in open town meetings. At these gatherings, the voters may propose, debate, and by simple majority vote adopt local laws. The meetings possess many of the important powers which are elsewhere vested in the county.

The New England Town. The town is usually a small rural region covering some twenty to forty square miles and containing one or more "villages," varying in size from tiny hamlets to settlements of three or four thousand inhabitants. Thickly populated urban centers are sometimes organized as city corporations distinct from the town but this is not always the case. In many instances considerable villages or even small cities, with several thousand inhabitants, are not separated from the surrounding agricultural district but are governed with the rest of the community by one meeting of electors, rural and urban. In rural districts where conditions have been undisturbed by the rise of the factory system or by the influx of immigrants, and everyone knows everybody's business, the town meeting preserves much of its ancient vitality and interest, but to a considerable extent the business of the meeting is determined in advance by a caucus of the adepts in rural politics. It is only when some matter of special importance is to be debated, such as the laying out of a street or the erection of a new school building, that the town meeting is likely to be more than a perfunctory affair.

New England Town Government. The administrative work of the town is carried on by a group of officers elected for terms of one or more years at the town meeting. The chief executive officers are the selectmen, varying in number from three to nine. Their emoluments and the character of their duties are largely determined by the size of the town. They execute the special orders of the meeting, lay out highways, draw warrants on the town treasury, act as assessors and election officials, and grant licenses. The town clerk is an important and often an interesting character, for his knowledge of local matters and family histories is sometimes stupendous. He issues marriage licenses, serves as registrar of marriages, births, and deaths, records the proceedings of the town meetings, and in Connecticut and Rhode Island is a recorder of deeds, mortgages, and other documents relating

to land titles. The funds of the town are guarded by a treasurer and sometimes there is an auditor to supervise all accounts. The peace of the town is in the keeping of the constables, who often have other duties, such as serving writs and collecting taxes. Minor cases at law, civil and criminal, are heard by the justices of the peace. There are in addition numerous other minor officers, such as poor guardians, pound-keepers, library trustees, and fence viewers, sometimes elected and sometimes appointed by the selectmen.

Towns and Townships for General Government in Other States. There are thousands of organized towns and townships in the northern and central states, patterned somewhat on the New England model, and engaged in general governmental activities.[18] While the town meeting, with variations, is found in some of these units, its functions are often of slight importance as compared with those of the New England town assembly, and with few exceptions the voters do not take a lively interest in the proceedings. In most of these towns and townships there is no township assembly at all.

The decline or disappearance of the town meeting in the middle west is principally due to the fact that the county organization came first there, when the regions were only sparsely settled, and it has retained most of the functions assigned to it in the beginning. Those states furthermore were settled by immigrants from all parts of the east and from Europe, and conditions did not favor that spontaneous cooperation which naturally arises among people tied together by common historical traditions. It must be remembered also that in this group of states the more populous urban centers are cut off from the rural regions by special village or city organizations, thus leaving only the scattered farmers to conduct their rural affairs by themselves.

States which have townships but no township meetings vest the local functions in elective officers, such as trustees, clerks, assessors, treasurers, justices of the peace, and constables. These officers are charged with certain definite duties by statute, and there is no occasion for by-laws and debate. In Indiana, for example, the most important officer is the trustee, who prepares the township budget, supervises the common schools in rural districts, and, generally speaking, occupies the place of the town board in New York or the selectmen in New England. A few towns and townships now have a town manager, a post resembling that of a city manager in urban places.

The Decline of Towns and Townships. Outside of New England, the town or township is on the decline. The United States Bureau of

[18] For a comprehensive listing, and a map, see the U.S. Bureau of the Census, *Governmental Units in the United States, 1942* (1944).

the Census found that "organized" [19] townships still existed, in 1942, in only twenty-two states and that in ten of these the "organized" township had disappeared in some areas.[20] In Washington, it survived in but two out of the state's thirty-nine counties; in Missouri, in only twenty-four of the 114 counties; in Nebraska, in but twenty-seven out of ninety-three counties. It had vanished in seventeen Illinois counties and was lacking in parts of the Dakotas, Kansas, and Minnesota. It had even disappeared in a small portion of its greatest stronghold, the New England states. Good roads and the automobile have extended the radius of easy travel far beyond the horse-and-buggy limits of many townships, encouraging the shift of functions from towns to counties.

Even where towns and townships still operate as units of general government, they are losing some of their responsibilities. The prime duties of old—maintenance of roads, management of schools, and care of the poor—are in process of transfer to other agencies. Trunk highways and subsidiary lines, subsidized by state and federal grants, pass under the administration of county and state highway departments. The one-room school house disappears, as schools are consolidated and children conveyed by buses to and from the central schools. Old-age pensions, provided out of state and federal funds, diminish the need for outdoor relief. Little independent work remains for townships to do, save the assessment of property for taxation, and even that is subject to state or county review. Searching investigations of township government, as A. W. Bromage shows in a review of them, condemn township government as obsolescent, wasteful, and inefficient, if not entirely useless.[21] It would seem that these "pure and elementary republics," as Jefferson called them, are doomed to become little more than administrative districts for county, state, and federal authorities. Not much public business remains to make the township "a training school for democracy and a center of community life."

