

**Social Science Text-Books**

EDITED BY RICHARD T. ELY

**THE NEW AMERICAN GOVERNMENT  
AND ITS WORK**

**SOCIAL SCIENCE TEXT-BOOKS**

EDITED BY RICHARD T. ELY

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THE NEW  
AMERICAN GOVERNMENT  
AND ITS WORK

BY

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## PREFACE TO THE FIRST EDITION

THIS book is intended for that large and growing circle of students and readers who want to know not only what the government is, but what it is doing, — its plans and results. In order to meet this need certain distinctive features, it is hoped, may be found in the present treatment. First — The *work* of the government is given fully as much space as its *form* or structure. Political forms are always of interest, but they no longer occupy the center of the stage. Government usefulness and activity are now coming strongly into the foreground, and this fact should be clearly reflected in our modern texts. Accordingly much greater emphasis than usual has been given to this part of the subject, so that the student may grasp the important achievements and problems of both nation and state. Second — In carrying out this thought, special attention is devoted to Government Regulation of Business because in all parts of the country this has assumed a prime interest for both the university student and the general reader. Third — Certain phases of Social Legislation have also been brought out in order to give a clearer statement of the government's work. Fourth — Judicial decisions unfolding and interpreting the vital and essential public powers have been assigned an unusually prominent place and have supplanted less important matters. The aim here has been to lend more reality, vividness, and clarity to a subject that is already beset by too many generalities. Fifth — In describing the structural side of our system, a stronger emphasis has been placed upon the Executive in order to bring the picture more into harmony with the real facts of public practice. Executive leadership to-day is the outstanding feature of our institutions. Instead of combating this fact or presenting it as an aberration from the true type, the present book accepts it unreservedly as a new and more effective form of working out our public problems and welfare. The Executive both in State and nation is set forth not as a self-seeking usurper but rather as a factor for efficiency, a means of carrying out the popular will. Our gov-

ernment is not a finished product nor a perfect crystal, it is still growing and ever facing new problems. The Executive has shown itself to be peculiarly fitted to study and investigate these new conditions, to plan and propose modern solutions for them and to carry out the mandate of the people in the face of opposition and inertia. Sixth — Our government is here presented as a means of service. It is no longer a mere necessary evil, — nor is it a Moloch, calling upon men for sacrifice only. One goal the author has persistently kept before him, — to picture the new government as it serves and helps the people, copes with their problems and aids in their struggle for a more abounding commonweal. Municipal government has not been included, since that subject is now handled in all the universities as a separate and distinct part of the field with its own special literature. Special acknowledgment is due to the editor of this series, Dr. Richard T. Ely, for his invaluable criticism, suggestion, and advice. With the faculty and student body at Pennsylvania the author also enjoys such an intimate relation that he feels the book to be largely a product of their inspiring friendship. To them it is dedicated.

APRIL, 1915.

## PREFACE TO THE SECOND EDITION

IN the few years since the first edition appeared we as a Nation have passed through some severe tests of our political capacity. With other peoples we have ascended the supreme heights and gone down to the lowest depths of national patriotism and civic spirit. Later we have entered a period of searching criticism, an era of experiment, of shifting views and new estimates of government. It is a striking fact that each of these changes has brought with it a more insistent popular demand for results. Larger circles of the people are beginning to ask — can a democracy be efficient? We are interesting ourselves more actively in proving that it can, — that it must. A closer relation between executive and legislative powers, a reorganization of administrative offices along modern lines and a more effective administration of justice are all being actively promoted. We are beginning to grasp also the urgency of our need for a more practical political education — for the trained capacity to govern ourselves. This capacity has been called in question by serious break-downs in self-government in the face of strong resolute opposition from organized groups and interests which successfully defy the law. Neither capital nor labor has shown that respect for the rule of law which has always been the pride of Anglo-Saxons. To reestablish this regard and to convince every American of the wisdom of social team-work is a task of the immediate present.

We are losing some of our early implicit belief in the infallibility of elections; the last legally disfranchised group, the women, have been given the suffrage and we now see that political progress must come not from more voting or more elections but from better voters and wiser action. Party bonds are growing weaker, blocs and groups are rising to represent narrower interests and to dictate to party leaders. Already murmurs are heard of a new type of representation no longer to be based on geographical districts but on economic and social interests. The closer relation between business and government has aroused a more intelligent interest in the methods of public regulation of commerce and industry. The

difference between irritation and regulation is more clearly grasped. An intelligently planned revision of our public system in this field is attracting attention. Meanwhile our foreign relations have brought us into a prominence which is enhanced by the crippled and demoralized condition of other peoples. International co-operation has become a problem of prime world importance.

In order to meet the conditions just described this new edition has been largely rewritten and a number of changes have been made:

1. The continuity of our government growth and development has been more strongly emphasized. The rise of civil and political rights and of public powers is traced in such a way as to bring out this continuity. The reader gathers more clearly that essential changes have come through growth. Even revolutions build on existing foundations.

2. A large amount of descriptive matter of a mere current and detailed nature has been omitted and emphasis placed on illustration of principles.

3. New chapters on Local Government, International Government, and Unsolved Problems have been added.

4. The attention given to social and economic problems of government in the first edition has been strengthened. The reader gets a clear impression that government is one side of social action.

5. A large number of new laws and decisions of the Supreme Court have been added, illustrating our political and constitutional development since the appearance of the first edition.

6. In order to meet the needs of college and university classes, most of the statements of principle and illustrative material are regrouped in such a way as to develop more strongly the students' reasoning powers.

AUGUST, 1923.

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**THE NEW AMERICAN GOVERNMENT  
AND ITS WORK**

# THE NEW AMERICAN GOVERNMENT

## CHAPTER 1

### PART I. THE RISE OF OUR NATIONAL SYSTEM

**Natural Growth versus Sudden Invention.** — Is a good government system the result of daring originality, of brilliant inspiration, clever devices, and remarkable inventive genius? Or is it a gradual and natural growth?

There will always be two points of view on this question. But the more we understand of government activity, the clearer it seems that a political system is a growth. It cannot be hurried, nor can it be quickly transformed by sudden invention. Rather must it conform to the habits, the conditions, the environment, the occupations, the social customs of the people — and it must change as these change. The greatest tribute that we can pay to our national government is that it has developed naturally from the experience of the Colonies and the mother country.

At times we have been taught to believe that the adoption of the American Constitution was a complete break with the past, and that the United States, by a bold and daring adventure, had abandoned all previous knowledge and struck out into the uncharted seas of political experiment. This may have flattered our pride, but we now know that the great success of the Fathers was in their clear grasp of the needs of the new nation and their consummate ability to fit government to these needs. They did not invent representative government — it had existed for centuries. But they did remodel it and extend its principles in new directions with remarkable results. The men who met in Philadelphia in 1787 were not faddists or wild dreamers — they were inspired by the urgent, vital need of “a more perfect union.” The real claim to greatness, of their work, is that it was built with breadth, soundness, and sincerity, upon political experience.

**How Our System Grew.** — Let us examine some of the features of our present Constitution and note its blood relationship to the family of representative institutions. All observers agree that the following are among the salient points of our system :

The division of powers and the system of checks and balances.

A written constitution.

A Federal Union.

Elective representative government.

The independent judiciary.

Limited powers of Congress and State legislatures.

**The Three-Department System.** — The division of powers into three government departments, executive, legislative, and judicial, was fairly well established in the colonies. The executive, or royal governor, was chosen by the King, or, where a proprietor owned a colony, the latter made the choice. The lower house of the colonial legislature was elected by the people, or rather by the more intelligent and the property-owning classes. The courts were appointed by the Crown. Checks and balances were therefore familiar. The colonists on many occasions opposed the action of the royal governors and sought to check their legislative plans. The upper house of the legislature was usually not elected but appointed, and exercised a strong influence on law-making, but the elected lower body could refuse appropriations of money and in this way oppose the governor's action.

Our forefathers constantly sought to enlarge the authority of the elected house as against that of the appointed upper house and the governor. This is a universal tendency which is found in all governments. Elected legislatures are aggressive. They are impatient of restraints whether from a constitution or from the action of a rival body in the government like the courts or the executive or an appointed upper house. And when both houses are elected they are jealous of each other. A legislative body is always made up of rival cliques and factions striving for supremacy. Each group seeks to attract popular approval by claiming the utmost popular control over the government. Each is tempted to outbid its rivals by the breadth of its claims and the intensity of its demands. This explains why even at the present day, of the three departments the legislative is the most exacting and jealous of its prerogatives, sometimes to a ridiculous extent. In colonial times

the legislature had an active, vigorous sentiment to support it and the ill-considered trade and tax policies of the royal governors only served to intrench the legislature more firmly in the popular favor.

**Written Constitutions.** — The Colonies had been founded for many different motives. Several were established as havens of peace by persecuted religious sects. Some of these saw in the new world an opportunity to enjoy the practice of their religious tenets without the interference, or even the presence of other sects. Others were formed by companies of merchant adventurers who wished to develop new opportunities for trade. Still others established great plantations on an aristocratic basis where a little group of the original colonists might found a new nobility.

But in all these diverse conditions there was one substantial feature in common — the colonists must secure grants of land and authority from the Crown, and this they did by written deeds. These written grants or charters formed the foundation of their governments. They became the “constitutions” of the Colonies and to them reference was had as to the kind of commonwealth to be established in the new world and the basic understanding as to its control. The charters were often violated, but the idea of a grant of power based on a written document was long a familiar one in the minds of the people.

Written constitutions had also been long known in England and on the Continent. When the great barons in 1215 forced King John to sign the Magna Carta at Runnymede, they established a form of constitution. In Europe large fortified towns which might have defied a royal army and which through their commanding position on trade routes were important centers of commerce and industry, were propitiated by the King through the simple method of granting them special “liberties” mentioned in a written charter or decree. In return for this the cities agreed to pay fixed sums of tribute or taxation to the royal treasury. These royal charters were nothing more than written constitutions on which the towns relied, sometimes in vain, against royal aggression and abuses.

The habit of placing guarantees and protections for the citizen in written form was a well-settled one. Anglo-Saxons had used it often since the Great Charter. The nobles frequently found the successors of King John inclined to violate Magna Carta or to forget and ignore its provisions. On repeated occasions they forced



the King to sign what they called a "confirmation of charters," in which the rights of subjects against the abuses of royal officers were again affirmed. In 1679 the famous *Habeas Corpus* statute had been passed by Parliament. This guaranteed to every person who was arrested the privilege of a writ or command by a judge to the jailer, to produce the accused before the judge in open court to ascertain if there was any valid charge against the prisoner. If no such charge existed, his immediate release was ordered.

This great basic principle is a fundamental safeguard of human liberty to the present day. It has always been regarded as a part of the British constitution and has been copied into nearly all modern written constitutions. Finally among the important written documents with which the colonists were familiar, were the Bill of Rights, of 1689, and the Act of Settlement, of 1701, both passed upon the occasion of calling William and Mary of Orange to the throne, to take the place of the dethroned Stuart family. Parliament then decided to settle once and for all its supremacy over the Crown and to end the former royal pretensions of irresponsible monarchy, and the claims of the Stuarts to rule by divine right. By these great constitutional Acts they wrote down the fundamental principle of control of the government by the representative legislature. From that time to the present, the British monarchy has existed at the will of the popular representatives. Here again was a great landmark in written form, familiar to all our forefathers. We often say that the British have an unwritten constitution, but this is only partly true. All the documents above described are essential and vital parts of the British constitution today and were so regarded when our government was founded.

The Fathers therefore carried out a practice well known to them when they wrote out in permanent form the Declaration of Independence in 1776, when they adopted the written Articles of Confederation, and when later they established our present Constitution and the various State fundamental laws.

**Limited Government Powers.** — It will be noticed that in all the great English charters just described, the dangerous and oppressive element in the government was the Crown. One by one limitations were imposed on its power, for the protection of Parliament, the courts, and the people. Also when the royal governors sought to force tax and appropriation laws through the colonial

legislatures their efforts were checked by the lower houses. So when the Fathers in 1787 had drafted the form of a new Federal Government, remote from the people, the State conventions called to ratify this new system, fearing that it might set itself up to oppress the people as had the Crown in former days, proposed a set of restrictions and limitations on the new government, in what then became the first ten amendments. These are called the Bill of Rights of our Constitution because, like the act of that name passed to limit powers of the new English sovereign a hundred years before, they formed a definite understanding for the protection of the States and the people.

There was another reason why the idea of limited government powers must necessarily arise. The men of 1787 were forming a new national government while yet allowing the States to continue. What should be the division of authority between the two? The Constitution itself must fix this division — that is, it must assign one sphere to the new national authorities and reserve all others to the States and to the people. In the States themselves the same thing had happened upon the adoption of their constitutions. They, too, had announced a set of fundamental protections and safeguards which the legislatures and governors must not transgress.

In these two ways, by inheritance and by the necessities of a *federal* form of government, the Fathers were familiar with the idea of limited government powers. When they provided in Art. 1, Sec. 9, Clause 2, that "the privilege of the writ of *Habeas Corpus* shall not be suspended," they built upon the solid foundations of 1679. When in Clause 7 of the same section, they provided that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law" they followed a familiar safeguard against royal abuses. When in Art. 2, Sec. 2, Clause 1, they denied the President power to pardon in cases of impeachment, they adopted a principle fixed by the Act of Settlement of 1701. When in the first ten amendments they provided against quartering of soldiers in time of peace, without the consent of the householder, against unreasonable searches and seizures, against deprivation by government of life, liberty, or property without due process of law, and when they asserted the right to a speedy and public trial by jury and prohibited cruel and unusual punishments or excessive

lines, they used, with but slight changes in wording, the essential clauses of Magna Carta, the Bill of Rights, and the Act of Settlement. This culmination in our own written Constitution of the victorious struggles of free peoples, reaching back into the times before the Norman Conquest, when the "common law" of the realm protected and secured the rights of every freeman, has excited the profound admiration of publicists and statesmen.

Many races struggled for control of the North American continent; many systems of law and government competed for the mastery. When the Fathers inserted the clauses and safeguards above mentioned in our national Constitution they placed the new Republic in the forefront of that vast army of peoples that were striving for the legal protection of human rights. The phrase "glorious heritage of liberty" has been so often used and abused on patriotic occasions that some of its real significance has been lost. Our ancestors have written its meaning deep into the fundamental law of our country in the principle that neither the people as a whole, nor a minority of them, nor even one person may be deprived by the government of those vital indispensable rights for which our forefathers through a thousand years have struggled and fought.

**An Elected Representative Government.** — There was little that the colonial statesmen did not know about representative government. They had operated such systems for generations. They were familiar with all the processes by which an economic or business issue developed into a political movement. They were inveterate pamphleteers. Controversies on all sorts of political questions were eagerly waged. They even used many of our supposedly modern methods of influencing the doubtful voter. A review of colonial politics shows a surprising similarity with some of our present issues. There was even the same sharp divergence between those who had property and were therefore "grasping and avaricious" and those who had not and therefore belonged to the "rabble" and "the ignorant masses."

The Fathers were not democrats. They believed in a ruling class composed of the more responsible elements including large and small property-holders. They were convinced that government must be conducted by this element and they at times showed scant sympathy with the large numbers of disfranchised persons.

There were many slaves, and a steadily growing group of "indentured" servants, that is, men who had secured passage from Europe to this country by selling their services in advance to the ship companies or captains. The captains later sold these services to the colonists, who then had a right to them for periods of say two years, or even longer. Again, the property qualifications for voters were rigidly observed, and it was impossible for the masses of the people to secure representation in the voting franchise. Still further there were restrictions on the persons who could be elected to the legislature — a fairly extensive property-holding was required.

From these facts, it will appear that democracy was added to our institutions later on. The Fathers at first had a class government in which the more intelligent, better educated, and propertied elements were represented. This aroused no organized discontent among the unrecognized disfranchised masses, because there were no facilities for organizing these masses. Nothing could have been further from the minds of the leading colonists than a system of political democracy. Nor was there any basis in education, training, habits of self-restraint, or tradition for such a democracy. Any attempt to introduce it would doubtless have resulted in complete chaos, and probably in the establishment of a more autocratic government in the end.

All representative institutions are founded on local government. Those of the Colonies were based on the town in New England and on the county in Pennsylvania and the South. From these local units, the representatives to the colonial legislatures were chosen.

The colonists were therefore accustomed to all the machinery of popular elections, were schooled in local government, and had been thoroughly practiced and exercised in the popular discussion of legislative matters.

**The Judiciary.** — They were also familiar with courts composed of appointed judges, serving during good behavior. The independent judiciary was a bulwark of liberty which had been erected with the greatest toil and after long struggles in England. These struggles were in the highest degree dramatic. When the Stuarts began their final attempts to set up an absolute monarchy, they were faced by a group of judges loyal to the common-law principles and determined to withstand every attack upon the legal liberties of the people. No modern student of jurisprudence can

withhold his admiration for these valiant men led by the great common-law jurist, Sir Edward Coke.

James and Charles I could secure absolute power only by reducing the judges themselves to mere personal agents and tools of the Crown. This they proceeded to do. James issued his own edicts in place of laws made by Parliament. When these edicts came before the court, Chief Justice Coke said that the King might proclaim a law which already existed, but could make no new law. A preacher had prepared but not yet delivered a sermon criticizing the royal policy. His house was searched by the King's agent, the sermon manuscript found, the clergyman arrested and tortured to secure a confession, and a charge of treason brought against him for his opinions expressed in the manuscript. A royal officer went to each of the judges privately to get their individual views as to whether the clergyman's action was treasonable. Chief Justice Coke objected that such an effort to secure private opinions was not according to the law of the land. He further declared that a criticism of the King, written in a manuscript sermon which had not yet been delivered, was not treason. Again, when requested to say in advance what the Court would decide on a matter affecting the royal interference with the courts, Coke answered — "whenever such a case should come before him he would do what was fitting for a judge to do." Shortly afterward, in 1616, Coke was dismissed from the office of Chief Justice. The King triumphed. But Coke had made forever clear that civil rights depended upon independent courts. The troublous times which followed culminated seventy years later in the English Revolution and the final supremacy of Parliament in 1689. The Act of Settlement, passed in 1701 to limit royal powers, contained full provision for the independence of the judges. It provided in Article 7, "That after the said limitations shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint* (during good behavior), and their salaries ascertained and established;" etc.

From that time the courts both in England and the Colonies ceased to hold office during the good pleasure of the Crown, and were appointed for life or during good behavior. The Fathers inherited and continued this vital safeguard of modern liberty. The colonists were accustomed to a Supreme Court in each Colony

with subordinate tribunals in the local districts. From the colonial courts an appeal could be carried to the Privy Council in England. It was a simple matter for the men of 1787 to follow a similar plan in creating courts for the new Federal system.

Even the power of judges to overturn any law which conflicted with the Constitution was not unknown to the Fathers. Professor Thayer, in his *Cases on Constitutional Law*, mentions examples of this. In *TREVETT v. WEEDEN*, the Superior Court of Rhode Island had in 1786 refused to act under a State law which failed to provide a jury in criminal cases; they held this contrary to the principles of the State constitution as inherited from the royal charter granted by Charles II, 2 *CHANDLER'S CRIMINAL TRIALS*, 279. In *DEN v. SINGLETON, MARTIN*, N. C. 49, the Superior Court of North Carolina in 1787 declared invalid a State law which, contrary to the State constitution of 1776, deprived a person of his property without jury trial.

That this same power would have to be used by the Federal courts was clearly foreseen by at least some of the members of the Constitutional Convention of 1787. On July 21, 1787, Mr. L. Martin and Colonel Mason both spoke of possible breaches and violations of the proposed Constitution and mentioned the duty and authority of the courts to uphold the Constitution as against a violating law.<sup>1</sup>

**The Federal System.** — We should expect to find in a group of thirteen Colonies various attempts to unite for consultation and advice on matters of common interest. There were frequent struggles with the Indians and the French. There were all the fears that we might expect in a group of people, huddled along the Atlantic seaboard with a vast and wild expanse of unknown land to the west, with poor and slow communications, and with a backward state of economic development and civilization. The British government itself at one time suggested the formation of a representative council for all the Colonies to take steps for military defense. This effort failed. There were also conferences of colonial representatives to protest against tax measures proposed by Parliament contrary to the colonial wishes, notably the stamp tax.

Finally there were committees appointed in each Colony to correspond with similar committees elsewhere to secure redress of

<sup>1</sup> See *Madison's Journal*, Vol. 2, page 22, Hunt's edition.

grievances and establish common views and common plans of action in protesting against improper legislation. This legislation, it will be remembered, covered the widest field of business affairs and civil and political liberties.

The passing of obnoxious tax laws perhaps stood first, especially as the colonists' wishes had not been consulted nor were they represented in the Parliament. The quartering of troops on the population, the burdens imposed on colonial industry in order to maintain a monopoly of the colonial market for British goods, the arbitrary judicial procedure, particularly in the trials of persons accused of crime, and the long list of offenses later mentioned in the Declaration of Independence, were all made the subject of correspondence by the committees. These committees multiplied rapidly; there were town committees, county committees, and farmer committees, of the colonial legislatures. Thus there grew up the whole machinery of education on political issues and this in turn grew into a vast network of coöperation, culminating in a Congress called in Philadelphia to consider measures for the repeal of the obnoxious laws. This was the First Continental Congress. It was not chosen by regular formal methods. Its members were elected or appointed by conferences, committees, or by meetings of the electors. In short, it was a revolutionary body. Its recommendations were moderate in character.

A second Congress which followed it next year, 1775, was also selected by revolutionary methods. Both bodies represented the more active spirits in colonial politics and those who favored a vigorous defense of colonial rights. There was no attempt to secure general action by the electors in the choice of these bodies, nor could there, in the nature of things, be such a choice. When the Second Continental Congress found the colonists in open revolution, it necessarily asserted the full national authority in the struggle against the mother country.

This was the beginning of generally recognized Federal action by the Colonies. From that time on the growth of the Federal spirit was steady and constant until the end of the Revolution, when it began to decline and aroused the fears of the leaders, who foresaw that united action would cease unless aggressive and determined measures could be taken to tie the Colonies together by some permanent bond. In 1777 the Congress, after lengthy discussions,

approved a set of Articles of Confederation. These were finally adopted, four years later, and formed the basis of Federal government until the adoption in 1789 of the present Constitution.

**Forming the Constitution.** — The government under the Articles failed because it could not command the respect and obedience of the States. It had no power to enforce its acts, no authority to collect taxes nor to settle any of the problems in which the people were interested. It could only adopt resolutions which were mere recommendations asking for funds or troops or for the enforcement of national laws. The business interests of the country demanded that this system be abandoned for a genuine national plan. Congress itself repeatedly called on the States and the people to amend the Articles and strengthen the national authority so that it might regain the respect, both at home and abroad, which it was fast losing. Washington, Hamilton, Madison, and other leading statesmen of the day clearly foresaw the approaching end of the Union unless some real central power were established.

After numerous attempts Congress provided for a convention to meet at Philadelphia in May, 1787, to revise the Articles. This body, chosen by the legislatures and governors of the States after a series of compromises, devised an entirely new Constitution. It abandoned the idea of merely revising the Articles because the fundamental principle upon which the Articles rested, viz., indirect action on the States, was admittedly no longer feasible. The new plan proposed a national government which could levy and collect its own taxes, regulate national trade, and act directly on the people instead of on the States. It was to have a real executive, separate courts of its own, and the power to enforce its own laws and treaties.

The new document was submitted to conventions in the States chosen by the voters, and a long and arduous campaign of discussion followed. The commercial, banking, and business interests, the more intelligent and politically better trained people of the cities and the commercial sections, actively favored the plan. Those of the more remote regions, the small farmers, and the discontented elements generally opposed it. In some of the conventions the plan was adopted by only the smallest majorities and until 1789 the final result was in doubt. It has often been said



and probably with truth, that the leaders rather than the masses of the people appreciated the need of the new Constitution and that it could not have won a majority in the popular vote. We shall now examine some of the new conditions which have grown up to influence the government thus created and to carry it far from the moorings provided for it in 1787-89.<sup>1</sup>

## PART II. POLITICAL CONCENTRATION

**1. Nation versus State.** — Our national system is now passing through an era of sweeping and important changes. The one central fact that stands out clearly in all these changes is the concentration of power. Political leaders have decried this tendency, magazine writers have denounced it, newspaper editors have deplored it, even the people themselves dislike and distrust what is called "centralization," yet it goes steadily on with such quiet, irresistible force that we must finally accept it as a feature of our plan of government. Let us glance at some of the forms of concentration produced by the conditions of our recent growth. We are now in the midst of a great shift of power to the Federal Government. Twice before in our history this has occurred on a large scale — in 1787-89 and 1861.

**Early Stages of National Concentration.** — The Constitution of 1787 strengthened the Federal system as we have seen by giving it: an executive, courts, the power to tax, to raise armies, to regulate national trade. These changes appealed strongly to the broad-minded statesmen of all shades of thought and more especially to the commercial classes of that time. It is characteristic of the commercial trader the world over that he wants law and order firmly established; with it he insists also on a liberal government, in which the rights of the individual shall be well safeguarded.

<sup>1</sup> During the period before ratification when it seemed that New York might probably refuse to approve the new plan, Alexander Hamilton, who was an ardent nationalist, assisted by John Jay of New York and James Madison of Virginia, prepared a series of newspaper articles explaining and defending the new system. These articles were so clearly and admirably written that they attracted nation-wide attention and were called the "Federalist." They have been collected in a single volume which has appeared in over thirty editions. In them will be found the views of two of the most prominent advocates and expounders of the Constitution while it was in the making.

**Another Wave of Nationalism.** — A second crisis came with the Civil War. Once more the issues at stake were largely economic. The South opposed the protective tariff and the industrial policy pursued by the national government and sought to protect its own slave property. The North with its free labor interests and growing manufactures was opposed to slavery both on broad humanitarian and on economic grounds. Compromises were attempted but failed to stop the growing animosity between these hostile forms of industry and their conflicting interests. Each side chose a legal doctrine that fitted its economic interests. The North favored an extension of national powers in order to wipe out slavery and to develop industry. The South exalted the sovereignty of the State in order to resist the threatened changes.

In this titanic struggle between State and Nation victory was with the Nation. Since then the central authority has grown strong not by reason of military power but because of the magnitude of our internal problems and our growing foreign policy. Leaving behind us the petty jealousies of the States, we have become Americans, and our sympathies and interests lie with the whole people rather than with any section. Foremost in producing this result has been the unifying and consolidating force of our expanding business interests. These have knit us together in a way that no constitutional convention or war could ever have accomplished. It is related of President Lincoln that, desiring to arrange for the transportation of Union troops to the South, he sent for Mr. Thomas Scott of the Pennsylvania Railroad, and with him went over a railway map of the country. The President expressed his astonishment at finding that all the great lines ran East and West and that rail transport southward was well-nigh impossible. To all of which Mr. Scott tersely replied, "Mr. President, if the railroad lines had run North and South, there would have been no war."

In both these crises, 1789 and 1861, every influence seemed to favor the supremacy of the State as the center of gravity in government. The scheming of small politicians, the State patriotism of the people, the traditions of self-government, the fear of centralization, all of these forces made the people unwilling to confer strong powers on the central authority. But gradually the farmer and the baker, the cotton-grower and the manufacturer

have found that their interests, although located in different parts of the country, were closely intertwined. "Business" has refused to be confined within bounds and has reached out to include whole sections and districts, located in more than one State. When finally the rise of swift and cheap transport facilities and means of communication generally, brought all sections of the people into the closest business relations with each other, the knell of State sovereignty was sounded and the supremacy of the Union became inevitable. The Nation was first.

**The Third Stage.** — We have already entered a third period in which national supremacy is becoming even more pronounced. The full effects of modern facilities of travel, freight shipment, parcel post, wire, radio, and airplane communication are just beginning to be felt — not only our business but our thoughts and interests are fast flowing into national channels. American manufacturers seek markets in Australia and China; the physician and the lawyer are members of a national medical or bar association; the farmer buys supplies from a distant mail-order house; the student travels across country to a university thousands of miles from his home; the ambitious clerk or mechanic studies in a national correspondence school; the baseball score is followed on telegraphic boards by crowds of spectators all over the Union; even the joke column is syndicated from the Atlantic to California, while great weeklies of fabulous circulation are placed on sale simultaneously throughout the land. These are a few of the outward or surface signs of our new national habit of life. They are the results not of the reasoning of books or the persuasion of orators but of modern systems of communication and of *national* industry and commerce. More basic and fundamental still are certain other factors which lead us towards centralization. The increase of national power now presents itself as a means of *getting something done*.

Few Americans appreciate the degree of concentration which this influence has already produced and towards which it is still leading us: in order to secure a fair and adequate solution of railway questions the railways are now, for the first time, being regulated under a comprehensive national law. Over 200 important general trade associations have been formed to deal with the distinctive problems of their respective industries as a whole. A long list of national labor unions has been established, seeking to con-

trol the labor supply in their industries. The mobilization of credit is now accomplished for the country as a whole, subject to the direction of a single government authority, the Federal Reserve Board. The educational interests of the country have united in the demand for Federal support for the school system under a cabinet secretary. A movement for the Americanization or training of aliens in American ideals is being undertaken under Federal supervision. There are insistent demands for national measures to protect the supply of food and fuel and for further action to prevent extortionate prices for the necessaries of life. The temperance movement has eventuated in a national Prohibition Amendment and law. The campaign for equal suffrage has similarly resulted. Strong efforts are now being put forth to improve the health and physical condition of the race stock by a national health system under Federal authority. Movements for national accident and health insurance are already under way—they would involve the Federal management of industrial accident payments and eventually of sickness benefits. It is even proposed that Congress should aid in the solution of the industrial housing shortage, which recurs at frequent intervals.

From the above list which represents movements for physical, mental, moral, and business welfare, it will be seen that the advancing standards in all these lines are now setting up demands for national action. We are reaching the climax of a wave of internal nationalism. The War only intensified this by a momentary impetus, for most of the new demands had arisen before 1914.

Doubtless there will be ill effects and reactions from this trend. Too much confidence has been placed in the ability of the national government to secure these ends. Many of the proposals noted arise from the desire to secure a share of Federal funds for such plans and avoid burdening the State government, or from the unwillingness of numbers of the people to take an active interest in the States and to make their governments effective. An extreme concentration, such as these demands imply, must inevitably lead to top-heaviness in our political system and eventually we must devise some means of restoring a proper balance between local and national authority. But at present the current flows irresistibly towards the center. Nor is this the only striking form of centralization now evident.

2. **Concentration inside Congress.** — A few men in each House have succeeded in gaining sufficient power to control legislation. They have built up a clique or organization of leaders whose sway over the law-making bodies is at times well-nigh absolute. The average Congressman, unless he belongs to the organization, is powerless. This peculiar legislative system, which is described in detail in the chapter on The House of Representatives, is generally admitted to be dangerous and even harmful, but it has survived because it seemed to be the lesser of two evils. The alternative is stagnation. Concentration of power is necessary in order to carry out the party program. The people have held the majority party responsible for legislation, and that party in order to fulfill its pledges and strengthen its hold on popular favor has felt obliged to centralize.

3. **But the Greatest Example of Political Concentration Is Seen in the Executive Office.** — Here our growth has led us far from the tradition of Revolutionary days and has created a one-man power of a strong type. The President, who was intended to be chiefly an agent of Congress, has been forced to take the initiative in both executive and legislative branches. Such a change has not been deliberately planned, but has come about through the same necessity for producing results and for getting work done that has affected the other parts of the government. The President today and the President of a century ago really belong to two distinct types of government, and though the text of the Constitution remains unchanged, yet the substance of the presidential influence has increased beyond the worst fears of the Fathers. He is now the leader, at times the master, of the government.

**The Theory of Checks and Balances.** — The great changes just described have all been opposed to the spirit and intentions of the men who drafted our form of government. If there was one fear that animated all members of the Convention of 1787, it was the dread of highly concentrated power. As Englishmen they had long believed in the doctrine that government should be built up of checks and balances, that is, every authority, officer, or legislative body should have some other authority which would check its power and prevent it from becoming absolute or despotic. One form of this doctrine is the theory of "Division of Powers." A brilliant French writer,<sup>1</sup> had attracted general attention by his

<sup>1</sup> Montesquieu, *The Spirit of the Laws*.

doctrine that the division of powers into legislative, executive, and judicial was the only means of preserving the liberty of the citizen from government despotism. The Fathers followed this theory faithfully in 1787. The three departments were separated as far as possible, and where their coöperation was necessary, they were set in balance as checks against each other. It will be noticed that the underlying motive of the Fathers was the *fear of oppression*. Briefly expressed it is: "Let us divide governmental power into minute particles, giving a small part to each authority so that none may become supreme or even dangerous."

Such is the famous doctrine of checks and balances. It is a theory inspired by fear. This theory is now confronted by a new set of intensely practical conditions: namely,

I. The growth in volume of government business.

II. The rise of technical questions in government.

III. A popular demand for greater speed in government action.

IV. The large size and slowness of legislative bodies.

**I. Growth of Government Business.**—The rise of manufacturing industry and large transportation enterprises has immensely increased the duties of all branches of our government. Manufacturing has involved:

Government efforts to aid and protect the national industries in every legitimate way,

The rise of the factory system,

The development of commercial law, requiring uniformity,

The desire for equal opportunity for all manufacturers and shippers on the railways,

Need of technical education,

Rise of large cities,

Demand for better health protection both in factory and tenement house,

Use of child labor,

Growth of a distinct labor class with separate interests,

Rise of other class interests.

As we glance over this list the surprising fact appears that every one of the changes noted involves some necessity for government action. Many of them fall under the authority of the State and city governments, yet all influence directly or indirectly the national government also, so that its work has multiplied by great

leaps and bounds in the last few decades until, at the present time, each new Congress produces an avalanche of over 30,000 bills, orders, and resolutions. This great increase in the volume of public business means that a radical change must be made in the old methods of work and in our government machinery, in order to secure results.

**II. The Technical Nature of Modern Public Questions.** — Most of the government problems of today cannot be settled by a popular vote. Even though our voters were all university graduates we could not reasonably expect them to work out a plan of government finance. The location of an Isthmian Canal, the reorganization of the army, the construction of a navy, the more rational development of our postal facilities, the planning of systems of irrigation, the regulation of corporate finance, the control of railway rates, and the management of our colonial dependencies are national questions of prime importance that cannot be settled by simple common sense and patriotism. They require rather the careful study of trained specialists and experts. If we examine the public problems brought up for discussion in the President's message we find that they are not only industrial or commercial but also *technical* in character.

How does this fact influence our government? Unquestionably it causes a greater concentration of power, because it means the gathering of these technical problems into the hands of men with scientific training whose function is to present their solution in such form that legislative bodies and the public generally can say "yes" or "no." Such a method of handling public questions is impossible under the old system of divided powers and responsibilities. The modern plan involves strong leadership and the systematizing of public affairs to an extent that was unknown in the earlier decades of the Republic. Our government follows the same urging force that has led great corporations to reorganize, standardize, economize, increase their effectiveness, and concentrate their administration. This force is seen in the gathering together of the control over appropriations, with all the technical problems involved, into the hands of one Appropriation Committee in the House. It shows itself in the adoption of the executive budget law of 1921. It is further seen in the measures to add new judges to the Federal Bench and to assign them to those districts where the dockets are

overcrowded. Also in the earnest and persistent efforts of the President to secure a complete reorganization of the departments and bureaus under his direction. Still more clearly does it appear in the accession to the government service both before and during the Great War, of large numbers of technicians — experts in the natural and physical sciences, in law, public finance, and social science. The government is equipping itself to study, investigate, and transact its business along effective scientific lines. It is this need of greater effectiveness that justifies concentration.

**III. The Demand for Quick Government.** — An interesting change in American political psychology is the nervusness and impatience of delay that we now show towards public questions. Instead of the meditation and reflection on political problems that marked our early history as a nation we now think in sudden gasps, spasms, and outbursts of emotion. Whether it be the hysterical outbreak of a lynching mob or the serious, earnest efforts of a city improvement club, we are inclined to rush matters, and we are impatient of obstacles, once it is known that an evil exists and demands a remedy. The age of oratory, eloquence, and prolonged discussion has almost passed. The people want action, immediate action. Doubtless it were better that more deliberation be exercised, that in the quaint phrase of a former State governor "celerity should be contempered with cunctation," but such is not the view of the people as a whole.

This demand for a quick government is after all an inevitable result of our surroundings. It is primarily due to modern means of communication, which enable us to speak five times where we formerly thought once. We see and communicate with more people, travel over a larger territory, are interested in a far broader scope of affairs, and transact more business in one day than our forefathers could in a fortnight — all because of better means of communication. The demand for speed feeds on itself. With each year a larger proportion of human energy is devoted to the saving of time. Modern business conditions are in this way breeding a "quick" man with swift mental processes; a wonderful capacity to see and grasp the opportunities of the moment, but with a corresponding intolerance of delay. Is it strange that this new type of man wants a government that will produce quick results? But a quick government means a concentrated government. Not



only must the control of these urgent matters be placed in the central authority, but within the latter itself the executive and legislative work must be so arranged that affairs can be dispatched and decisions reached with the utmost celerity.

Such are the new and changed conditions which in the last thirty years have arisen to confront our government — our government which was founded on the old theory of checks and balances. Any one of these influences would have been enough of itself to cause some change in our political methods, but all combined have been irresistible; before them the whole fabric of divided powers has given way and a new system is taking its place.

But in all that has been said, it must be remembered that we Americans have not voluntarily given up the old doctrine of division of powers — we have not intentionally gone about to repeal that doctrine. The man who invented the steam engine and the trolley motor is responsible for it. A political theory is the result of conditions; a change of conditions brings a new theory. The passenger elevator has changed the architecture and “sky line” of our cities, the discovery of germs has given us a new preventive policy of public health; and so, gradually and insensibly without the blare of trumpet or the eloquence of orators our mechanical and industrial growth has created a new political philosophy. The keynote of this newer American government is Efficiency. Work must be done, problems attacked and solved, national policy planned and executed; the government must produce results for the people. We have always thought of government as a necessary evil. We have been patriotic, we have fought, bled, and died for our native land, but for the government itself we have always cherished the half-concealed feeling that the less it attempted, the better. Our grand old Constitution itself is always referred to on the Fourth of July as the “palladium of our liberties,” which in plain English means, that it keeps the government from abusing us. That curious persistent idea — that the government must always be kept from doing something which it is about to perpetrate, is now on the eve of disappearance, and we are developing in its place a new thought that the government is to perform a great and increasing amount of public service for the whole people. Government is now to be a means to an end, not the end itself. We are no longer, in the words of a prominent New Yorker, to be-

lieve that government is like the air, to be noticed only when it is bad. Hereafter, it is to be not a burden but a convenience. And what a marvelous vista of possibilities this new doctrine has already opened up in our national policy. Millions of acres of land have been reclaimed for cultivation by modern systems of drainage and irrigation. Hundreds of millions of dollars' worth of new crops have been added to our national wealth and prosperity by the Department of Agriculture. The people of hitherto unattainable regions of South America and Australia are brought within the reach of the Atlantic seaboard by the greatest engineering feat of modern times. And in the State governments the new idea is taking root no less rapidly and with amazing results. Hitherto unconquerable obstacles to greater prosperity, and problems of health and crime and poverty are now being attacked with the confidence and inspiration born of this new belief that the purpose of government is Service. It is this belief in the greater usefulness of government that has created the demand for efficiency. Against this universal demand are balanced the fears of the fathers, the general dislike of concentrated power, the traditional arguments against centralization and the natural conservatism of our people in political matters. Efficiency has gradually turned the scale. We are fairly launched on our new career with a set of political institutions whose form is the same as of yore, but whose real substance is as different from that planned in 1787 as are the conditions of that day from ours.

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### QUESTIONS

1. Has centralization of political power been popular in America? What evidence can you show from history or from current literature on this point?
2. Mention some provisions of the Constitution designed to prevent concentration of power in any one branch of the national government.
3. What is the theory of checks and balances? Illustrate.
4. The theory of division of powers? Illustrate.
5. Has the adoption of these principles in 1787 prevented concentration of power? Examples.
6. Explain any fundamental forces (a) favoring concentration; (b) opposing it.
7. Of these forces which is the stronger? Why?
8. The basic, fundamental cause of great political changes is the opinions of leading statesmen and orators. Is this true?
9. From your historical and newspaper reading show that the government problems of today are more or are less complex than those of fifty years ago.
10. Mention any influences today which increase the demand for speed in government action. Examples.
11. Contrast the size of the House of Representatives in 1789 and today. The Senate. How does this affect deliberation on legislative bills?
12. Resolved that we should go back to the kind of government that the Fathers created in 1787-9. Take one side and speak to definite points.
13. Resolved that the chief duty of government is to see that the constitutional and legal rights of the people are not violated. Take one side.
14. Is government efficiency more or less important now than in 1789?
15. The remarkable feature of the American government is the fact that it was invented in a few short months of 1787. Is this true?
16. Show why the Fathers adopted a written rather than an unwritten constitution.
17. Mention several important written parts of the English constitution.

18. Prove that the idea of checks and balances and division of powers was or was not already familiar to the Fathers in 1787.
19. (a) Exactly what do you mean by an independent judiciary? (b) Prove from the Constitution that the Federal courts were intended to be independent.
20. Why was this point regarded as particularly important in English history? Illustrate the results of a dependent and an independent court in England.
21. How and when was the principle established in England?
22. The United States national government is one of limited powers. What does this mean? Illustrate.
23. Was the principle of limited powers familiar to the Fathers? Prove your answer.
24. Mention some of the fundamental rights of the people which our Constitution forbids the government to violate.
25. Show any similar protection established in the English charters and laws.
26. (a) What do you understand by a *federal* form of government? (b) Why did not the Fathers establish a single national government and abolish the thirteen separate State governments?
27. How did the colonists secure experience and familiarity with the Federal idea before and during the Revolution?
28. Examine the Articles of Confederation and state why the national government under them was falling to pieces.
29. Mention the bodies that drafted and adopted the Constitution.
30. Prepare a table of contents of the Constitution, by Articles.

## CHAPTER 2

### THE PRESIDENT

IN our progress towards a stronger government, the great surprise of the Constitution has been the Executive. Designed to be a mere faithful agent of the Congress, he has become its guide and mentor; dreaded by all as a prospective tyrant, he has grown to be a tribune of the people. It is not easy to find a single aspect of the President's office which has worked out as it was originally intended. The limits and restrictions placed on him have proven vain, the powers originally given him have grown steadily with the increasing work of government, and the attitude of the people has become one of dependence rather than distrust. Even the method of choosing the President, upon which the Fathers spent so much of their ingenuity and inventive skill, has worked out far differently from their plans. If the men of 1787 could see the executive office as it is today they would not recognize their handiwork. Yet with few exceptions the changes have been along the line of greater simplicity, directness, and strength and have all tended to make the government more effective and more responsive to the popular will.

**Election of the President.**<sup>1</sup> — The thought of the framers was that the President should be removed from the masses of the people by an indirect election, in order to prevent some wave of popular enthusiasm from sweeping into office a demagogue or a military leader who might subvert the political institutions of the new Republic. To prevent this the Fathers designed the plan of selection by Presidential Electors, who in turn should be chosen by the various States in such manner as the State legislatures would determine. It was expected that the legislatures themselves would choose the Electors, and this method was at first followed. It was also expected that the Presidential Electors when chosen,

<sup>1</sup> The method of nominating the President is described in the chapter on The Party.

meeting in each State at the capital, would weigh and consider the merits of respective candidates, making a choice perhaps from prominent members of Congress who were known to be men of proved statesmanship and ability. As there were in 1787 no parties such as later developed, it was not foreseen that party politics would play any rôle in the choice. In order to secure the election of an equally qualified man as Vice-President it was originally provided that in balloting at the State capital each Presidential Elector should vote for two persons for President, and that of these two, the one who received the majority of all the electoral votes should be the President, and he who received the next largest number should be the Vice-President. Such in brief was the plan of presidential election. Its essential feature was the choice by "the best" of the people, it being assumed that the Presidential Electors would be "the best" because they were chosen by men of unusual ability, to wit, the State legislatures. But although this plan had been thought out with great care it was not based upon the real political conditions of the time and it did not provide for political parties. It was not a natural method.

**The Indirect Method in Practice.**—The election of 1800 in which Jefferson and Burr were the chief contestants showed that the plan was weak in important points, notably that so long as each Presidential Elector voted for two persons for President there was a danger that the man who received the second highest number of votes and thereby became Vice-President would be of a different party from the President. In case of the death of the President the control of the executive would therefore pass to the minority party. Party feeling at this time was far more hostile than at present. In order to remedy this weakness the Twelfth Amendment was adopted in 1804; its principal provisions are that each Presidential Elector shall vote for one person as President and one person as Vice-President.<sup>1</sup> Another weakness of the indirect sys-

<sup>1</sup> In case no one presidential candidate receives a majority of all the electors, the House of Representatives chooses the President from the three candidates having the highest votes. After the popular election in November, the Presidential Electors meet at the respective State capitals on the second Monday of the following January, and cast their votes. The returns from the respective States being sent to Washington are counted on the second Wednesday of February.

tem is its uncertainty. In 1876 a serious dispute arose over the contested returns from four doubtful States. These votes would decide the election, and in each State two sets of returns, one Republican and one Democratic, were sent to Washington. On account of the importance of the dispute, an Electoral Commission of fifteen members was provided for by Congress to decide which returns should be accepted. Eight of the members were Republicans and seven Democrats. By a strict party vote of eight to seven the Republican returns were accepted from all four States, and the Republican candidate, Hayes, was thereby declared elected over his Democratic competitor, Tilden. The partisan nature of the Electoral Commission vote and the fact that Tilden had the larger number of popular votes led to great dissatisfaction and even to talk of civil strife. Congress has therefore provided by law that in case any State shall hereafter send in two sets of returns, those returns shall be counted which are accepted by both Houses acting separately, and in case the two Houses cannot agree the vote of the State shall be lost.

A third criticism has been aroused by the needless complexity of the indirect system. All the Electors are now chosen by the voters; why not let the people vote directly for the President? The original idea that the masses of the people should not know who the candidates would be, and that they should not take part in the choice has now been abandoned for over a century. The nominee of each party is chosen in a party convention in June or July, and is known to the people as a candidate. Furthermore, the men nominated as the Presidential Electors by each party if elected, are morally pledged to vote for the candidate of their party: to vote for the opposite party's candidate would be universally regarded as an act of treachery, although it could not be punished by law. The ballot used in the popular election of the Electors clearly states which party they will support if elected. For example, the names of the Republican Electors are grouped in one column, under the name of that party, the Democrats in another, etc. Everything possible is therefore done in order that the people *may* understand clearly and make a conscious choice. To preserve the old fiction that the people are not electing the President is therefore, in the face of all these facts, manifestly unwise and even harmful. It is true of all political institutions that the greater

their naturalness and simplicity, the greater their chances of success and permanence. Our presidential electoral system has failed because it is a complex method based on a distrust of the people.

**Injustice of the Indirect Method.**— Finally, the gravest and most serious weakness of the indirect plan is that one candidate may be chosen by the people while another is elected by the Electors. The popular choice is thus defeated. Twice in our history this unfortunate result has occurred. In 1876 Samuel J. Tilden received a popular plurality but was defeated in the Electoral Commission, and in 1888 Grover Cleveland received a popular plurality of 98,017, but the Electoral College by a majority of 65 votes elected Benjamin Harrison.

This is possible because the electors are not chosen by districts as are the Congressmen, one from each district, but "at large," each voter balloting for *all* the electors to be chosen in his State. The party which wins a majority of the popular vote therefore wins *all* the electors. The minority party gets none.

New York has 45 Presidential Electors.

Pennsylvania has 38 Presidential Electors.

New York is a "doubtful" State, with the parties evenly divided, while Pennsylvania was for years overwhelmingly Republican. Let us suppose that Pennsylvania gives the Republican ticket a majority of 200,000 popular votes and that New York goes Democratic by only 50,000 popular majority. Omitting the rest of the States from the calculation the result of the election in these two would then be:

#### POPULAR MAJORITY

Republican: Pennsylvania . . . . . 200,000

Democratic: New York . . . . . 50,000

Net popular majority: 150,000 for the *Republican* ticket in the two States.

#### ELECTORAL MAJORITY

Democratic: New York, 45 electoral votes

Republican: Pennsylvania, 38 electoral votes

Net electoral majority in the two States, 7 Presidential Electors for the *Democratic* ticket.



In this way the Republicans would win the greatest popular vote but the Democrats would secure a majority of the Electors and with it gain the election. The popular and the electoral votes seldom correspond. In 1908 Mr. Taft, by winning 52 per cent of the popular vote, received 67 per cent of the Electors. In 1912 Mr. Wilson received 42 per cent of the popular vote, but owing to the split in the Republican party he obtained 98 per cent of the Electors. In 1920 Mr. Harding won 60 per cent of the popular vote, yet his electoral vote was 76 per cent of the total. The indirect system is unfair and dangerous. The total number of votes now cast at a presidential election is about 27 million, of which about 8 million are by women.

**Term.** — The President's term of four years has caused much discussion. Many publicists, including former Presidents, have urged that it be lengthened to six or seven years and that the President be made ineligible to succeed himself. Such a change, they claim, would not only give the Executive a stronger position politically but would free him from the present excessively large share of time which he must devote to purely political questions in order to secure a reelection. It would also allow him a longer period in which to develop his constructive program and policies.

Although the popular election is held on the Tuesday after the first Monday in November the Presidential Electors do not meet to vote until the second Monday of January, the votes are counted in Washington on the second Wednesday in February, and the new President is not inaugurated until March 4th. It would seem advisable to install the President at an earlier date.

**Immunity from Suits.** — As the head of the executive department the President is usually immune from lawsuits and injunctions to compel him to perform his duties or to forbid him from committing acts in connection with such duties. The courts have usually held that they will not interfere with the President as such. Even in suits against other persons the President may not be subpoenaed, although, of course, he has appeared voluntarily as a witness. President Jefferson was summoned to appear in the trial of Aaron Burr for treason. He declined to do so on the ground that it might interfere with his other public duties.

While it is extremely doubtful if the President can legally decline when summoned to appear before a court, yet politically there

is no means by which he could be compelled to do so without a serious clash between different departments of the government. The courts therefore seek to avoid all such conflicts of authority, by refusing to summon the President or to issue orders of injunction against him. This does not apply to his subordinates.<sup>1</sup>

**Salary.** — The Constitution does not fix the President's salary, but leaves this to Congress, with the single restriction that his compensation "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." While he may not be paid more as a part of his salary or emolument he may and does receive other allowances. The President's salary is \$75,000 at the present time; there are also numerous allowances for clerk hire in the White House, traveling expenses \$25,000, repairs, furnishings of the executive mansion, a contingent fund of \$25,000, and other smaller items. It is not unusual for the total presidential expenses, including all items connected with the White House and grounds, to amount to \$300,000. The President's personal expenses are heavy, so that few of our national Executives have been able to save any great part of their salaries.

**The Vice-President.** — The duties of the Vice-President are to succeed the President in case of the latter's disability or death and to preside at the meetings of the Senate. This, however, is such an insignificant rôle in the government that the Vice-President has been termed the "fifth wheel" of our system. President Harding revived the custom of inviting the Vice-President to Cabinet meetings, a plan which it is hoped may be followed by other executives. At various times, as President of the Senate, he has decided tie votes on important questions.

**The President's Powers.** — The Constitution confers five important powers on the President:

- I. Appointments.
- II. Legislation.
- III. Foreign Relations.
- IV. General Enforcement of the Laws.
- V. Command of the Military and Naval Forces.

The above is the order of importance of these powers in ordinary

<sup>1</sup> See W. H. Taft, *Our Chief Magistrate*, page 131.

times; it may be temporarily changed or reversed by special circumstances. A war may raise the Executive to the rank of a military dictator; a series of negotiations with foreign powers, at some critical moment, may focus all eyes upon his control over our relations with other peoples, but in the long run the order above given tends to reestablish itself. It is remarkable that of the five powers named, the last is probably the only one which is exercised in the way and to the extent intended by the Fathers.

**I. The Appointing Power.** — Former President Harrison said of appointments to the Federal service, that the President spent from four to six hours daily during the first half of his term in hearing applications for office. This gives some idea of the practical meaning which the power has for the President today. Yet, as originally conferred by the Constitution it did not seem extensive. Although it included all the positions in the Federal service, these were surprisingly few, slightly over a thousand. Most of them are reported to have been made personally by the President. The number of positions in the Civil Service at the present time is 500,000, of which the President with the advice and consent of the Senate, appoints about 15,000. It is manifestly impossible for one man to make the actual selection for any considerable number of the vacancies occurring in these offices; the practice therefore early arose of allowing a Senator or Representative to suggest names for offices situated in his State. The Constitution declares that "the President shall nominate, and by and with the advice and consent of the Senate appoint. . . ." But by the necessities of the case, the Senate now nominates while the President gives his consent. This reversal of the constitutional intent has been further aided by the custom known as "senatorial courtesy": should the President seek to ignore the preference of a Senator for appointments in his State, the other Senators rally to the support of their colleague by refusing their approval of the person favored by the President for the position in question. Numerous Presidents have attempted with varying degrees of success to break down the custom but with each administration it has been reasserted.

The question is often asked, why should the Senate possess the power to approve or reject appointments? The original reason was the belief that the President needed the advice of a mature

body of men, also the desire to place a limit or check upon his authority so that he could not set up a despotic power in the government; in short the theory of "checks and balances." But the plan has not worked out in practice as it was intended. It is generally conceded that the Senate should not interfere with appointments to the President's Cabinet; he is therefore given a free choice of his advisers. Also in appointments to positions located in Washington the President can usually exercise great freedom, since the very multitude of candidates from different States enables him to play off different claimants against each other; he must not ignore any one State but he is not limited to any group of men for his choice. The strongest argument in favor of the senatorial approval plan is that the President is induced to consult those who are best equipped to give information on political questions, viz., those whom the people have chosen as their representatives in the Federal legislature, their Senators and Representatives.

This theoretical consideration is far outweighed by the practical record which "the advice and consent of the Senate" leaves in its trail. The President must peddle out his appointments to the chief supporters of each Senator or he must undertake a wearing and harassing struggle to urge the Senators to submit men really qualified for the service. No defender of the system by any flight of imagination could contend that it prevents the President from making bad appointments, nor that it gives the public service as efficient a class of men as the President himself would select by a merit principle with service record.<sup>1</sup> Nor can anyone conversant with our presidential history claim that if this restraint of senatorial consent were removed, the Executive would immediately embark upon a career of personal aggrandizement and establish a dictatorship. Are we to be saved from this by forcing the President to dole and peddle out his appointments to party leaders? But if this danger does not exist, why guard against it? Countless instances are known in which men abundantly qualified for a national post of importance, who were acceptable to the President, have been quietly dropped out of consideration because they were for some reason not congenial to a Senator from their State. Even the judiciary itself has not been spared this humiliating test of "fitness" for appointment. On one occasion, a vacancy arising

<sup>1</sup> See the chapter on Civil Service.

in a Federal judgeship, the Senator whose privilege it was to " suggest " men for the post, selected one whose local reputation was so unsavory that a deputation of members of the bar from the district immediately waited upon the President and urged him strongly to investigate with care before committing himself to the candidate proposed. The President was plainly desirous of securing a well-qualified man but he also felt impelled to hold the powerful friendship of the Senator in question. The latter influence finally weighed down the scale, although one member of the deputation ventured the prophecy that the candidate if chosen would be impeached within a year. The nomination was made despite all protests; it was confirmed by the Senate and the new judge outlasted the prediction by six months. Senatorial control of appointments, in practice, is not a safeguard but a blight upon executive efficiency. No one today would seriously contend that it produces better civil officials.

**President Taft's Suggestion.**— Ex-President Taft has also pointed out the futility and waste of this system and its unnecessary drag upon the President's strength and time. " I cannot exaggerate the waste of the President's time and the consumption of his nervous vitality involved in listening to Congressmen's intercession as to local appointments. Why should the President have his time taken up in a discussion over the question who shall be postmistress at the town of Devil's Lake in North Dakota? How should he be able to know, with confidence, who is best fitted to fill such a place? If we were to follow ordinary business methods in a matter which concerns business only and does not concern general political policies, as we ought to do, would we not leave such appointments to the natural system of promotion for efficiency? " . . . . " In my judgment, the President should not be required to exercise his judgment to make appointments, except to fill the most important offices. In the Executive department, he should be limited to the selection of those officers, the discharge of whose duties involves discretion in the carrying out of the political and governmental policy of his administration. He therefore ought to have the appointment of his Cabinet officers, and he ought also to have the appointment of a political under-secretary in each department to take the place of the head of the department when for any reason the head of the department is not able to dis-

charge his usual duties. All other officers in the departments, including the Assistant Secretaries and the Chiefs of Bureaus, should have a permanent tenure and not change with each administration. This would greatly facilitate the continuity of the government and prevent the halt and lack of efficiency that necessarily attend a change in the Assistant Secretaries in each department and in the Chiefs of all Bureaus. For a year or a year and a half, at least, sometimes for a longer period, it throws the administration of the department into the complete control of minor subordinates, the Chiefs of Divisions and Chief Clerks, and makes the inexperienced heads of departments, Assistant Secretaries and Chiefs of Bureaus entirely dependent on such subordinates."<sup>1</sup>

**II. Legislation.** — To understand the true importance of the appointing power we must observe its bearing on the making of laws. Supposedly the President's influence on legislation was restricted to the veto power and the "information on the state of the Union" which he furnishes to Congress in messages from time to time in pursuance of Article II, Section 3, but in practice these latter activities are seldom of importance. A frequent use of the veto power shows a lack of sympathy between the chief Executive and his party leaders in Congress, since the latter, if in accord with the President, would not allow the passage of measures to which he was known to be opposed. But in order to control legislation in a positive way the President must exert some influence on the introduction of bills and on the actual provisions placed in them. Precisely this influence is offered by the distribution of appointments among Senators and Representatives. The President does not barter executive appointments for congressional votes, but his appointing power has grown to such an extent as to place his wishes in a strong light before the legislature. We should recall that the Senator or Representative is constantly harassed for appointments by his constituents. His strength at home is too often measured by the "patronage" secured from the appointing power. If he loses this patronage one of his mainstays is gone. On the other hand, the President is held responsible by the country at large for the fulfillment of a certain political program, including legislation. He must get results. The circle of his friends in the Congress is

<sup>1</sup> Wm. H. Taft, *Our Chief Magistrate and His Powers*.

extended and strengthened by the appointing power, and strong support for his legislative program arises as a matter of course. It is noticeable that much prestige is now accorded those members who are said "to voice the opinions of the administration." It may be asked — is this in accordance with the spirit of the Constitution? Decidedly it is not. Yet it has become a means of securing greater harmony of action between the legislative and executive branches and in this way it has proved an invaluable aid to the latter department in bringing about the passage of many useful laws. In this development the President's Cabinet advisers have shared in his growing powers. The old notion of a splendid isolation for the executive official has vanished; in its place has come the idea that to be a successful Cabinet secretary, one must influence legislation as well as manage his department.

Not a session passes without the heads of several important departments appearing before legislative committees of each House not only to give information, but actively to urge or oppose pending measures. Nor has the evolution halted at this point; forced on by the pressure of necessity, the executive officials have presumed to draft bills dealing with the field covered by their departments and have had these measures introduced in Congress by the aid of the members friendly to the administration. To those who have not closely watched this significant growth, the extent which it has already reached will be surprising. The President has always exerted much influence in law-making, but the legislative era which opened with President McKinley's first term must be considered one of the turning points in the history of the American Executive.

If we glance over the most important laws passed during this period, the measures which stand out most prominently, because of their importance, are those dealing with the Hawaiian, Porto Rican, and Philippine governments, irrigation, army reorganization, the regulation of corporations, the railway laws, the creation of departments of Commerce and Labor, the Isthmian Canal, a permanent Census Bureau, permanent rural free mail delivery, the parcel post, the postal savings bank, the creation of great forest reservations, the inspection of meats, foods, and drugs, the income and corporation taxes, the conservation laws, the Reserve Bank acts, trade laws, and a host of others. Of this great array of constructive measures all were either prepared in detail by executive officials

or in closest consultation with them. Can any more convincing proof be asked of the rôle played by the Executive in legislation?

**Executive Leadership.** — The President's influence on law-making has too long been thought to be simply a result of the aggressive personality of individual Presidents. If this were correct we should find some Presidents using their influence while others refrained. But can any refrain? The mild and tactful McKinley was for years pictured as a modern Bonaparte dreaming of imperialism. Congressional critics spoke of the "reign" of Theodore Roosevelt. Both men had to furnish the initiative in law-making on all important measures. But the real test of executive leadership has come since Roosevelt. Mr. Taft through judicial training, natural habit of mind and temperament, preferred to follow the old policy of a subordinate Executive. But confronted at the close of his first year in office by the approaching end of a long session of Congress in which nothing had yet been done, he cast tradition, judicial habit, and personal preference to the winds and in the memorable closing month of the session of 1909-10, he forced through every important measure, save one, that had been recommended in his annual message. It is significant that he carried out his program because it was based upon a strong public opinion. Every law so passed had been a party issue in the previous election. Executive leadership does not mean the arbitrary use of one-man power but rather the President's determined insistence on the passage of popular bills. Nor may we believe that the mass of congressional legislation is guided by the Executive; his intervention is felt only in those laws which are of prime importance. President Wilson's sway over government policy was due largely to the War crisis. The so called "Wilsonism" of his administration was the effect not only of personal traits, but of emergency conditions which called for strong decisive action. Mr. Harding's efforts to restore the executive to its "constitutional" subordinate place led to a serious break in party discipline and a general stagnation in Congress. The results of this loss in congressional leadership would seem to be a most convincing proof of both the wisdom and the urgent need of executive guidance.

**Legislative Opposition.** — This legislative activity of the Executive has always aroused strong protests. The Senators, especially, have objected that it is unconstitutional, yet their arguments seem



curiously out of date in view of the vital need of leadership. Let us glance at two of these protests, made twenty years apart. In the second session of the 57th Congress, the Fowler currency bill was brought up before the Senate for action. A member of the House had tried to help the passage of the bill in the Senate, and wrote to Senator Hoar of Massachusetts stating that the measure had the approval of the President, the Secretary of the Treasury, the Comptroller of the Currency, and the Director of the Mint. The Senator was so shocked that he at once arose and declared it "contrary to the privileges of the Senate to have the opinion of the President of the United States stated in legislation. The House of Commons or the House of Lords always resented it and have in history done so for a great many years, when that statement is made about the Crown." He also criticized sharply the growing custom of holding conferences at the White House in which Senators arrange "with the President of the United States what the Senate shall do about a treaty or about a trust bill." The press comments on this speech were remarkable, showing as they did, the extent to which the leaders of public opinion sided with the President twenty years ago. Among others a former Cabinet officer, Charles Emory Smith, to whose view much importance was attached, showed clearly the character and tendency of the present system. Writing in the *Saturday Evening Post* of February 21, 1903, Mr. Smith, who was a Republican newspaper editor, said: "Senator Hoar's remonstrance against the intrusion of Presidential authority and influence into the activity and legislation of Congress finds theoretical assent and practical rejection. The venerable Massachusetts statesman is a Senator of the old school. He has great reverence for the traditions of the fathers, for the fundamental principles of our political system, and for the constitutional division and boundaries of authority. The President, according to his view, is to communicate with Congress by message; he is to pass upon bills by signing or vetoing them when they come regularly before him in due process; Congress is to legislate without his interference except through his public recommendations; and conference at the White House to arrange what shall be done at the Capitol, and announcements that this or that measure is an Administration measure, are equally objectionable.

"All this Senator Hoar found occasion to utter in very plain

terms. 'There is a constitutional method,' he said, 'by which the President conveys his approbation or disapproval of bills. It is nobody's business to be arranging with the President what the Senate shall do. We are an independent body.' This was indeed a sharp lecture both to the President and to the Senate. And the general judgment found expression, when, upon its conclusion Senator Spooner rose and said: 'Mr. President, the Senator from Massachusetts is absolutely right, of course. I move that the Senate do now adjourn.' That was the only rejoinder. Theoretically right, but not worth answering.

"Senator Spooner's suggestive response reflects the truth. Senator Hoar's position is technically correct, but practically erroneous. It goes back to the original constructive division of powers and overlooks the development of actual conditions. The real working of our political system has changed in this as in many other ways without any change in the text of the Constitution. The President is not merely the Executive but the Premier of the Government and the leader of his party. If he would win either administrative or political success he must impress himself on Congress and mold its action. The President who failed to do this would discredit himself and imperil his party. Once in a century comes a Henry Clay who from his place in the Senate dominates his party in Congress and in the country; but it is only at the rarest intervals that such an over-towering Congressional leader appears, and generally the real leadership must fall to the President."

**Recent Protests.** — Even President Harding's tactful efforts to influence legislation were violently resented. After his appearance in the Senate in July, 1921, a series of outbursts from Senate critics occurred. It was urged that he had no authority under the Constitution "to veto a bill by argument in the Senate before it is passed." Also that he was not delivering a message but was taking part in debate. "Who legislated? What became of the greatest legislative body in the world? It had become an amanuensis to record the vote of one man." The simple, unaffected, matter-of-course appearance of the President on this occasion was heralded by one senatorial scold as a "pitiable, intolerable and indefensible spectacle. . . . It was simply deplorable." To the credit of the Senate be it said that there were others who regarded the affair as a natural incident in the orderly transaction of government

business. Said one: "I would like to inquire whether it would not be a sad day for a Republic that has three coördinate branches when it is determined . . . that any one of those branches cannot confer with the others upon matters of public interest."<sup>1</sup>

**National versus Local Influences.** — With each future increase in executive leadership we must ask ourselves: Shall the Federal Government be animated by national or local motives? Former President Taft has well shown that the natural tendency of Congress is towards local interests. The pressure from home districts, the competition to "get something" for influential local cliques is hard to resist. Says Mr. Taft, "The people themselves are largely to blame for this, not the people as a whole, but the people divided into districts, because the constituencies of members of Congress and of Senators stimulate their representatives in a competitive effort to get as much money out of the public treasury for their respective districts as possible, and are prone to decline reelecting representatives who fail in this contest. I have not time to dwell on the enormous burden that this selfishness of the people of each district and of their representative imposes upon the government and upon all the people. The waste of money in river and harbor bills, in public building bills, in the establishment of army posts and of navy yards at places selected, not because they are most useful to the army and navy in the economic administration of military and naval defenses, but because they are in favored districts, have had much to do with the increase by leaps and bounds of our actual governmental expenditure. . . . I do not mean to say that the heads of bureaus and even the heads of departments in the Executive branch may not be prone to extravagance, but the result of my experience, which I am sure is borne out by the conclusion of others, is that the Chief Executive, because he is the one whose method of choice and whose range of duties have direct relation to the people as a whole and the government as a whole, is most likely to feel the necessity for economy in total expenditures."<sup>2</sup>

**Closer Union with the Legislative.** — One of the greatest needs of national life today is that of responsible criticism and open discussion of an entire program of public policy. The proposal made

<sup>1</sup> See *Congressional Record*, July 14, 1921, page 3748; August 22, 1921, pages 5421-22.

<sup>2</sup> Wm. H. Taft, *Our Chief Magistrate and His Powers*, page 6.

by a Senate committee in 1881 that the President and Cabinet members should be allowed to take part in the discussions in either House on pending bills, is well worthy of adoption. Under our present practice the executive departments may, and often do, draft measures which are introduced in either House. In order to reap the full benefit of this initiative, however, we should allow the Executive to present directly amid the running fire of comment and interpellation the exact reasons for any or all features of the policies proposed. Members of both Houses now discuss bills pro and con and print lengthy speeches in the Record — but the measures so talked about have no relation to each other nor are they ever considered by the Senate or by the House in their entirety *as a program*, nor do those best qualified to speak on the subject ever have a direct part in the debates upon it. The Secretary of the Treasury prepares a draft of an income tax bill on which he is allowed to speak — but only before a committee. The Interstate Commerce Commission drafts an amendment to the railway acts and the Postmaster General prepares a measure affecting his department; these officials are invited to address the appropriate committees of Congress, but the committees only.

In no way is there ever presented to the public a clean-cut program of legislation which the public can see as a whole, in order to appreciate the bearing of its different parts upon each other. At no time does the public see a full intelligible statement of the case for and against such a proposed program. The theory of our political party life is that a platform is advocated by each party and that the majority when it secures control must necessarily carry out its policy or incur public censure. But in practice the majority party leaders gather together in secret conclave at the beginning of a session and try to decide which measures shall be pushed for final passage. No official list of such bills is ever published nor is the public ever aware of any formal action taken or of a responsible organization to which it can look for information and public discussion. So far as the public can see, Congress burrows its way like a mole through a dense mass of bills, and also like a mole zigzags from one measure to another without apparent rhyme or reason.

**Cabinet Members in Congress.** — If we are to have pointed, purposeful debate instead of loose, irresponsible talk in Congress, it would seem advisable (a) to offer to Cabinet members and to

the President full freedom of debate in either House; (b) to intrust the administration with the definite preparation of a program of action for each session.

Publicists and writers of such widely divergent tendencies as former Presidents Taft and Wilson, Dr. F. A. Cleveland, and Henry Jones Ford have all commented on the great practical benefits to be realized from such a change. It would mean that instead of having vital decisions on important measures made in the committee room, where there is "low visibility," such action would be forced out into the open arena of the House or Senate with the attention of the nation focused on the debate. It would mean that the official executive leaders of the majority party with their allies in Congress would meet the opposition leaders in debate on every *essential* bill and would assume the responsibility of preparing, proposing, defending, and carrying through such bills. Last but not least it would assure that the measures so proposed and carried would fit into each other as component parts of an intelligently and harmoniously planned program of law-making.

**Objections to the Plan.** — Would an amendment to the Constitution be needed to bring about this change? Apparently not. The President is already allowed to address the Congress by message, which he delivers in person. That the Cabinet members and assistants could be allowed the privilege of the floor without the right to vote seems beyond doubt. The grant of this privilege by the two Houses seems to be the only essential move required and this would involve a change in their rules of procedure but not in the Constitution. It will be asked, what would happen when the President was of one party while the majority in the Congress was of another? — Such a contingency frequently arises under our present plan and is met by the two parties concerned through the natural processes of compromise and veto. Under the plan proposed the President would offer a program of legislation modified to meet the requirements of a hostile majority. In a discussion of these measures face to face with such majority both sides would willingly grasp the opportunity to make its case clear to the public. Mr. Taft has well said that at frequent intervals in our public life the President has been faced by a congressional majority of the opposing party. In his view, this opposition has often caused delay in legislation but the discussion arising from it

has only served to bring out more clearly the relative merits and defects of proposed bills.

Such a change in our practice would undoubtedly arouse opposition in Congress. But no substantial objection can be raised that does not apply to the present plan. Indeed, the method now used gives no adequate leadership in law-making while it nevertheless causes constant irritation against the employment of "the big stick." A recent inquiry among 50 Senators and 50 Representatives<sup>1</sup> showed that the entire number favored a change in the relations between executive and legislative powers. Sixty-one approved the proposal to give the Cabinet Secretaries seats in Congress.

**Advantages of the Plan.** — Such a change would offer the following advantages:

(1) A definite program of legislation would, as we have seen, be presented by the Executive at the beginning of each session. This program would be harmonious, its various parts fitting into each other and into the plan as a whole. The power of Congress or of individual members to consider other bills would not be altered. But the President and his assistant party leaders who now have the responsibility would also have the recognized authority to plan and defend the measures necessary to redeem the party's pledges.

(2) This program of bills when introduced would then become the target of opposition criticism, but the administration which had drafted the bills would answer directly and officially the various arguments presented. As Dr. F. A. Cleveland has pointed out,<sup>2</sup> the criticism of these measures would also be more responsible, *i.e.* it would come from the leading men of the opposition, who in turn would face the leaders of the administration or the majority party. At present no plans of law-making are official and no criticism of these plans formally represents the minority party, but a general guerrilla debate proceeds on all measures.

(3) Gradually this plan would result in the administration measures being supported by the entire majority party and opposed by the minority, except in those cases where the President and the Congress were of different parties. In these the President's program of legislation would have to be modified, so as to command the support of both parties.

<sup>1</sup> W. H. Crawford, *World's Work*, August, 1921.

<sup>2</sup> See *Democracy in Reconstruction*, 1919.

(4) Not only would the laws fit into each other as a session program, more harmoniously, but each individual law would be more carefully worked out as to detail and technique. At present the President is obliged to put pressure on Congress to pass "some kind of a bill" on certain important party issues. If his administration does not draft the measure which is to be passed, Congress may obey his injunction to do something but the result may often be most unhappy. Can any legislation be imagined that would more admirably defeat its supposed purpose than the Tariff Act of 1909 and the Clayton Act of 1914?

(5) Such a change would also offer the advantages and benefits of legislation planned by those who are to administer it.

**III. Growing Importance of our Foreign Policy.** — As the foreign relations of the United States expand there is a notable increase in the number of affairs which require the constant everyday attention of the government. There are more Americans traveling and living abroad than ever before, and they often appeal to our diplomatic representatives for advice and assistance. There are new inventions and new trade conditions arising on which our consuls should report to the home government for the benefit of American business. Opportunities for the sale of our exports in wider markets may arise. Our Secretary of State may try to preserve the open door for trade in China. Our business interests at any moment may involve us in such difficulties as we have already observed in Mexico or Central America. These are all matters requiring, not the adoption of a treaty, nor the approval of the Senate, but the constant watchful care of the Executive.

In this way the President has gained in power and influence by the growth of our foreign contacts. The strongest reason for this is the increase of our export trade through the expansion of home manufactures. So long as the United States remained an importing nation her foreign policy was extremely limited, and might well be summed up in the familiar precept of George Washington, to avoid entangling alliances with foreign powers; but the growth of American exports and the conditions following the Great War have involved the Nation in a new set of relations abroad. We are gradually learning to exchange the distant attitude of the buyer for the more suave and courteous manners of the seller. We have considerably more to lose in our foreign relations than at any time

since the Civil War, and we have also incomparably more to gain. The revolutions of our neighbors are ceasing to be matters of indifference to us, the closing of Asiatic ports to our cotton goods or the indirect restriction of our markets under one pretext or another by the nations controlling various sections of Asiatic territory, is a matter of immediate concern, while the protection of our citizens abroad is of growing importance and difficulty.

And these increasing points of contact with foreign peoples have given the basis for a new foreign policy. We want our government to play a more active part in the council of nations and to be prepared to protect and foster our interests in every quarter of the globe. This change in our program tends distinctly toward a strengthening of that branch of the government which is always in session, constantly on the alert and ready to act at a moment's notice. The Monroe Doctrine itself is not a treaty but a simple declaration of policy by the Executive.<sup>1</sup>

<sup>1</sup> The Doctrine in its original form was the announcement in 1823 by Secretary James Monroe that the United States was opposed (1) to any future European colonization in America; (2) to any extension of European government systems to America; (3) to any European interference with existing American States. All such action was held to be dangerous to our continued existence as a free republic.

This declaration was not a treaty or agreement, nor an understanding formally accepted by European nations, but a simple statement of American policy.

A "Holy Alliance" of European monarchs had been formed to combat the spread of representative government, and was preparing to reestablish monarchy in Latin America. The declaration was intended to forestall such action from Europe. Its most emphatic opponents have been the peoples of Latin America themselves, whose spirit of national independence has been injured by our assumption of a protecting authority over them.

The Monroe Doctrine has been applied on numerous occasions, to prevent European occupation of South and Central American territory. The most frequent cause of foreign intervention has been the failure of certain Latin American governments to pay the interest or principal on the debts which they have contracted in Europe, also their inability to maintain law and order and to protect foreigners. These conditions have placed us in an untenable position as regards the Monroe Doctrine in that while we were unwilling to have European governments defend the interests, lives, and safety of their citizens, we were yet unprepared ourselves to undertake this protection. Such a weakness in our national policy is leading many publicists to urge that we should either abandon the Monroe Doctrine or, in the interest of fairness, we should ourselves protect Europeans as well as our own citizens, in Latin America.



The intricate and involved steps in our recent relations with Mexico have all been taken by the President. The proposals for our participation in a League of Nations were initiated by the Executive and negatived by the Senate. The two important later steps, the reduction of armaments and the prevention of a war with Japan, were both matters of executive initiative carried out against determined and influential opposition in the Senate. The latter being a deliberative council, is unable to enter into all those minute yet important developments which form the greater part of the daily conduct of affairs; the President and his officials are therefore obliged to undertake this growing side of governmental activity.

**Foreign Policy.** — The management of our foreign relations falls naturally under five general heads, each possessing certain peculiar and interesting features.<sup>1</sup>

(a) Appointment of (1) diplomatic and (2) consular representatives.

(b) Treaties, conventions, and protocols.

(c) War power.

(d) Recognition of new nations claiming independence, or of hostile factions claiming control in a foreign government.

(e) General negotiations and communications with foreign powers.

**The Diplomatic Service.** — We have thus far created a permanent professional staff only in the lower ranks of our service. For the highest diplomatic positions we have availed ourselves of the services of prominent merchants, lawyers, journalists, and others. While it is by no means certain that we should improve matters by establishing a professional corps in the highest ranks it does seem advisable to retain experienced men longer in their posts and to make the service permanent for those who show conspicuous abil-

<sup>1</sup>The President's constitutional control over foreign affairs rests upon those clauses of Sections 2 and 3 of Article 2, authorizing him, first, to make treaties by and with the advice of the Senate, provided two-thirds of the Senators present concur; second, to nominate, and by and with the advice and consent of the Senate, appoint ambassadors, other public ministers, and consuls; and third, to receive ambassadors and other public ministers. The first and second of these clauses form a basis for the additional power of conducting negotiations on all subjects affecting international relations even though such negotiations are not intended to lead to a treaty or agreement.

ity. The diplomatic service is composed of various grades, the order being Ambassador, Minister Plenipotentiary, Minister Resident, Counselor, Secretary of Embassy, Commercial, Naval, and Military Attachés. From the post of Counselor downward the civil appointments are made under Civil Service rules, but the higher positions are political appointments and are made by the President and Senate.

*Commercial Attachés.* — In order to secure a thorough and systematic study of trade opportunities, commercial attachés are appointed at the more important American Embassies and Ministries abroad. These officers, who are fairly well paid, report to the Bureau of Foreign and Domestic Commerce of the Department of Commerce. They are commercial representatives coöperating with the Diplomatic Service. In order to secure well-qualified men for this branch, the members are all required to pass special examinations and to have an experience fitting them for the work of inquiry and investigation in trade fields. The plan is still an experiment and has encountered some obstacles, the most serious being the difficulty of securing cordial coöperation between three sets of men whose duties overlap each other and are not clearly defined — the commercial attaché, the consul, and the minister or ambassador.

The salaries of ambassadors vary from \$12,000 to \$17,000, of ministers from \$4,000 to \$12,000, but large as these amounts appear, they are by no means sufficient to cover the expenses of the positions. In fact so inadequate is the salary, that practically all our representatives abroad have to devote their private funds to the support of their positions; it follows that only wealthy men can retain these posts for any length of time. A heavy item of expenditure is the rental of the embassy, — other nations own their official residences and offices and thereby relieve their representatives of this expense. A more liberal policy by our government would make it possible to appoint men of less wealth when this seemed desirable.

In 1920 a specially chosen committee of the National Civil Service Reform League made a study of proposed changes in the diplomatic service, to meet the new conditions brought about by the Great War, and the growth of our foreign relations. The Committee recommended — an improvement and modernization of the

entrance examinations; the purchase of embassies abroad; the increase of salaries of all ranks of the service; the extension of the Civil Service requirements to include the rank of minister; transfers from consular to diplomatic service.

*The Consular Service.* — On June 27, 1906, and August 26, 1919, new rules were issued to establish this branch of the government as a permanent career and to relieve it from purely political appointments. The grades in the service are consul general at large, consul general, consul (various classes), advisory consul, consular assistant, student interpreter, consular agent, and clerk. Examinations for appointment to each of these are held except for clerks, consular agents, and those advisory consuls who are not professional, that is, who are not seeking promotion to a consulship.

The salaries range from \$1500 and expenses for student interpreters, to \$12,000 for consuls general of the first class. The higher positions as a rule are filled by promotion and the whole service is gradually being placed on a permanent, professional basis. The chief consular duties are to assist in the extension of American trade and to aid and protect American citizens and their interests. Unlike the diplomat, a consular official is assigned to a local district which is well defined and in which he comes in close contact with all classes of people. His usefulness depends largely upon his adaptability, good judgment, tact, and integrity. The salaries paid are low in comparison with the type of man required for this service. The government does not maintain a school for the training of candidates nor does it prescribe a particular course of study other than the matters covered in the entrance and promotion examinations.

*Treaties.* — The constitutional provision requiring the assent of two-thirds of the Senators present, for the approval of any treaty negotiated by the President, lays upon the latter an effective restriction in his conduct of foreign affairs. The Senate uses its controlling power freely, and many of the treaties negotiated fail of senatorial approval. Notable in recent years has been the failure of the important reciprocity treaties negotiated in McKinley's administration, the Taft reciprocity treaty with Canada, Mr. Bryan's arbitration conventions, and Mr. Wilson's treaty and covenant. Even the Hughes pacts for the limitation of armament and the preservation of peace in the Pacific were obstructed by

every known resource of senatorial procedure and were finally passed by only slight margins above the required two-thirds majority. The proposal for the purchase of the Danish West Indies, though repeatedly brought up, was defeated or postponed for over 40 years before its final adoption in 1917. The treaty-purchase of Hawaii was persistently combated until its advocates, realizing that a two-thirds majority was out of the question and that quick action was needed because of the war with Spain, had a joint resolution passed by a simple majority vote of both Houses, accepting the sovereignty over the islands as offered by the Hawaiian legislature.

*The Senate's Rôle in Treaty-Making.* — The Senate has always looked upon itself as a coördinate part of the treaty-making machinery; it has not restricted its activity to approving or rejecting the proposals of the President and his Secretary of State but has often proceeded to make a new draft of treaty for transmission to the foreign government through the executive offices. Realizing the independence of the Senate in this respect, it has become the custom of the Executive to consult the chairman and leading members of the Senate Committee on Foreign Relations regarding any important steps, and to keep them well informed of the progress of negotiations on treaties.

The original grounds for requiring a majority of *two-thirds* for the approval of treaties were strong. Since a treaty was a binding agreement involving the good faith of the national government, it was of the highest importance that the Executive should have the advice and coöperation of the more conservative branch of the legislature, which would not lightly enter into such agreements without sufficient reasons. All possible precautions were thereby taken against an impetuous foreign policy. The arrangement worked well, although few instances can be recorded in which the Executive might be accused of hasty action. In later years, however, the needs of the people have changed considerably and the treaty-making power must be considered from a different standpoint. We now need more treaties and we must regard our treaty-making machinery more with a view to producing results than of merely preventing action. It is hard to believe that our Executive is to be less trusted than those of other nations. In no other great world power is a majority of two-thirds of the upper House required for the approval of international agreements.

This requirement together with the right of unlimited debate in the upper House seems to give to a small group of men too much power to delay and block action on important measures and as it becomes more necessary to enter into trade arrangements with other countries we require a more effective method of treaty-making. To this end the suggestion has been made that treaties be approved by a simple majority of *both* Houses. This would be an easier method than the present two-thirds rule in the Senate and yet it would fully safeguard all interests concerned.

*Approval by the House.* — Another limitation of the President's treaty-making authority has arisen in the well-known claim of the House of Representatives to the approval or rejection of treaties. This claim rests on two bases: first, the right of the House to take part in appropriations. Since all important treaties require an appropriation for their execution, this claim practically amounts to the demand for a part in all international agreements. Second, it is contended that no treaty may amend the customs tariff and tax laws of the United States without the consent of the House of Representatives since the latter is peculiarly the popular representative assembly and has been given both by custom and by the Constitution a special care over taxation. The Senate has not formally admitted this claim but in order to get funds it has placated the House by passing appropriation laws to carry out the treaties adopted. The President too has been obliged to keep in touch with the House Committee on Foreign Relations, and where an appropriation is necessary the concurrence of the House is asked.

*Conventions and Protocols.* — Many less important or temporary arrangements with other governments are made, sometimes without submission to the Senate. If the agreement is solely to cover an emergency until a final treaty can be negotiated, it is called a protocol. Such was the memorandum which ended the Great War in 1918. In 1901 the President agreed with European sovereigns to the protocol of Peking which ended the American-European invasion of China after the Boxer rebellion. It provided for the payment of an indemnity by China and the withdrawal of the foreign troops. In 1817 we signed an agreement with Great Britain limiting the naval forces to be retained on the Great Lakes. It was not submitted to the Senate until a year later, when it was formally ratified as a treaty.

The word "convention" may mean either a treaty not yet ratified, or an agreement which is not to be submitted for ratification. The Act of 1872 authorizes the Postmaster-General to make postal conventions with foreign powers for the carriage of the international mails. These do not require Senate approval. The tariff act of 1890 empowered the President to make certain reciprocal commercial arrangements with foreign governments. The Presidents of Mexico and the United States have agreed to allow each other's troops to cross the international boundary line in a close pursuit of bandits. President Roosevelt's convention with Santo Domingo provided for the collection of certain taxes in that country by American officers and the disbursement of these funds to meet the unpaid foreign debts. Although made in 1901 it was carried out by the President for two years before the Senate finally consented to ratify it.

Again there is the dangerous device of "identical notes" by which the representatives of two governments exchange similar pledges and formal understandings in order to settle some problem. So the integrity of China was recognized by identical notes between Secretary Root and Ambassador Takahira of Japan. The same integrity was cast to the winds by the Lansing-Ishii notes of 1917, recognizing Japan's special privileged position in China, a mistake which was rapidly leading us to hostilities with Japan until corrected by the Disarmament Conference.

*Treaties and State Laws.* — May a treaty regulate affairs that are ordinarily within the sphere of State control? Can the Nation make a treaty which conflicts with State laws? The more our foreign relations grow, the more acutely this problem presses upon us. Where we ask protection of foreign governments for American citizens by treaty, and promise such protection to their citizens in return, we must either carry out this obligation or confess ourselves incapable of fulfilling our promises. The State governments are often unable to protect foreign subjects from mob violence and at times the Federal Government has paid indemnities to the nations concerned while remaining in the humiliating position of political impotence. It has been provided by treaty that the property of deceased foreigners located in the United States shall be administered in a certain way. Also, that citizens of certain nations shall be free to acquire real estate within

the United States. Both of these conflict with the laws of some of the States, and authorities are divided on the question. (See *GEOFROY v. RIGGS*, 133 U. S. 258; *BALDWIN v. FRANKS*, 120 U. S. 678.) In 1907 and 1908 a number of Japanese children living in California were excluded from the public schools or were forced to attend separate schools. The Japanese government maintained that this was a violation of its treaty rights and the same constitutional question arose in acute form. The President maintained that the Federal Government had the authority to enforce an equal treatment of the Japanese with that accorded other persons in the school system, but this claim was not pressed because of the aroused public sentiment throughout California. Eventually a compromise was effected, leaving the constitutional question undecided. It is of the essence of a treaty to offer protection and full enjoyment of civil rights to the subjects of a nation in return for similar privileges granted to our citizens, but what do these rights avail if our Federal Government must plead with the States to protect them? Has the national authority no power to step in where necessary and compel the observance of its treaties regardless of local laws and feeling? On the other hand, can it by treaty repeal the valid legislation of a State, so far as that legislation applies to foreigners? Our national policy here has placed us in a position which does not win for us either the friendship or respect of foreign nations. Certainly we should give little attention to the claim of a foreign government that it could not protect our citizens because it was a Federal form and must not encroach upon the internal sovereignty of its States. Yet this is exactly what we say to other nations.

*The Migratory-Bird Treaty.* — On December 8, 1916, a treaty with Great Britain was proclaimed for the protection of the great numbers of birds passing to and fro between Canada and the United States. Pursuant to this treaty, Congress passed the Act of July 3, 1918, which prohibited the destruction of such migratory birds except under conditions fixed by the Act. It also authorized the Secretary of Agriculture to execute the law and to make the necessary regulations. Under authority of this act, Holland, a national game warden, was about to enforce the Secretary's rules when the State of Missouri objected that the Federal law was unconstitutional, since only the States could control

wild game and the Tenth Amendment expressly reserved to the States and their people the powers not granted to the Federal Government. In *MISSOURI v. HOLLAND*, 252 U. S. 416, 1920, the Supreme Court upheld the Act and pointed out that the Federal authority to make treaties was broader and covered a wider range of subjects than the law-making power.

Said Justice Holmes: "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. *ANDREWS v. ANDREWS*, 188 U. S. 14, 1903. When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

Where the national interest was involved and its protection could only be secured by agreement with a foreign power, the Federal Government possessed the undoubted right to regulate the subject by treaty. The Court pointed out that although the great body of private relations falls within the control of the State, a treaty might override that power, as was established by *HOPKIRK v. BELL*, 3 CRANCH 454, 1806, on statutes of limitation. The confiscation of property was regulated by treaty and the action upheld in *WARE v. HILTON*, 3 DALLAS 199, 1795. Also a regulation of the escheat of land, a State matter, was regulated by treaty and such action was supported by the court in *CHIRAK v. CHIRAK*, 2 WHEATON 259, 1817.

The United States has twice refused, the last time in 1922, to join with other nations in blotting out the international white slave traffic by treaty, on the ground that it would be a Federal



usurpation of the police power of the States. To many it will be difficult, in view of the Holland case, just cited, to see why the Nation may protect wild birds by treaty but may not by the same method protect women. If the Court and Congress are willing to build on the broad foundation offered in the Holland decision, a full and complete legal protection can be offered to aliens in America.

**Influence on War.** — Although the Constitution gives Congress the power to declare war, the steps leading towards or away from hostilities are taken by the President. In nearly all our wars the President has first resorted to every possible measure, even against public opinion, to prevent the conflict. Yet he must act as the official voice of the Nation, he must take a definite stand, and this may lead to hostilities. The long struggle between England and France, culminating during Washington's second administration, was rapidly drawing this country into a second conflict with England when the President, by his determined, though not popular, attitude, extricated us from this danger. Again, a series of seizures of American vessels by French warships threatened a similar conflict with France, but the President refused to be drawn into armed hostilities and the crisis passed. The emphatic declaration of President Cleveland in favor of arbitration of the boundary dispute between Venezuela and England placed the United States and Great Britain unexpectedly in a position where one or the other must openly recede from its announced intention, if a conflict was to be averted. The case was finally settled by Great Britain's agreement to arbitrate. The long-continued efforts of American oil interests to embroil us with Mexico and to bring on armed intervention, if not war, with that country, were frustrated by President Wilson, who steadfastly refused to open hostilities with that country.

At the same time he sought by every means in his power to avoid participation in the great World War. He submitted to the changing whims, the apparent duplicity, and the arrogant attitude of the Central Powers for two years before finally taking a definite stand which permanently fixed the attitude of the United States as to its international rights. The continued and persistent violation of these rights *as defined by the President*, finally led to our entrance into the struggle. The policy of the Executive in all

these cases has been decisive. While he may always rely on an undercurrent of national pride and "jingoism" which exists in any country, to support him in an aggressive foreign policy, it is an undeniable fact that our Presidents have acted with the utmost conservatism. Each in his turn has realized the immense responsibility attaching to his acts and has been willing to withstand political and popular pressure, in order to prevent an armed conflict.

Nor is there any other official body in the government to whom the authority over foreign relations could safely be intrusted. The control by a council or a committee of Congress would be highly dangerous and would be entirely unsuited to effective, consistent, harmonious action, as was shown by our experience during the Revolution. Congress at critical moments is likely to be even more radical than the President and his advisers.

**Recognition of Foreign Powers.**—The Constitution framers could not foresee the many delicate questions touching the recognition of the independence of new republics which would be thrust upon our government in its management of foreign affairs; had they done so they would probably have defined the power of recognition more clearly. Congress has repeatedly undertaken to exercise this power, sometimes in conflict with the President, but in practice the victory has thus far been with the President. In the Cuban case an excited popular opinion throughout the United States seemed strongly in favor of recognizing not only the rights of Cuba as a belligerent, in its struggle against the Spanish yoke, but also of recognizing Cuban independence. President Cleveland, knowing that this would mean immediate war with Spain and that we were unprepared, threw all his influence against action by Congress, and his Attorney-General in an opinion which commanded general respect declared that the Constitution conferred this power upon the President when it authorized him in Article 2, Section 3, to receive ambassadors and other public ministers. The congressional leaders allowed the matter to rest here, the President refused to receive as public ministers any deputation from Cuba, and the formal recognition of Cuban independence was put aside until the United States was enabled by force of arms to compel the withdrawal of Spanish sovereignty. But the most striking illustration of the broad influence of this power is offered by our

relations to Mexico. The refusal to recognize General Huerta led to the recall of the Mexican chargé and of our acting ambassador. The recall of our ambassador created a vacancy in our embassy which could not be filled without recognizing Huerta, since we must send our ambassador with credentials addressed to someone in authority and Huerta was the only authority. The recognition of the Carranza government by the United States gave the acts of that government a legal status of great importance to the property interests of Americans. When one of his generals seized a quantity of lead belonging to an American company in Mexico, giving a receipt and a promise to pay for it, a question soon arose as to the legal ownership of the lead. It was sold to a party in the United States and upon arrival in America its former owner claimed possession. The Supreme Court held in *RICAUD BARLOW v. AMERICAN METAL CO.*, 246 U. S. 304, 1918, that since the United States had recognized the Carranza government the action of that government could only be contested in the Mexican courts. American courts could not decide the legality of action taken by the recognized Mexican government within its own territory. When the government of Colombia refused to allow the United States to purchase the land for the Panama Canal located in Colombia, the inhabitants of the provinces along the line of the proposed canal were highly indignant as were also the officials of the French company which owned the canal concession. A revolution of the discontented elements was organized and a new republic of Panama set up on November 3, 1903, and three days later was recognized by President Roosevelt. A treaty with this new republic by which the United States guaranteed its independence and offered to protect it, was then signed. Unless this instant recognition had taken place and protection had been guaranteed, the Colombian army would undoubtedly have suppressed the new republic immediately. The President's recognition was a determining factor in the acquisition of the canal strip.

**Negotiations and Communications with Foreign Powers.**— This is the everyday work of our international relations and it is the part in which the President enjoys the widest freedom from restraint. Aside from the long and complex negotiations incident to treaties, there is the constant interchange of communications necessary for the protection and advancement of American in-

terests under the treaties already made and under the general international law of custom. Whether it be the exacting of an "Oriental promise" regarding Manchurian trade, the presentation at Constantinople of a bill of damages for the destruction of American property in Turkey, the statement of our opinion and interest in European methods of collecting debts in Venezuela, or our demands for greater safety for our citizens and their property in Mexico — the President, through his Secretary of State, fixes the substance, the form, the time, and the tone of the communication and thereby determines the official attitude of the United States. In so doing he commits the Nation to a policy from which the legislative department can hardly depart without provoking a serious political conflict at home or diminishing our respect abroad. The President feels it expedient, if not obligatory, to consult with some of the party leaders before taking a positive stand on important international questions. As the treaty-making power is legislative in character, the President's power of communication is the administrative and interpretative side of our foreign relations.

**A Constructive Foreign Policy.** — We are slowly groping our way towards a much-needed definite foreign policy. Heretofore our foreign relations have been determined entirely by the whim of the moment but without any fixed, settled principles of action. We have had no definite aims in view nor have we pursued a consistent course toward any of the nations with whom we were in constant contact. While this has apparently possessed advantages in freeing us from any alliances, it has not left us free from entanglements arising from the very nature of our foreign problems. Towards the continent of Europe we have always showed a desire to avoid friendships. In China and Asia generally we have, at various times, attempted to extend our markets in a spasmodic way but have never followed up our own announcements of programs and principles. Towards the Central and South American peoples we have shown a desire to be friendly and to protect them from European aggression and even at times from domestic chaos and disorder, but to this day, no foreign nation, whether in Europe, Asia, or South America, is aware of any definite, positive principles guiding our course of action, upon which they may rely with confidence except the Monroe Doctrine.

The Hon. W. Morgan Shuster in an address before the American

Academy of Political and Social Science<sup>1</sup> has set forth certain essential factors of a foreign policy which well deserve consideration. These, briefly summarized, are:

(1) It must represent the collective business and moral sentiment of the people. All the foreign negotiations and treaties of our government are discussed with the greatest freedom in the press and by public societies. Our authorities would not consider for a moment the enactment of a treaty which was opposed by a strong public sentiment. No notoriously dishonest or immoral policy could long maintain the popular support.

(2) A constructive foreign policy must also have some permanence and continuity—if it is to be a guide to us in dealing with other nations and to other nations in their policy toward us, it must be non-partisan and must be consistently followed within certain general limits by administrations of all parties.

(3) It follows from "1" that we must scrupulously respect the sovereignty of small nations and

(4) Observe with greatest care the exact spirit of our treaties, avoiding even the appearance of neglect or sharp practice in interpreting our obligations toward other peoples.

(5) And our policy should take heed of our peculiar position in the Western Hemisphere—it should build with greatest care a feeling of confidence among the peoples of South and Central America.

(6) To this end our intervention in their affairs should be confined to a minimum and should occur only as a last resort for the protection of our interests, and we should avoid all permanent occupation of their territory.

(7) Our foreign policy should be altruistic and generous but it should also have as one of its chief aims the promotion and protection of American investments abroad.

To Mr. Shuster's points we might now add—an intelligent co-operation with the leaders of reconstruction in Europe.

**IV. General Enforcement of the Laws.**—In our early history when the government was limited in activity, we paid little attention to executive powers, because the *making* of the laws seemed all-important. The people fixed their attention upon the broader, more impressive aspects of the government, assuming that the

<sup>1</sup> See *Annals of American Academy*, July, 1914.

executive work would prove a mere matter of detail. It was not until government activity had assumed general importance that the execution of the law began to stand on a par with the passing of bills, in the minds of the people. When the men of 1787 placed in Section 3, Article 2 of the Constitution the clause "He shall take care that the laws be faithfully executed," they doubtless considered that they had clearly fixed the subordinate position of the Executive. The word "faithfully" is significant. It shows the President's intended rôle as the true and obedient administrator of the legislative will; and in the enforced separation between the two departments, the President has done what he could to carry out this faithful execution of the laws.

**Executive Discretion.** — Thirty years ago Congress enacted all its laws in detail, prescribing with jealous care even the minor points of the subject-matter; today Congress is too busy to go into these — it accordingly passes what we might call outline acts, which lay down certain fundamental principles and direct the Executive to apply these principles. The President is free to choose any reasonable means in order to carry out the aims of the act — he or his department heads issue ordinances or regulations covering all the details of legislation, and these ordinances are as binding as the law itself — they are in fact the law. At other times, Congress being for the moment unable to cope with a temporary emergency passes over to the President the authority to manage the situation for a limited time. Congress alone possesses the power to legislate for the dependencies and territories of the United States, but for three years the most important of these, the Philippines, were handed over to the President and his appointees on the Philippine Commission. When the United States first secured the Panama Canal strip, the Senate drew up with painstaking care a complete system of government for that district, but after much discussion the plan was abandoned and the canal zone, like the Philippines, was handed over to the President's control with instructions to dig the canal as best he could. The Postmaster-General in his department exercises undisputed sway, under the law, in the issue of regulations for the postal service. One of his Assistants even determines whether certain postal matter is "fraudulent" or "obscene" and, as such, is to be excluded from the mails. The Secretary of the Treasury may issue or retire a large amount of United

States bonds in a manner and at a time which will have important effects upon the business community. The Federal Reserve Board can raise or lower the interest charge for rediscounts on certain types of bank loans and by this simple change may aid or prevent the storage of large stocks of goods for higher prices or the undue expansion of credits in a given industry.

The Tariff Act of 1922 authorizes the President to add 50 per cent to the ordinary tariff rates when these rates seem insufficient to equalize the cost of production.

All these examples show that while Congress fixes the broad general outlines of our policy, the substance and content of that policy are left, to a surprising extent, to the Executive. Here then is the cause of the great discretionary power of the executive officer. It has produced a change in our administrative system towards greater elasticity and adaptability, two qualities that are especially needed at the present time.

If we compare the government business with that of any great commercial corporation we find that the corporation can measure its success by its profits at the end of the year. It has this simple test of results constantly before it. A defect in any part of the system is detected by the accounting department and is remedied immediately, before a further money loss occurs. Spurred on by this practical measure — financial results — the corporation is constantly revising its methods and plant, improving its personnel, and developing new opportunities for profit. It is a live, elastic, and rapidly changing organization whose very life depends upon its keeping up with new conditions and whose whole spirit is that of progress. Not so the government. The public administrator is beset with fixed, though general rules, his success usually is measured not by results, but by *compliance with the rules*; he must carry out the law even where the law is inexpedient and at the end of the year he can point to no definite money gain or loss resulting from his operations. For these reasons the urgent need of our government administration today is greater elasticity and freedom to conform to new conditions and a clearer, more definite test of results. In this sense the new freedom which the Executive enjoys is a great advantage to the community; it enables him to adopt modern methods, to change with the rise of new circumstances and to keep the administration thoroughly up to date. The State and

city executives are even forced to go one step farther and to choose which of the laws they will enforce.

**Are Facts Found by the Administrator Binding in the Courts? —** One of the methods by which interested parties have tried to delay government action is to appeal to the courts on the ground that the administrator has mistaken the facts in their case, or that his judgment was poor and that he acted unwisely. If the courts generally revoked or changed official acts on these grounds the result would be that every person who disagreed with any government action whatever, affecting his interest, could at once block it by simply alleging other facts or by differing from the judgment and opinion of the administrator. The courts have therefore preferred to say that if the administrator after a fair hearing of both sides, has found certain facts, these will generally be accepted in court as binding. Or if he is granted discretion by a law, the court will not listen to complaints of parties that he did not use this discretion wisely.

In *GAINES v. THOMPSON*, 7 WALLACE 347, 1868, the Secretary of the Interior had canceled an entry for land by an applicant, in the exercise of his discretion in interpreting the land laws. In *NOBLE v. UNION RIVER LOGGING CO.*, 147 U. S. 165, the same official's decision that a railway company was entitled to a right of way over certain public lands was in question. In *JOHNSON v. DREW*, 171 U. S. 93, 1898, the Land Office decided as to who was in actual possession of a piece of land. In *BATES v. PAYNE*, 194 U. S. 106, 1904, the Postmaster-General had ruled that certain periodical publications were not second-class mail matter. In *MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING CO. v. BURLESON*, 255 U. S. 407, 1921, the same authority had held that certain literature was designed to prevent the recruiting of the Army during war-time and was therefore not mailable as second-class postal matter. In *SMITH v. HITCHCOCK*, 226 U. S. 53, 1912, the Postmaster had ruled that certain "series" of books were not numbers of a periodical and were therefore not entitled to periodical postage rates. In *TANG TUN v. EDELL*, 223 U. S. 673, 1912, the Secretary of Commerce had ruled on the citizenship of a Chinese person seeking to enter the country. In *HOUSTON v. ST. LOUIS PACKING CO.*, 249 U. S. 479, 1919, the Secretary of Agriculture had determined that a certain compound was not "sausage"



and must not be so labeled in interstate commerce. In all these cases and a host of others the Supreme Court has upheld the administrative finding of facts in order to enable the executive to conduct its work without undue hindrance.

**Means of Enforcing the Law.** — The President has at his disposal for the execution of the law, the courts and the armed forces of the United States, including the State militia when the latter are required to suppress an insurrection. In our early history the use of an armed force was more familiar than at present. Early in the history of our country President Washington had to cope with a serious, organized attempt to violate the tax-laws of the United States in western Pennsylvania. The internal tax on distilled spirits fell with special weight upon the people of that section and all classes organized to resist the collection of the tax. The movement assumed such proportions as to threaten an insurrection and the President sent a force of fifteen thousand troops under General Lee to suppress opposition and compel obedience to the law. In the American Railway Union strike of 1894 violence and rioting were employed and the mail trains were forcibly blocked. After much destruction of property and some bloodshed, President Cleveland decided not to wait for the Governor's call for assistance but to send troops to *enforce the Federal Postal Laws*, etc. This vigorous action speedily restored order, and shows the President's power to use armed force to execute the Federal acts, whether the State government calls for aid or not. On August 30, 1912, after repeated calls for assistance from the Governor of West Virginia, President Harding first issued a proclamation calling on persons engaged in a violent insurrection in that State to abandon such insurrection and return to their homes by noon of September 1. This proclamation being disregarded he sent regiments of Federal troops to the disturbed region and suppressed the insurrection by force. This illustrates the Federal authority under Article 4, Sec. 4, to protect a State "on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." These cases attracted widespread attention and much criticism because of their rarity and some attempts to excite popular sympathy with those in resistance, but there is no doubt of the constitutional power of the Executive.

**Orders, Regulations, Ordinances.** — The President and the

heads of departments in filling out the details of Federal laws and enforcing them must issue regulations and ordinances. For example, the Civil Service act authorizes the Executive to extend its application to new classes of employees. This he does by order. Or he may exempt certain groups from the obligation of the classified service rules. This also requires an order. The Secretary of Agriculture issues "regulations" to enforce the meat inspection act of 1906. The Interstate Commerce Commission makes general "orders" affecting rates on freight and passenger service for each group of rail carriers. All departments issue these regulations, which have the binding force of law.

**Command of Military and Naval Forces.**<sup>1</sup>—To many it may seem that the war powers of the President should be ranked first in importance; they are unquestionably the most extensive in scope and irresistible in sway, placing him in the position of a temporary dictator. Yet they are but temporary. What a striking proof of this is furnished by the wars of 1861, 1898, and 1918! From the command of millions of men this power fell within one or two years to the control of a handful in the regular army. In 1861-65 from the unquestioned military sway over the lives, property, and liberty of millions of people, the central authority shrank to a joint legislative and executive control over a few districts in the South, waiting to be re-incorporated in the Union. Great and irresponsible as are the military powers of the President, imminent as seems the possibility that he may in time of crisis violate even the Constitution itself, we must acknowledge that the tide of power ebbs even more swiftly than it rises, leaving the President with more prestige perhaps, but with no increase of authority.<sup>2</sup> Public opinion demands the reduction of military expenses and the return to their homes of the men who have volunteered for the war. In the face of this demand no scheme for military dictatorship could survive. Nor is it different with the President's civil powers in war time. In such a crisis both parties recognize the need of leadership and defer to his wishes on all important matters. Our war Presidents, like the dictators of ancient Rome, have been intrusted

<sup>1</sup> The question of army administration is discussed in the chapter on The War Power of Congress.

<sup>2</sup> The military power to govern territories acquired by war is also only temporary.

with unquestioned civil as well as military authority. But history shows that in all wars this intense fervor of patriotic confidence and self-denial is followed after the war by an equally intense reaction of hyper-criticism and peevish irritability in which nothing that the President does is right. The sweeping civil powers controlled by Lincoln ran to their lowest ebb in the administration of President Johnson, who escaped impeachment by one vote in the Senate. McKinley's conduct of the Spanish war won him the unanimous support of all factions until its close, when there broke over him a storm of criticism. He was even accused of imperialistic designs over the newly acquired territory. The general and enthusiastic acclaim of President Wilson during the Great War changed to a tempest of denunciation after the signing of the Armistice. This is a universal tendency. Within four years from the close of the war not one of the war-time leaders was left in office. In America the reaction against the Executive even extended over into the Harding administration and led to a general attempt by Congress to invade the domain of executive prerogatives. Thus the influence of war on the President's authority is first a sudden and abnormal expansion, followed by an equally violent and extreme contraction.

Of the remaining powers of the President, three deserve special mention, his message to Congress, his veto power, and his duty to protect a State against invasion and domestic violence.

**The Annual Message.** — The President's influence on law-making has not developed along that line which at first glance seems to offer the most natural means of growth, that is, his annual message. The value of the message has even declined. The annual communications of earlier Presidents were documents of the highest importance. They were in very fact "information of the state of the Union," to quote the words of the Constitution and as such received the grave consideration of the Congress, being answered and discussed oftentimes in detail. And to the people at large the President's message was "information." The telegraph and the hourly newspaper edition have removed us far from this state of affairs and the message may now only be called "information" by courtesy. The real importance of a message is now to be seen not in the annual communication sent to Congress in December, but on occasions when a special session is called or when the President sends

a note to Congress, dealing with a single occurrence requiring immediate legislative action. All our recent Presidents have sent such messages dealing with the tariff, national expenses and economy, reciprocity treaties, canal tolls, the adoption of the Women's Suffrage Amendment, trade laws, and the like, and in nearly all cases their urging has been heeded.

**The Veto.** — As a bill passes each House of Congress it is signed by the presiding officer, the signature being attested by the clerk or secretary. Having passed both, it is sent to the President and signed and dated by him; the date which he gives it determines the time at which it becomes law unless the bill itself provides otherwise. If the President vetoes it, he writes upon it simply the word "veto" (I forbid) and returns it to the House in which it originated with a brief summary of his reasons. According to Article 1, Section 7, Clause 2, the President is given ten days, not counting Sundays, in which to sign or veto a bill. If he takes no action in that time and Congress is still in session the bill becomes a law without his signature, but if Congress has adjourned within the ten-day period and thereby prevented him from returning it, the bill fails of enactment. This is the "pocket veto." Some of the earlier Presidents considered that the purpose of the veto was to prevent the passage of unconstitutional legislation, but our later Executives have taken the broader view that the President may use his right on any ground of public policy that he sees fit, and that it is his duty to act as an independent factor in legislation. These same Presidents, notably Cleveland, Taft, and Roosevelt, frequently forced the amendment of pending bills in Congress by letting it be known that they would veto the measures unless changed to conform with the executive views. While the simple statement of this power seems arbitrary, it has not been so used by the Executives in question but has rather been employed by them to hold the majority legislators to a stricter observance of the party's pledges.

Congress may carry a bill over the President's veto by a favorable vote of two-thirds of those present in each House. Such action is quite rare since the President usually selects for veto only measures of doubtful value and his action is generally supported by an influential part of the public. The President should have the same authority to veto single items of an appropriation bill that some of the State Governors now possess.

**Protection of States.** — The duty of the President to protect the States against invasion and domestic violence is founded upon Section 4 of Article 4 of the Constitution, which provides :

“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.”

Congress may decide when a republican form of government exists in a State, by means of its power to admit the Senators and Representatives from that State to their seats in the respective Houses of Congress. Congress has also provided by law for the occasion and manner in which the President may intervene to repel invasion and suppress domestic violence upon the application of the Executive or the legislature of the State.

**The Cabinet.** — The American Cabinet, like that of Great Britain, is not a formal legal body recognized by statute; it is a weekly gathering of the heads of the ten executive departments for report and conference with the President. The members meet in the President's office and are seated about a central table in the order in which their respective departments were created by law, and their reports are usually heard in this order unless events of special importance in one department should cause a deviation from the customary program. The Secretary of State is seated upon the President's right, the Secretary of the Treasury upon the left of the President and so on, the order of precedence being as follows: State, Treasury, War, Justice, Post Office, Navy, Interior, Agriculture, Commerce, Labor.

The affairs brought up for discussion are selected from the few most important matters in each department. Formal motions or resolutions are not made but a full and free expression of opinion is invited. At the close of the meeting a brief memorandum of the action agreed upon is usually communicated to the press. An interesting feature of the Cabinet is the combination of Business and Politics represented in its personnel. Our Presidents are obliged to enlist the political support of doubtful States and of doubtful factions in the party by allying the leaders with the administration. One of the best ways of doing this is by appointment to the Cabinet. But it is also necessary to have certain important departments

headed by men with special administrative ability regardless of their prominence or insignificance in the party leadership. While it is conceivable that a group of capable business and professional men might administer national affairs so efficiently as to deserve general approval, the President's Cabinet must not only *deserve* but also *secure* approval; that is, some of its members must be skilled in the art of winning popular sympathy and support. The only regular organization for expressing this support is the party. In England this distinctly political phase of the Cabinet is even more pronounced than in the United States. All the leading English politicians of the majority party are necessarily made official members of "the Government." In America the President has developed the practice of securing political counsel from all sections of his party regardless of membership in the Cabinet; the latter body is gradually taking on more of an administrative character, and discusses chiefly executive rather than political questions.

Another important difference between the American and British Cabinets is the custom of American department heads of managing their departments in fact as well as in theory, while the British chiefs rely almost entirely upon their assistants for the ordinary conduct of business. This partly explains the short term of service of most American officials. Such men as have the executive capacity and willingness required to manage a department are in great demand outside the public service.

In our own country the Cabinet takes no political responsibility for the acts of the President; if a department head does well or ill the praise or blame falls on the President. If the President makes a mistake he reaps the results. Nor is there any Cabinet unity or "solidarity" as the Europeans call it, that is, our Cabinet does not stand or fall together as a body — each individual is appointed separately and retains or leaves office as the President prefers. The Cabinet does not resign when Congress falls under the control of the opposition party; it need retire only when the President goes out of office. All these features of our national executive council give it a peculiar position in the government, prevent it from controlling the authority and influence which are exerted by European Cabinets, and make it a body of administrative as well as political advisers.

**Department Heads.** — The general powers of department heads have been well described by Ogg and Ray<sup>1</sup> as (1) the direction of the work of their Bureaus, Divisions, and Offices, (2) the appointment and removal of the personnel of their departments, (3) the issuance of orders, rules, and regulations to enforce the laws intrusted to them, (4) the decision of disputed questions arising from the relations of their department with the public, and (5) advice and information to the President and Congress on matters pertaining to their branches of the service. The department heads enjoy a great advantage over similar executives in the State government in that the Federal department organization is hierarchical. That is, each official from the lowest to the highest is subordinate to a definite superior who in turn reports to one above, and so on, until the department Secretary himself is reached. Next below the Secretary come three or often half a dozen assistant secretaries, each in charge of a group of Bureaus. In each Bureau is a chief to whom report the heads of Divisions. Each Chief of Division in turn has under him the heads of Offices. In this way both power and responsibility are centralized in clearcut, definite fashion. When a recommendation is to be worked out in any department for a change in practice or in regulations or a proposal for a new bill to be submitted to Congress, it is first drafted in the office having charge of the matter. When approved by the chief of the office, it is passed up to the Division, or Bureau, and if O. K.'d here, it is transmitted to the Assistant Secretary who has called for the report. He initials it and sends it to the Secretary of the Department. It is, of course, impossible for each of these men to give a thorough, complete, and independent review of the whole matter, nor is it desirable that they should do so. But it is important that from the President down to the lowest employee in the Civil Service, a definite train of responsibility exists, and that both executive action and recommendations for law-making come up in regular order from those who are intrusted with enforcement of the law. If our legislative projects were all so submitted to the competent administrative officials for review before being passed by Congress, a substantial improvement in their quality and a reduction in their quantity would result.

**The President as a Leader of Public Opinion.** — Since the Presi-

<sup>1</sup> *Introduction to American Government*, page 294.

dent is now the chieftain of his party and has taken the responsibility for all important party measures, he must have an opinion on every national question of the day and must place this opinion before the people.

The usual means is the semi-official statement given to the public journals. The Associated Press and all the larger daily newspapers of the country maintain special correspondents with offices in Washington. These press representatives are recognized and given special privileges in the Executive Office Building. The old-fashioned interview with all its opportunities for misunderstanding and mistaken inferences, is considered unsatisfactory and has become rare. The President's secretary prepares full statements for the press which are sometimes read to the assembled newspaper men or are manifolded and handed to them for such use as their papers may wish to make. If public interest in the question is active, the official statements often reach a column in length and are placed on the front page of every morning paper in the country.

The influence of these written statements is general and profound. Within twenty-four hours the President by this method is enabled to place before the entire nation a concise, popular summary of his attitude, framed in his own words. It is not strange that these frequent, published addresses to the people have become one of the strongest means of molding opinion.

Every citizen has laid on his breakfast table in the morning a communication from the chief Executive of the nation. Opinions may differ as to the advisability of his acts but the advantage is all with the President. The people feel that they are taken into his confidence and he is able to build up a strong popular support for his ideas. One result is the strengthening of his influence on legislation. He finds that his efforts to secure the passage of his bills through Congress are aided by the force of the public opinion which he has himself aroused. This opinion makes itself felt in letters to Congressmen, in letters to the public press, and in the editorial attitude of the newspapers, so that on important issues it becomes difficult for the party leaders to withstand the pressure; they often fall in with the President's program because it has become the people's program.

**The Strong President.** — A few decades ago the popular candi-



date for President was a man without enemies — one who, because of his diplomatic, tactful attitude towards all public questions, had avoided provoking hostility and who was therefore welcome in all factions of his party. Lord Bryce, in the first editions of his well-known work, *The American Commonwealth*, included a chapter with the title, "Why Strong Men Are Not Chosen Presidents." But in thirty years our conditions have greatly changed and the people no longer have an interest in the candidate who is a tactful non-entity. Rather do they favor one who proposes that something be done and who is himself a man of action. In response to this new popular feeling the political leaders usually choose men of positive force and strong views. This is not peculiar to our present conditions; in the past the national crisis has called forth the strong man. When the slavery question suddenly transformed itself into the problem of secession James Buchanan occupied the presidential chair. Amiable, well-meaning, and honest, he tried to compromise the difficulty, but in vain. The majority of the people, feeling the need of a pronounced and positive character, then turned to Lincoln. Examples might be multiplied, but it is a familiar fact that the man of purpose and capacity is often forced up by the emergency. If now we add to this the fact that our present national questions are steadily growing in breadth and importance and that they can no longer be solved by the former innocuous type of statesman we may realize how completely the qualifications for the Presidency have changed and how difficult if not impossible it would be to return to the old standard.

Our view of the stronger Executive is accordingly a matter of temperament. If we believe that a passive, quiescent government is required, we shall fear the one-man power because of the danger that it may be controlled by a misguided or an unscrupulous Executive. In such a case, we say, would not the very efficiency, rapidity, and irresistible power of the office become a two-edged sword which might plunge the country into war, debauch the national Civil Service, prostrate the business interests of the nation, and even destroy popular faith in republican government? A strong Executive from this standpoint is dangerous because he is efficient for evil as well as good. But if we feel that a new era has set in in American national life and that our government must imperatively be reinforced to cope with the greater problems of

this new era, we shall be more impressed by the need for action than by the danger of mistakes, and our ideal will be an active government guided by a strong man.

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## QUESTIONS

1. Prepare a summary of the provisions of the Constitution on the following points:
  - (a) Date of Presidential election.
  - (b) Presidential electors.
  - (c) How are electors chosen?
  - (d) How, where, and when do electors choose the President and Vice-President?
  - (e) How, where, and by whom is the vote counted?
  - (f) How many are necessary to a choice?
  - (g) How shall the President be chosen if no one secures a majority of electors?
2. Correct the following statement: The Constitution provides that the people shall elect electors who shall choose the President.
3. (a) Who determines whether women may vote for President?  
(b) Would an Act of Congress, granting to all citizens of the United States over 21 years of age the right to vote be constitutional?
4. If three candidates divide the electoral vote between them so that no one has a majority, and if the House of Representatives fails to give any of these three a majority, who would be the President? Give your authority.
5. Which of the following men would be ineligible to the presidency and why?

John Doe, born in New York of English parents, October, 1877.

Richard Rosen, born in Sweden, 1876, of American parents, who later returned to this country.

Wah Lee, born in 1872 in America of Chinese parents.

Charley Lee, born in Shanghai in 1879, whose father brings him to America in 1871.

Jacob Higginheimer, born in Ireland in 1874, immigrated to the United States in 1894 and naturalized in 1909.

6. Resolved that the President should have a six-year term. Defend either side of this question.
7. How was it intended that the President should be chosen? Did the fathers want the method to be democratic? Why?
8. How has this method been changed by the rise of political parties? How by the Twelfth Amendment?
9. Resolved that the President should be chosen by direct election. Defend either side of this question.
10. Show by figures how one candidate can secure a majority of the popular vote and another a majority of the electoral vote.
11. In such a case as the above, which candidate is elected and why?
12. Why does not the State legislature provide by law that each candidate shall receive a number of presidential electors in the State proportionate to his share of the popular vote in the State?
13. Contrast the salary of the President with the amount of appropriations which he actually controls for executive purposes.
14. Can Congress increase the salary of a President whose policy it approves? Why?
15. Can Congress diminish the other allowances of a President whose policy it disapproves? Why?
16. What does the Constitution provide as to the President's power of appointment and how are appointments made in practice?
17. Explain the number and importance of the positions filled by the President with the consent of the Senate.
18. Why does the President lose so much time on appointments?
19. Resolved that the President should be allowed to make appointments without the concurrence of the Senate. Take either side.
20. What does the Constitution provide as to the legislative powers of the President?
21. Did the framers of the Constitution intend the President to be the active force in law-making? Why?
22. What influence has the annual message to Congress?
23. The veto?
24. How has the President secured the leadership in legislation?
25. Prove that this leadership is a temporary change due to the personality of certain Presidents, or that it is a permanent feature of our government.
26. Mention some important laws in recent administrations that were passed under presidential influence.
27. Explain the arguments used against executive influence in legislation.
28. What is the practical effect of the opposition to this influence? Why?
29. Explain how and why our foreign relations are growing in extent and importance.

30. Point out the change in our attitude toward foreign trade.
31. Cite all the clauses of the Constitution dealing with foreign relations.
32. Describe briefly the various grades of positions in the diplomatic and the consular services.
33. Explain the present method of choosing men for these services; are they permanently retained? Reasons.
34. How could the effectiveness of our foreign services be increased?
35. Why was a two-thirds majority of the Senate required for the approval of treaties?
36. How does this fit in with our present needs?
37. If a treaty negotiated by the President and passed by the Senate provides for the payment of a sum of money, what further steps must be taken to render the treaty effective?
38. If a treaty and a State law conflict, which takes precedence according to the Constitution?
39. Mention some conflicts which have occurred in practice and their results.
40. Correct the following statement: The President shall have power to declare war.
41. What is the President's influence in bringing on or preventing a declaration? Examples.
42. Can the President, without consulting Congress, recognize a new nation as independent and sovereign? Reasons.
43. Can the President declare that the sovereignty of the United States extends to a given island, and if he does so is his declaration binding? See *JONES v. UNITED STATES*, 137 U. S. 202; 1890.
44. Mention some of the ordinary day-to-day negotiations with foreign powers.
45. Explain the need of a constructive foreign policy and some of the necessary principles of such a policy.
46. Cite the Constitution on the President's executive power and duty.
47. Why has the Executive so much freedom of discretion and judgment in enforcing the laws?
48. The tariff law of 1909 gave to the President the power of levying a maximum or minimum rate upon imports from foreign countries according to their treatment of our exports to their territory. How would you justify such a provision?
49. Why is elasticity especially needed in the executive department?
50. If the President in executing the tax-laws encounters violence, what can he do? Give examples.
51. Under the President's authority a deputy marshal is assigned to accompany and protect a United States Judge, against whose life threats have been made. In a restaurant where the two are seated an attack is about to be made upon the Judge when the deputy shoots and kills the assailant. Can the deputy be punished under State law? Why? See *In re NEAGLE*, 133 U. S. 1; 1890.
52. A mob obstructs the passage of a mail car. What can the Federal authorities do?

53. Cite the Constitution on the military powers of the President.
54. Why does not the President become a permanent dictator by means of these powers?
55. Why does not the annual message of the President command greater influence on legislation?
56. Explain the present usefulness of the message.
57. When a recent strike at Colorado had got beyond the control of the State government the Governor called upon the national government for protection. What clause of the Constitution justified the President's interference? Could the President under those circumstances control the Colorado militia?
58. How does the national government protect the States against violence and disorder?
59. Is the Cabinet provided for by law? What is its purpose? Explain the various elements which usually compose the Cabinet and why.
60. Mention some of the chief differences between the American and the British Cabinets.
61. Correct the following statement: The President has power to introduce in Congress bills covering the recommendations made in his annual message.
62. Why and how does the President seek to influence public opinion after he has secured office? Mention some examples.
63. Can the President pardon a highwayman who holds up a pedestrian on the streets of Chicago? Reasons.
64. U. S. Judge X is impeached and discharged from office by Congress. Can the President pardon him and restore him to the bench? Why?
65. Resolved that the welfare of the country is best served by a stronger executive department than that planned by the framers of the Constitution. Take either side.

## CHAPTER 3

### THE HOUSE OF REPRESENTATIVES

**Why the House Is a Popular Body.** — The American visiting the Capitol at Washington approaches the Supreme Court Chamber with reverence, he listens to the Senate debates with mingled respect and doubt, but he enters the Hall of the Representatives with the hope that here he will find *his* delegates expressing *his* views. "The House," as it is familiarly called, is the traditional protector and champion of the people's cause. It inherits all that popular confidence and loyalty which have accumulated through centuries of struggle in England between the House of Commons and the King and through the long colonial era in America when the people's representatives in each colony defied the royal governors. Such is the force of old traditions. But the House is also popular because it personifies all the national qualities of our people. It has its moods of exalted patriotism and of captious irritability, of noble self-devotion, and of flippant cynicism. It can vote by acclamation in the twinkling of an eye 640 millions of dollars for national defence, or it can spend an entire afternoon on the hilarious and farcical discussion of a bill providing a whipping-post for wife-beaters in the District of Columbia. The same House which as a Committee of the Whole, threatens to plunge our civil service into the corruption of fifty years ago, by refusing to appropriate money for the expenses of the Civil Service Commission, rises from its session as a Committee and becoming once more the House proper, gravely votes to grant the appropriation which it threw out as a committee. Then, too, the House has the American love of extremes. It will follow its leaders sedately and decorously for half a session, then suddenly rising up for one exhilarating moment of utter defiance it can brush aside all the carefully laid plans of the leaders and send Speaker, Rules Committee, Senate, and President about their business. Because it represents so many

sides of American character, strong and weak, exalted and commonplace, the House has won and maintained the sympathy of the masses.

Another cause of its popular nature is the shortness of its term. As one of the Federalist writers has said, the House cannot get far away from the people in sentiment and opinions, because its term is only two years. This is a briefer term than that of any other important national legislature in the world. The British House of Commons is elected for five years but may be dissolved at any time and a new Commons may be elected in response to a change in public opinion. Our House while elected in November does not go into office until the fourth of March after its election and usually does not meet until the following December, one year and one month after its election. The Congress should meet shortly after its election.

Then too, the House has always been elected directly by the people. The men of 1787 had little confidence in popular government. Direct election of Senate or President appeared to them to be an experiment so fraught with dangers of demagogue rule and popular turbulence as to be out of the question. In the House however a concession to democracy seemed reasonably safe provided it was checked by an indirect method of choice for the other departments. Section 2 of Article I requires that the voters shall have the same qualifications as electors of the most numerous branch of the State legislature. In Colonial times the most numerous branch of the Colonial legislature was the lower house, and it was this lower house which had most firmly espoused the popular cause.

Finally the House is popular in a deeper sense in that it represents the people directly in proportion to their numbers while the Senate represents arbitrary State lines. The majority of the people no longer controls the majority of the Senate because in it the new and sparsely populated States which have been carved out of the West, taken together with certain diminutive Commonwealths in the East, possess a balance of power. But in the House a just rule of apportionment according to population has created a confidence that the majority of the members represents most of the people.

**Qualifications.** — The requirements of Section 2 that every member be twenty-five years of age, seven years a citizen of the United



States, and an inhabitant of the State from which he is chosen, are designed to secure a reasonable maturity, Americanism, and knowledge of local conditions. In practice no man is nominated as Representative by any party unless he resides in the district from which he is to be chosen. If any party were to break this custom, the opposition would have an excellent opportunity to appeal to local prejudice by nominating a man of local prominence against the outsider. There are many strong reasons for allowing any citizen who is an inhabitant of the State, to be elected from any Congressional district within the State as is the case in Europe, but the establishment of such a practice is difficult if not impossible in America because of the political effect just described.

**Basis of Apportionment.** — The apportionment of members among the States according to population was originally a complicated matter because of the dispute between the slave and free States in the Convention of 1787. The slave States wanted slaves counted as a basis of apportionment; the free States objected. The same dispute arose on direct taxes, the free States wanting the slaves counted for taxation, to which the slave States objected. A deadlock resulted from this inconsistent position taken on both sides, and a compromise was finally effected, by which direct taxes and representation in the lower house were coupled together, and it was agreed that for both purposes a slave should count for three-fifths of a white person, leading to the curious Clause 3 of Section 2, Article 1, that "representatives *and* direct taxes shall be apportioned, etc." The three-fifths clause has since been repealed by the Thirteenth Amendment, which abolishes slavery, and the Fourteenth Amendment which provides simply that "representatives shall be apportioned among the several States according to their respective numbers." The same section further declares that when male citizens of the United States, twenty-one years of age, are denied the right of suffrage by a State, the representation of that State shall be proportionately reduced in the House of Representatives. This latter provision, which is aimed to protect the negroes' right to vote, has never been enforced by Congress because of the disinclination to raise the race question and also because of the very great difficulty of ascertaining the exact number of persons who have been disqualified, and of making a proportional reduction in the representation of the State.

**Congressional Districts.** — After each decennial census Congress passes an act fixing the number of members of the next House and redistributing the Representatives among the States according to the new figures of population. It then becomes the duty of each State legislature to divide the State into Congressional districts, provided a change in the State's representation has been made. A State however may, if it chooses, elect its Representatives "at large"; that is, the State is not divided into districts, but the Representatives are elected from the entire State. Each voter instead of balloting for only one Representative from his district, ballots for as many Representatives as the entire State is entitled to elect. This plan is now practiced in North and South Dakota and Washington. It is open to the objection that the minority party can elect no Representatives at all from the State, but the majority party takes all, although it may have only 51 per cent of the total vote, while under the district plan a section of the State which favors the minority party may elect a Representative of that party. Some abuse has been made of the district method by dishonest elements in the State legislatures; in some States the legislatures have so arranged the Congressional districts as to throw into each district a majority of voters of the majority party, thus giving it practically all the Representatives from the State. This is called a Gerrymander.<sup>1</sup> The fairest method would be to elect at large the

<sup>1</sup> The best short but comprehensive description of this dishonest practice is given in Bryce, *The American Commonwealth*, Vol. I, page 126, new edition:

"So called from Elbridge Gerry, a leading Democratic politician in Massachusetts (a member of the Constitutional Convention of 1787, and in 1812 elected Vice-President of the United States), who when Massachusetts was being re-districted contrived a scheme which gave one of the districts a shape like that of a lizard. Stuart, the well-known artist, entering the room of an editor who had a map of the new districts hanging on the wall over his desk observed, 'Why, this district looks like a salamander,' and put in the claws and eyes of the creature with his pencil. 'Say rather a Gerrymander,' replied the editor; and the name stuck. The aim of gerrymandering, of course, is so to lay out the one-membered districts as to secure in the greatest possible number of them a majority for the party which conducts the operation. This is done sometimes by throwing the greatest possible number of hostile voters into a district which is sufficient to turn the scale. Thus a district was carved out in Mississippi (the so-called Shoe String district) 500 miles long by 40 broad, and another in Pennsylvania resembling a dumb-bell. South Carolina furnishes some beautiful recent examples. And in Missouri a district was contrived longer, if measured along its windings, than the State itself, into which as large a number as possible of the negro voters were thrown."

Representatives from each State but to adopt some plan of voting that would secure proportional representation to the minority party. Such a plan is considered in Chapter 27.

**The Special Right to Propose Tax Bills.** — It is for the control of taxes that nations establish representative legislatures. The British House of Commons fought with the Crown for centuries to conquer and maintain this right over the purse, and it was only in the measure that the Commons succeeded, that real popular government was established. Almost without exception, the great constitutional documents of Great Britain from Magna Carta in 1215 down to the Bill of Rights of 1689, contain the solemn promises of the King to respect this right. One of the means of securing popular control is the custom of allowing only the direct representatives of the people to propose tax bills. Our American House has inherited this privilege, which is guaranteed by Section 7 of Article I: "All bills for raising revenue shall originate in the House of Representatives." The Senate is of course allowed to amend a tax bill; it may also introduce a bill providing for the appropriation of money. Since the Senate amendment may and often does take the form of an entirely new substitute for the House bill, the ancient privilege of the lower house amounts to nothing in practice. The real advantage is with the Senate, as we shall see.

**Impeachment.** — A second special prerogative of the House is the power of impeachment. Section 2 of Article I provides "The House of Representatives shall choose their Speaker and other officers and shall have the sole power of impeachment." By impeachment is not meant the hearing and final decision of the case (this duty belongs to the Senate, which is the trial court), but rather the bringing of a formal accusation. This accusation, which is technically the impeachment, is formulated by the House. After the resolution of impeachment has been passed, a special committee of the House is then chosen to present the charge to the Senate and to conduct the prosecution before the latter body. In the final trial before the Senate a majority of two-thirds of the Senators present is necessary for a conviction but in the House the vote to bring the accusation or impeachment may be a simple majority. The most noted trial in America, that of President Andrew Johnson, resulted in a failure by one vote to secure the necessary two-

thirds majority in the Senate. President Johnson's differences with Congress were mere differences of opinion on questions of reconstruction policy, in which it now seems he was right, whereas the process of impeachment was intended as a punishment for flagrant wrongdoing. The influence of partisan or factional intrigue in the determination of a case was not foreseen by the framers of the Constitution. Impeachment is no longer considered a feasible means of remedying any evils short of treasonable misconduct.

**The Speaker.** — When the authors of the Constitution provided that "The House of Representatives shall choose their Speaker and other officers" they had in mind a Speaker who would act merely as a chairman in debate, presiding over the proceedings with that impartiality which is customary in all foreign legislatures, especially in Europe. But the keen conflict of parties in the United States, and the many opportunities that are presented to the minority party to obstruct business by taking unfair advantage of the rules, have placed the Speaker in an awkward predicament. Either he must stand by and see the measures to which his party stands pledged, blocked by the obstructive stratagems of the minority, or he must plunge into the conflict and use his official power to aid his party in the passage of those measures. He has chosen the latter course. Whether the Speaker has been Clark, Crisp, or Randall of the Democrats, or Cannon or Reed of the Republicans, he has been forced to abandon all pretence of impartiality and to support and guide his party in its legislative program. Previous to 1910, the Speaker was the autocrat of the House. He appointed committees and their chairmen, he dominated the all-powerful Committee of Rules which determined the order of business of the House, and, by his influence over the committee chairmen, he determined what action should be taken by each committee on every important bill referred to it. As his prestige grew the competition among the members of the House for his personal favor also increased; it was in the Speaker's power to consign a member to oblivion or to exalt him to the chairmanship of a strategic committee upon whose work the attention of the Nation would be concentrated. It was therefore natural that this control over the personal destinies of members of the House should make the Speaker not only the moderator but also in a real sense the dictator of the House.

The Speaker became the maker of both laws and men. He determined who should stand in the public mind to represent and personify the principles of the majority party, whose names should be on every lip in political discussion, whose speeches should be printed in the newspapers, and who should lead the party on the great issues of the day. As ex-officio member of the Committee on Rules, the Speaker determined what measures the House should consider, and for how long. Armed with this power, it was inevitable that he must sooner or later confuse his personal views with the will of the majority party, and that when these two conflicted, he should be in position to use every means in the control of his office to suppress opposition.

It was this personal use of the Speaker's power which led in 1910 to an insurrection within the Republican party. The insurgent element declared for greater democracy, for more frequent consultation of the party members on questions of policy, and the total and complete abolition of the Speaker's practice of punishing men who opposed him in the party councils. They declared that no party member who merely differed from the Speaker on questions of policy was therefore to be excluded from the important committee appointments and otherwise punished in the procedure of the House. The insurgents claimed that in order to protect the members of the party and insure the carrying out of its will the Committee on Rules should not be under the control of the Speaker, nor should he be a member of it, but that it should be elected by the members of the House. The committee on rules was enlarged from five to ten members, elected by the House, and the Speaker was deprived of his membership in the committee. In the following session of Congress the Democrats were in the majority, and the first question which claimed their attention was the revision of the Speaker's power. Having steadfastly declared for a more democratic form of organization, they proceeded to reorganize the entire committee system and the House rules.

**Selection of Committees.** — The first step was to provide that all standing committees, which are the important ones, must be elected by the House. This at one stroke removed from the Speaker his most extensive and most dreaded power. In practice, the committees are now chosen as follows: The majority party holds a caucus at which it elects by ballot a party committee on

committees. This body is composed of the party leaders, and its duty is to distribute committee memberships among the different members of the party. Each member is placed according to his importance, experience, and ability, but not according to his mere docility or compliance with the wishes of the Speaker. The committee on committees, having completed its labors and arranged its lists, a formal meeting of the entire House is called, at which the various members are nominated for the committees to which they have been assigned, and are formally elected to the same. With slight variations, the same procedure is followed by the minority party which has meanwhile had assigned to it a certain number of places on each committee. These places are distributed by the caucus of the minority party by its executive committee. Its committee members are nominated in the House election and formally chosen at the same time as the majority members, the floor leader of each party making the nominations. We must not suppose that this new plan of electing committee members thereby removes them entirely from the control of the party leaders. Such a system is unthinkable, because with it the discipline of each party would disappear. On the contrary, the new system simply transfers party control over the members from its arbitrary, intensely concentrated form in the Speaker's hands to the hands of the committee on committees, which is a gathering of all the party leaders of the majority. While this may not appear to be an important change in theory it is in practice. All the members of the House would prefer to have their committee appointments, and thereby also their opportunities for legislative work, decided by a gathering of the leaders than by a single individual. It is this change from a monarchy to a representative system in the control of procedure which makes the new plan more welcome to the members, and on the whole more successful in the operation of the House.

**Present Powers.** — In spite of this curtailment of his prerogatives, the Speaker still wields the strongest influence in legislation. He presides over the proceedings of the House, refers bills to Committees, and in general is the leader of his party in the House. In presiding over debates, he recognizes whom he will. Theoretically, the first member who rises and addresses "Mr. Speaker" — has the floor, but in practice such an informal method of securing the ear of the House is most rare and can occur only in unimportant

debates. The Speaker now either has at his elbow a memorandum of the men whom he is to recognize and give the floor, or he has already arranged with the floor leaders of the respective parties that they are to divide the time for debate among their followers. In a general, promiscuous debate the Speaker can and does select those men for recognition who will voice the sentiments which he wishes to have expressed. Therefore as the arbiter or pilot of debate the Speaker can not only protect his own party from defeat and delay, but within his party he can strengthen and develop that group of men which he favors. As presiding officer, he decides points of order and procedure, always with a view to helping his party's legislative program.

**Committee on Rules.** — This body is at present composed of ten members, elected, four by the minority and six by the majority. The work of the committee is to prepare a set of rules of procedure for adoption by the House and to bring in from time to time special rules determining what measure the House shall consider. The procedure rules have grown up through a century and a quarter of Congressional practice and are therefore little changed from term to term, even when the majority passes from one party to another. They cover about one hundred and fifty pages, including Jefferson's Manual, and are renewed by motion at each Congress. But the most important power of the committee is its right to bring in a single rule at any moment. The committee's report is in order at any time, and takes precedence over all other business. The report when made must be acted on immediately by the House, usually with an extremely limited time for debate, — often not more than ten minutes on each side.

In order to appreciate the practical value of the committee's work, let us take the House for example at a time when the two parties are nearly equal in numbers. The minority, feeling its strength, is making every effort to prolong debate and to harass and delay action. The majority, feeling its control over legislation slipping from its hands, is beginning to grow restive under the strain. In such a case, heroic measures are needed. The majority leaders, who are nearly all members of the Committee on Rules, confer with the Speaker and agree on a rule which shall confine the House to the consideration of a particular measure, and shall insure an early vote. They

prepare a rule accordingly, providing that on a given day the House shall proceed to the consideration of House Bill No. 362 and shall continue such consideration from day to day. This means that House Bill No. 362 is to be taken from its place far down in the calendar and given preference over all other measures until passed. The majority members of the committee, having agreed, the minority members are then notified and the committee of rules reports its rule to the House for approval. The House must then decide at once to accept or reject the rule. It necessarily adopts the rule, because a rejection would mean the repudiation of the majority party leaders, something which rarely occurs for obvious reasons. The change made by the Democrats and Insurgent Republicans in the committee on rules has not diminished the powers of that body, but has distributed these powers among the leaders of the majority party instead of concentrating them in the hands of the Speaker, as was formerly the case.

**Floor Leaders.** — The position of floor leader is highly important but is little understood by the public. Briefly summarized, his duties are to direct and manage, for his party, the debates on important measures. Congressional debates involve numberless questions of parliamentary law and legislative procedure of such complexity as to require the talents of skilled parliamentarians. The first function of the floor leader therefore is to avoid the pitfalls by which the opposition party may attempt to defeat a bill and the embarrassments into which its own advocates through carelessness may bring it. The conduct of a debate also involves far more than a series of speeches on each side; if the bill is one of importance, to which the party stands pledged, it must be put in the most acceptable form, it must be advocated before the House by the strongest speakers, and these speakers must bring out the best features of the bill; this must all be done within a limited time and in such a tactful way as to keep the rank and file of the majority members enlisted in support of the measure. This is the second function of the floor leader, — to marshal the forces of his party so as to present the most effective array in debate and maintain carefully the party strength and support. This second power leads to some curious results in practice. Let us take the final debate on an important bill in the House. The majority floor leader confers with the minority leader and a verbal



agreement fixing the day and hour for the final vote is reached. This the majority leader can easily secure because he is supported by the Committee on Rules, which if necessary can report a special order fixing a time for the vote. The agreement frequently provides that one hour for debate shall be given to each side before the final vote is taken.

The floor leader of each party then arranges the list of speakers for his side. Strange as it may seem, a Representative who wants to address the House is in this way often obliged to report to his floor leader and have his name placed on the list of party speakers by the leader, otherwise he has as little chance of securing the floor as has a spectator in the gallery. It will be noticed that such an arrangement gives the right of debate, not to members of the House, but to the party organizations in the House, and within these party organizations, it recognizes the leaders only. The severity of this rule varies according to the importance of the bill under consideration and to the amount of free time which the House has at its disposal. Occasionally on a minor bill, or in the early days of a session when there is no business of importance pending, the floor may be open to all members of the House, and the pent-up stream of oratory may be allowed to flow for two or three days. Paradoxical as it seems, the Representatives can speak at length only on unimportant measures or those in which the people have little or no interest; on essential bills, only from one to five minutes can be allowed to each member on the floor of the House.

The leader may conduct his debate in either of two ways: he makes up a list of his party colleagues who wish to speak and who have handed their names to him for that purpose, which list he then delivers at the Speaker's desk, thereby fixing the order in which the members of his party shall take the floor; or more usually he claims for himself all the time allotted to his party, and after having made some preliminary remarks, he yields the floor for a fixed time to each one of his party colleagues whose names are on his list. At the end of each of these speeches, he states, "I now yield the floor for — minutes to my colleague from —." The gentleman from — speaks for the allotted period, and so on down the list. When the list is exhausted, the floor leader then arises and concludes his own remarks, summing up the arguments of the

preceding speakers and reënföring them with others of his own. In this way he controls the discussion at all times. In many cases where the time allowed is extremely limited and only one hour can be given to each party, the share which an individual member may receive from his floor leader is exactly one minute, and even then a number of members must be denied a hearing. Because of the importance of expert management of debates, the position of majority floor leader is the most responsible post in the House next to that of the Speaker; for this reason also it is necessary that he should be posted on all points which may be brought up in connection with the pending debate, and if the official leader is not so prepared, it is customary to make the chairman of the committee which has reported the bill the floor leader for that particular bill, thereby bringing to the front for the majority party the strongest representative in its membership.

**Choice of the Floor Leaders.** — Although the floor leaders are men of great influence and authority, they are not irresponsible despots — usually they are prospective candidates for the position of Speaker in some future Congress; a fact which makes them solicitous to win as large a personal following as possible and renders them amenable to any strong and continuous drift of opinion among the House membership. Then too, they must be leaders in the real sense of the word; that is, they must be able to control and influence the votes of their fellow members. They are chosen by the caucus of their party.

The minority party also holds a caucus and nominates a candidate for Speaker, who is foredoomed to defeat at the subsequent election of the House, but who becomes the leader of the minority, is so recognized in debates by the Speaker of the House, and is given charge of the floor for the minority party. He is also elected on the important committees. In this way he becomes almost as absolute in his sway over the minority party as are the Speaker and his floor leaders over the majority party. In both parties discipline and "organization" are the controlling influences.

**The Caucus.** — Frequent reference has been made to the caucus; this is a secret conference of members of a party for the purpose of securing unanimous party action on some important question. Such a question may be the nomination of a Speaker, the decision as to how the party should vote on an important bill or resolution,

or the general attitude to be taken by members of the party on some new problem which, it is foreseen, may arise during the session. The main idea on which the caucus is founded is quite simple. Each party knows that if it presents an unbroken front, it not only stands a better chance of dictating to or securing concessions from the other side, but it also commands more substantial support and respect from the people. In the seven years from 1895 to 1903 an internal dispute or schism in the Democratic minority destroyed its ability to caucus in either House or Senate; as a consequence the party fell rapidly to such a position of weakness and helplessness that it lost all control over its own members and became a negligible quantity in national legislation.

Meanwhile, the majority by its strict enforcement of caucus rules was enabled to run the government as it pleased. When in 1910 the Democrats secured a majority in the House they became a constructive party and were obliged to make frequent use of the caucus, aided by the President's active influence. The caucus is the simplest means of preserving party unanimity and discipline in favor of a positive program of legislation. A new bill comes before the House in the early part of a session, and before the discussion progresses to any length it becomes apparent that large numbers of the people are interested in the measure and desire either its passage or its defeat or amendment. If the individual members of the majority party are left to themselves, some will advocate it, some oppose, and some insist on essential changes in the bill, and since the weight of inertia is against legislation, the bill must apparently fail for want of agreement. At this point the caucus machinery of each party is set in motion. The majority meets and perhaps decides that the bill should be made a party measure. This means that every member who attended the caucus must vote for the bill on its passage through the House. He may express what views he pleases in the caucus, he may use all his influence against the measure within the conference room, but once the caucus has acted, he must support the common policy by his vote in the House. "Must" means that if he refuses he is outlawed from his party, the measures in which he is interested are marked for an early grave, he may be denounced to the party executive committee in his State to be defeated in the next election, and his usefulness to his constituents as a legislator is at an end

until he repents, is forgiven, and becomes once more an obedient member of the caucus. Severe as is this discipline it is impossible to see how a party could otherwise secure the passage of legislation for which the country holds it responsible.

Meanwhile the minority party may also hold its caucus and decide on an equally binding policy for its members. Formerly the minority would simply oppose the measure, but since the essential differences in principle between the parties have disappeared and they are now competing with each other on the same ground, the minority is apt to advocate either a more radical or a more conservative substitute for the measure indorsed by its rival.

From this description it will be clear that the caucus is another influence towards the weakening of the individual member for the benefit of the party. It also strengthens greatly the position of the party leaders. By securing the adoption of a bill as a caucus measure they can crush out all effective opposition among the rank and file of the House membership. But we must also remember that it enables a scant majority of the majority to control the action of the entire House, although forming but a fraction of its membership. Many observers have seen in this practice a serious danger to our institutions and have pointed out that a clique of interests may dictate the legislation of the country on important questions. Doubtless the danger is a real one.

But it must be understood that strong influences tend to correct any serious abuse of caucus rule. First, the caucus of the minority party itself which is eager to see and advertise the slightest mistake of its opponents and, by shrewdly taking a pronounced and public stand in opposition, to bring out sharply the contrast between the two parties in the popular mind and thereby win public support. Second, caucus action does not bind individual members except upon measures of serious importance to the party, that is, unless a majority of the party members in the House should declare the matter a party measure. This cannot be done with any bill at the mere whim of the party leaders. In order to outlaw a member who refuses to abide by caucus action the leaders must have the aid of public opinion within the party, and if the impression got abroad that the caucus was being improperly used to push through bills of no essential interest to the party, an immediate rebellion might be the outcome, with disagreeable results for the leaders.

Since 1908 the spirit of independence has become so strong that political ties are no longer all powerful, and the members have grown more keenly sensitive to expressions of opinion among their constituencies.

Third and most important is the good sense, practical experience, and sound judgment of the leaders themselves. They must know when to insist and when to forbear, when to give free sway to individual views, and when to concentrate the entire strength of the party upon a single important measure to insure its adoption. The House may lose its head often, but the leader must never do so. It is this steadiness and breadth of view which offers the chief protection against abuses of the caucus system and of the party discipline. Those who criticize so harshly the emphasis placed on party organization and the practical elimination of the individual at times, must remember that the House has reached an almost unmanageable size, and that although it cannot deliberate with 435 members, yet it must enact into law the principles to which the majority party is pledged. It is admitted that in so doing the free prerogatives and privileges of individual members are often limited to an undesirable, almost intolerable, extent, but this is necessary if the lower House is to be an acting rather than a mere debating body. The mass of bills and resolutions is so great that complete freedom of debate would be impossible and would block action on necessary measures, thereby placing the majority party at the mercy of the minority.

Such are the arguments for and against the present method of controlling the House debates. The present organization of the House, the method of choosing the floor leader, committee on committees, and the party's representatives on the committee on rules seems far more equitable and fairer than the old dictatorship, while still allowing effective concentration of authority in battles with the obstructive minority.

**Reduction in Membership.**—It seems only a question of time until the same movement which has led to the reduction in size of city councils and is now centering around state legislatures, shall also reach the national House of Representatives and cause a change in our present methods of distributing members among the States. Most of the drastic measures which are necessary to secure the transaction of business in the

House and the sacrifice of the new member for the sake of getting bills passed and business transacted might be dispensed with or modified if the House were a body of reasonable size. We may never adopt the commission form of government for the national legislature, but we might unquestionably improve our procedure and the quality of our legislation greatly by making debate possible in the House. With a minimum number of one from each State and slightly more from the larger States, the House could be cut down to a body of 150, a change that would restore to it much of its former importance and prestige.

**Committees.** — Dr. McConachie in his interesting work on *Congressional Committees* has pointed out that the history of a nation is mirrored in its legislative committees. As new questions of public moment arise, new committees are formed to deal with bills on the subject, as old problems are settled and pass out of the political horizon, their corresponding committees diminish in importance and are discontinued.<sup>1</sup> The acquisition of our island dependencies in the Philippines, Porto Rico, Guam, etc., gives rise to the new Committee on Insular Affairs, the demand for more land in the West develops a need for irrigation on a large scale and this in turn causes the establishment of the Committee on Irrigation and the passage of laws which have done more for the West than any measures since the building of the trans-continental railways. Meanwhile, the Pacific Railway question having been solved, there now remains nothing to prevent the Committee on Pacific Railways from disappearing altogether.

Let us glance at some of these "miniature legislatures" as they have been called, and observe their duties.

<sup>1</sup> "Society is everywhere using committees. Their importance in the many lines of public and private coöperation is on the increase. Here a fashionable city club chooses certain of its members to arrange for some brilliant reception; there a busy board of trade requires a select few of its body to report upon an important commercial undertaking. The Christian Endeavorers find remarkable utility in the committee idea. So does Tammany Hall. Alike to the primary and to the governing council in a rural American village, to the German Reichstag and to the active municipality of Berlin, the device is indispensable. . . . Wherever men have begun to use political representation, advantages similar to those which recommended it to democracy have soon led the assembled representatives a logical step farther to commitment."

The Committee of the Whole House on the State of the Union is composed of all the members of the House; it is presided over not by the Speaker but by some member whom the Speaker designates for the purpose. Its rules of procedure, unlike those of the House, are very informal, votes of individual members are not recorded because the proceedings are only those of a Committee. For the same reason its acts, to be valid, must be approved by the House sitting formally as a House. The purpose of the Committee is in general to allow of free discussion and amendment of a measure so as to mold it into the most favorable form for presentation to the House. This is designed to secure the adoption of the best amendments under the most favorable auspices.

The Committee of Ways and Means now has twenty-five members; like all legislative committees its membership is divided among Republicans and Democrats approximately in the same proportion in which the parties are represented in the House. It considers all bills for raising revenue, including tax and bond measures. Taxation is always a central question in Congress, especially so with us because of the protective tariff policy which focuses attention from every business interest in the country. The Chairman must be "sound" and orthodox; that is, if a Republican, he must favor a high tariff, if a Democrat, he must advocate a low tax. It goes without saying that he must also be persona grata with the leaders, otherwise he can expect no chairmanship. If he conforms to these two requirements and is at the same time a man of considerable ability, his prospects of promotion are indeed most brilliant, for he stands before the people as a personal representative of a fundamental issue in American politics.

When a new tariff bill is to be submitted to Congress the chairman draws up a general plan, apportioning the tariff schedules on different classes of imports among the different members of the majority party in the committee. These members draft a preliminary scale of rates for their respective classes of goods, and the whole majority membership is then called together during the summer months and a detailed draft is then made up and completed. When Congress meets in December each division or schedule is then brought up for a series of public committee hearings. These are formal meetings at which representatives of any view

may appear and present their testimony. Such hearings give the committee an opportunity of learning at first hand the precise opinions and wishes of the interests directly concerned; such interests at times employ legal talent for the effective presentation of their cases. The meetings also create in the mind of each set of interests the impression that their side has at least been given a fair hearing. As for the influence of the hearings upon the committee itself, this is in most cases very slight. The hearings usually come after the decision of the majority members of the committee has been made. Finally the committee reports the bill back to the House with a favorable recommendation.

From this brief description it will be apparent that important bills originate with committees, that majority members often prepare such measures before the session, that open hearings may be held, and that a committee either makes no report or reports in favor of a measure.

The Committee on Appropriations was established in 1865. In December, 1920, it was given jurisdiction over all appropriations with a view to concentrating financial control. Fourteen of its thirty-five members are taken from certain other standing committees in order to secure a better knowledge of important subjects of appropriation, *e.g.* Military Affairs, Naval Affairs, Post Office, and Rivers and Harbors.

Membership on the Committee on Appropriations is of great importance because of its control and influence over the executive branch of the government and over the general disposition of the public funds. The Ways and Means Committee touches closely the industrial system of the country through its control of the tariff but a membership on Appropriations gives a Representative the enviable position of a dispenser of moneys. To this Committee the Budget of the executive departments must come for funds, and all extra expenditures must be explained and justified. Its membership therefore confers a peculiar influence and power and often leads to higher preferment. It ranks second in importance and influence among the House committees.

The Committee on Rivers and Harbors, for reasons similar to those already given, also occupies a front rank. Although it is a comparatively young body, having been established in 1883, its jurisdiction over the improvement of rivers and harbors gives



into its control the commercial development of nearly every important city in the United States. There are few large municipalities in the country which are not located on some body of water. The struggle to secure Congressional aid for harbor improvements is in fact a struggle for existence. The inclusion or omission of a city in the general harbor improvement plan rests with the Committee. There is another important aspect of its powers. There are several means of building up the party influence in doubtful States, one is by appointments in the Federal service, another by Federal appropriations benefiting the State.

The disadvantages of the plan are obvious, in that the "solid" States are apt to have their interests woefully neglected. The remedy lies largely with the "solid" States. They should insist upon a more reasonable and equitable distribution of government improvements. Signs of such a change of attitude are already visible. The essential point is that in all the interplay of interests and influences between different sections of the country, between parties, and between different factions within a party, the decisive victory is usually won in the deliberations of some Committee.

The Committee on Interstate and Foreign Commerce, established in 1891 to take the place of the old Committee on Commerce created in 1795, has jurisdiction over the most important problem now confronting the national government, — the adequate regulation of railway, steamship, telegraph and express companies, oil pipe-lines, etc. Commerce between the States and with foreign countries is under the jurisdiction of the national government. Since the formation of the great industrial and commercial combinations it has been a matter of complaint by the smaller producers that the combinations have received special favors from the railways, while the smaller shippers have been discriminated against. Other serious evils have arisen in the transportation systems of the country until the general impression grew up in the public mind that the national government must intervene more actively to insure fair treatment for all. Great waves of public feeling have at various times swept over the country, and in response to these, laws have been enacted designed to allay public indignation. Such has been the work of the House Committee on Interstate Commerce. Its economic importance is second only to that of the Committee on Ways and Means.

In addition to these committees which may be called the cream of the House organization there are a number of other standing committees such as :

Foreign Affairs	Coinage
Military Affairs	Elections (3 divisions)
Banking and Currency	Insular Affairs
Post Office and Post Roads	Irrigation
Immigration	Naval Affairs
Judiciary	Patents
Agriculture	Public Lands
Claims	Territories, etc.

The total of these standing or permanent committees is 60. The members are elected as above described at each new term of Congress and serve two years until the next Congress comes into office. Besides the Standing Committees there are certain Select Committees which are temporary bodies chosen for the purpose of making an investigation, or of conferring with representatives of the Senate to secure an agreement of both Houses upon a measure.

**Conference Committees.** — When the Senate and House fail to agree on an important bill, a conference committee is appointed consisting usually of three members from each House. Both sides try to secure an agreement upon the bill with as few concessions as possible, but in this “jockeying” process the Senate enjoys marked advantages. Being elected for six years the Senators know that they do not come up for reelection as soon as do the Representatives. The latter body feels most sensitively the pressure of public opinion and dares not go before the people with a record of failure to enact a popular bill. Therefore the House members of the conference are frequently forced to give in, particularly to Senate amendments on appropriation bills, for if the House allowed the appropriation for the executive departments to fail, the members would suffer at the next election. The conference proceedings are secret. Certain important measures such as the tariff are sometimes almost re-written in conference committee. This is apt to occur whenever an abrupt change in tariff policy is made. The interests affected by customs duties are highly organized and their spokesmen control sufficient influence in both Houses to defeat or delay radical changes. In the tariff of 1909 it was only the ultimatum sent by President Taft to the members of

the conference committee which prevented that body from raising rates instead of lowering them as the party had pledged in the preceding election. As a rule conference reports are adopted by both Houses.

The new member entering Congress is apt to be surprised, confused, and deeply disappointed by the peculiarities of the Committee system. He may have come to Washington with ambition to shine as an orator but finds that little or no oratory is possible in the House. When a debate finally arises on some important measure he discovers that since he is not a member of the committee having it in charge, it is extremely difficult for him to secure the floor and at most only five minutes is allowed him. Looking over his own committee assignments he is further shocked to realize that he has been appointed to unimportant committees in whose action the general public has not the slightest interest, such as "Expenditures in the Interior Department." Under such circumstances the new member is often discouraged. But it is the history of the House that the man who goes to work to master thoroughly the business of his committee sooner or later secures recognition and is advanced to other committees of greater importance.

**Advantages and Disadvantages of the Committee System.** — With a House of 435 members and 30,000 bills and resolutions introduced in one session, it is clear that some means must be adopted to reject the worthless measures and to mold the more important bills into proper form for the better information of the House. The 66th Congress at one time remained continuously in session for eighteen months, passing 547 separate laws, of which 407 were public and 140 private. Abroad this work is intrusted to a single committee, namely, the Cabinet, but in the United States, since the Cabinet is not allowed membership in Congress, the work must be undertaken by Congressional committees separate from the Executive. Furthermore, the different sections of the country and various economic interests must be "recognized"; that is, they must be given chairmanships in the various committees. It has been found impossible to centralize legislative business according to the foreign method — hence our sixty committees with their conflicting schemes of legislation and conflicting claims for the attention of the House. Since each committee feels that its prestige depends upon securing action by the House and the passage in some form or other of a measure

which the committee has introduced, the House as a whole, particularly in the latter half of each session, is harassed and worried by committees demanding the immediate adoption of various bills. If we examine the legislation passed at any session of the House, we find that the measures in question bear little or no relation to each other. While the British Cabinet is able to prepare and carefully work out the plans of legislation for an entire session and to pass these through the House of Commons, our American committees work largely without regard to each other. The effects of committee chaos are noticeable in all parts of our legislation, but in the field of finance, the adoption of the executive budget system described in Chapter 5 and the consolidation of the Appropriation Committees in both House and Senate have removed the most serious weakness. Formerly the Committee of Ways and Means prepared the revenue legislation of the country, but seventeen other committees in the House prepared the expenditures without consultation with each other or with the Committee of Ways and Means. The executive departments made up their estimates of requirements for the coming year and presented them to the various committees having charge of appropriations, but the latter frequently paid so little attention to the estimates as to reduce them almost one-third or to alter them in other material ways. The two changes above mentioned have now introduced greater unity and harmony among the committees dealing with national finances.