Special Position of Southern and Western Townships. Attempts to introduce the general township system of the north and east into the south and west have met with little success. While townships exist in the latter areas, their importance is slight. Some of them are mere geographical divisions, used solely to locate property lines on the public lands, and have never had any distinct governments of their own. Others are very minor law-enforcement districts, entitled to elect justices of the peace who hear certain small cases and constables to

[19] By "organized" the bureau means a town or township that does more than merely elect justices of the peace and constables to preserve order.

[20] U. S. Bureau of the Census, *Governmental Units in the United States, 1942*, (1944).

[21] *National Municipal Review*, October, 1936, pp. 585 ff.

help maintain the peace. A counterpart of the western township is the magisterial district in the south.

Villages and Boroughs. In all the states outside of New England—and to some extent, even there—it is the common practice to separate the more populous communities from the surrounding rural districts and to incorporate them as villages or boroughs. The number of such minor municipalities in the United States is more than ten thousand, ranging in population from a very few to several thousand. Sometimes they are incorporated by special acts of the state legislature, but more commonly in accordance with a general law providing the conditions under which the inhabitants of any thickly settled region may set up a government of their own. The village government consists of a small elected board and a chairman or president usually chosen by the board but sometimes it is headed by a mayor elected by popular vote. Its business includes the management of local finances, public buildings, streets, pavements and drains, and the maintenance of order.

SPECIAL DISTRICTS

Organization. A comparative newcomer in the field of rural local government is the special district, a unit set up to serve some single purpose, such as the provision of schools or of water for irrigation. Its boundaries are flexible and may be drawn at will to serve the particular aims of the district. Sometimes a democratic process is employed in bringing a special district into being, beginning with the signing of a popular petition and ending with a general election at which the majority of the voters in the proposed area determine whether the district shall, in fact, be established. In other cases, districts are laid out by the authorities of the county or some other existing governmental unit, with little direct reference of the matter to the public other than, perhaps, a hearing on its merits. Usually a district is governed by an elective or appointive board. It is financed from taxation, assessments on those benefited by its work, or service charges, as from the sale of water.[22]

Number and Nature. A federal survey of special districts as they existed in 1942, recorded more than 100,000.[23] The great majority were school districts, and the bulk of these were small rural units. Among the other special districts appearing in the survey were units for fire protection, highway construction and maintenance, navigation, sewers, weed control, libraries, parks, drainage, irrigation, diking, soil

[22] Fairlie, J. A. and Kneier, C. M., *County Government and Administration* (1930), pp. 476–494.

[23] U. S. Bureau of the Census, *Governmental Units in the United States, 1942* (1944).

conservation, cemeteries, water supply, electric light and power service, gas, housing, bridges, hospitals, pest control, and crop and livestock protection.

Consequences of the Spread of Special Districts. The special district technique permits a great deal of flexibility in rural local government without reference to traditional county and township agencies. Such districts are convenient devices for providing modern services to rural areas able to pay for them. But valuable as districts are, their multiplication creates serious problems. Individuals who own property that lies within several overlapping districts may carry an enormous tax burden, be little aware of what all of them are doing, and have a slight, if any, real voice in their government. Reckless use of the special district device encourages costly, irresponsible government. Here, as in other fields, there is much to be said in favor of moderation.

INTERGOVERNMENTAL RELATIONS IN RURAL AREAS

National Assistance. Agencies of the National Government have made many surveys of rural conditions in recent years and suggested concrete improvements. Owing to such national efforts, for instance, we are finding out about rural sanitation which was once supposed to take care of itself automatically. As a result of studies made in different parts of the Union, the federal Public Health Service declared in 1920 that in less than two per cent of the rural homes in the United States were the most essential principles of sanitation consistently followed in practice, and that for less than three per cent of our rural population was the local health work approaching adequacy. The Service also discovered that "certain diseases which are caused by infections spreading from person to person are, notwithstanding the sparser population, much more prevalent in our rural sections than in our cities. Hookworm disease and malaria are now almost entirely of rural origin. In many sections of our country typhoid fever and dysentery are more prevalent in the rural districts than in the cities. Tuberculosis is appallingly common in our average farming community."[24] In response to such revelations, and under strong federal encouragement, over one-half the counties have now established full-time health departments.