**Contrast with Foreign Methods.** — Every observer of American government sooner or later asks — why do we need such an immense volume of legislation? In war time the number of bills actually diminished because of the more concentrated activity of the government leaders. Yet in the 66th Congress nearly 22,000 bills and resolutions were introduced. Of these 470 were passed. Seventy-seven constitutional amendments were proposed and 244 investigations requested. Of the latter 32 were authorized. A comparison of this great mass of measures with that in foreign legislatures, recently made by James A. Emery, Esq., shows that during a fourteen months' session of the British Parliament ending in January, 1916, 231 bills were presented, while during a nine months' session of Congress of that year, 25,700 bills and resolutions were introduced.

From 1901 to 1905 Parliament enacted 1500 laws. In the same period Congress and the State legislatures passed 45,000. The effect on the respect for law and on the economic prosperity of the country of such a vast mass of legislation can well be imagined. To this we must add the admitted fact that the quality is worse than the quantity. Most of them are framed without an adequate understanding of the economic and social conditions involved. They do not fit the already existing law nor are they calculated to produce the effect desired. No stronger argument can be adduced for allowing the executive to develop and present a definite, comprehensive program.

**Foreign Methods of Committee Work.** — In any effort to establish real deliberation in Congress some revision of our committee system must be undertaken. On this point the legislatures of Europe have out-distanced us and have established a method by which each member may take part freely in the shaping and amendment of a bill, without unduly delaying the procedure. While the details vary, the main features of this plan are as follows:

At the beginning of each annual session and sometimes oftener the members are divided by lot into six or even more "sections" or "bureaus" with about fifty to seventy members each. Each bill which is acted on by a House must first come before all of the sections, meeting separately. Amendments are freely offered by everyone interested and quickly acted on. At the close of the consideration each section chooses a reporter to represent it on this one measure. He is often the man who has shown himself in the debate to be most familiar with the subject. A meeting of all the reporters of the sections is then held and the various forms of the measure as amended by the sections are then consolidated into a new compromise bill which is reported to the House. Here again the man who has shown himself to be the best informed may be chosen by the reporters' section to be the final reporter to the House or as we would call it, the floor leader in charge of the bill. By this method every representative is given a chance to debate every bill and is a member of one section. The plan also gives a good opportunity to a comparatively new member to secure advancement and recognition in accordance with his ability. It likewise prevents the "pickling" of bills; that is, the suppression of a measure which may be popular but which a particular com-

mittee does not wish to have considered at the time. In short the method is more direct, more simple, and less time-consuming.

Since the sections could not consider thousands of bills which members might introduce, a special committee under the control of the majority party is provided to sift out those bills introduced by private members and determine which of them shall be submitted to the sections. The most important bills are, of course, introduced and presented by the Cabinet Secretaries and they are the ones to which the sections devote most time. The plan could readily be adapted to American use and would restore our House to the rank of a deliberative legislature.

**How Laws are Passed.** — The time of our House is divided according to formal rule, certain days being reserved for special action. An important bill is usually introduced by the chairman of the committee to which it will be referred. The introduction consists of handing the bill to the clerk; its title is then read. The bill is thereupon referred to the appropriate committee, and either allowed to die without further action or is reported back to the House with a favorable recommendation, and perhaps in an amended form. An unfavorable recommendation is never made, because it is much easier to defeat a measure by making no recommendation at all, whereupon it dies a natural death. The committee having drawn up its report to the House, the bill is placed upon the calendar for consideration and second reading. This is not enough to insure its discussion by the House, however, as there may be a hundred other bills similarly situated. The next step is to secure a definite date for its discussion, and this must be done by an arrangement with the Speaker and the floor leader. The committee having been given a date, the chairman of the committee or the floor leader of the majority party announces the report of the committee. The printed bill is submitted to the members and if it is an important measure, a motion is made to consider the bill in "Committee of the Whole on the State of the Union." In this Committee, the bill is read section by section and a number of amendments are usually reported to the House. The House thereupon adopts or rejects the bill in this amended form, thereby passing it on the second reading. It is at this point that most bills reported by committees usually fail. Either amendments are introduced which completely neutralize the real object

of the bill or the opposition to the measure is so strong as to lead its friends to seek a postponement in the hope of securing a more favorable vote at a later moment. If it runs the gauntlet of the second reading successfully, it is apt to be passed on the third reading without further action, although amendments frequently are made even at this late stage. On its third reading it is read *in toto* with all the amendments incorporated in final form. It is then passed and sent to the Senate. Usually in important bills the Senate makes additional amendments, and these must be approved by the House before the measure can become a law. If the House wishes to accept the Senate amendments, it can do so without further formality by passing the bill once more in its amended form, and it is then sent to the President. If not, a conference committee as already described, prepares the bill in compromise form for final passage.

By reviewing this long procedure through which each measure must pass, we may see how many opportunities there are to defeat legislation and how the weight of inertia is unfavorable to every bill. It is this very inertia which kills so many measures or offers to their opponents the opportunity of secretly amending them in such a way as to defeat their real purpose. It is also this cumbersome nature of the House procedure which necessitates the concentration of power and authority in the hands of a few men in order to secure legislative action.

Votes may be taken either "viva voce," that is by the Speaker's judgment on the volume of sound coming from the Ayes and Noes, or by tellers when so demanded, in which case the members pass between tellers, the affirmative first, followed by the negative, or by Yeas and Nays, as required by the Constitution, when one-fifth of the members present so demand. In the latter case the vote of each member is recorded on the minutes.

**Time-Saving Devices.** — By reason of its large size and the great number of bills and resolutions which are annually presented for action, the House must not only rely upon its Committees, but must resort to every possible expedient to save time. Among the most important of these devices are: (a) The previous question; (b) leave to print; and (c) compelling a quorum.

The "previous question" is a device copied in modified form from the procedure of the British House of Commons. It is a mo-

tion that the question under discussion be immediately voted on. This motion is made by a floor leader or manager of the bill for the purpose of cutting off all further debate. A call for the previous question cannot be argued or discussed, but must be accepted or rejected at once by the House. If carried, the question itself — that is, the section of the bill or resolution which has been under discussion — must be immediately put to a vote without further debate. It will be seen that this is a powerful means of forcing quick action by the House on any bill favored by the majority; in fact, it is an invaluable means of suppressing minority filibustering and obstruction. Since the previous question has come so largely into vogue, the minority has usually submitted to an agreement for a vote at a specified time, knowing that if it does not submit, the previous question will be called for by some member of the majority, and a vote taken at once.

“Leave to print” is the unanimous permission to print a speech in full in the *Congressional Record*. When a member has been granted the floor for perhaps five minutes and his speech is of such length as to occupy much more than the time allowed, he asks for unanimous consent to print the speech in full. This curious system has arisen from the desire of members to send copies of their speeches to their constituents, and as this is a desire common to the entire membership of the House and as a member is much more willing to accept a short allowance of time, provided that he be given leave to print, the unanimous consent required is very seldom denied. Because of this singular practice, the speeches printed in the *Congressional Record* are immensely inflated. Abuses of the privilege have at various times arisen; one member is known to have had an entire book copied in the form of quotations embodied in his speech. The abuse has been aggravated by the fact that each member is allowed the franking privilege of sending speeches and other matter through the mail without postage, and is always supplied by the public printer with a large number of copies of his speech, without charge. Recently attempts have been made to correct this evil, and the printing of books as parts of a speech is now prohibited.

**Officers.** — The Constitution lays no restriction upon the number of officers which may be appointed by the House, and a large list of employeés and officials has resulted. The more important of



these besides the Speaker are the Chaplain, the Clerk, the Sergeant-at-Arms.

There are also hundreds of clerks, messengers, pages, assistants, and employees. These are maintained chiefly for their value as political appointments.

**Number and Character of Membership.**— The membership has been enlarged after each census until recently. The number under the first apportionment was 65 or one for every 30,000 population; at present it is 435 or one to about 230,000.

The members are chiefly lawyers and politicians, of middle age. The salary is the same as in the Senate, \$7500 annually and mileage. Many members have risen from humble circumstances, few are wealthy, and nearly all have simple democratic tastes. One remarkable feature which stands out in strong contrast to conditions in all other important national legislatures is the absence of representatives of the labor class. Even the British House of Commons has its group of 120 Labor Party men, exerting a strong influence on legislation, but in our House the two major parties have hitherto succeeded in maintaining entire control and have made efforts to include labor questions in their respective political platforms. In recent years, however, a number of serious differences have arisen between the majority party leaders and the labor unions, and the formation of a distinct group of labor candidates seems imminent. Many of the more prominent labor leaders now advocate the election of labor representatives to Congress.

**The Sessions.**— The House is elected in November of the even years. But the term of the members then chosen does not commence until noon of the following March 4th (of the odd year). If there is no extra session called at that time, members do not assemble until the first Monday of the following December (of the odd year), that is, thirteen months after election. The first regular or long session then begins. This usually lasts until July. The second regular session beginning in December of the even years is necessarily the short one because the terms of members expire on the next March 4th. Since this expiration puts an end to the Congress, most of the business must be transacted at the first or long session.

**Official Perquisites.**— Certain regrettable abuses have crept into the business methods of the House and Senate and have be-

come a fixed part of their organization. One of these is an extra allowance for clerk hire, which the chairman of every committee receives. Another is the special allowance for session clerks of the committees. In many cases, the chairman appoints a friend or a member of his family to both of these positions. There are also other posts, as messengers and assistant clerks for many of the committees. Yet it has been proven repeatedly in the House debates that between 15 and 20 of these committees are useless and are apparently continued only for the purpose of furnishing patronage and funds to the chairmen. The system has been exposed on the floor of the House at various times. On May 24, 1917, when discussing a resolution to provide clerks for the 11 committees on "expenditures in the executive departments," one member stated that the committees had not taken any action for years and that it would be a great hindrance and obstruction to the executive departments if they did. Another member stated that the Committee on Expenditures in the Navy Department had not met for 19 years. Another, that the similar committee on the State Department had not met for 20 years. Another stated that the 11 committees in question each had the same person as clerk of the committee that was serving as secretary of the chairman of the committee. Another influential member stated that he had served for years on the Committee on expenses in the Department of Commerce and Labor, the chairman of which committee drew the salaries of the secretary and clerk *but appointed no one to either position*. At the time mentioned the House was paying for clerical services, for janitors, and messengers, over \$1,500,000 yearly.

That the right to practice these petty dishonesties is jealously treasured is well illustrated by the treatment accorded to any member who seeks their abolition. On February 25, 1918, Congressman Fuller of Massachusetts, a successful business man who had no patience with the wasteful and pettifogging legislative methods used in the Great War crisis, resigned from the Committee on expenditures in the Interior Department, an unheard of procedure. In a letter to the Speaker giving his reasons, he stated that of the 60 standing committees in the House, more than half were as useless as the one from which he was resigning. His committee had held only one short "smoke-talk" meeting, at which nothing was

done. He asked that the committees be either abolished or be given useful work to do and that the clerical and office perquisites of the Chairmen be abolished.

He immediately became the target of ridicule, sarcasm, and personal abuse in a tirade lasting over two hours, from various members of the House. The leader of the attack against him was later discovered to have appointed his own wife both as session clerk and secretary to himself as chairman of a committee, and to have drawn on account of these two positions held by the same person \$2750 for one session. The financial aspect of this system is the least important. Of far greater significance is the waste of time, the blundering inaccuracy, and the general incompetence which weigh upon all government business as a serious handicap. We may hope that as more light is shed upon this subject by successive inquiries, and by a greater definiteness of responsibility, the House will strengthen its organization by the adoption of more business-like methods.

**A Day in the House.** — A meeting of the House presents many interesting aspects to the visitor. One of these is the marked contrast between the beginning and the end of the annual sessions. At the beginning there is little or no important business ready for action. Most of the committees are industriously working out their drafts of bills and the daily sittings of the House are taken up by lengthy and uninteresting debates on unimportant questions. But when the leaders have prepared their legislative program a sudden change comes, the dull and trivial measures are unceremoniously whisked off the stage, and the real bills are brought out. By this time the session has advanced far towards spring, the battle between Committees for the attention of the House waxes fiercer, the Senate sends in a mass of bills for consideration, and the newspapers begin to call for immediate action on certain measures. The great appropriation bills, carrying millions of dollars of expenditures, commence to take form and to push aside minor interests, the Senate fails to pass important bills sent to it by the House. Conference committees must be chosen and their reports acted on. The numberless private pension bills pile up until they take all the spare time of the House in the evenings. The pressure for legislation grows greater, the hot weather sets in with all its depressing effects in Washington, and there begins a frantic rush

which can be likened only to a panic on the stock market. Bills are passed under suspension of the rules and are ground out with astounding rapidity. In the short session when on March 4th, the last day of the session arrives, the President moves down from the Executive Mansion to the Capitol, bringing with him a force of secretaries and members of his Cabinet, to consider and sign bills passed at the last moment. On this day the hands of the clock are turned back several times as they move on towards twelve, the hour when the Congress dissolves. At last the bills are all passed and signed, the clock is allowed to indicate five minutes of 12, and some member of the Speaker's supporting clique arises, and on behalf of the House expresses its warm appreciation of his impartial rulings and unfailing courtesy! The member further moves a vote of thanks which is seconded with Chesterfieldian politeness by the minority leader and carried by acclamation amid the greatest enthusiasm, the members singing, and generally abandoning themselves to the free enjoyment of relaxation from the arduous work of the session. Some one starts up a verse of Auld Lang Syne and with one accord Democrats and Republicans join in the chorus. In the midst of the din the Speaker declares the second session closed and another Congress has passed into history.

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## QUESTIONS

1. Resolved that the House is the most popular branch of the Federal Government. Defend either side of this question.
2. Why were none of the other branches of the Federal Government at first elected directly?
3. Who is the Representative from your district, and when does his term expire?
4. Which of the following men were eligible to the House of Representatives in 1916? Which were not, and why?
  - (a) John Doe, born 1803 in Chicago.
  - (b) Ricardo Roelo, born in 1880, in Turin, Italy, and naturalized in the United States in 1912.
  - (c) Henry Long, born in Manchester, England, 1881, and naturalized in the United States in 1906.
  - (d) William Wilkins resides in Chicago, but runs for election to the House in an Iowa district.
5. Does the Federal law prevent a citizen and resident of Los Angeles from being elected a member of the National House from San Francisco?
6. Explain the difference between the original and the present method of apportionment of House members among the States.
7. What does the Constitution provide as to the time, place, and manner of choosing Representatives?
8. Would it be constitutional for a State legislature to provide:
  - (a) That all of the House members from that State should be elected at large?
  - (b) Or that the legislature itself should elect the members of the House?
  - (c) Or that only women should be allowed to vote for members of the House from that State? See Nineteenth Amendment.
9. How do the States apportion their Representatives among the voters?
10. What is a gerrymander? Could Congress prevent it?
11. Explain the "at large" method of choosing Representatives and its advantages and disadvantages.
12. What is proportional or minority representation?
13. Congressman Doe resigns from the House of Representatives. How is the vacancy filled?
14. Congressman Roe after serving one year in the House is discovered to have been elected through bribery in which he took an active part. What can be done?
15. Why are the lower houses in national assemblies usually given the power to propose tax bills? Give some examples.
16. What practical importance has this privilege in the United States and why? Explain the rôle of the House in impeachment.
17. What was the intention of the fathers as to the Speaker's influence? Why have his powers grown?
18. Explain his position before 1910.

19. How could he influence the political careers of members? Give examples.
20. How could he determine legislation? Examples.
21. Explain the changes made in 1910 and 1912.
22. Where is the power now lodged that formerly belonged to the Speaker?
23. What are the powers and duties of the Committee on Rules?
24. What is the purpose of the Committee of the Whole House?
25. Select the Committees that you consider most important and explain why.
26. Explain how they are chosen.
27. What is a "floor leader"? Why is he necessary, how is he chosen, and what are his duties?
28. Explain to a foreign inquirer how the majority party controls its members in the House and makes its full strength tell in favor of the party program of legislation.
29. Show the advantages and disadvantages of this system.
30. Compare the party discipline and control of the two leading parties.
31. What is a "caucus"? Why is it necessary? How does it influence the freedom and activity of the new member?
32. What prevents the caucus from establishing the irresponsible control by a small clique over the party membership?
33. Would you favor or oppose a reduction in the number of members of the House? Why?
34. What is a Conference Committee? Why is it appointed? Explain how it acts?
35. Why has the present complicated committee system arisen?
36. What is "the previous question"? Why is it moved and by whom?
37. Explain "leave to print."
38. What is meant by the recording of the "ayes" and "noes" as provided in the Constitution, and when must this be done? What is its purpose?
39. When is the short session held and why is so little general business transacted during it?
40. If you were a member of Congress how would you expect to rise to greater usefulness and prominence in the work of the House?
41. Mention three questions or issues that have recently been discussed in the House of Representatives.
42. State the chief opposing views on each of these questions.
43. Why do we have so much legislative business and material to consider in the American House as contrasted with foreign legislatures? Explain.

## CHAPTER 4

### THE SENATE

**Ideals of the Senate.** — It is in the Senate more than in any other part of our government that we may grasp the political thought of the fathers. Conservatism, Aristocracy, and State Sovereignty are not popular today, but they were political ideals in 1787. The minds of the leaders at that time were occupied with grave fears lest the new Federal government, which they were about to establish, might overshadow and perhaps destroy the authority of the States. The new government, it was hoped, would strengthen the union against outside enemies, but no one knew what scheme of centralization might develop at any moment. The tendencies of the time presented a conflict between the desire for a national government and a fear of its growth. We are not surprised to find that a political system founded on this conflict of ideas should be one in which conservatism was exalted as a fundamental virtue; hence the peculiar rôle of the American Senate, which has probably changed less in the last century and a quarter than has any other branch of our government.

**Conservatism.** — We are accustomed to look on our Supreme Court as the most conservative influence of our time, but when the Constitution was framed, it was preëminently the upper house of the Congress that was designed to withstand the storms and shocks of popular opinion. Its conservatism was safeguarded in various ways. Section 3 of Article I of the Constitution provides a higher age qualification, a longer period of citizenship, and a longer term of office than in the House; also, that only one-third of the Senators shall retire from office at one time, thereby keeping a majority of two-thirds of the members who are experienced and familiar with public business. But the contrast between the Senate and the House is even more marked than appears in the Constitution. A glance about the Senate chamber shows that the members are as a

rule past middle age. A recent count of the membership showed that approximately one-half of the Senators were sixty or over, while seventeen of them were over seventy. One reason for this is to be found in the peculiar political conditions of the States. In order to be elected Senator a man must either possess great wealth and be in position to command the influence of the political leaders of the State, or he must himself be the political leader, or he must be one who enjoys the confidence and trust of the industrial, commercial, or other interests which may dominate the politics of the commonwealth. In order to satisfy any one of these three requirements, a man must have been in the arena of business, the law, or politics, for many years. There is thus imposed, from the very nature of the conditions, a much higher age qualification than that required by the Constitution.

Then, too, the small number of members in the Senate, 96 at present, acts as an influence towards caution by promoting the free discussion of all measures, while the House, through its large membership, has been severely restricted and its usefulness impaired. It is noticeable that a measure which may escape amendments in the House is oftentimes subjected to such a running fire of comment, criticism, and essential change in the higher body, that it can hardly be recognized when returned to the Representatives for their approval. Furthermore, since many of the Senators are men of wealth, their natural inclination is toward the protection of stable property interests, and their influence is thrown in this direction.<sup>1</sup>

**Aristocracy.** — The statesmen of 1787 were aristocrats; they were the leaders of an uninformed populace. The masses of the

<sup>1</sup> The plan of having two houses in a legislature is so old as to make it seem an instinctive idea in politics. The earlier legislatures had an even larger number of houses. In the Parliament of Edward I of England at the close of the thirteenth century, there were four bodies, representing the Clergy, the Nobility, the Knights, and the Town Burgesses. Later the Clergy sat with the Nobility, while the Knights and Burgesses voted together. The four "estates" thus became two, known as the Lords and the Commons. Most of the American colonies before the Revolution had two Houses, the upper being the counsellors of the Royal Governor, while the lower was a popular assembly. This thought of the upper House as a council for the Executive undoubtedly influenced the powers of the Senate and made that body an executive as well as a legislative assembly.



voters, possessing none of the modern means of learning the latest happenings throughout the country, and being but slightly affected by public opinion outside their immediate locality, took their views from the leading local politicians in a fashion which is now seen only among the most servile political elements of our large cities. The leaders of the time nominated candidates for office at private conferences of the select few; they believed in a government of the people by "the best" of the people. Therefore they believed also in indirect elections and a restricted suffrage. The indirect election of the Senate by the State legislature was intended to throw into the hands of the best people of the State the power of choosing Senators, and thereby avoid the excitement, agitation, and violence of a popular election.

**State Sovereignty.** — In a time when the States commanded the first allegiance of the people and the national interests took second place, the sovereignty of the individual commonwealths appeared most sacred and its protection was to be carefully safeguarded in the Constitution. This was achieved by the requirements of Section 3, Article I, that each State should have an equal number of Senators and that they be chosen by the legislature. Delaware and Rhode Island were made the peers of the great Commonwealth of Virginia. The basis of representation was one of the most serious problems that the Constitutional Convention had to face, and threatened at one time to break up that body. Under the Articles of Confederation all the States had an equal representation in the legislature, irrespective of size of population — a purely *Federal* form of government. In the convention, many delegates, especially those from the smaller States, favored retaining this method, and objected to any form of representation proportioned to population, which had been suggested by the larger States. An assembly made up of delegates according to population would have been a purely *national* form of government, and the smaller commonwealths opposed this on the ground that it would give the larger States too much power in the Government, and would also fail to represent the States as separate and individual entities, thus encroaching on their sovereignty. The matter was finally referred to a compromise committee, which suggested that the lower House should be composed of members chosen by popular vote, according to population, and the upper composed of two delegates

from each State, chosen by the legislature. This compromise was accepted by the convention, and in this way the *national* idea of proportional representation was blended with the *Federal* idea of retention of State sovereignty.

**Qualifications.** — The Constitution requires that a Senator shall be thirty years of age, nine years a citizen of the United States, and a resident of the State from which he is chosen. While these qualifications insure a body of mature men, the natural conditions under which Senators secure office have still greater force in raising the age standard, as we have seen. The Fourteenth Amendment also excludes any person, who having previously taken an official oath to support the Constitution, shall have engaged in insurrection or rebellion against the United States. Congress has made use of its power to remove such disability in the case of Confederate soldiers, so that no persons who engaged in the Civil War on the Confederate side are now disqualified for that reason. An ineligible person may act as a member of the Senate or House if no one calls attention to the lack of qualification. Henry Clay was a member of the Senate before he was thirty years old. No State may constitutionally add to the qualifications of members of Congress.

Each House is sole judge as to the qualifications of its own members. In case of disputed elections, or charges of fraud, or questions involving the integrity or the identity of prospective members, each House may decide for itself whether it will accept as a member the person in question. Each also has the power to punish any member for disorderly conduct by reprimand, suspension, or otherwise, and even expel, provided a two-thirds vote is obtained in this latter case. To deny the right of admission, a simple majority vote is all that is necessary. A final qualification, before an elected member may take his seat, is the taking of an oath to support the Constitution, before the body to which he has been elected.

**Term.** — The term of office of the Senate is six years. Various terms were proposed in the constitutional convention; the terms of the colonial legislatures varied from one to seven years. It was felt that the upper House of the Congress should be chosen for a period which would insure abundant opportunity to become familiar with the public business, and the fact that the Senate was not intended to be a popular body made this longer term acceptable. The upper houses in foreign countries have either a six-year or a

longer tenure. In England membership in the peers is hereditary; in France the Senate is chosen for nine years; in Germany each member of the Federal Council or "Reichsrath" retains office indefinitely until his State government chooses a successor. But in America a six-year term is unusual. All our official tenures have been made short and elections frequent, in order to keep power in the hands of the voters. The term in most of the State legislatures, as well as in the House of Representatives, is but two years. It was made longer in the Senate in order to render that body more stable and conservative, to free it from the influence of frequent political changes, and to make possible a permanent and consistent policy. The greater permanence so attained has proved a strong and helpful influence in the work of the upper House. Says Bryce, "A Senator has the opportunity of thoroughly learning his work, and of proving that he has learned it." Owing to the Senator's political or financial power in his State, he is usually reelected for a second term and frequently for several terms in succession. For the same reason a Senator having once been defeated for reelection seldom succeeds in regaining his office, since the new leader takes it for himself. The clause providing that only one-third of the body shall be renewed every two years has worked admirably. This division into classes was made by lot when the first Senate assembled in 1789. Care was taken not to place any two Senators from the same State in the same class. When a new State is admitted to the Union, its Senators are placed by lot in these classes, only one being added to any one class, and in such a manner as to keep the classes as nearly equal in number as possible. When a vacancy occurs the new member chosen to fill the vacancy is elected for the unexpired term.

**Election.** — The Constitution originally provided that Senators should be chosen by the legislature of each State but did not say how this choice should be regulated. The Federal law of 1866 provided that each house of the legislature should vote separately. In case the houses did not agree, they should come together in a joint meeting after the second Tuesday of the session and elect the Senator by a majority vote of all present. While the election of Senators was purposely made indirect in order to remove it from the people, the same change had begun to take place as in the choice of the President; that is, the election had gradually become

direct in reality, although remaining indirect in form. When the legislature was to be chosen, every voter knew who would be chosen Senator if certain legislators were elected. In fact, the choice of a Senator usually overshadowed all other issues at the polls, so that a legislator was often known as an adherent of this or that candidate for the Senatorship.

Meanwhile popular sentiment favorable to the choice of Senators by direct election had been steadily growing since the middle of the last century. Repeatedly the House of Representatives had passed a constitutional amendment providing for the change, but the Senate either rejected the proposal or allowed it to die without action. There can be no stronger evidence of the unwisdom and even danger of our present difficult method of amendment than the obstacles encountered by the movement for direct election of Senators. For many decades there has been a clear and undoubted preponderance of opinion in its favor, yet the opposition of the very house whose modernization was to be wrought was sufficient to block the movement for half a century.<sup>1</sup> The Western States, ever in the vanguard in the search for better methods of govern-

<sup>1</sup> Many strong objections were urged against the indirect method of choice. The chief of these were the accusation of bribery, which frequently occurred in Senatorial elections; the danger that the State, in case of deadlock, would lose its representation in the Senate, — several legislatures were deadlocked for two and three years; and the inevitable confusion of State and national issues resulting from having a national official like a Senator chosen by State legislators. The danger of bribery was constantly present, nor could it be avoided so long as the influence of a very few votes in the legislature determined the choice. The situation was always like that arising in a nominating convention where a few delegates hold the balance of power as between the different candidates. The influence of the Senatorial choice upon State legislation and State politics generally was also unfortunate. In our modern system of politics, the political leader of the State is often a Senator. To this there can be no valid objection. In fact, it is an advantage to have the leader take public office. But when his acts are attacked it may become necessary for him to defend himself by subordinating the entire policy of the State to the one issue of continuance in office. In this way there arises confusion between those matters which affect national government and those which are properly questions of State policy. There is no reason why the voters at a State election should choose a member of the legislature who makes laws on the school system, public health, and local conditions throughout the State, but at the same time also chooses a Senator to vote on the tariff, the currency, our foreign relations, and other national matters. State questions should be settled separately. Yet this becomes im-

ment, began to pass laws providing for the expression of popular preference for Senators as a guide to the State legislatures in the election. The legislature usually followed this expression of opinion and there was in reality a popular selection of Senators in the commonwealths adopting this system. Gradually the movement spread southward and eastward until thirty States had provided for informal popular selection. At this point, when it became evident that the agitation had reached the dignity of a universal movement against the Senate, that body capitulated and allowed the passage of a House resolution providing for a constitutional amendment. The proposal was then submitted to the legislatures of the States, approved by the necessary three-fourths, and officially proclaimed by Secretary of State Bryan, May 31, 1913, as Article 17 of the Amendments. Its provisions are as follows:

"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."

Both Senators and Representatives are obliged by Federal law to make public their campaign expenses for both nomination and election.

possible the moment that they are mixed up with the election of a national Senator.

Furthermore, aside from the possibility of money bribery, the astute leader of a small faction either in a convention or a legislature knew the vital importance of the votes which he controlled to the conflicting interests in the struggle, and he was able to exact concessions and make deals that were injurious to the public welfare. The indirect system had long fallen into disrepute throughout the country.

**The Newberry Case.** — For many years rumors of the use of excessive funds in the nomination and election of Senators have been rife. Some have maintained that this is an incident to the direct primary, which requires a widespread and expensive campaign, the use of large-scale advertising, public meetings, etc., but the same conditions existed under the indirect method. All the States and the Federal Government have sought to exert some control over this use of money in nominations and elections. Section 8 of the Federal Corrupt Practices Act of June 25, 1910 and August 19, 1911, provided that a candidate for Representative or Senator should not contribute, expend, or cause to be given or expended, in procuring his nomination or election, any sum in excess of the amount allowed under the law of the State in which he resided. A maximum of \$10,000 for the nomination and election campaign was fixed. Candidates were allowed an additional amount for necessary personal expenses, travel, stationery, printing, etc.

In the celebrated contest of 1918 for the Republican Senatorial nomination in Michigan between Newberry and Henry Ford, the Government charged that Newberry and others had conspired to violate the Federal act by giving, or causing to be given and expended, a sum of \$100,000 or over. Newberry, when convicted by the District Court, appealed to the Supreme Court on the ground that Section 8 was unconstitutional, being outside the authority of Congress. Article I, Section 4, of the Constitution provides that "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." The Government urged that this power to regulate elections included also the authority over nominations, since these were a necessary part of an election. A "primary" was a means of selecting the representative of each party for the later election contest and all parties conducted some method of nomination as an essential part of their election activities. Also, the Seventeenth Amendment provided for election of Senators by the people and fixed the qualifications of voters for this purpose. Hence the selection of candidates by the parties was a matter of direct national concern and one on which Congress could properly legislate.

But the Supreme Court in *NEWBERRY v. U. S.*, 256 U. S. 232, 1921 overruled this contention and held that the law having been passed prior to the Seventeenth Amendment, must be based on Article I, Section 4. The term "election" must be understood in the way it was intended by the authors of the Constitution. Party nominating campaigns were unknown to them, therefore the selection of a candidate to represent a party, by the members of that party, was not in their minds when they gave to Congress authority to regulate the "manner of holding elections." It was true, a nomination was necessary for an election under present conditions, but many other things were necessary and might affect an election outcome — voters, education, transportation, health, public discussion, private animosities — even the face and figure of the candidate — but the authority to regulate these had not been given to Congress under the power to fix the "manner of holding elections." Hence only the State could control these affairs. Section 8 of the act was therefore unconstitutional as an exercise of power that had not been granted to Congress.

An examination of this peculiar decision leaves room for hope that a different outcome might be reached were the law reenacted at this time. Of the nine Justices, four held that Congress had no control over nominations, four held that it did. The ninth declared that the law having been passed before the Seventeenth Amendment, could not rely on that Amendment for its validity. The inference is that a new law, passed after the Seventeenth Amendment, might receive the approval of a majority of the Court. The outcome of the case produced such a painful impression that after the election of 1922 Senator Newberry resigned his seat in order to relieve his party of embarrassment.

**Exceptional Position of the Senate.** — Since the Senate embodied most faithfully the political ideals of 1787 — conservatism, aristocracy, and State sovereignty — it was natural that the framers should wish to give that body as much influence as possible in the government. Its position was made one of exceptional authority, higher than either the President or the House — it is first, a legislative body co-equal with the House excepting on finance bills; second, it is a court ordained to try cases of impeachment; third, it enjoys extensive and important executive powers and can thereby take part in treaty-making and in the administration of the law.

As a legislative body it is supposedly on a par with the lower House, except in the case of bills for raising revenue, which according to Article I, Section 7, must originate in the House; but in reality it is a much more influential assembly, in all forms of legislation, than is the lower chamber. It is a common occurrence for the Senate to attach important amendments to appropriation bills and to compel the House to accept these amendments. This it can do for the reasons which we have examined in Chapter 3. This applies to all important measures to which the majority party is committed. If the party cannot bring the two Houses to an agreement, its pledges are not fulfilled; it must suffer, and the Representatives are naturally the first to feel public disfavor.

The Senate is well aware of this advantage and makes the most of it. As a body, however, it seldom arrays itself openly against party or popular measures for any great length of time. It may amend and modify an important bill or delay its passage or resort to numerous other expedients of committee procedure to defeat legislation but is seldom placed in the disadvantageous position of the English House of Lords when the latter attempts to defeat a popular bill which is resolutely pushed by the House of Commons. In such a case the entire machinery of the government and the force of public opinion are lined up against the upper House and the issue soon becomes a conflict between the people and a privileged class. It was such a struggle which led the Liberal party to amend the constitution of the Lords in 1911 and deprive it of its absolute veto power. The fact that our Senate avoids such contests is another reason for its continued supremacy in legislation. Power, like mercury, tends to flow together. As between the Senate and the House one must dominate. In the governments of all modern nations the lower House has won the struggle for mastery because it is directly chosen by the people. It has championed their cause against hereditary rights and aristocratic privileges, as represented in the upper chamber. But in the United States the upper House has kept its superiority, by reason of the unusual ability and training of its members, by the free discussion of bills in the Senate which is impossible in the House, and by those peculiar constitutional prerogatives and exceptional privileges which have just been outlined.



**Impeachment.** — In impeachment, the Senate's position is that of a court. The lower House, as we have seen, passes the resolution of impeachment, and a committee of Representatives is appointed to prosecute the case. This Committee employs counsel, the evidence is prepared, and at a time agreed upon, the Senate, presided over by the Chief Justice, if the President be on trial, hears the case, giving the accused also the right to be heard, to employ counsel, and summon witnesses. In the impeachment trial of President Johnson in 1868, every partisan and factional influence was brought to bear, much bitterness of personal feeling was aroused, and a large vote in favor of conviction was finally secured, but the total failed of the necessary two-thirds majority by a single vote. Since this great trial it has been generally conceded that the remedy of impeachment has little practical significance, but is to be considered solely as an extraordinary measure. Only nine impeachment trials have been held by the Senate in the history of the government: the accused persons being William Blount, a Senator, in 1799; John Pickering, a U. S. District Judge, in 1804; Samuel Chase, Justice of the U. S. Supreme Court, in 1805; James H. Peck, a U. S. District Judge, in 1831; W. H. Humphreys, a U. S. District Judge, in 1862; Andrew Johnson, President of the United States, in 1868; William W. Belknap, Secretary of War, in 1876; Charles Swaine, a District Judge in 1905; and Robert W. Archbald, a Judge of the Commerce Court, in 1913. Of the nine three, Pickering, Humphreys, and Archbald were removed from office. In the case of Blount the offense with which he was charged, that of receiving money for an appointment to the United States Military Academy, was admitted by him but the Senate held that the process of impeachment was not intended by the Constitution to apply to a Senator or Representative. The ground of this decision was that, historically, impeachment had always been used as a protection against executive officers. A Senator being a legislator could therefore not be considered an "officer" in the sense intended by Section 4 of Article II. As the Senate is the final tribunal in all cases of impeachment, the Blount decision remains as a precedent.

**Executive and Treaty-making Powers.** — As an executive body, the Senate approves treaties and appointments. It does this in "executive session," which means that all spectators and news-

paper correspondents are temporarily excluded from the Senate Chamber and no record of debates is kept, only the final results of the Senate's action being made public. It is doubtful if such secrecy is desirable or necessary at present. The main object of secrecy is not attained, as news of the proceedings leaks out in one way or another.

In its approval of treaties (by two-thirds) and important appointments (by a simple majority) the Senate exerts a political control which has already been discussed in connection with the President's duties.

Through its treaty power the Senate exercises a strong influence on foreign relations, and recent events have strengthened this influence. Its Committee on Foreign Relations takes an active part in drafting the terms of foreign agreements, being consulted by the President on all important steps.

The coöperation of the Senate with the State Department has become less and less harmonious in recent decades owing to its resentment at the leading rôle played by the President and all the executive departments. From Cleveland's time to the present many treaties have failed of ratification in the Senate, including such important agreements as those on international arbitration, the purchase of the Danish West Indies, a number of commercial reciprocity treaties strongly advocated by President McKinley, several arbitration treaties, and the League of Nations covenant. Others have been delayed by opposition in the Senate to such an extent that some embarrassment has been experienced by the President, notably in the Cuban reciprocity, the San Domingan debt, and the Canadian reciprocity treaties, while still others have been so amended as to cause their abandonment by the Executive. Even the treaties limiting armaments in pursuance of the Washington Conference were violently resisted by the same elements which in a narrow spirit oppose all agreements with other nations.

Many of the less important matters that have come up in our relations with foreign nations have always been settled by the President through executive agreements or protocols, carried out without senatorial action. The Senate attacked this method of dealing with foreign nations by requesting the President to submit the San Domingo protocol of January 20, 1905, to it for

ratification.<sup>1</sup> After considering the matter, the Senate failed to ratify this agreement, but the President immediately carried out its terms to a large extent through the use of his executive powers, and in 1905 he was attacked in the Senate for so doing. His course was, however, strongly defended by several Republican members, and eventually the agreement was approved by the Senate.

This brings up the interesting practical question, what determines the victory in a struggle between the President and the Senate over the ratification of a treaty? The advantage is with the President because he can propose the substance and form of the treaty; in short, he can choose his own ground and the exact time and way in which to open the question. If he proposes something which is strongly popular with the voters, he is in position to force the Senate leaders into line even against the wishes of that body. An instance of this is the Canadian reciprocity treaty of 1911, already mentioned. After the Senate had refused to pass the treaty at the session of 1910, an extra session was called to consider the measure, in April, 1911. Meanwhile the majority party had been chastened in spirit by the unfavorable elections of 1910, the Senate was still Republican but by a small margin, and the House was strongly Democratic. With the pressure of public sentiment in the Mississippi Valley, the West, and the South, to back him, the President returned to the charge and forced the treaty through the Senate. It was afterward defeated in Canada.

The power of the Senate is undoubtedly greater to-day than it was at the beginning of the government, although Senators often argue to the contrary. In the earlier days, Senators were looked upon as ambassadors of their respective States, limited in their individual discretion, and subject to instructions from the legislature which had elected them. Until about 1825 the Senate was not regarded as of equal importance to the House of Representatives, or even to the State legislature. Men often preferred leadership in their State legislatures to what was considered "the somewhat empty honor of the senatorial dignity." This condition was changed mainly in the three decades preceding the Civil War, due to the presence of a few brilliant statesmen like Clay, Webster,

<sup>1</sup> The protocol provided for the collection of San Domingan customs duties by an American official and the use of the funds so collected to pay interest on the San Domingan debt.

Calhoun, Benton, and Sumner. During this period the Senate established its claim to intellectual leadership of the Nation in political matters, and became famous among the legislative bodies of the world. It began to assert its power in the struggle against Jackson, and although it did not succeed in gaining the upper hand at once, its influence was augmented, and it was able to force the weaker men who followed Jackson to admit its power. After the Civil War, the Senate wielded its authority even more completely and succeeded in defeating the independent policy of Johnson, and in imposing its views on Grant, largely on account of the latter's inexperience in political affairs. Cleveland was more successful than his predecessors in overcoming the opposition of the Senate, and the struggle became even more marked during the administrations of Roosevelt and Wilson.

Political leadership in a State is usually held by one of the two Senators and, where authority is equally divided between the two, an amicable arrangement is made to divide the State territorially, each Senator having control of appointments and other matters in his section of the commonwealth. Before the political revolutions which began in 1908 the dominance of each Senator in his party was so complete and unquestioned that the political machines of the two parties were able to "steam roller" all opposition. But with the coming of more flexible and unsettled conditions in the party management, there is greater room for men with some tendencies towards independence of thought and action.<sup>1</sup>

<sup>1</sup> The influence of practical politics on the character of the Senate is well depicted by Prof. Paul S. Reinsch in his *American Legislatures*, page 120: "The advantageous position of the senators with respect to the control of party machinery was recognized as soon as the Senate had made good its powers over the federal patronage. Professional politicians, whose chief stock in trade is the procuring of public office, soon developed a vivid interest in the senatorial position. Before long, men who were supremely successful in the organizing of the political forces of the State, claimed for themselves the high honor and the potent influence of the senatorship; and they often gave the position of junior senator to a personal ally whose chief political qualification consisted of liberal campaign contributions. The direct control which the party machinery exercises over the state legislatures, and over the workings of the caucus system, makes it essential to the senator, if he be not himself the boss, at least to court the good graces of the party magnates. He must be a master of practical politics. Indeed, most senators, often against their personal likings, find that the major portion of their time is taken up with the nursing of political support at home.

**Senate Committees.** — Each Senator is a member of from six to eight committees. As most of the members are reelected from term to term, promotion in committees is slow, being dependent upon new vacancies. The new member is usually given unimportant appointments. The influential committees are Appropriations, Finance (corresponding to the Ways and Means in the House), Commerce (including Shipping), Interstate Commerce, Foreign Relations, Post Offices and Post-Roads, Judiciary, Naval Affairs, Military Affairs. The new Senator is not apt to find his name on any of these; rather will he be intrusted with the care of such committee subjects as, the Condition of the Potomac River Front at Washington, Indian Depredations, Civil Service and Retrenchment, Disposition of Useless Papers in the Executive Departments!

Under the rules the committees are chosen by ballot, but in practice each party, in its caucus, makes up a list of its members for committee appointments, the majority party conceding to the minority a number of members on each committee in proportion to the strength of the two parties in the body. Each caucus having decided the allotment of its party members a motion is introduced that the committees of the Senate shall consist of the members named on the list. This motion being contrary to the rules which provide for election of the committees by ballot, it is necessary to have unanimous consent in order to suspend the rules. Such consent is uniformly given. In the party caucus it is customary to have the committee "slate" for the party made up by a committee on committees which until 1913 was appointed by the chairman of the caucus, but is now elected.

The chairmanship of each committee is given to the member who has served upon it continuously for the longest term. A continuous service in the Senate is in this way of great practical advantage to a member in that he obtains a larger number of committee chairmanships. It is apparent that this system, by depriving the Vice-President of the power to name committees, prevents him from securing the same influence which the Speaker of the House has attained. The Vice-President is merely an impartial

This development has introduced into the Senate a class of prominent politicians, who are often lacking in those qualities of statesmanship which the traditions of the Senate demand, who are simply shrewd players of the intricate game of local politics, and who have introduced commercial ethics into political life."

chairman to preside over the debates. It is also clear that those States which reelect their Senators term after term soon secure representation on the important committees and a large number of committee chairmanships, and thereby wield a commanding influence in national legislation.

As a matter of fact, the New England and Eastern States have always been the most consistent in their policy of reelecting their Senators for term after term, while the Western States more often elect a new man every six years. This largely accounts for the dominance of New England in the Senate, a dominance of which Westerners complain. It is very seldom that a Senator from one of the New England States is not reelected, if his party continues in power; in fact, he generally holds office until he retires, or dies. He gains in influence not only through the automatic rule that important committee places are determined by seniority, but also through the accumulation of experience, a better knowledge of the work of the government, and thus a greater fitness and ability for dealing with public questions. With the breaking up of the solid Republican phalanx of ultra-conservatives in the Senate, some of the members of longest terms of service have been retired, and the adoption of the direct method of choice tends to change the membership of the upper House more frequently. The rise of the farm bloc has increased Western influence.

**The Steering Committee.** — The Senate majority feels, although to a less degree, the same need for arranging and systematizing its legislative program as exists in the House, and has adopted the same means of doing so; viz., the Steering Committee. This body is not elected by the majority caucus but is largely a self-constituted gathering of the principal leaders. Its work is to determine which bills shall be pressed for passage at each session. Since, as in the House, the natural inertia of procedure tends to defeat a bill, it is usually not necessary for the Steering Committee to determine which bills shall be defeated. Its sole function is to select some important fundamental measures to which the party is pledged and to secure sufficient unanimity of opinion among the members to obtain the passage of its bills. This committee forms the embryo of a Senate machine or organization, but it does not use its influence in the same obnoxious, arbitrary way that was so characteristic of the old House machine. In fact its principal weapon in

all attempts to secure unanimity among the majority of members is the appeal which it makes for the support of the party interests. The measures which it does not support are left to the individual judgment of each Senator.

**Senate Procedure.** — Unlike the House, the Senate allows full freedom of debate; each member may speak as long as he chooses on any subject and as often as he can secure the floor. This has both advantages and defects. On the one hand it allows a higher standard of courtesy and etiquette in the legislative body; it is not possible for one man as presiding officer to choose who shall speak, what measures shall be discussed, and what views shall be expressed on these measures. Furthermore the freedom of discussion gives full play to individuality and the development of real statesmanship. The membership of the Senate includes many men of the highest ability, and in urging the claims of their respective interests and constituencies they show brilliant qualities as advocates, orators, and strategists in debate. In this respect the Senate ranks far above the House and is the peer of any legislative body in the world.

For many years the Senate has sought to lessen the abuses of free and unlimited discussion by a series of voluntary agreements among members as to the time for taking votes on various measures. The leading advocates and opponents of a bill make an amicable arrangement for a vote on a given date, with the understanding that each of the members shall take his own opportunity to present his views meanwhile. This arrangement is then ratified by the Senate and the measure finally passed or defeated at the time set. But it will be noticed that such a means of preventing useless waste of time depends entirely upon the good will of all the Senators.

In listening to a Senate debate, one is impressed by the maturity, dignity, and admirable forensic training as well as the substantial qualities of the participants. But on the other hand the Senate is now nearly four times the size contemplated by the fathers of the Constitution and the privilege of unlimited debate shows certain marked weaknesses; a small clique of members may hold up legislation desired by the majority and, by talking *ad libitum*, may prevent the passage of a measure to which the party is pledged. This abuse is not confined to either party but is common to both

and is employed by the opponents of both bad and good measures. It is a highly obnoxious habit now regarded as a traditional right by the members of the upper House. A noted instance of this was Mr. Quay's speech on the tariff in 1894 which lasted for three days, when by arrangement with his friends he managed to prolong his "remarks" to such a point that the managers of the majority party were forced to change the pending bill to suit his wishes. A similar case occurred in the debates on the repeal of the compulsory silver purchase clause of the Sherman coinage act in 1891 and 1892. At this time a small group of Senators, representing silver money interests, banded themselves together to defeat the repeal, and although the country was rapidly plunging into a great financial and industrial panic, they successfully prolonged the debate against the measure advocated by the majority party, until the disastrous crisis of the following year swept over the country. Again in 1917 when the President desired to place defensive guns on American merchant ships to protect them from illegal attacks of submarines, a small group of Senators decided to prevent the passage of the measure which had already been adopted by the House. By abusing the privilege of unlimited debate they were able to prevent the bill from coming to a vote. Popular attention at the time was concentrated upon this question and the President decided to make it an issue. In a public statement he pointed out the overwhelming majority of members in both Houses who wanted to pass the measure, and ended by saying, "A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible." Thereupon a special session of the Senate was called at which that body attempted by a new rule to prevent future repetitions of the incident.<sup>1</sup>

<sup>1</sup> The substance of this rule is that whenever 16 Senators sign a motion to close debate on a pending measure the presiding officer shall state the motion immediately and shall lay it before the Senate two days later. Thereupon a vote is had on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" If two-thirds of those voting favor the motion it shall become the unfinished business until disposed of and each Senator shall be entitled to speak in all not more than one hour. It will be seen that this rule would limit debate to as many hours as there were Senators engaged in the filibuster.



**What is a Majority of the Senate?** — Recently several important actions of the Senate have been disputed on the ground that they were not taken by the required constitutional majority. In *MO. PAC. R. R. v. KANSAS*, 248 U. S. 276, 1919, the validity of a Kansas liquor law depended on the passage of the Webb-Kenyon Act by Congress over the President's veto. The Constitution, Article I, Section 7, Clause 2, provides that the two Houses may re-pass a vetoed bill if in each House "two-thirds of that House shall agree to pass the bill." The railroad claimed that the law was not properly passed over the President's veto because only two-thirds of *those present*, not of those *elected to membership* in the House, voted in favor of the bill. The Supreme Court held that if a quorum were present, two-thirds of this number was sufficient to carry the measure. The first ten amendments had been proposed by two-thirds of those present. In 1861 a Senator had inquired, when voting on a treaty, as to the number which was necessary to pass it, and the Senate had determined by a vote of thirty-three to one that two-thirds of a quorum only was essential. In the Constitutional Convention of 1787 a motion had been made to require a two-thirds vote of all the Senators elected, in order to ratify a treaty, but had failed of adoption.

Numerous decisions on the same clause in State Constitutions had also interpreted those documents in the same sense. For these reasons it was held that two-thirds of a House meant two-thirds of those present, if a quorum.

**Officers.** — The officers and employees of the Senate are numerous, the "pay roll," like that of the House, being somewhat inflated. The Vice-President of the United States is ex-officio President of the Senate with a vote only in case of tie. There are also the President pro tempore of the Senate who is elected by the body from among its members and serves regularly when the Vice-President is absent, the Chaplain, the Secretary, and a large staff of assistants, clerks, and messengers.<sup>1</sup>

<sup>1</sup> A full statement of the details of Senate and House organization and personnel with committee assignments, clerical force, residences, etc., is found in the annual Congressional Directory. Both the Senate and the House publish at the close of each session a history of Senate (House) bills and resolutions, from which the action taken by each House can be traced.

**Low Salaries.** — The Senator's salary is \$7500; the Vice-President receiving \$12,500. These amounts are far below what they should be; at least \$10,000 should be paid in both Senate and House. The necessary expenses of a member of either branch of Congress are so great that the present salary frequently does not cover them. While it is possible that a very poor man might find the salary of \$7500 sufficient for his needs, a Representative or Senator who aspired to some influence in the legislative councils would be unable to make both ends meet, without some private income. Since 1800 both parties in the government have laid great stress upon democratic simplicity and lack of ostentation. It has been considered a virtue to keep down salaries even to the point of parsimony. This was eminently fitting among a nation of pioneers in a new country. But with the general rise in the standards of living and of income in other positions, it cannot be wise to pay the national legislators proportionately on such a low plane. The necessity for a higher salary is less felt than in the House, because of the greater honor of Senatorial rank. All observers have commented on the attractiveness of Senate membership. Its political influence, social prominence, longer tenure, and the marked ability of its members have made membership in that body a prize to which many of the ablest and most gifted men in political circles of all the States aspire. Some of its critics have called it "the finest club in America."

**New Influences in the Senate.** — Until recent years our upper House has been known as the stronghold of ultra-conservative influences. Both the Democratic and Republican parties have sent to that body able lawyers and successful business men trained in the old school of constitutional law and politics. The political leader in each State, the successful corporation attorney, the wealthy manufacturer or mine owner have been conspicuous figures in our upper House since the Civil War. It was natural that such men should act with caution in the political struggles of the national arena, and that the measures proposed by the Senate, and its influence on House bills, should be conservative in tone. Such an influence is needed in every government, and the Senate has performed a function of the highest value in examining the proposals of the House, and asking regarding each measure such questions as —

Is it constitutional?

Does it fit in with the other laws on the subject?

Does it interfere with existing interests in any way?

These queries can only be put and answered properly by a body of men possessing the peculiar training of our Senators. But all virtues have their limit. By its absorption in defending vested interest, the Senate gradually began to ignore the welfare of the masses. Certain of its members were known to represent the manufacturing interest, others the mining interest, others oil, while a large group were known as railroad Senators. The votes of any of these men on a given measure could be as accurately forecast as the opinions of their clients, and it was not long before this unwholesome condition began to dawn on the public mind. Having gained a reputation of hostility to progressive laws, the reorganization of the Senate became only a question of time. This change has been effected along two lines — the direct election of Senators and the change in its personnel. Responding to the popular feeling that economic and social progress must not be held up by the upper House, there have been elected to that body a number of younger men whose sympathy, aims, and ambitions are radically opposed to the fixed traditions of former times. Wisconsin, Minnesota, Oregon, Iowa, Kansas, Colorado, Nebraska, and other Western States have sent to Washington to represent them, men whose tendency was not to stop with the question — is it safe? but who have rather concentrated their attention on the new programs of law-making for the benefit of the farmer, the small manufacturer, the small shipper on the railways, and the masses of the people generally. The advent of these men from both Democratic and Republican States has marked a turning point in our national development and a new line-up of forces in the political arena.

The significance of the new movement lies in the change which it has wrought not only in both parties but in the character and temper of the Senate; that body has been brought nearer to the people and has avoided the hostile public movement which directed itself against the House of Lords in England. By representing popular interests equally with those of concentrated wealth, by standing for the small business men and wage earners as well as

the more effectively organized economic groups, the Senate has lost little if any of its real conservatism. The patriarchal rôle which the upper House has always played in every government requires that the elder statesmen shall survey with fatherly eye the entire membership of the political family, the weak as well as the strong. In resuming this rôle the Senate has strengthened its control over the government and fortified its influence as a bulwark against impracticable and dangerous forms of law. Its work is greater and more important in the new era which we are now entering than in the past — the task of analyzing with clear legal and business insight the many crude proposals for government regulation, of selecting those which are feasible and progressive, and of translating them into the accurate, precise, and valid terms of national law. Such a task demands the full measure of ability, ripe experience, and legal training possessed by the Senate; if properly fulfilled it also means a new ideal of conservatism.

**What is the True Rôle of a Representative Legislature? —** The answer to this question must be gleaned from the practical experience of some centuries. In all nations the representative legislature has had to fight the king, and for this reason has been regarded at first as the sole dependence of the people in the struggle for popular rights. As time has passed and the importance of the monarch has dwindled or disappeared, the peoples have commenced to look upon their legislatures with a more critical eye and have demanded that these bodies shall not only *defend* the people against despotism but that they shall *produce legislation* of an effective and helpful nature. So long as fighting the king was the main concern, the *legislative* control of all parts of the government meant *popular* control. This justified the most detailed and minute supervision of everything, by the lawmaker and his assumption of full authority over all problems. He must not only make laws and make them in detail, but must also watch their administration to prevent improper action; he must check the Crown at all points.

But once the popular victory was won and representative government fully established a new need thrust itself upon the law-making assembly. It must now reorganize its committees and its procedure to produce results. In practice it must abandon much of the minutiae of detail and must concentrate its attention more carefully upon guiding the main lines of legislative policy.

It is dangerously easy for a legislative body to have its time and attention side-tracked from essential matters to unimportant trivialities. Indeed, the major part of a session is too often occupied with precisely this kind of irrelevant and trifling affairs, while the measures of greater import are rushed through without adequate consideration. Prof. W. W. Willoughby in considering the underlying ideas of democracy<sup>1</sup> has pointed out the urgent need of some guidance and supervision in order to focus the lawmaker's attention on essential things. Our Congress is now in this transitional stage, unable to develop its own leadership and guidance towards this end, and as yet unwilling to give the Executive full recognition as leader. The goal towards which we should strive is the restoration of the legislature to its true rôle — a body shaped and organized to furnish careful, thorough, and real consideration of the proposals and acts of the Executive. This involves genuine discussion, responsible criticism, a modern committee system, a drastic reduction in size of the House, the presence of representatives of the Administration, Executive initiative, and all the steps involved in a closer coöperation between President and Congress. In this development the Senate is especially qualified to play a leading part.

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 See also references under Chapter 3.

<sup>1</sup> In *Democracy in Reconstruction*, edited by Cleveland and Schafer, 1919.

## QUESTIONS

1. Who are the Senators from your State, and when do their terms expire?
2. What are their committees and which measures are they actively supporting?
3. Why was the Senate originally given so much power and influence in the government?
4. Explain the ideals of the "Fathers" in establishing the Senate.
5. How did they make the Senate conservative?
6. Why did it seem desirable to make the Senate somewhat aristocratic and how was this accomplished?
7. Why was so much weight laid upon representation of the State as a State and how was this arranged in establishing the Senate?
8. Explain the difference between the National and the Federal ideas as they are woven together in our National legislature.
9. Explain which of the following men were eligible to election as Senator from Illinois in 1916 and which were not, and give the appropriate portions of the Constitution:
  - (a) Henry Higginson, Jr., born of Massachusetts parents in Boston, 1885, removed to Chicago 1914.
  - (b) Jan Jansen, born in Christiania 1884, immigrated to Minneapolis in 1900, was naturalized an American citizen in 1906 and removed to Springfield, Illinois, in 1914.
  - (c) Boris Romanof, born in St. Petersburg 1886, migrated to New York in 1889, was there naturalized in 1910, and removed in 1911 to Chicago.
  - (d) Richard Roe, born 1889 of American parents in Evanston, Illinois, where he has since continued to reside.
10. Senator X is accused of bribery in securing his seat in the Senate. How can his colleagues constitutionally remove him from the body?
11. John Doe satisfies the constitutional qualifications for admission to the Senate but it is discovered after his election that several years before he had forged a check. Can he be denied admission to the Senate? Reasons.
12. The legislature of Pennsylvania passes a law providing that Senators from that State in the future must own not more than \$50,000 worth of property. Is the law constitutional? Reasons.
13. Compare the term of the Senate with that of foreign upper houses.
14. Explain the advantages of a long term.
15. Compare the present and former method of electing Senators.
16. In a debate you are asked to defend the old method. Outline your arguments.
17. You are called on to defend the new system.
18. How did the Western States previous to the Seventeenth Amendment establish a popular choice of Senators?
19. What is the difference between the Senate and House methods of choosing presiding officers? Reasons for difference.

20. How are vacancies in the Senate filled under the Seventeenth Amendment?
21. How does the legislative power of the House differ from that of the Senate according to the Constitution? How does the Senate's legislative power exceed that of the House in practice, and why?
22. Explain the Senate's position and duties as a court of impeachment.
23. What is the extent of punishment in case of impeachment? Illustrate.
24. Why are Senate bills better prepared than House measures as a rule?
25. What is meant by "executive session" of the Senate?
26. Explain the exact control of the Senate over treaties and any recent uses which the Senate has made of this power.
27. Which are the important committees in the Senate and how are they chosen in practice?
28. Why is it an advantage for a State to have its Senators serve for several terms?
29. Explain the work of the Steering Committee of the Senate.
30. Explain the most important points of difference between the Senate and House procedure in debate.
31. Why is "filibustering" so easy in the Senate?
32. What is the salary and the allowance of the Senator?
33. A law was passed in 1909 raising the salary of members of the Cabinet from \$8,000 to \$12,000. Can Senator X, a member of the Congress which passed this bill, resign after one year's service in the Senate and accept a Cabinet position? What clause of the Constitution applies?
34. A United States Senator while in attendance at a session of the Senate assaults a man in the streets of Washington. Can he be arrested? Suppose he commits murder, can he be arrested? What clause of the Constitution applies?
35. During a debate in the Senate, one of the members falsely charges the head of a great corporation with perjury and bribery. What redress has the latter? What clause of the Constitution applies?
36. Besides legislative powers, what executive and judicial powers does the Senate exercise?
37. Explain the most valuable service performed by our Senators in law-making and show how the body is peculiarly adapted to its duty.
38. Point out recent changes in the attitude and personnel of the Senate and the reasons for them.
39. Prepare a short essay on the value of the upper House in American government.
40. Why are two Houses necessary in the national Congress?
41. What are the advantages of a small Senate?
42. What are the advantages of having so many lawyers in the Senate?
43. Explain senatorial courtesy in appointments.
44. Why has this custom arisen?
45. How do the rules restricting debate in the House affect the influence of the Senate?
46. How does the Senate avoid the constitutional rule that bills for raising revenue must originate in the House?

47. Why are conference committees appointed, and how do they strengthen the control of the Senate over legislation?

48. How is the Senate especially equipped for perfecting the form and details of legislation?

49. Is the political or party influence of a Senator greater or less than that of a Representative?

50. What changes does the Seventeenth Amendment make?

51. Resolved, that the number of Senators from each State should be proportionate to the State's inhabitants, as in the House. Take one side.

52. Senator Y in 1918 violates a Federal law passed in 1911 regulating the amount of money that he may spend in securing his nomination. Can he be punished? Reasons.

53. All the Senators except eight want to approve a bill under discussion. The eight decide to talk the bill to death so that it cannot be voted on. What can the majority do?

54. Resolved, that Congress in passing all laws should cover subjects in full detail in order to protect the interests of the people. Take one side.



## CHAPTER 5

### POWERS OF CONGRESS: TAXATION AND FINANCE

THE powers of Congress have been the great battle ground of the Constitution. Around them have surged the legal combats of Strict and Broad Construction, of Tariff and Taxation; of Nullification, of Secession, of the Currency, and finally of Commerce Regulation and Corporation Control. Each of these great conflicts has arrayed the statesmen of the time in two opposing schools, one holding that Congress had the constitutional power needed, the other contending that it had not. In each struggle too, there has been some vital interest of the nation at stake, and on the answer to the question "Has Congress the power?" has hung the decision whether we should go forward or backward. We can now see that the men who contended for a broad interpretation, and who supported the powers of Congress, were fighting for national progress, and that their success meant a freer, stronger national government to cope with the problems of the time. It is interesting to see that during this century and a quarter of struggle many foreign nations have adopted federal constitutions, notably Canada, Germany, Switzerland, Australia, South Africa, and Mexico, and all of these without exception have conferred upon their federal authorities far more power than ours possessed.

The powers given to Congress in 1787 were those that seemed absolutely necessary to answer the immediate needs of that time.

Taxation, borrowing, and coinage.

Regulation of foreign trade and commerce between the States.

Maintenance of an army and navy.

These were the points at which the Articles of Confederation had broken down. Any new government must control these essential points of sovereignty if it was to be truly national in character and to hold the respect and loyalty of the people. But since that time no new authority over business conditions has been con-

ferred by any amendment of the Constitution, and Congress is now struggling to deal with national questions by means of a group of powers that are no longer adequate to the task. As each decade passes it becomes clearer that the Federal authority must be substantially increased.

**Taxation and Finance.** — The taxing power is by general consent the most vital and important of all government prerogatives. Without it no national government can long exist. All the early conflicts between the King and the barons in England centered at this point, and the rise of English political liberty dates from the time when the Parliament won for itself the right to be consulted in taxation. Our own Congress, under the Article of Confederation, could not tax the people, but must ask the State governments for funds. The States paid or not as they saw fit. It is not strange that a government without resources of its own could not long command respect. To remedy this weakness it was provided by the new Constitution that Congress should have power “to lay and collect taxes, duties, imposts and excises.”

The effect of this change was far-reaching. First, it gave the national government an independent source of revenue, yielding abundant funds for all its expenses; the dignity and power of the nation were thereby at once raised to an unquestionable plane. Henceforth it could plan and undertake its administrative duties without fear of bankruptcy or humiliation. Second, it has made possible the protective tariff system by which the national manufacturing industries have been built up and developed. The first Congress under the new Constitution passed in 1789 a tax law with the following preamble: “Whereas, it is necessary for the support of government, for the discharge of the debts of the United States and the encouragement and protection of manufacturers that duties be laid on goods, wares and merchandise imported, Be it enacted, etc.”

Third, it has enabled Congress to regulate many industries by means of taxation; for example the manufacture and sale of alcoholic liquors, oleomargarine, etc., have been heavily taxed by Congress in such a way as to control to a large extent the production and use of these articles, and by the Corporation Tax of 1909 the Government has secured information about the finances of all the principal companies operating in the United States.

Under the constitutional taxing power a number of practical questions have arisen :

What may Congress tax, and what may it not tax?

What may the States tax, and what may they not tax?

**What May Congress Tax?** — Congress may in general tax anything except the State governments and their agents. It may not tax the State governments because by doing so it might seriously interfere with them, and it is the purpose of the Constitution to preserve and protect the States as well as the national government. A good instance of this principle is seen in the case of *TAX COLLECTOR v. DAY*, 11 WALLACE 113, 1870. Here the Supreme Court ruled that Congress could not tax the salary of a State official because it might obstruct and hinder the necessary work of the State. Day was a State Judge and the Court declared that a Federal tax upon his salary would be in effect an interference with the State's judicial department. If the Federal Government could tax the salary of such officials it might become impossible for the State to carry on its affairs. Each State is supreme in its own sphere and must not be hindered or obstructed by the Federal Government.

A different ruling was made in the case of *VEAZIE BANK v. FENNO*, 8 WALLACE, 533, 1869. Here Congress had taxed the circulating notes of State banks with the apparent purpose of discouraging their circulation, and the question arose — could Congress interfere in this way with the privileges granted by the State government to its local banks? The Supreme Court decided that Congress had the constitutional authority to do so because the Constitution had granted it not only the taxing power, but also the control over the national currency, and in pursuance of this control Congress had established a national banking system which should issue bank notes. This new national currency authorized by the Constitution must be made supreme in order to displace the currency issued by the State banks. If Congress had the right to issue such currency, it had the right to give it a preferred standing, and this it had chosen to do by a heavy tax of 10 per cent on State bank notes. The law was accordingly held to be constitutional under the authority to levy taxes and to provide a national currency.

And if a State engages in a private business it cannot claim exemption from the usual Federal taxes on such business, on the ground that the Federal tax is an interference with the State

government. In *SOUTH CAROLINA v. U. S.*, 199 U. S. 437, 1905, the State in order to reduce drunkenness had taken over the business of dispensing liquor. The Court held that the regular Federal internal revenue taxes could be levied upon the business regardless of State operation. Such a levy was not an interference with the State, but an ordinary revenue measure to which all who engaged in the business were subject.

**Can Congress Tax a State or City Bond ?** — In 1894 Congress had levied a tax on incomes, including the income or interest from city bonds. The owner of such a bond claimed that the law was unconstitutional because it interfered with the borrowing power of the city, and the city was a part of the State government. This claim brought up for decision in the Supreme Court the case of *POLLOCK v. THE FARMERS' LOAN & TRUST CO.*, 158 U. S. 601, 1895, in which the Court held the Federal income tax to be unconstitutional. The city as part of the State government was obliged to borrow money in order to carry out its powers. It did this by selling bonds. If its borrowing power could be interfered with by the Federal Government in any way, the city would be prevented from performing the duties confided to it by the State. This would be an interference with the State powers by the Federal tax and therefore contrary to the purpose of the Constitution. The Federal tax on the interest on municipal bonds was, in substance, a tax on the bonds themselves, and this was a tax on the State government's power to borrow. Hence the Act was unconstitutional. The reasoning here, on broad lines, is the same as in *COLLECTOR v. DAY*, 11 WALLACE, 113, 1870. The national government, like the State governments, is supreme *in its sphere*. Congress must therefore not reach out into the sphere of the States and use its taxing power to hinder them in any way.

From these rulings it is clear that all the necessary and proper means by which the State carries out its duties are free from taxation by Congress. With this exception, however—Congress may tax all the property of the people. The national and the State governments may even tax the same property.

**Tax Exemption of Judges' Salaries.** — Article 3, Section 1 of the Constitution declares that the judges shall receive a compensation "which shall not be diminished during their continuance in office." A somewhat similar clause is contained in Article 2,

Section 1, as to the salary of the President. Does this exempt these officers from Federal income taxes? This question was answered in *EVANS v. GORE*, 253 U. S. 245, 1920. Evans, a Federal District Judge, sought to recover from the Collector, Gore, the sum paid for his income tax, claiming that the tax diminished his compensation contrary to Article 3. The Supreme Court pointed out that the purpose of this and other clauses in Article 3 was to establish the judiciary in complete political and financial independence. It quoted Hamilton in the *Federalist*: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." The exemption was not for the private benefit of the judges, but for a great public purpose — to secure to all classes of the people the benefits of an independent judiciary. The courts were in special need of protection. To the Collector's argument that the tax did not fall separately or distinctly upon the judges but upon all persons in the community, and they were therefore not suffering a special levy but were performing their general duties as citizens and members of the community, the Court answered that Article 3 did not seek to protect the judges only from special burdens that might be laid on them but aimed to give them a distinctly preferred position by assuring them that no diminution in their compensation would be made. The Court therefore held that the income tax could not be constitutionally applied to the salary of a President or a Federal Judge.

**Taxation without Representation.** — The principle that taxes should only be levied upon people who are represented in the law-making body, is one of policy rather than of law. The territories, the dependencies, and the District of Columbia have at various times been taxed under laws passed by Congress before their representatives were admitted to Congress. The territories and dependencies now have delegates in the House of Representatives. The District of Columbia has not. In *HEALD, EXECUTOR, v. D. OF C.*, decided May 15, 1922, the constitutional power of Congress to tax the District of Columbia was in question. Heald was executor of the estate of Eugene Peters, a deceased resident of Washington. He claimed that the people of the District were taxed without any representation in Congress. They had no suffrage and no voice either in the levy of taxes or in the use of the money raised by taxation. The funds so raised were paid into the Treasury of the

United States and were not held as a separate District fund. This being taxation without representation was contrary to the fundamental principles of our Constitution.

The Court by Justice Brandeis held that the objection was not sound. "There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage."

**Repeal of Tax Exemption of Securities.** — The State may not tax Federal securities nor may Congress tax State or local bonds. This rule has created a class of tax-free bonds which the large investor strongly favors. The modern trend towards income taxes with higher rates on the larger incomes has led investors to give preference to Government, State, and City bonds because they are tax-free. The amount of these securities has grown so fast that they are estimated to comprise one-fifth of the national total. These funds are diverted from the more productive channels of private enterprise, and a strong public sentiment has developed against tax exemption. The farmer who wishes to mortgage his land, the business manager who needs new capital, or the public utility company which must provide fresh funds in order to keep its facilities up to date — all these are subject to taxation, and the investor passes them by for the preferred tax-exempt public loan. The repeal of this exemption would help to restore the normal flow of funds into private enterprise.

**Express Constitutional Limits.** — In addition to the limits on the tax power just considered, the Constitution imposes certain others upon the way in which national taxes may be levied; all of these were intended to secure fair treatment for all the States and complete freedom of trade among them.

(a) *Direct* taxes, except those on incomes, must be levied among the States in proportion to population. (Article 1, Section 9; and the Sixteenth Amendment.)

(b) Indirect taxes must be uniform throughout the United States. (Article 1, Section 8, Clause 1.)

(c) No tax shall be laid on articles exported from any State. (Article 1, Section 9, Clause 5.)

(d) 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. (Article 1, Section 9, Clause 6.) All of the above restrictions apply only to Federal taxes.

(a) The rule requiring Federal *direct* taxes to be levied among the various States according to the population, raises the question, what is a direct tax? The Court has held the following taxes direct:

Capitation, or so much per head of the population.

Taxes on land or on the rent from land or real estate.

On personal property or the income from it.

General income taxes.

IN *POLLOCK v. FARMERS' LOAN*, 158 U. S. 601, 1895, the Court held that the income tax of 1894 was direct, and since it had not been apportioned under the rule according to population, it was unconstitutional.

Agitation immediately began for a change in the Constitution; and eighteen years later, in 1913, the required three-fourths of the State legislatures ratified an amendment providing that "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."

The words "from whatever source derived" have aroused some uncertainty which it required two decisions of the Supreme Court to clear up. In *BRUSHABER v. U. P. R. R.*, 240 U. S. 1, 1916, and in *EISNER v. MACOMBER*, 252 U. S. 189, 1920, the Court held (1) that these words did not extend the Federal tax power over State bonds and State officers' salaries or over any other subject which Congress previously was not allowed to tax. The only purpose was to enable Congress to levy income taxes according to incomes rather than according to the population of the States. (2) The amendment changed the method of levying *income* taxes only. It did not affect, for example, the way in which direct taxes on personal property must be levied. If such property were directly taxed, the tax must be apportioned among the States according to population. Therefore if a corporation distributes to its share-holders a stock dividend which is not "income," the Federal income tax cannot

constitutionally be levied on this stock dividend, because the Sixteenth Amendment applies only to income.

**Form of New Income Taxes.** — Under the amendment several income tax laws have been passed with varying rates of taxation but in the same general form. The lower incomes of \$1000 and under are exempt. Married persons are also allowed an extra exemption. From \$1000 to \$5000 the minimum rate is imposed. Above \$5000 incomes are classified according to size with the rates of taxation increasing as the classes go up. Appeals from the decision of the local district collectors of internal revenue may be made to the Commissioner of Internal Revenue at Washington. Corporations, companies, and associations likewise pay a tax on their net income; and, in order to avoid double taxation, their shareholders are exempted from paying any tax on the dividends from such companies.

Each taxable person or company makes a return to the collector. Assessments are based upon these returns and further upon the additional information which the collector in any district may consider necessary to secure, in case there is reason to believe that a return is incorrect. The assessments of corporations are filed in the office of the Commissioner of Internal Revenue and constitute public records, but are open to inspection only upon the order of the President. The purpose of this provision is to enable the government and other authorities to secure accurate information as to corporate finances and conditions. Collectors and other employees of the government are forbidden to make known to persons not concerned, the operations, apparatus, methods of work, etc., of any manufacturer, or the sources of income, profits, losses, and expenditures of any person, or corporation, or to permit any income return or copy thereof to be seen by any person except as provided by law.

(b) The second constitutional rule that indirect taxes "must be uniform throughout the United States," does not mean the same rate on all goods but the same rate on the same goods *throughout the country*. The "United States" means, not a distant dependency or possession of the nation, nor a part of foreign territory occupied by American troops — it means only that part of the country which is included within the "States" and the incorporated territories. An incorporated territory is a district which



Congress has organized with a view to its becoming a future State, that is, with the aim of making it a part of the "United States." For example, an indirect tax may be levied in Porto Rico, the Philippines, Guam, or the Canal Zone at a different rate from that levied in California or Pennsylvania. In *DOWNES v. BIDWELL*, 182 U. S. 244, 1900, and the other insular cases the Supreme Court held that Porto Rico and the Philippines were not parts of the "United States" in the sense of this clause. The Court considered the origin of the clause and ruled that it was intended to protect the States as such. It should therefore only be applied to them and to such territories as were being prepared by Congress for statehood, that is, the incorporated territories. Since the new dependencies in this sense were not a part of the "United States," Federal taxes laid on them need not be uniform.

Whatever the soundness of the legal reasons for such a decision may be, the decision itself is of the greatest practical benefit in the administration of our colonial possessions; it leaves Congress free to deal with each dependency according to the special conditions and needs existing there.

(c) The reason for prohibiting Federal taxes on articles exported from any State is to prevent the destruction of the foreign trade of the States and also to avoid possible discrimination. The colonies had suffered severely from attempts made by Parliament and the Crown to suppress their exports, and it was desired to make such oppressive measures impossible. Here again the territories and dependencies are not included, and an export tax may be levied, for example, on articles leaving the Philippines.

(d) In declaring that no preference should be given to the ports of one State over those of another, the Constitution aimed to prevent discrimination by means of administrative rules and port regulations as well as by general legislation. In 1787 the States did not trust each other to the same extent that they now would, hence their efforts to exclude all opportunity for unequal regulation and favoritism. The rule does not apply to territories or dependencies, but only to ports of the States. Furthermore, the coast-wise trade from one port to another must be free of taxation. It was to establish this freedom from State taxes that the new Constitution was proposed as far back as 1785. To protect this interstate trade from burdensome Federal taxes it was provided that

the national government should not compel vessels engaged in such trade to pay duties when passing from one State to another.

**The State Taxing Power.** — The States in their turn have also found their taxing powers limited by the Constitution. In general they may tax anything except

interstate commerce,

imports and exports,<sup>1</sup>

the tonnage of ships entering their ports,

and the agencies of the National Government.

Tonnage taxes and import and export duties are expressly prohibited in the Constitution (Article I, Section 10) but the prohibition of a tax on agencies of the Federal Government is implied by the nature of the Government itself. This prohibition was first declared by Chief Justice Marshall in the celebrated case of *MCCULLOCH v. MARYLAND*, 4 *WHEATON*, 316, 1819, in which a State tax upon the notes of the United States Bank was declared unconstitutional. It was held that the United States Bank had been chartered by Congress as a means of carrying out certain national powers; it was therefore an agency of the National Government. If the State of Maryland could tax such an agency, it might by excessive taxation prevent the National Government from exercising its powers within the State boundaries. Said the Chief Justice, "the power to tax involves the power to destroy." If Maryland could tax the United States Government, all the other States could do the same, and the Government could be taxed out of existence. Such was clearly not the intention of the framers of the Constitution, hence a State tax on the National Government agencies of any kind is unconstitutional. The ruling in this case corresponds with the Federal tax case of *COLLECTOR v. DAY*, 11 *WALLACE*, 113, 1870, already mentioned.

With these exceptions, the State is free to levy on whatever it chooses. A more complete explanation of the constitutional protections in this field is given in Chapter 21.

**The General Welfare Clause.** — In two parts of the Constitution the expression "general welfare" is used — the preamble

<sup>1</sup> For inspection purposes such as quarantine etc., they may levy a tax on imports or exports to an amount sufficient to pay the cost of the quarantine or inspection, but any surplus of the taxes over and above this amount must be paid into the national treasury, Article I, Section 10.

states that one of the purposes of the new government is to "promote the general welfare," and Section 8 of Article I gives to Congress the power to tax "to provide for the common defense and general welfare of the United States." These general phrases, taken from the Articles of Confederation, have been more widely misunderstood than any other part of the instrument, although their meaning is clear upon a moment's reflection. They do not confer on Congress a *separate* and *distinct* power — that of promoting the general welfare. If Congress could promote the general welfare in addition to its other powers, there would be practically no limits to its authority. It might control labor, regulate marriage and divorce, and govern manufacturing and farming conditions; but all these subjects are in reality regulated only by the States, not by Congress. What is the true meaning of this clause? The words "general welfare" explain the *purpose of taxation*. Congress may tax in order to provide for the general welfare. This is readily seen from the other purposes of taxation given in the same clause — "to pay the debts and provide for the common defense." The phrase becomes clear if we insert the words "in order to," — Congress has power to tax in order to pay the debts, and in order to provide for the common defense and the general welfare of the United States.

**Regulation of Business by the Taxing Power.** — The power to tax is usually construed in a broad free spirit by the Courts, and Congress is given the benefit of the doubt in disputed questions of constitutionality. This has enabled the Federal Government to use its taxing authority to regulate in many ways that would otherwise be illegal.

The Protective Tariff lays a tax burden on imported articles in order to encourage the *production* of such articles in this country. The Federal tax on State bank notes, upheld in the *VEAZIE BANK CASE*, 8 WALLACE, 533, which we have already considered, was laid for the purpose of restraining State bank note circulation. In 1902 Congress laid a tax of 10 cents per pound upon the manufacture of oleomargarine colored to resemble butter. The law was passed at the instance of the farming interests who wanted to discourage imitations of butter. In *MCCRAY v. U. S.*, 195 U. S. 27, 1904, the constitutionality of this act was brought in question. McCray, a licensed dealer in oleo who had not paid the 10 cents tax, ob-

jected that it was unconstitutional, as an attempt to regulate and control the production of oleo and that Congress had no authority to regulate production. The Supreme Court held the law constitutional as a tax measure, and refused to see in it any illegal attempt to regulate — “the judiciary cannot restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. Therefore we find no merit in the argument that the purpose of Congress in levying this tax was to suppress the manufacture of oleo and not to raise revenue.” The law was in the nature of an excise tax and Congress undoubtedly has the power to levy excises so long as they are uniform throughout the United States. It was within the authority of Congress to select the objects on which the excise should be laid.