In the field of agriculture, national assistance to rural areas has taken many forms. National authorities have provided financial aid in various ways to rural regions during hard times, made loans at low rates to farmers, and assisted with soil conservation work. Congress has aided state agricultural colleges and experiment stations. County extension

[24] Federal Public Health Service Reports, Nos. 570, 613, 615, 708.

agents acting under state and federal authority carry the lamp of science to the door of the humblest farmhouse. A. F. Macdonald has described this work with brevity and insight. "The county agents," he says, "are usually selected from among the graduates of the agricultural colleges. Their duty is to disseminate information regarding proper methods of farming and this they do, wherever possible, by means of personal contact with the rural population. They conduct actual demonstrations on the farmer's own land, explaining the proper use of fertilizers and showing how to prune, spray, and otherwise care for trees. . . . They even furnish plans for homes, suggest how farm buildings should be constructed, help establish new pastures, and renovate old. Through the bureau of agricultural economics . . . they sell nitrate of soda direct to the farmers. Women employed as demonstrators carry on similar work in and about the homes. They teach gardening and poultry raising and show how to preserve foods."

Changing State-Local Relations. We have advanced far on the way toward state supervision over the processes of local administration and the transfer of local functions to higher authorities. The idea that the people of a locality have nothing to gain by accepting the advice or other assistance of outsiders at the state capital or in Washington, has received many hard knocks during recent years. Moreover, as a result of radical changes in our economic life, affairs that were once of purely local concern have become of state-wide and even national importance. It does not matter much to neighboring counties whether any particular county keeps the weeds cut along the roadside or allows fences to fall into decay but, in these days of swift and constant intercommunication, it does matter whether the county safeguards its inhabitants against contagious diseases, keeps its highways in order, allows the children to grow up in ignorance, or permits factories to pollute the major watercourses.

Forms of State Supervision. As a result of increasing state-wide interests, there has come a demand for more state supervision over local institutions. We now have state boards of health with large powers over local sanitary arrangements, food and dairy products, water supplies, and other matters affecting the health of the state generally. We have state factory and mining inspectors, railway commissions, highway boards, charity and correctional boards and officers, tax supervisors, excise commissioners, and educational officials. Recently many states have sought to standardize the whole system of local finances and to secure efficiency and honesty in local financial administration by instituting state bureaus of inspection. State legislatures are more and more subjecting local authorities to uniform standards in the matter

of education, sanitation, highways, and finance. Consequently, through both legislative and executive centralization, local authorities have become in many relations subordinate agencies engaged in carrying out state laws on matters of vital interest to all communities.

Effect on Local Autonomy. The transfer of local functions to state agencies and the extension of state scrutiny over local activities has gone so far that local powers and responsibilities have been materially diminished in large parts of the Union. Delaware, North Carolina, and West Virginia, for instance, have transferred the construction and management of all county highways to their state highway departments. As state governments and the Federal Government are lending more and more financial aid to communities, they insist on increasing their supervisory power over the execution of projects which they help to sustain. Although useful in raising the standards of backward regions, this centralization, if pushed to extremes will undermine, perhaps destroy, local responsibility and autonomy, even while the voters of communities continue the historic practice of electing their local officials.

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APPENDIX

Except for (1) some modernization in spelling, (2) some changes in capitalization, and (3) the addition of numerals to the clauses of sections, the Constitution as here printed is an exact copy of that contained in the United States, Department of State, *The Constitution of the United States of America, Literal Print* (Government Printing Office, 1934).

APPENDIX

Constitution of the United States

WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes[1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[1] See the 16th Amendment.

[2] Partly superseded by the 14th Amendment.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof,[3] for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[3]

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4. 1. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.[4]

Section 5. 1. Each House shall be the judge of the elections, returns and

[3] See the 17th Amendment.
[4] See the 20th Amendment.

qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

Section 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8. 1. The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the

erection of forts, magazines, arsenals, dockyards, and other needful buildings;—and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or ex post facto law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.[5]

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

Section 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

[5] See the 16th Amendment.

ARTICLE II

Section 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[6]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the

[6] Superseded by the 12th Amendment.

President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.[7]

6. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he *shall have power to grant reprieves and pardons for offenses against the* United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

[7] See 20th Amendment.

ARTICLE III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State; [8]—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of

[8] See the 11th Amendment.

the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or af-

firmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same. Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names,

[Names omitted]

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures or conventions in the several States pursuant to the fifth article of the original Constitution.

ARTICLE I[9]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in

[9] The first ten Amendments were adopted in 1791.

time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI [10]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

[10] Adopted in 1798.

ARTICLE XII [11]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII [12]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[11] Adopted in 1804.
[12] Adopted in 1865.

ARTICLE XIV [13]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV [14]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

[13] Adopted in 1868.
[14] Adopted in 1870.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI [15]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII [16]

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [Repealed by 21st Amendment] [17]

Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the states by Congress.

ARTICLE XIX [18]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

[15] Proposed in 1909; proclaimed in effect in 1913.
[16] Proposed in 1912; proclaimed in effect in 1913.
[17] Proposed in 1917; proclaimed in effect in 1919.
[18] Proposed in 1919; proclaimed in effect in 1920.

ARTICLE XX [19]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI [20]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[19] Proposed in 1932; proclaimed in effect in 1933.
[20] Proposed in 1933; proclaimed in effect in 1933.

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