**Regulation of Narcotic Drugs by Taxation.** — In 1914, by the Harrison Narcotic Act, Congress laid a small tax on the production, importation, and distribution of opium and its derivative drugs. The most important part of the act was the regulation of sale and distribution which made it illegal to manufacture, sell, or give away any quantity of the drug without a license, and permitted the drug to be distributed only to persons who filled out a blank issued by the Collector. But had Congress the power to *regulate local sales* under the guise of a tax law? In *U. S. v. DOREMUS*, 249 U. S. 86, 1919, the defendant urged that such a Federal regulation of local sales was unconstitutional because it usurped a power that belonged only to the States. Doremus was charged with selling the drug to a person who had not made out the blank form required by the law. His defense was that the Federal power over local business was only to tax, not to regulate; it could not determine to whom drugs might be sold, it could only tax the sales. If so, the detailed rules as to registration, making out of blanks by purchasers, etc., were all outside and beyond the tax power of Congress. But the Supreme Court held that while the law did contain some regulative features which affected local sales, these regulations bore upon the collection of the tax and facilitated it, making the evasion of tax payments more difficult. The Court therefore refused to consider the regulative side of the act as the chief purpose of Congress and declared the Act valid as a tax measure. This established the principle that the mere presence of some secondary regulation in a tax law will not render it unconstitutional.

**Can Congress Regulate Child Labor by Taxation?**— Congress at first sought to suppress child labor by excluding the products of such labor from interstate commerce. But the Court for reasons discussed in Chapter 9 held such a law unconstitutional. A section was then added to the tax act of 1919, laying a tax of 10 per cent on the net profits of concerns employing children under fourteen in factories, shops, and other industrial establishments. It was hoped that the new law would be upheld as a tax measure.

In *BAILEY v. DREXEL FURNITURE CO.*, decided in 1922, the Court held the Child Labor Tax unconstitutional. The Furniture Co. manufactured in North Carolina. It was assessed \$6000 for the year 1919, for having employed a boy under 14 years of age. The Company objected that the law was unconstitutional because of its purpose, to regulate production. The Government urged that the law was valid on the same ground as was the tax in the *McCray* and *Doremus* cases. Also that the courts had always refused to look for improper motives in tax laws if the subject itself was one which Congress could tax. There was nothing in the subject of child labor or the profits of factories which prevented Congress from taxing. Hence, the courts could not attribute a regulative purpose to a law which on its face was a revenue measure and which, in effect did produce revenue. Even if some regulation did result from the measure, this would not invalidate it, according to previous decisions.

To this the Court replied that in the past, out of a proper respect for the legislative, the Court had gone far to sustain taxing acts as such, "even though there has been ground for suspecting from the weight of the tax that it was intended to destroy its subject." But in the present law there was strong evidence against the constitutionality of the Act on the very face of its provisions. "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

There was a difference between a tax and a penalty. Taxes were sometimes imposed in the discretion of the legislature with the chief motive of obtaining revenue from an object and with the incidental motive of discouraging the object by making its continuance burdensome. Such taxes do not lose their character because of the incidental motive. "But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard." For these reasons the law was unconstitutional as an attempt to regulate manufacturing.

**Regulative Tax on Grain Trading.** — By the Act of August 24, 1921, Congress laid a tax of twenty cents a bushel on all grain bought and sold on exchanges, but exempted from the tax such grain as might be dealt in on any exchange which conformed to rules fixed by the Secretary of Agriculture. The evident purpose of this was to regulate grain speculation and bring it under rules fixed by the Government. Yet the Government had no constitutional authority to regulate purely local transactions on such exchanges. In *HILL v. WALLACE*, decided in 1922, the Supreme Court held this Act unconstitutional on the ground that it was a palpable attempt to regulate local business by the use of the tax power.

**Class Exemptions from Taxation.** — The steady drift of public opinion towards graded taxation, that is, towards levies which fall with a higher percentage upon the well-to-do, is in the main a progressive tendency, but we must remember that every "graded" tax should if possible be collected, if only to a trifling amount, from all but the very smallest incomes. Every citizen should have an interest in the government and with that interest he should have the sense of responsibility that goes with bearing his share in its cost. The growth of a great mass of voters who had lost this sense of responsibility would be a calamity.

There is always strong political pressure to exempt the lower

incomes from taxation and to raise the exemption figure in order to appeal to larger numbers of the people. To justify this the economic wrongs done by monopolies, trusts, and large accumulations of wealth are pointed to and it is urged that these rather than the masses of the people should bear the burdens of taxation. But we cannot use these arguments as a pretext to inflame class feeling by seductive appeals to the desire for tax exemption, without defeating the very hope of these appeals. Economic injustices may be partly corrected by taxation, but not by the absolute exemption of small tax payers and the shifting of all burdens upon the corporation or the larger income; the setting up of a large "tax-free" class in the community would speedily destroy all spirit of democracy.

Rather must we bring to both rich and poor alike a keen sense of the matchless service that our government can perform if it is properly supported and financed by all classes, and is in this real sense a government of all the people.

**National Finances.** — The magnitude of the national budget may be seen from the following illustration taken from the year 1922.

#### SUMMARY OF NATIONAL FINANCES

Receipts from Customs.....	\$357,000,000
"    "    Internal revenue.....	\$3,207,000,000
Miscellaneous.....	\$537,000,000
Total Receipts.....	\$4,103,000,000
Total Expenditures excluding debt interest.....	\$3,360,000,000
Interest-bearing debt.....	\$22,796,000,000

**The Tariff Commission.** — Because of the large receipts from customs duties and of their effect on industry, Congress has been urged to adopt a more business-like method of revising the tariff, by some scientific fixing of rates according to the cost of production here and abroad and the general conditions in the industries concerned.

In 1909 a Tariff Commission was established, to be revived after a temporary lapse, on September 8, 1916. This law establishes a Commission of six members appointed by the President and Senate, three of each political party, with a term of twelve years. Its duty is to investigate the industrial, financial, and administrative effects of American customs laws, the rates of duty on raw materials and finished products, the effects of ad valorem and specific

duties, the arrangement and classification of the taxed articles in schedules, and in general to ascertain the operation of the customs laws, their relation to the national revenue, and their effect upon business and labor. The Commission reports annually to Congress and makes such special investigations as may be required by the President and the two tax committees of the Senate and House. In order to carry out this work it is authorized to examine documents and records of business firms, corporations, and persons, to require the production of books and testimony, to summon and examine witnesses, and hold the necessary hearings. In making its investigations it coöperates with and has the aid of the Treasury and Commerce Departments and the Federal Trade Commission and any other offices whose assistance is required. Members of the Commission and its employees are forbidden to divulge in any way not provided by law, the trade secrets or processes of any concern whose records and affairs they investigate.

What this body can achieve will depend upon the support given it by public opinion. When the voters so require, the making of tariffs will cease to be a purely political log-rolling enterprise and become a scientific undertaking.

**Collection of Taxes.** — This work is intrusted to two main agencies of the Treasury Department — the Division of Customs and the Collector of Internal Revenue. The Customs Division has jurisdiction over taxes on articles imported into the United States from abroad. Under this division are the 48 customs districts with the main ports of entry fixed by law. At each of these is a collector of customs with various deputies, surveyors, weighers, etc. Each customs district is divided into a number of inspection districts, including the piers, wharves, and stations within the district. There are also numerous bonded warehouses under the supervision of the collector of the port, for the purpose of storing goods before duty is paid. The deputy collector of customs having examined the goods imported and announced the tax which is due, the importer may appeal from his decision to that of the collector of the port and, should the decision of the latter be adverse, the importer may again appeal to the Secretary of the Treasury, and finally to the United States Board of General Appraisers, a body composed of ex-officio members appointed from the Treasury Department, who are technical experts especially



qualified to interpret the law. Should any questions as to the *legality* of the decision of the latter arise, such questions may be brought in the United States Customs Court created by the Act of 1909, but in matters of executive *discretion* the judgment of the Board is final.

The Commissioner of Internal Revenue has for his province the collection of the heavy taxes on incomes, profits, and on the manufacture and sale of oleomargarine, "renovated" butter, flour mixed with adulterants, "filled" or adulterated cheese, the duties upon tobacco products and distilled spirits and fermented liquors, playing cards, etc. At Washington there is an Assistant Commissioner and several deputy commissioners, each responsible for a unit under his control such as Income Tax, Sales Tax, Estate (Inheritance) Tax, etc. A Prohibition Unit with its chief reports direct to the Commissioner, as do also certain special divisions on Appointments, Appeals and Review, Solicitor, etc. The most important of all these is of course the Income Tax, which now brings up the largest single item of net government income. The area of the United States is divided into sixty-five collection districts, with a collector and deputies in each.

**The Budget.** — The first step towards placing our national government on a par with other governments in the handling of its finances, was the concentration of legislative appropriations under one committee in each House, as already noted under Chapter 3. The second step was the enactment of the law of June 10, 1921, on the Budget. This provides that the President shall transmit to Congress on the first day of each regular session, a budget, setting forth both in summary and in detail — (a) Estimates of executive expenditures and appropriations necessary in his judgment for the ensuing year. The courts and Congress have separate estimates of their expenses, not controlled by the President. (b) His estimates of the receipts during the ensuing fiscal year, under both the existing laws, and the revenue proposals which he makes, together with past and current receipts and expenses, debt balances available for use, etc.

If the revenues exceed or are less than the estimated expenditures, the President recommends necessary adjustments. He may also submit, from time to time, supplemental or deficiency estimates with reasons therefor. No revenue or appropriation estimates

may be submitted to Congress by any officer or employee of a department, unless at the request of either House.

**Budget Bureau.** — This work is intrusted to the Budget Bureau under a Director appointed by the President. Attorneys, financial experts, and other employees are chosen by the Director, and such assistants as may be secured from other executive departments are transferred when required. The Bureau also makes a detailed study of the departments and offices, to enable the President to change the existing organization and grouping of duties and to re-assign these on a more effective basis. The Bureau has access to all papers, documents, and revenues of the departments. Each department, or establishment head, designates a budget officer, who prepares annual estimates for submission to the Bureau.

**The General Accounting Office.** — The control and audit of government receipts and expenditures provides an examination of the accounts of all receiving and disbursing officers by an independent authority and thereby places a check upon inaccurate or dishonest payments of public moneys. The task involved is a huge one, as nearly every bureau, office, or division in the government service has its disbursing officer, that is, an employee authorized to pay out funds for the office. The administrative machinery which has been organized to audit all these accounts is under the direction of the Comptroller General appointed by the President and Senate for a term of fifteen years. The duties of his office are not only to approve expenditures and audit accounts of the different departments but also to settle or adjust accounts due, by, or against the United States and especially to prescribe forms, systems, and procedure for the accounting of funds in the different government offices and to examine the accounts of all fiscal officers.

He makes regular reports to Congress at each session and also special reports when required by the President or either House. He also furnishes information to the Bureau of the Budget when required.

Much attention is now being given by experts to the problem of government accounting. The clear accurate statement of government expense, the ability of responsible officials and congressional committees to learn at any moment the financial condition of each of the departments and offices, the estimate of the cost of conducting any piece of government work — all these are matters

taken for granted in business enterprises but extremely difficult of attainment in public offices. The Comptroller General through his authority to revise and reconstruct the accounting system of the government has a field of usefulness unexcelled by any other public official.

**Some Results of the New Act.** — Although the two offices just described were only recently created the effects of their work are already noticeable. One of the first steps taken by the Budget Bureau under Director Dawes was the establishment of a central control over the purchase and sale of supplies by the government offices, through the Executive Order of July 27, 1921. The country was divided into nine areas with a "coördinator" of supplies in each. This officer, acting under instruction from the Director of the Budget and the Chief Coördinator at Washington, confers with each department and office, inspects supplies and accumulations of government stocks, keeps in touch with the government projects in his area, and fixes the fair market price for sale of supplies, supervises the purchase of new stocks, and has authority to postpone sales when such would not be to the interest of the government. In each executive department there is also a Director of Purchases and a Director of Sales. These maintain relations with a Chief Coördinator at Washington, and the latter through his local coördinators is able to execute a general policy throughout all the government offices.

Such efforts have borne remarkable results. The immense and varied needs and supplies of widely scattered offices are fitted to each other, a surplus at one point is diverted to a deficit existing elsewhere. The War Department has mine planters no longer needed while the Lighthouse Service requires new tenders; the transfer from the War Department to the Lighthouse Service effects a saving of \$1,500,000. The Army is paying \$20 a ton for coal delivered at one point while the Navy is buying its coal at a nearby point at \$9.50 per ton. The Navy is asked to buy for the Army at this location, thereby saving \$10.50 per ton. At the end of its first year the Budget Bureau had effected a saving of \$250,000,000 with prospects of material increases in later years. The organization of a traffic board of railway experts to study and systematize the government's transportation needs, netted an annual saving of over a million in the freight bill.

But great as have been the advantages of economy, the Bureau of Budget and the General Accounting office are in a position to perform an even greater service by giving to Congress and to the public at large, a comprehensive view of the work of all departments of the government. Our system is so vast that we cannot see it unless the work and activities of the various branches, their methods, and procedure, are all coördinated and brought together in some intelligible way. This task the two offices described now perform effectively.

**Coinage and Legal Tender.** — The Constitution gives to Congress the power “to coin money, regulate the value thereof and of foreign coin.” But at the outbreak of the Civil War, the government issued large amounts of paper money also, which it later made a legal tender in payment of all debts. The Supreme Court at first declared that this was beyond the authority of Congress. “To coin” meant to stamp pieces of metal, and this could not be held to include paper money; *HEPBURN v. GRISWOLD*, 8 WALL., 603, 1870.

But later, in the *LEGAL TENDER CASES*, 12 WALLACE, 457, 1871, and in *JULLIARD v. GREENMAN*, 110 U. S. 421, 1884, the Supreme Court, which had meanwhile been increased from seven to nine members, ruled that Congress could issue paper money under the power to coin money, to borrow money, and under the war power. The Court in these decisions held that the printing of paper money and the compulsory acceptance of this money was one of the most common and usual forms of borrowing as practiced by all modern governments and the Constitution had expressly conferred the power to borrow. Furthermore while the coinage power alone might not be sufficient authority to issue the notes, yet the coinage clause when taken together with the clearly granted power of carrying on a war and the authority to borrow, all combined, undoubtedly gave to Congress the necessary constitutional right to issue paper money as a legal tender. By these decisions the enormous paper currency of the Civil War was legalized; in 1879 the Government was able to resume payment of coin in redeeming the legal tender notes, and the crisis was safely passed.

**The Currency.** — The national currency is composed of coin, Government notes, and the notes issued by national and Federal Reserve banks under the authority of the Federal laws. To secure

the value of these national bank notes an executive official, the Comptroller of the Currency, is appointed by the President with the approval of the Senate. This official has sweeping powers over the national banks. He inspects them through his agents, requires regular reports as to their financial condition, compels all persons desiring to secure national bank charters to conform to the necessary qualifications as to number of incorporators, amount of capital, reserve, etc. He also prepares and furnishes to the banks the notes which they are authorized to issue, requires them to deposit with the Treasurer of the United States securities covering the value of such notes, as a protection for note-holders, and, in case any national bank becomes insolvent, he takes charge of its property and assets, and disposes of them in such a way as to protect note-holders, depositors, and creditors. A redemption agency is also established under the Treasurer of the United States, where holders of national bank notes may present the same for redemption in legal tender. This system has worked fairly well except in times of great money stringency or panic, when it has not been sufficiently elastic to supply the credit which was needed.

**The Federal Reserve System.** — Until 1913 the national bank system had been weak because in a crisis there was no general government reserve of credit to place at the disposal of threatened banks — a succession of bank failures always occurred. In that year a comprehensive act revising the entire system was passed. The country is divided into twelve reserve districts and in each district the national banks form a new Federal Reserve Bank with a capital of at least \$4,000,000. The stock of this Reserve Bank is subscribed to by the national and State banks in the district, and by the public and the National Government. Each reserve bank is governed by its own board of directors who are chosen partly by the subscribing banks and partly by the central authority which supervises the entire Federal system, and which is known as the Federal Reserve Board. The public funds in the national treasury may be deposited with these Reserve banks and they also act as fiscal agents of the Government. They further become reserve depositories for the subscribing banks in each district; that is, the local banks must keep a certain proportion of their deposits on reserve with the Reserve bank.

The chief business of reserve institutions is the "re-discounting"

of commercial paper. Any subscribing bank which has made loans to manufacturers, merchants, farmers, or other business men upon promissory notes, if it needs more funds to lend to its clients, may take this paper to the Reserve bank of its district and secure a loan upon depositing the paper as security. The local bank thereby relieves itself from the pinch of tight money. It may not deposit stocks or bonds as collateral but only commercial paper. The Federal Reserve Board is composed of the Comptroller of the Currency and the Secretary of the Treasury ex-officio, plus six members appointed by the President with the consent of the Senate. These latter members receive a salary for their duties. The Board has extensive authority to watch over and regulate quickly every feature of the new system. It directs the accounts and reports of the Reserve banks, publishes a weekly statement, controls the issue and retirement of special Federal Reserve notes when these are needed, and changes the local reserve requirements fixed by law, for both the local and the Reserve banks. It may also remove officers or directors of the Reserve banks for causes connected with their official duties.

The Federal Reserve notes are issued on the security of commercial paper deposited by the subscribing banks and other security that may be accepted in the discretion of the Board. The profits of the Reserve banks are divided between the subscribing institutions, after a suitable allowance for a surplus fund and Federal tax have been made. The Reserve banks are allowed to establish branches within their districts.

**Results of the Reserve System.** — The advantages of the new Act are many, chief among them being: First, the concentration of reserve funds which it provides within each region in order to strengthen and help any or all of the local banks which may need assistance in time of emergency. Second, the new system places a premium upon commercial paper of short time, such as ninety days, and thereby removes in part at least the preference which the National banks have heretofore shown to stocks and bonds as collateral for loans. Third, the new Act furnishes a central controlling authority in the management and direction of our reserve funds. Without the Federal Reserve system our public finances could not have met the sudden and enormous strain either of the Great War or the reconstruction period which followed.

**Federal Land Banks.** — By the laws of 1916 and 1918 Congress sought to supply in part the farmer's special need of credit. These Acts established 12 Federal Land Banks similar to the Reserve banks. They were authorized to sell bonds and to lend money to local farm loan associations within their districts. They were also authorized to buy and sell Government bonds, to act as fiscal agencies of the Government and to receive deposits of public funds. In *SMITH v. KANSAS CITY TRUST CO.*, 255 U. S. 180, 1921, the constitutionality of these Acts was attacked on the ground that their purpose was to aid and encourage farming, and that Congress had no constitutional power over agriculture whatever. The Supreme Court upheld the law under the authority to borrow money, to tax, and to deposit the proceeds of taxation in banks, also under the general power to appoint fiscal agents to carry out financial transactions of the Government. The fact that the banks so created lent money to farm loan associations did not render their creation for other purposes unconstitutional.

**Federal Subsidies to the States.** — The Government now grants annually large sums to the States to be used for such purposes as agricultural and home economics education, industrial training, roads, Americanization, the militia, etc. A discussion of these will be found under Chapters 21 and 30.

**A Public Thrift Policy.** — Within recent years the Treasury Department has exercised a remarkable and beneficial influence along educational lines through its thrift campaign. The Savings Division was organized during the War, to help market the Liberty and Victory bonds. Prior to 1917, an insignificant proportion of Americans were bond-buyers. In all parts of the country, the desirability of National, State, and local bonds as investments has been brought home to the man who saves in small amounts. The Division, by issuing pamphlets for use in normal and public schools, and enlisting the aid of the school teachers and pupils, has greatly stimulated popular interest in Government securities, and the Treasury, by the sale of bonds of small denomination, has finally brought National loans within the reach of all classes. These efforts, backed by constant advertising, are helping to convert us into a more thrifty people.

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## QUESTIONS

1. Why have the powers of Congress given rise to so much conflict of opinion among statesmen and in the courts?
2. Why were the Federal powers enlarged in 1787? Which powers were added at that time?
3. Why was the taxing power considered important?
4. What power of taxation had Congress under the Articles of Confederation and how was this changed in the new constitution?
5. What is the rule given in the constitution governing the levy of duties, imposts, and excises (indirect taxes)?
6. Could Congress constitutionally tax the salary of a State official? See *COLLECTOR v. DAY* and the Sixteenth Amendment.
7. Congress levies a tax upon the circulating notes issued by State banks. Is it constitutional? Give reasons and a precedent.
8. Show the difference between the rules applied by the Court in *VEAZIE BANK v. FENNO* and *MCCULLOCH v. MD.*
9. If Congress levied a tax on all personal property, could it include such property as State or municipal bonds? Why? Give a precedent.



10. The State Government of X decides to take over the tobacco business within its borders and conduct it by State officials. Must it pay the Federal internal revenue tax on tobacco? Explain the arguments of the State and the decision of the Court, with reasons.

11. Explain the constitutional rule governing the levy of direct taxes.

12. In order to protect our natural resources Congress levies a duty of \$1.00 per ton on all coal exported from the United States. Would such a tax be constitutional? Reasons.

13. Do direct taxes have to be uniform throughout the United States? Reasons.

14. Could Congress levy a tax of 50 per cent on the value of silks imported into the United States and a tax of 51 per cent on imported tobacco?

15. Could Congress levy a tax of 50 per cent on the value of woollen cloth imported into Philadelphia and 30 per cent on the same cloth imported into New York City? Reasons.

16. Congress enacts a law providing that vessels passing from Chicago to Duluth shall pay a tax of one-quarter of 1 per cent of the value of their cargo at the latter point, and shall make out clearance and entry papers for the voyage the same as if they were bound for a foreign port. Is this constitutional? Reasons.

17. In 1894 Congress levies a tax of 1 per cent on all incomes over \$4,000. Is it constitutional? Reasons.

18. In 1913 Congress levies a tax of 1 per cent on incomes over \$3,000. Is it constitutional? Reasons.

19. The Federal Government does not at present tax land. Could it constitutionally do so? How must a land tax be levied and why?

20. In order to discourage the attempts of the States to regulate business, Congress establishes a tax of 5 per cent on the salaries of all officials employed in regulative work by the States. Is it constitutional? Reasons.

21. Which kinds of Federal taxes are direct?

22. In 1900, a grocer imports coffee from the Philippines and is obliged to pay a small duty at the port of entry in the United States. He protests on the ground that the Constitution declares that duties shall be uniform throughout the United States. Decide the case with reasons.

23. Give and explain the most important sections of the Constitution limiting the State power to tax.

24. If Illinois levies a tax of \$1.00 per ton on steamboats and other craft which ply the waters of the State, is the tax constitutional? Reasons.

25. Could Illinois without Federal consent tax the notes of the new Federal reserve bank located in Chicago? Reasons. Cite an authority.

26. Could Massachusetts protect the health of its people by establishing a State quarantine or health inspection service and charging a small inspection fee on all goods imported into the State, in order to cover the cost of the medical officers in examining the imported goods? Explain the reasons and quote the clause of the Constitution in question.

27. If Congress gave its consent could a State levy a general tax on imported articles?

28. Explain fully the meaning of the general welfare clause of Article I, Section 8.

29. You are present at a discussion in which the power of Congress to regulate the public school system is argued. Someone claims that Congress has the power to do so under the general welfare clause. What would be your views?

30. Would a law which levied a tax of 2 cents per pound on imitation butter and thereby made it unprofitable to produce such imitation butter, be constitutional?

31. Mention some constitutional tax laws which have been used to regulate business.

32. Mention some unconstitutional ones.

33. Show the difference between them as explained by the Supreme Court.

34. In 1920 Congress levies a heavy tax on automobiles. You own an automobile on which you have already paid taxes to the State. Could you claim that the Federal law was unconstitutional because of double taxation?

35. How have the State and national governments heretofore kept their subjects of taxation, or sources of revenue, separate?

36. What subjects are they now both taxing?

37. Explain briefly the newer drift of public opinion in taxation and its effects upon proposed tax laws.

38. Is taxation without representation unconstitutional? Illustrate.

39. In a discussion of the Federal income tax it is claimed that the law is unconstitutional because it exempts incomes under \$1,000 and thereby violates Article I, Section 8, which requires that certain taxes shall be uniform throughout the United States. Give your views as to the strength of this claim, with reasons. What does "uniform throughout the U. S." mean?

40. Give a brief summary of the chief sources of national revenue.

41. Explain how customs duties are collected and the administrative organization for this purpose.

42. Summarize briefly some problems arising in the collection of customs and internal revenue.

43. Does Congress or do the people know accurately the efficiency, economy, or extravagance of the executive departments? Why?

44. What is the purpose of the national budget?

45. Describe the organization and operation of the Budget Bureau.

46. How are the financial accounts of the Federal Government supervised?

47. Why is it proposed to abolish the exemption of public securities from taxation?

48. Explain the meaning of the words "from whatever source derived" in the Sixteenth Amendment.

49. Explain the difference between a scientific and a political settlement of customs tariff problems.

50. What is the constitutional power of Congress over currency?

51. In order to pay the expenses of the Civil War Congress issued a large amount of paper money and declared such paper to be legal tender in payment of debts between individuals. Was such action constitutional? Reasons.

52. Was it constitutional in time of peace? Reasons.
53. Explain how the new Federal banking act aims to remedy this weakness.
54. How has the Government sought to help the farmer to secure cheaper credit?
55. How does the United States borrow money?
56. It is urged that Congress having no authority over agriculture cannot establish farm loan banks. Decide this question with reasons in full.

## CHAPTER 6

### POWERS OF CONGRESS: REGULATION OF COM- MERCE — THE RAILWAYS

**Purposes of Regulation.** — The Government today is a silent partner in every large business. Public regulation now exists in all fields. Its effects are sometimes injurious, sometimes helpful; a survey of the chief regulative laws shows that their purpose is really to conserve and protect business welfare. They aim to safeguard (a) the consumer; (b) the investor, and (c) the producer.

**Protection of Consumer.** — Formerly we believed that the consumer was amply protected by the ordinary economic law of supply and demand. When he was defrauded or charged an extortionate price or otherwise injured, he was supposed to patronize a different dealer. This shifting of trade to the honest and moderate priced producers theoretically offered full protection to the community. Our laws were based on this doctrine. But it no longer fits real conditions. Trade has ceased to be personal, and is now national in scope. The buyer today does not know personally either the manufacturer, the wholesaler, or the retailer whose goods he purchases. An article may be what it seems, but quite often it is not. Producers of some standard necessity of life may combine together to extort unreasonable prices from the public. Fraud may be practiced in manifold ways, so that the consumer is unable to protect himself. He is now thoroughly aware of this fact and demands public protection. These changes in the conditions and in the beliefs of the people have produced a strong tendency towards Government regulation for their protection.

**Investment Protection.** — The investor has likewise undergone a profound change in his beliefs and in his attitude towards the Government. We formerly considered it the buyer's business to protect himself in any deal. The old legal principle *caveat emptor* — "let the buyer beware" — meant that every purchaser was thrown on his own resources in the open market; if he were de-

ceived it was from lack of due care and caution. Practical as this rule may have been some generations ago, we can no longer rely wholly upon it in the purchase of stocks, bonds, and securities today. The investor now demands that there shall be at least some minimum standard of safety and honesty in the issue of securities, and that this standard shall be fixed and enforced by the Government as far as possible.

*Trade Methods.*—The producer has also claimed protection against monopolies and unfair trade practices by his rivals. Critics often claim that the friends of regulation always want other people's industries regulated. This hardly fits the facts. The Pennsylvania Railroad worked actively to strengthen the anti-rebate clause of the Railway Act. The H. J. Heinz Co. has steadfastly urged the stricter regulation of preservatives in foods and the prohibition of benzoate of soda. The Associated Advertising Clubs have insistently demanded that the Government suppress fraudulent advertising, as an unfair trade method. Even the Investment Bankers' Association has at last been forced to indorse some form of public securities law to restrict the sale of fraudulent stocks. The vast majority of producers prefer to eliminate both monopoly and crooked trade practices. To this end they demand public regulation.

**Excessive Regulation.**—Undoubtedly, the desire to regulate has been allowed to go beyond reasonable bounds, and many unimportant details of business life, together with some subjects that could not properly be controlled by public authority, have been subjected to unnecessary interference. The quantity of legislation has been unduly inflated. Taking the last five normal years before the Great War, ex-Senator Root has declared that Congress and the State Legislatures together had passed over 62,000 statutes, and the courts of last resort had rendered over 65,000 decisions, in 630 volumes of reports! In the twenty-five-year period from 1890-1914 the laws annually passed by the Massachusetts legislature had increased 75 per cent and the bills introduced increased over 300 per cent.

**The Power to Regulate.**—Article 1, Section 8, of the Constitution confers on Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." This is the most frequently used of all the Federal powers.

It is employed to control monopolies, transportation, telephones and telegraphs, food and drugs, and other matters of vital interest to the people. The Federal authority extends over any transaction across State lines, but not to those within a State which affect exclusively local commerce. Whenever a company engages in trade beyond the bounds of its own State, it becomes subject to the possible legislation of Congress. This explains why the attention of the people has become so closely fixed upon the regulative power as to make it the very center of government activity today. The business men of 1785 found that State regulations and State taxes were hampering the free flow of trade between the States. Their efforts to unify the commerce power formed one of the strongest influences in the adoption of the Constitution.

The commerce clause has raised several important questions:

What is "commerce"?

Does it include manufacture?

When is commerce "among the States" (interstate)?

What is the present system of regulating commerce?

**Meaning of "Commerce."**—What is *Commercé*? Chief Justice Marshall, than whom no greater authority can be cited, has said in *GIBBONS v. OGDEN*, 9 *WHEATON*, 189, 1824, "Commerce is intercourse." This includes not only the means of transport known in 1787 but also those which have developed now and may arise in the future.

Chief Justice Waite in 1877 said (*PENSACOLA TELEGRAPH CO. v. WESTERN UNION TELEGRAPH CO.*, 96 *U. S.* 1, 1877):

"The powers thus granted over commerce and postal mails are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steam-boat, from the coach and the steam-boat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

Justice Harlan in another case said, "Commerce among the

States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph." It is fortunate that our highest court in defining "commerce" has taken such a broad and statesmanlike view. Had it adopted a narrow interpretation, the power of Congress might have been so severely limited as to deprive the national government of its authority. Since 1787, the economic progress of the country, the growth of mechanical inventions, and the increase of population have all combined to make "commerce" one of the greatest businesses of the nation, and with every step in this growth the Federal authority has kept pace. Every new invention and discovery which promotes intercourse, increases the power of the national government to that extent.

**Does "Commerce" Include Transport by any Means Whatever?**

— It may seem strange that this question could arise after the broad, inclusive definitions above quoted. Yet it has had a direct bearing on many recent cases. In *U. S. v. CHAVEZ*, 228 U. S. 525, 1913, Arnulfo Chavez was charged with violating the Federal law of 1912 which prohibited exportation of munitions of war to American countries where conditions of domestic violence existed. The government claimed that he had carried on his person 2000 Winchester cartridges from El Paso, Texas, with the intention of entering Mexico, contrary to the Act. The defense was in part that the carriage of articles *on the person* was not an export and that the law could therefore not apply to Chavez.

But the Court held that the *method* of carriage was immaterial — a man could not evade the Federal power over commerce by the simple device of carrying articles on his own person. Such personal carrying from Texas to Mexico was an export and therefore subject to national regulation. And one who placed two quarts of liquor in his motor car in one State and then drove to his home in another, was likewise taking part in interstate commerce; *U. S. v. SIMPSON*, 252 U. S. 465, 1920.

**Must "Commerce" be for Gain or Profit?** — In the Simpson case above cited, the defense urged strongly that commerce involved the idea of traffic for gain, and that the common use of the word clearly showed this. Simpson insisted that mere travel in one's own conveyance, after having purchased an article, and with the purpose of taking it home, was not in any real sense of the word

"commerce." But these arguments were definitely rejected by the Court, which ruled that the presence or absence of profit, barter, buying, and selling did not affect the fundamental fact of intercourse between the States. And over such intercourse Congress had complete authority.

**When is Commerce Interstate?** — Congress may not regulate all kinds of commerce but only that which is "among the States," or with foreign nations, etc. If Congress, for example, passes a loosely worded law declaring that all employees of interstate railways may recover damages for injuries caused by the company's neglect, the company may reply that such an act is unconstitutional because it includes employees engaged in local commerce as well as those employed in national traffic. In *HOWARD v. ILLINOIS CENTRAL*, 207 U. S. 463, 1908, the Supreme Court declared that such an act was invalid when applied to all employees of interstate lines because all included those engaged in purely local train movements. Over these Congress had no valid authority. Later a new act was passed, April 22, 1908, which applied to employees engaged in interstate commerce, and the Court upheld this, as being within the constitutional power of Congress, in *MONDOU v. N. Y. N. H. & H. R. R. CO.*, 223 U. S. 1, 1912.

Railway men employed in interstate train movements are, of course, subject to Federal law. Those engaged partly in local and partly in interstate train operation are subject to State law on the former and Federal law on the latter. Those who repair cars and locomotives used exclusively interstate are also engaged in national commerce. So also are men who repair the tracks and bridges over which interstate trains are run. In a recent interesting case even a man who cleaned a camp car, attended to the beds, and cooked for a gang of railway bridge carpenters repairing interstate bridges, was held to be employed in interstate commerce, *P. B. & W. R. R. v. SMITH*, 248, U. S. 101, 1919.

**Does "Commerce" Include Manufacturing?** — The importance of this question for the business man may be seen at once from the fact that practically every business except farming, mining, and the professions, would be subject to the direct control of the National Government if commerce were so broadly defined as to include industry. This interesting problem came before the Supreme Court in the case of *UNITED STATES v. E. C. KNIGHT*, 156 U. S. 1,



1895. Congress having passed an act prohibiting monopolistic combinations in interstate *commerce* the question arose, is a *manufacturing* combination subject to this law? The attorneys for the Knight Co. declared that manufacturing was the change of form while commerce was the change of place, and that Congress had control over commerce but not over manufactures, according to the plain meaning of the constitutional clause. This view was upheld by the Supreme Court. Industry is not commerce. But practically, this distinction is becoming daily of less importance since every large manufacturing enterprise is now obliged to engage actively in trade between the States. It must transport its raw materials and sell and ship its finished product. The assembling and distribution of these materials and products has now become so closely connected with their manufacture as to be inseparable in practice; which amounts to saying that our large industrial companies have become subject to the commerce regulating power of Congress. Over this great current of interstate trade the authority of Congress is absolute and plenary, subject only to the restraining clauses of the Constitution.<sup>1</sup>

It may pass laws to remove obstacles from trade, to protect commerce from dangers and evils which are threatened, to regulate the kinds of commerce which shall flow from State to State and the channels by which it shall flow, and may even prohibit commerce temporarily, in an emergency.

**Insurance and Interstate Commerce.** — In *PAUL v. VIRGINIA*, 8 WALL. 168, 1868, the question — when is commerce interstate? — again took on practical importance. Paul was the Virginia agent of several New York fire insurance companies. He wrote applications for policies in Virginia which were sent to the home offices in New York and there approved. The policies were then sent to Paul in Virginia who delivered them. At this point they became binding contracts. The Virginia law required insurance agents of companies from other States to take out a license and de-

<sup>1</sup> The most important of these clauses are the prohibition of taxes on articles exported from any State and of preference to the ports of any State, also the declaration that vessels in the coasting trade shall not be obliged to enter clear or pay duties while passing from one State to another: all are contained in Article 1 of the Constitution. The purpose of these restrictions has already been explained under Taxation.

posit bonds with the State Treasury of Virginia. Paul had not done this, he was therefore prosecuted for violation of the Virginia Act. In defense he urged that as his transactions were with New York companies he was engaged in interstate commerce — and his business was therefore subject to the regulation of Congress, not of the States. The Supreme Court, however, upheld Virginia and ruled that since the policies were contracts of indemnity against loss by fire, they were not articles of commerce in any proper meaning of the word nor were they commodities or articles shipped from one State to another. They were not interstate transactions even though the parties were located in different States, because the policies did not take effect nor come into existence until contracts were delivered by the agent in Virginia. Hence they were local transactions and must be governed by the local law. They formed no part of the commerce between States. If a citizen of New York were to visit Virginia and make a contract for the purchase and sale of goods in Virginia such a contract would not be a part of interstate commerce. Accordingly Paul must be governed by the law of Virginia. The same principle was reaffirmed in *NEW YORK LIFE v. DEER LODGE COUNTY*, 231 U. S. 495, 1913.

**Stages in Regulation.** — The chief regulative laws of recent years have been aimed first, to prevent railway discriminations and extortionate rates, hence the Commerce Act of 1887; second, to prevent the formation of combinations in restraint of trade, hence the Sherman Act of 1890; third, to restrict the evils of stock inflation and over-capitalization, leading to the Publicity laws of 1903 and 1909; fourth, the prevention of harmful competitive practices, by the Trade Commission and Clayton Acts of 1914; and fifth, the building up of the run-down railway systems and a national mercantile marine by the Railway Act of 1920 and the Shipping Acts of 1916 and 1920.

**Railway Regulation.** — Our Federal railway policy has been inspired by three main purposes: (a) to afford "reasonable" freight rates, particularly on farm products; (b) to keep the railway system open to all shippers upon a fair, impartial basis; (c) more recently, to reestablish the railways financially so that they can offer a more adequate transportation service to the country. Of these the two latter require special mention.

**Discriminations and Rebates.** — Throughout its entire history the railway business has been infested with open and secret discriminations. One of the commonest forms of this was a lower rate quoted to the large shipper, but as this inequality soon became known and aroused antagonism the discrimination was then changed in form. The large shipper was quoted the same rate as his small competitor, but he received a secret discount or rebate of part of this charge.

After the rebating practice had become thoroughly established the large shipper decided to extend his advantage one step further by demanding a rebate not only on his own shipments but also on those of his competitors. He was not always able to secure this, but if he controlled a sufficient amount of freight to make it worth while for the railway to accept his terms, he was successful. Court records show for example that one railway allowed its largest freight shipper a rate of 10 cents per barrel of oil, whereas his competitors were paying 35 cents per barrel, and that the railway furthermore paid to the large shipper the sum of 25 cents per barrel, *on his competitor's freight*, which was the difference between his rate and that charged the small shipper. The large company thereby enjoyed an advantage of 50 cents per barrel over its competitors in the cost of marketing its product.

This entire practice is now forbidden by the Act of 1887, and the amendment of 1903, providing that "it shall be unlawful for any person, persons, or corporation to offer, grant, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act." "Every person or corporation whether carrier or shipper who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor." So long as the Act punished only the railways, it was difficult if not impossible to enforce it, since the initiative in rebating did not usually come from the carrier but from the shipper, who demanded a drawback. But the amendment of 1903 just cited, which visited a punishment upon the shipper who demands, as well as the carrier which offers or grants the rebate, speedily put an end to the grosser forms of drawback and the practice has steadily diminished. Many of the principal railways and large

industrial combines have been fined for rebating, some of the traffic managers being penalized as much as \$10,000 each and one railway company being fined \$118,000. That the illicit custom has not died out yet is due to the fact that some hope has remained until recently of devising new indirect methods of rebating which might stand as legal.

**Other Forms.** — Discrimination has also been practiced on a large scale through the following means :

*Private freight cars* — owned indirectly by one large shipper and leased out to competitors. The owner is favored or the competitor is penalized by special terms and charges.

*Private railways* — owned and operated by large manufacturing companies. They receive freight from the public carriers at the entrance to the manufacturing plant and sometimes make a high charge against the railway for this local plant service. This charge being subtracted from the railway freight rate gives the manufacturer in effect a rebate on his freight bill.

*Demurrage* — which is an extra charge by the railroad against the shipper for keeping the cars longer than forty-eight hours. It may be calculated in such a way as to discriminate against or in favor of certain shippers.

*Car supply* — is always short in rush seasons. The favored shipper is allowed more than his share of the available cars by the railway, and this severely limits his competitors and at times even shuts them off from the market. This discrimination has for years been a standing practice in the coal business.

*Railway terminal facilities.* — After the shipper has secured equal freight rates with his erstwhile favored competitor, he may find that the latter is obtaining some special privilege or lower charge at the terminus of the railway for the services rendered there. These services cover in modern trade such a large field as to be of vital interest to every manufacturer or shipper. The storage of freight in elevators or warehouses, the ferrying of freight across rivers or a harbor, the private exclusive use of special parts of the railway company's equipment such as piers, wharves, docks, etc. — all these must be watched by the shipper to see that his terms are equally favorable with those given his competitors. In order to prevent these forms of discrimination, the Commerce Act has conferred on the Commission the supervision and control over all

terminal services directly or indirectly connected with transportation, and the Commission now regulates not only the charges, but also the kind of service rendered. All the above forms of discrimination are forbidden by the following clause of the Commerce Act:

“That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give *any undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to *any undue or unreasonable prejudice or disadvantage* in any respect whatsoever.”

The injured shipper may also recover in a suit for damages. Rebates, as we have seen, are especially forbidden, both the giver and receiver being subject to a fine of from one to twenty thousand dollars and imprisonment for two years.

**Discriminations against Cities and Districts.** — Another form of discrimination which has caused much trouble and against which the Federal law is directed, is the difference in railway rates to different cities and sections of the country. It is to the interest of the railway to build up a long haul; points at the end of its line are sometimes favored at the expense of nearer cities. The reason is that the railway can handle traffic more cheaply and develop a more profitable business on long-distance freight. This often leads to a higher charge for a short haul to the nearby town than for a longer one to the city at the terminus of the road, and therefore works injustice to the nearer points. The necessity for a reduction of rates as a rule arises from discrimination against particular places, but not from the general level of rates charged, which is lower in this country than in other parts of the world.

**Market Competition.** — The real problem of government rate control today is the competition between different sections of the country for the same market. The manufacturers and merchants of the Atlantic seaboard are competing with those of the Mississippi Valley to win the trade of the Rocky Mountain States and the Pacific Coast. The slightest change in through railway rates westward is bound to affect this competition and help one section at the expense of another. The railways understand this and their efforts are bent towards a scale of rates which will encourage the most

traffic at a high profit and at the same time answer the needs of the communities through which they pass. But frequently circumstances beyond their control, such as water transportation, competing railways at terminal points, or the rise of new industries requiring special rates for their encouragement, intervene to compel an entirely different basis of rate-making from what would otherwise be possible.

**The Commission.** — Amidst all this maze of bewildering and conflicting interests there must be some impartial tribunal which shall survey the whole field of rates and regard each local question in its connection with the entire problem of industrial competition. This is the work of the Interstate Commerce Commission. We may appreciate the magnitude of its sphere and its transcendent importance to the business of the country when we realize that every accurate study of rates, and every just decision as to their reasonableness, must be based on a knowledge of the physical and financial condition of the railway and its competing lines, and the business conditions at the origin and destination of the traffic, together with those of other competitive districts which may be affected. Gradually the Commission is being forced to become the economic supreme court of the American transport world and to establish a system of rates which shall give to the manufacturers and merchants in each section a special facility in reaching their markets. The Commission consists of eleven members appointed for seven years. This body has power to receive complaints of shippers, investigate rates, and ascertain if undue preferences or discriminations exist. It may also order the necessary changes to remedy discriminations and excessive rates. It holds hearings of all parties concerned, and provides a quick, simple, and cheap form of procedure so that both railway and shipper may secure an equitable adjustment of their differences. Having heard both sides and made such independent investigations of its own as it may wish, the Commission issues a rule or order deciding the case. The orders of the Commission may be reviewed by a Circuit Court of Appeals.

**Rates.** — The carrying companies are entitled to a fair return on the value of their property used for transportation. The act of 1920 temporarily fixed  $5\frac{1}{2}$  to 6 per cent as a fair return on such property as a whole, although particular companies may get more

or less. Changes in rates made by any company may be suspended by the Commission until it examines their reasonableness. The Commission may also investigate any rate, and order a change when necessary. The "long and short haul clause" provides that a carrier may not charge more for a shorter than for a longer distance, over the same line going in the same direction, when the shorter is included in the longer distance, but the Commission may, in special cases, after investigation, authorize exceptions to this rule.

**The Commodities Clause.** — By the act of 1908, railways were forbidden to transport commodities which they themselves owned or produced, except timber products and articles needed for their business as carriers. This clause was interpreted in several important anthracite coal cases, notably the *U. S. v. D. L. & W.*, 238 U. S. 516, 1915; *U. S. v. READING*, 253 U. S. 26, 1920; and *U. S. v. LEHIGH VALLEY R. R.*, 254 U. S. 255, 1920. In order to comply with the laws, while still retaining control of the coal on their lines certain of the anthracite carrying railways had formed coal companies, separate in name, but substantially controlled by the same officers or stockholders as the railways. In this way the carriers sought to control the coal business in substance, while apparently conforming to the commodities clause. The Supreme Court in the cases above mentioned declared these pretexts to be mere subterfuge. It ruled that the railway companies did in effect control the coal companies and therefore were engaged in owning, producing, and transporting the coal, a violation of the commodities clause. The Court looked through the form to the substance of the transactions, and compelled the carriers in question to change their practices to conform to the law.

**Scope of Regulation.** — The powers of the Commission cover not only railways but also private car lines, sleeping cars, parlor cars, express companies, pipe lines except gas and water, telegraph, telephone, and cable companies, shipments of goods partly by rail and partly by water, storage charges, etc. The Commission also prescribes a uniform system of accounts for carriers, and requires reports from them on earnings. It enforces the law governing air breaks, couplers, and other safety appliances on interstate trains. Under the Act of 1920 the Commission may approve or disallow

issues of new stock and securities for interstate railways, also extensions of lines or the building of new lines.

**Results of the Law.** — The results obtained by these laws have amply justified their passage; rebates have not ceased but they are being rapidly suppressed and are punished with severity. Over \$200,000 in fines are sometimes levied in one year, and vigorous prosecutions are being pushed wherever evidence is obtainable. Numerous shippers injured by other forms of discrimination have brought suits before the Commission and in the Federal Courts and have received substantial awards of damages. The whole problem of giving to all producers a fair and equal opportunity to use the railways is slowly nearing a solution. It would be greatly aided by some means of further hastening court procedure in law-suits on railway cases.

Over 5000 complaints are yearly received by the Commission; of its own accord it has made important use of its power to investigate, one inquiry for example resulting in a complete change in the methods of the express companies along more modern lines.

**Criticisms.** — The Commission's work has been severely criticized, too often with justice. It is claimed that the carriers should have been more liberally treated by allowing them to charge freight rates sufficiently high to enable them to make purchases of rolling stock, extensions, and improvements. The general rate of return on money invested in the railway business, it is urged, has been so low that the public is loath to buy railway stocks. The carriers having no means of securing adequate new capital to improve their properties should be allowed to accumulate surplus income to pay for improvements. Many of the more favorably situated lines have done so but the poorer lines could not. The Act of 1920 seeks to remedy this by a broader, more progressive policy under which the Commission is to allow charges which will net the carriers in groups or as a whole a fair return on their property value.

The Commission has also been criticized from the other side by many who believe that railway charges are too high and that the law against discrimination is often evaded. The most ingenious methods of evasion have been attempted. One large shipper even went to the extreme of having one of his clerks appointed by the railway as its freight agent, the railway paying this "agent" a heavy commission for securing the shipper's freight business. The



greater part of this so-called commission went to the shipper himself and was in substance a rebate. A host of these shifty expedients has been attempted but the Commission and the courts have held them illegal. In the enforcement of any regulative law, no matter how beneficent and fair its principles may be, there is always a period in which some of the parties concerned seek by every available means to open up the loop-holes and cracks in the statute. This is the period of interpretation and prosecution. As soon as it becomes clear that Congress, the executive, and the courts are all in earnest in supporting and enforcing the act, the attempts at subtle evasion or open violation lessen and all concerned begin to accept the statute in good faith. We are approaching this condition in the clauses designed to secure fair treatment of all on the railways.

**Consolidation of Railways.** — The earlier acts expressly prohibited the pooling of receipts by competitive railways and the Sherman Act prohibited their consolidation. Here again a distinct advance in public thought has later taken place. The Act of 1920, Section 407, expressly permits pooling and combinations of competing lines if approved by the Commission. It even encourages consolidation by a clause authorizing the Commission to draw up a plan for the future combination of existing railways into a limited number of large systems. This work is now under way.

**The Federal Power to Settle Railway Labor Disputes.** — Anything which threatens to interfere with interstate railway traffic may be regulated by Federal law. For this reason a difference between managers and employees over wages, hours, or working conditions is a matter of distinctly national concern. The Erdman-Newlands Act of 1898 and 1913 provided for both mediation and arbitration by the Federal government when agreed to by the disputing parties. Mediation is the settlement of a difference between parties themselves, under the advice and persuasion of a mediator acting as a representative of the public. In arbitration the parties agree to let an outsider settle it. Under the Erdman Act mediation was first attempted, and if it failed the government tried to persuade the parties to agree to arbitrate.

This act was fairly successful until 1916 when the railway unions refused to continue the plan, and demanded an eight-hour day.

The Adamson Act of that year was then passed, providing that

eight hours should be the measurement of a day's work and that the employees must be paid extra for overtime beyond eight hours. Also that pending an investigation of the effects of the new law, the wage rate formerly paid for the longer day should be paid for the eight-hour day. This raised the question — could Congress regulate interstate railway wages, in order to avoid a strike? The Supreme Court in *WILSON v. NEW*, 243 U. S. 332, 1917, decided that Congress had the power. The strongest objection raised was that Congress had no authority over wage contracts or disputes. Wages were not transportation nor commerce, and Congress had authority over commerce only. To this the Court replied that the authority to regulate commerce included the power to protect commerce from any and every obstruction, no matter what its source. The power to regulate would be a subject of ridicule if it did not enable the Government even temporarily to settle a wage dispute which threatened to stop commerce. As a temporary means of maintaining the free uninterrupted flow of interstate railway traffic the law was held to be a constitutional regulation of commerce.

**New Federal Arbitration Plan.** — The Adamson Act ended arbitration under the Erdman Law. It established the principle that the stronger side by dictating terms to the public and to the opposition could force concessions. When the railways were taken over by the President for operation during the war, a new series of demands were made by the railway unions and further material concessions secured from the government, which felt powerless to refuse. With the return of the railways to their owners in 1920, however, some new method of settlement had to be devised. The Federal Railway Act of that year provided that in case of a dispute which threatened to interrupt operation of the lines, a conference should first be held between the two parties. If they were unable to agree on terms, the dispute should then be submitted to the Federal Railway Labor Board. This is a permanent body composed of 9 persons, three nominated to the President by each side and three chosen by the President himself.

The Board can render a decision but has no compulsory power to enforce it.

A remarkable demonstration of its value was given in 1922 when necessary reductions in the wages of railway shopmen and

maintenance-of-way men were made. The shopmen struck, the maintenance men asked for a re-hearing of their case. The shopmen's strike caused vast losses of wages and inconvenience to the public and the carriers. The strike was lost, and those who could secured their positions back on substantially the old terms. The maintenance men's application for a re-hearing was granted and a substantial increase in wages was awarded, without the loss of a dollar in idle time or public inconvenience. This striking contrast between the two methods of union management has proven the possibilities of Government arbitration if fairly entered into by both sides.

**Present Problems.** — Among the unsolved labor questions involving Government action are the following :

(a) *Shall the Federal authority which arbitrates wage rates be separate from the authority which fixes freight and passenger rates?* That is, shall the railways' expenses be determined by one body while their income is fixed by another? It has been proposed that the Labor Board and the Commerce Commission be united to meet this problem.

(b) *Shall the body which arbitrates labor disputes have authority to enforce its decisions?* In the near future the country must squarely face and answer this question. There are strong objections to compulsory settlement of disputes so long as voluntary methods will succeed. It is however gradually dawning on us that no one man nor body of men, managers, or employees, can safely possess the absolute power to paralyze national railway traffic. Public sentiment will not tolerate a succession of "hold-ups" by either side. If the free unrestricted right to paralyze traffic is to be given up, the public must guarantee to the parties a fair and just settlement of disputes by an impartial tribunal. This explains the growing sentiment in favor of authorizing the Federal Government to enforce its settlement of railway disputes. The real nature of this question can no longer be beclouded by such slogans as "socialism" or "hostility to labor." If the labor unions themselves possessed entire control of all our industries and transport systems they would find it necessary to settle transportation disputes *with authority* or else see our economic world dissolve in chaos.

(c) *Shall the Nation, or the States control labor law?* At every

point, where the government touches business, it is becoming more difficult to establish standards and to enforce regulation by State law. The division of power under which Congress regulates interstate commerce labor questions while the States regulate local industrial, agricultural, and mining questions, is breaking down. Manufacturing industries, including the labor questions that go with them, are now national in scope. Unions are national. The managers are themselves establishing employers' associations to study and act on employment questions from a national point of view. They recognize local differences in the cost of living, wage rates, etc., but they also concede that national standards must soon be established in health, sanitation, shop management, and to some extent in hours and wages, with differentials to allow for local conditions.

Once this point is reached, the ability of the State to make local laws fitting the new conditions ceases, and national legislation becomes essential. As soon as the process of organizing industries on this broader basis is completed we must therefore look for a change in the distribution of power between Nation and State.

**The Merchant Marine.** — In legal theory the high seas are open to all. Anyone who has the vessels and a docking space may start a line. In practice the regular shipping lines have been controlled by agreements and combinations. Only a tramp, a vessel without regular sailing dates, and ports, is free. A regular line cannot operate without a continuous flow of traffic on which it may rely. To secure this traffic it must have permanent arrangements with shippers and with the railways as feeders. The line companies have therefore had understandings and agreements with each other to maintain stable conditions; it has been just as impossible to start a new line of steamships as it would have been to build a new transcontinental railway parallel with existing routes. The problem is all the more difficult because it involves shipping representing every modern nation of importance.

The building up of an American merchant marine has long been advocated in Congress, but no effective steps were taken to this end until the passage of the Shipping Act of September 7, 1916. This law was brought about by the urgent demand for shipping, due to the Great War. The foreign merchant fleets were being rapidly decimated by submarine warfare, and American trade with

Europe was seriously hindered by the lack of ships. In this emergency Congress established a Shipping Board of five members, chosen by the President and Senate, with power to build, buy, and charter vessels and sell or let them to American shipping companies, also to prevent foreign discrimination against American trade in ocean commerce, to enforce a new clause of the law forbidding rebates, and to approve or disapprove agreements between shipping companies on rates and service. Under this Act the Board organized the Emergency Fleet Corporation to develop both ship-building and the maintenance of shipping lines during the war emergency.

Private shipyards were enlarged, the building of new yards was aided by Government support, and one of these at Hog Island, Philadelphia, rapidly became the largest ship building plant in the world. Great numbers of ships were built, launched, and made parts of the American merchant marine; but it is not sufficient to have a vast tonnage of ships in order to maintain a successful marine. In addition there are the necessary terminal facilities and connections with shipping agencies, railway lines, and all that is included under the building up of "good will." Both in this country and in foreign ports these connections and facilities must be developed slowly and with great effort. Sometimes they require government encouragement, and often they involve agreements with trunk line railways reaching into the heart of the continent affected, in order to secure freight. It will be clear that this is not the work of a year, or even a decade, but a long and arduous process of cultivation.

**Merchant Marine Act of 1920.** — In order to aid in this development the Act of June 5th, 1920, was passed. It increased the membership of the Shipping Board from five to seven, with a six-year term. It authorized the Board to determine which steamship routes should be established from ports in the United States, or its possessions, to domestic and foreign markets, in order to promote and maintain trade of the United States and an adequate postal service; also to determine the type of vessels which should be employed upon such lines, and the other requirements of an adequate service. The Board may sell or charter its vessels to American citizens who will maintain such a service on the lines mapped out, and if American owned and operated lines cannot be

established, the Board itself may operate vessels over such lines until private operation can be maintained. Another important duty of the Board is to prevent foreign shipping lines and agents from seeking to destroy the competition of the new American lines by illegal agreements and discriminations. To this end it may investigate cases of violation of this rule and certify its findings to the Secretary of Commerce, who thereupon refuses foreign companies practicing such discrimination the right of entry to the United States for their ships, until the violation has ceased. The Board may also lend money from its funds to American citizens to aid in the construction of vessels to be built in American yards and operated on American lines. The construction and maintenance of American shipping lines would have been impossible without some such agency as the Board. A supplementary law passed in 1921 opens the way for the formation of American insurance companies to deal with marine risks.

In this way there have been established the necessary governmental agencies to handle the whole problem of a mercantile marine. All modern nations have found such government aid and regulation essential to their shipping growth. The problem is a distinctly national one because of the vast extent and the many ramifications of the shipping problem in its relation to the internal transport systems of modern countries. Private capital and enterprise unregulated and unaided cannot cope with this question. Many European governments have even taken stock in and active control of the policies of the companies which own their mercantile fleets.

**Federal Control over State Trade.** — We come now to the constitutional problem — Can the Federal authorities regulate *intrastate* commerce? In general, the answer is No. The rule for interpreting the powers of Congress in such cases is given in the Tenth Amendment, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." If we are doubtful as to whether Congress possesses a certain power or not, we are to apply this simple test — Does the Constitution directly or indirectly confer the power on Congress? If not, then such a power belongs to the individual States or the people, not to Congress. Applying this to commerce entirely within a State we

find that the Constitution does not grant the authority over such trade to Congress. Accordingly that power is reserved to the State. But oftentimes national and State trade are so closely mingled that it is impossible for Congress to regulate the former without including the latter. This is notably the case in the national laws on navigation and railroads. In the decision on the DANIEL BALL, 10 WALLACE, 557, 1870, an important principle was fixed in this problem. The Daniel Ball was a steamer navigating the Grand River in the State of Michigan between Grand Rapids and Grand Haven. It did not pass out of the State but was engaged in transporting merchandise and passengers between those places. The question arose whether under such circumstances it must be licensed or inspected under the laws of the Federal government. Its owners claimed that it need not secure such a license since it was engaged solely in local trade within the boundaries of Michigan, but the government contended that the Grand River was a navigable water of the United States and that the steamer transported merchandise which was consigned to ports and places outside the State so that the transportation by steamer was only one link in a chain of interstate trade, much of the goods in question being taken from the steamer and carried to a destination outside the State. The Supreme Court decided that the steamer must conform with the Federal inspection and license laws, on the ground (1) that the Grand River was undoubtedly an avenue of interstate trade; (2) The merchandise carried by the boat was in part consigned to other States, so that the vessel's passage was in reality only one part of a general interstate shipment. On these grounds it was to be considered an agency of interstate commerce, and as such, subject to the Federal regulation. This decision establishes the rule that even an agency of intrastate carriage is subject to Federal regulation if it forms part of an interstate system.

**National Control of Railway Safety Regulation.** — When Congress attempts to provide safety on interstate railways, either by limiting the hours of work in order that men may be reasonably fresh and fit for train operation, or by requiring the use of adequate safety brakes and couplers on rolling stock used in connection with interstate traffic, the question always arises how far do these rules affect men and trains engaged in both local and national traffic? It is clear that the two kinds of commerce will often be so closely

intermingled that dual regulation will be impossible. When this occurs the Supreme Court holds that the Federal rule shall be applied. For example, in 1907 Congress passed a safety law providing that employees engaged in interstate railway work should not be employed continuously for more than 16 hours in any one day. In *B. & O. v. INTERSTATE COMMERCE COM.*, 221 U. S. 612, 1911, the company claimed that in calculating these 16 hours, only the time spent in national commerce could be included, because Congress had no authority over local employment. Therefore if a man worked at both kinds of train operation the Federal law limited his hours only in national commerce. But the Court held that the essential point was the physical condition of the employees and that the purpose of the Federal law was to protect them against excessive fatigue in order that they might perform their duties with safety. Congress had authority to protect national commerce not only from dangers arising within such commerce itself but also from outside dangers. It would be impossible to prevent excessive fatigue unless the hours devoted to all kinds of employment were included. "If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations." This decision shows that in its efforts to protect, control, and regulate national commerce the Federal government is free to defend such commerce from all the actual dangers which threaten it and that its protective measures may extend in a practical way even to the control of State trade where this affects national commerce.

And when Congress by Act of 1903 required that automatic couplers and safety brakes be placed on all trains and locomotives used in connection with interstate commerce, the question arose — must a local train be so equipped if it ran for part of its journey on an interstate track? In *SOUTHERN RWY. v. U. S.* 222 U. S. 20, 1911, a train of 3 cars with defective couplers, operating only in local traffic, was moved on a line also used by interstate trains. An accident was caused by these defective couplers. The railway argued that Congress had no authority over this local train and



that the Federal Safety Appliance law did not apply, but the Court held that when such cars traversed an interstate track they became subject to Federal regulation. Otherwise the aim and object of Federal safety laws would be defeated by the presence on an interstate line of a train which could not be controlled as required. The Court said: "And this is so not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

"Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one or results in disabling one of its operatives is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

**National Control of Rates: Minnesota Rate Cases.** — How far may national regulation of rates affect purely local rates within a State? How far may the States in regulating their own rates affect national traffic? Is there a "twilight zone" or a "no man's land" which may be controlled neither by the National nor the State governments? In the MINNESOTA RATE CASES, 231 U. S., 352, 1913, Minnesota had lowered freight rates on hauls

within the State by about 20 per cent. Several transcontinental lines traversed the State and the effect of this change was to force them to lower freight rates on interstate hauls across Minnesota. The railways concerned brought suit to prevent the State from making the change, on the ground that it affected national trade and thereby interfered with Federal power over such trade. The Supreme Court pointed out that neither Congress nor the Interstate Commission had acted to prevent Federal rates from being affected by the Minnesota regulation, also that the State action was directed solely to local rates. Therefore until the Federal authorities acted the State was within its constitutional rights in regulating local trade.

**The Shreveport Case.** — At first the above decision was thought to imply that a State could always regulate its own local freight charges no matter what the effect on interstate rates might be. In the SHREVEPORT CASE, HOUSTON RWY. *v.* U. S., 233, 1914, the Court corrected this impression. The Texas authorities had arranged certain local rates within the State in such a way as to favor Dallas and Houston, Texas, as distributing centers, while maintaining high rates on shipments from Shreveport, Louisiana. Shreveport aimed to be a distributing center rivaling Houston and Dallas for the trade of the intermediate district. Could the Federal authorities prevent this discrimination? On March 11, 1912, the Interstate Commerce Commission, at the request of the Louisiana railroad commission and the Shreveport mercantile interests, ordered the railways to reduce the through rates in question *to the same basis that they charged under similar conditions on hauls within the State of Texas.* To this the railways objected, claiming that the National Government had no authority over rates within a State and could not control the *relation* between State and interstate charges. The Supreme Court held that any discrimination against interstate traffic from Shreveport, Louisiana, could be remedied by Federal action and that the proper method of doing this was to establish a reasonable *relation* between the inter- and intrastate rates. The Commission had done no more than this, and while it had no authority whatever to regulate intrastate charges so long as they affected only local traffic, it could constitutionally fix the relation between these charges and those on interstate traffic over the same lines. The Court pointed out that when the Federal

authorities acted on such a relation of rates, their authority was supreme. "It is to be noted — as the government has well said in its argument in support of the commission's order — that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority."

**The Wisconsin Case.** — The Shreveport doctrine was extended by the decision in *WISCONSIN v. C. B. & Q. R. R.*, 1922. The Transportation Act of 1920 aimed to assure to the interstate railways a fair return on their property, also to prevent local discrimination against national traffic by State railroad commissions. Acting under this law the Interstate Commission granted increases in rates in 1920 in order to assure the carriers a fair return. But this increase in national rates would not be sufficient unless the States cooperated with the National Government by fair increases on local rates. This both Wisconsin and New York refused to do. They claimed exclusive authority over local rates, whereas the railways urged that the States must follow the national plan, otherwise the railways would not get a fair return on their property.

The Supreme Court upheld the Federal law and the Commission on these points and ruled that the State must conform to the principles established in the Act.

Chief Justice Taft showed that the refusal of Wisconsin to conform to the Federal standard of rates would cost the railways of that State \$6,000,000 annually. He pointed out that the purpose of the Act of 1920 was to assure to the people of the United States an adequate transportation system by guaranteeing to the carriers a fair rate of return on their property value.

Such a rate of return must be earned on the property *as a whole*, not simply on that part devoted to national commerce. If the interstate commerce rates were raised to a point which guaranteed a fair return, while the State rates remained below this, the carriers would still fail to receive their fair return.

The Federal Government might remove any obstructions raised by State regulation which prevented the successful carrying out of the Federal plan. Of two passengers riding on the same train and in the same seat, one who had bought a local ticket would be pay-

ing a much lower charge. The result would be that passengers would cease to buy interstate tickets and secure a succession of local tickets covering their journey. The railway reports bore out this fear and showed a large falling off in the sale of interstate tickets, with a corresponding increase in local sales. Judged by any reasonable standard this was a discrimination against interstate commerce, one of the very results which the Act of 1920 aimed to prevent.

The State had argued that its laws prohibited a charge of more than 2 cents per mile for passenger fares on *local* traffic but the Court ruled that such a State law must not hinder or obstruct Federal action to secure a fair return on the *entire property value* of the carriers. The Court expressly disclaimed any intention to give the Commission local control over all local rates unless these affected interstate commerce. "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce."

**Summary.** — A survey of these important decisions shows that while Congress may not assert any right to regulate matters of purely local bearing, it may establish national regulation and apply this regulation to any and all local conditions that affect interstate commerce. The problem confronting the Courts, therefore, is no longer to find a principle but rather to apply it to the complex and changing conditions of modern commerce — that is, when does a local circumstance or practice "affect" interstate commerce? When railway employees are injured and seek redress from the company, the Court no longer need grapple with the question as to what constitutional rule shall cover the case, but rather the much more difficult one — when is a worker engaged in interstate commerce? A man working in a repair shop on a locomotive used in interstate commerce is engaged in such commerce if the locomotive is only withdrawn a short time for repairs, but if it is taken out of commission for an indefinite time, lasting, let us say, over four months, the repair-man ceases to be engaged in interstate commerce and is a local worker. A man who refills the sand boxes of interstate locomotives is engaged in interstate commerce, but one who

digs coal in the railway company's mine, which coal is to be used on interstate locomotives, is not. The Court finds that in order to come under Federal law a worker's employment must be "so closely connected with interstate commerce" as to be properly considered a part of such activity. The Court determines when a man's work is so "closely connected" in each case according to the circumstances, and applies the general rule, which we have examined, accordingly. In determining freight and passenger rates the principle is substantially the same. How closely is the rate in question connected with interstate commerce? Here the application is easier because it is not difficult to prove that the change of a given local rate will or will not affect interstate rates. The railways could show in the Wisconsin and New York cases that passengers had ceased to buy interstate tickets and had bought a series of local tickets instead, thus proving that the State law had directly affected and prejudiced interstate commerce.

It is clear that we are here in the midst of a transition from State to national control, for within a few years the connection between the two kinds of commerce may be so close as to justify the Court in holding that many railway rates and many classes of employment which are now considered exclusively local in their nature, really have a direct and sensible bearing upon interstate business. When this point is reached the distinction between the two sorts of commerce will cease to have a practical meaning.

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## QUESTIONS

1. Explain why government regulation of business is demanded by consumers.
2. Show why it is also demanded by investors and producers.
3. Give some idea of the way in which the Federal power to regulate commerce touches the various interests of the people.
4. Explain the meaning of the word "commerce" as used in the Constitution.
5. Show how the meaning of the word has been enlarged by modern inventions and discoveries.
6. Does it include manufacturing? Cite an authority.
7. Would it include a small package carried in the owner's pocket on a motor trip if the owner does not intend to sell it? Reasons.
8. Mention some interstate commerce which is regulated and some which is not.
9. Outline briefly the general subjects of regulation by Congress.
10. Could Congress regulate the business of a company which has its factory in Philadelphia and ships goods to San Francisco and Seattle? Reasons.
11. Could Congress regulate the manufacture of the goods in Philadelphia? Reasons.
12. Can Congress regulate all kinds of commerce? Explain.
13. Mention several prominent companies whose business is now or could be constitutionally regulated by Congress.
14. Could Congress forbid life insurance agents to combine with each other and raise insurance charges? Reasons.
15. Explain some of the present aims and purposes of national trade regulation.
16. Explain what a rebate is and why it is prohibited by the interstate commerce act.
17. Give a brief summary of the most important powers of the interstate commerce commission.
18. Mention several forms of discrimination practiced on the railways in the past and explain the authority of the commission to prevent such discrimination under the present laws.
19. Explain the chief causes of railway discrimination between cities and districts. Why are the railways often forced to give such discriminations against their will?
20. What power has the interstate commerce commission over this situation?
21. John Doe tries unsuccessfully to secure a rebate from the railway, but is refused. Richard Roe secures a special rate lower than the published rate, but is given no rebate. Thomas Jenkins accepts a free pass from the railway, in return for which he ships freight over the railway's line. State all of the parties who have violated the law. Explain fully.
22. Is it legal for a large shipper of fruits to secure a lower charge for icing the refrigerator cars which he hires from a private car company, than is paid by other fruit growers shipping over the same line?

23. Explain some discriminations in terminal facilities, and apply the law to them.
24. Explain the importance of car supply in modern coal mining or in other industries. If a coal operator does not secure his proper proportion of cars what redress has he?
25. May a railway give any preference whatever to a shipper or to any kind of traffic or to any locality? Explain fully.
26. What is the long and short haul clause?
27. How does it affect the rates west of the Missouri River?
28. How does the interstate commerce law provide for the quicker settlement of disputes?
29. Has the commission regulative power over anything besides railways?
30. Give some idea of the business transacted by the commission.
31. What are your impressions as to the success of the commission's regulation of rates?
32. What is the Commodities Clause? Interpret it.
33. May competing railways combine? Explain.
34. Why are agreements and understandings between competing ship lines necessary?
35. Why is government action necessary to build up an American Merchant Marine?
36. What effect has the War had on the project?
37. How does the national government seek to aid in this question?
38. What authority has the government over interstate railway labor strikes and disputes?
39. If a railway lock-out or strike is threatened could Congress temporarily prescribe hours and wages to settle the difficulty? Reasons.
40. How do present Federal laws provide for settlement of railway labor disputes?
41. Does the Constitution give Congress any power over intrastate trade?
42. A steamer is plying the waters of the Little River, carrying merchandise and passengers who are destined from one State to another, but the steamer itself only transports them from one point to another within the same State. The river opens into a large lake, part of which lies in another commonwealth. Under these circumstances would the national navigation and license laws apply to the steamer?
43. Congress passes a law forbidding interstate railways to keep their employees at work more than sixteen hours in any one day. The purpose of the act is greater safety on interstate lines. Could a railway which is subject to the act employ its workmen for fifteen hours on interstate work and then two hours on local business in intrastate trade? Explain the reasons and cite a precedent.
44. A Federal act provides that safety brakes shall be placed on all trains used in connection with interstate commerce. An interstate line operates three cars without such brakes locally in its intrastate business and in doing so moves them over a part of its interstate line. Would the application of the Federal act to these cars be constitutional? Reasons. Cite an authority.
45. A State railway commission fixes high rates from the State boundaries to

interior points in order to keep out trade from the outside, meanwhile granting low rates between interior points, in order to promote local trade. Can the interstate commerce commission interfere with this system in such a way as to promote outside trade into the State? Reasons and authority.

46. Had the Interstate Commerce Commission acted in the Minnesota rate case? In the Shreveport case? Does this difference have any bearing on the decision?

47. Is every railroad rate or every railway employment subject to Federal regulation?

48. How would you state the doctrine established in the Wisconsin rate case?

49. An employee of an interstate railway company is injured in the course of his duties. Explain to him the considerations which determine whether he could recover damages under the State or the Federal law. Illustrate.

50. Prepare an essay on "The Need for and Results of Federal Railway Regulation."



## CHAPTER 7

### POWERS OF CONGRESS: TRADE REGULATION

**The Right to Trade.** — Can the Government protect the marketplace and keep it open to all? Can combinations to restrict and monopolize trade and to manipulate prices be controlled by public action? The struggle for the right to trade is older than the fight for free government. There have always been those who contended that since economic laws were fixed and inexorable, they could not be changed by human effort — hence the regulation of trade is not within the proper sphere of government; the only attitude for public authorities to take is — “hands off.” They point to the many costly blunders of regulation and they conclude, with some reason, that the natural, healthy flow of commerce requires complete freedom from artificial obstructions. Anything which interferes with this flow and with the fundamental law of supply and demand is bound to produce evil and to react with injurious results upon the whole community.

The advocates of regulation on their part also denounce interference with freedom of trade, but they point out that it comes chiefly from organized efforts by a few, to secure exclusive control by shutting out others from the market. Is trade, they ask, more free when publicly regulated, to preserve equal opportunity for all, or when allowed to fall under the control of manipulative pools, price juggling agreements, and exclusive monopolies? In short, they claim that regulation is needed not to destroy, but to restore and maintain the freedom of trade. They admit that before reaching this end we pass through a series of difficult and costly experiments. We shall direct attention to certain special features of our national trade law policy: (1) the aims sought; and (2) the exact methods of regulation attempted and the Government machinery required for it.

There is no magic in law. The mere writing of words in a statute book is not sufficient. The principle expressed in the words must

conform to standards of ethics, sound practice, clearness, and effective administration. Without these and the backing of public opinion the writing of laws is vain. An act may satisfy some of these tests and fail in others. It may be business-like and moral, but if it is not clear and has no effective machinery for its enforcement, it will be generally harmful or may be totally disregarded. We shall see many applications of this in our examination of the Federal trade laws.

**The Sherman Act.** — The second step in our national policy of regulation corresponded to the popular belief that trusts and combinations were evils in themselves, and should be abolished by law. This thought lies at the basis of the now celebrated Act of 1890, known as the Sherman law. Every contract and combination in restraint of national trade was forbidden. No person was permitted to monopolize or attempt to monopolize any part of national trade either singly or in combination with others. The Federal courts were directed upon application by the Department of Justice to issue injunctions to prevent monopolies or restraints of trade. Parties injured by violations of the act could sue for threefold damages sustained. Property circulated in national commerce by an illegal combination was subject to seizure and condemnation by the Government.

**Amendments.** — Several amendments to the Sherman law have been passed, including:

(a) *The Webb Act of April 10, 1918*, which permits combinations restricting competition in export trade with foreign countries. Under its provisions numerous competitive manufacturing concerns have united to form export associations. The Sherman Act does not apply to these unless the restraint or monopoly which they may cause, affects commerce in the United States.

(b) *The Agricultural Exemption Law of February 18, 1922*, which allows farmers, planters, dairymen, etc., to form associations and companies in order to market their products collectively and make all necessary agreements to this end. If they "unduly enhance" (!) the price of agricultural products by such action, the Secretary of Agriculture may summon them to a hearing, and if he finds substantial restraint or monopoly he may issue an order requiring them to cease and desist from monopolizing and restraining trade in such products. The order may then be reviewed by the courts.

(c) *The Shipping Acts of 1916 and 1920*, which were considered in the last chapter.

(d) *The Trade Commission and Clayton laws.*

**Special Problems under the Sherman Act.** — We may best appreciate the task of trade regulation by glancing at some of the practical questions that arise for interpretation under this law. Is a monopoly of *manufacturing* forbidden by the act? In *U. S. v. KNIGHT SUGAR CO.*, 156 U. S. 1, 1895, the Court answered — no. Manufacturing was production — that is, the change of *form* of goods. Commerce was change of *place*. The Sherman Act governed commerce, not production.

But if manufacturers combine in such a way as to restrain commerce, are they subject to the Sherman Act? In *SWIFT v. U. S.*, 196 U. S. 375, 1905, it was held that any combination in restraint of trade by whomsoever made, was prohibited by the law. Agreements among packers not to bid against each other in buying cattle or to manipulate the price by combination were held to be restraints of trade.

Does the act apply to railways? In *U. S. v. FREIGHT ASSOCIATION*, 166 U. S. 290, 1897, the Court ruled that since *every* combination in restraint of trade was forbidden this included combinations by railways to prevent competition.

Are agreements not to compete in interstate trade generally forbidden? The Court declared these under the ban in *ADDYSTON CO. v. U. S.*, 175 U. S. 211, 1899. Here six different shippers located in various States had formed a pool in bidding on municipal contracts for iron pipe. They agreed to maintain certain prices and arranged their bids in advance so that certain of their number would secure the contracts. The Court considered this a restraint of trade in that real competition was suppressed.

May one interstate railway purchase the stock of its competitor and thereby control it? Such a merger or union of competitive lines must necessarily destroy competition and to that extent act as a restraint on trade, according to the decision in *U. S. v. UNION PACIFIC*, 226 U. S. 61, 1912. Even a holding company formed to buy and control the stocks of two competing railways is forbidden by the law since such a union also removes competition and tends to establish a monopoly, as was held in *NORTHERN SECURITIES CO. v. U. S.*, 193 U. S. 197, 1904.

Does the law forbid every restraint of trade by combination or only those restraints which are unreasonable in their purposes and effects? To this the Court has answered in several decisions that the law aims to prevent unreasonable restraints. In a narrow sense the formation of the simplest partnership or firm is a combination between two persons who might otherwise compete but who now cooperate. While this cooperation is a removal of possible competition and to that extent technically a restraint it may yet be reasonable. In a general way we may distinguish between what is unreasonable and what is permitted, by the *purpose* and *results* of a combination as was said in the STANDARD OIL CASE, 221 U. S. 1, 1911, the AMERICAN TOBACCO DECISION, 221 U. S. 106; 1911, and more especially in U. S. v. TERMINAL ASSOCIATION OF ST. LOUIS, 224 U. S. 383, 1912.

Does the Sherman Act apply to labor combinations to restrain trade? An organized campaign to prevent the circulation of goods in interstate commerce by any persons, whether employers or workers, was held illegal in LOEWE v. LAWLOR, 208 U. S. 274, 1908 and BUCKS CO. v. GOMPERS, 221 U. S. 418, 1911. These decisions led to the amendment to the annual appropriation for the Department of Justice, providing that no part of that appropriation may be used for the prosecution of associations of workers or farmers for violation of the Sherman Act.

May a group of traders circulate among themselves lists of names of persons with whom it is their policy not to deal? The resolution to circulate such a list was held to be in substance an agreement not to deal — that is, an agreement to restrain trade, in EASTERN LUMBER DEALERS v. U. S., 234 U. S. 600, 1914.

Is a "corner" in staple goods, such as cotton, a monopoly forbidden by the Act? A corner is usually defined as the purchase of a large supply of a product with the purpose of withholding it from trade and thereby artificially enhancing its price. Its effect is to prevent the free flow of trade, and for centuries in this country and in England it has been held illegal as an attempted monopoly. As such it was condemned by the Court in U. S. v. PATTEN, 226 U. S. 525, 1913.

**Some Conclusions on the Sherman Act.** — Any attempt to protect the open market will always be hailed with a storm of criticisms from those whose special interest leads them to demand

complete freedom to establish monopolies and restraints. There has also been a wide divergence of opinion among economists and publicists as to what the Government, even with the best of intentions, can actually do. From the practical results secured by the Sherman law we may draw the following conclusions :

1. It has very properly been applied to many combinations which were guilty of destructive, unethical practices ;

2. Some combinations were condemned because they were combinations or because of their size. Many of these have been sound both economically and ethically. Neither the size of a company nor the fact that it was a combination of previous competitors is a good reason to dissolve it. Some prospect of a new policy is shown by the decision in *U. S. v. U. S. STEEL CORPORATION*, 251 U. S. 417, 1920. Here the Court said, "The Corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible ;"

3. The Sherman Act should not apply to the railways because these are already amply regulated by the Commission under the commerce laws ;

4. The law has been successfully invoked to prevent the formation of speculative monopolies in such staples as cotton, as we have seen in the Patten case. The people probably do not realize how far this decision has protected them from other similar attempts in wheat, rubber, and other raw materials ;

5. If neither the size nor the form of a combination should determine its legality, but rather the question — is it destructive, oppressive, and harmful in its effects and purposes? — then some means of sifting out those which are beneficial from those which are harmful is essential. Such a means should be an administrative body like the Trade Commission, with a jurisdiction over the commercial companies corresponding roughly to that of the Commerce Commission over the railways. The immediate effect would be to clear up the meaning of the law in a way which the courts have not been able to do in the more than thirty years of its existence.

The Sherman Act should be turned over to the Trade Commission for enforcement ;

6. The Act should unquestionably apply to all classes of producers and shippers alike. The principle of selecting particular groups such as labor unions or organizations of farmers and exempting them, while applying the Act to others, is un-American. No privileged groups, cliques, or factions should be granted exemptions from the law.

**Third Period of Regulation : Publicity.** — After the Spanish War a host of new companies were floated with immense amounts of watered securities, and public attention was attracted to a new abuse in corporate and trust finances — inflation and over-promotion. It was seen that the promoters of most of these watered companies were able to “step from under” before the crash came and leave their weakened companies to the mercies of the receiver. Fabulous profits were realized in this way. Could the Government do anything to remedy this condition? The answer was “Publicity.” That is, the authorities should open up to public knowledge the finances of industrial and trading companies so that frauds of the kind above described would be restricted, if not prevented.

**The Acts of 1903 and 1909.** — To this end the Bureau of Corporations of the Department of Commerce was created in 1903. In 1914 its powers were transferred to the newly organized Federal Trade Commission. These powers are to investigate the organization and management of companies engaged in national commerce, except railways, to give the President information which would enable him to make recommendations to Congress, and finally to make any inquiries or reports on particular industries or conditions which the President might request. To this the law added “and the information so obtained or as much thereof as the President may direct, shall be made public.”

The real service rendered by these inquiries has been the collection and publication of facts. No more healthful influence can be exerted. Sometimes the mere knowledge that information on certain illegal practices has been secured by agents of the bureau was sufficient to cause their immediate cessation. In one case a series of important railway discriminations was stopped as soon as the bureau agents had collected the data necessary to prove them,

even before the publication of the facts took place. This potential publicity of the practices arising in trade competition is one of the most effective methods of government regulation yet devised. Although only insignificant funds have been devoted to this work it has brought valuable and noteworthy changes. It has proved beyond question the wisdom of this third step in our regulative policy. It has become a practice among industrial companies to issue annual or quarterly statements of their business. In the short period from 1903 to 1910 a complete revolution in the publicity methods of all the great producing companies was brought about. The concern which practices secrecy of its accounts is now the exception rather than the rule.

Since it was doubtful whether Congress could require information from companies not engaged in commerce, such as manufacturing and insurance concerns, the corporation tax of 1909 was levied. It required corporations of all kinds, both trading and industrial, to pay a Federal tax, and for this purpose to make a statement of their gross and net revenues and other data to the Collector of Internal Revenue. It also provided that these statements should be public records open to general inspection. In this way it was sought to introduce publicity into corporate affairs. As no adequate appropriation was ever made to render the records public this part of the law has been a dead letter, but its general effect has been of great advantage. Both of the laws named have given great impetus to the movement for publicity of corporate finances and thereby indirectly wrought the desired result.

**Advantages of Publicity Policy.** — Every great corporation desires public approval and coöperation. It wants (a) To sell its stock to numbers of small investors in order that the public at large may have an active interest in the enterprise; (b) It must have a favorable public sentiment in order to market its wares most profitably; (c) The experience of recent years has taught that no corporation is strong enough to defy public sentiment. Such sentiment, when thoroughly aroused, brings on a destructive and hostile political movement which undermines the prosperity of all business undertakings; warfare between the government and a corporation seldom results profitably for the latter.

Many corporations are trying to win public confidence by vast and expensive forms of publicity and advertising. The publica-

tion by the government of the results of its investigations of any business would naturally be sufficient to influence public opinion in such a potent way that few corporations would willingly oppose or disregard the sentiment thus aroused. Mystery, secrecy, and suspicious appearances are being rooted out by responsible managers, and the public is being courted with an eagerness that bespeaks a new understanding of the relation of the people to the corporation. In this new movement, which has already been of inestimable value to all concerned, the laws of 1903 and 1909 have played a leading rôle.

### THE FEDERAL TRADE COMMISSION

**Fourth Period : Need of an Administrative Body to Enforce Trade Laws.** — We have seen that much of the weakness of the Sherman Act lies in the absence of any executive authority to clear up its meaning, to make regulations on detailed points, and generally to care for its enforcement. Unless such an administrative body exists, the law depends for its enforcement entirely upon the courts. But court procedure is necessarily slower. A court has no permanent staff of research agents to investigate the economic facts which are necessary to decide such problems as those just mentioned. Its decisions must be based on the data and arguments presented by two conflicting parties. The public interest may be brought out at such a trial, but again it may not. A court naturally looks backward on the law as it has thus far developed. An administrative body should make rules for the present and the future. Its action is not only remedial but preventive. By clearing up the meaning of a trade law it enables those who wish to observe the law to do so without uncertainty. A court sits at intervals, taking up only the past transgressions of the law. An administrative body sits continuously and conforms its rulings to the changing trade conditions of the time. It also specializes in the regulative law of commerce in a way which courts cannot do. Likewise its procedure is simpler, less formal, quicker, and less expensive.

**The Federal Trade Commission : Its Powers.** — These considerations doubtless moved Congress in passing the act of September



26, 1914, against unfair trade practices, to provide for a Federal Trade Commission to enforce its provisions.

It is composed of 5 members appointed by the President and Senate for seven years, each with a salary of \$10,000. The other central feature of the law is the provision in Section 5 "That unfair methods of competition in commerce<sup>1</sup> are hereby declared unlawful." The Commission is directed to prevent persons, partnerships, or corporations from using unfair methods of competition in commerce, excepting banks and common carriers which are subject to other laws.

**Procedure.** — The Trade Commission may of its own initiative ascertain any unfair methods, or it may hear applications of injured parties for redress. It notifies the concern charged with such practices, and if, as often happens, the latter discontinues the abuse, the matter is at an end. If not, the Commission sets a time for the hearing, furnishing the defendant with a copy of the definite "complaint," and states the part of the Act which it is believed may have been violated. After this hearing the Commission may either dismiss the case if no action is necessary, or it may decide against the defendant and issue an order requiring him to cease and desist from an illegal practice. The defendant if dissatisfied may take the matter directly to a Federal Circuit Court of Appeals, skipping the District Court, to insure an earlier decision. If he fails to obey the order the Commission may resort to the Court and have a formal order issued to compel compliance. The findings of fact made by the Commission, if supported by evidence, may not be questioned in the later court procedure. If new evidence is produced at the court proceedings the Court suspends action and refers the evidence to the Commission.

The Circuit Court of Appeals, after its hearing, issues a decree to enforce, set aside, or modify the orders of the Commission. Section 5 declares that no order of the Commission or judgment of the court enforcing the order, relieves or absolves any person or corporation from its liability under the Anti-Trust Act. That is, the rules and orders of the Commission do not supersede the Sherman Act. The new law does however provide that where the Government is seeking an injunction to dissolve an illegal combination

<sup>1</sup> Commerce is defined in the sense of territorial, interstate, and foreign trade.

under the Sherman law, the Court before which the suit is held may ask the Trade Commission to work out a solution of the whole problem and may embody the Commission's recommendations in the court decree.

**Further Powers of the Trade Commission.** — The Commission also has power to gather, compile, and publish information on the organization, business management, practices, etc., of any corporation engaged in national trade (excepting banks and common carriers), and its relation to other corporations or individuals.

It may require corporations so engaged to file annual and special reports or answers to questions under oath.

In connection with the Sherman Act, although the Commission may not authorize variations from that Act, it has certain powers of report and recommendation.

It may on its own initiative, or on the application of the Attorney General, investigate and report upon the manner in which a final court decree under the Anti-Trust Act has been carried out and obeyed. In its discretion it may publish this report.

When directed by the President or by either House of Congress, it investigates and reports on the facts relating to alleged violations of the Anti-Trust Acts.

Upon application of the Attorney General it may investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the Anti-Trust Acts in order that such corporation may thereafter manage its business in accordance with law. This significant power has been given to the Commission because of the large number of companies which were operating in violation of the Sherman Act but which desired to bring their practices into conformity with the law. In many of these cases the Attorney General properly held that a reasonable adjustment or reorganization rather than a government prosecution would be the fairest and most equitable manner of enforcing the Act.

**Regulations.** — The Commission has full power not only to inquire and investigate but to issue orders which have all the force of law, and to provide rules and regulations both special and general, which shall carry out the great central principle on which the law is based, namely that unfair methods of commerce are prohibited.

One feature of the law is especially notable and praiseworthy, viz., Congress has not attempted to regulate any detail of the minute questions of commercial competition but has contented itself with fixing one fundamental principle, and has authorized the Commission to translate this principle into rules, regulations, orders, and decisions in the particular cases that may come before it. It is precisely this elasticity and adaptability that we have seen were most needed in our regulations of the trust problem.

**Some Results of the Commission's Work.** — Aside from the benefits of publicity, the Commission is building up a body of commercial law through its orders on trade practices. Some of the practices corrected by these orders may be mentioned :

The misbranding of goods, giving them a label or brand falsely describing their ingredients and quality, or their place of origin. For example, mercerized cotton when sold as "circle silk" has been held to be an unfair imitation of pure silk, hence a violation of the act. Various other so-called "silks" which were not genuine but were cheap substitutes have had to be re-named. Their sale, of course, is not questioned when properly labeled to avoid misrepresentation.

The adulteration of commodities under conditions which deceive the purchaser.

The bribery of buyers or other employees of customers.

The payment of fees and bonuses by manufacturers to the salesmen of jobbers or retailers in order to push the special wares of a manufacturer.

The procuring of business secrets by espionage or bribery.

Procuring the breach or cancellation of competitors' sales contracts.

The use of false and disparaging statements about the competitors' products, business, and financial credit.

False and misleading advertisements.

Threats of patent infringement suits against dealers generally, to induce them to stop relations with competitors.

False claims to patents.

Tampering with machines sold by competitors, to discredit them with the purchaser.

Passing off of products of one maker for those of another by imitation of wrappers, or simulation of names.

**A Typical Case of Unfair Competition.** — The Trade Commission's power to forbid the use of deceptive labels as unfair methods was upheld by the Court in *COMMISSION v. WINSTED HOSIERY CO.*, 1922. The company sold to retailers various brands of underwear in cartons which were labeled as "natural merino," "gray wool," "natural worsted," "Australian wool," respectively. Some of these products contained as little as 10 per cent of wool. After a complaint and hearing by the Commission the company was ordered to cease the use of such brands on its goods unless accompanied by additional words which would explain that the products were in part of cotton or silk, etc., or by such words as "part wool." The company claimed that the labels were not an unfair method of competition because the word "merino" had often been used in the trade to include part-cotton goods. The Supreme Court held that the terms used on the labels meant wool and were chiefly and primarily understood to mean fabrics wholly of wool. Even sales-people and buyers for retail stores in addition to the public were misled by the use of "merino" on the labels. The Winsted goods were sold in competition with those of other manufacturers who labelled their products clearly and without deception. The Hosiery Manufacturers Association had by resolution condemned the use of deceptive labels, such as those here in question. This was clearly an unfair method of competition as against other manufacturers selling in interstate trade. "For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest."

**Coöperation with Business Concerns.** — In order to enlist the stronger and more representative influences in business circles in the movement for fair trade practices the Commission has wisely adopted a policy known as the Trade Practice Submittal. This is in substance a conference convened by the Commission from among the representative leaders of a single industry to consider which practices in that industry are regarded as needing regulation. The action of such a conference commands unusual force because it is representative. A complete list of trade custom is considered,

full opportunity is given to all present to express their views, and at its close the Commission has what may fairly be called the opinion of the industry itself on the customs in question. Such conferences have been held for the oil, paper, creamery, rebuilt typewriter, celluloid, butter, macaroni, and other industries. In some of these the conference has itself brought about a voluntary agreement to abandon harmful practices.

If the Commission can continue this policy successfully it will speedily reestablish interstate trade on a satisfactory plane and will gain the invaluable coöperation of the chief industries of the country. About two-thirds of the matters brought to the Commission's attention do not require formal proceedings and are satisfactorily settled without publicity or expense.

In surveying the Commission's work one cannot avoid contrasting its results with those which flow from ordinary law-suits. Only a small proportion of the Commission's rulings are contested in the courts. The vast majority are quietly settled without delay, expense, or formal procedure. The meaning of unfair competition is being rapidly cleared up. A long line of precedents has been created and we are already nearer an understanding and solution of the problems handled by the Commission in its short existence than we are to those of the Sherman Act of twenty-five years before. Yet the personnel and expenses of the Commission are comparatively light, the staff numbering about 400 and the appropriation about one million.

**Price Protection.** — One of the difficult problems facing our national trade policy is — What shall be the Government's attitude towards the various methods practiced by manufacturers in keeping up the retail prices of their products, to the public? Supposedly the public derives great benefit from absolutely free competition by the retailers and supposedly the more the dealers cut prices the greater the public benefit. We are beginning to suspect that this reasoning is mistaken. Price-cutting is a device to attract trade by creating the impression that the store in question is low in price on all wares. The dealer selects a widely advertised standard article as a "leader" and announces a cut in its price, meanwhile retaining perhaps full regular prices on other products. The leader must be some article with which the public is familiar both as to quantity and price.

The effect of cut-price sales is to destroy the market for the leader, in other stores. These rival storekeepers complain to the manufacturer that while they are maintaining the regular price, the price-cutter is creating a sensation by his policy and attracting trade from their stores. They demand that the manufacturer stop the practice by some pressure on the cut price dealer. From the manufacturer's view point the problem is a serious one. He spends a fortune in advertising not only his products but also their prices. He seeks to build up a permanent clientele by fixed standards of quality, service, and price. The price-cutter seriously damages this system and disrupts the manufacturer's relations with the retail trade, meanwhile raising a question in the public mind as to the fairness of the advertised price. For these reasons the manufacturer now seeks to persuade, induce, or compel the retailer to observe a regular price list without cutting. What should be our public policy on this question?

*Methods of Price Protection.* — The first system of protecting prices was the obvious one of inducing retailers to sign an agreement not to sell the product below a certain price. In *MILES MEDICAL CO. v. PARK DRUG CO.*, 220 U. S. 373, 1911, such an agreement was held to be forbidden by the Sherman Act. It was a *combination to suppress competition* by the retailers in the prices of their products, said the Court, and was therefore a means of denying to the public the benefits of competition. As such it was an agreement in restraint of trade and illegal. This single decision invalidated 400 wholesalers' agreements and 25,000 retailers' contracts.

The patent medicine manufacturers have often used their patent rights to maintain retail prices. In *BAUER v. O'DONNELL*, 229 U. S. 1, 1913, the manufacturer had produced a patented remedy known as Sanatogen which was distributed to the retail stores with a notice to the retailer that every bottle must be sold for not less than \$1.00 and that any violation of this clause would be an infringement of the Bauer Company's patent rights. When O'Donnell, a retail druggist, sold the product at less than the fixed price he was prosecuted by the Company for infringement of patent. The Supreme Court held that the manufacturer had no control over the price of the product after he had parted with his ownership of it. The retail store which had bought it might resell at any

price. A patent gave the patentee control of the product only so long as he owned it. The same problem arose in the publishing business and was decided in *STRAUS v. THE PUBLISHERS' ASSOCIATION*, 231 U. S. 222, 1913. Here the publishers' association issued a fixed scale of prices of copyrighted books which they wanted the retailers to observe. Straus failed to do so, cut prices below the list, and was refused a further supply of books by the publishers acting in unison. The Court held that such an agreement not to sell to Straus was a combination to restrain trade. This form of price maintenance likewise fell under the ban.

**The Open-Price Method.** — Is the open-price method legal? By this plan the members of a trade association agree to send to the secretary full information about the prices which they are charging, the stock of goods on hand, etc., he meanwhile keeping them advised of the general state of the market and often urging them to maintain or even increase prices. In *AMERICAN COLUMN AND LUMBER CO. v. U. S.*, 1921, this method was held illegal because one purpose of the agreement to exchange information was to suppress competition in price. This made it an agreement to restrain trade. Is the request and espionage method legal? In *FEDERAL TRADE COMMISSION v. BEECHNUT CO.*, 42 SUPR. CT. REP. 150, 1922, an interesting new method was before the Court. The company in supplying Beechnut products to dealers, "requested" them to maintain the full list prices, warned them that those dealers who failed to do so would not be supplied with the goods, and then employed agents who watched the retailers to see that they maintained prices. The Court held that such a system was an unfair method of competition. Any practice which was against public policy because of its dangerous tendency unduly to hinder competition or create monopoly or which included deception, fraud, or oppression, was an unfair method of competition. The Beechnut plan because of its dangerous tendency to hinder competition was therefore an unfair method.

The above list by no means includes all the methods of maintaining retail prices. Should manufacturers of large financial resources prefer to take no chances of illegality, they retain the ownership of their products while in the retailer's hands, by making him their agent and instructing him as to how and at what price he shall sell their goods. Here the retailer has not purchased the product,

but the manufacturer still owns it. He therefore has a right to direct his agent in every detail of its disposal. This method is legal under our trade laws. It is not generally followed because few manufacturers have sufficient capital to retain the ownership of their products until these reach the final consumer. Rather must they dispose of their wares outright to the wholesaler or the retailer and secure payment from him without waiting for the final sale several months later.

**Commission's Recommendations on Price Maintenance.** — In December, 1918 and July, 1919 the Trade Commission recommended that the law be changed to permit agreements to maintain retail prices when such agreements have been approved by some Government body to be determined by Congress. This points out the only natural and effective way of solving the problem. We cannot rely upon the mere good will and altruism of dealers to keep prices down or up to a fair level for the protection of the public or of the manufacturer. Nor if the manufacturer were free to bind his dealers with valid agreements, could we depend upon his self-restraint in matters of price. In fact the dealers themselves would strongly object to the pressure which might be brought against them to sign up such restrictive price agreements. The approval of a Government authority after some inquiry as to the reasonableness of the conditions in the agreement offers a greater freedom than the present plan, for both the producer and the distributor, while affording the public adequate protection.

**The Clayton Act.** — The next step in our regulative policy was taken in the passage of the Clayton Act, October 15th, 1914. This important measure has three objects: First, To put the injured party or plaintiff who is seeking redress under the anti-trust laws in a stronger legal position, and make it easier for him to prosecute his suit; second, To define more clearly certain abuses and restraints of trade and to forbid these, and to empower the Trade Commission to suppress them; third, At the request of organized labor the law was also made to include a revision of the methods of granting injunctions in labor cases, and especially to legalize the boycott in labor disputes. These three separate objects were originally embodied in three distinct bills, but in order to hasten congressional action the leaders in Congress unfortunately decided to combine them in a single measure.



1. *Strengthening the Injured Competitor's Legal Position.* — We here face one of the interesting and vital aspects of all trade regulation. The violator of a trade law may by reason of its sheer corporate size and bigness, possess resources which enable it to tire out the injured competitor and force him to abandon litigation. This happens whenever a law is carelessly drafted to allow many pretexts for delay, or difficulty or expense in bringing suit, or makes the injured party assume an unnecessarily heavy burden of proof. Behind all of these legal intrenchments the violator "digs in" with serene confidence that the very complexity, technicality, and slowness of the law will protect him. Every great concern has its permanent legal department to which one suit more or less is a mere matter of routine.

A regulative law to be effective must not saddle either side in a dispute with an impossible burden of technicalities. Section 5 of the Act provides that where the Federal Government in its prosecution of violators of the anti-trust acts either by criminal suits or by injunction, has secured a court decision establishing a violation of the law, these decisions shall be prima facie evidence of the violation of the Act, and may be used as such by a private suitor against the same violators. This clause materially lightens the burden of the injured suitor and enables him to make effective use of the Government's evidence and results.

Another notable change in the law is the privilege now granted to private suitors of securing an injunction against continuing violations of the anti-trust acts. Under the old laws only the Government could ask for an injunction (Sec. 4 of Sherman Act) while private suitors might only demand damages, as was pointed out in *PAINÉ LUMBER CO. v. NEAL*, 244 U. S. 459, 1917. But to an injured competitor the injunction with its immediate power to stop the forbidden restraint is often more essential than a long drawn out suit for damages. Section 16 of the Clayton Act now provides that the injured competitor may secure a court injunction against concerns violating the anti-trust laws. This gives him the means of stopping such violations before they have destroyed his business existence.

2. *Definition of Abuses; Price Discrimination.* — In order to make "restraint of trade" more definite in meaning, the Clayton Act specifies certain practices and prohibits them. Among these is

price discrimination. Section 2 forbids such discrimination against particular buyers in national trade, for the purpose of suppressing competition or causing monopoly, with the proviso however, that a dealer may select his own customers in bona fide transactions, not in restraint of trade. This section is difficult to enforce.

*Exclusive Agreements.* — For many years a favorite method of suppressing competition has been to require purchasers to handle the seller's products exclusively. The sale of phonographs and records, camera and photographic supplies, tobacco, mimeograph, and countless other articles was pushed under this policy of — "buy all or none from us." These agreements, imposed on the dealer against his will, were euphoniously called "loyalty contracts" or "tying" or "exclusive" agreements. The dealer was forced to submission by the threat that if he disobeyed he could secure none whatever of the seller's goods. To meet this situation Section 3 of the Clayton Act requires that the seller of goods in interstate trade must not impose the condition or understanding that the purchaser shall not also deal in the goods of other persons, when the effect of such a condition is to lessen competition or create a monopoly. The Act authorizes the Trade Commission to enforce these sections.

3. *Labor Combinations.* — This purpose of the Act was carried out by several sections which seemed to legalize peaceful boycotts in disputes between the employer and employee and to forbid injunctions in such disputes except for the purpose of protecting some property right. Section 20 was so unfortunately worded as to invite misunderstanding. It provided in substance that no injunction should be granted by a Federal court in a case between an employer and employee, growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property. Also that no such injunction should prohibit any persons from striking, picketing, or boycotting by peaceful means. Nor should any of the acts specified be held to be violations of the Federal law.

**The Labor Clauses Interpreted.** — In *DUPLEX PRINTING PRESS CO. v. DEERING, BRANLEY, ET AL.*, 254 U. S. 443, 1921, these provisions were before the Supreme Court for interpretation. The Duplex Co. manufactured large newspaper printing presses at Battle Creek, Michigan. Many of their largest customers were

in New York City. Deering and Branley were representatives of the International Association of Machinists in New York City. The International decided to unionize the company's factories on the closed shop basis, that is, to exclude non-union men. They sought to do this by direct demands and by pressure on customers of the Duplex Co. in New York City. The company asked for an injunction in the Federal court, to prevent the following acts:

Warning customers that it would be better for them not to purchase, or having purchased not to install the presses made by the company and threatening them with loss if they did so.

Threatening customers with sympathetic strikes of other labor crafts.

Notifying a trucking company employed by customers not to haul the presses and threatening the trucking company with trouble if it did so.

Inciting employees of the trucking company and other men employed by the customers of the Duplex Co. to strike against their employers in order to interfere with the hauling and installation of the Duplex presses.

Coercing union men by threatening them with loss of union cards and blacklisting them as non-union scabs if they helped to install the presses.

Threatening an exposition company with a strike if it permitted the Duplex presses to be exhibited.

The Company claimed that these acts formed a boycott or conspiracy to stop interstate commerce and were therefore illegal under the Sherman Act. The defendants claimed that Section 20 of the Clayton Act expressly prevented an injunction against the labor boycott.

The Supreme Court reviewed the decisions on boycotts under the Sherman Act and analyzed Section 20 of the Clayton law. It pointed out that the section applied only to cases between an employer and employee or between employees and persons seeking employment, in a dispute concerning terms or conditions of employment. This was clearly not such a case, for the defendants Deering and Branley and others in New York City, were not employees or persons seeking employment of the Duplex Co., nor was there a dispute between the Duplex Co. and its employees over conditions of employment. After the company had begun suit a

strike was attempted in its works but immediately failed, so that in no sense could the Court find a dispute between the company and its employees. Nor did the company complain of a direct boycott of its products; it showed clearly the indirect nature of the conspiracy. The Machinists Union threatened other firms and other workers with loss unless these others, who were in no way connected with the dispute, should boycott the Duplex Co. Here again the Court pointed out that Deering and Branley in threatening loss or damage to companies in New York were in no wise conducting a dispute with an employer in Battle Creek. It was not the purpose of the Clayton Act to legalize an indirect, secondary boycott on outsiders in order to force them to take part in a dispute against their will. This very question as to the boycott of outsiders had been raised, said the Court, when the Clayton Act was debated in Congress and the member of the House Committee in charge of the bill had stated that the bill did not and was not intended to legalize the secondary boycott, *i.e.*, the boycott of outsiders. For this reason the Court held that Section 20 did not apply to an indirect, secondary boycott and that the courts were free to grant injunctions against such a boycott to prevent an irreparable property loss, as in the present case.

A detailed description of this case is given in order to show clearly the serious results of an ambiguously worded act. Section 20 is so phrased that one faction may find in it a legal protection of the pernicious boycott while another may discover that it grants no such protection except in a limited number of cases. Such use of deceptive phraseology is dangerous. It arouses unreasonable and extravagant hopes of class exemption from the law and casts on the courts the burden of destroying this class illusion.<sup>1</sup>

**Proposals for Federal License and Federal Incorporation.** — It has been proposed that a plan either of Federal *license* or of Federal *chartering* of interstate trading companies be established. The idea is that certain standards both of publicity, stock issues, price-

<sup>1</sup> The evil effect of this upon popular feeling for the courts is clearly seen. At the convention of the American Federation of Labor following the Duplex decision, a clerical orator aroused intense and prolonged enthusiasm by saying, "When these capitalists get to heaven they will get to a place where the Supreme Court is on the square."

fixing agreements, and other matters connected with trade companies shall be fixed, to which all interstate companies shall conform in order to receive the permit or the charter to engage in national business. These suggestions have been before the public since 1904, when they were presented in a valuable report by the bureau of corporations of the department of commerce. Under the Federal incorporation plan each company desiring to engage in interstate commerce would take out a Federal charter for that purpose. But the charter could authorize it only to engage in commerce because Congress, having no power over manufactures, could not charter a company to engage in industry. Hence the same concern would probably have to have two charters, one from the Federal government for commerce and one from the States for manufacturing. Under the license plan a company would retain its present charter and secure from the national government a license or permit to engage in national trade. Under either of these plans the charter or the license would be conditioned upon the company's observance of the Federal trade laws and might be forfeited if the laws were violated.

**Federal and State Powers of Incorporation.** — Each State may incorporate companies for any purpose that it chooses. It may give these companies in their charters the right to exist and transact business anywhere in the world, provided that other State governments or Congress, or foreign governments will permit such corporations to come into their respective jurisdictions. No corporation without this right can enter another State to open up its business offices or transact its affairs, neither may it engage in interstate trade, unless Congress either expressly or tacitly permits. The lax corporation laws of the States have greatly lowered the requirements for chartering a company, and the variety of rules passed by the different States to govern corporations coming into their boundaries from other States have, taken together, formed a chaos of corporation law and regulation which can be straightened out in only one way — by turning over to the Federal Government the entire control over incorporation and the rights which flow from it. At present Congress can only charter a company to engage in those forms of business which are subject to Federal regulation, because the constitutional powers of Congress do not extend beyond such subjects.

For these reasons we need an amendment extending the Federal authority over all matters connected with the formation and powers of any companies which transact business in the United States. The reasons for State control of incorporation were originally strong and binding. The policy of each State, it was felt, should be free on this question. In order to protect its people, each commonwealth must have the exclusive control over any company that enters its boundaries to transact local business there. This reasoning is unanswerable so long as the States vie with each other to grant the most favorable terms of incorporation to new companies. If they are allowed to do this, then it is essential that each commonwealth must have a corresponding authority to defend itself by supervising, regulating, and even excluding such corporations from its bounds. But on the other side, the corporation itself needs more protection. And more especially for those which are chartered by States with reasonable or high standards of incorporation there should be some central authority, such as the Federal Government, to insure free entrance to all the States of the Union for any company which had complied with all the necessary requirements of safety, honesty, publicity, etc. The new problem in national incorporation is to transfer to the central government this power. Business has become national. Corporations are no longer matters of State concern. These are very apparent commercial facts, and our law should correspond with them. Such are the considerations which have created and are rapidly strengthening the demand for Federal control of incorporation.

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## QUESTIONS

1. What is the difference between the purpose of the Sherman Act and that of the Railway Acts?
2. Which kinds of trade are covered by the Sherman Act?
3. Show the various criminal, civil, and equitable suits which may be prosecuted when the Sherman law is violated.
4. Several interstate railways are prosecuted (a) for fixing passenger rates by agreement; (b) for agreeing not to build any branch lines into each other's territory. When prosecuted they urge that for (a) they have the approval of the Interstate Commerce Commission and as to (b) the Sherman Act does not apply to railways. Decide both points with explanations.
5. Could the railways agree not to accept freight from competitors of a certain oil company? Give your reason.
6. All the steel companies of the United States agree to form an export association in which they will not compete with each other. Legal? Explain.
7. The tobacco manufacturers of America form a secret agreement not to buy any tobacco from planters for six months. The planters having no market are obliged to reduce the price of their leaf tobacco 50 per cent. Then the tobacco companies buy the crop. Legal? Explain and give precedent.
8. The City of X advertises for bids for street paving material. All the material men within 500 miles agree that one of their number shall bid low and the others high. The low bidder upon fulfilling the contract is to divide his profits with the others. Does the Act apply? Explain.
9. The managers of three large manufacturing and selling companies of national scope meet at lunch daily, and talk over prices. At the conclusion of the luncheon they settle upon a price below which they will not sell their product in competition with each other, but they do not make a written contract to that effect. Is this a violation of the Sherman Act? Reasons.
10. Would the Sherman Act apply to a company formed to buy and control the securities of two competing interstate railway companies? Why? Precedent.
11. What do you understand by the Rule of Reason? Illustrate.
12. Would the Rule of Reason apply to any other law than the Sherman Act? Illustrate.
13. If all the aviators in the country joined in an agreement to prevent the

transport by airplane of any goods which were not manufactured in exclusively closed union shops, would the Sherman Act apply? Explain.

14. Prepare an essay on Price Protection and the Sherman Act showing the methods, the advantages, and disadvantages of price protection and outlining any proposals for a proper legal regulation of the problem.

15. Select six nationally advertised articles sold in your town; report on the following for each article:

(a) Patented or unpatented? (b) Is the article owned by the store or by the manufacturer and sold by the store? (c) How is the price protected? (d) Is this method of protection legal? (e) Should our government policy be to allow price protection of this particular article by agreement between the manufacturer and the dealer?

16. Resolved, That the government should regulate trade only so far as is necessary to prevent violence, theft, or fraud. Defend one side.

17. What does the Sherman law provide as to the protection of a competitor whose business is damaged by an illegal combination?

18. Prepare an essay on the Sherman Act showing the reasons for its passage, its most important features and their interpretation, and giving conclusions as to its value.

19. What is a boycott?

20. Did the Sherman Act originally apply to interstate boycotts carried on by labor unions? Cite examples.

21. Outline and explain the changes made on this point by the Clayton Act of 1914.

22. Mention some classes of combinations which are exempt from the Sherman Act.

23. Resolved, That the Act should apply to all classes of people without regard to occupation. Take one side.

24. What do you consider the chief differences in purpose and aim between the Sherman Act and the Publicity Laws?

25. Explain the rise of the demand for government publicity in corporate affairs.

26. Outline the publicity powers of the Trade Commission, and give examples of companies from which the Trade Commission can and cannot require reports respectively. Explain why.

27. Resolved, That all private businesses should be free from compulsory publicity. Defend either side.

28. Explain the chief features of the Corporation Tax of 1909.

29. Why was it passed?

30. Why are large companies more desirous now of securing public approval and coöperation than they formerly were?

31. What are the chief difficulties of "judicial regulation" of business, *i.e.* the application by the *courts* of such a law as the Sherman Act? Illustrate.

32. Is an administrative body any better able to solve the problem? Prove your answer.

33. Explain to a group of men who have not studied the subject the Federal Trade Commission and its powers.



34. What is the procedure before the Commission?
35. When appeals are made from the Commission's rulings to what court are they taken, and why?
36. In a discussion of the Commission's powers it is said that the Commission may excuse or approve acts and agreements in interstate trade which were formerly forbidden by the Sherman Act. Explain with citations whether this view is correct or not.
37. How can the Commission get the information on which to base its decisions and rulings?
38. What is the usefulness of the Commission in lawsuits under the Anti-Trust Acts?
39. Give several examples of unfair trade practices which have been condemned by the Commission.
40. What is meant by a "trade practice submittal"? Its advantages?
41. As a dealer or manufacturer of widely advertised products would you prefer to protect your interstate trade by Commission action or by a lawsuit? Why?
42. Why was the Clayton Act passed?
43. How does the Clayton Act help the company whose business has been injured by its competitors' violations of the anti-trust laws? Explain fully.
44. Outline briefly the difference between the Sherman Act and the Clayton Act, with reference to labor boycotts in interstate trade.
45. The Breakfast Food Co. of Chicago runs an open shop, with both union and non-union labor. The San Francisco bakers' union threatens all the Frisco grocery stores with a boycott unless they stop buying from the Chicago Co., in order to force the latter into a closed shop agreement. The Chicago Co. asks the U. S. court for an injunction against this boycott. The union replies that the Clayton Act forbids injunctions against labor boycotts. Decide, giving exact reasons.
46. What do you understand by Federal license and Federal incorporation respectively of interstate companies?
47. Why have the proposals been made?
48. You are asked to report on the details of a bill for Federal incorporation. Outline your report.
49. A report on Federal license.
50. Explain the difference between the constitutionality of the two plans, and give your views as to their relative feasibility.
51. What constitutional power would the Federal Government have to charter or incorporate companies engaging in interstate trade? Cite an authority.
52. Explain several methods by which manufacturers seek to maintain retail prices of their products.
53. Show the legal status of each of these methods under the Federal trade laws.
54. From your study of these trade laws what do you consider to be some important points to be borne in mind in trade legislation? Illustrate each point.

## CHAPTER 8

### POWERS OF CONGRESS: FEDERAL POLICE POWER OVER INTERSTATE COMMERCE

OVER the vast current of national commerce that flows through all the states and territories and to the remotest parts of the world, Congress wields a full, plenary power. It may "regulate." That is, it may protect, preserve, encourage, promote, remove obstacles from, and when necessary it may reach down into the stream and lay an arresting hand upon those elements whose circulation in national commerce would harm the common interest. This authority has been likened to the State police power, with the single difference that the State prerogative is exerted over all businesses and activities while that of Congress extends only to commerce. As examples of the national authority we shall consider:

The control over Immigration, the White Slave, Lottery, Food and Drug laws, and the attempts to regulate child labor.

**Immigration Control.** — The chief aims here are (*a*) to select the best of the human material which presents itself for admission to the United States, (*b*) to distribute this material in the parts of the country where it is most needed, (*c*) to protect it from exploitation and fraud during the period of immigration, (*d*) to open up the facilities of naturalization in order that the new immigrant may as rapidly as possible become assimilated in the body politic, and (*e*) to proportion the newcomers from every part of the world according to some reasonable and fair basis, whenever it is not possible to admit all who are qualified.

**Selection.** — The sifting process is set forth in three Federal acts of 1910, 1917, and 1921. Under these laws a long list of persons are excluded from admission to the United States, among them being idiots, insane, epileptics, paupers, and persons likely to become a public charge, professional beggars, persons suffering from tuberculosis or other dangerous or loathsome diseases, per-

sons physically or mentally so defective as to be unable to make a living, persons convicted of a crime or misdemeanor involving moral turpitude, polygamists, anarchists, women or girls imported for immoral purposes, and persons aiding in their importation, contract laborers — that is, those induced to migrate by offers or promise of employment or by agreements (except artists and professional men); natives of the South Pacific Islands and of the greater part of Asia except Persia.

The law also excludes all aliens over sixteen years of age who cannot read English or some other language or dialect. The reading test is applied by the immigration inspector in the form of printed slips containing thirty or forty words. Each immigrant designates the language or dialect in which he wishes to take the test. Numerous exceptions are allowed even from this simple test, *e.g.* persons avoiding religious persecution or members of the families of those who are already domiciled here, also government officials and their families.

In 1921 an interesting experiment which has long been advocated was undertaken. It temporarily restricts the number of aliens who may be admitted of any nationality in any one year, to 3 per cent of the number of foreign-born persons of such nationality resident in the United States in 1910. A head tax of \$8 is collected for each alien entering the country.

**Administration.** — The execution of the law is intrusted to the Commissioner General of Immigration; he appoints, subject to the approval of the Secretary of Commerce, a number of commissioners at the various seaports of the United States, together with inspectors, investigators, and other employees. Disputes as to the admission of aliens are referred to boards of special inquiry appointed by the Commissioner at each port; these boards decide as to the alien's qualifications for entrance and an appeal may be taken from their decision to the local commissioner, from him to the Commissioner General, and ultimately to the Secretary of Commerce. The Commissioner General also establishes a division of information for the benefit of immigrants. This division aims to promote the proper distribution of immigrants into those sections of the country where immigration is most needed. Correspondence with State and territorial officers is conducted and complete infor-

mation regarding the resources and opportunities in each State is presented in foreign languages and distributed among the incoming aliens.

**Moral Regulation of Commerce: Protection of Immigrant Women.** — The immigration authorities and the Department of Justice having ascertained that organized and systematic efforts were carried on to induce or force respectable women and girls, arriving in the country, to lead an immoral life, and that such women because of their ignorance of the country and the language were in special need of protection, it was decided to take unusual precautions for the safety of arriving immigrants. Not only was the importation of women for an immoral purpose forbidden, but Section 3 of the Act of 1907 provided that whoever should maintain, control, support, or harbor for an immoral purpose, any alien woman or girl, within three years after she had entered the United States should be guilty of a felony. This section was interpreted in the important case of *KELLER AND ULLMAN v. U. S.*, 213 U. S. 138, 1909. A Hungarian woman, having entered the country in November, 1905, came to Chicago in October of 1907 to a house of vice which was purchased in November of the same year by Keller and Ullman. The latter were prosecuted under the clause above mentioned, of the Immigration Act of 1907. This case presented the important constitutional question whether Congress could exercise a protecting care over immigrants during a period of three years after they had entered the country or whether an immigrant ceased to be an immigrant before that time and therefore ceased to be under the national control and regulation and became subject only to State protection. The Supreme Court decided against the National Government and declared Section 3 of the act unconstitutional. The Court held that the Constitution conferred on the United States no power to regulate the ordinary affairs and relations of aliens *after they had taken up residence*. It pointed out that the census of 1900 gave the total population of the country at 76,000,000 of which about 10,000,000 were persons of foreign birth. Could Congress extend its control over all these persons under the guise of protecting immigrants? If so, declared the Court, Congress might regulate all their other relations regardless of the States. Such was clearly not the intention of the Constitution. Congress can control immigration but not the condi-

tions of the immigrant for three years after he has entered the United States. Being denied full authority to protect immigrant women the Government has attempted in later laws to do the next best thing. The Act of 1917 forbids the harboring or keeping of immigrant women for immoral purposes — *in pursuance of their importation*. The United States is also a party to an administrative arrangement with foreign nations to supervise and prevent the importation of women for immoral purposes. It is not, however, a party to the general international treaty for the suppression of this traffic, largely because the Federal nature of our government makes it difficult to regulate by treaty those affairs over which the States have authority. As long as this obstacle prevents Federal action it will be difficult, if not impossible to afford full protection to the immigrant.

**Moral Regulation: The White Slave Act.** — On June 25, 1910 the so-called Mann White Slave law was signed by the President. This oft-cited measure makes it a felony punishable by a heavy fine and imprisonment for any person to cause to be transported or to aid in transporting any woman or girl in interstate or foreign commerce, for immoral purposes, or to induce or compel a woman or girl to go from one place to another in interstate or foreign commerce, or in any territory, for such a purpose. The law was passed after a thorough investigation, made by agents of the Department of Justice, had made it clear that immense numbers of women and girls were not entering immoral life voluntarily, as was commonly supposed, but were being lured or forced by violence and crime into the abyss, and that many persons were systematically engaged in the revolting vocation of securing and selling new victims. This traffic so far as it takes place entirely within the borders of a State cannot be reached by the National Government for constitutional reasons, but when it crosses State lines it becomes subject to Federal regulation. The Mann Act operates on the same principle as the food laws, the lottery act, and the trust regulations — it prohibits any attempts to circulate the forbidden object in interstate commerce. It has been repeatedly tested in the courts and although opposed by all the ingenuity and legal skill which could be mustered by the accused, it has been upheld by the Supreme Court and is now a strong and effective weapon in the fight against organized vice. There is needed however a much larger appropriation for the

detection and prosecution of offenders, also the coöperation of State authorities, in order to stamp out this blot upon our civilization.

The attempts to overturn the law have raised some important questions concerning the extent of the national authority over interstate trade. The most serious objections were raised by the defendants in *HOKE v. U. S.*, 227 U. S. 316, 1913. Here it was urged, first: that any person had a right to pass from State to State, and that a woman, no matter what her moral character might be, possessed this right. Accordingly, when Congress attempted to prohibit anyone from inducing a woman to go from State to State it was in effect saying that persons might not be persuaded to do what they had a legal right to do. This was impossible as a legal doctrine, said the defense, for Congress had no such authority. To this the Supreme Court answered that no one had an absolute right to pass in interstate trade — if he or she intended to make use of this right for a purpose which Congress deemed immoral, harmful, or injurious to the community, then Congress could not only withdraw the privilege of interstate trade for such purpose, if it chose, but could also prohibit other persons from inducing a woman to make use of her supposed right for such immoral or injurious purpose.

In the second place, the defendant urged that Congress had no authority whatever over morals — this was reserved to the State governments; when Congress attempted to reach over into the bounds of a State and forbid an act which it considered immoral, it was usurping State authority in an unconstitutional manner. Hence, the Act of 1910 exceeded the Federal powers. To this the Court replied that the Mann Act prohibited, not the practice of vice (over this the States had control) — but the securing and persuading of women to pass from State to State for purposes of vice. This interstate passage was subject to Federal regulation as a part of national commerce. Congress, having control over the avenues of national commerce, could exclude from them any dangerous or harmful elements whose passage might injure the community. This passage no State had the constitutional authority to regulate; it was solely subject to the power of Congress. Accordingly the Act was a constitutional exercise of the regulation of commerce and was upheld in all points.

**Moral Regulation: The Lottery Acts.** — In 1895 Congress passed “an act for the suppression of lottery traffic,” which prohibited the sending of lottery tickets through the mails or from State to State by the ordinary channels of trade. Under this Act, C. F. Champion, alias W. W. Ogden, was prosecuted for having circulated in interstate commerce from Dallas, Texas, to Fresno, California, certain tickets or lottery shares of the Pan-American Lottery Company. In his defense he urged that the sending of lottery tickets was not an operation in interstate commerce; third, that the power to regulate lotteries and the sale of tickets was exclusively within the jurisdiction of the State government. It was claimed that the whole question of moral regulations of sale and purchase in such cases was intended by the Constitution to be governed only by the States. The Supreme Court, in its decision, *CHAMPION v. AMES*, 188 U. S. 321, 1903, overruled the defendant on all points and held that the power to regulate included the power to prohibit; that Congress being vested by the Constitution with full authority over national commerce, could remove from it any harmful or dangerous elements. The law did not prohibit lotteries, but forbade them to use the channels of national commerce. Similar Acts in 1897 forbidding interstate trade in articles intended for an immoral purpose and the circulation of improper literature have likewise been upheld. *POPPER v. U. S.*, 98 FED. REP. 423, 1899.

**Pure Food Laws.** — A new and important side of the national control over interstate trade has developed in the Pure Food Laws. The adulteration of alcoholic beverages has long been a matter of common knowledge. The practice soon spread to drugs, and it became customary to cheapen many standard articles, even those used in the preparation of medicines. Nor did the process end here; it invaded the field of food production. The homely squash and the apple when doctored, flavored, colored, and attractively packed, became “preserved strawberries”; oleomargarine dyed yellow took on the semblance and name of “butter”; strips of veal were metamorphosed into “potted chicken,” while even those cereals which form the food mainstays of the poorest classes were not spared, but flour, cornmeal, oatmeal, etc., were all “blended” with siftings, cheaper meals, and even mineral earths. The eagerness to put food production on a “commercial basis” had meanwhile invaded the meat-packing industry and animals were slaugh-

tered under conditions which, mildly stated, were unsanitary, while many diseased or decayed meats were packed for sale to the trade.

With a few notable exceptions the whole field of manufactured food, drugs, and drink production was honeycombed by these practices. Aside from the extensive fraud involved, the public health was threatened by the dangerous preservatives or adulterants used. When the reaction came, a great wave of popular feeling surged over the country, forcing Congress to take immediate action. The legal obstacle at once arose — what constitutional authority had Congress to regulate manufactured foods, drugs, or adulterations? Obviously none whatever. In the emergency it was decided to resort to the power to regulate commerce between the States. Two important laws known as the Food and Drugs Act and the Meat Inspection Act were passed and approved June 30, 1906, to prohibit *the circulation in interstate trade* of all fraudulent and unhealthful foods, drugs, beverages, and meats; that is, those which are not prepared according to the rules and standards authorized by Congress. These rules are as follows:

**Meat Inspection.** — Animals slaughtered for interstate trade are inspected by agents of the Department of Agriculture, the carcass is also examined after slaughter and stamped as “passed” or “condemned” — those meats which are packed or canned must also be inspected and marked, and finally the slaughterhouse itself must have been examined and approved.

**Food and Drugs Act.** — This law is aimed to prevent adulteration and misbranding; it prohibits the use of deceptive labels on both food and drugs; medicines which contain alcohol, laudanum, and other dangerous ingredients shall have the proportion of such ingredients plainly stated on the wrapper and label; it further requires that all drugs shall conform to the standard of purity fixed by the national drug lists. The definition of food includes beverages, confectionery, condiment, and other articles used as food for either man or animals. The term drug as used in the Act includes all preparations recognized for internal or external use by the two standard measures of the United States, the U. S. Pharmacopœia and the National Formulary, also any substance or mixture “intended to be used for the cure, mitigation, or prevention of diseases of man or animals.” Thus a horse liniment is subject to the Act as a drug, while an ordinary soap, hair dye, or cosmetic is not, since



it is not intended for use in the cure of disease. This distinction is not generally understood, and the administrator is sometimes criticized for not preventing the interstate sale of cosmetics containing acids, and of hair "lotions" containing wood alcohol which have caused blindness. But these are not drugs and are therefore not subject to the Act.

In the protection of foods the law prohibits harmful preservatives and the adulteration of any food product by the addition of other ingredients, unless the composition is so marked on the label; one product may not be sold under the name of another; the law also applies to beverages. The enforcement of the Act is intrusted to the Bureau of Chemistry, Department of Agriculture and to the Food and Drug Board composed of the Secretaries of Agriculture, Treasury, and Commerce. The Board makes decisions and rules interpreting and applying the law to new conditions. These rules are of unusual interest in the study of trade regulation. They again show the great usefulness of an administrative body in quickly clearing up the meaning and interpretation of an important law, thereby preventing the rise of numberless disputes and much litigation. The rules define terms used in the Act such as "original unbroken package," "narcotic drugs," "label," etc., also the procedure to be followed at hearings, the kinds of coloring matter that may be employed in foods and drugs, the uses of preservatives, detailed provisions concerning misbranding and adulteration, etc. The Bureau of Chemistry collects and analyzes samples of foods and drugs circulating in interstate trade. If such samples prove to be manufactured contrary to the law the manufacturer is immediately notified and allowed to present a full statement, and in case a serious violation of the law has taken place, the evidence is presented to the Department of Justice for prosecution. Where the violation is not an important one no prosecution is begun except in case of repeated failure to observe the spirit of the law. The more progressive manufacturers have been quick to see the benefit and importance of government inspection, and many of them advertise that they observe a standard even higher than that required by the government.

The immediate practical effects of these two Acts have been more beneficial than those of any other two laws passed within a generation. It is not too much to say that the food and drug manufac-

turing industries have been revolutionized and that the basis of competition in those businesses has been so changed that purity of product is now an advantage instead of a commercial handicap.

**Methods of Enforcement Contrasted.** — We may here pause to make a brief contrast between the enforcement of regulative laws by judges and administrators. The law originally had provided in Section 8 that a drug or food was mislabeled and therefore excluded from commerce, if the label bore any statement "regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any part." Yet when a "mild combination treatment for cancer" which was represented as a cancer cure, was found to be a fraudulent preparation, the Supreme Court held the above Section had not been violated because there were no false claims made *as to the ingredients* of the supposed medicine; *U. S. v. JOHNSON*, 221 U. S. 488, 1911. Naturally under such a ruling the intent of Congress was defeated and the door thrown open to continued deception and fraud. Congress therefore by the so-called Sherley amendment in 1912 was forced to make its meaning doubly clear by adding to Section 8 "if its package or label shall bear or contain any statement, design or device, regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." In sharp contrast with the above Court decision is Regulation 10 of the Food and Drug Board on confectionery — its unmistakable effect is to enforce the letter and spirit of the law — "(a) Mineral substances of all kinds (except as provided in Regulation 15) are specifically forbidden in confectionery whether they be poisonous or not, (b) Only harmless colors or flavors shall be added to confectionery."

\* **The Net-Weight Act.** — On March 3, 1913, Congress added the provision that all packages shipped in interstate commerce shall be plainly and conspicuously marked to show the quantity of the contents.

**Inspection.** — The number of inspectors rarely exceeds 50, which, in view of the immense field to be covered and the importance to the community of the work done, is totally inadequate. During a single year these men collect over 10,000 samples for examination and visit many thousand manufacturing establishments. For economy's sake they are concentrated in a few centers, making field

trips to the territory around them. In addition to the main central laboratory, there are now 21 branch laboratories. The scope and importance of the inspectors' work may be seen from a short recital of some of their ordinary routine duties. At one time they pay especial attention to the preparation and shipment of milk from those sections which have no local milk inspection service, particularly the small towns adjacent to great cities. At another time they study the water of those sections in which shellfish are caught in large quantities, with a view to detecting and preventing the causes of disease. Again they investigate the many attempts made to bleach food products such as flour with injurious chemicals, and stop the practice. Or they find that in the milling industry it has become a custom to add screenings and mill refuse to the animal foods sold as by-products of the mill. Many illegal shipments of such adulterated animal foods have been seized. The Bureau learns that great quantities of Italian tomato sauce and tomato paste are being imported. A representative is sent to Italy to confer with the manufacturers there, inducing them to adopt sanitary methods which will satisfy the requirements for importation. The Bureau discovers a widespread practice of sweating unripe citrus fruits to give them the color of maturity. It brings suit in the courts, thereby putting an end to the practice.

*Services of the Bureau.*— The Bureau has performed a signal service both to the manufacturer and to the community at large. Its inspectors have not acted merely as detectives to spy out violations of the Act and punish the malefactors, but have frankly recognized that many illegal practices were unintentional, while others resulted from a mistaken commercial zeal. They have accordingly admonished, instructed, and advised quite as often as they have prosecuted. The shippers of milk have been taught greater cleanliness and have been prosecuted only when they failed to follow suggestions. The grape juice producers have been aided by a field laboratory in which the methods of preventing the formation of alcohol are studied and perfected. The poultry and egg raisers have been instructed by a model refrigerator car showing the best methods of care and preparation of their products and especially pointing out the importance of immediate cooling of poultry and eggs before storage. The sanitary preparation of frozen and dried eggs has been demonstrated. New methods of

preventing the formation of arsenic and metallic impurities of copper, zinc, and lead in gelatin have been developed, and in the important process of canning an exhaustive study has been made of the possibilities of improvement.

Furthermore the law itself has not been enforced in the courts by heavy penalties. The producer, unless he shows a determined and persistent spirit of violation, is handled with the greatest leniency and is usually allowed to go free of all penalties upon signing a bond for the future observance of the law and paying the very moderate court costs. The result of this praiseworthy spirit in the administration has been a remarkable improvement in food conditions in all sections of the country and it cannot be doubted a much greater benefit would follow an extended and more adequate appropriation for the needs of the service.

**National vs. State Food Laws.** — If a State law requires a different labeling of retail food packages from that fixed by the National law, which rule applies to foods brought in in interstate commerce and sold at retail? In *McDERMOTT v. WISCONSIN*, 228 U. S. 115, 1913, this question arose from the provision of a State law requiring syrups which contained more than 75 per cent glucose to be labeled as "glucose" on the retail package. The Federal regulations provided that the labels of both original package and retail sale package must conform to the Federal rule. Also that syrup extracted from corn might be labeled corn syrup. McDermott brought into Wisconsin from another State a shipment of corn syrup containing 90 per cent of glucose. Which rule governed the label on the retail package? The State argued that retail sales were local commerce and were subject only to the State law but the Supreme Court decided that the Federal label rules applied to both the outside original package label and the inside retail label.

"Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed."

"The object of the statute is to prevent the misuse of the facilities

of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser. — We think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce.”

But a State may protect its people from foods which it considers to contain harmful preservatives, by prohibiting their sale, and apply this prohibition even to foods brought in from other States. This was decided in *WEIGLE v. CURTICE BROTHERS CO.*, 248 U. S. 285, 1919. Here the Federal F. & D. rules permitted the use of benzoate of soda as a preservative while the Wisconsin State law forbade the retail sale of foods so preserved. The Supreme Court upheld the State law even as against foods brought in from another State. And when a State chooses to restrict the sale of narcotic drugs over and beyond the rules laid down by the Federal tax law such action is constitutional, as was decided in *MINN. v. MARTINSON*, 256 U. S. 41, 1921. “When objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment and prohibit what Congress did not see fit to forbid.” “Such regulation is not an attempt to supplement the action of Congress in interstate commerce, but the exercise of an authority outside of that commerce that always has remained in the states.”

**New Problems in the Federal Police Power over Commerce.** — Can Congress use its regulative power for any purpose that it pleases? Can it bar out of interstate trade any product which it chooses? These questions came up for settlement, in the passage of the first Child Labor Law of 1916. By it Congress prohibited the interstate circulation of goods produced in any factory, shop, or mine in which children under 14 had been employed. The Federal power to pass this law was questioned in *HAMMER v. DAGENHART*, 247 U. S. 251, 1918. Dagenhart, whose children were employed in a North Carolina cotton mill, protested that the law exceeded the Federal authority over commerce. Hammer, a District Attorney, claimed that the power to “regulate” included the power to exclude from national commerce. He pointed out that the Court had repeatedly upheld this power when applied to

commerce in lottery tickets, diseased meats, fraudulently labeled foods and drugs, the white slave traffic, and the circulation of alcoholic liquors intended to violate State prohibition laws. Congress was the sole judge of what should and what should not be allowed to pass through the channels of National trade. It was not the province of the Courts to question the motives of Congress in using a power which the Constitution expressly granted.

The Supreme Court, however, declared the Act unconstitutional. It pointed out that the other laws above mentioned had been upheld because of the peculiar nature of the subjects concerned. In each of these cases "the use of interstate transportation was necessary to the accomplishment of harmful results."

The evil against which Congress sought to protect the people in the Lottery, Food and Drug, and White Slave acts could only be prevented by forbidding the interstate circulation of the subjects concerned. But in the present Act the evil which Congress sought to combat, viz., the employment of children of tender years, had already occurred in the production of the goods. Their interstate circulation must not be stopped unless there was something harmful in the goods themselves which would be injurious to the community if circulated. An article produced by child labor might be laid side by side with one produced by adults, and no distinction would be apparent, nor would any harm arise to the community from the circulation of one more than of the other.

In substance Congress was therefore attempting to regulate production. "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless." "When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power." The production of articles intended for interstate commerce is a matter of local regulation. If it were otherwise, all manufactures intended for interstate shipment would be brought under Federal control, to the extermination of State authority. Congress had no general authority to exclude from commerce any object whatsoever that it might select.

The statute was therefore beyond the power of Congress. The attempt made in 1919 by Congress to regulate through the tax power has been considered in Chapter 5.

**Regulation of Packers and Stockyards.** — Responding to numerous complaints of cattlemen and consumers against the meat-packers, Congress in 1921 passed the Packers and Stockyards Act, the main purpose of which was to protect the owners and shippers of live stock from abuses growing out of the packers' control of the stockyards and related facilities. The Act defines a stockyard as a place conducted for profit, as a public market with pens where stock is kept for sale or shipment in interstate commerce. Owners of stockyards, the commission men and dealers therein, are regulated, and the business is practically declared to be one affected with a public interest. Rates and charges for services and facilities in the yards must be just, reasonable, non-discriminatory, and non-deceptive, as must also all practices in connection with the handling of live stock passing through them. The Secretary of Agriculture is given supervisory and regulative authority to enforce the Act, and he also supplants the Trade Commission in preventing unfair competition in this industry.

**Constitutionality of the Act.** — Acting under this law, the Secretary of Agriculture made rules for the registration of dealers and commission men and established forms of accounts and reports, etc. In *STAFFORD v. WALLACE*, decided in 1922, the legality of the Secretary's action was questioned and the constitutionality of the law itself attacked on the ground that it exceeded the Federal power, because many of the matters regulated were not directly concerned with interstate commerce. It was protested that if the purchase and sale of cattle on local exchanges was a local matter, Congress under its interstate commerce power had no authority to require the registration of commission men, dealers, etc., in such businesses, nor could it regulate the management of the yards where the cattle were kept while awaiting local sale.

The Supreme Court upheld the Act under the commerce power. It pointed out that the various transactions in which the commission men and dealers were engaged and which they had claimed were purely local, were, when taken as a whole in connection with each other, merely the parts of a general movement of commerce which Congress had authority to control and regulate. Commerce

between the States was not a technical legal conception, but a practical one drawn from the course of business. When cattle are sent for sale from one State to another, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the movement thus arising is a current of trade among the States, and the purchase and sale of the cattle in the stockyards is a part and incident of such trade. The Court must therefore refuse to separate some of the transactions, consider them alone, declare them to be local in nature, and exempt them from national control.

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

The Court reached its decision largely on the basis of the Federal Trade Commission report on the Meat Packing Industry of July 23, 1918, showing the packers' position in the business and their control of stockyards, commission men, banks, cattle loan companies, terminal and switching facilities, yardage services and charges, weighing, disposal of dead animals, and other yard monopolies. The Court looked at the entire history of the long efforts of the government to establish fair conditions in these features of the business and in the sale of packing products to the distributor and consumer, and regarded the present law as a step in this long struggle.<sup>1</sup> So considered the Act was within the Federal power,

**The Warehouse and Bill-of-Lading Laws.**— A bill-of-lading is a receipt given by the carrier to the shipper, certifying the quantity and kind of goods which he has delivered for transportation. Such bills are used as collateral for loans at the bank. They form the basis of insurance policies issued on the shipment. Innumerable questions as to their genuineness and the legal obligations and rights of parties under them, are constantly arising. In order that bills based on interstate shipments should conform to a general

<sup>1</sup> Under the new law 78 stockyards were registered and 3435 dealers licensed during the first year of its operation.



uniform standard, Congress in 1916 passed the National Bill-of-Lading Act. This defines bills, regulates their handling by carriers and shippers, fixes the liability of the carrier and the rules for transfer or negotiation of such bills and forbids their forgery or alteration.

In the same year the National Warehouse Act was passed, to protect interstate shippers of farm products. It authorizes the Secretary of Agriculture to investigate, supervise, and regulate the storage, weighing, grading, and classifying of such products and to inspect and license the warehouses in which they are stored for interstate commerce. Licenses are issued only to persons who conform to the regulations. The Secretary also licenses graders, classifiers, and weighers. Standard forms of warehouse receipts are prescribed to safeguard the interest of the shipper, the purchaser, the warehouseman, the bank, and the insurance company. The law applies to flaxseed, wheat, grains, and similar products and is constitutionally based on the power to regulate interstate commerce.

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#### QUESTIONS

1. If the Federal Government has no authority over manufacturers what power has it to pass a pure food law, or a meat inspection act?
2. Why were such acts passed, in 1906?
3. Outline the chief features of the Food and Drug Act.
4. The Actors' Coöperative Association of New York buys from Chicago one hundred pounds of grease paint for make-up. When applied it is found to contain chemicals which seriously injure the skin. What can be done under the Food and Drug Act and why?

5. What is the work of the Pure Food Board in enforcing the act?
6. Of the Bureau of Chemistry?
7. Contrast administrative with court enforcement of the act.
8. A manufacturer labels his product "preserved strawberries." It contains 60 per cent of strawberries, the balance being squash and apple. Has he violated the act? Explain.
9. A manufacturer of breakfast foods located in Chicago prepares a mixture of Minnesota oats and labels it "Edinburgh Scotch Breakfast Oats"; he makes another mixture of dried corn flakes with sugar and labels it "Elijah's Manna"; a third he makes from a good quality of wheat flour and labels it "Buckwheat Brain Builder." He sells these to the trade in various parts of the country. Explain fully the legality of each label.
10. The government prosecutes a drug manufacturer for adulterating his camphor sold to the trade. What standard will be used to measure the purity of the drug?
11. A state law regulates the labels of packages offered for sale at retail within the State. This conflicts with the rules of the national Food and Drug law for goods sold in interstate trade. The State claims that the national government has no authority over retail trade. Decide with reasons.
12. Can a State forbid the local sale of foods which contain benzoate of soda if these same foods may legally circulate under the United States Food and Drug law?
13. In 1911, Dr. Quack circulated in interstate trade his Magic Consumption Cure. The label and wrapper say nothing of the ingredients but both guarantee a sure cure for consumption if the remedy is taken persistently, a teaspoonful after each meal. Upon analysis, the cure is found to contain one part of salt and ten parts of water. Has the law been violated? Explain fully.
14. In 1914, Dr. Quack continues his sales of the remedy under the same conditions. Can he be prosecuted? Explain fully.
15. Explain the provisions of the Net-weight Act.
16. Go to a retail drug store or grocery store in your town and get the proprietor's opinion of the value and disadvantages of the Food and Drug Act. Prepare a report on them.
17. You are about to enter the business of slaughtering and packing of meat products for interstate trade. Explain fully the inspections to which your business would be subjected by the Federal Government.
18. Correct the following statement, giving your views: The passage of the Food and Drug and Meat Inspection laws assures to all consumers a complete purity of the meat, food, and drugs supplied.
19. Correct the following statement: Congress has no authority over morals since such questions may be regulated only by the States.
20. Could Congress forbid the interstate sale of tickets for a raffle if the proceeds were to be donated to charity? Reasons.
21. A manufacturer prepares for interstate shipment, a lot of goods which may not circulate in interstate commerce under the law, and leaves them in his shipping room, sending meanwhile for the Express Company. Has he violated the act?

22. The goods are placed on the train for shipment to another State, but the train has not yet reached the State boundary. Has the act been violated?

23. He delivers them to the express company which takes them to its depot, but has not yet placed them on the train. Has any violation of the Act occurred?

24. Outline briefly the educational work among manufacturers and other producers carried on by the bureau of chemistry.

25. What constitutional authority has Congress over immigration?

26. Enrico Alfano migrates from Naples to New York. What tax is imposed upon him on entrance and from whom is it collected?

27. Which of the following persons are excluded from the United States under the Immigration Act? Give the provisions of the act covering each case:

(a) John McGinniss, an epileptic invalid.

(b) Mary McGinniss, an idiot.

(c) Wm. McGinniss, aged 30, who has had several attacks of insanity, but is now in possession of a physician's certificate stating that he is sane.

(d) Philip McGinniss, who was insane three years ago but who has now a physician's certificate as to sanity.

(e) Jacob McGinniss, who has no dangerous contagious disease, but is blind, friendless, and penniless.

(f) Michael McGinniss, who has served out a term in prison for manslaughter.

(g) Antonio Bonato, who has been convicted of a trifling misdemeanor in Naples, but has been allowed to go free and his passage paid to America by the city of Naples.

(h) Paolo Lombardi, who has been engaged by the Columbus Coal Company to work in its mines and E. Caruso, who has been engaged by the Metropolitan Opera Company to sing in New York and Philadelphia.

28. Could Congress forbid all immigration for five years? Reasons.

29. John Doe, a British subject, migrates to America. Mention some of the requirements which he must satisfy before entering.

30. How did the Act of 1921 limit immigration?

31. Explain the Federal Government's special protection to women in interstate travel by the Mann Act of 1910.

32. Explain fully the strongest arguments against the constitutionality of the Mann Act. The decision of the court on these arguments with reasons.

33. Could Congress forbid the passage in interstate trade of goods which had been manufactured in the United States by non-union labor? Reasons and a precedent.

34. How has Congress sought to protect the interest of shippers who store their goods in warehouses?

35. How does the Packers and Stockyards Act safeguard the cattle raiser's interest, as affected by practices in the stockyards?

36. What is the strongest argument which might be brought against the constitutionality of such action by Congress?

37. Decide as to its constitutionality with reasons in full.

## CHAPTER 9

### POWERS OF CONGRESS: FEDERAL AND STATE POWERS OVER COMMERCE — PROHIBITION

**The Original Rule on State Powers.** — Can a State apply its trade laws to National commerce? At first the answer was No. The question at issue was the grant by a State of a monopoly of steam navigation which, the owner contended, barred out all other steam vessels from the use of the State ports. Fulton and Livingstone, as a reward for their services in inventing and perfecting the steamboat, had received from New York such a monopoly of steam-navigation in the waters of that commonwealth. They sold the right to another person who tried to enforce it by preventing all other steamboats from entering the ports of New York from other States. The owner of a steam vessel plying between New Jersey and New York resisted this action and in the celebrated case of *GIBBONS v. OGDEN*, 9 WHEATON, 1, 1824, the Supreme Court decided that no State could grant a monopoly affecting *interstate* trade because the Constitution had given Congress the power to regulate that trade. The monopoly therefore could not apply to waters which formed avenues of interstate traffic. A similar ruling was delivered in the case of *BROWN v. MARYLAND*, 12 WHEATON, 419, in 1827. Here the State had levied a tax on importers in the form of a business license of fifty dollars. The Court held this license unconstitutional in that it interfered with importing or *foreign commerce*. If these decisions had stood without further change the States would have had no control whatever over national commerce.

**The Rise of State Power.** — The entering wedge of State authority was driven in the case of *COOLEY v. THE PORT WARDENS OF PHILADELPHIA*, 12 HOWARD, 299, in 1851, and a new interpretation was given to the commerce clause. The Supreme Court declared that although Congress had full power there were certain details of

national trade of such a local nature that Congress might permit the States to regulate them. One of these was the question whether pilots were necessary for ships entering and leaving a port. So long as Congress permitted it, a State might require, as Pennsylvania had done for Philadelphia, that all ships coming into the local harbor must take on a pilot, for safety, and that this pilot must be paid at a fixed rate. The State might even impose a fine for the violation of this pilotage rule. Other similar matters of a local nature which are subject to State regulation until Congress acts, are the placing of harbor buoys, anchorage rules, harbor lights, erection of wharves, piers, and docks, etc. But in other matters requiring uniform regulation such as the permission to transport goods between the States or to enter and leave a State, only Congress can regulate, and if it does not act, its silence is to be understood as a declaration that such commerce is to be free. The Act of 1899 provides that no bridges may be constructed across navigable interstate waterways without the express consent of the Federal authorities.

**Some Purposes of State Regulation.**—A State usually regulates national trade in order to protect the public health and safety or to secure revenue. It often tries to protect its industries from outside competition, sometimes on the pretext of health or safety. In *MINNESOTA v. BARBER*, 136 U. S. 313, 1890, the State, by act of 1889 “for the protection of the public health” had required that all cattle, sheep, and swine which were to be used for food in the State must be examined by State inspectors within twenty-four hours before slaughter. It was forbidden to offer for sale any meat taken from an animal not so examined by State inspectors *before slaughter*. Barber had been convicted of violating this act by offering meat brought in from another State, for which he could show no Minnesota certificate of inspection. The Supreme Court held that the law was unconstitutional and his conviction therefore illegal. As the inspection must take place within twenty-four hours before slaughter the law necessarily excluded from the Minnesota market all meats taken from animals that were slaughtered in other States. It was physically impossible to ship animals from outside States into Minnesota, have them inspected there, and within 24 hours send them back to the abattoirs in other States and slaughter them. Even if possible it would be financially impracticable. The

effect of the law would be to bar out from Minnesota even those meats which had been most carefully and adequately inspected before and after slaughter, by other commonwealths. A State could protect the health and comfort of its people but must not exclude from its markets the harmless products of other States. The Act was therefore an interference with the Federal power over interstate commerce.

**State Regulations of Safety.** — How far may the State go in protecting the safety of its people in matters of interstate commerce? The general principle now governing this question is that, until Congress has acted, a State may so intervene if its regulation is clearly reasonable. In *NEW YORK, NEW HAVEN AND HARTFORD RAILROAD v. NEW YORK*, 165 U. S. 628, 1897, the State had passed an Act forbidding the use of coal or wood stoves on passenger coaches in the State and had sought to apply this act to the New Haven line. This the company protested, claiming that it was engaged in interstate traffic and that its through trains could not be interfered with by the State, but must be regulated only by Congress under Section 8 of Article 1. The Supreme Court, however, ruled that the State authority when used in this way was constitutional; the purpose of the Act was to prevent the burning of coaches in train wrecks, and the consequent loss of life and property. For such a purpose, the State might, in the absence of action by Congress, make reasonable regulations to require the railways to use modern heating apparatus of a safer nature; and the New York Act was a reasonable rule of this kind which might well be applied even to interstate trains, until Congress acted.

A similar ruling had already been made in *SMITH v. ALABAMA*, 124 U. S. 465, 1888. Here the State had established a Board of Examiners to license locomotive engineers; it required all engineers to pass an eye examination to secure such a license before driving a train in the State. A fee of \$5 was to be paid for the examination and the license; persons who were known to be negligent and incompetent were disqualified. Smith was an engineer of the Mobile & Ohio Railroad whose run was exclusively in interstate commerce; being approximately 60 miles in Alabama and over 200 miles in Mississippi. For this reason he claimed immunity from the State rule, and contended that he could not be required to secure a State license to engage in interstate com-

merce. The Supreme Court upheld the State statute and set forth that the purpose was not to license national commerce but to protect passengers and property from careless and incompetent engineers and railway accidents. The fee of \$5 was not a tax on interstate commerce, but was a proper charge for the expense of examination and license. Until Congress acted the State might apply the requirements above described, even to engineers making an interstate run, part of which lay within Alabama, so long as the law was a reasonable and proper requirement in the interests of safety. The Act was not intended to, nor did it, obstruct interstate commerce. It is to be observed that the Court would probably have declared the State law unconstitutional if it had imposed a heavy license fee, or onerous and burdensome restrictions on those who tried to secure a license; but as neither of these defects existed, the law was allowed to apply, as a reasonable measure.

**State Licenses for National Trade.** — Where a State license is simply a permit to engage in national trade, it is unconstitutional. For example, in *CITY OF SAULT v. TRANSIT CO.*, 234 U. S. 333, 1914, the Supreme Court held that a city ordinance requiring ferry companies to take out a local license and pay a fee of \$50 could not be applied to an international ferry between points in Michigan and Canada because it would be an interference with foreign commerce. Permission to engage in foreign trade could only be granted or withheld by the National Government. The State law although constitutional when confined to local traffic was invalid when it bore upon national trade.

**State Railway-Safety Rules.** — In *VANDALIA R. R. v. INDIANA*, 242 U. S. 255, 1916, a State rule requiring locomotives to be equipped with headlights of not less than 1500 candle power was applied to engines in both local and interstate traffic and was upheld by the Supreme Court on the ground that the Federal government had not acted, that some regulation was necessary, and that the requirement was a reasonable one.

But when Congress assumes control of a subject, the State rule no longer applies. In *P. R. R. v. PA.*, 250 U. S. 566, 1919, the State had ordered railways to run at the end of trains, a car with a rear platform of prescribed width, with end-rails, steps, etc. When applied to interstate trains the Supreme Court held this to be unconstitutional because both the Postoffice Department and the

Federal Safety Appliance Act regulated the end cars on certain interstate trains. Federal action must not be interfered with by State rules.

How far may a State go in applying its grade crossing rules to interstate trains? In *SEABOARD R. R. v. BLACKWELL*, 244 U. S. 310, 1917, a Georgia law required engineers of all trains in the State to check the speed of their trains at grade crossings "so as to stop in time should any person or anything be crossing said track on said road." Mrs. Blackwell sued the railway to recover damages for the death of her son who in crossing the railway line was killed by an interstate train that had not slowed down according to the law. The Court held the State Act unconstitutional and pointed out that between Atlanta and the State boundary, a distance of 123 miles, there were 124 grade crossings on the line. In order to comply with the Act the train must slow down so as almost to stop at each of these. This meant an increase of nearly 6 hours in the running time of the train. A rule which so interfered with interstate traffic was an unreasonable burden upon it and therefore a usurpation of the power of Congress to regulate national trade. —

**Automobile Licenses and Registration.** — All the States now require that motor-driven vehicles passing over the roads of the State must be registered, and the owner pay a fee, usually graded according to the motor power. The driver must also secure a license and pay a fee. Could a State apply these measures to persons traveling through the State on an interstate trip? This constitutional question was answered in *HENDRICK v. MD.*, 236 U. S. 610, 1915, and *KANE v. N. J.*, 242 U. S. 160, 1916. Both drivers raised the objection that a State could not interfere with interstate commerce, and that the rules for registration and licensing of car and driver were a substantial interference with such traffic. Also, the license fee was a burden on interstate intercourse, and therefore unconstitutional. The Supreme Court upheld the State laws. It pointed out that motor-traffic was highly dangerous, and was also abnormally destructive to the highways. Since *some safety regulation was essential* the State might prescribe necessary rules, and might even apply these rules to motor cars traveling interstate, until Congress acted.

The State was under heavy expense in furnishing special road facilities, it must also conduct registration and licensing offices.



A reasonable registration or license fee for such purposes to be paid by all without discrimination was not an undue burden on interstate trade. Accordingly, so long as the fees charged were reasonable, and the registration and licensing rules were appropriate, the State power would be upheld *in the absence of Federal action*.

**State Laws to Prevent Fraud.** — May a State apply its laws against fraud to the sale of goods brought in from other States? In *PLUMLEY v. MASS.*, 155 U. S. 461, 1895, the State had prohibited the sale of oleomargarine colored to resemble butter. Several packages from outside the State were placed on sale in violation of this act. The Court held that the law could be applied to them. It did not prevent the sale of oleomargarine but only its sale in a fraudulent way under false colors. The Constitution did not secure to anyone the privilege of selling a fraudulent article. Nor did freedom of commerce among the States mean a right to deceive the public even in articles produced in one State and sold in another.

But this decision does not imply that a State may prohibit the sale of all oleomargarine within its borders and apply such a rule to a product brought in from another State. In *SCHOLLENBERGER v. PA.*, 171 U. S. 1, 1898, the Court declared such a law unconstitutional when applied to oleomargarine brought in from outside. Oleomargarine was an article of commerce which could be introduced and sold in the State in the original package so long as it was not deceptive or fraudulent in appearance.

**State Inspection and Regulation of Interstate Commerce.** — The attempts of North Dakota to regulate the storage, purchase, and sale of grain, have raised an important constitutional question of general interest. The North Dakota Act of 1919 established a State Inspector of grain warehouses with authority to license such warehouses, the buyers and solicitors of grain and other products, to fix uniform grades and certificates for marketing, and to fix a reasonable margin of profit to producers of grain, warehouses, elevators, and mills and determine all charges for inspection, weighing, etc., and make rules to enforce the act. No person could buy or grade or weigh grain in a public warehouse without a license.

In *LEMKE v. THE FARMERS GRAIN CO.*, DECIDED IN 1922, the constitutionality of this act was attacked on the ground that it interfered with interstate commerce. The Supreme Court found that

the State law set up a comprehensive scheme to regulate the buying of grain, its grading, and to fix the margin of profit which the buyer or dealer should realize on his purchases. North Dakota was a grain-growing State with many elevators, in which the dealers bought wheat to be shipped to and sold in other States, especially the cities of Minneapolis and Duluth. There was practically no local market in North Dakota for the grain purchased by the Farmers Grain Co., a cooperative concern. At its elevator in North Dakota, the Minneapolis (Minnesota) prices were received four times daily and posted. Purchases were made with the intention of shipping the grain to Minneapolis as a rule. The Farmers Co. claimed that the State law was an interference with interstate commerce and therefore unconstitutional. The Court upheld this claim and declared that the grain traffic from North Dakota to points outside the State was necessarily obstructed or interfered with by the State law, and that the State could not constitutionally determine the profit of dealers in interstate commerce. In doing so the State had interfered with the power of Congress to regulate such commerce, and the State law was invalid.

**State Regulations for Public Convenience.** — Most of the State laws passed for this purpose have to do with the railways and public utilities. While the principle is the same as in the health, safety, and fraud cases, its application is much more difficult. The Courts, in deciding on the constitutional point involved, have usually asked — Does the subject require regulation? Has the Federal government already acted? Does the State rule single out interstate commerce or is it a general rule applied without discrimination to both local and national traffic? Is the State regulation substantially reasonable?

When Ohio required railways to stop at least three trains daily each way at towns on their line, of 3000 inhabitants or over, this raised the question as to whether the rule could be applied to an interstate train. The Supreme Court held that three trains daily each way were not too many to require for local service, and if the railway had failed to give such adequate local service the State might require it to stop an interstate train until local trains were provided. The State rule did not specify interstate trains but sought only to provide sufficient local service; it was therefore reasonable. The company might avoid interference with its in-

terstate train schedule by providing adequate local trains; *L. S. & M. S. R. R. v. OHIO*, 173 U. S. 285, 1899.

But when Illinois required *all* regular passenger trains to stop at all county seats on their line and applied this rule to interstate trains also, the Supreme Court held that if at a given county seat, Hillsboro, there was already adequate local train service, the State could not constitutionally require a through interstate train, "the Knickerbocker special" from St. Louis to New York, to stop at the town. This train ran on a fast interstate schedule in competition with through service on other lines and routes. The State law if applied to such trains would be an interference with national commerce. "After all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable and an infringement of the Constitution." *C. C. C. & ST. L. v. ILLINOIS*, 177 U. S. 514, 1900.

In determining what is reasonable, the Court examines the number of trains already stopping at a given point, the population to be served, and the amount of traffic. If a hamlet in South Carolina of 453 persons already has one through train and several local trains each way daily, a State order to stop a fast through train running between New York and Tampa would seem unreasonable and the Court held the State order unconstitutional. *ATLANTIC COAST LINE v. R. R. COM. OF SOUTH CAROLINA*, 207 U. S. 328, 1907.

**Special Variation from General Principles.** — The rule on commerce in game varies from the usual principle. The Supreme Court has held that the right to take game, which was originally vested in the King under ancient law, has descended to each of the States. This included the right to determine who should be allowed to capture or kill game and the disposition that he might make of it after it was taken. Following this reasoning the Court holds that a State may grant licenses to shoot wild birds within its domains with the understanding that such birds shall not be taken from the State; it may even forbid any person to have such game in his possession for the purpose of transporting it outside the State. In this sense game is not "commerce" in the ordinary meaning, and the State has a complete control over it.

**State Regulation of Correspondence Schools.** — In *INTERNATIONAL TEXT BOOK COMPANY v. PIGG*, 217 U. S. 91, 1910, the Court

applied basic principles to the widespread practice of requiring a State license of all companies that engage in business within the State.

The International Correspondence School through its text book company, employed agents in the various States to solicit scholars and to collect money due for courses and for text books. The Kansas agent of the company was required by the State to pay the usual license fee exacted from foreign corporations transacting business within the State, but he refused to do so. Later, Pigg, a student, having failed to pay his tuition fees, was sued by the agent of the company. He defended his non-payment of dues on the ground that the company's agent had failed to pay the legal license fee to the State, and was therefore transacting business in the State in violation of the law. The Supreme Court decided against Pigg, in favor of the company, on the important ground that its business was interstate commerce. The Court ruled that the transfer of lessons and lesson papers, the imparting of knowledge, the return of corrected papers, and the interchange of communications necessary thereto all formed a species of intercourse between States which was in every sense a form of national commerce, and, as such, was not subject to State licensing or interference.

**Federal versus State Regulation.**—A consideration of the decisions described in this Chapter, which have been selected from various fields, seems to point toward the remedy for our present conflicting State rules, viz., a more extended uniform regulation by Congress over every part of the field of national trade which is now in danger of State control. So long as Congress abstains from setting up its own rules over national business the States will necessarily be forced by local public opinion to attempt regulation. And State regulation means conflict and confusion, with serious hindrance of interstate trade. This is doubly important in the case of carriers such as the railways, the express companies, pipe lines, and the telephone and telegraph companies which are themselves the very means of transmitting commerce. They should be free from local interference.

**Prohibition: Interstate Business and State Liquor Laws.**—There is a remarkable parallel between the efforts of the slaveholding and the liquor interests to keep the control over their respective businesses and property in the hands of the States. In

both cases it became difficult and finally impossible to settle the question by State laws, and in both the abolitionists finally resorted to action by the national government. In both instances also a change in the Constitution was required to transfer the regulative power from the State to the Nation.

So long as any industries and commerce remain under State regulation the dividing line between national and State regulative power will be of prime importance.

What is the precise moment at which the large volume of goods flowing into a State ceases to be subject to Federal control and comes under State authority?<sup>1</sup> The Court answered — When the original package in which the goods were brought into the State, has been sold or broken. In *LEISY v. HARDIN*, 135 U. S. 100, 1890, Iowa had adopted a prohibition law and Leisy had brought in beer in sealed packages, from another State. Hardin, a State officer, seized the beer under the State law but the Court held that as the goods were yet in the original package, unsold, they were still in interstate commerce and therefore were subject to Federal not State regulation. When the bundle or package was broken and part of the shipment taken out or sold, the goods mingled with and became a part of property within the State and were subject to State law.

In order to remedy the effects of this decision, Congress next provided in 1890 that shipments should be subject to the State law "upon arrival in such State." But when had a shipment "arrived" in a State? In *RHOADES v. IOWA*, 174 U. S. 412, 1898, the Court held that this did not occur until the shipment reached the consignee. "Arrive" could not mean merely cross the State boundary, for this would give the State authority over a shipment while it was still in motion in interstate commerce.

This decision opened the way for a flood of violations of the State prohibition laws. Distillers of Ohio sent whiskey into the dry counties of Kentucky and delivered it C. O. D. claiming that the transaction being interstate commerce was not subject to State law. In one case, *ADAMS EXPRESS v. KENTUCKY*, 206 U. S. 129, 1907, a gallon was shipped to a man who had not ordered it. When informed that it was at the express office consigned to him,

<sup>1</sup> The answer to this question for tax purposes is somewhat different and is given in Chapter 21.

he paid for and secured it. The Express Co. was sued for violating the local prohibition act but the Supreme Court held that the Company as a common carrier was forced to accept recognized articles of commerce in one State and ship them to another. The point that the delivery was to be made C. O. D. did not change the interstate nature of the transaction, and the local law must not interfere with the Federal power over interstate trade.

These decisions illustrate the practical problem of regulating matters over which the States have constitutional authority but which are intimately connected with national trade. Either State regulation of its local affairs is balked by the freedom of national commerce, or else national trade suffers from the confusion of State rules. In both cases a real inconvenience of much practical importance arises. This is an incident of all Federal governments.

**National Prohibition.** — We cannot review this long struggle over the liquor traffic without reaching the conviction that modern means of communication make the evasion of State laws comparatively easy and that only the authority and machinery of the national government can cope with the problem. This conviction gradually spread throughout wide circles of the people. The liquor interests themselves realized it and concentrated their fight against national control. The temperance forces recognized it; they were convinced from a long line of decisions that it was impossible for the country to be half dry and half wet. Like the Abolitionists of sixty years before, they mustered the great latent moral sentiment of the country and concentrated their attention upon national prohibition.

On December 18, 1917, Congress proposed the Eighteenth Amendment, the first two sections of which provide: Sec. 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."

Sec. 2 — "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

A second glance at the curious wording of this amendment will show that it invites, even provokes controversy. The language

of a constitution must always be more general than that of a law, but it should avoid terms that must necessarily stir up lengthy and undesirable litigation. This is especially true as to division of power between the States and the Nation. In all of these respects the Eighteenth Amendment has violated fundamental standards of constitution-making. Perhaps the term "intoxicating liquors" may be justified on the ground that it leaves to Congress the definition of its exact meaning and thereby gives greater flexibility to the Amendment, but such language as "for beverage purposes" is of doubtful import. Can intoxicating liquors be used in foods, desserts, sauces, etc.? Section 2 gives Congress and the States "concurrent power" of enforcement. It is difficult to imagine language which would cause greater ambiguity and controversy. Does "concurrent power" mean that they have equal authority or that they may act together or that they must act together, *i.e.*, that a Federal enforcement system must require the consent of the States, or that if both legislate, in case of conflict the Federal law shall be supreme, or that the States may only legislate in the absence of Federal action? In seeking to interpret the Amendment both Justices White and McKenna of the Supreme Court called attention in plain terms to this unfortunate phrase. It can only be explained by the exigencies of legislative strategy. When the Amendment was before the House of Representatives for proposal, one of its sponsors explained that many members of the House entertained views (presumably as to States' rights) which would prevent them from voting for the proposal if the entire power of enforcement were placed in the Federal government. He admitted the ambiguity and trouble-making possibilities of the clause but found its retention necessary to secure the required two-thirds vote.

**Enforcement Laws.** — Congress in an act which became effective at the same date as the Eighteenth Amendment, January 16, 1920, prohibited the manufacture, sale, and transportation of liquors containing one-half of one per cent or more of alcohol by volume, for use as beverages. Adequate provision was made to permit liquors to be used for medicinal, sacramental, or industrial purposes. A special office in the Internal Revenue Bureau, was created for the enforcement of national prohibition. The States also passed laws under their "concurrent power," many

of them conflicting with the national act. Some permitted alcoholic drinks containing less than 2.75 per cent, others fixed 5 per cent as the prohibited amount.

**Constitutionality of the Amendment.** — While it may seem strange to ask — Is an amendment to the Constitution constitutional? — yet strong efforts were made to cast such a doubt upon the Eighteenth Amendment, and the acts enforcing it in *RHODE ISLAND v. PALMER AND FEIGENSPAN v. BODINE*, 253 U. S. 350, 1919. Among the more important objections raised were:

(a) Art. 5 on the method of amending the Constitution requires amendments to be proposed by two-thirds of each House of Congress whereas the Eighteenth Amendment had only been proposed by two-thirds of "those present," which was less than two-thirds of the entire membership of each House.

(b) The Eighteenth Amendment transferred to the National Government a power hitherto reserved to the States, to prohibit the manufacture and sale of intoxicants; this was a violation of the fundamental understanding on which the States had entered the Union and by which the States retained control of matters of local concern.

(c) Would the Amendment prevent independent legislation by the States?

The Supreme Court ruled that the first question had already been decided in *MISSOURI PACIFIC v. KANSAS*, 248 U. S. 276, 1919; two-thirds of a House meant two-thirds of the *members present*, if a quorum.

As to the second, it held that the power to amend the Constitution included the power to transfer to the Federal government prerogatives and authorities which had been previously possessed by the States, even the authority to prohibit manufacture or sale.

On the third point, the Court held that the Amendment having become a part of the Constitution, had the same effect as all other parts — it operated throughout the entire limits of the United States. Any State act which conflicted with the Amendment must necessarily be invalid. This prevented independent State action. The phrase "concurrent power" did not mean that the authority over enforcement laws must be jointly exercised by Congress and the States nor that the two must agree on the methods of enforcement. Congress could enact such a measure as the Vol-



stead law which then must take precedence over State legislation.

Against the constitutionality of the Federal enforcement act it was urged that the Eighteenth Amendment had given to Congress only the power to prohibit "intoxicating" liquors, whereas Congress had gone further and prohibited liquors containing one-half of one per cent, or more, of alcohol. Such a small percentage was not intoxicating, therefore Congress had exceeded its constitutional authority. The Court, giving no reasons, stated that although there are limits beyond which Congress could not go, the Volstead Act had not exceeded these limits and Congress therefore had authority to declare beverages intoxicating which contained one-half of one per cent.

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#### QUESTIONS

1. What is the practical importance to business men of the dividing line between State and interstate trade?
2. Have the States any authority whatever over interstate commerce?
3. John Doe is given a monopoly of aerial navigation in the State of Illinois as a recognition of his services in perfecting the aeroplane. Richard Roe flies into the State from Indiana and is sued by John Doe under the rights granted in his monopoly. Decide the case with reasons. Cite an authority.
4. California makes rules governing pilotage in the harbor of San Francisco. The captain of a vessel entering from another State refuses to obey these rules on the ground that he is engaged in interstate commerce, and that until Congress acts, no State has authority to regulate the matter. Decide the case with reasons and cite a precedent.
5. If Congress has not regulated an interstate commerce question may a State regulate it in all cases?
6. Can a State bar out from its territory persons or animals afflicted with a dangerous contagious disease?
7. Could a State require that all butter sold within its bounds must be examined by an inspector of the State within twenty-four hours of manufacture to see that it was healthful? Reasons.

8. Would a State law providing that all persons entering or leaving the State by railway have a permit, be constitutional?

9. Could it require all trains to stop at all grade crossings on their lines in the State? Reasons.

10. Can it forbid the use of stoves which it considers dangerous, on all trains within the State, and apply this prohibition to trains coming in from another Commonwealth? Reasons.

11. A State requires all persons acting as locomotive engineers on any trains in the State to pass a test for color blindness for which test a fee of \$5 is charged. Will this Act apply to locomotive drivers on interstate trains coming into the State? Reasons.

12. Massachusetts attempts to forbid the sale of oleomargarine prepared in imitation of butter. Can the oleo manufacturers of other States sell their goods in Massachusetts in violation of the Act? Reasons.

13. Could a State make laws to apply only to interstate trains?

14. Ohio requires all railways in the State to furnish a given number of trains daily to all towns on their routes with a population of 3000 or over. Will such a regulation apply to an interstate line running through Ohio?

15. Would the law be valid if it provided that all trains on all lines must be stopped at all county seats on the line? Reasons.

16. Summarize and illustrate the principles which determine whether State rules may be applied to interstate trains.

17. The State requires all persons driving motor vehicles on the State roads to take out a license, pass an examination, and register the motor, paying therefor a fee ranging from \$2 to \$20. Could it apply this law to John Doe who is crossing the State on a transcontinental motor tour?

18. A pipe line furnishes natural gas from State *A* to consumers in State *B* but its rates are not regulated. Could State *B* apply its general rate laws to such rates? Reasons.

19. John Doe is prosecuted for violation of a State law which forbids persons to shoot deer within the State or to have in their possession such deer killed within the State for the purpose of taking it outside the State. He claims the act interferes with the commerce power of Congress. Decide with reasons in full.

20. What is an "original package" of interstate commerce?

21. What was the importance of this package in the Leisy Hardin decision?

22. Summarize the efforts made by the States to prohibit the sale of intoxicating liquors and the obstacles which they encountered through interstate commerce.

23. Show how the decisions of the Supreme Court on interstate commerce necessarily interfered with the enforcement of State prohibition laws.

24. Analyze the Eighteenth Amendment showing its meaning.

25. Resolved, That the Eighteenth Amendment is unconstitutional. Defend one side.

## CHAPTER 10

### POWERS OF CONGRESS: POSTAL POWER — BANK- RUPTCY

**The Work of the Post Office Department.** — Of all the government departments, that which touches the people most closely is undoubtedly the post office. Its branches reach out to every hamlet of the land, its employees number 330,000, its receipts total \$450,000,000 yearly, its expenditures are even more. This entire establishment with all its activity is based upon one short clause in Section 8, Article I of the Constitution which gives to Congress the power "to establish post offices and post roads." The term "to establish" is a very broad one. It includes the designation as postal routes of certain roads, railways and shipping lines, the power to make contracts with the railways, steamships, and other carriers for the transport of the mails, and without doubt it would also give a constitutional authority for the erection or purchase of telegraph and telephone lines if such were considered necessary, just as the government now builds and controls post offices. The post office is not merely a means of carrying letters. It is a gigantic machine which can serve materially the business progress of the country. From this larger viewpoint let us regard some of the chief problems which the Department is now successfully solving.

**Postal Savings Bank.** — All the principal countries of the world have adopted a plan by which every post office becomes a savings bank. The result has been to stimulate wonderfully the habits of thrift and economy among the people and to render their funds useful for important government undertakings. After much opposition Congress on June 25, 1910, passed a law providing a postal savings plan under the general control of a Board of Trustees consisting of the Postmaster-General, the Secretary of the Treasury, and the Attorney General. This Board designates which post offices may act as savings depositories; and at such places

any person ten years of age or over may open one account to a maximum amount of \$500. In order to encourage the saving of smaller amounts it is provided that savings cards with 10 cents savings stamps may be purchased at the post office. When the stamps amount to \$1 they may be deposited with the card and are then destroyed by the postmaster and credited in the account of the depositor. The funds of the system are deposited in local banks and draw from such banks  $2\frac{1}{4}$  per cent interest. Thirty per cent of such funds may be invested in bonds or other securities of the United States. The depositor is paid 2 per cent interest and the government guarantees the payment of the deposits. The system steadily expanded until after ten years there were 466,000 depositors with \$152,000,000. The officers of the Postal Savings Division have taken steps to popularize the plan and its facilities still further by calling it to the attention of the public through the local postmasters, the schools, and immigration offices.

**The Parcel Post.** — For many years there has existed a strong demand for a postal express service similar to that of other nations, by which packages of moderate size may be sent through the mails. Such a plan found little support in Congress because of the strong opposition of the express companies and the small country storekeepers, the latter fearing that their business would be hampered or destroyed by the mail-order stores in the large cities. The natural current of small trade between different parts of the country was clogged by the expense of transmission. This highly artificial condition was maintained long after other nations had established cheap and efficient postal express service. On August 24, 1912, Congress provided for a modern Parcel Post. This law has wrought a revolution in the conditions of interstate retail trade. The country is divided into zones based on distance from the point of sending, and the charges vary according to these distance zones. The article sent may be insured up to \$50 on payment of a small fee. The results of the first year of the service were so satisfactory, even at the low rates charged, that a reduction in rates and an increase of the size of the package which might be carried was made; the weight limit is now 50 lbs. for the first and second zones and 20 lbs. for the others, and books have been added to the parcels accepted. The Third Assistant Postmaster-General in his report for 1913, said of the growth in business:

“The usefulness of the parcel post as a ready, cheap, and efficient means of transportation is realized by the public more and more each day. Its numerous features and advantages are being utilized in a surprisingly large number of ways, and there is almost no limit to the variety of articles transported. The consumer is placed in direct touch with the farmer and producer whose products can now be conveniently and quickly obtained at a very reasonable charge for transportation and handling, thereby assuring the freshest fruits, vegetables, eggs, butter, and other necessities, for the lowest possible price and opening the way to the lowering of the high cost of living, which has caused so much concern in recent years. As a saver of time to those who in the past were compelled to leave their accustomed duties in order to get articles which now are brought to their doors by parcel post, the system has proven a boon indeed. The fact that the service is universal, extending to every city, town, and village of the United States and its possessions, and covering a field vastly greater than that of any other transportation agency, at once makes it the ideal system for carrying on the small commerce of the Nation. The usefulness of the system was greatly enlarged by the addition, on July 1, 1913, of a collect-on-delivery service, and it is now possible for one to send an article by parcel post for repairs and then have it returned, insured against loss, the charges for the repairs to be paid upon delivery of the article. Furthermore, by utilizing the special-delivery feature of the postal service the forwarding and return of the article can be expedited to the fullest extent. The advantages and accomplishments of the parcel post have not only been direct, but indirect as well, for the competition created by it has caused other transportation agencies to increase their limits of free delivery in many districts, improve their service in other respects, and decrease their charges in many instances.”

**Marketing by Mail.** — In 1914 the first steps were taken in a plan to bring the farmer and the consumer into direct relations through the Department. A list of farmers was prepared by local, rural postmasters, giving the kind of produce and the quantity which each would supply at regular intervals. These lists were furnished to the large city postmasters who in turn distributed them to the prospective customers in the city, upon application. The farmer and his customer having made satisfactory arrangements, the produce was then forwarded by parcel post. The possibilities of this system seem most promising and it has already been extended to several large cities.

**Fraud Orders.** — The Postmaster-General has authority to exclude from the mails all fraudulent, illegal, or obscene matter. This is done after a hearing, by the issue of a "Fraud Order" an administrative decree issued against those firms who are proven to be engaged in a fraudulent business. It excludes their circulars, letters, etc., from the mails. The power is a drastic one and is frequently resisted by impostors and others who are detected in attempts to defraud the public by advertising methods. In *DEGGE v. НИТЧОСК*, 233 U. S. 639, 1913, such an order had been issued against Degge after a hearing showing him to be engaged in a fraudulent land scheme. The order, as is customary, requested the Postmaster of the city in which his mail was received, not to deliver such mail to Degge or his corporation but to return it to the senders with the word "fraudulent" plainly stamped on the envelope. Degge protested and asked the courts to intervene and stop the issue of such an order. But the Supreme Court pointed out that unless an administrative act was clearly illegal, the courts must refuse to interfere with the administration or hold up its work.

**Administrative Organization.** — We have thus far paid little attention to the method of organizing the departments, but a glance at this, the largest department, will make clear these methods. The Postmaster-General, who presides over the Department, has four assistants, each controlling certain definite groups of bureaus, divisions, and offices. All grades of work, even the most important, are conducted by the chiefs of these bureaus and offices and are then if necessary referred for approval to that Assistant Postmaster-General who exercises jurisdiction over the bureau. That official then approves or disapproves, usually by initialing the papers presented, and passes on the most important affairs prepared, for approval by the Postmaster-General. The latter is naturally obliged in most cases to rely upon the recommendations of his assistants.

Each Assistant-Postmaster has under his direct charge a number of divisions such as salary and allowances, supplies, money orders, railway adjustment, railway mail service, foreign mails, accounts, classification, registry, appointments, inspectors and mail depositions, free delivery, etc.

The Salary Division is important because in it originate the pro-

posals for promotion and pay increases. At one time grave irregularities were discovered by which these increases were sold to employees. This was corrected and the Division is now an effective means of keeping down useless expenses and rewarding the initiative and loyalty of the employee. The railway mail service has charge of the traveling post offices on steamboats and cars in this country. Its employees are highly trained, and familiarize themselves with the names of from 1500 to 20,000 post offices and their locations and with the respective postal routes to which they belong. The large through trains often carry a double force of clerks who work in shifts, under high pressure, opening the sacks as the latter are thrown into the cars, sorting the mail and distributing it among a large number of bags ranged along the walls of the cars, and completing each lot by the time the various destinations along the route are reached.

In the foreign mails carried on the ocean steamships there are also traveling post offices with a double force of clerks, American and foreign. The Division of Railway Adjustment has charge of the arrangements for the railway transportation of mails — expending over \$175,000,000 annually for this purpose. The national territory is divided into districts and in each district contracts are made with the railways for the transportation required. These contracts are based on the weight of the mails which is determined once every four years in each district.

The Division of Inspectors and Mail Depredations maintains a highly skilled corps of inspectors distributed through fifteen inspection districts which cover the United States and its dependencies. Their duties are to examine on the spot the accounts of postmasters, investigate all complaints, accidents to the mails, robbery, and other interference with the business of the Department. In the course of this work they are obliged to vary their activities through a wide range of occupations from accountant to detective. It is largely through the efforts of this Division that all the more important irregularities in recent years were unearthed.

It has recently been proposed that the legal and prosecuting duties and the detection of crime be transferred to the Department of Justice but such a change is of doubtful wisdom.

The Division of Free Delivery is under the direction of a General Superintendent, who retains immediate control of the subject of

special delivery, but delegates to two subordinate superintendents the branches of city delivery and rural delivery respectively. The city free delivery service was established on July 1, 1863, in 66 cities with 685 carriers. It has now been extended to 2000 cities with 50,000 carriers. The rural free delivery system which was established on 44 routes in 1897 and has since grown to include 40,000 routes, marks the greatest advance of our postal system since the Civil War. It has been opposed in some sections because it tends to reduce the number of fourth-class post offices and thereby also the number of political appointments open to party workers, but to the masses of the farming population it has proved a great boon and the demand for the establishment of new routes far exceeds the available appropriations.

**Newer Problems.** — 1. *The Magazine Rates.* — All magazine and periodical publications are carried in the mails as second-class matter, the former rate being 1 cent a pound. The government paid the railways much more than this to carry such matter. One-half or more of the weight of a magazine, and all the profit, are in the advertising pages. It is the advertising which causes the unusual cost of carriage. This expense has been sharply criticized by many who contend that the post office should pay its own way and should be run as a business enterprise. But by means of this second-class rate the low-priced magazines representing many million copies weekly and monthly have been enabled to reach out through the country until the people are provided in this way with a cheap weekly review of current events, fiction, popular science, etc. It has been calculated that although we buy fewer books proportionately than any civilized people except Russia, we read many times more magazines than any other nation. So small is the margin of profit on each copy of these magazines that an increase of a cent or two per pound in the postage rates would put most of them out of business. By a temporary compromise, reached in 1917, the country was divided into zones, and rates on advertising matter fixed by zones, the average rate being materially raised.

2. *One-Cent Letter Postage.* — An influential section of the business world is now discussing the possibility of a one-cent rate for letters. The contention is that if the magazines were charged the higher rate which in justice they should pay, there would be



such a large surplus in the postal department as to allow of a reduction to one cent in the rate on letters. This would be a great boon to the business community. It is claimed that the two-cent letter rate now yields an actual surplus which is eaten up by the deficit on magazine postage. The magazine publishers, however, contend that their advertising pages originate a large number of inquiries and correspondence at the letter rate and that no real economy would be effected by the change in rates.

3. *The Post Telegraph.* — A government ownership and operation of the telegraph has been frequently proposed. It is urged that the rates might be lowered for the benefit of the public and that a great advantage in public convenience would be secured from having a telegraph station in every post office. A committee appointed by the Postmaster to investigate the subject, reported in 1913 in favor of government management of both telegraph and telephone and urged that the post offices be used for this purpose in order to effect economies in management.

The experience with government operation and management during the War gives no reason for believing that either telephone or telegraph would be as well operated as under private control. The experience of foreign countries seems to show also a decidedly inferior state of wire services, slowness of transmission, and inadequate equipment. The policy of the American wire companies is now so progressive and liberal that no reasonable ground exists for further experiment with government operation.

4. *Exclusion of Newspapers from the Mails.* — The Constitution, in Amendment 1, provides for freedom of speech and of the press. The freedom of the press depends upon the use of the mails. Yet there must be some authority vested in government to prevent the circulation of destructive, harmful literature. The line of division between this authority and the freedom of the press was illustrated by certain postal cases arising during the Great War. In *MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING CO. v. BURLESON, POSTMASTER-GENERAL*, 255 U. S. 407, 1921, the power to exclude from the mails was in question. By the Espionage Act of 1917, the Postmaster-General had been authorized by Congress to revoke or cancel the privilege of sending papers through the second-class mail in case they contained matter which was forbidden by the Act. This revocation cancelled the privilege of cheap newspaper rates

until the Attorney-General had reason to believe that the publication would contain only legal matter. Writings which were intended to prevent or hinder the recruiting of the American military forces or to convey information to the enemy were declared to be non-mailable and to subject the newspaper in which they were printed to cancellation of the second-class privilege. The Milwaukee Socialist paper published frequent articles containing false reports and statements with apparent intent to obstruct American recruiting and enlistment and to promote the success of the enemy. The Postmaster-General held a hearing at which a number of editorial articles to this effect were submitted in evidence. He then cancelled the second-class privilege, which action made it unprofitable for the paper to circulate.

The publishers claimed that this action was unconstitutional, that Congress could not interfere with the freedom of the press without violating the first amendment. They also urged that even though Congress might so act, the Postmaster-General under the law could only exclude individual issues of the paper which were non-mailable. He must not exclude issues for the future but only those that were proved illegal. The Supreme Court held that freedom of the press was not absolute but was subject to the ordinary rules which governed all other rights protected by the Constitution. These rights must conform to the public interest and safety. As to the Postmaster's power to exclude, if he must examine each individual issue before excluding it, even though it was known that the publication for several months had been circulating illegal matter, it would be physically impossible to hold the necessary hearings and make a decision in time for action on each case. The law meant that when a publication contained illegal matter, its second-class privilege could be revoked until the Postmaster-General was convinced that such matter would not be circulated in future issues. He might then renew the privilege.

It will be seen that this gives a sweeping and important power to the Postmaster-General similar to that in fraud orders, already described. But in exercising it he is subject to review by the courts, and despite the broad extent of the power, in practice it has been used only with the utmost moderation and good judgment. The wisdom of conferring it upon the administrative officials has been amply confirmed.

5. *Airplane Service.* — In 1920 regular daily mail transport by airplane was started on certain limited routes. These routes were later extended until a permanent service between New York and San Francisco was established. With the development of night flying, radio signaling, and guidance the time of this service has been reduced to about a day and a half from coast to coast. Improvements in mechanical construction of planes and methods of guidance and direction have reduced the cost of maintenance to a point at which the service may readily be extended to a large number of other routes at a moderate cost. There is apparently no reason why this branch of the Department's work should not grow rapidly and with good results.

**Bankruptcy.** — The protection of business men against fraudulent bankrupts and debtors is one of the difficult problems confronting the National Government. Section 8, Article 1, gives Congress the power to pass "Uniform Laws on the subject of Bankruptcies throughout the United States." Trade between the States has grown to such a point that it is difficult, if not impossible, for the creditors of a firm doing business in several commonwealths to protect their interests under all the varying State laws. For this reason the power to establish a uniform law was wisely given to Congress. For many years this power was not exercised, and as some regulation was necessary the States themselves passed insolvency acts. In 1867, a Federal law was enacted by Congress which superseded the State rules. But in 1878, the Federal law was repealed and the former State laws once more became valid. Finally in 1898, in response to the general demand of business interests, Congress again passed a law regulating bankruptcy, which was amended in 1901, 1903, and 1910, and the State laws were once more superseded by a uniform national rule.

These changes in the law are interesting, not only as they affect bankruptcy, but as they show the supremacy of and the need for national legislation on those subjects which are given to the control of Congress. They illustrate the rule that where the Constitution has granted to Congress a power which, however, Congress does not see fit to exercise, the State governments may generally issue regulative acts of their own on the subject; these acts are valid and binding until Congress exerts its power to regulate, when the State laws are superseded by the Federal Act. Should Congress

at any time repeal its laws, the State regulations again become valid.

**The United States Bankruptcy Act.** — As amended in 1910 the United States Bankruptcy Act provides that the Federal District and Territorial courts of the United States shall have jurisdiction over bankruptcy. Upon a petition being filed by creditors in a Federal court asking that a debtor be declared bankrupt, the court summons the defendant, and invites his creditors to prove their claims under the usual legal forms; a jury trial may be granted if the court so decides. An application or petition for involuntary bankruptcy is granted against a debtor when he commits any of the following acts of bankruptcy: if he conveys, transfers, removes any part of his property with intent to hinder, delay or defraud his creditors;

Transfers while insolvent any portion of his property to certain creditors with the intent to grant them a preference over other creditors;

Allows, while insolvent, any creditor to secure preference by legal proceedings;

Makes a general assignment for the benefit of his creditors or applies for a receiver or trustee in insolvency, or where such a receiver or trustee has been appointed under the law;

Admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt; a person or corporation may also be adjudged an involuntary bankrupt upon default of payment after an impartial trial. After the court has considered the application of the creditors and the debtor's rejoinder, it either rejects the application and allows the debtor to continue, as before, in control of his own affairs, or it finds him to be bankrupt and appoints a referee and a trustee to manage his property. The work of the referee is to find and recommend to the court a solution of the whole problem so as to incur as little loss as possible for both sides. He takes charge of the proceedings, receives the claims, makes up a list of the assets, and in general administers the estate of the bankrupt. The trustee receives the property under the direction of the referee and of the Court, collects and reduces to money the assets of the estate and disburses them, making a final account or report, and pays the dividends as declared by the referee. Both referee and trustee are paid partly in a fixed sum and partly in a

percentage of the bankrupt's estate. The Court calls meetings of the creditors when necessary for the presentation and proof of their claims and for the approval of any compromise or composition which may be offered.

The Act also fixes an order of priority of claims against the estate and provides that any bankrupt who conceals his assets or makes a fraudulent statement concerning them may be punished. After the proceedings have been closed a motion may be made for the discharge of the bankrupt. If the Court decides favorably on this motion, the bankrupt may then be legally freed from further responsibility for his debts, except: taxes, claims for property which he has secured by false pretences, debts for wilful or malicious injuries or alimony for the support of his wife or child or other criminal penalties, those debts which have not been duly listed in time for proof during the proceedings of bankruptcy, unless the creditor had notice of the proceedings, and finally those debts which were created by fraud, embezzlement, or defalcation while acting in a position of trust.

These provisions of the law have had a strong, helpful influence in the protection of both creditors and debtors, but further government supervision is needed to shield the creditor from certain notorious abuses. It has become customary for fraudulent debtors to set up as wholesale or retail merchants, usually in the form of a partnership or trading company, to pay promptly for their goods until they have established a commercial rating, and then suddenly to buy large consignments on credit from many different firms, to ship their goods from their stores to distant points where they are sold at auction, while the firm suddenly declares itself insolvent and either "loses" its books or burns them. The members profess complete ignorance of the causes of their failure, and are usually found to have no personal assets when bankruptcy proceedings commence. Hitherto this practice has been combatted by the National Association of Credit Men, but most creditors prefer not to "throw good money after bad," and will often refuse to prosecute or to pay the expense of a thorough investigation unless the loss is a heavy one and the proof of fraud is clear. As long as the initiative and the cost of detecting fraudulent debtors and restoring stolen property depends entirely upon the private creditor, there must always be a standing invitation to dishonesty

in such a system. The only remedy is a complete control of fraudulent bankruptcies by the Federal Government, and a sufficiently large national appropriation to cover the detection of such crimes and the recovery of the sums involved. Such a plan would effectively discourage the systematic bankruptcy frauds now practiced, and would offer to all creditors a much-needed protection.

One of the difficulties yet to be overcome is in the administration of the bankruptcy act. The law itself is excellent in purpose and scope but it has been hampered by the appointment of incapable referees. In the event of a fraudulent bankruptcy, all the chances of escape favor the bankrupt; he may plan for months, or in some cases years ahead, to defeat the law and in such cases it is difficult if not impossible to detect the well-laid plans for concealment of assets or their transfer to other members of the conspiracy.<sup>1</sup> One remedy for this condition of affairs is a greater care in the selection and appointment of referees in bankruptcy by the Federal judges. Requests to this effect have been made by the Credit Men's Association, to the members of the District Courts throughout the country. There is also need for a larger staff of postal in-

<sup>1</sup> The following is a typical case reported in the Bulletin of National Association of Credit Men, November, 1913. Sam L— and Sarah L—, his wife, operate separate stores in a western city. Sarah L— fails with total liabilities of \$35,000 widely distributed among various creditors in the northwest. One of the creditors, with a claim of \$700 suspects fraud and communicates with the others, asking that an investigation be made and that the consent of the creditors be not given to any discharge or settlement until the claims of all are satisfied in full. The other creditors answer that undoubtedly the case is fraudulent but that there is no proof whatever obtainable and that it would be useless to spend further funds; they advise that a settlement of 25 cents on the dollar be accepted. This the \$700 creditor refuses. He employs an attorney of ability who puts detectives on the case and the following facts are soon discovered:

Sarah L— has been conducting a series of cut-price sales in many instances at figures below what the goods could be purchased for; shortly before her failure she sends a large part of her stock to her husband's store, where it is packed in trunks and sent northward to a point above Seattle. Here it is stored in a warehouse for several months and later re-packed in large shipping cases and sent back to her husband's store where it is placed on sale. A portion is also sent to the stores of her brothers-in-law and there sold. Indictments are found against Sarah L— and her husband and brothers-in-law, charging her with perjury and all with conspiracy to conceal her assets and defraud the creditors. Most of the defendants were convicted and sentenced.

spectors to make possible an immediate and thorough investigation of this elusive and demoralizing practice. A closer cooperation between government agents and the credit men of the country would also do much to bring the whole problem to a solution.

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### QUESTIONS — THE POSTAL POWER

1. Cite and explain the constitutional clause governing the postal power, and show by illustration the meaning of "establish" as used in this clause.
2. Explain the general work of the Post Office, and give some idea of its magnitude and its particular relations to the people.
3. Resolved, That the Post Office should confine itself to the transmission of letters. Defend either side of this question, showing the advantages and disadvantages of other activities.
4. A foreigner asks you how the Postal Savings Bank is managed, and its general regulations. Explain.
5. Why was the Parcel Post opposed, and why adopted? What is its present usefulness?
6. Resolved, That the Post Office can assist in reducing the cost of marketing. Defend either side of this question.
7. What is a fraud order?
8. A company engaged in a fraudulent business finds that the circulars which it sends out are being returned to it marked "fraudulent." It protests on the grounds that the circulars are its own property which it has a right to send through the mails, or to dispose of as it pleases, under the Fifth Amendment. Quote the Fifth Amendment, and explain what the Court would decide as to the rights of the company and why.
9. An immoral or fraudulent publication or letter is offered for transmission through the mail. Explain fully the exact authority of the postal officials over this matter.

10. Prepare a report showing the general administrative organization of the Post Office Department, and contrast its organization with that of your county government. Which is the more effective form of organization and why?

11. Resolved, That some increase should be made in the rates charged for transporting magazines through the mails. Examine postal reports and defend either side of the question.

12. Resolved, That it is CONSTITUTIONAL for the Post Office to purchase and operate the large interstate telephone and telegraph lines of the country. Defend either side of the question.

13. Resolved, That it is ADVISABLE for the Government to purchase and operate the interstate telephone systems of the United States. Support either side of the question.

14. During the Great War a daily newspaper publishes a series of articles designed to obstruct and discourage Army recruiting. The Postmaster-General after a hearing revokes the paper's permit to use the second class postal rate. The claim is made that this is a violation of freedom of the press. Read any Supreme Court decisions covering this point and give (a) the strongest argument for the newspaper: (b) the decision of the Court with reasons.

15. In the above case the publisher contends that even if the Act of Congress is constitutional, the Postmaster-General cannot under the law exclude a paper for the future but only those issues which have been proven to contain illegal matter. Decide with reasons after reading Court decision.

16. The editorial of a revolutionary paper declares that the Postmaster-General is a Czar and can exclude from the mails the publications of his personal business or political enemies. Is this correct? Explain fully.

### QUESTIONS — BANKRUPTCY

1. What is the exact authority of Congress over bankruptcy? If Congress did not pass a bankruptcy law could each State regulate insolvency?

2. Resolved, That Congress should leave the regulation of bankruptcy to State legislation. Defend one side.

3. Why is a bankruptcy law necessary?

4. Explain the difference between voluntary and involuntary bankruptcy under the Federal law.

5. How may an insolvent firm become a voluntary bankrupt under the Federal Act?

6. You have a claim against John Doe & Company, and you receive information that he is transferring his assets to his wife. What steps can you take? Explain fully.

7. Explain and illustrate why the bankruptcy law is so easily evaded.

8. How can the Post Office Department aid in protecting the public against fraudulent bankruptcies?

9. Explain the practical value and work of such bodies as the National Credit Men's Association, in the enforcement of the Bankruptcy Act.

10. Point out some of the weaknesses in the administration of the Act, and show how they could be remedied, after you have talked with a bankruptcy lawyer.



## CHAPTER 11

### POWERS OF CONGRESS: THE WAR POWER

SEVEN clauses of Sec. 8, Art. 1, are devoted to the War power. These are: the declaration of war, maintenance of army and navy, government of the land and naval forces, calling forth the militia, organizing and equipping the militia, and exclusive legislation over forts, arsenals, and dock yards.

**Declarations of War.** — As we contemplate the vast authority conferred by these clauses, a number of questions arise, which can best be answered by a brief review of precedents. How is war declared? A resolution is passed by both Houses and signed by the President, declaring that a state of war exists between the United States and the nation in question. A declaration of war between modern nations usually allows three days in which merchant vessels of the enemy may leave the ports of the country making the declaration, in order to avoid liability of capture. Contrary to popular belief, the declaration of war may be and often is made after the war itself has begun. This occurred in the Japanese-Russian War of 1904, when the naval hostilities opened, by surprise, on the night of February eighth, while the declaration followed on the tenth of that month. The purpose of Japan in delaying the declaration was to strike while the Russian naval force was divided into two detached squadrons.

**Spanish-American War.** — Quite frequently an ultimatum or formal, imperative demand for action is made by one government upon another, preceding a declaration of war. So Austria in 1914 gave Serbia five days in which to comply with her demands. Serbia agreed to all of these except one, whereupon the war opened. In our war with Spain Congress first passed on April 20, 1898, a joint resolution calling on Spain to withdraw from Cuba at once, authorizing the President to use the armed forces of the United States to force such withdrawal, and disclaiming any intention

on the part of America to retain the Island after having freed and pacified it. When the passage of this resolution became known Spain at once withdrew her minister from the United States and broke off diplomatic communications without waiting to receive the ultimatum. The hostilities therefore began on the following day, April 21st, although no formal declaration of war was made until four days later, on the 25th.

**Declarations in the European War.** — How important the delay in declaring war may be, is well shown by the great European conflict. Upon the outbreak of hostilities between Austria and Serbia, Russia let it be known that she would not tolerate an Austrian occupation of Serbian territory, and she began to mobilize part of her forces to support this position. Then began a remarkable series of attempts by the Great Powers to open the war without formal declarations, each seeking to show that the other had taken the offensive. Both the Triple Alliance of Germany, Austria, Italy, and the Triple Entente of England, France, and Russia, were avowedly defensive. The leaders in each of these two leagues felt that any aggressive, offensive act on their part would give the other members of the league an opportunity to refrain from joining in the war. Consequently each Power sought to take up a defensive position so that when attacked it might call upon its allies. This explains the curious reluctance to make a formal declaration of war. Germany in particular had to choose between a defensive attitude in the hope of winning Italian support and English neutrality if war broke out, or the undoubted advantages of a quick and surprising offensive in pursuance of her long prepared and carefully worked out plan of attack. She chose the latter and lost the former.

On August 1st she sent a twelve hours' ultimatum to Russia to stop mobilizing and that night declared war on Russia and invaded Luxemburg *on the French frontier*. This was an act of war on France, but the French scrupulously refrained from making any formal declaration in return. Thereupon Germany invaded Belgium, another overt act against the French, and on August 3d formally declared war on the Republic. This vigorous German offensive at once brought a declaration of neutrality from Italy, and the careful French diplomacy reaped its reward on August 4th in a declaration of war by England based on the attacks made

by Germany on her western neighbors. Simultaneously came the French declaration of a state of war, carefully presented as an answer to the German.

**Declaration of the United States.** — The American declaration against Germany is also couched in defensive terms. On April 6, 1917, the following resolution of Congress was approved by the President:

“Whereas the Imperial German Government has committed acts of war against the government and people of the United States of America: Therefore be it

“Resolved etc., That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.”

**Military Maintenance.** — How does Congress raise and support armies and provide and maintain a navy? The general outlines in both branches are fixed by “organization” acts passed at lengthy intervals such as the laws of 1908, 1917, and 1920. The details are determined by the annual appropriation laws. Under the Constitution an army appropriation bill may not cover a period of more than two years (Section 8, Article 1). The origin of this provision is the fear of a military dictatorship; if the funds for the army are granted only for short periods, the army cannot make itself independent of the government, and it is difficult if not impossible for a military leader to establish his authority in defiance of Congress. This provision followed the British practice which limited army appropriations in a similar way. Although we have no ambitions of conquest and are not in apparent danger of attack from any foreign power, our army and navy expenses had by 1914 steadily mounted to such surprising figures that for current military and naval costs alone, one-third of the national budget was required. By 1920 military and post-war expenditures had risen to 93 per cent of the budget. The reduction of the current part of these expenses must depend upon

the progress of international coöperation, which is considered in the chapter on International Government. Some idea of its possibilities may be had from the naval results of the Disarmament Conference of 1922. The navy has already been reduced to 86,000 men, with a total capital ship tonnage of 500,000 and an annual appropriation of 290 millions. The regular army has been brought down to 150,000 with an appropriation of 250 millions.

Like all other large appropriations the army bill has "riders" attached to it — provisions which are really separate bills but which, in order to increase their chances of passage, are moved as "amendments" to the army measure. In this way important questions of military and national policy are often determined by special clauses in the army appropriation. So in the bill of 1903 the entire general staff of the army was reorganized, in the bill of 1901 the President was given absolute sway over the government of the Philippines and the so-called "Platt Amendment" in 1901 provided that the American military forces should not be withdrawn from Cuba until the Cuban Constitutional Convention agreed to certain important articles governing the relations of the United States to that Island.<sup>1</sup>

**Army Administration.** — In all genuinely representative governments the problem of successful military administration has remained unsolved. It differs from the management of civil affairs in many ways, among which are: the test of military efficiency comes only in times of great crisis; far greater intensity and speed of action are required, to which all individual initiative must be subordinated; it is largely irresponsible and self-sufficient; finally, being separate or remote from the ordinary currents of popular thought, the military organization has an inordinate tendency to fix itself as an inflexible, traditional, routine system hostile to new ideas — it becomes rapidly obsolete. An army may be built up on principles which are radically wrong

<sup>1</sup> The amendment requires that Cuba shall not impair its sovereign power by treaties with foreign nations nor contract any public debt beyond its power to pay. Also that the United States may intervene to preserve Cuban independence and the protection of life and property. The Cuban Government shall take effective steps to prevent epidemic and infectious diseases. Coaling and naval stations to be mutually agreed on shall be leased or sold by Cuba to the United States. Under the amendment American intervention twice occurred in Cuban affairs, being withdrawn upon their satisfactory settlement.

but its inefficiency will remain undiscovered until the declaration of war is made. All the great wars of the last century have led to fundamental changes in the methods of army organization and equipment on the part of one or both contestants. Similarly the wars of 1898 and 1914 caused reorganizations of our military system. During the earliest stages of the Spanish War the various administrative bureaus whose duty it was to house, transport, equip, feed, and supply the army, worked so entirely at loggerheads with each other and finally broke down so completely that the most serious outbreaks of disease with heavy mortality among the troops followed. Meanwhile through political influences large numbers of inexperienced men were appointed to positions in the supply bureaus. This explains the unparalleled loss of life in our army on American soil before the troops reached Cuba. Although popular indignation wreaked vengeance upon the Secretary of War, who was forced to resign, the new Secretary, Mr. Root, later explained that the real difficulty was with the system—that no man could make it work.

Obviously the need of efficient management is the same in all wars. Even to the layman it is evident that in all things pertaining to the discipline and control of troops there must be unity of purpose; what the layman does not see is that the same principle must be followed in devising plans of campaign or in supplying food, transportation, and equipment.

Napoleon's famous maxim that "an army travels on its stomach" points to a vital problem of military management. We are accustomed to think that the chief work of the army is to fight, but no army spends more than a fraction of its time in battle. Its energy is devoted to preparation. It is precisely in this endless labor of preparing that the machinery of *administration* plays its part. It is in efficient management, rather than individual fighting ability, that the superiority of an army now consists. The General Staff with its centralized administrative powers is intended to supply this need.

**The General Staff.** — In order to assure unity, speed, and effectiveness in the plans for equipping, transporting, feeding, and operating armies under a single authority, Congress after the Spanish War established the General Staff, by the Act of 1903. It was reorganized during the Great War by General Order No. 80 of the

War Department in 1918. After the close of that conflict its lessons were studied with great earnestness and the Army Organization Act of June 4, 1920, made further changes in the staff. This body consists of a variable number of officers of different ranks, taken from all arms of the service, and assigned for a limited time to staff duty. The Chief is the head of this organization and in reality of the entire army. The duties of the Staff cover every phase of administration. The Staff must above all draft plans of campaign, offensive and defensive, against foreign powers with whom we may come into conflict. In order to do this it must provide in detail for the arming, uniforming, equipping, provisioning, and transportation of prospective armies in case of a possible war.

In perfecting military plans in advance, the German staff was a recognized model. The German mobilization of 1914 was quickly accomplished and the advantages of military initiative were secured because of staff work. Each soldier received a card showing the rendezvous of his company, there he was immediately provided with a uniform and new outfit complete. Horses, motor cars, and vehicles of all descriptions had been registered in advance and those required were taken over immediately for the purposes of mobilization. The number of men, animals, etc., which could be accommodated in passenger and freight cars was also previously recorded and detailed plans were at once forthcoming for transport, feeding, and supplies so that without undue delay or confusion each army moved to its appointed task. This care for infinitesimal details as well as for the great outlines of strategy may only be secured through centralization. The key-note is effective administration and adequate planning.

Following these same principles the work of the American staff has now been reorganized under these divisions: Operations, having charge of mobilization, demobilization, promotions, equipment, recruiting of regular army, motor transport, etc.; War Plans including preparation of plans of campaign, education, training of troops, reserve officers corps, new legislation, and Military Intelligence including the usual duties assigned to this branch, also the investigation of enemy activity and of disloyalty within the United States, frauds against the government, etc.; Purchase, Storage, and Traffic, having control over the real estate, finance, purchase and standardization of supplies, the issue and storage

of material, transport of material by ship, rail, or animal, and the sales of supplies. In all of these the chief activity is planning. Current administration is cared for by the regular bureaus of the War Department. The staff divisions draft projects and plans. For this reason in reductions of our military forces during peace times, it is unwise to reduce seriously the number of officers assigned to staff work. In maintaining a skeleton army organization which can be rapidly expanded in war-time, the army gains both time and economy. The planning and research departments should be kept at full strength.

The United States entered the War on April 6, 1917. The Armistice took effect on the eleventh of November, 1918, one year, seven months, and five days later. During this time the army was increased from about 200,000 men of whom 133,000 were in the Regular Army and 67,000 in the National Guard — to 3,357,000 men. Of these 2,860,000 were transported to France.

**The Regular Army.** — The size of the regular army fluctuates from year to year but in peace time averages about 150,000 men. Many new branches of the service have been added because of the experience gained in 1918. The army now includes the following sections or services.

Infantry	General Staff	Ordnance
Cavalry	Adjutant General	Chemical Warfare
Field Artillery	Inspector General	Militia Bureau
Coast Artillery	Judge Advocate General	Chaplains
Air Service	Quartermaster	Military Academy
Engineers	Finance	Indian Scouts
Signal Corps	Medical	

Military organization of the line commences with the squad of eight men and proceeds upward as follows — squad, platoon, company, battalion, regiment, brigade, division, corps, army. For administrative purposes the area of the United States is divided into corps areas and these are grouped into departments.

**The Militia.** — The Constitution provides in Section 8, Article I, that "Congress shall have power to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." A second glance at this clause shows that the militia may not be used outside the United States, but must be employed exclusively as a defensive force inside the national boun-

daries. Naturally no military operations can be confined to territorial boundary lines. To be of full service all our military forces must be at the undisputed command of the Federal authorities, regardless of where they are to be used. A worse restriction is placed by Section 8, Article I of the Constitution, upon the Federal control of the militia — in that Congress is authorized “to provide for organizing, arming, and disciplining the militia,” etc., “reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.” It is inconceivable that the militia could be properly managed under Federal control so long as the States themselves carry out its training and appoint its officers. This is one of the loopholes by which political appointments, wire pulling, inefficiency, and even insubordination have crept into the military service. The experiment of a State-controlled, State-officered militia, which can be used only within the boundaries of the United States, has been a failure.

Whenever war has broken out Congress has been obliged either to allow the militia organizations to dissolve and re-enlist in a voluntary National Army as in 1860, 1898, and 1917, or to rely upon draft laws, or both. Our militia has not been serviceable as such in time of war; it does not fulfill its purpose in the way intended.

**Reorganization of the Militia.** — The American theory of national defense is that of a regular standing army sufficient to meet the first shock of war, and backed up by a large force of National Guard. Our practice, however, has been to maintain only a small army of 100,000 men which would be totally inadequate to fulfill the purpose required, and to leave to the States under congressional stimulus the preparation of the National Guard. The Guard has too often been regarded as a mere exclusive possession of the State government and has been at the mercy of the State office holders and the political factions controlling them. From these and other causes the militia had lapsed into a series of disconnected units without modern training and equipment. It was used chiefly for the suppression of disorder and became in the minds of many, an unpopular symbol of force rather than a means of national protection.

Serious opposition was shown to all attempts to nationalize



the militia units, that is, to bring them into harmonious and practical relation with the national army. Even the rule that Federal funds appropriated for the militia could be used only by those divisions and units which conformed to national army regulations, was resisted. In order to overcome all these difficulties the Acts of 1916 and 1920 provide that members of the militia shall upon enlistment agree to a draft into the regular army and the service of the United States in time of war or emergency, and shall there remain until the end of the emergency. The Acts further require each State to have an annual inspection and review and a certain number of meetings for drill by each company during the year.

Officers from the Federal establishment are detailed to attend State encampments and to give instruction. An annual sum is appropriated by Congress for arms, stores, camp equipage, and other expenses of the militia. This is apportioned among the different States, which have accepted the terms of the Acts of 1916 and 1920 and have recruited their National Guard divisions accordingly. The total strength of the organized Federal militia is 158,000 and will gradually increase as the States are able to make full use of the terms of the Federal Act.

**Methods of Raising Army.** — Under its power "to raise and support armies" Congress may use such means as it chooses to this end. In *ARVER v. U. S.* 245 U. S. 366, 1918, the extent and scope of this authority were made clear. Congress had passed a Selective Draft law, May 18, 1917, providing for a national army which should be raised by several methods, including the draft. Arver objected that the law was invalid because the Constitution gave no authority to draft armies. Congress should raise troops by the customary method of voluntary enlistment or by calling the militia into the national service. The act also established an "involuntary servitude" thereby violating the Thirteenth Amendment. The Supreme Court, however, held that Congress having been given power to raise and support armies could use any appropriate means to this end. There were several such means, the compulsory draft being one of them which had been practiced from the earliest times. Congress was therefore not limited to any one method. Nor was the citizen's supreme duty to defend the Nation in war an "involuntary servitude." Some of the highest public duties might be required by compulsion

such as jury service. These were fundamental obligations, not servitudes. The draft law was accordingly held constitutional.

**Military Training.**—Among the more important changes wrought by recent events is the attempt made in the Act of 1920 to establish a more effective system of military education, especially of officers. This includes a Reserve Officers' Training Corps, with a senior division located at universities and colleges which offer military courses, and a junior division at other public and private schools, all under the control and instruction of officers of the regular army. These courses are two years in length, and offer an elementary training in military science; also at the reserve officers' training camps, of six weeks duration, an attempt is made to approximate field conditions. The law also makes the important provision that after the announcement of the first list of officers eligible for appointment to service on the General Staff, no additions shall be made to such list, except of those who have taken courses in the General-Staff War College. The effect of all these provisions is to assure to the army a large number of more thoroughly trained officers than under the old system.

**New Problems.**—Recent experience shows that unless some genuine international coöperation can be established, a complete change in our policy and methods of national defense must take place:

(a) We must prepare against surprise attacks, the greater advantages of which were shown in the Japanese-Russian and European wars. Such preparation would involve a vast increase in coast defenses and a permanent enlargement of the regular army to at least 500,000 men, also a heavy annual appropriation for technical equipment of ultra-modern type.

(b) We must follow the European precedent and assign to every man and every piece of material and to every productive apparatus, factory, shop, railway, car, and automobile, its place in the scheme of war. Nine-tenths of war is "business"—production, transportation, distribution. We now know that a system of national defense which leaves the organization of this "business" until the outbreak of war is doubly expensive and is physically impossible after war has begun unless other powers keep the enemy from our shores.

This is illustrated in the demand during the War for technically

equipped mechanics, electricians, and specialists in numerous lines. The list of such skilled men who are required for an Army division reads more like the payroll of a manufacturing plant, than of an Army unit. Plumbers, auto mechanics, electricians, carpenters, blacksmiths, chemists' assistants, photographers, accountants, are all required to transact the day-to-day business of a division.

(c) Industries which are not of natural growth must be created and maintained by government support, new strategic railways and roads must be built. Many industries which are now too near the seaboard and therefore vulnerable to attack, must be relocated or duplicated at a safer distance. Much of our industrial, commercial and even financial life must be re-adjusted.

(d) Military equipment has undergone a technical revolution. The same changes which marked the abandonment of shrapnel and the adoption of high explosives and poison gas, the perfection of aerial and submarine attack and land tanks have now set new demands upon technical equipment. A military force without this equipment would today be helpless.

Those who would favor the adoption of half-way measures on any of these points are silenced by the experiences of recent years. Countless instances may be cited in which the absence of one or another of these elements has caused the destruction of vast fighting forces and prolongation of conflict. A national government which fails either to cooperate with others or to provide a reasonable and adequate system based on the above described points is foredooming its armed forces to disaster. There is no half-way ground between military preparedness and international cooperation.

**The Relation of the Army to the Government.** — One of the grounds of perpetual disturbance in all military States is the question, Shall the Army be subordinate to the representative government? This question has never been satisfactorily solved. If a government is truly representative and responsible to the people, the legislature will attempt to control the army organization. This means the subordination of the duties and acts of the military officials to the will of the legislature. It undoubtedly causes some weakness and inefficiency in the army itself. At the point of contact between the political representatives and the army chiefs,

party influence inevitably creeps in with its paralyzing effects. Even in our own country this influence is clearly apparent. On the other hand, if the army becomes largely independent of the legislature, as it did in some countries of Europe, a ruling clique is soon set up which practices many irregular and illegal abuses, all of which are justified on the plea of "national defense."

This problem cannot be solved so long as there are armies, it can only be compromised. We may lessen the evils of military inefficiency by creating a strong reserve of officers, technicians, and skilled men whose military ability has been developed under Federal control in time of peace.

**The Navy.** — The size of a naval force and the kind of ships required by each nation varies according to national geography and political ambitions. Great Britain with a limited food supply and dependence on her colonies and distant portions of the earth for raw materials and food feels herself forced in the absence of some international understanding, to protect the ocean lanes over which her commerce arrives. Much of her foreign trade has been secured and held by her ownership of vast mercantile fleets. To protect these an extensive navy has been a vital necessity. A country like Russia possessing its own natural resources in one continuous continent requires land transport rather than an ocean fleet. Its naval establishment need not be large.

Naval experts have varied greatly since the war in their opinion as to the type of ship required for the future but most nations have continued to build the large capital ship of great tonnage and heavy armament. There is a strong opinion to the effect that special defensive submarines with an adequate system of aircraft protection might form the chief basis of our future naval strength. The American navy is divided roughly into an Atlantic and Pacific force. The latter has gradually been strengthened as the dangers of oriental conflicts have increased.

Much research work is being done in the Navy bureaus.<sup>1</sup> Ship

<sup>1</sup> The navy organization includes: General board, bureaus of navigation (including gunnery, ocean and lake surveys, training stations, naval reserve, naval war college, naval home), ordnance, yards and docks, medicine and surgery, supplies and accounts, construction and repairs, engineering (including also repairs and experiments), aeronautics, naval academy, marine corps (the latter including an extensive quartermasters' department).

control by radio from distant stations is being developed, electrical cables and "invisible pilots" are used to guide ships into harbors and ports, new devices for locating submarines have been perfected as well as depth bombs for combating them. Among the notable achievements of the navy during the War were the transporting and convoying of 46 per cent of the American troops landing in France,<sup>1</sup> the return of the entire army to America in naval transports in record time and the joint laying with the British navy of the mine barrage against submarines in the North Sea, 230 miles in length. This barrage was laid in several rows to a depth of 240 feet and was the most effective measure taken against the submarine menace.

The navy at the peak of the war had over 500,000 enlisted men and 32,000 officers. By 1922 it had been reduced to 106,000 enlisted men.

**Extent and Duration of Federal War Powers.** — Is the War power subject to the same constitutional limitations as all other Federal authority? Is it confined to matters directly connected with military operations? Does it cease with the cessation of hostility? These questions were answered in *HAMILTON, COLLECTOR, v. KENTUCKY DISTILLERS CO.*, 251 U. S. 146, 1919. The Court held that the war power extended to matters beyond the regular peace time jurisdiction of Congress and included even such a problem as prohibition of intoxicating liquors. Congress could not repeal the clauses protecting life and liberty but it might forbid the conduct of a business which interfered with the efficiency of the national defense. Nor would these powers lapse immediately with the signing of an armistice. They had frequently been held to continue up to the ratification of a peace treaty.

During the War Congress regulated intra-state railways, the manufacture and supply of raw materials and finished products, of fuel, food, insurance, etc., and solved labor questions in any and all industries which affected the conduct of the War.

<sup>1</sup> Because of the small amount of available tonnage, over 51 per cent of the American troops were carried in British vessels.

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## QUESTIONS

1. How would you explain the large amount of space devoted in the Constitution to the war power, as contrasted with that devoted to other affairs which now seem more important?

2. Correct the following, giving your constitutional authority: "The American Government is so arranged that the Executive can declare war but peace may only be made by the legislature." Also the following: "In order to declare war the constitution requires a three-fourths majority of both Houses combined, while a treaty of peace requires only a simple majority of the two Houses separate."

3. Draw a contrast between the exact authority conferred by the Constitution upon the President and Congress respectively over the declaration and management of a war.

4. How is war declared? Give some illustrations.

5. Show why the President with so little nominal power over the declaration of war, has nevertheless such great influence in bringing on or avoiding a conflict.

6. Must a formal declaration of war always precede hostilities? Examples.

7. Explain how an advantage may sometimes be gained by beginning hostilities before the declaration, or by delaying the declaration even after hostilities have begun.

8. What is an ultimatum, and why does it usually lead to war when delivered by one great power to another?
9. Explain the legal preliminaries leading to the outbreak of the Spanish-American War.
10. From your reading about the Great War explain the chief reasons given by the various powers for declaring war.
11. Why does our Constitution limit each appropriation to the army to a period of two years?
12. Show the proportion of our total national government appropriations which is devoted to the military and naval outlay.
13. Why is Cuba sometimes spoken of as a "sphere of influence" of America?
14. Why is the Platt Amendment called an amendment? Explain its chief provisions.
15. Show the difference between military and civil administration and explain some of the chief problems of army organization.
16. What is the principal difference between the American Army organization today and that of 1898?
17. Why is a General Staff required, and what are its duties?
18. Show exactly how it increases the efficiency of an army.
19. Prepare a report showing the organization of the American regular army.
20. What is the difference between the regular army and the militia?
21. Show how the constitutional clauses on the Militia interfere with the effectiveness of that body.
22. How has this been overcome by the recent army acts?
23. Contrast the problem of army and militia organization of this country with that of European countries.
24. How is the militia organized under the present military laws?
25. What are the chief provisions of the laws as to military training?
26. What are the chief differences between older war conditions and those which would confront us today were we to enter war with any great power?
27. What do we need in order to meet these conditions, in the absence of some international organization to prevent war?
28. How would you explain the perpetual conflict between efficient army administration and popular government? Give examples.
29. Examine the annual report of the Secretary of the Navy and present from it a brief report stating the present size and needs of the American navy.
30. Prepare an essay on the military policy of the United States.
31. Show how our army and navy have decreased in size and expense from the peak of war time to the present.
32. Explain briefly how the American army was raised and organized in the Great War.
33. Explain some of the problems of war legislation aside from the raising of an army.
34. John Doe when summoned under the draft in 1917 claims that the Con-

stitution requires Congress to raise and support armies by volunteer recruiting and that this has always been done in past wars, hence he cannot be drafted. Decide with reasons.

35. Describe briefly the organization of the navy.
36. Mention briefly some of its most important work in the Great War.
37. Make clear to an inquirer how long a set of special war laws may remain in effect after hostilities have ceased.



## CHAPTER 12

### POWERS OF CONGRESS: CONTROL OVER THE TERRITORIES — OTHER POWERS

**Our Colonial Empire.** — The dramatic events of 1898 suddenly brought the Nation face to face with a new problem — the government of distant dependencies. Art. 4 of the Constitution gives to Congress the power to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” The Courts have also held that the Government possesses, as a part of national sovereignty, the authority to acquire territory, and therefore to govern it. The annexation of Hawaii, the Philippines, Porto Rico, Guam, the temporary control of Cuba and the later purchase of the Canal Zone and the Virgin Islands have given us extensive foreign possessions with all their incidental government problems. With some exceptions our plan has been to establish first a military government, and as soon as conditions permitted, a temporary civil form, chosen by the President. Later when a basis for self-government appeared Congress has passed “organic acts” providing for elective legislatures and a high degree of autonomy or even a territorial form.

In appointing the first civil governments President McKinley fortunately chose men who were preëminently well qualified for the work to be done, and then intrusted them with full power. The result was a rapid organization of the governments of all the dependencies and an efficient and progressive administration throughout the critical early stages of American sovereignty. Precedents and standards of a high order were established in the administration of roads, health, schools, taxes, and financial administration. The island governments had a good start.

To settle everything possible in Manila, Honolulu, and San Juan was the motto of the Administration and events have proven its

wisdom. While the central authorities at Washington have thereby escaped a great deal of unnecessary red tape, they have been able to keep in close touch with the colonies by frequent conferences between the President and the governors and other executive officials from the dependencies. In order to concentrate the control over the dependencies there has been established a special Bureau of Insular Affairs in the War Department under the direction of an experienced army officer. Besides its ordinary functions the Bureau has become an extensive purchasing agency for the islands, a means of preparing needful legislation to be introduced in Congress, and last but by no means least, an effective press agency by which the public is constantly informed of important happenings in the colonies.

**The Philippines.** — The Filipinos like the other Island peoples have constantly asked for greater autonomy and even independence. After the first organic Act of 1902 had shown that the people possessed capacity for self-government, a second step was taken by the law of August 29, 1916. This was a compromise between those who favored giving independence and those who saw the folly of such a step. The law declared it to be the purpose of America to grant ultimate independence to the Islands and meanwhile to enlarge their autonomy. Under it Philippine (not American) citizenship was conferred on the inhabitants who had resided there in 1899. The Island legislature could confer such citizenship upon still others if it chose. The more important provisions of our first ten Amendments were included in a bill of rights protecting the people from government action. This, however, did not guarantee either a grand jury or a petit jury trial. These latter were left to the insular law.

The act further prohibited polygamous marriages, required that taxes should be uniform, and that the Island government should provide its own revenue. Limits were placed upon the public debt, to protect property owners. The laws of the United States and future acts of Congress are not to apply to the Philippines unless especially so mentioned. Full legislative power is given to the Island assembly with the exception of tariff relations with the United States. General laws are subject to the approval of the American President within six months of their passage.

The legislature consists of a Senate and House of Representa-

tives. The Senate has twenty-four members, two from each of twelve districts, with a six year term, one-half retiring from office after three years. The House has ninety members chosen for a three year term. Sessions are held annually and must not exceed one hundred days in length.

The Governor calls special sessions and signs or vetoes bills. If a measure is passed over his veto it is transmitted to the President who may sign or veto it within six months. All laws are reported to Congress, which may annul them. If the Insular legislature refuses to provide funds to run the government, the same appropriations as for the current year are to be renewed for the ensuing period. Instead of a territorial delegate the Islands have two resident commissioners to the United States elected for three years.

Executive power is vested in the Governor who holds office at the pleasure of the President. The Governor appoints with the consent of the Insular Senate such officers as may be authorized by the law. He prepares a budget and submits it to the legislature annually. He commands the local militia and may call upon commanders of the American militia and naval forces in the Islands to suppress insurrection. He may also place the Islands under martial law. The accounting system is under the control of an auditor appointed by the President. He makes rules for all public accounting, including that of the local governments. Local courts are chosen by the Governor and a Supreme Court is appointed by the President. There are also provisions limiting the grant of franchises and public utility rights and designed to protect investors against fraudulent stock issues in public service companies. The local governments are organized as provinces and *municipios* or townships with elected executives and councils.

The suffrage qualifications are liberal and are based upon several alternatives such as the ownership of property, or an educational test, or a former right to vote. The legislature is now controlled by a political party which demands immediate independence from America, but its members have shown a willingness to cooperate for the passage of many necessary laws. The standards of both legislation and administration at one time fell far below the urgent needs of the Islands and the experiment begun in 1916 of granting a sudden increase in autonomy has not thus far proved a success.

In November, 1921, a Commission composed of Major-General Leonard Wood and former Governor W. Cameron Forbes, visited the Islands and surveyed the Government. They reported to the President recommending that the existing status under American control be continued until the people had had more time "to absorb and thoroughly master the powers already in their hands." They found the Civil Service rules to be honestly administered, the quality and character of the native officials on the whole, to be good, the younger generation to be full of promise, the legislative houses to be composed of representative men. But there was a disquieting lack of confidence in the courts to an extent which menaced the stability of the government; and neither the business interests nor the national defense was organized sufficiently to support national independence. The efficiency of the public service had deteriorated due to the injection of politics and to the rapid handing over of administrative power to untrained men, in some departments. There was a general demand for independence but the people did not appreciate all that complete independence under the protection of the United States would involve. The United States should under no circumstances accept responsibility without authority in the Islands, the Governor General should have greater freedom in making appointments and in case of dead-lock between him and the Philippine Senate, the President of the United States should make the final decision. Following receipt of this report, General Wood was appointed Governor and conducted a complete and successful reorganization of the insular finances and administration. The debt limit for the insular government was at his recommendation extended and a new loan floated to permit of the strengthening of the more important government services. The cooperation of leading members of the legislature was won, a number of useless offices abolished, expenses reduced, and efficient methods of administration restored.

**Hawaii.** — Hawaii is the farthest advanced in civilization of all our dependencies. It has therefore been made a "territory" or embryo State. The legislature is composed of a Senate and House of fifteen and thirty members, chosen for four and two years, respectively. The Governor and his chief assistants are appointed by the President with the consent of the Senate. There is a Delegate to the House of Representatives at Washington, chosen by

the voters for a two year term. The courts are appointed by the President and Senate. The suffrage qualifications are American citizenship, one year residence, an educational qualification (English or Hawaiian), and personal registration. The general average of education is very high among the native Hawaiians, but not among the Chinese and Japanese, who constitute a large part of the population. The local governments were originally mere districts, administered by officials appointed from the central government at Honolulu but an elective town and county system has been drafted from American models.

Hawaii, before American sovereignty, had already enjoyed the advantages of enlightened rule and economic prosperity. The most serious problem here is the racial one, arising from the presence of large numbers of Japanese who are active, intelligent, and aggressive, but who are not eligible to citizenship, at least in the first generation. This large foreign element is a controlling factor in the labor conditions of the Islands. Its presence is bound to have a direct effect upon the political future of Hawaii.

**Porto Rico.** — This, the smaller but most densely populated of the island dependencies, occupies a stage midway between Hawaii and the Philippines, as to general advancement. The original Act of 1900 was amended by the more liberal measure of March 2, 1917. The latter provides the usual bill of rights and requires that taxation shall be uniform throughout the Island, and no duties shall be levied on exports. American citizenship is extended to Porto Ricans. The legislature is made elective in both houses, which are chosen for a four year term. Measures vetoed by the Governor are handled in the same way as in the Philippines, the President having ninety days within which to veto a bill which has been passed over the Governor's veto. If the President does not act, the measure becomes law. The Governor, other important civil officials, and the judges are appointed by the President with the consent of the Senate, and Congress reserves the authority to annul acts of the legislature. There are the usual limits to the public debt allowed for the Island government and its expenses must be covered by its revenue. In case of failure to make appropriations, current amounts are renewed for the ensuing year. A resident commissioner is chosen by the people and sits with the House of Representatives at Washington.

The Island legislature is given full authority over its affairs but a Public Service Commission grants franchises of a public service nature. The suffrage requirements are adult citizenship, one year's residence, and registration. Voting has been made compulsory by the Insular Law of 1919. Failure to vote is a misdemeanor unless excused by illness or other cause which would prevent the voter from fulfilling his duty. Evidence to this effect must be produced in court.

The local governments, reorganized on an excellent plan proposed by the commission which codified the insular laws in 1900 and 1901, are municipal in character, with a local council and mayor. There is in all our dependencies a much greater power of central supervision and guidance over the local districts in order to insure the efficient maintenance of new American methods in the local governments; but such centralization as exists is vastly less in extent than that maintained under Spanish dominion.

Great importance was attached to American citizenship by the Porto Ricans. So long as this was denied them, they felt themselves to be held in an inferior and humiliating political position. The Act of 1917 in extending American citizenship allowed any citizen of Porto Rico to reject his new citizenship within a period of six months by a simple appearance before a local court, and the filing of a declaration. Although during this period the American draft law was passed and it was believed possible to escape the draft by refusing citizenship, only 283 persons in the entire Island filed declarations of rejection. Some of these withdrew their declarations and others later took out naturalization papers. No comment on these facts is needed.

**The Virgin Islands.** — By the Treaty of 1916, ratified January 7, 1917, the Virgin Islands were transferred by Denmark to the United States. They included the West Indian Isles of St. Thomas, St. John, and St. Croix. A temporary government was provided by the Act of March 3, 1917, which vested control in a "Governor and such persons as the President may appoint" until Congress provided a permanent form. The President established a Governor and Council, both appointed, and a centralized form of government under these authorities. Freedom of trade with the United States was established for native and American products respectively, except sugar. All funds from local taxes and custom

duties are devoted exclusively to the insular government. While the state of education and advancement is not yet such as to warrant a high degree of self-government it may be expected that with the improvement in these conditions which has everywhere marked the advent of American sovereignty, a liberal form of government may soon be established.

**The Need of a National Policy.** — The possession of territories and dependencies with a population of over ten millions, places upon us the responsibility for some definite policy of government which will care for their affairs in a progressive and liberal spirit. We need a careful survey of the resources and requirements of our dependencies. Among the questions which require solution are, How can the economic resources of the islands be best developed? Would it be feasible and wise to extend American loans to the islands to build roads and schools? What shall be the degree of American control over each? How can this control be continued, while enlisting to a greater degree the participation and interest of native voters and officials? How can effective and honest administration be combined with the gradual schooling of the native population in the use of free institutions?

Underneath all of these lies the fundamental question, what is to be the future relation of America to the dependencies? If we are to retire from the islands in the near future neither American nor foreign capital will locate there. With the recent experiences of Cuba and Mexico, and the natural uncertainties of civil rule in the tropics, only the most adventurous would care to invest in dependencies which within a short time might be turned over entirely to native government. If we are to retain the dependencies and incorporate them as States into the Union, it is essential that such a policy should be early decided on and definitely announced. The effect of such an announcement upon the outside investor and the native peoples themselves would be most salutary.

**Need of American Loans.** — Certain fundamental needs are apparent, on which the governments must for many years concentrate their attention; these are roads, schools, public health, agricultural and industrial development, and a more efficient administration. Large areas of productive country still lack good roads. The need of a vastly enlarged school-building program is most urgent. In both Porto Rico and the Philippines public

education is a disgrace to American sovereignty, because of lack of schools and teachers.

The country schools of Porto Rico offer only a four-year course. In the Philippines, by the Act of December, 1918, an extraordinary effort was put forth to cope with this situation by increasing the annual appropriation nearly 50 per cent, but the financial resources of the islands will probably be unable to stand this increased burden. The school houses are crowded to capacity, and the people tax themselves for school purposes beyond their ability to pay. As to roads and public health, similar aid should be given. The island peoples have willingly assumed financial burdens which, measured by their ability to pay, would do credit to more prosperous and advanced communities, but they are unable to make up for centuries of neglect without outside aid. *In Porto Rico less than one-half and in the Philippines less than one-third of the children of school age are enrolled.* We should immediately extend to the islands a generous loan, ample to create a complete school system.

**Health and Order.** — In health administration the results secured have been excellent. Undoubtedly the greatest have been the highly successful Cuban administration of General Wood and the remarkable achievements of Generals Gorgas and Goethals in the Canal Zone. No greater benefits of colonial government can anywhere be shown than these exploits in regions that had long been abandoned to tropical fevers. Much work still remains to be done in Porto Rico and the Philippines, particularly in educating the natives to a higher health standard.

Another American achievement has been the establishment of law and order in the islands. Long and troubled movements towards independence under the Spanish régime had so completely unsettled the entire population of the Philippines that thievery and highway robbery or "ladronism" had become chronic in many sections. A scientific study of brigandage would probably show that it is rooted partly in economic conditions, partly in political grievances which enable the ladrone to pose as a patriot. Ladronism cannot be combatted by military efforts alone; it must also be wiped out by economic opportunity and by systematically enlisting the active interest of large numbers of people against robbery. This the Americans did, and although it was



over ten years before the last symptoms of brigandage disappeared, the universal sentiment of the people today supports law and order.

**Tax Systems.**—In financial administration the Americans have wrought a complete revolution of methods. Under the system bequeathed by Spain, the richer classes escaped tax-paying, leaving the burden of government costs to the poor. This was arranged by taxes on food and the necessaries of life, upon small retail dealers, ruinous local and export taxes, and fees for trifling government services. The corrupt methods of enforcement were far worse than the law itself. The American administrator has substituted for this system a general property tax so arranged as to fall principally upon the wealthier classes. The burden of taxation is more equitably distributed and larger revenue is actually collected with less cost to the people. A thorough-going control of local finances has been established at Manila and San Juan. Village and town accounts have been audited and controlled from a central point at the insular capitals with much advantage to all concerned.

**The Constitution and the Dependencies.**—Do all parts of the Constitution apply to the dependencies? If so, then no matter what systems of law the island peoples want or have been accustomed to, we must impose our methods on them. We could not tax the dependencies more lightly than ourselves and according to their needs, for "duties, imposts and excises must be uniform throughout the United States," Art. 1, Sec. 8, Clause 1. Nor could we allow a person accused of crime to be tried in the islands under the customary procedure there, but must require a jury trial for him under the Sixth Amendment—"in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial *jury*." Nor might we allow the charge against such a person to be brought according to local custom, but must follow the Fifth Amendment and require the "presentment or indictment of a grand jury." In some of our territories the American laws and procedure would fit, in others they would not, for the people have long been accustomed to their own local methods.

The Supreme Court has held that we must distinguish between those territories which have been "incorporated in the Union" and are therefore a part of the United States, and those which

have not. In the former all parts of the Constitution take effect, in the latter only those which can reasonably apply to local conditions. We have seen in Chapter 5 that this enables Congress to tax the islands at a different and lower rate than the mainland since the uniformity clause of Art. 1, Sec. 8 does not apply.

So also a man accused of manslaughter in Hawaii before it was made an incorporated territory, need not be indicted by a grand jury nor given a jury trial as required by the Fifth and Sixth amendments because the procedure fixed by those amendments was necessary only in the United States, not in places or districts which were as yet outside the Union or not incorporated in it; *HAWAII v. MANKICHI*, 190 U. S. 197, 1903. After Hawaii became an incorporated territory these amendments applied. Alaska, however, was an incorporated territory, and was therefore considered as part of the Union, and all sections of the Constitution applied to it. Hence a person accused of crime must be proceeded against by grand jury and jury trial under the Fifth and Sixth amendments. Whether a territory is "incorporated in the Union" depends on the action and intent of Congress. The mere fact that Congress by the Act of 1917 which we have just considered, granted to Porto Rico a bill of rights and American citizenship, did not make that dependency a part of the Union. Accordingly the Fifth and Sixth amendments did not automatically take effect. The Porto Rican legislature need not prescribe a jury trial for misdemeanors such as libel unless it wished to do so. In *BALZAC v. PORTO RICO*, DECIDED 1922, the legislature had not required a jury trial and the Supreme Court held that as the Island was not a part of the United States or a territory incorporated in the Union, the trial without a jury was constitutional.

**The Admission of New States.** — The Constitution provides that new States may be admitted by Congress.

The usual procedure in admission is an enabling act passed by Congress authorizing the inhabitants of a territory to hold a constitutional convention and to prepare the draft of a new State Constitution. When this draft has been formally presented to Congress and approved by that body, a date is fixed in the final act of Congress at which the new State shall spring into being. In approving the draft of the new Constitution, Congress may, and frequently has taken the occasion to require certain provisions

to be incorporated in it, and in some instances the Executive has let it be known that he will veto admission if the new Constitution contains obnoxious features. President Taft in 1912 vetoed an act of Congress, approving the State Constitutions of Arizona and New Mexico because they contained a provision for the recall of judges by popular vote. The President held that a new State should not start out on its career as a commonwealth under the handicap of a dangerous institution which would deprive the judiciary of its independence. The provision objected to was thereupon dropped and the new States admitted. When Utah was admitted, it was stipulated by Congress that the new Constitution should contain a provision prohibiting polygamy.

**Can Congress Impose Permanent Conditions?** — The admission of the three States just named raises a practical question which may later become of much importance in our Federal form of government. Could Utah, once admitted, amend her Constitution and permit polygamy? Could Arizona and New Mexico later replace in their Constitutions the provision for a recall of judges by a popular vote? Can a territory, once admitted as a State, "change its mind" and reinsert in its constitution by amendment a provision objected to by the national legislature when the territory was admitted? Or can it drop from that constitution a provision required for admission by the Congress?

When Oklahoma applied for admission Congress required a pledge that the State capital would not be removed from the City of Guthrie before 1913. Such a pledge was given by the Oklahoma Convention and on this condition the territory was admitted to the Union. But in 1910 the State legislature removed the capital to Oklahoma City contrary to the pledge. In *COYLE v. SMITH*, 221 U. S. 559, 1911, certain taxpayers who owned property interests in Guthrie started suit to prevent the removal. They urged that the State having been admitted on an explicit pledge, had made this promise a fundamental part of its Constitution, which could not thereafter be changed. Congress had the sole right to admit States and could do so upon such conditions as it found necessary. It was clear from Art. 4, Sec. 4, which required Congress to guarantee to each State a republican form of government, that some supervision of the States was allowed to Congress. But the Supreme Court held that in admitting new States there was a sharp

distinction between the conditions which Congress could make as a result of its general powers such as those over commerce, etc., and conditions which affected the local internal affairs of a future State. The latter became entirely subject to the State's control as soon as it was admitted to the Union. If this were not so then Congress might admit new States with all kinds of reservations and conditions limiting their sovereign power over their own local affairs. It might thus deprive them of essential parts of their independence. The Constitution never intended that there should be different classes of States with different amounts of sovereign power. Hence, after a State was once admitted it immediately possessed complete control over its local affairs no matter what conditions had been imposed at its admission.

**Conditions on Federal Grants of Property.** — The above principle should be distinguished clearly from conditions which Congress attaches to any gifts of property which it makes to a new State. For example, in *ERVIEU v. U. S.*, 251 U. S. 41, 1919, Congress had given to New Mexico at the time of its admission in 1911, certain public lands for school and other purposes. Sec. 10, of the Act provided that any other use of the proceeds from these lands would be a breach of trust and authorized the Federal Attorney-General to secure an injunction if such a violation occurred. The new State accepted the lands under these express conditions, but later violated them by using part of the land fund for advertising purposes. The Supreme Court held this to be an illegal use of the money and subject to an injunction as provided by the Act granting the lands. There is thus a difference between conditions which Congress attaches limiting the political power of a new State and those which it attaches to a gift of property to that same State. The latter are, legally binding, the former are not.

**The Panama Canal.** — In 1902 the United States purchased from a French company and from the Republic of Panama the site and rights of the Panama Canal which had been partly excavated by the French corporation. A commission of seven members was appointed by the President and Senate with full authority over the canal zone, including the work of construction. A strip of territory five miles wide on each side of the canal was bought by the canal administration, and laid waste and all human habitation forbidden, except by agents of the canal administration — the

purpose being to protect the waterway in time of war. Both ends of the canal were fortified. The results secured by the commission astonished the civilized world. Previous to the American control of the canal strip the French engineers had been engaged for decades in the construction work and had been defeated only by the insuperable obstacle of yellow fever. It was a known certainty that every white man who went to the canal region must succumb if he remained there only a few years. Meanwhile, the experiments made by physicians in various parts of the world within the previous five years had shown that the chief means of spreading yellow fever was the mosquito. The American engineers began their work at this point. Under the direction of Colonel Gorgas a war of extermination and prevention was started against the mosquito: the swamps were drained, pools were filled in, stagnant water was sprinkled with petroleum; and in a short time yellow fever and other epidemics were wiped out. Upon the basis of healthful sanitary conditions the remainder of the work was pushed energetically, and although it was seriously hindered by political influence in appointments, and by the intrigues of certain interests opposed to the canal, it was completed before the date originally set for its opening.

*Administration.* — On August 24, 1912, Congress passed an act providing for the opening, maintenance, protection, and operation of the Canal and the government of the Canal zone. The new government superseding the construction commission, consists of a governor and a number of department chiefs subordinate directly to him.

Authority is also given to the governor to divide the Zone into districts and determine the location of towns and cities, and establish a magistrate's court in each region. One district court of the United States for the Zone is established by the Act. Rules and regulations governing the right of any person to enter or remain in the Zone are made by the Governor and it is made a felony to injure or obstruct the waterway. Railway companies are forbidden to own, control, or operate any ships through the Canal which do or may compete for traffic with such railways. The fact of competition is determined by the Interstate Commerce Commission. Vessels belonging to corporations which are violating the Sherman Act are forbidden to pass through the Canal. In time of war

or when war is imminent the President may designate an army officer to take charge of the Zone in which case the civil Governor becomes his subordinate. Following this Act, the President, by executive order of 1913 and 1914, created the following executive departments under the direction of the Governor:

Operation and maintenance	Accounting
Purchasing	Health
Supply	Executive Secretary

The latter has general charge of the administration under the Governor's direction. The Governor himself reports to the Secretary of War.

The use of the Canal is rapidly growing. It now pays its current expenses and should eventually pay also for its cost of construction. Its effects on commerce are already felt at important points. A large current of freight is flowing in both directions between the coast cities of the United States. Large quantities of Pacific Coast products, including fruits even, are being marketed in Europe at a much lower price because of the cheaper water freight, while the products of the West Coast of South America are now coming through the Canal to our North Atlantic ports.

**Naturalization.**—The Constitution confers upon Congress power to establish "an uniform rule of naturalization." In pursuance of this power two methods of naturalization have grown up. First, by general acts, Congress has conferred citizenship upon whole classes of persons such as tribes of Indians, the inhabitants of new territory acquired by the United States, etc. By the Act of June 28, 1898, the Muscogee or Creek Tribe of Indians and the Choctaw and the Chickasaw Tribes were admitted to United States citizenship upon the breaking up of their tribal relations; the Act of April 30, 1900, provided that all persons who were citizens of Hawaii at the time of its acquisition by the United States should be admitted to United States citizenship; the Act of 1917 did the same for Porto Rico. On other occasions, the President and the Senate, in the exercise of their treaty-making power, may provide that citizenship shall be conferred upon the inhabitants of territory acquired by the United States.

Second, the general and more usual method of naturalization is that prescribed by the revised statutes in sections 2165 and follow-

ing, which provide that an alien must reside five years in the country before being finally admitted to naturalization. Two years before receiving citizenship he must make a preliminary declaration of intention to apply and at the end of that time (2 years after the declaration) he may receive his final papers. Both the preliminary declaration and the application are made before a Federal or a State or territorial court of record. Among other formalities the applicant must renounce allegiance to any foreign power and must give up all claims to any title of nobility which he may have possessed. He must swear his fealty to the United States Constitution and laws and must present evidence of good moral character and of the necessary period of residence in the United States.

Not every alien may be naturalized under the general law. For example, no provision has been made for Asiatics. In fact, only two classes of persons have been provided for under the general naturalization act which, in section 2169 of the revised statutes declares: "The provisions of this title (of naturalization) shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Since no mention is made of persons of Malay race or descent it is held that they cannot be naturalized except by special act of Congress or by treaty.<sup>1</sup>

When any naturalized citizen resides for two years in a foreign State from which he came, he loses his American citizenship, unless he makes a declaration before a Consular or diplomatic officer retaining his citizenship. Wives may take the citizenship of their husbands or may retain their own citizenship according to a declaration which they may make. A child born outside of the United States but living here becomes entitled to American citizenship if its parent later is naturalized during its minority. The children born abroad of American citizens are entitled to American citizenship if they continue to reside abroad, providing that upon reaching the age of 18 they register with an American Consul their intention to become residents and remain citizens of the United States, and providing that upon reaching the age of 21 they take the oath of allegiance to the United States.

**Implied Powers.** — Surprisingly few of the subjects daily dis-

<sup>1</sup> An exception has been made in favor of Hawaiians, Samoans, and Filipinos.

cussed by Congress are expressly mentioned in the Constitution. Congress enacts irrigation, meat and food inspection, corporation accounting laws, and many other measures; but the Constitution has nothing to say on such points. Where then did Congress secure the authority? One general rule for interpreting all the powers of Congress is given in the Tenth Amendment: "The powers not delegated to the United States by the Constitution; nor prohibited by it to the States, are reserved to the States respectively or to the people." In short Congress has only the powers given it by the Constitution; all others are reserved to the States and to the people. For every law passed by Congress there must be some basis in the powers granted by the Constitution, either in the express powers, those given by the direct terms of the Constitution, or the implied powers, those which are not specifically mentioned but are derived or inferred from the express powers. For example, the power to build a post office is expressly given in the words of Section 8, Article I, Congress shall have power "to establish post offices and post roads"; the authority to prohibit the passage of objectionable literature in the mails is an implied power. It is inferred from the expressly granted authority over post offices and post roads.

Furthermore the Constitution confers on Congress the authority 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." This provision of Section 8 of Article I gives a still firmer basis for the implied powers. If Congress has the authority to provide a navy it must of necessity have also the right to take all steps which are "necessary and proper" to that end. Is the establishment of a training academy at Annapolis necessary and proper for the maintenance of a navy? Would a commercial or consular school for the training of officials be a fitting means of regulating commerce? Could Congress purchase and operate railways and roads as a regulation of commerce? Can it regulate the manufacture of articles, intended to circulate in interstate commerce? In fact most of the interesting and important national questions of our time involve the implied powers. The answer to these questions depends upon the exact meaning of the terms "necessary and proper."



**Marshall's Interpretation.** — Chief Justice Marshall, the great expounder of the Constitution, in his famous decision on the case of *MCCULLOCH v. MARYLAND*, 4 WHEATON, 316, 1819, ruled that the National Government had the power to create a banking corporation as a "necessary and proper" means of collecting and caring for the funds derived from taxation. The State of Maryland had contended that such action by the United States was unconstitutional, and that an implied power was "necessary" only when it was *absolutely required*, to carry into effect some express power. If the express power could be executed in any other way, then the implied power was not necessary, and hence it was unconstitutional. In overruling this contention and deciding that Congress had the power to incorporate a bank, Marshall said:

"Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? . . .

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. . . .

"This provision was made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which

can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. . . .

“ For example, the power to establish post-offices and post-roads. This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment. . . .

“ We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .”

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## PROBLEMS

## THE DEPENDENCIES

1. Resolved, That the National Government has the constitutional power to acquire and govern dependencies. Defend the affirmative, and cite the appropriate clauses of the Constitution.
2. Explain how each of our present dependencies has been secured.
3. Secure copies of the Philippine government acts of July 1, 1902 and August 29, 1916. Show the difference between these two laws in general provisions and in spirit.
4. Prepare from these acts and from the reports of the Philippine Governor a report setting forth the chief government problems of those Islands and the proposed solution. Also give your own views as to the extent to which interest in these questions is shown in the American newspapers.
5. What are the chief points of similarity between the governments of Hawaii and the Philippines?
6. What is the difference in legislative or constitutional status of the two?
7. Prepare from the reports of the Governor of Hawaii an essay showing the chief government problems, the solutions proposed, and a summary of the economic and social conditions of the people.
8. What is the difference between the way in which we acquired Hawaii and the Virgin Islands, respectively? Reasons for the difference.
9. Prepare a report on the government and government problems of Porto Rico, from the act of 1917 and the Governor's reports.

10. Pedro Diaz, a Porto Rican, convicted of crime in a San Juan court declares that his conviction is unconstitutional because there was no jury and this violates the first sentence of the Sixth Amendment. Decide the case with reasons.

11. If Diaz were an inhabitant of Hawaii today would the decision be the same? Reasons.

12. The Philippine legislature is about to pass a bill which may be disastrous to the interests of the island. What can the President do?

13. What can Congress do?

14. If the President believes that the administration of the Philippine laws is not being properly carried out what can he do?

15. What are the fundamental needs of our dependencies and why are these needs more urgent than in America?

16. Explain our financial policy.

17. Is American citizenship considered important by Porto Rico? Prove your answer.

18. Resolved, That dependencies should always pay their own expenses. Defend one side, giving definite illustrations.

19. Explain the chief changes in the principles of taxation introduced by the American government in our new dependencies.

20. Mention some of the definite advantages which have come from American control of our dependencies.

21. Where are the Virgin Islands? Why did we acquire them? What is their form of government?

22. Explain the chief changes in the principles of taxation introduced by the American government in our new dependencies.

23. Resolved, That all parts of the Constitution apply to the dependencies. Defend the negative and cite your authority.

24. Prepare a report on the Government and conditions of the Panama Canal Zone.

25. Could Congress constitutionally lay a higher tariff on goods coming from abroad into the Virgin Islands than on imports into the United States? Give arguments on both sides and the decision with reasons.

#### NEW STATES AND NATURALIZATION

1. Give the constitutional authority to admit new States and explain whether this clause would authorize the national government to refuse statehood to a territory which had a large population and a high state of education.

2. Would it be constitutional to admit the Philippine Islands as a State without first making them a territory?

3. Give the usual procedure in admitting a State.

4. If Congress imposes conditions for admission to the Union must a State comply with these? Give reasons and illustration.

5. In an act of 1930 admitting Hawaii to the Union Congress requires that Hawaii must spend \$100,000 annually for the education of Japanese children in Hawaii. Congress also donates upon admission \$1,000,000 to be used for roads,

exclusively. Hawaii accepts both conditions, is admitted to the Union, and then discontinues its Japanese school appropriations and uses the road fund for harbor improvement. What could the national government do? Reasons.

6. Resolved, That Congress should have the authority over naturalization. Defend one side.

7. A Chinese who has lived in the country seven years asks your advice as to how he should become naturalized. What would you tell him?

8. An Italian who has been here four years asks you what steps he shall take to become naturalized. What would be your advice?

9. Richard Roe is born of American parents residing in Paris. What determines his citizenship?

#### IMPLIED POWERS

1. Explain the doctrine of implied powers of Congress and give several examples.

2. Where does Congress get the authority to establish and maintain the naval academy at Annapolis?

3. Give Chief Justice Marshall's view of the implied powers.

4. State which of the following laws, if passed by Congress, would be constitutional and the parts of the constitution upon which the law could be based:

(a) Creating an agricultural college in Lincoln, Nebraska.

(b) In Washington, D. C.

(c) A mining college in Alaska.

(d) Requiring the teaching of industrial subjects in all public schools.

(e) Establishing a special school for postal carriers.

(f) Forbidding the manufacture of dangerous explosives in any part of the United States.

(g) Limiting the hours of labor in all industries.

(h) Providing for the purchase and operation by the government of all locomotive works in the United States.

## CHAPTER 13

### THE NATIONAL CONSERVATION POLICY

**Rise of a National Policy.** — No country enjoys a greater diversity and abundance of natural resources than are possessed by the United States. The history of our people has been chiefly that of the conquest and subjugation of Nature. Until quite recently this natural wealth has been looked upon as practically unlimited. Our government policy has been simple — to throw open the public lands to immediate settlement and encourage the settlers to exploit them to the full. As successful as this policy has been in making our country the wealthiest of nations, it was appropriate only to the stage of colonization. The settlers regarded forests, rivers, and other physical features chiefly as obstacles to be removed or overcome and it was hard to realize their value in the future economic progress of the country; so the forests were cut away, the farms were planted year after year to the same crop without fertilizer, the coal and mineral deposits were exploited with prodigal waste. Labor was costly and natural resources cheap. To save resources at the expense of labor would have been ruinous in the early settlement and development of our country, so that the main effort of our people has been to develop labor-saving machinery rather than the means of saving coal or timber or land or ore.

We now realize that we have already consumed much of our natural capital and that we need a national policy of conservation. Such a policy can only be carried out by the National and State Governments acting in harmony to protect the supply for future generations and to insure the proper and economic use of our natural wealth today. Conservation became a national problem during the administration of Mr. Roosevelt, and largely through his efforts and those of Gifford Pinchot and Henry Graves of the Forestry Bureau.

**The National Conservation Commission.** — In 1908 the President held a conference of governors and appointed the National Conservation Commission, of fifty members, with Mr. Pinchot as Chairman. It was divided into four sections: Waters, Forest, Lands, and Minerals. The commission first made an inventory of our natural resources and had its report ready for the second joint conference on conservation, held at Washington in December, 1908, by which conference it was indorsed. This report gave a general survey of our natural wealth, and brought the whole problem of conservation into the focus of public attention.

**The Forests.** — Our forests, private and public, now cover 550,000,000 acres, or about one-fourth the area of the United States. The lumber industry began in the northeast, and has moved gradually westward and southward. Washington is now the principal lumber-producing State, with Louisiana second. Although only about 30 per cent of our original forest area has been cut or destroyed, this portion represents the most valuable parts of our timber supply, especially in the north and east. The commercial supply of every kind of timber, except in the Pacific forests, has been seriously reduced, so that the price of lumber has been steadily rising.

Sixty-one per cent of the timber now remaining lies west of the Great Plains, far from the bulk of our population and agricultural and manufacturing industries. We have used up our forests without planting new ones. The area of idle land is being increased annually by three million to four million acres.<sup>1</sup>

At the present rate of consumption, many of our most important woods are threatened with exhaustion within the next fifty years. We are now taking from our forests each year, not counting the loss by fire, three and one-half times their annual growth. Besides this there is a large amount wasted.<sup>2</sup>

<sup>1</sup> Report of Forester for 1920.

<sup>2</sup> Since 1870 forest fires have each year destroyed an average of \$50,000,000 worth of lumber. Taking together the loss by fire, waste, and destruction from other causes it appears that from 1000 feet of standing timber which leave the forests, only 320 feet of lumber is obtained. But in addition to its effect on the wood supply the forest problem has a wide-reaching influence on the river-flow, and thereby affects the questions of water power development, the improvement of internal waterways, reclamation of arid and swamp lands, the prevention of floods, and the preservation of the soil. Scientific forestry is a comparatively

**A National Forestry Policy.** — Our policy has thus far developed the following points — first, the creation of national forests or reservations, owned and managed by the National government; second, an organized forest service; third, coöperation with the State governments.

First, the Act of 1891 authorized the President to set aside by public proclamation any part of the public lands covered with timber or undergrowth, as public reservations, thereby withdrawing these lands from sale. In 1907 the representatives of six of the far northwestern States persuaded Congress to pass an act declaring that no more forest reserves might be created in the northwestern states, except by Act of Congress. When President Roosevelt saw that Congress was about to pass this law, he immediately issued proclamations laying aside 32 separate reserves, containing 17,000,000 acres of forests, in the six States enumerated in the Act, and thus forestalled Congressional action.

The existence of large "national forests" has created the impression that the forestry problem is largely solved. This is far from the truth. The national forests represent less than one-fourth of the standing timber of the country. Private owners hold over three-fourths, and it is from the private forests that 97 per cent of the timber now comes. The national forests now total about 150,000,000 acres. This is much larger than the total owned by the States. The national reserves are widely scattered through many of the commonwealths and territories, the largest being in Alaska, which has 20,500,000 acres, and California, with 18,800,000; the smallest is in Porto Rico, with 12,400 acres.

**The Forest Service.** — This Bureau in the Department of Agriculture is under the direction of a Chief Forester and a number of assistants. It is divided into branches controlling operation and lands, silviculture and products, grazing products, laboratory, and acquisition of lands. There are 163 reserves or "national forests" as they are now called, in order to avoid the impression that forest lands are withdrawn from use. These are divided into

recent art, which has only been applied to a limited extent in America but it is estimated that with modern methods we should produce a constant timber supply beyond our present needs, and with it conserve the usefulness of our streams for irrigation, water supply, navigation, and power. Under proper management our forests should yield over four times as much as they do now.



six districts with a district forester and a staff in each. The total number of employees is about 4000, of whom slightly over 700 are employed in administrative, laboratory and clerical work. The remainder, who are rangers, assistant rangers, guards, and wardens, are distributed throughout the forest tracts. Under the direction of Pinchot and Graves this service was made one of the most efficient in the government. The purposes followed by the bureau are: protection against fire and depredations; the harvesting of mature timber; the maintenance and betterment of a growing crop of timber; the protection of the water supply; utilization of the forage crop; betterment of range conditions; establishment of better means of communication through the forests; public recreation parks.

**Fire Prevention.** — The National Forests are protected against fire by a system of fire patrol. Combined with this are such measures as brush burning, fire lines, back firing, the construction of roads, trails, and telephone lines, and the use of lookout and observation towers. The most important feature is the patrol system. Rangers are stationed at convenient intervals throughout the forests. Their hardships and self-sacrifice deserve the admiration of the public. They enforce the laws against building fires in the forests, and keep a lookout for flames, to extinguish any which may spread. When a conflagration breaks out, they receive assistance from rangers in other districts. As the Federal service has been enlarged and extended, the proportion of the public forests burned each year has steadily decreased.<sup>1</sup> The area that each ranger has to cover (40,000 to 150,000 acres) is too great, however, and the number of rangers would have been greatly increased long since,

<sup>1</sup> The cost of maintaining an efficient patrol is small, compared with the annual loss from fires. It is estimated that the \$50,000,000 annual loss in the United States could be practically prevented by the annual expenditure of \$10,000,000. Less than 1% of the private forest lands are now patrolled. It is considered even more important to prevent fires in regions where the forests have been cut and where only underbrush exists, because fires on such lands are apt to prevent re-forestation. The U. S. Forester has pointed out that fires could be reduced to a minimum by educational efforts among those who use the forests, by extensive road and trail building to make all parts of the reserve accessible, by the acquisition of motor driven equipment for the transport of men and materials in fire fighting, which equipment could also be used for road building.

had it not been that a faction in Congress has opposed all attempts to aid the Forest Service.

**Forest Planting.** — Forest planting means the protection of denuded watersheds from erosion, and the protection of farm homes and crops from wind and cold, as well as an increase in the timber supply. The United States contains 70,000,000 acres of stripped land suitable only for the growing of trees, but which will not bear a productive forest again except through the actual planting of trees. There are also in the west 16,000,000 acres of treeless land which should be planted to trees in the interest of agriculture.

**Special Studies and Investigations.** — The Forest Service, besides its protective work in the national domain, conducts investigations in silviculture, in the uses to which waste products of forest and mill may be put, statistics on mill products, prices of lumber, etc., wood preservation, and timber tests. A special inquiry was also made in 1919 on newsprint paper, which showed the need for immediate steps to renew the wood pulp supply now rapidly disappearing throughout the east and in Canada. The Forest Service has also thrown open the national forests for recreation use. The law of March 4, 1915, authorized the issue of term permits for not over 5 acres of forest land and for periods not exceeding 30 years for camps, summer hotels, and public parks. In this way an extensive use of the public forests has developed; many communities now recognize in their national forests one of their greatest natural assets. The Service has also attempted the protection of game and fish and has coöperated with the State and local authorities in this field as far as possible.

**Coöperation with States.** — This third point in the national policy is developing as rapidly as funds can be supplied. Congress makes an annual appropriation of about \$150,000 for this purpose. Under the Weeks law of 1911, the Federal Government also buys forest areas in the States at the headwaters of rivers in order to protect water supplies and flow. Some of the States have begun to make reservations of forest lands. New York State has set aside as State reserves nearly 2,000,000 acres.

Pennsylvania has reserved 900,000 acres, and is planting 400,000 trees each year. The Pennsylvania tax law is regarded as a model in this respect. It provides for a very low rate on such private forest lands as are submitted to State supervision, with a moderate

tax on timber, which is not collected until the timber is cut. Oregon, Washington, California, and Minnesota also own large forest areas. Many of the States have systems of patrol, or provide for fire fighting. Private owners have also formed coöperative fire-fighting associations. The national bureau coöperates with these associations and with the State wardens. The private ownership of most of the merchantable timber means that our chief future progress must come from coöperative agreements between the Federal Service, the States and private owners, for fire protection and replanting.

**Opposition to Conservation.** — For several years there has been a strong opposition to the national conservation policy, both as to forestry and mineral lands, on the part of such States as Idaho, Montana, Washington, and Oregon, which have sparse populations and wish to attract new settlers by throwing open their natural resources to unreserved exploitation. As large parts of the national domain are located in these States the conservation policy naturally conflicts with local desires for quick development, even at the cost of the future. The members of Congress from these States have had placed in the forestry and land laws the proviso that no additional forestry reservations shall be created in certain western States except by Act of Congress. They have also succeeded in cutting down seriously the appropriation for the Forest Service, and disastrous forest fires have resulted. It is not uncommon to lose a million and a half acres of forest annually by fire.

**Additional Legislation Required.** — The more important measures now required are an increase in the number of rangers in order to reduce the districts to a reasonable size, larger funds for coöperation with the States in fire prevention, and the purchase of additional tracts for inclusion in the national forests. To round out this policy the States should not only extend their own forest reserves but must use their police power to require private owners to take adequate measures for fire prevention and replanting.

**The Bureau of Mines.** — This branch of the Department of the Interior, established in 1910, investigates the development, utilization, and marketing of mineral resources and the improvement of health and safety in the mining industries. An intensive study is made of the prevention of waste of minerals in transportation, the use of petroleum and natural gas, the development of pro-

cesses of extraction, mine hazards, rescue and first aid courses for miners, and health in mining communities. The country possesses extensive depositories of low grade ores which cannot be smelted properly under present methods. The Bureau makes valuable experimental studies of this problem, also of the economic use of natural gas supply.

**Mineral Laws.** — Little effort has thus far been made to protect our mineral resources from waste or improper exploitation. The Act of 1910 authorizes the President to withdraw temporarily from settlement and sale any of the public lands in the United States or the district of Alaska and to reserve them for public purposes. This reservation continues until revoked by the President or by Act of Congress. On lands not so reserved, earlier acts allowed the purchase of limited tracts for mining purposes, but by the mineral leasing law of Feb. 25, 1920, a new policy was adopted. Mineral lands may be leased, not sold by the national government. This is a change of the first importance in our national policy and one which bids fair to secure to the community as a whole some of the advantages heretofore reaped exclusively by speculators. In order to attract capital to the development of mineral lands it is necessary to have a lease on liberal terms with a sufficient length of time, such as thirty years, to warrant adequate investment. In order to promote uniformity in the mining laws of the States the Bureau of Mines also collects and publishes the State mining acts and the court decisions interpreting them.

**The Lands.** — Within a century we may have to feed three times as many people as now, and the main bulk of our food supply must be grown on our own soil. Ultimately the present acreage may be nearly doubled by the clearing of millions of acres of brush and wooded land, and the reclamation of swamp and arid lands. But as our acreage is limited, and cannot increase with population it will be necessary to increase the yield per acre. Although our soil is fertile, our mode of farming does not secure as full crop returns as in Europe. Soil fertility need not be diminished; but may be increased. Proper management should at least double our average yield per acre. The greatest wastes of our soil are due to preventable soil washing by floods and erosion, the growing of continuous crops year after year, and the neglect of fertilizers. Much of these wastes might be avoided by government action, both in educating

the people and by a change in public policy. At the time of the adoption of the Constitution, the Federal Government came into possession of vast areas of western lands through cession by the original States. This land, the "public domain," has been increased through the subsequent acquisition of lands, such as the purchase of Alaska and Louisiana, making in all, about a billion and a half acres. Congress under its constitutional power has disposed of most of this land reducing the domain, exclusive of Alaska to about 300 million acres. Nearly all that is left is arid or unsuitable for settlement for other reasons. The administration and sale of public lands are in the hands of the General Land Office, Department of the Interior.

At first our policy was simply to sell the lands as a source of revenue. The Act of 1796 was passed for this purpose. The second step marked by the Homestead law of 1862 was to secure rapid settlement of the land by making free grants to bona fide settlers. Extensive abuses of this privilege occurred; numbers of people were employed to take up land and then transfer it to their employers.

**The Era of Reservation.** — The third epoch in our public-land policy, that of reservation, begins with the conservation movement. The most important step taken has been the reservation of nearly 200,000,000 acres of timber land in the national forests. The policy is also manifest in the agitation to reserve water-power sites, to secure new laws on the disposal of coal-lands, and on the repeal or modification of the commutation clause of the Homestead Act. The recommendations on these subjects by the National Conservation Commission<sup>1</sup> are:

Every part of the public lands should be devoted to the use which will best subserve the interests of the whole people.

The classification of public lands for their administration in the interests of the people.

The timber, the minerals, and the surface of the public lands should be disposed of separately.

Public lands more valuable for conserving water supply, timber, and natural beauties or wonders, than for agriculture, should be held for the use of the people except for mineral entry.

<sup>1</sup> Vol. 1, page 19, Rept. of Conserv. Commission.

Title to the surface of the remaining non-mineral public lands should be granted only to actual home-makers.

Pending the transfer of title to the remaining public lands they should be administered by the Government and their use should be allowed in a way to prevent or control waste and monopoly.

**Conservation of Waters** has to do with the regulation of the flow of streams so as to make them navigable, produce power, furnish water-supply to cities, and prevent floods or soil erosion. This work is undertaken by the Reclamation Service, the Geological Survey, and other bureaus.

Surveys of water supply and flow in surface streams have been carried out in most of the States and territories through the maintenance of 1400 gauging stations, where the volume of water carried by the streams is measured. Records of stage and other data are collected, from which the daily flow of the streams is computed.<sup>1</sup>

There are now 26,000 miles of navigable streams, and this mileage could be doubled by the improvement of waterways. As population increases and traffic becomes more dense, the possibilities of improvement become apparent, especially for the carriage of heavy and bulky articles of freight which can be transported much cheaper by water than by rail. The direct yearly damage by floods since 1900 has increased steadily from \$45,000,000 to over \$238,000,000. Floods also mean the waste of vast quantities of water. This could be largely obviated by the storage of waters in huge reservoirs in the upper branches of streams, and by the re-forestation of denuded catchment basins. The regulation of stream-flow also means a greater development of water power, a source of power which is becoming increasingly important. Under our past policy, water power sites have been neglected except by a few large corporations.

**Water Power.** — About one-fifth of the total power used in the United States is developed from falling water. This proportion should steadily increase as the cost of fuel rises. Attention is now being focussed on our future power requirements and transmission lines over wide areas are being built, together with unconnected systems between generating stations so that the power needs of an entire region may be economically supplied. An intelligent development of our water sites would enable us to use many times our present supply of power from this source. The

<sup>1</sup> See *Annual Report of Geological Survey*.

Geological Survey collects valuable data on the possibilities of saving coal by the use of water power in generating electricity. It is estimated that of a total production of electricity by electric public utility plants of about 39,000,000,000 kilowatt-hours, 62 per cent is produced by fuels, and only 38 per cent by water power. The fuels consumed comprise 35,000,000 tons of coal, 11,000,000 barrels of oil, and 21.7 million M cubic feet of gas.<sup>1</sup>

**The Federal Power Commission.** — For many years water power sites were disposed of as ordinary lands under the Homestead Act ; there was no recognition of the importance of such power. An investigation showed that thirteen companies had secured and retained an amount of undeveloped water power equal to one-third of that in use. The subject was repeatedly called to the attention of Congress by the President and the Secretary of the Interior. Finally the Water Power Act of June 10, 1920, undertook a partial solution of this problem. It established a Federal Power Commission composed of the Secretaries of War, Interior, and Agriculture, with the duty of supervising, conserving, and making future disposal of water power sites in the public lands and reservations.

The work of the Commission is performed through the three departments represented, their engineering, technical, and clerical staff being drawn on for this purpose. The Commission investigates and collects data on the water resources of any region, its water power and the relation to other industries and to national commerce, ascertains the fair value of such power, publishes information for public use, and coöperates with the States in making surveys and records of water resources and water power. It also issues licenses to American citizens and corporations to construct, operate, and maintain dams, conduits, reservoirs, power houses, transmission lines, and other projects, for the development of navigation and utilization of power along, across, or in any of the navigable waters of the United States, or upon any of the public lands and reservations or territories ; it also grants licenses for the purpose of utilizing surplus water, or water power, from any Government dam. It may prescribe a system of accounts for the enterprises which it licenses, and may examine such accounts at any

<sup>1</sup> *Forty-first Report, Geological Survey, 1920, p. 137.*

time and require statements and reports on the business. Every license is limited to fifty years duration, and is subject to revocation if its conditions are violated. Preference is given to States and municipalities which desire to establish power plants, or improve navigation for the public benefit without a profit. Combinations to limit the output of electrical energy, to restrain trade, or to maintain fixed or increased prices for electrical service, are prohibited.

When power from any works or project subject to the Act enters into National commerce, the rates to be charged and the service rendered must be reasonable, non-discriminatory, and just to the customer. Rates and services which violate these principles are prohibited. Such rates and services are subject to the State Commissions, if such exist, and if not, or if the State Commissions cannot agree with each other on rates and services, the Federal Power Commission takes jurisdiction. The Act applies only to works to be established after its passage, but allows previous enterprises to register and be licensed under the Act, if their owners choose. When a proposed enterprise will affect navigation, the approval of the Secretary of War must be obtained, as in other cases.

The law is a praiseworthy attempt to handle the public water resources of the country as a National problem. It should prove highly valuable as a means of developing and conserving essential water power sites and navigation projects, and may greatly assist State and local governments in the cheapening of electrical current.

**Reclamation.** — This term includes the draining of swamp lands and the irrigation of arid wastes. Although we generally think of reclamation as irrigation there is much more land that may be conserved for agricultural uses by drainage of swamps. The area of swamp is estimated at 75,000,000 to 80,000,000 acres, located principally in Florida, Louisiana, Mississippi, Arkansas, Michigan, and Minnesota. By the Act of 1850, the United States granted to the several States the lands which were classified as swamps. Over 65,000,000 acres were turned over to the States under this law and by them all but 5,000,000 acres were conveyed to private holders. Only about 1,300,000 acres remain in national possession at present.<sup>1</sup> It is estimated that about 16,000,000 acres

<sup>1</sup> *Report National Cons. Com. I, 83 and III, 361 et seq.*



of swamp land, largely in the upper Mississippi Valley, have been reclaimed and converted into exceedingly profitable farm lands, and that the value of such reclaimed spaces is double or treble the original value plus the cost of drainage. Practically all the wet lands of the country can be reclaimed at profit, and the Conservation Commission estimates that they would form homes for a population of 10,000,000.

*Irrigation.* — To irrigate large sections of arid land, immense works are necessary, and private corporations had begun to attempt this as early as 1880. Most of the large ditches now in use were built by such corporations, many of the latter being bankrupted by the long period of waiting for profits. The individual farmers, however, flourished. Recently, the Federal Government has begun to participate actively in the reclamation of arid lands.

The Conservation Commission estimated that 45,000,000 acres of arid land in the United States were capable of irrigation, chiefly in California, Montana, Wyoming, and Idaho. The Great Desert is really a great reservoir of productive power ready for development as soon as Congress and the States can supply the necessary funds.

The Federal Government has passed four important laws for the encouragement of irrigation: (a) the desert land laws, (b) the Carey Act, (c) the Reclamation Act, and (d) the Warren Act. The Desert Act of 1877 and 1891 allows the purchase at cheap rates, of desert land provided the entrant irrigates the land. It has brought poor results. The Carey Act of 1895 transfers to the States large areas of national arid land on condition that they secure the irrigation of these tracts. The States accept these grants and contract with private companies for its irrigation. The plan has been successful.

**Reclamation Act of 1902.** — The most important irrigation measure is the law of June 17, 1902, under which the government itself undertakes the irrigation of lands still in the public domain. A special fund in the treasury is set aside out of the proceeds of sale of public lands, and is put in charge of the Secretary of the Interior, who makes surveys and examinations, and constructs projects of irrigation. He also operates such projects until charges for the water have been repaid — whereupon the burden of operation and maintenance passes to the owners of the land. The

irrigation projects of the Government have been confined mainly to those enterprises which are too large, too costly, or too slow in producing returns to tempt private or corporate investment. The Warren Act of 1911 an important supplement of the Reclamation Act, provides a connecting link between Government works and private canal systems built in the same vicinity or drainage basin. The latter usually lack storage facilities, depending upon the unregulated flow of the streams alone. This natural flow often declines in the irrigation season to a point far below the needs of all the canals. The Government, therefore, furnishes stored water at such times from the reservoirs built by the Reclamation Service.

**The Reclamation Service.** — A separate bureau of the Interior Department, called the Reclamation Service, has been organized to take charge of the work. It has already completed vast systems of irrigation and has others in course of construction. The Service consists of about 400 employees whose time is devoted to the planning of new projects, the engineering and other work connected with construction, an extensive educational campaign, and the survey and leasing of water power sites. The costs of the Service are paid partly from regular appropriations, partly from land sales, and partly from an issue of bonds authorized by Congress. A revolving fund has been created which is used by the Service on any new projects as soon as the old projects have paid for themselves. By the expenditure of \$125,000,000 the Service has created values of over \$500,000,000.<sup>1</sup> The funds devoted to this purpose should be increased many fold. There are few activities of the national government which are so directly productive as those of conservation and reclamation. There are now more men and women than ever before in our history who are seeking land. The annual report of the Reclamation Service shows that the value of products on irrigated land is double per acre the average yield of ordinary land in the humid regions. There is also a closer settlement, a more intensive cultivation, and a more

<sup>1</sup> Some of the most important irrigation projects of the government are the Salt River system with an area of 272,000 acres and a tunnel two miles long, and a dam 1000 feet long and 284 feet high, the Uncompaghere project in Colorado with an area of 146,000 acres and the Gunnison tunnel 5½ miles long; other projects in Idaho covering 450,000 acres, and in South Dakota covering 100,000 acres.

active community spirit and coöperation in the irrigated districts. In view of all these facts it would seem that a greater proportion of national funds should be invested in these productive enterprises.

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### QUESTIONS

1. Why do we need a national policy of conservation?
2. How has the relative cost of labor and raw materials delayed this policy?
3. Would you favor leaving the whole matter of conservation to individuals and corporations or to the national and State governments and why?
4. How was our conservation movement started?
5. Outline the special need of forestry regulation.
6. What has Congress provided on this subject?
7. What has the President done?
8. What have the States done? Summarize the Pennsylvania Forest Land and Timber Tax.
9. Summarize the organization of the forest service and explain its work.
10. What are the causes of forest fires? Extent of loss?
11. How does the Forest Service cope with the problem? What further government action could be taken?
12. How could the national forest policy be made more effective?
13. Explain the objection in the northwest to the government's conservation policy?
14. How would you show the need of government conservation of mineral resources?
15. How does our present policy regulate the private acquisition of mineral lands in the public domain?
16. Explain some of the wastes in production and use of coal.
17. Why is our public land policy of importance to the people?

18. What was the original land policy?
19. Explain the homestead law.
20. What are its practical defects?
21. How are forest lands acquired under the Timber and Stone Act?
22. Contrast the present with the past land policy of the government.
23. Explain the most important proposals for future land legislation by the Conservation Commission.
24. What is the practical importance of a public water conservation policy?
25. How and why has water power increased in value in recent years?
26. How are water-power sites conserved by the Act of 1910?
27. Explain the work of the Geological Survey in connection with water power conservation.
28. What is the present system of regulating water power in the public domains?
29. What are the advantages of this plan over the old system?
30. Explain the chief proposals for additional laws on this subject.
31. What is meant by reclamation?
32. Explain the practical value of irrigation to the western farmer and show the extent of the need.
33. Summarize the provisions of the Carey Act.
34. The reclamation act of 1902.
35. Give some examples of what the government has done under the latter act.
36. Describe the organization of the Reclamation Service.
37. Would it be good policy for the government to extend its reclamation work? What are its chief obstacles?
38. Prepare an essay on National Conservation of Natural Resources showing what the government itself is doing and what it could profitably do.
39. Prepare a report on the forestry and other conservation laws of your State.

## CHAPTER 14

### THE FEDERAL JUDICIARY

THERE is no feature of the American government which has been so generally admired abroad nor which is now undergoing such drastic criticism at home, as the Federal judiciary. The unusual power possessed by our courts, of declaring a State or National law void when it is contrary to the Constitution, has brought the judge into a much more prominent position in this country than elsewhere and has set him above both legislator and executive. But with this high prominence has come an unexpected and undesired responsibility, that of defeating the legislative will — an exercise of power which necessarily calls down upon the courts the highest praise and the most violent denunciation from different circles of the people. The strong influence of court decisions upon business and labor conditions is becoming more apparent and public attention is being attracted to the courts in a way that must increase their efficiency and usefulness. We shall examine briefly:

1. Why we have separate Federal Courts.
2. Their present organization.
3. Their practical operation and influence.

**Reasons for Separate Federal Courts.** — The Constitution of 1787 established a national system of law which was to be uniform throughout the United States. In order that the interpretation of this law by the courts should be maintained on the same level in all parts of the country, a Federal court system was necessary. Observers of our State governments are often surprised by the lack of uniformity and differences of opinion between the courts of different States in the enforcement of the same legal principles. Such a danger could not be permitted in Federal law.

Second, not only must the interpretation of the national law be uniform, but it must also be impartial. If the Federal law were left to the State courts to interpret, these might favor their own

citizens at the expense of those of other States or of the foreigner. Third, there were problems of State control of lands; there were questions in dispute between the State governments themselves, and fourth, there was also the possibility that the State courts might enforce the national laws in such a sense as to rob Congress of its intended powers. We can hardly imagine a State court giving those broad statesmanlike national views of the powers of Congress, which are contained in John Marshall's Supreme Court opinions nor could we expect that when the State and National powers came into conflict the State judges would support any views of National progress that would limit the State sovereignty.

For these reasons a separate national judiciary was established, a plan that has proven successful in all of the points above described. As a general rule, the personnel of the Federal courts is superior to those of the States both in legal knowledge and in the ability to handle large legal and constitutional questions in a large way. Not only have they established the desired uniformity of Federal law but under the stimulus of the Supreme Court they have helped and guided in the growth of the National powers and established the National sovereignty on a secure footing over that of the States. At the same time they have played an indispensable part in preserving and protecting the Constitution.

**The People's Interest in the Constitution.** — Important as is the duty of interpreting the national law with uniformity, the greatest service of the national courts is the protection and development of the Constitution. There is no government question today which is so little understood as the development of the Constitution by the courts. It is to the interest of every man, woman, and child in the country that the Constitution should grow in order to insure a *steady, continuous* progress of our business and social conditions. This progress is a never-ending duel, in the political arena, between radicalism and conservatism. If either side completely vanquishes the other through a long series of years, the progress of the country is not steady, but suffers either a reaction or a severe prostration. The radicals always fasten their attention on human rights and point out how these rights are being violated under the existing system; but the radicals cannot be trusted with permanent control because they gradually press their doctrines to impracticable extremes and fall under the influence of wild, unbalanced leader-

ship. Nor are the conservatives any more trustworthy, since their thought is but little occupied with unequal human rights or grievances. Their aim is to protect the strong and to preserve what is, while their leaders, though more able, are too often reactionary.

The normal, healthy business and social progress of the nation cannot be secured by the overwhelming and long-continued victory of either of such forces; it must come through the gradual working out of a feasible compromise in the system and policy of the government. How shall this compromise proceed with some steadiness and continuity? We must have some machinery which will prevent too sudden or sweeping a change by the radicals or too violent a reaction by the conservatives. This machinery is the Federal judiciary.

The Constitution is replete with safeguards against extreme radicalism,<sup>1</sup> the court must either defend and uphold these bulwarks of conservatism or see the national progress confounded by the ill-considered whim of a momentary majority. The Constitution grants progressive powers, the court must either interpret these in the broad, free, advancing spirit of statesmanship or make the Constitution "not an instrument of life but a symbol of death." It is as much the judicial duty to find new and broader meanings for the words of the Constitution, thereby strengthening and applying its spirit in a progressive way to new conditions, as it is to check the legislative in any attempt to override or destroy the fundamental law. It is in this task of protecting the Constitution from both extremes and thereby preserving the even pace of progress, that the American judiciary fulfills its highest duty.

"A Constitution," says Governor Baldwin, "is the garment which a nation wears. Whether written or unwritten, it must grow with its growth." He aptly quotes Lord Bryce, "Human affairs being what they are, there must be a loophole for expansion or extension in some part of every scheme of government; and if the Constitution is Rigid, Flexibility must be supplied from the minds of the Judges."<sup>2</sup>

Justice Holmes of the Supreme Court has well expressed the duty

<sup>1</sup> See the practical illustrations of this whole thought in the Chapters on the Constitutional Protections of Business, the Police Power, and the Powers of Congress.

<sup>2</sup> S. E. Baldwin, *The American Judiciary*, page 84.

of the Judge in interpreting the Constitution — “ But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.” *GOMPERS v. UNITED STATES*, 233 U. S. 604, 1914. And even in cases involving no constitutional point, the courts must show statesmanship of a high order. The constitutional question “what is commerce?” as we have already seen is one which the Court may answer in such a way as to extend the control of Congress over a great part of the business of the country or to destroy that control completely, and leave business subject to the 48 State legislatures. Even in the problem — what is a “reasonable and just” railway rate? — the Court’s answer may give a large profit to the carrier or may cut that profit in half or destroy it altogether and thereby increase or diminish the value of railway property by hundreds of millions of dollars. What is railway “discrimination”? Upon the Court’s reply may hang the chances for immense wealth for some interests and the smothering of others, the immediate and rapid rise of whole communities and districts and the slow decay of others; — cities may grow or decline accordingly as the judiciary interprets the long and short haul clause of a commerce law to mean one thing or another.

When is a drug “misbranded” or falsely labeled? If the Court declares, as we have seen that it did, that misbranding is a misstatement as to the ingredients actually used in a drug compound, then the consumer is only protected against fraud in ingredients; if the Court decides, as it did, that “misbranding” does not include false and deliberate misstatement on the label as to the curative powers of the drug, the patent medicine fraud continues unabated until Congress is forced to make its intention emphatically clear by the Shirley Amendment.

**Early Enlargement of the National Powers by the Court.** — Mention has already been made of the Court’s great influence in establishing the power and authority of the National Government upon a secure footing, early in its history. The patriotic foresight of this policy can only be appreciated when we realize how strong were the centrifugal forces tending to break up the new govern-



ment and how important it was to establish that government firmly in the respect and loyalty of the people. A weak National Government in the first twenty years following 1789 would have inevitably meant the rapid disintegration of the union and its annexation by foreign powers. It was the work of the Court to rehabilitate the nation legally and to express in law that dream of union which the constructive genius of the great Federalist statesmen had revealed to the people. The Court did this by giving to the national authority the benefit of every doubt in the interpretation of the Constitution. Can the Nation acquire new territory? Without this power we could not purchase Alaska, Louisiana, Florida, nor round out our national domain as a continental power. Does the National Constitution protect corporation charters against State action? Can the Nation exempt the notes of its bank from State taxes? Can it secure a similar freedom of its national loans from State tax burdens? Can it regulate national commerce free from State interference? Does such commerce include navigation or is this latter subject to State rule? In these and a host of similar problems Chief Justice Marshall and his successors struggled to give the Federal powers a broad firm foundation and to establish the legal sovereignty of the Nation.

**Present Organization.** — The first Judiciary Act was passed in 1789, followed by a number of later laws all of which were revised and codified by the general Act of March 3, 1911. This provides for the following organization: The Supreme Court, with a Chief Justice and eight Associate Justices, any six of whom constitute a quorum. The Chief Justice is paid \$15,000 annually, the other justices \$14,500. A marshal, a clerk, deputies, reporters, etc., are appointed by the Court. The Supreme Court has been the idol of the American legal fraternity and has been copied by foreign countries in establishing Federal forms of government. Its prestige and high standing have come largely from that spirit of statesmanship which we have seen is especially required in the American court system. Its jurisdiction includes "original" cases, being those which may be brought immediately before it in first instance, such as cases affecting ambassadors of foreign powers, cases in which a State is a party,<sup>1</sup> and the "appellate," making up the larger

<sup>1</sup> *The Eleventh Amendment.* — Article 3 of the Constitution provides that the Federal Judicial Power shall extend "to controversies between a State and cit-

proportion of its duties, and including appeals and reviews brought to it from the Courts below. The nine Circuit Courts of Appeals each consist of three judges with a salary of \$8500. Those tribunals were established in 1891 to relieve the Supreme Court of its burden of business by hearing appeals from the lower courts. At the time the change was made cases remained on the docket for three years before they could be argued. The judgment of these Appeal Courts is final except in a narrow range of cases, but they may certify any important disputed point to the Supreme Court for decision, or the latter may on application review the opinion of the Court of Appeals.

**District Courts.** — The area of the United States and Alaska, Hawaii, and Porto Rico is divided into 83 judicial districts with a district judge in each and in certain districts two or three judges, each with a salary of \$7500 yearly. The court officers of each District Court are appointed by the Court. All the jurisdiction which was formerly held by the Circuit Courts, now abolished, has been transferred to the District Courts, which makes them tribunals of first instance in Federal cases. The Judge in each district appoints a commissioner who acts as a sort of justice of the peace in criminal cases.

The United States Court of Claims consists of five judges with a salary of \$7500 except the chief justice who receives \$8000. The Court sits at Washington and considers all civil claims against the United States. A lump sum is annually appropriated by Congress to pay the judgments awarded against the Treasury by this Court. This formality is necessary because the Constitution, Article 1, Section 9, declares that, "No money shall be drawn from the treasury but in consequence of appropriations made by law."

The Court of Customs Appeals is composed of a presiding judge

izens of another State." The State of Georgia was sued for non-payment of a debt under the above clause, and the State attorney urged in defense that the State could not be sued without its consent. The case coming to the Supreme Court, that tribunal decided against the State in favor of the private creditor.

(*CHISHOLM v. GEORGIA*, 2 DALLAS, 419; 1793.) The States' Rights Party which was strong in our early history secured the adoption of the Eleventh Amendment which prevents suits from being brought in the Federal Courts against any State by the citizens of another State or by foreigners. All of the States have made provision by which such suits may be brought in their own courts. Suits between States may commence in the Federal Courts as before.

and four associates receiving a salary of \$7500 yearly. The Court sits in any of the judicial circuits and has exclusive jurisdiction over appeals from the Board of General Appraisers of the Treasury Department as to the value of imported goods and the rate of duty imposed thereon.

The judges in all the Federal courts are appointed by the President with the advice and consent of the Senate, and serve during good behavior. In the territories and dependencies there are courts created by special acts of Congress; these bodies are not a part of "the judicial power of the United States" as provided by Article 3 of the Constitution, neither do the detailed provisions of that Article apply to them, such for example as the tenure of judges during good behavior, etc.; their authority comes from the power of Congress to govern the territories and Congress can and has organized and abolished them at will, limiting their terms of office and providing for appeals from them to the regular Federal courts or not, as it pleased.

The Supreme Court, being established by the Constitution, cannot be abolished by Congress, although the number of its members may be increased, and upon vacancies occurring, its membership may be reduced. The inferior courts, while provided for in a general way by the Constitution, are largely the creatures of Congress. They may be reorganized, new courts created, or a whole class of courts discontinued, as was done with the Circuit Courts and the Commerce Court in 1913.

**Jurisdiction of the Courts.** — In fixing the jurisdiction of the Federal courts the Constitution prescribes that this shall consist of:

All cases arising under the Constitution itself.

Under Federal laws and treaties.

Cases affecting ambassadors, consuls, etc. (Because such suits would involve foreign governments or their representatives.)

Cases of admiralty and maritime jurisdiction.

Those in which the United States is a party.

Controversies between States.

Between citizens of different States.

Suits commenced by a State against the citizens of another State.

Between citizens of the same State under land grants from different States.

Between American citizens and foreign States, citizens, or subjects.<sup>1</sup>

A second glance over this list of controversies shows that they include all the cases in which State partiality or bias might influence the decision if it were left to the State courts. It also includes those subjects which require the greatest uniformity in decision in all parts of the country.

**The Supreme Law.** — The Constitution in Article 6, Clause 2 defines the order of precedence of the law as follows:

“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.”

**The Decision of Constitutional Points.** — In passing upon the constitutionality of any act, State or Federal, the courts observe certain guiding principles, chief of which are the following:<sup>2</sup>

Any court may be called upon to decide the question of constitutionality from the Supreme Court of the United States down to the Justice of the Peace in a country village. Whenever brought to its attention in such a way that the case must be said to turn upon the constitutionality of a given law or ordinance, such a court may properly decide the point.

Nevertheless in all cases the court will avoid the point of constitutionality unless it is necessary to decide it; if the case can properly be determined upon some other grounds such a course will be followed. This policy is a natural one because the judges do not wish to go out of their way to attack the validity of a statute. Accordingly, if they find that the court has no jurisdiction in the case or that the law does not apply to the conditions before them, or if they have other reasons for making a decision without invalidating an existing statute, they will take advantage of the other grounds for their decision.

Those whose rights are not involved or affected by a law cannot

<sup>1</sup> In cases affecting ambassadors, public ministers, and consuls, and cases to which a State is a party, the Supreme Court has original jurisdiction.

<sup>2</sup> These maxims are admirably set forth in Cooley, *Principles of Constitutional Law*, page 152.

ask the court to invalidate it. The law stands until some one whose rights are immediately concerned questions its validity.

Not every law which is unwise or unjust is necessarily unconstitutional. We often hear that a law is invalid because it is taxation without representation or because it is unfair or inexpedient or wasteful, but none of these defects renders the act unconstitutional unless it conflicts with the letter or spirit of some part of the Constitution.

If an act is constitutional in one part and unconstitutional in another the courts will declare invalid only that part which conflicts with the fundamental law and will allow the rest to stand if possible. This is not possible where the remnant would be so far from the legislative intent and purpose as to be a clear violation of the will of the lawmakers. For example, the income tax of 1894 contained certain provisions which were valid and others which conflicted with the Constitution, but the Supreme Court concluded that if it allowed the valid parts to remain, the will of Congress would be entirely defeated and a grotesque tax law of which Congress would utterly disapprove would result. For this reason it declared the entire act unconstitutional.<sup>1</sup>

The presumption is always in favor of the validity of an act, a mere doubt or possibility of conflict with the Constitution is not sufficient. The benefit of the doubt will always be given to the legislator. If any reasonable construction harmonious with the apparent purpose of the legislature can be found which will render the intent of the act constitutional, such construction will be adopted by the Court.

As a general rule the courts will not impute illegal motives to the legislative authority; an unconstitutional purpose in legislation, in order to be so decided, must appear clearly upon the face of the act or from its terms or its necessary consequence.<sup>2</sup>

**Federal Interpretation of State Laws.** — Although the Supreme Court exercises the fullest freedom in passing on the constitutionality of a State act, it accepts without question the decisions of the State Supreme Courts as to the meaning of State laws and their

<sup>1</sup> POLLOCK V. THE FARMERS LOAN, 158 U. S. 601; 1895.

<sup>2</sup> See also the discussion of these rules in Story, *Commentaries on the Constitution*, sections 399 and ff.

conformity to State constitutions. It will not question their decision on these points because it is not an interpreter of State laws nor of State constitutions further than their harmony with the National law. If it did not observe this rule it would immediately be plunged into an endless maze of purely local questions which would soon overburden the Court and lead it far from its original purpose and object. A long line of decisions has established this principle. Of the many questions which arise in the Federal courts between citizens of different States, the large majority are matters of State law. In all of these the national courts follow the interpretation of the State tribunals as a matter of course.

**Execution of Court Judgments.** — The decrees and decisions of the Federal District Courts are executed, if necessary, by the marshal of the district. If he is opposed by force application may be made for Federal troops to carry out the court decision, although such a contingency rarely occurs, because of the general respect for Federal tribunals.

**Advisory Opinions.** — The Federal courts do not give opinions on the constitutionality of any bill or any other question until the case actually comes before them in which the rights of interested parties are concerned. Washington, in his first administration, asked the advice of the Supreme Court as to the rights and duties of the United States under certain of its treaties and under international law, but the Court answered that it could not give a decision until the case came before it. The reason given is that the courts are not administrative, political, or advisory bodies in any sense of the word. Their duty is to uphold the Constitution and the laws by applying them to actual cases. Any extension of this power to include the giving of advice to the legislator or the executive, it is feared, might bring the courts into political agitation and undesirable partisanship. While there may be some force in this view the advantages of such a court opinion would far outweigh its dangers. It must be remembered that the courts would not be called on to *advise* as to the expediency or wisdom of a proposed law but only to *inform* as to its validity. How much uncertainty and loss of time might be saved to the community if the doubtful point of constitutionality could be cleared up before the passage of a bill instead 3 or 5 years later! The real objection of greatest weight would be the burdening of the courts and the necessarily short time which

they would have to render their advisory opinions. The Court of Claims may be consulted by a department head, as to the validity of a department debt, and the Supreme Court of the State of Washington may be consulted by the Secretary of State as to the constitutionality of an Initiative proposal which is about to be submitted to the people. The Supreme Courts of Massachusetts and several other States also give opinions to the Governor or legislature.

**The Judicial Power to Declare Laws Unconstitutional.** — There is no doubt that lawyers originally were divided on the question whether the acts of Congress could be declared invalid by the courts. Some of the Constitution framers believed that the courts had such a power. In the minds of many of the framers, the new government that was being formed was based on an *agreement*, and if it exceeded its powers under the agreement it might usurp those of the States. They felt the need of some authentic interpretation which would uphold those laws properly passed and declare invalid those which exceeded the agreement. Naturally the courts, being the only proper authority to interpret the laws, must measure each law by the Constitution and declare void and of no effect every measure which transcended the proper powers of the new government.

Before 1789 several of the State courts had revised or annulled legislative acts which they considered contrary to the State constitution, and had pointed the way for similar action by the national Supreme Court. In *HOLMES v. WALTON*, decided 1780, the Supreme Court of New Jersey held invalid an act passed by the legislature during the Revolution, which provided that goods of the enemy might be seized and confiscated after trial by a jury of six men. The Court apparently considered that a jury of six men was not a jury as commonly understood in the colony up to that time. Upon an attempt being made by petition to the Assembly to have the legislature overthrow the action of the Court, the Assembly passed a law ratifying the Court's action and declaring that the judges on demand of either party should grant a jury of twelve men. This precedent must not be over-estimated in importance but it is apparently a clear annulment by the Court of a legislative act on the ground of unconstitutionality. Later cases in other States established the principle more completely.

In the National Government it was confirmed by Chief Justice Marshall in *MARLBURY v. MADISON*, 1 CRANCH, 137. The Constitution had given the Supreme Court original jurisdiction in

1. Disputes in which a State was a party;
2. Suits in which ambassadors and ministers were concerned.

But Congress attempted by the Judiciary Act of 1789 to add other kinds of cases.<sup>1</sup> This raised the question — could a law change the Supreme Court's original jurisdiction from what the Constitution provided it should be? To this Marshall answered that the Constitution was supreme and the law must be regarded as of no effect in so far as it violated the Constitution.

“The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered by this court as one of the fundamental principles of our society. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each.” From this momentous decision down to the present time the power of all our courts, both National and State, to declare invalid a law conflicting with the Constitution, has never been successfully disputed. The various movements which are now on foot to limit this authority, are based on the thought that it has been honestly used, but in such a narrow way as to block the enactment of urgently needed legislation.

<sup>1</sup> This added original jurisdiction was the power to issue a writ of mandamus (court order) to public officers in certain cases. But a writ of mandamus has always been held to be an act taken only by the Court which has original jurisdiction over a case. Congress was therefore in substance enlarging the original jurisdiction of the Court beyond that fixed by the Constitution.



In the view of Professor Charles G. Haines<sup>1</sup> our attitude towards the Courts and towards their control of legislation is largely determined by our general views of government — if we believe in the theory of checks and balances, to protect property rights and the interests of minorities at whatever cost, we shall uphold judicial control of legislation; but if we lend our support to the principle of “popular rule” espoused by the more advanced factions and parties in national politics, we shall uphold rather the principle of legislative and executive supremacy, and favor some means of limiting the judicial veto. The mildest of these is the provision of the Ohio Constitution of 1912 that decisions holding a State law unconstitutional must be concurred in by six of the seven judges of the State Supreme Court. The more radical proposals are the recall of judges and the recall of judicial decisions, also the suggestion that Congress should be authorized to repass an unconstitutional law over the Court’s veto by a two-thirds vote.

Not a little of the popular hostility to the courts is caused by legislative cowardice for which the judiciary is in no sense responsible. Both Congress and the State legislatures frequently pass laws that are either unconstitutional or unclear, knowing that the odium of declaring them illegal or of defining their real meaning will fall not upon their authors but upon their interpreters. This is now so frequently done as to be a recognized legislative custom.

**Practical Operation of the Federal Judiciary System.** — Our American courts are passing through an era of searching criticism; the stock promoter and the radical agitator, alike, are dissatisfied with judicial rulings. It is also complained that the judges’ decisions lag too far behind public opinion, a strong current of popular sentiment is demanding a cheaper, quicker, and simpler method of procedure, and there are sporadic proposals for a recall which shall place it in the power of the people by majority vote to oust from office any judge or other official at any time. The judicial system is about to undergo some revision in order that it may reflect more accurately and helpfully the business and social development of our period. The worth-while criticisms of our system may be divided into two general classes; first, that the judicial

<sup>1</sup> *The American Doctrine of Judicial Supremacy*, Macmillan, 1914. See especially Chapters 3 and 4.

process is so slow and costly as to be a luxury for the rich. There is much truth in this charge and it applies not only to the Federal courts but to those of the States as well. England and the Continental countries have far surpassed us in the admirable simplicity and dispatch of their court procedure. In America it is not uncommon for a law suit to require from five to seven years from its inception to its final decision. This occurs when both sides are willing to expedite the case and where the question is not such a close one as to require more than one argument before the final court. When mistakes in procedure occur or either side interposes delays, or where a re-argument is necessary, from one to three years additional time may be required, making a total of from six to ten years of litigation. Numerous instances of this latter kind are constantly recurring.

Since much of this unfortunate slowness has been due to overcrowding of the dockets of the courts and to the immense recent growth of litigation over Federal laws, Congress by the Act of September 14, 1922, created twenty-four additional judgeships and provided for an annual conference of the senior judges from all the circuits, at which a report is made covering the number and kind of cases on the docket in each of the Courts and the need of additional assistance. The Chief Justice may request the conference judges to assign extra judges to districts where help is needed. A movement has also been started to simplify and hasten procedure of the Federal Courts and to give the Supreme Court power to prescribe forms and rules for all the Federal Courts. Some of the delays are unavoidable, but much must be charged to downright slowness. So, for example, in *ATHERTON MILLS v. JOHNSTON*, decided by the Supreme Court May 15, 1922, an injunction was sought to prevent the enforcement of the Child Labor Law. Johnston filed his complaint April 15, 1919, and by the time the case was decided, three years and one month later, the Supreme Court ruled that the child having reached an age in excess of 14 the case would no longer be considered! On the same day the Supreme Court handed down a decision that the Act was unconstitutional.

In *TRUAX v. CORRIGAN*, decided December, 1921, a still more striking case is presented. Here an employer sought an injunction to protect his business from an unlawful conspiracy, filing his com-

plaint in 1916. He was denied protection by the State courts and appealed his case to the United States Supreme Court where it was decided in his favor in 1922. Although he thus won a legal victory by his six years' fight in the courts, his business had meanwhile been completely destroyed and himself financially ruined.

A much larger increase in judgeships is urgently needed. In some of the jurisdictions the docket is so overburdened that cases cannot be called for a year after they are filed. The abuse of "continuances" is also a serious block to quick procedure. For these both the attorneys and the courts are responsible. It is now customary even in the Federal courts for the judge to grant several continuances or postponements on the application of either side, without serious question. The attorneys, knowing this, make use of it not only to enable them to conduct other cases but also to delay and harass the opposing party.

**A Simpler Court Procedure.** — In the second place, lawyers and laymen alike agree that the procedure in most of our courts is needlessly complicated, and inordinately time-consuming. Mr. Taft, both as President and as Chief Justice has showed his acquaintance with these weaknesses and made a special effort to remedy them. Pursuant to his suggestion, the Supreme Court revised and simplified the entire method of pleading and conducting equity suits in all the Federal courts; a similar revision is contemplated for the ordinary *law* cases. Most of the needless complexity in the starting of suits and in the nature of the exact pleas to be entered has descended to us from English procedure of two hundred years ago — while in the land of its origin, this same procedure has long been abandoned for simpler, more convenient forms. In this respect our Federal courts are far more advanced than those of the States. The tendency to seize on trivial detail or minute discrepancies in statement or form has been allowed to run riot through our procedure with appalling cost to the community and to the popular respect for the courts. Under the continued stimulus of Chief Justice Taft and the American Bar Association strong efforts are now being made to divest procedure of its unnecessary formalities and delays. Nothing could be done which would so effectually rehabilitate the judicial system in the trust of the people. In the last analysis we do not measure the value of our tribunals by the method of their choice, whether appointed or elected, nor by their

qualifications, nor their salaries, nor by the recall, nor even alone by their erudition and knowledge of the law — rather do we believe “by their fruits ye shall know them.” If the courts can give us broad, statesmanlike interpretation of the law through a quick, simple, and cheap method of procedure, it matters not whether they are appointed nor whether we can recall them or their decisions. And if on the other hand we adopt every modern device to make them sympathetic with the popular will but allow the technicalities of a by-gone age to remain, encumbering their machinery, their real work is not done.

A third and more serious criticism of our court system is that it protects the powerful against the weak, and is largely a means of maintaining and fortifying the interests of the conservative classes exclusively. This criticism while untrue in many cases has sufficient basis to require examination. The legal training of the judge from the time he starts out as a practicing lawyer is such as to attract his attention to the sacredness of property; his mind is chiefly occupied with the means of upholding property rights. In examining the historical reasons for our existing law, he is inclined to look with much greater care upon the past than upon the present growth of the law. As a result his whole professional education makes him intensely conservative unless by temperament his natural instinct favors progressive changes. A profession whose members are trained by long environment to this view of life must naturally tend to sympathize with what is, rather than to seek new interpretations of the law in the interest of less influential classes of the people.

It is no criticism of the judge to say that his education has molded his habit of mind, since the same is true of any other professional or business class, yet the fact is a serious weakness in our judicial system, and has created a feeling in wide circles that the judiciary is under the influence of property interests. Such a control if it exists is not the result of a deeply laid plot or scheme but rather of this psychological fact of natural reaction against change, caused by the environment and training of the judge's mind. This conservative bias must be changed, not by a change in the appointing power, not by a recall, nor by any other device which may threaten the independence of the judges, but rather by a change in the method of training men for the bar. Since the judge is first a

lawyer, it is the education of the lawyer which must be made to include a knowledge of the causes and nature of social and economic growth. If our law is to be progressive it must be interpreted by men trained to see the necessity of legal growth and life. Here again some foreign systems have developed more rapidly than our own. They have insisted on giving prospective attorneys and judges a thorough training in social and economic as well as legal affairs. If the members of our courts in this country were so educated there would be little reason for complaint of class partiality. If our judicial system were simplified, our court procedure curtailed and expedited, and the legal training of the attorney were made more social in character we should have a national judiciary second to none.

**The Injunction.** — Where damage to property is feared as in case of a riot or organized violence, the threatened property-holder usually applies to the court for an injunction. This is a writ issued by the court either to particular persons mentioned by name or to all persons whomsoever, forbidding them to commit any act which will destroy the property in question. This injunction is then published or "served," and upon such service becomes binding on all parties concerned. Any person disobeying this writ is liable to immediate arrest and punishment for contempt of court, either by fine or imprisonment or both. The injunction is often asked for by the Executive to compel obedience to a law. A good example is the case of *DEBS*, 158 *UNITED STATES*, 564, 1895, which arose in the Pullman strike in Chicago in 1894. In this case Eugene V. Debs, President of the American Railway Union, on the petition of the United States District Attorney was enjoined by the United States Circuit Court, from combining or conspiring with other persons to obstruct the rails, tracks, engines and trains of certain railways engaged in interstate commerce and in carrying United States mails. Debs and other members of the American Railway Union and "all other persons" were forbidden by the injunction from so conspiring to commit such damage to property and to the mails. After the injunction was issued the violence continued and Debs and four of his fellow officers in the Union accused of disobedience to the injunction, were brought before the Circuit Court, and on December 14, 1894, they were found guilty of contempt and sentenced to imprisonment in the county

jail for terms varying from three to six months. They appealed to the Supreme Court of the United States which upheld the lower court in all respects and declared the injunction to have been properly issued in order to protect the property of the United States and to prevent interference with the postal laws.

The use of the courts to enforce Federal laws has now become the principal mainstay of the Executive when faced by serious opposition. The employment of the military is avoided except as a last resort. Much criticism has been aimed at the injunction by the leaders of some labor unions because the writ has prevented them from employing either violence or other methods to destroy the business of the employer, in labor disputes. This criticism bears chiefly on the following points: (a) restraining orders are issued too hastily without hearing both sides; (b) they do not describe accurately and fully the precise acts forbidden; (c) when so used as a weapon by the employer and violated by the worker the latter is subject to fine and imprisonment without a jury trial.

(a) The hasty issue of restraining orders, or temporary injunctions is especially objected to in that it prevents the persons restrained from presenting their side of the controversy before the order is issued. A judge may be applied to even at his home, by the attorney for one side, with a sworn statement that immediate and irreparable injury is about to be inflicted on his client's property. No testimony need be taken from the other party nor need the latter even be summoned, but if the judge feels after hearing the arguments of the first party that there is reasonable ground to expect such injury, unless immediate steps are taken, he may grant a temporary restraining order which may run for weeks or even months before an argument is heard upon both sides.

(b) The vagueness and inaccuracy of many restraining orders makes them far more sweeping and drastic than the law permits, and on appeal they must frequently be modified and brought within the law. But they are not changed until months after they were originally issued, and in the meanwhile every person mentioned in them is under the severe restraint of an illegal court order. In the Bucks Stove and Range case,<sup>1</sup> Samuel Gompers and others had established an illegal boycott against the stoves and other

<sup>1</sup> See *GOMPERS v. BUCKS STOVE AND RANGE CO.*, 221 U. S. 418, and *GOMPERS v. U. S.*, 233 U. S. 604; 1914.

products of the Bucks Company and they were very properly forbidden from continuing it, but in its injunction the Washington court even went so far as to forbid them from referring to the controversy in print or in their public meetings — an order which later, on appeal, had to be modified since it denied the freedom of speech and of the press, as protected by the Constitution.

(c) He who violates an injunction or restraining order is guilty of "contempt of court" and may be summarily punished by fine or imprisonment or both, without a jury trial. The court which has issued the original order, commands the arrest of the defendant, and allows him to explain his conduct or produce evidence to show that he did not commit the act complained of. If from the testimony it appears that he is guilty, he may be allowed to apologize to the court and promise future obedience or in serious cases he may be imprisoned for a short time. These provisions are in themselves most reasonable and lenient and cannot be criticized as severe, but when applied in labor cases, to the violation of hastily issued orders, they cast upon the defendant the reproach of violating the law and of having a jail sentence hanging over him when in fact his action may have been well within his legal rights. Later the injunction may be changed or dissolved altogether by a higher court and the decision and sentence reversed, but henceforth the defendant is stigmatized as an "anarchist" or a "criminal", regardless of the merits of the case.

A very small proportion of all injunctions are issued in labor cases. But because of the insistence of the unions, Congress by Sections 17 to 25 of the Clayton Act, regulated Federal injunctions in labor disputes as follows: preliminary injunctions shall require notice to both parties. Temporary restraining orders also require such notice unless immediate irreparable damage is shown to be about to occur. Temporary orders without notice expire in ten days but may be renewed if good cause is shown. When an order is issued without notice a date for hearing must be fixed.

Any party served with a restraining order without notice, may upon two days' notice to the applicant, appear before the court and move the dissolution or modification of the order, and a hearing must then be had.

Any party applying for a restraining order or injunction must give security in such sum, as the court may deem proper, for the

payment of costs and such damages as may be incurred, to the parties restrained by the order, in case it is later decided that such parties were wrongfully enjoined or restrained.

No injunction or restraining order granted under the above conditions shall prohibit a peaceful strike, nor peaceful picketing, nor advising others to strike, nor boycott.

Disobedience of a restraining order or injunction, if it constitutes also a criminal offense under the Federal laws, shall be punished as contempt of Court only after a jury trial if the defense demands it.

But contempt committed in the presence of the Court or so near thereto as to distract the administration of justice, or disobedience to a Court injunction or order in a suit brought by the United States may be punished without a jury trial, as heretofore. The new law thus effectually improves and modernizes the granting of restraining orders, and brings them within limits which are fair and reasonable to all concerned. The interpretation of the Clayton Act in labor cases is explained in Chapter 7.

So much of the public discussion of injunctions has centered around employment disputes that the public believes the injunction to be primarily a protection of the employer. This is far from the truth. The great majority of injunctive writs do not touch on labor questions but have to do with the protection of business concerns and property rights against other dangers. The injunction is also a weapon of defense of labor as against the employer. In *SCHLESINGER v. QUINTO*, 192 N. Y. SUP. 564, 1921, the members of a garment workers' union asked for and secured an injunction against an employers' association to prevent the latter from violating a contract with the union which had still several months to run. The manufacturers had combined to repudiate the agreement and the Court ordered them to observe their contract with the union until its expiration.

In doing so the Court said, "The cases thus far decided have been at the suit of the employer against combinations of labor, for the simple reason that this is the first time that labor has appealed to the courts. The principles of law on which they were decided are applicable to a combination of employers who by coercive measures seek to break contracts between employer and employee. The remedies are mutual, the law does not have one rule for the



employer and another for the employee. In a court of justice they stand on an exact equality, each case to be decided upon the same principles of law impartially applied to the facts of the case, irrespective of the personality of the litigants.”

The injunction is also a vital protection of the individual worker against combinations of others who deny him the right to work. In *BOGNI v. PEROTTI, ET AL.*, 224 MASS. 152, 1916, a hod carrier who was a member of the I.W.W. asked for and secured an injunction to protect him from a conspiracy by members of another union to force his discharge by the employer. The two unions were rivals and it is perhaps the irony of fate that the I.W.W. union which has so often preached violence, sabotage, and even the overthrow of government, was forced to appeal to that very government which it had so often denounced, for protection against the illegal acts of its rival. The Court granted the desired protection.

It must be remembered that an injunction is *preventive* and that as such it has the inestimable advantage of preserving property and keeping many people out of jail who would otherwise be placed there by the criminal law because of their hasty violent acts. No amount of criminal prosecution will restore the factories, buildings, and rolling stock burned by rioters — this property is a dead loss to the community. The proper measure is not to prosecute but to prevent and avoid the injury and yet to do so in a way which will preserve also the full rights of both parties. It is this which makes the injunction question well worthy of the careful study and attention that are now being given to it.<sup>1</sup>

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### QUESTIONS

1. Resolved that the State courts could satisfactorily do the work now performed by the Federal courts. Defend either side of this question.
2. How would you show that all classes of the people have an interest in the protection and development of the Constitution?
3. Explain the rôle of the courts in this development.
4. Why must the courts expand and extend the meaning of the words of the Constitution?
5. Cite some opinions of publicists on this point.
6. Show by examples the Supreme Court's influence in protecting, limiting, and expanding the national Constitution and laws.
7. What does the Constitution provide as to the Federal Courts, their establishment, number of judges, tenure of office, method of choice?
8. Could a Federal judge be discharged from office because he did not belong to the same party as the President? What does the Constitution say on this point?
9. Outline all the steps necessary to remove a Judge from office.
10. Outline the organization of the Supreme Court giving the number and salary of the judges and the offices and important employees of the Court.
11. What is the difference between original and appellate jurisdiction?
12. What is the Supreme Court's jurisdiction as fixed by the Constitution?
13. Could Congress pass a law changing the extent of the appellate jurisdiction of the Supreme Court? Why?
14. How does the Eleventh Amendment change the jurisdiction of the Federal courts and why was it passed?
15. If you wish to sue a State where would you bring your suit?
16. Draft a report showing what inferior Federal courts have been established by whom and under what authority in the Constitution, also the organization, number, and general powers of each of the inferior courts.
17. Attend a session of any Federal court and report on the proceedings.

18. Why was the commerce court established? Why was it abolished and what was its practical usefulness?
19. Could Congress abolish the circuit courts of appeals? Why?
20. Could Congress abolish all the inferior courts? Why?
21. If Congress wished to lower the salary of a certain Supreme Court Justice, could it do so by law? What part of the Constitution governs this question?
22. Could Congress constitutionally establish a special United States Court which would have jurisdiction over patent cases? Explain.
23. Explain fully the constitutionality of Congressional acts providing as follows:
- (a) Abolishing the present Supreme Court.
  - (b) Abolishing the present District Courts.
  - (c) Reducing the number of members of the Supreme Court to seven upon the death or resignation of the next two Justices.
  - (d) Providing that the Justices of the Supreme Court may be appointed by the President without the consent of the Senate.
  - (e) Providing that the President may discharge District judges for sufficient reasons which may be reported to Congress.
24. Outline the general jurisdiction of the Federal courts.
25. Explain some of the general principles guiding the Supreme Court in deciding on the constitutionality of a law.
26. A State statute of 1901 covering the subject of bankruptcy conflicts with an Act of Congress of 1898; which is supreme? Supposing the Act of Congress was passed in 1904, which would be supreme?
27. How does the Constitution fix the order of the supremacy of laws?
28. A citizen of Pennsylvania, while employed on a trolley car in Trenton, is injured. Could he sue the Trenton company in the Federal courts. What provision of the Constitution applies?
29. Do questions of State law, involving no constitutional point, ever come to the Federal courts? Explain.
30. How are the Federal courts guided in deciding on the meaning of State laws and State Constitutions and the powers of State officials? Why?
31. In executing the decision of a Federal court the marshal is opposed by force. What can he do?
32. Will the Supreme Court advise the President as to the constitutionality of proposed Federal acts? Why? Example.
33. In a debate you desire to show that the Supreme Court has the constitutional power to declare both (a) Federal and (b) State laws unconstitutional. Outline your arguments.
34. Explain the Court's position on this question in any decision which it has handed down.
35. What are the causes of slow procedure in the Federal courts? How could this be remedied?
36. Resolved that court procedure should be simplified to reduce the cost and delay in law suits. Defend either side of this question.

37. Explain why the conservatism of the courts has been criticized. Read some of the references and give your impressions on this point.
38. What is an injunction? How is it usually granted?
39. Explain the criticisms of the injunction as applied to labor cases.
40. Will the courts grant an injunction forbidding the mention of a labor controversy in speeches and writings of either party? Why?
41. Apply the Clayton Act to the following cases:
- (a) The employees of John Doe & Company demand higher wages, shorter hours, and employment of Union men only. In order to secure their demands they strike and declare a boycott of the Doe Company's products sold in interstate commerce, and seek to persuade the public generally not to purchase the Doe Company's goods. A heavy loss of business is threatened, and the Company asks for an injunction on the ground that the combination is illegal under the Sherman Act. Decide the case and give reasons in full, with reference to the Clayton Act.
  - (b) The Chicago and San Francisco Railway Company is asked to increase the wages of its engineers and conductors. It refuses. The employees strike and appoint a committee on picketing, the duty of which is to persuade prospective employees not to seek work with the company. Can the Company secure an injunction under either the Interstate Commerce law or the Sherman Act? Reasons.
  - (c) A Federal Court is asked by an interstate railway company to grant an injunction to prevent the destruction of its property. The Company produces evidence showing a plan to destroy the company's property a year from date, and the proof that the property destroyed is worth \$2000. The Company asks for an immediate restraining order without notice to the opposite party, a labor union. What action will the court take and why?
  - (d) A temporary restraining order is issued by a court without hearing both parties, but simply upon the evidence offered by the plaintiff. Immediately after the order has been issued the party restrained appears before the court and asks that the order be cancelled. What must the court do?
  - (e) A witness in a law suit growing out of a labor dispute in interstate trade refuses to answer a question after being ordered to do so by the court. Upon being summoned for contempt of court he claims a jury trial. What will the court decide and why?
42. After reading the references and securing the opinion of an experienced attorney or judge, prepare an essay on the court system of your State and its chief problems.
43. Lay the essay aside and attend a civil and a criminal trial in your county. Criticize and revise the essay.

## CHAPTER 15

### THE STATE: THE CONSTITUTION

**New Duties of the State.** — The growth of the National Government has not meant the drying up of State powers. During the last thirty years these latter have increased fully as fast as those of the Federal union. This increase is due to extensive changes in business conditions. It is noticeable that most of the questions with which the States now have to deal, have sprung from manufacturing industry. For example:

The rise of urban districts and the various city problems;

The tenement house;

The conditions of workers in factories, stores, and sweatshops;

The adulteration of foods;

The universally recognized need of education;

The necessity for better means of communication;

The unchecked license in corporate promotion;

The growth of class feeling between employers and workers;

The breakdown of the old system of caring for the poor and the criminal classes.

**Influence of Mechanical and Scientific Progress on Government.**

— The chief source of this increase of State work is the progress of scientific discoveries. We like to point to the influence of a single statesman or philosopher upon our political life, and to say that Washington achieved Independence and that Lincoln saved the Union, and it is true that in times of emergency one man may commit the nation to a policy from which it cannot turn back. But in ordinary periods of quiet, natural growth, public policy is really determined by the influence of new inventions and scientific discoveries, remote as these may be from the field of politics. Science has done more to change our national life and policy than has the reasoning of political philosophers. Let us glance at the conflict between Socialism and Individualism. For generations the In-

dividualists have contended that the government should regulate nothing, but should leave all to the free action of the individual — and the Socialists have claimed that it should manage everything, even own, control, and operate all forms of business. This whole contrast of views together with that immense and ever-growing mass of tangled problems that we call “the industrial system,” and which includes the factory question, the labor problem, the corporation problem, and other questions of large scale production, may be traced directly back to the invention of the *steam engine*.

The mechanical discovery creates the social problem. The perfection of the *passenger elevator* has produced the modern office building whereby a population equal to that of a small town may be gathered under one roof and the greater concentration of business within a city made possible. Similarly the invention of the *trolley motor* has built up the “suburban city” with all the changes in government and social life which accompany it. Equally interesting is the political influence of medicine. The growing idea that we should prevent disease rather than merely cure it has brought with it a fresh view of the State’s duties to the people; it is to be traced to the *germ theory* in medical science. Finally the educators of the country have observed the effects of our mechanical and industrial progress, have seen the need of new kinds of school and college training, and have broadened their program to meet these demands with the result that the activity of the State governments has again expanded. In all these fields, scientific inventions have so changed the conditions of health, of education, of factory, and of city life that the work of the State in regulating these questions has grown to enormous proportions. From a quiescent body the State has been transformed into a powerful influence in the life of the people. Yet the people have taken little interest in the Socialistic movement; they simply demand that the State shall make itself more useful. It is safe to say that no useful change in government can be either adopted because it is Socialistic, or defeated because it is called such. The real influence behind government changes is the determination of the people to make that immense body of scientific inventions, discoveries, and devices, which is now so rapidly coming to us, more serviceable and helpful to all classes.

We shall consider first the constitution and machinery of com-

monwealth government; second and more important, what the State is doing for its people — its work.

**State Constitutions.** — The State constitution, like that of the Nation, divides government into three departments, Executive, Legislative, and Judicial. The executive power, however, is divided among the Governor, the Senate, and a number of other officers, some of whom are appointed by him and some elected by the people. The legislature like Congress, is composed of two Houses, the Senate and the House of Representatives, and the judicial department consists of a Supreme Court and local county or district courts. The constitution is usually a lengthy document in which the people have written a great many real principles along with many more crude devices intended to cure political ills. Most of these latter ought to be ordinary laws, but the people's distrust of the legislature has led them to place ordinary laws in the constitution. For example, we find that the State constitution not only guarantees such fundamental rights as Freedom of Speech and Press, Religious Liberty, Honest Elections, Jury Trial, Habeas Corpus, etc., but it goes into great detail to forbid special laws affecting a particular person, place, or corporation, granting special divorces, or giving to any person or corporation a special privilege; it also forbids any law which changes the powers and duties of any local government without first giving due notice to all who may be interested.

Many constitutions also regulate the laws on corporations in such a way as to guard against legislative abuse. Some of them require the rights of shareholders to be fully protected, by cumulative voting or otherwise, and in general the greatest care is taken to prevent the predatory exploitation of corporate property by a small clique through majority control of the stock.

**The Amendment of the State Constitution.** — Most of the constitutions provide that single amendments must be passed by the legislature at two successive sessions, and then referred to the people for approval. Some States require the legislature every ten years to submit to popular vote the question whether the entire constitution shall be revised by a convention. Ordinarily however, a total revision can be made only by a convention called for this purpose after the legislature has voted favorably and the project been approved by the people. Some of the States have a method

of amendment which is practically impossible to follow, that is, two legislatures must first pass the amendment; it must then be submitted to the people at a regular State election for officers, and can only become valid if a majority of those who voted for officers at the election approve the amendment. This is impossible because in almost any election the average voter overlooks the question of amending the constitution. It is usually printed at the bottom of the ballot and the ballot is so large that the constitutional question attracts no attention. Accordingly, it is most improbable that a majority of those voting will vote on the amendment at all and still more improbable that a majority can be secured favorable to it regardless of its merits. Such a provision formerly existed in the constitution of Illinois, and in Professor James W. Garner's opinion,<sup>1</sup> it "makes the Illinois system of amendment one of the most archaic and cumbersome in the world, and has already retarded the progress of the commonwealth." It was coupled with the provision that a constitutional change may only be submitted to the voters once in four years.

In Indiana the constitution provides that a majority of those voting at the election must favor the amendment and, furthermore, that an amendment, once submitted to the people, is before them indefinitely until either approved or disapproved by a majority; and, finally, that while an amendment is so pending no other change may be proposed. This has effectually bottled up all normal constitutional growth in Indiana for over fifty years. Some decades ago a proposal was made for a change in the requirements of admission to the bar; this, being a constitutional amendment, was submitted to the people but failed to secure sufficient attention to obtain a majority and accordingly has been before the people indefinitely, but meanwhile blocking the proposal of any

<sup>1</sup> *American Political Science Review*, February, 1907, page 240. He also points out the value of having individual amendments proposed to the voters at a *special* election, as in New Jersey, rather than at the general election, when they will be ignored or overshadowed by other issues. His demand for a more facile method of constitutional change voices an opinion which is rapidly gaining ground in all the States — "In conclusion it may be asked whether, in the effort to prevent too frequent and ill-advised changes in the State constitution, the reactionary pendulum has not swung to the opposite extreme, and, instead of progress and growth, we are now confronted by constitutional stagnation, if not retrogression."



other constitutional change. In some of the New England States notoriously unequal systems of representation of the towns, in the State legislature, have existed since the Revolution; but owing to the impossibility of passing an amendment through the legislature to remedy this inequality, the States are still governed by minorities. We must choose between two points of view on this question. Either the State should seek to suppress all constitutional change except at fixed periods — an unwise and dangerous course, or it should provide a natural and feasible method of amendment which will permit healthy growth and adaptation to new conditions. We cannot stop all change by “sitting on the lid” — such a policy invites violation.

**Desirable Provisions as to Amendment.** — When constitutional conventions are to be held it is highly important that the Constitution itself should provide as fully as possible for the method of election, the organization of the body, and other matters which affect its procedure; in general, the more completely this is prescribed in the Constitution, the better. Professor Garner shows the practical benefits which such a system offers in carrying out the popular will. — “The new provision in the New York Constitution is a notable example. . . . By the Constitution of that State the participation of both executive and legislature in constitution making is, as already remarked, reduced to a minimum. No legislative act is necessary to bring the convention into existence when once the people have voted in favor of revision. Moreover, the constitution itself fixes the number of delegates, the time and method of choosing them, their qualifications and compensation, the time and place of the meeting of the convention, the number of delegates necessary to make a quorum, and even prescribes some of the rules of procedure.

In the States which have direct legislation, the people are allowed to propose amendments without the intervention of the legislature. A small proportion of the total number of registered voters, usually from eight to fifteen per cent, may sign a petition to which the proposed amendment is attached, asking that it be submitted to the approval of electors. If at the next election a majority approve the amendment, it then becomes a part of the constitution without legislative action. Severe criticism has been devoted by some publicists to the fact that the voters are constantly

harassed by cranks and enthusiasts who want new features placed in the fundamental law. Yet of the two dangers the rigid, inflexible, unchanging constitution is certainly the greater. It tends to keep back the development of the government until some explosion of popular indignation takes place, when a hasty, ill-prepared amendment may be passed, and thereby may become fastened on the government by the same difficulty of making a change.<sup>1</sup>

The chief subjects of recent constitutional amendments have been :

The adoption of direct legislation

Enlargement of school and university facilities

The State budget

The compensation of injured workmen

The increase of State and local debt limits

The extension of city home rule to allow greater local independence

**The Election Laws.** — It is in the election laws of a State more than in the high-sounding phrases of its constitution, that the real political rights of the people are guaranteed. We may find the most flattering language of democracy in the fundamental document but if the laws do not secure the fair, just, and accurate expression of the people's will at the polls, democracy becomes as sounding brass. The essential points in our State election laws are :

The qualifications of voters

Registration

State regulation of party machinery to protect the voter

Nomination of candidates

The Ballot

Corrupt Practices Acts

**The Right to Vote.** — The State determines who may vote at both its own and national elections. The franchise requirements are the same for each office except that some States allow all property holders to vote for school and tax boards in the districts where their property is located. There is wide diversity in the qualifications of voters in different commonwealths. They all require

<sup>1</sup> An admirable description of the methods of amendment may also be found in W. F. Dodd : *The Amendment of State Constitutions*. See also Prof. J. Q. Dealey's article on "Tendencies in State Constitutions," in the *Political Science Review*, February, 1907.

electors to be 21 years of age and nearly one-half allow women to vote or will do so if pending constitutional amendments are approved. Several require educational tests. Of these Connecticut is a type. Its constitution provides that no one shall vote unless he can read any section of the constitution or of the laws in the English language and can write his name. In Pennsylvania and many of the Southern States there is a small property qualification in the shape of a poll tax. This is 50 cents in Pennsylvania and from \$1 to \$2 in the South. Most of the Southern States located in the black belt have found it necessary to debar the negro from voting. This is done by an educational test or by the property qualification, notably the requirements that voters must have paid all poll taxes for five years, or by a clause which, as in Alabama, requires that electors to be registered must be persons of good moral character who understand the duties and obligations of citizenship under a republican form of government. The constitution of that State also authorizes the registering board to require the applicant to state under oath the name or names of all his employers for the last five years, any willfully false answer being perjury. As many of these clauses would debar the whites also, various devices have been invented to include the white vote. One of these is the grandfather clause. In Louisiana and North Carolina all men who were voters before January 1, 1867, and in Louisiana the sons and grandsons of such men and in North Carolina all lineal descendants of such persons, who were or might become voters before 1908, remain for life qualified to vote, regardless of the educational or property qualifications. In Virginia all adult male persons who do not own property and cannot pass the educational test may vote if they have served in the army or navy of the United States or of the Confederate States, or if they are the sons of persons who did so serve. Although the Fifteenth Amendment prohibits the States from denying the right to vote to anyone, on account of his race or color, it has been possible to exclude the great masses of negro voters by these provisions or by the peculiar interpretation which the registry boards give to them.<sup>1</sup>

**Grandfather Clause Invalid.** — Are such provisions as those just

<sup>1</sup> See the article, "Negro Suffrage" by J. C. Rose, *American Political Science Review*, Volume 1, page 17.

described forbidden by the Fifteenth Amendment? In *GUINN AND BEAL v. UNITED STATES*, 238 U. S. 347, 1915, the Supreme Court declared them unconstitutional. The Oklahoma Constitution provided that a literacy test should be required of voters *except persons who on or before January 1, 1866, were entitled to vote, or their lineal descendants*. Guinn and Beal were election officers accused of conspiring to prevent certain negro citizens from exercising their right to vote. They urged that the State had power to fix standards of voting and the Fifteenth Amendment in no wise deprived them of this power. Accordingly they, the defendants, were acting within the law in refusing to accept the votes of the negroes in question. The Supreme Court held that while the Amendment did not take from the States the power over suffrage, yet it did undoubtedly restrict their power to deny citizens the right to vote on account of race, color, etc. The Court could find only one interpretation of the Oklahoma clause, viz., that the State was seeking to revive voting requirements which the Fifteenth Amendment was especially designed to remove. This was a clear violation of the spirit of the Amendment and was accordingly unconstitutional.

It would be a calamity for the South to fall under the political control of an uneducated element, either white or negro, but it would seem desirable to exclude this element by some fairer means than those described. Such devices have resulted from the mistaken policy of the Fifteenth Amendment. Its repeal would remove from the southern white race the fear of black domination, would enable the parties to vote on other than racial issues, and would soon produce a fairer spirit towards the negro himself and a better cooperation between the races.

**Woman Suffrage.** — After a long and arduous campaign the advocates of woman suffrage succeeded first in introducing this change into many State Constitutions and finally in 1920 into the National document, by the Nineteenth Amendment. This clause declares that "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." It gives Congress the power to enforce the change. This still leaves the State free to fix the conditions of voting — it does not grant the right of suffrage to every woman citizen, nor does the Fifteenth Amendment grant to every male citizen such a right. These two Amendments forbid only a denial of

the right to vote on account of race or sex. The States may still deny the vote for other reasons, such as to those who are illiterate or who contribute nothing in taxes or who have committed certain crimes or who fail to register or who are aliens.

**Compulsory Voting.** — In some countries an experiment has been made by requiring all qualified voters to exercise their franchise. In Belgium and Porto Rico such provisions of law exist. The Belgian system has been a success in the opinion of its administrators. The citizen who fails in his duty is required to appear before a special civic court and explain his absence and submit to a fine. Second offenses are also punishable by a fine while a repeated failure to vote is punishable by disfranchisement. A similar experiment should be attempted by some of our State governments. It would doubtless result in a material diminution of the absentees in the city elections. They frequently number from one-third to one-half of those eligible.

**Registration of Voters.** — Among the many methods of making up the list of qualified voters in each district, that which has proven most satisfactory is the personal registration plan, first adopted in California, and used in most of the commonwealths in which there are large cities. This involves the personal appearance of the voter before an official board of registrars, usually meeting at the polling place about 60 or 90 days before the election. The voter makes affidavit as to his identity, age, citizenship, length of residence in the State and district, his home address, and his place of birth. If naturalized he must produce his papers; if the law requires a poll tax, he must show his receipt. If an educational qualification must be satisfied, the registry board applies it. Opposite his name in the registry book, the above facts are entered and with them a brief description of the voter's personal appearance, and his signature. In New York he repeats his signature on election day, for comparison. The advantage of this plan over the old method of registry by visiting assessors who called at each residence, is that personal registration immensely reduces the opportunity for fraud and repeating.

**State Regulation of Party Machinery.** — The regulation of the party itself is necessary to secure fairness and make each party organization more representative of the rank and file of its members. There can be no doubt that, left to itself a party machine

tends to slump into the hands of those interests and cliques which devote the most time, capital, and organization to it, and that these by no means represent the party voters in any true sense. For this reason, when some issue arises in which the people do take an active interest they usually find the machinery of both parties in the hands of rings which attempt to stifle or block any movement towards progress. Accordingly, several of the States have provided that the State committee which is the controlling executive body, shall be elected by the party voters, one member from each locality. Pennsylvania allows one committeeman to each of the fifty senatorial election districts, Wisconsin two to each congressional district. In those commonwealths which have not yet abandoned the older convention form of nominating candidates, the convention usually chooses the committee, but this is of course the favorite method of taking control out of the hands of the party members.

A party is usually defined by the laws as being an organization of voters which at the last State election cast a certain number of votes (New York) or a certain proportion of the total vote (Oregon). All details of arrangement of the ballot, the time and place of holding the nomination elections, and the expenses of the same are fixed by law under the new system, the purpose being to prevent members of other parties from interfering, and to minimize opportunities for fraud and mistake.

**Direct Primaries.** — Although some of the States still nominate their party candidates by conventions, in which all the old devices of former times are resorted to in order to manipulate the choice, the movement for direct nominations by the party voters has now reached national proportions and has almost displaced the older system.<sup>1</sup> The direct primary law usually provides that the

<sup>1</sup> Strenuous efforts have been made to arrange the primary laws so as to favor the small governing cliques in each party, by such expedients as the requirement that the voter must announce his party allegiance when he enters the primary, or that new parties may not be formed except under most difficult conditions, or that candidates for certain offices, at least, may be nominated at conventions, but these devices are unable to stay the widespread general tendency to place the party under the control of the mass of its voters and make it responsive. Partial reactions have taken place in New York, Pennsylvania, Idaho, and other States. New York in 1921 provided for the nominations of State offices by convention but did not change local offices. Pennsylvania in

primary nomination shall be held at the same time for all parties, and shall be under official State control. Prior to the primary, the State or local officials in charge receive lists of candidates,<sup>1</sup> whose names they print upon the separate ballot of each respective party. The vote on these names is then taken in regular election booths by the voters, each party having its own ballot.<sup>2</sup> If the voter is not required to register his party affiliation, but may choose the ballot of any party that he wishes, the plan is called the "open primary." When he must announce his allegiance and ask for the ballot of his party by name, the plan is called the "closed primary."

Both plans have serious defects in practice; the closed primary makes known every voter's party allegiance and defeats the principle of the secret ballot. The open primary allows the leaders of a large majority party, especially in the cities, to order a number of their henchmen to vote the ballot of the opposition or minority and on it to support candidates for nomination who will be friendly to the majority's interests — in this way destroying the minority party's existence, save in name. The open primary is safest, on the whole, especially when combined with full opportunities for nomination by petition. Wisconsin has adopted the open form, Pennsylvania the closed, and New York has a compromise plan. The primaries of all parties are usually held on the same day and at the same polling place. Expenses are paid by the State. This is a wise recognition of the distinctly public nature of the primary.

1921 abolished direct primary nominations for judicial offices. Minnesota has established conventions preceding the direct primary. Candidates endorsed by the convention may have that fact noted on the direct primary ballot.

<sup>1</sup> The State laws usually allow the suggestion of such names by petition with a number of signatures, or upon simple application and payment of a moderate fee.

<sup>2</sup> The first direct primary system, established as a substitute for the convention, was adopted in Crawford County, Pennsylvania, in 1868. The voters in each party, by agreement of the party leaders, determined directly by ballot the nominees of that party for the succeeding election. The system worked successfully and was later adopted in several other counties of the State. Its practical weaknesses arose from an extensive system of vote buying and from the great preponderance of the cities and towns in nomination. The urban districts, because of their large subservient vote, could easily outweigh the farming sections. Despite these defects the system was in the main satisfactory and contained the chief principle upon which the later State laws were based. See E. C. Meyer, *Nominating Systems*, pages 147 and ff.

As a rule the laws provide for the nomination by a simple plurality. That is, the person who receives the highest number of votes becomes the party's nominee, even though he has not a majority of the votes cast. He may, in fact, be objectionable to the majority of the voters at the primary and it is this possibility of a minority determining the party's choice which has led some of the western States to provide for preferential voting at the primaries. That system enables each voter to express his first, second, and sometimes his third choice for each nomination.<sup>1</sup> In this way a majority control of the nomination is always assured. The direct primary has already been adopted either by law or by party rules in most of the States.

**The Advantages of the Direct System.** — Many theoretical benefits and defects of the direct nomination plan were prophesied before its general adoption. A full list of these may be found in Dr. Meyer's *Nominating Systems*, but the direct method has not worked out precisely as either its friends or its enemies claim. (a) It has not destroyed the party "organization" or "gang," — but has greatly changed the efforts and methods of that body and brought it further into the light than ever before. Were all our political leaders angels from Heaven, those who resorted to organization would win and those who refused to do so would not. Undoubtedly, however, the character of the organization has been immensely improved by forcing the entire process of nomination out into the open and by greatly increasing the opportunities for new men who have not the official O. K. of the leader. In short, the organization has been made more responsible, which was, after all, the real purpose of the direct plan.

(b) It has not eliminated "business" from politics. While corporations may not contribute directly, their large shareholders support, within each party, the candidacy of those men who will "do the right thing." But the new plan offers a complete ventilation of the claims of the various candidates and allows and encourages the voter to register his preference with the valuable knowledge that his vote will count as it is cast and that no delegates to a convention, pledged to one candidate, can be manipulated to another.

<sup>1</sup> This is provided by the Wisconsin Act of 1911.



(c) The critics of the direct primary plan claimed that it would increase vote buying. This has not proven true in practice. There has been a great increase in expenses for advertising, for traveling, and for generally getting acquainted. There has also been an enormous growth of speech-making in the cities and at the country crossroads, and many pious pledges have been given by candidates in the primary campaign which were slightly florid in character. But it cannot be said that either bribery or carousing and intoxication or other improper methods of influencing the voter have been resorted to; on the contrary, the direct primary has vastly increased the more serious methods of influencing public opinion and has focused attention upon the real substance of public policy in a way which was never possible before. All observers agree also that it has immensely raised the vote cast at the primary elections. The voters always like to see and meet personally their representatives in council, legislature, or Congress. In recent years they have even shown a healthy tendency to quiz candidates in open meeting and by direct question to place aspirants for office upon record.

(d) It has undoubtedly excluded from nominations for party office many high class men who are not expert vote getters and who refuse to descend to the cheaper forms of popularity-seeking and grand-stand play. If our public officials are to be men of firm character and vigorous thought they cannot be mere puppets answering the momentary whim of a shifting majority — they must be leaders, rather than followers of some gust of popular emotion. The direct primary undoubtedly undermines the independence of public men and makes them mouth-pieces of loud noise rather than representatives and guides of popular thought.

**The Ballot.** — Two forms of ballot are now struggling for popular favor; the older style is known as the "party column," in which all the candidates of one party for the various offices are arranged in a vertical column under the party's name, usually with a circle at the top in which the voter by placing a mark, may at one stroke vote for all the candidates of that party — "a straight ticket." Of course the party leaders strain every effort to force the voter to do this, since it immeasurably strengthens their control over the party machine. The usual form of party column ballot is given below:

THE PARTY COLUMN BALLOT

DEMOCRATIC For a straight ticket mark X in this circle ○	REPUBLICAN For a straight ticket mark X in this circle ○	PROGRESSIVE For a straight ticket mark X in this circle ○
<i>Governor</i> John Doe	<i>Governor</i> Richard Roe	<i>Governor</i> Richard Jones
<i>State Treasurer</i> William Tompkins	<i>State Treasurer</i> Henry Wright	<i>State Treasurer</i> John Smith
<i>Auditor General</i> James Williamson	<i>Auditor General</i> Harvey Wiley	<i>Auditor General</i> Thomas Perkins
<i>State House of Representatives</i> William McGuire	<i>State House of Representatives</i> Thomas Dougherty	<i>State House of Representatives</i> Frank Small

The square at the right of a name is marked by the voter who wishes to "split" his ticket.

Straight voting is praised as a virtue, the voters who obey are called "stalwarts"; malediction and political excommunication are threatened upon those who split their tickets and at every chance the election laws are covertly worded so as to make split voting difficult — but all in vain. The tide has set toward greater independence of the voter, the belief has arisen that a party should be a servant, not a master, a means rather than an end. The number of those who say with a complacent smile on election day that they "voted the straight ticket," with the air of having saved the Republic, is growing steadily less.

**The Australian Ballot.** — The public mind is turning toward the Australian ballot, which places the names of candidates of all parties for a given office in alphabetical order giving each candidate's party affiliation after his name, thus:

Sheriff

John Doe, Democratic

William Tompkins, Republican

Henry Zane, Socialist

This makes straight ticket voting impossible and requires the elector to make a mark opposite the name of each candidate for whom he votes. It is the form used in Australia,<sup>1</sup> and has been in use in Massachusetts for many years. The great advantage of this arrangement is that it makes it just as easy to make a split ticket as a straight one, and thereby gives us the benefit of that very large vote by persons who would willingly make a real choice between candidates if they were allowed a reasonable opportunity. The Australian or Massachusetts ballot is the only form which offers this opportunity. It is now proposed to strengthen the ballot further by reducing the number of elective officers so that the voter may concentrate his attention upon a few important positions and make a real choice.<sup>2</sup> The alphabetical ballot was first adopted in America in 1888 when Massachusetts and Kentucky abandoned the old vest pocket type and established the Australian form.

**Corrupt Practices Acts.** — In order to prevent bribery and other gross forms of dishonesty in elections and to discourage the employment of large sums of money in influencing the electorate, a whole series of election laws, and "corrupt practices" acts have been passed by all the States. These prohibit the offer or acceptance of money or other valuable consideration by a voter, a delegate, a committeeman or nomination or election official, to influence his action. If such violation of the law is proven to exist on a scale which would influence the result of the election, the courts may order a new vote in the district affected or reject all the returns from the district. In England the judiciary makes a free use of this power, instances being on record where a new election has been ordered on the ground that the victorious candidate's political manager had provided free drinks and other entertainment to the voters; but in this country the judges are extremely reluctant to

<sup>1</sup> A number of other forms of ballot even including the old party column style, are sometimes wrongfully called the "Australian" ballot but the only form which can properly claim the title is the alphabetical arrangement given above.

<sup>2</sup> See the Chapter on The Short Ballot.

intervene in any form of election dispute, fearing that the suspicion of favoring one side or another might be incurred, and the courts thereby drawn into politics. Other provisions require candidates and their political managers or treasurers to file an official statement under oath, of their nomination and election expenditures, and prohibit the payment by corporations of any gifts or contributions to party funds. This latter is also forbidden by the Federal Act of 1907. It was formerly the custom for the largest companies to contribute heavily to the treasuries of both parties, a practice which supposedly gave them immunity from hostile government action. In New York an attempt has been made to fix the uses to which election funds can be devoted, by limiting them to traveling expenses, personal outlays of candidates, payment of political workers, meetings, printing, etc. These provisions are easily evaded.

**Greater Honesty in Elections.** — Undoubtedly the last decade has seen a marked improvement in the purity of election laws and their administration and a demand for still stronger action is prevalent in all parts of the country today. Reaction is especially strong in the large cities where the domination of the leader and his petty minions has been most absolute. This improvement has not kept pace with the public standard of morality, however, and many observers are inclined to be pessimistic because of the greater distance still remaining between the public conscience and the actual results so far realized. Prof. Beard<sup>1</sup> says: "Just as in the familiar contest in the field of naval construction between high-power projectiles and still more powerful defensive armor, so every advance in the direction of greater rigor and minuteness in the provisions of the election law has been met by a more than corresponding systematization and perfection of the methods of evading such provisions." We must remember, however, that the vast improvement of recent years is only the first fruit of a new movement towards the organization and modernization of what were formerly called reform elements in politics. These scattered factions and influences were mere temporary groups with no common center and little capacity for coöperation. They are now being gathered together in permanent clubs and are beginning to see the

<sup>1</sup> *American Government and Politics*, 2d edition, p. 685.

advantages of modern systematic methods of guiding public opinion. In every large city today there is some organization such as the City Club of New York or Philadelphia. These clubs hold together the advanced and progressive elements in each municipality and make a permanent point of departure for municipal movements. There are also many municipal leagues of a non-partisan nature, whose chief aim is to concentrate public attention upon the records and principles of candidates for local office. Foremost among these is the Chicago Municipal Voters League which, without proposing candidates of its own, exerts a strong and often successful influence at elections by showing what the candidates have done to deserve public reward or otherwise. Closely related to these are the many business associations, city, State, and national, almost all of which throw their influence, when possible, toward the improvement of government methods. It has become customary in most of these commercial bodies to devote at least a part of the time of their meetings to the consideration of some public improvement question.<sup>1</sup> The very fact that popular opinion is now so far in advance of existing methods of government is the most encouraging sign of the times. The results already achieved have three important features which promise still greater advantages in the near future — greater simplicity, directness, and publicity. Wherever these features have been embodied in our election laws under conditions of fair trial, a noticeable improvement has resulted.

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## QUESTIONS

1. Why has not the growth of national authority weakened the State governments? How have business and economic changes affected the State governments in the last thirty years?
2. You are present at a discussion of the relative influences exerted upon government by unusual personalities and by ordinary scientific progress respectively. Explain the views which you would advance on either side of the discussion.
3. When was the present constitution of your State adopted? Prepare a brief outline or table of contents of it showing the main topic of each division and article.
4. Why does the State constitution contain so many provisions of ordinary law?
5. What are special laws? Local laws? Why are they forbidden?
6. Show the similarity between the bill of rights in your State constitution and that in the national document.
7. How is your State constitution amended? When was it changed last?
8. The members of a constitutional convention are considering the article dealing with future conventions — should they make this detailed or general in character? Reasons.
9. A convention is about to consider the article on single amendments. Give your impressions as to a wise formulation of this article.
10. Why are the election laws of equal importance with the constitution?
11. What does the national constitution provide as to the qualifications of voters for congressman, senator, and presidential electors? What difference is there between the qualifications of these voters and those at State and local elections?
12. Outline the principal qualifications for voters in different sections of the country as determined by State laws.

13. Where does the property qualification occur and what form does it take?
14. How are the colored people debarred from voting in the South?
15. How has the Fourteenth Amendment stimulated these methods?
16. Is the grandfather clause constitutional? Reasons.
17. Give your impressions as to the advisability or otherwise of repealing the Fourteenth Amendment, with reasons.
18. An Italian woman who is thirty years of age, and has lived seven years in this country, on attempting to vote is told that her name is not on the register. She claims that the Nineteenth Amendment gives her the right to vote. Decide with reasons.
19. "The Fifteenth and Nineteenth Amendments give to all adult citizens, male and female, the right to vote." Is this correct? Explain.
20. Outline a plan of personal registration of voters. Why is it needed?
21. Why has the State regulated party machinery and organization?
22. How is the State committee of each party chosen in your State?
23. How does your State law define a party?
24. What is a direct primary and why is it now established by law?
25. Outline the chief provisions of such a law.
26. What is the difference between the open and closed primary?
27. Outline briefly the disadvantages of each and give your impressions as to the better plan.
28. How are the expenses of direct primaries paid and give your impressions of the wisdom of this plan of payment.
29. Outline the primary system existing in your State.
30. Why does party leadership and "organization" still exist although in less despotic form perhaps, under the system of direct primaries?
31. What is the difference between the plurality and majority methods of nomination?
32. Prepare an essay on the direct primary after reading the references, and secure the opinions of two political workers of opposite parties in your district — give your conclusions as to the advisability of the direct system.
33. Explain the party column form of ballot and contrast it with the Australian form. Which is the better and why?
34. Give your views of the argument that the ballot law should strengthen party control by making it easier for the party worker to instruct and advise voters how they should cast their ballots, and by making it more difficult for independent movements to arise and for independent voters to split their ballots.
35. What is a corrupt practices act? Outline the chief provisions of these laws.
36. Why should a corporation not contribute to a political campaign fund?

## CHAPTER 16

### THE STATE: EXECUTIVE, LEGISLATURE, AND COURTS

#### THE GOVERNOR

THE State executive is slowly struggling upward into the same position of leadership that has already been won by the President. For many generations the Governor was a mere figurehead, because in Colonial days he had been the "royal executive" and, as such, the means of royal oppression and tyranny. When the Colonies became States in the Revolution, they immediately stripped the office of its real authority and left it that curious anomaly which it has since remained until the most recent years—a post of much honor but little power. In some of the States half of the Governor's cabinet are elected rather than appointed.

*The chief executive offices are:*

Governor	Insurance Commissioner
Lieutenant Governor	Superintendent Public Instruction
Secretary of State	Industrial Commission
Attorney-General	Factory Inspector
Treasurer	Highway Commissioner
Comptroller or Auditor	Board of Health
Banking Commissioner	Bureau of Charities
Public Service Commission, etc.	

So far as these are elected they are of course independent of the Governor. In fact the strongest influences have been put forth to prevent the Governor from becoming the controlling force in the commonwealth and in many States he is dependent at every turn upon the leader of his party, as we shall see.

The Governor's election, term of office, and qualifications differ widely in the various States, but there are certain general provisions common to all. The Governor is elected by popular vote, a simple plurality<sup>1</sup> being sufficient. In most of the commonwealths he is

<sup>1</sup> By plurality is meant the highest number of votes cast for any candidate. A majority requires more than half of the total votes cast.



nominated by a direct primary. The usual qualifications required of the Governor are citizenship, residence within the State for a period of from five to seven years, and a required age of thirty to thirty-five years. The old feeling of distrust of the executive shows itself in the short term of two years which many of the States provide. A majority, however, now retain their executives for four years, and this is the better course, since no Governor can do half of what is expected of him in two years. In fact, most of them have only fairly started upon their plans of legislative and administrative progress at the end of the second year. In Indiana, Pennsylvania, and a few other commonwealths the executive may not immediately succeed himself. This provision defeats any effort at consecutive work on the Governor's part through a term of years. Most Governors begin during the first or second year of their administration to force promised changes in legislation. This brings them into immediate conflict with many strongly entrenched interests, partisan and otherwise, in the State, a conflict that wages for several years. To forbid the Governor to succeed himself is to prevent him from organizing his forces in the struggle; from the outset the shortness of his tenure is a serious handicap. The Governor's term of office should be extended and he should be allowed to succeed himself for at least one term. The salary varies widely. Until recently some of the New England Governors were paid only nominal amounts — in one State as low as \$1500. Some of the wealthier States such as Pennsylvania pay \$18,000.

*The most important of the Governor's duties are:* Appointments, Legislative Veto, General Executive Powers, Judicial, Military.

**Appointments.** — The appointing power has greatly increased because of the growing work of the State and the new offices which have been created to carry it on. Each appointment is made after consultation with the ruling political leaders, and all important factions of the party and all parts of the State must be represented in the offices. In several of the commonwealths a system of appointment by civil service rules has been adopted for the subordinate positions, notably in Massachusetts, New York, and Wisconsin, where the plan has proved successful in reducing the pressure for purely political appointments.<sup>1</sup>

<sup>1</sup> These are fully described in the Chapter on The Civil Service.

All the States require the approval of the Senate for the Governor's appointments. This has proven a serious obstacle to his control over the State administration. There is no reason why he should not be trusted to select the State officials, even the most important. The question at bottom is after all a simple one — do we want the Governor to manage the State administration? Or differently expressed, do we want that administration to be controlled by outside forces which escape public observation and responsibility? Every check and limit which is placed upon the Governor's appointive and executive authority is a means of directing power and responsibility from him to these outside forces. Every step taken to increase his prerogatives brings out into the daylight the real influences at work in State government and renders that government more accountable to the voter. Our commonwealth administration today is one of indirect responsibility and concealment. It is no coincidence that many advanced and vigorous executives protest against the policy of limiting the Governor at every point. Every executive who seeks to carry out his campaign pledges is seriously hampered by these conditions.

Those who favor the short ballot as a means of making the State government responsive to popular will strongly insist upon the concentration of the appointing power in the Governor's hands.<sup>1</sup>

**Legislative Power.** — The Governor's personality influences his legislative control; if he is a natural leader and has a hold on the people he may draw up a strong program of popular measures and, concentrating public attention upon these by an open and aggressive campaign of speech-making and public interviews, he may bring such pressure to bear on the legislature as to force his program through. Many successful Governors have done this among them Cleveland, Roosevelt, Hughes, Lafollette, Johnson, Cummins, Wilson, and others. Instead of submitting to the advice and commands from "higher up" they have gone direct to the people and have won. It is precisely this appeal to the voters that determines the strength of the Governor, and brings the office to a plane of real influence.

Finley and Sanderson in an excellent work, *The American Executive*, give the results of an inquiry sent to the Governors

<sup>1</sup> See proceedings of Conference of governors.

of several States, as to their influence in securing legislation. Practically all the answers showed a substantial increase, some declaring that nearly the entire program mapped out by the Governor was carried into effect by the legislature; others stating that only a small number of the Governor's recommendations were followed, but these included his most important suggestions. Where the Governor and the legislature belonged to different parties or factions, the Governor often appealed to the people and a number of his recommendations were forced through the assembly.

"While all these *ex parte* answers indicate with one or two exceptions a disposition on the part of legislation to follow executive suggestion, it is apparent even from these letters that it is not a servile following, and it is plainly stated or intimated by two or three that they both follow an imperative public opinion, the Governor having the first opportunity to respond, and so giving unintentionally the impression of leading, whereas he, too, but follows. It is apparent, too, that the Chief Executive has found a way of compelling legislation, while punctiliously observing the legislative limitations of his office; that is, by appealing to public opinion to make itself felt in the legislature. There is certainly no menace in the power of the Chief Executive of the Commonwealth. He has too little. Greater centralization of administrative power and unity of effort are here desirable." The Governor's power to force legislation is strengthened by his right to call a special session which most of the constitutions provide. Only those subjects mentioned in the call may be considered by the legislature. In this way many Governors are able to concentrate public attention upon a single subject in an emergency and if it is one on which a real public opinion exists, especially an urgent moral or social issue, they may secure positive action by the legislature.

**The Veto.** — The veto is often used, both on general legislation and to cut off the usual excess of appropriations over revenues. The members of the legislature are so harassed by various interests among their constituency, demanding appropriations, that they are afraid to refuse the demands lest they make themselves unpopular. They accordingly vote appropriations for hospitals, homes, dispensaries,<sup>1</sup> etc., etc., until they have approved

<sup>1</sup> See the Sections on Charities and Correction.

expenditures enough to swamp the State treasury with a deficit, provided the Governor signs the bills. The pressure on the members to continue this practice is almost irresistible and on the other side they cannot increase the tax rate to cover these increased expenditures without incurring serious unpopularity. What shall be done? Too often the answer is, "Put it up to the Governor," and the bills are rushed through *en masse*. The Governor must then assume the painful duty of vetoing the excess appropriations. Recent legislative sessions in several States have granted appropriations \$20,000,000 in excess of the revenues, all of which had to be cut down by the Executive. The Governor may veto an entire bill, but in some States he has also the constitutional right to veto particular items in an appropriation, or to reduce such items, and by using this important power he may cut down the amount for each object to a point within the revenues of the State.

**Power of Removal.** — The right to remove is as essential an appointment so far as the Governor's control over his subordinates is concerned. Few of the State constitutions grant this power in clear and satisfactory terms. Usually the Governor is permitted by custom to discharge from office for misconduct or neglect, any official whom he has the power to appoint, but in practice for political reasons, the power is seldom employed. Since appointments have been made at the behest of the party leader, it would be insubordination on the Governor's part to dismiss from office the men so chosen.

Any Governor of independent views who is willing to take on a fight with the party organization, can clear out the incompetents from most of the State offices, but he must then be prepared for trouble in the legislature. Some States allow the Governor to remove certain local officers such as district attorneys and sheriffs, for cause, after a hearing. Such a provision if generally employed and enforced would be most salutary.

Every official elected in our local governments has sworn to obey and enforce the law of his State, and, regardless of party organizations or factions, he should be compelled to do so under pain of dismissal. The "Governor's Recall" of disobedient and neglectful officers would offer a powerful means of establishing new standards of service in all grades of public office.

**General Executive Powers.** — As chief executive of the State the Governor is required "to see that the laws are faithfully administered." He receives complaints from citizens, supervises the work of the heads of departments, represents the State in its relations with the other commonwealths and with the National Government. As a rule, however, he is unable to watch the various departments as closely as he should, because of the loose and unsystematic way in which the offices are grouped, and, unless an official is guilty of serious maladministration or dishonesty he is not apt to attract the unfavorable notice of the chief. In fact the executive having made his appointments largely for political reasons, is apt to retain officials in their places for the same reasons regardless of their efficiency, as we have seen, unless public attention is called to some serious abuse in the office concerned. Removals for inefficiency are almost unknown.

A peculiar feature of the Governor's executive duties is his ex officio membership in a number of the chief administrative boards of the State; a large share of his time and attention is taken up with the work of these bodies. The reason for this custom is that the legislature, when regulating a new subject, may wish to avoid the additional expense incurred in a new office, and may assign the duty to a number of existing officers acting as a committee or board. Almost invariably the Governor is made a member of this new body. One of our commonwealth executives has calculated that he might devote his entire time to the duties of the boards of which he was officially a member. Yet most of these bodies have important work to perform and the fact that the Governor is unable to be present shows that a new arrangement should be made or new departments created. Following are some of the boards in which the Governor takes an active part when his other duties allow:

Board of Agriculture, State Library Trustees, Commissioners of Public Grounds and Buildings, Soldiers' Orphan Schools Commission, Armory Board, College and University Council, State Live Stock Sanitary Board, numerous boards of trustees of colleges and schools, etc.

**General Problems of State Administration.** — Having created a vast number of State officers without regard to their coöperation we are now beginning to consider:

1. The necessity of a systematic grouping of the offices in departments;

2. The need of a strong control by the Governor.

The lack of a systematic grouping of State offices has prevented successful management. In theory the Governor oversees all officials but in practice this is impossible. Modern governments are much like machinery, there is in each the same tendency to needless friction, the same necessity for accurate adjustment of the wearing parts, and even the same inert inclination to "run down" unless constantly impelled by that expansive force which in physics is called steam, in politics public opinion. But this force, to be effective, must be concentrated. It cannot be trivially or indiscriminately "squirted" at any or all parts of the governmental machine, causing them to work in unison; it must be guided and led along direct straight lines. This is the rightful function of the chief executive — he should represent the guiding force of public opinion, he must personify the people in their political feelings.

If any part of the complicated structure is out of order, if any wheel is slowing down, then and there his influence should make itself felt. In order to do this, the administrative offices must be grouped and subordinated to each other as is done in any business organization. We are too prone to say that all depends on the personality of the chief, that if he is an energetic, capable, and honest man, his spirit will in some measure dominate the whole administrative force, while if he is incapable, no amount of "system" will produce results. Such a statement is only half true, for a "system" is the means through which the influence of the chief makes itself steadily and regularly felt. Can we imagine the President of a great railway company appointing thousands of officials, all of them independent of each other, when by choosing a cabinet of six, and subordinating all the others to these, he can secure greater efficiency? The business plan of organization has its weaknesses, but it also has one indispensable feature of modern management — definite responsibility. We have completely ignored this principle in our State administration.

One hundred men may be necessary to govern a small community, but much depends upon the way in which this personnel is grouped. If the entire hundred are divided into ten separate groups each completely independent of the other and performing

its duties regardless of the others, the administration of the community is doomed to failure. Nor is it otherwise with the State governments. Yet the President directs a national staff of one hundred times the size of the State personnel and does so more effectively, by the simple plan of concentrating the force under 10 responsible heads. There is never any doubt as to who is the real chief of the national administration.

The simplest and most effective plan would be to abandon the method of electing administrative officers and make them all appointive by the Governor; to reorganize the State offices under a few department heads as in the National Government, making these heads the Governor's Cabinet. Such departments should not exceed ten or twelve in number since it is vital that their chiefs should form a group of Cabinet members to whom, both as a body and as individuals, the Governor could turn for advice on policy and through whom he could control the entire administrative personnel. Such department heads should be appointed by him without approval by the State Senate. The head of each department should be empowered to prescribe regulations for its business, the conduct of its employees, and the distribution and performance of its affairs, as has been pointed out by numerous writers.<sup>1</sup> This would insure a greater amount of flexibility and effective action as well as a more real responsibility. Such changes have already been made in Illinois, Ohio, and other States following their example. The Illinois plan adopted in 1917 and the Ohio code of 1921 have both produced such an improvement in administration that a similar reorganization of offices is now taking place in other States. The Ohio act established the following departments, the list of which shows how readily the widely scattered offices of the State may be brought into a coordinate system:

Finance	Health
Commerce	Industrial Relations
Highways and Public Works	Education
Agriculture	Public Welfare

The Illinois code grouped over fifty important offices, boards, and commissions into nine executive departments and created a

<sup>1</sup> See works of Dodd, Mathews, and other references at the close of this chapter.

complete control of nearly all of them by the Governor through the budget. Even the former critics of these plans would not consider returning to the old system.

**Political Position of the Governor.** — If the Governor ruled his party he would be the strongest influence in the State, for the control of the party and of the government are inseparable; no one can be the real head of the latter unless he is also the party leader. Glancing over the principal States we find that only in the rarest exceptions does the Governor occupy this position; almost invariably he is under the thumb of a great party chieftain who is "the power behind the throne" and who either prefers to occupy a seat in the United States Senate or not to hold office at all. This man is the State administration; all appointments are made after consultation with him, and he also determines which bills shall pass the State legislature. Naturally he prefers to place in the Governor's chair a person who will be agreeable to his wishes, who will consider the party interests and, especially, help to build up the leader's influence within the party. It is clear that a Governor who is young, ambitious, and determined to seek power for himself is not desired by "the chief." The latter prefers a man advanced in years, or of satisfied ambitions, and amiable qualities — in short, a man of the "honored citizen" type. Such was for many years the political position and influence of the State executive — a nominal authority controlled by a "king maker," who was the real head of the State.

**The Struggle between the Governor and the Party Leader.** — Into this peculiar political situation a new factor has entered in the demand for greater State activity. The first effect was apparently to strengthen the party leader; all classes of the people desiring legislation must first secure his consent and aid. But little by little the desired laws are being enacted and it is now seen that their efficacy depends on the executive. The Governor grows into greater prominence after every legislative attempt at regulation; with the adoption of factory, health, pure food, corporation laws, and a host of other measures his nominal power increases, until a point is reached where he can no longer withstand the temptation to assert some slight degree of independence and feel himself in deed, as in name, the chief executive. If he is a strong man, or a consummate politician, or if the conditions of the moment prove



especially favorable, he subordinates the State executive offices, one after the other, to his own control, and even reaches out towards the legislature to become the real head of his party. In all this long struggle he is opposed by the forces of the old party system and supported by the strength of popular demands for government efficiency. These demands are growing stronger but they are still unsteady and spasmodic; the struggle results now in favor of the executive, now in favor of the old leaders. This is the significance of the constant turmoil and political unrest in our commonwealth administration; we are evolving a responsible form of State government.

**Military.** — The Governor is Commander in Chief of the State militia and appoints the commanding officers, the Adjutant-General and a staff of aids, whose duties as a rule are not onerous. He may order out any portion of the State militia or national guard which is required to maintain order in any district. The request for troops is usually made by the Sheriff of the county, although the Governor may act without such a request.

**A State Police.** — Many of the problems of crime detection, suppression of disorder, enforcement of State fire laws, and similar matters cannot be handled by a local police authority because they extend beyond the boundaries of a local unit. This has led some of the Commonwealths to establish State police forces. The peculiar difficulties in the protection of the Mexican frontier caused the reorganization in 1901 of the famous Texas Rangers. Other western States followed suit and in 1905 Pennsylvania led the way in the East by setting up a larger force known as the State Constabulary. This example has recently been followed by New York, New Jersey, Michigan, and others. The method of organization is substantially the same in all — a Superintendent chosen by the Governor has military control over the force, which is selected by him under Civil Service rules. The force is divided into companies each with its complement of commissioned and non-commissioned officers and privates. Applicants are required to pass a physical and mental examination based on the rules of the police force of large cities. The members are either mounted or motor-equipped. The force is distributed through the State in small detachments each with local headquarters, but is capable of quick mobilization. Its members are given the usual author-

ity of policemen to make arrests without warrants for violation of law which they witness and to serve and execute warrants issued by the proper authorities. They are also authorized to act as forest, fire, and game wardens and are directed to coöperate with the local authorities in detecting crime, apprehending criminals, and preserving order. The expenses are borne by the State.

The results of this plan have been such as to commend it strongly. The State police inspire respect, they are non-political, and their efficiency is far greater than either the militia or the local police forces.

The Governor may in most States suspend the writ of habeas corpus in times of disorder. By doing so he enables the militia to protect life and property and to avoid the many grounds on which judicial interference with military action may be invoked. Martial law, however, is only proclaimed for those sections immediately affected by hostilities and only so long as the hostilities exist. The State executive is loth to make use of this power because of the great unpopularity which it entails. For the same reason most of the sheriffs are unwilling to call for State troops, preferring to cope with riots and disorders by the aid of local police forces and posses.

**Judicial.** — The Governor possesses the power to pardon for offenses against the State laws, in some States upon the recommendation of a board of pardons, which board is composed of heads of departments such as the Attorney-General, Secretary, etc. Clemency extends only to offenses against the State laws. The Governor also grants extradition of fugitive criminals and requests extradition from other State executives. Article 4, Section 2, Clause 2 requires the Governor of the State to which an accused criminal has fled to deliver him up to the Executive of the State in which the crime was committed, but the Constitution has fixed no way to compel such delivery. In *KENTUCKY v. DENNISON*, 24 HOWARD 66, 1860, the Supreme Court held that to compel a State Governor to perform such a duty would be an interference with his official powers and obligations to his own State. Thus the courts must not attempt. The Constitution was not designed to destroy or hinder State government in the sphere of its reserve powers. The officials and agents of the State must be free to carry out these powers without interference from the Courts.

## THE LEGISLATURE

Probably no body of men in America exerts legal powers of such vital importance to the business community as those wielded by the State legislature. Our form of government makes the State the great reservoir of authority; the legislature therefore possesses practically every power which has not been forbidden to it or granted to Congress. Originally the State legislatures were looked upon with great favor and confidence by the people because they were the legitimate successors of those colonial assemblies which had so valiantly and faithfully protected the rights of the colonists. But the turnpike, canal, and railroad companies which were floated in the first half of the nineteenth century persuaded many of the legislatures to guarantee dividends on the company stock. Other similar ventures and mistakes soon destroyed the popular confidence, and brought a strong reaction of distrust and suspicion against the legislature, which unfortunately continues with cause, to the present day. The real difficulty lies in the ease with which secret intrigues and deals may be consummated in the law-making bodies of the State, because of the large number of members and the methods of transacting and concealing the transaction of legislative business. In the bewildering mass of bills and resolutions and from the way in which they are shuffled like cards in a pack, it is impossible for the public to distinguish the good from the bad and unless a measure is conspicuously good or bad there is small chance of its attracting attention. The membership of our legislatures corresponds fairly to the average honesty and intelligence of the people. When legislation fails to satisfy, it is not because the legislature is not representative but rather because it is not so organized as to provide directness, publicity, and responsibility of its proceedings.

**Houses of the Legislature.** — The upper House or Senate usually consists of about fifty members while the lower or House of Representatives has from one hundred to two hundred.<sup>1</sup> The quali-

<sup>1</sup> Here is a weak spot in the legislatures. They are too large to be responsible. Delaware has the smallest Senate — 15 members; Minnesota the largest — 63. New Hampshire is able to get along with 24 Senators but has 402 members in the lower House! New York, Pennsylvania, and Illinois have 50 or 51 in the Senate and 150 (N. Y.) to 207 (Pa.) in the House. There is no need either for the two Houses or for a large number of members in any State.

fifications for office and for voters are usually the same in both and even the term of office is sometimes identical.<sup>1</sup> The members are paid in most of the States, \$1500 being the salary in New York and Pennsylvania. The regular sessions as a rule are held every two years and there is often a limit placed by the State constitution upon the length of the session. The purpose of this is to prevent the legislature from doing any more harm than is necessary; but it has acted in the opposite direction in countless instances. The first half of the session usually goes by without any important legislation whatsoever. This means that if there is a sixty-day limit set by the Constitution, all action is taken in the last thirty days, so that in this brief period an immense mass of private and public bills are technically "considered" but really are rushed through both Houses, oftentimes under the suspension of the rules and without any knowledge by the members as to the real purpose and effect of what they have passed. Like so many other constitutional limitations on the legislature the sixty- or ninety-day clause has done more harm than good.

**Procedure.** — The procedure is modeled on that of Congress, but the control of the Speaker, floor leaders, and caucus over all bills and over the members themselves is far more tyrannical than in Congress. This control is corruptly and flagrantly abused, because of the lack of public attention and understanding. In the obscurity of State procedure the manipulator finds his protection. The State party "organization" is even more intolerant of opposition than in the national body; it ignores the rules, or changes or violates them at will. Measures which lack a majority vote are declared "passed," words and whole clauses are added to or dropped from bills, after they have been passed, by clerical "mistakes." The courts take the ground that such changes are validated by the signatures of the presiding officers attesting the passage of the bills. Committee meetings are called suddenly or when the opposition are not present, bills are smothered in committee or "lost" and the whole gamut of trickery and chicanery is run in the attempt to block and thwart popular measures opposed by the "organiza-

<sup>1</sup> In some States the Senate term is double that of the House. In New York where there are annual sessions the House is elected for one year, the Senate for two; in most of the other Commonwealths the terms are two and four years respectively.

tion " and to force through laws in behalf of some private interest. The members of the legislature may fairly represent the average honesty and intelligence of the people, but without the stimulus of individual responsibility and public attention we cannot expect them to enact laws of a high standard nor to withstand the pressure of powerful special interests.

**Restrictions on Legislative Powers.** — The recklessness of party control of the legislature has led all the States to impose an extensive series of limits and restrictions on legislative powers and procedure :

(a) The strict prohibition of special legislation where a general Act will cover the subject, and a detailed setting forth of the kinds of special and local laws which may be passed.<sup>1</sup>

(b) The enactment in the Constitution itself of much ordinary legislation on important subjects, such as corporations, local option, public service utilities, etc.

(c) Every bill must relate to one subject only, which must be clearly expressed in the title of the bill. The purpose of this provision is to block the practice formerly prevalent of attaching snake clauses and riders to meritorious provisions with which they were in no way connected. The friends of the meritorious measure were then obliged to defeat their own bill or to accept the obnoxious amendments dealing with other subjects.

(d) A majority of the members elected to each House, not a simple majority of those present, must vote in favor of a bill to insure its passage.

(e) On finance bills involving appropriations or taxation, two-thirds of the members elected must approve.

(f) On the final reading of a measure the " ayes " and " noes " must be entered in the journal.

(g) In all except six of the States the legislature is allowed to meet only once in two years except at the call of the Governor.

Yet these severe constitutional restrictions have not prevented the legislature from sacrificing public welfare to special interest when occasion demanded, nor have they served to reestablish that body in the confidence of the people. Popular distrust continues and

<sup>1</sup> Prof. Reinsch mentions the interesting fact that in California and Ohio the constitutions specify *over thirty subjects* on which special laws may not be enacted. *American Legislatures*, p. 150.

has shown itself in the movement towards direct legislation and towards a complete reorganization of the legislature itself. Meanwhile strong efforts have been made to improve the quality of legislation by placing at the disposal of the legislator more complete information both as to subject-matter and the form of laws.

**Legislative Reference Department.** — One of our prominent national traits is that we feel competent to give an off-hand opinion on any subject connected with government, no matter how technical or far removed from our sphere of knowledge the question may be. This quality has caused us much discomfort in State law-making and has deprived our governments of the expert services which all private businesses enjoy. No private company would dream of intrusting its funds or its operations to a department head unless he were a highly trained, technically proficient expert who had by education or experience qualified himself thoroughly for his work. But the State constantly intrusts its duties to the bungling ignoramus whose sole qualification is that he means well or that he worked for the ticket. As time passes we are growing out of this condition, but all of the State governments are still seriously weakened by it, and nowhere does it show more plainly and with greater disadvantages than in the partisan legislator. The suspicion is beginning to dawn that we are not all born legislators. A large majority of those chosen to the law-making bodies are unfamiliar with the simplest and most important principles of law-making. They are flattered into the belief that good intentions are sufficient to make good laws. What is therefore their surprise when they find that a measure of undoubted merit which they have introduced and passed may be unconstitutional for not one but several reasons, and that even if upheld by the courts it would not achieve the end that they had in mind, but would perhaps defeat their very purpose! Yet this is a common discovery by both professional politician and reformer. It is only another instance of that impressive fact that in legislation as in science and in business, we have reached the era of "instruments of precision." We need the benefit of every technical aid that we can secure.

No legislature should try to be its own lawyer. "He who pleads his own case has a fool for a client," is an ancient English saying that aptly fits our law-making. We need the service of the legislative expert in drafting measures. Upon this thought as a basis,

the legislature of Wisconsin established a Legislative Reference Department in 1901. The State University furnished an expert, the late Dr. Charles McCarthy, who built up in his department a complete collection of information and material useful for perfecting the form of legislation, which was placed at the service of the members without charge. The department observes the following rules:

(a) Bills are drafted only on the specific written request of a member of the legislature over his signature.

(b) No suggestions as to the substance of bills are made by the department or its draftsmen — the department's work is only clerical and technical.

(c) The department itself is not responsible for the constitutionality or legality of any measure, although its work necessarily obviates most of the evils of illegality that beset the average bill. The department is non-political and non-partisan; it places its trained experts at the disposal of all factions and members in the legislature.

The department prepares all available references on the proper subjects of legislation at each session. It is thus a legislative laboratory. Other States have rapidly followed Wisconsin's lead. The more efficient of these bureaus are now able to give not only the laws passed on a given subject by other States but the results secured by these laws and the court decisions interpreting them. This is an invaluable aid to the law-maker.

Following another precedent set by Wisconsin, several of the States have created revision committees to search all bills for technical errors. Measures are checked at every stage of their passage from the legislature by the clerks of this Committee. In this way a number of mistakes which occur in the printing and preparation of measures are avoided with great advantage to the quality of the legislative product. The State has also provided a statute reviser, who issues an annual volume revising the statutes and bringing them up to date.

**The Lobby.** — The legislature is in position to grant such favors, privileges, and advantages to a few, under the ostensible cover of beneficent legislation, that its action is of vital interest to every man in the community. It is beset by agents of organized interests working either to accomplish or prevent the passage of bills affecting

their clients. The secret of influence upon the legislature is organization. Those elements of the people who are unorganized count for little or nothing. The lobbyist is the agent of an organization. He "sees" leaders; he confers with them, and makes friends with committeemen; he is a steady, insistent, and secret force prepared to take advantage of all those factional eddies and whirls of party organization which constantly recur in State politics. Some of the States, again led by Wisconsin, have attempted to cope with this problem by requiring registration of all lobbyists with the names of the companies that they represent. The register is open to public inspection. The law provides that their work for their clients must be done in the open, that is, in public committee hearings. It is believed that this has reduced some of the graver evils of the practice.

**Proposed Changes in State Legislature.** — The belief that the State legislatures are not properly organized to carry out the vast burden of new duties and services which they are now attempting to perform has grown so strong that serious attention is now devoted to their reorganization. All the plans proposed contemplate a material reduction in the number of members in the legislature, and in its relation to the Governor. The most practical of the proposals made for improvement of the State legislature is one first suggested by the "People's Power League" of Oregon, the main features of which are:

First, to abolish the direct primary and place in its stead a system of preferential voting for the Governor; this would do away with the need of a primary and allow every voter to express his first, second, and third choices on his ballot.

Second, to establish a State budget in which the Governor can fix a maximum for each item.

Third, to elect the members of the legislature by a system of proportional representation.

Fourth, to reduce the number of members of the legislature and establish a single house.

Fifth, to make all administrative officers appointive by the Governor.

Sixth, to give the Governor and members of his Cabinet a seat and a vote in the legislature, in order to secure the advantages of greater harmony and unity between the two departments.



Seventh, to retain the popular initiative and referendum and establish a recall of all executive and legislative officials and representatives both appointive and elective.

The Oregon plan has been widely discussed and offers the most promising model on which to form our State governments.

### STATE COURTS

The usual organization of the State judiciary, commencing at the bottom, is:

The magistrate or justice of the peace,  
In the cities, municipal courts,  
County courts, both civil and criminal jurisdiction,  
A Supreme Court or Court of Appeals.

In most States the judges hold office for ten-year periods in the lower courts, and for longer terms in the higher. The Supreme Court tenures vary from two years in Vermont to 21 years in Pennsylvania. No general agreement has been reached by the States in their customs of choosing the judges. The most usual methods are election, or appointment by the governor,<sup>1</sup> and of these the choice by appointment seems more desirable — first, because of its simplicity, enabling the people to divest the election of confusing issues and personalities and concentrate under the short ballot principle on the fewest number of offices. Second, because the method of election is in reality an appointment by the political leader of the majority party in the State. A majority nomination means election, and no one can secure this nomination without the O. K. of the leader. For these reasons it seems wise to fix more definitely the responsibility for the choice by giving it to a public official, the Governor, rather than to a less visible and less responsible influence. This plan has proved successful in New Jersey and other States. In most of the States, the nomination of an elective judge in the higher courts is made under the control of the political elements which run the other departments of the State government. Owing to these and other causes it has not been possible for the judiciary to remain free from political influences. Such influence

<sup>1</sup> The method practiced in a few of the States of election by the legislature is least desirable of all for the reasons which are obvious from what has already been said of the legislative procedure.

shows itself even in the appointment of court officers. A judge cannot be removed from office during his term except by impeachment or, in the inferior courts, by the Governor upon a request from the State legislature. Such a removal is unknown in recent times.

In the last twenty years many of the States have created special courts for peculiar classes of litigation. The large cities have established municipal courts, the purpose of which is to hear small cases, both civil and criminal. The ordinary county courts are so overburdened that the small debtor can usually escape his obligations by the simple means of delay and the attendant expense to the plaintiff. By relegating these small claims to a special court with simple procedure, the plaintiff secures more adequate justice at less expense. A similar change has taken place in criminal suits. Formerly it was the custom to hear all criminal cases together, the accused being herded in the lockup, regardless of their age or experience in crime. Special courts have now been created for women and young persons, the result being that those who are just entering a criminal life are treated with greater consideration and care and do not form those associations which are so often the cause of permanent delinquency; the Juvenile Court is now a well-established feature of every advanced city judiciary. And, through the efforts of the judges and the probation officers connected with the courts, a large proportion of the young persons brought before the tribunal are saved from becoming a complete loss to the community.

**Execution of Decisions.** — The sheriff is the executive officer of the local county courts and if opposed by force he has power to enroll as his assistants such a number of citizens as he may require to carry out the court decree, by forming what is known as a posse. If this is unsuccessful he may call upon the Governor for the militia, and the Governor, if unable to cope with the disorder, may invoke the aid of the United States by a direct request to the President, as provided in Article 4 of the Constitution. The sheriff also exposes for sale, under orders of the court, the goods and property of debtors, and carries out important duties in apprehending and imprisoning criminals, under orders of the courts.

**The Prosecuting Officer.** — The position of the district attorney is a strategic one in the judicial system of every community. He is the public prosecutor in criminal cases; under the peculiar tradi-

tions of our American law, he may wait until a formal complaint is brought to his attention, or, of his own initiative he may start proceedings against officers, using the powers of his office and of the courts to secure the necessary testimony. In this way, a prosecutor may be either supine or active. He may wait for complaints to be made or he may conduct his own vigil over the laws of his city and State. As a rule, the district attorney is inactive and takes it for granted that if the law is violated some one will be injured and will complain. Such an officer usually conducts his prosecutions from the routine evidence produced by the police department. Occasionally, however, there steps into office a man of different type who disregards the purely political aspects of his post and conducts it in an aggressive manner. It would be physically impossible for him to insist on the vigorous prosecution of all offenses, nor would such a course tend to the best interests of the community. He therefore selects a limited number of important cases, regardless of the police reports, and often gathers the evidence through his own agents and prosecutes on his own initiative without waiting for complaint. Such men have inevitably won great prestige or advancement because of their stand; and many of them have established a national reputation and have received high public office. Among such may be mentioned William T. Jerome of New York City, Joseph W. Folk of St. Louis, Charles S. Whitman of New York, Francis J. Heney, and numerous others.

**Judicial Safeguards.** — In all criminal cases and civil suits above a certain value, usually \$15 or \$20, a jury trial is required by the State constitution. Before a person can be tried for a crime, an "indictment" or formal accusation must be drawn up and approved or found to be a "true bill" by a grand jury; this body is usually composed of 23 members who ascertain whether there is sufficient probable cause for the detention and trial of the accused. In our early history the people were much concerned to prevent the prosecution and punishment of innocent persons and accordingly all attention was focused on the safeguards to be thrown around the accused. But the accused has been so thoroughly protected that under our changed conditions he stands more than an even chance of escape and there is a growing sentiment in favor of protecting society from the criminal by removing some of these technicalities of procedure.

There are so many of these safeguards and technicalities that it is often an easy matter for a skillful attorney to secure an acquittal or a light punishment for men who are undoubtedly guilty of the most heinous crimes. The common methods of doing this are to claim any of the following:

The indictment or accusation found by the grand jury does not clearly state the crime; or

It does not state that the act is forbidden by law; or

The law itself is not sufficiently clear as to the exact criminal act which is to be punished; or

The indictment misnames or wrongly names the person accused; or

The crime was committed more than two years ago and the accused is therefore freed under the Statute of Limitations; or

That in the trial itself the rights of the accused were violated by trying him in a heated state of public opinion; or

By allowing certain evidence against him to be produced which should not have been admitted, or

By refusing certain evidence in his favor, or

By the judge's decision on certain matters of fact which should have been left to the jury to decide; or by the partiality of the judge's charge, etc., etc.

If any of these or of a thousand other claims is allowed, the prisoner escapes or secures a new trial, no matter how perverted or dangerous he may be nor how abominable may have been his crime. On the other hand, a poor or ignorant person, weakly defended by an incompetent attorney, may be and often is heavily dealt with regardless of the nature of his offense. The safeguards of our criminal procedure, originally designed to protect the lowly against the great power of a royal government, are now a convenient and easy means of escape for the cunning, rich, and unscrupulous evil doer, while the poor and ignorant are too often unprotected. So far has this dangerous condition developed that it is now well described in the cynical aphorism, — "It's not safe to steal less than a million."

**Justice of the Peace.** — The greatest need for improvement is in the lowest round of the judicial system, where the largest number of cases is handled. The justice of the peace decides matters of petty civil and criminal jurisdiction. Although an appeal may be

taken from his decision to a court, the vast majority of cases do not go beyond him. His office under our present laws is a source of favoritism, oppression, and intolerable laxity in law enforcement. Elected on a political basis, the justice, in the words of Dr. Dodd, "must obtain business. In order to obtain business he must decide in favor of those who bring him business." Most of our progressive cities have abolished this institution, which now persists only in the rural sections, but where the cities still maintain this official under the guise of "magistrate," his court is known as the most flagrantly corrupt and most subservient to political influence of any part of our government structure. The only adequate remedy for this condition is the abolition of the justice and the creation instead of a local court corresponding in the country regions to the municipal court in our cities, with cheap, quick procedure.

**Judicial Reform.**—In Chapter 14 on the Federal Courts we have already considered the need of hastening Federal procedure. The efforts to improve the State court system, which are now being made by the progressive elements in the legal profession run chiefly along the following lines:

1. *The abolition of the magistrate or justice of the peace and the creation of local courts to take his place, as above described.*

2. *A complete reorganization of the criminal courts in cities.*—This has been done by concentrating in a single court with several sections all the criminal jurisdiction of the city, giving the presiding judge in this court the authority and the responsibility for establishing a quick procedure and having the court's docket kept up to date.

**Detroit Plan.**—Detroit has led the way in this change. Until 1920 that city followed the usual methods in dealing with criminal prosecutions such as now exist in all American cities. There were police judges or magistrates for trivial misdemeanors and a criminal court for more serious offenses. The judges in both were paid small salaries and were controlled by politicians who used the courts to punish enemies and reward friends. Around these tribunals, as elsewhere, had grown up the professional bail bondsman, the cheap criminal lawyer and the jury fixer with all the political go-betweens who could secure "influence." Whenever a professional criminal was accused of an offense in the police court

he would appeal to the higher court. His case would be postponed for months or a year and he meanwhile was free on bail to continue his illegal vocation. If he jumped bail it was later discovered that the professional bondsman had put up bogus security. Or if his case ever came to trial the date was so long postponed that the witnesses had meanwhile been influenced or had disappeared.

The police did their best but convictions were so difficult and the whole machinery was so "set up" in favor of the criminal that many honest members of the police force were completely discouraged. This is today the situation in nearly every city in the United States. It explains in part, at least, the unparalleled increase in crime which has startled and dismayed all students of criminal law in this country.

The local Bar Association, together with the more progressive citizens, secured a reorganization of the system, which took effect in 1920. The plan of two separate courts was abandoned, and a single criminal court established with complete power and undivided responsibility. The new court has seven judges who annually elect one of their number as presiding judge. The judge so chosen has very extensive powers in the arrangement and control of the court's business. The new law classified or grouped minor cases into seven sections, each judge having charge of one section. The balance of his time after dealing with minor cases is devoted to the regular jury trial of more serious crimes. When this concentrated unified new court came into existence there were twenty-two hundred cases of serious crimes awaiting trial. By the end of the first year only thirty-two untried cases remained. The average number of untried cases during the second year was reduced to twenty-five. The average length of time between date of arrest and time of trial does not exceed two weeks. A notable increase in heavy penalties for major crimes has resulted and it is claimed that crime has been reduced one-half in the city.

3. *Psychopathic Clinics.* — The Municipal Court of Chicago, handling criminal and civil cases, first established a clinic or laboratory to which all doubtful cases were referred, that is, all persons whose mental condition and responsibility were not clear. An expert trained psychologist with a staff of skilled assistants has the work of studying the mental and physical condition and drafting

recommendations for the proper treatment of each prisoner referred to the clinic. It has been found in the city named and in numerous advanced and progressive institutions like Sing Sing, Elmira, and others, that the mentality of the criminal can be analyzed with fair accuracy, and his future conformity to law forecast. The officers of such a clinic can report to the court whether it will be safe to parole a prisoner or whether his criminality results from such fundamental causes as to make it unsafe to release him. In some striking cases the experts have even advised that permanent imprisonment was necessary, and although such a sentence could not be imposed upon the criminals in question, they have later committed serious crimes which bore out in detail the forecasts of the clinic.

The psychological clinic involves a complete right-about-face in our dealing with both the major and petty criminal. It means the abandonment of the vindictive retaliatory treatment of crime and a scientific analysis of causes and probable future conduct such as only the skilled expert can give. The Cleveland Survey recommended that the clinic should pass on all cases coming before the criminal court in which problems of insanity, epilepsy, or mental deficiency arise. It does not mean the abandonment of severe penalties for those whose future course will be helped thereby. In the words of an expert professional criminal to the members of the survey, "The only way to stop us is to find out who and what we are and what we're good for. Then you've got to make punishment severe enough or opportunity good enough for us. You don't do either now."

4. *Conciliation in Civil Cases.*—The popular mind is beginning to be impressed by the immense proportion of civil suits which might be prevented by some regularly established method of commercial or civil arbitration or conciliation. In England much of this is done by voluntary tribunals set up by merchants' associations. Illinois and New York have passed laws by which such voluntary arbitration awards are made binding and enforceable when the parties previously so agree. But there is needed some official public plan of conciliation by which the prospective parties to a lawsuit may first submit their case to an impartial authority and secure its arbitration without the expense or delay and formality of a suit at law. Such public systems have long existed in

Denmark and Norway. Probably because of the Scandinavian origin of much of its population, Minnesota has led the way in this country by a State law which is permissive rather than compulsory. It allows cities to set up special conciliation judgeships, to conduct such impartial and informal hearings with the aid of a court clerk. No regular court fees are exacted from the parties. The argument is held without attorneys but a case may be transferred at any time to a regular court. The judge's efforts are to secure an agreement among the parties on a settlement and reduce this to writing. A similar court established in Cleveland has disposed of many thousands of cases with negligible costs and no delay. In Norway the conciliation courts are now able to adjust satisfactorily 80 per cent of the cases coming before them.

5. *Legal Aid Bureaus.*—In order to make justice accessible to the poor, many philanthropic societies have established, and maintained without cost, legal aid bureaus. These bureaus take up both civil and sometimes criminal cases for persons who are unable to retain counsel. As a rule, however, they seek to avoid criminal defenses, divorces, and bankruptcies. Many cities already employ a public defender so that the legal aid bureau need not include criminal defenses. Legal aid has met such an important need that in Philadelphia it has been taken over as a part of the City Department of Public Welfare and has shown a remarkable record of assistance to the poor, over twelve thousand applications for aid being received each year.

6. *Unification of Courts.*—There is now a well-defined move represented by legislation in Massachusetts, Wisconsin and other Commonwealths to group all the courts in one organization and place them under the direction of a presiding judge who shall have authority to assign judges to overburdened courts in different parts of the State. There is also a regular annual meeting of chosen representatives from all the courts to survey and plan the judicial business of all. It also means less control of the courts by legislation and more responsibility by the courts themselves for the establishment of an efficient procedure. It means that the rules of all the courts shall be regularly revised, simplified, and improved by the central conference of judges already mentioned.

7. *The Judge Should Conduct the Trial.*—A much more important and active part should be taken by the judge. He should *conduct*



the trial. At present he is not a judge in any serious sense but a moderator who merely tries to insure fair play for both sides in the battle of words, occasionally being called on to interpret the rules of the game. So long as our judges occupy this position of umpire it is impossible to avoid the perversion of justice already described; there must be a willingness on their part to participate actively in the trial and to assume full responsibility for its successful conclusion. Such an attitude on their part would at once put an end to the continuous bickerings between counsel which are now so common, and would shorten the proceedings and reduce the cost of both civil and criminal suits. These changes are not based on theoretical principles of law but have long been practiced in the English and Continental courts where justice is dispensed quickly, without useless technicality, and far more fully and cheaply than in our own country.

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## QUESTIONS

## THE EXECUTIVE

1. Why has the Governor been given such a weak position by the State constitution and laws?
2. Mention the more important officials of State administration.
3. Which of these are elected and which appointed by the Governor in your State?
4. How is the Governor nominated in your State?
5. What are the qualifications of the Governor?
6. Give some idea of the terms of office common in different States. Is a long or a short term more desirable? Reasons.
7. Give some idea of the salaries paid by different States.
8. What are the Governor's most important powers?
9. Explain the method of making appointments.
10. What are your impressions as to the advantages and disadvantages of senatorial approval of appointments?
11. A new Governor elected on a platform favoring certain new laws finds a strongly organized opposition entrenched in the legislature. What steps can he take in the impending struggle to carry out the platform pledges?
12. Why does the Governor so often make use of the veto power?
13. Prepare a brief summary of the extent of the Governor's power of removal in your State and discuss the advisability of extending this power, including a statement of the offices to which it should be extended.
14. Why is it difficult, if not impossible, for the Governor to supervise and direct the State administration as the President does in the National Government?
15. Why has the Governor been made a member of so many boards? Can he attend to the duties of these boards?
16. How could the Governor's supervision and control of the administration be increased?
17. Explain the chief principles underlying the administrative changes made in Illinois and Ohio.
18. Outline briefly the causes of the dependence of the Governor upon the party leader of the State.
19. Why is a young, ambitious man as a rule not favored by the party leader for the governorship?
20. Explain the forces and the clauses of the Constitution which favor each side in a conflict between the Governor and the party leader.
21. Outline the military powers of the Governor.
22. Explain the writ of habeas corpus and the effect of its suspension by the Governor.
23. What are the Governor's powers in cases of extradition? What are his duties under the National Constitution?
24. If the Governor of your State refused a request for extradition by another State, what could the authorities of the other State do?

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## QUESTIONS

## THE LEGISLATURE AND THE COURTS

1. Outline the main features of State legislative organization and explain its similarity to that of Congress.
2. Does the majority party have a greater or less control of the State legislature than has the majority in Congress? Give some examples of its powers.
3. How would you explain the fact that unpopular and even crooked measures have so much better opportunity to pass in the State legislature than in Congress?
4. Why has public confidence in the State legislature been undermined?
5. Prepare a brief essay, showing the attempts made in State constitutions to limit the powers of the legislature, to govern its procedure, and to prevent it from doing harm to the interests of the State.
6. How would you answer the argument that the legislature is composed of untrustworthy men?
7. What do you consider the strongest need of the legislature in order to rehabilitate it in public confidence?
8. Give some idea of the size of the two Houses, with example.
9. How large are the Senate and the House in your State?
10. Is the session of your legislature limited in time? Reasons.
11. Get the opinion of an experienced newspaper man on the advantages and disadvantages of a time limit.

12. Outline briefly the views of Governors on the relations between the Governor and the legislature.
  13. Explain the need and work of a legislative reference bureau.
  14. Have you such a bureau in your State? What are your impressions as to the advantages for your State?
  15. Explain the work of the Wisconsin revision committee and its effects on the quality of legislation.
  16. What is a lobby and why is it necessary?
  17. Summarize some of the evils which have arisen from the lobby and the way in which the States have coped with this question.
  18. How does the number of members affect the trustworthiness and efficiency of the legislature?
  19. What are the proposals of the Oregon Citizens Committee and your impressions of their value.
  20. Prepare an essay on responsibility and efficiency in the State legislature and the means of securing them.
  21. Explain the system of courts in your State.
  22. How do the tenures of the judges vary from those of other officers?
- Examples.
23. How are the judges chosen in your State?
  24. Mention some other methods and give your impressions as to which is the best and why.
  25. Why have special courts been so frequently established in recent years?
  26. Has the plan been a success or failure? Examples.
  27. Explain the general position and powers of the sheriff in the court system of your State.
  28. Outline the main duties of the district attorney and show why he occasionally becomes a popular hero in the political strife of the city or county.
  29. Why does the district attorney abandon or drop so many indictments?
  30. Outline the more important judicial safeguards thrown around the accused in criminal trials.
  31. Give your impressions as to the effect of these safeguards in aiding or hindering a reasonable administration of justice.
  32. How is it proposed to remedy these difficulties?
  33. What are the causes of delay in civil suits?
  34. What do you mean by a unified criminal court? What are its advantages over the old system?
  35. How can psychological science aid the criminal courts?
  36. What is a legal aid bureau?
  37. How can arbitration and conciliation help the court system?
  38. Why is it proposed to unify the State court system?
  39. How could the judges themselves improve court procedure to the benefit of the parties?

## CHAPTER 17

### THE STATE: BUSINESS PROTECTION AND REGULATION

THE question, "What is the State doing for its people?" is so much more important than the forms, methods, and machinery of its government that we must devote the larger share of our attention to the *work* of the State. Among the activities of special interest are:

- Business Protection and Regulation
- Labor Interests
- Education
- Health
- Charities and Correction
- Highways, Finances

In each of these departments of work, recent years have seen the rise of new and important problems for which the State governments are now seeking a solution. For greater convenience, the State's constitutional authority over each of these fields is given in the chapters on Constitutional Protection of Business, and The Police Power.

Regulation has run along the following main lines: (a) The grant of charters of incorporation, and the issuance of permits to companies from outside to transact business within the State; (b) the special supervision and control over banking, insurance, and similar fiduciary businesses; (c) the regulation of charges, services, and accounts of railways, common carriers, and public service corporations; and (d) the attempts to maintain fair conditions of trade and competition.

#### CHARTERS

In the grant of charters, our States have established some executive office, usually the Secretary of the State, where, upon compliance with the general laws, the incorporators of a new company may secure a charter. As a fee or tax is usually charged for this purpose,

certain Commonwealths have fallen into the practice of bidding for this "trade" by reducing their requirements, except the fee, to a practical nonentity, in this way attracting to their capitals the lucrative business of chartering corporations on a wholesale plan. Delaware, West Virginia, and until 1913 New Jersey have freed themselves of much of the burden of ordinary State taxation by this practice. A charter once secured in one State, the company may transact business in others upon complying with their general laws. The charter is the constitution of a corporation, outlining the purposes of the company, the authorities by which it is to be managed, the rights and duties of its "citizens" or stockholders. In all of our States a charter may be forfeited or canceled if the corporation exceeds or abuses its charter powers, but this provision is in practice a dead letter. The only real regulation occurs after the company has been chartered and has begun business. Outside, or as they are called "foreign," corporations wishing to transact local business within the State may be required to take out a license or permit, and this permit is usually issued by the Secretary of the State upon payment of a fee.

#### BANKING AND INSURANCE

The most familiar instances of State regulation are seen in the case of financial institutions. These businesses are so interwoven with the warp and woof of our commercial fabric, and their stability is so necessary to the successful maintenance of business credit, that a special public interest in the security and reliability of banking and insurance corporations admittedly exists. The State therefore is obliged to surround enterprises of this character with special safeguards for the protection of the entire community. Each Commonwealth appoints a Superintendent or Commissioner of Banking and an Insurance Commissioner, with the necessary corps of deputies, inspectors, and examiners. State banks and trust companies are required to make semiannually and in some States quarterly, a detailed report of their financial condition to the commissioner. The latter, if he deems it necessary, may also order a special examination of the books and vaults of any institution to ascertain its solvency and should such an examination show the company's entire inability to meet its obligations it is the duty of the

commissioner to take charge of the assets and wind up the affairs of the corporation. If necessary he may assess the stockholders, to make good the losses of depositors. Many Western States at one time established public guarantee funds to assure depositors the return of their money after a State bank failed. The constitutional authority of a State to require State banks to pay a special fee for the creation of such a guarantee fund was disputed by an Oklahoma bank in *NOBLE STATE BANK v. HASKELL*, 219 U. S. 104, 1911, but the Supreme Court held that the tax power and the general police power of the State gave it full constitutional authority to pass such a law. The banking business was so fundamental in relation to all others that the protection of deposits was important. Hence the State could establish a special safety fund. But a law may be constitutional and yet most unwise. The Oklahoma plan was followed in several other States, but the policy proved a complete failure when the great agricultural depression of 1920-21 set in. When insurance against loss was most needed the guarantee fund was exhausted. The State Insurance Commissioner examines insurance companies, requires the maintenance of the proper reserve, issues and revokes certificates permitting outside companies to transact business within the State, and supervises the winding up of affairs of insolvent and defunct concerns. In case any insurance company is found to be fraudulent, or illegally organized, or about to fail, the commissioner suspends its officers from control and takes entire charge of its affairs until the court appoints a receiver. Some States also declare that rates must be "reasonable," accounts public, and the expense of solicitation limited.

Insurance regulation by the Commonwealths, while partially successful in preventing the more disastrous effects of fraud and weakly capitalized companies, is not entirely satisfactory, since it involves too heavy a burden upon the large concerns doing business in several States. The entire cost of inspection must be paid by the company; each State also may legally insist on inspecting every insurance concern within its borders so that every company may be subjected to an inspection in every State it enters. In many instances the fees are so heavy and the inspections so frequent as to constitute a serious tax on the business. The insurance commissioner of one Western State, during a recent dull summer

season, decided to "inspect" one of the large New York life companies which did business in his State. With his assistants, who included members of his family, he traveled de luxe to the metropolis and for a week spent a couple of hours every morning in the offices of the company. The afternoons and evenings he and his staff devoted to harmless diversion and recreation, seeing the sights. Having vigilantly safeguarded his State's interests, at the expense of the company, he returned home, embodying in his inspection report *copious extracts from the annual report of the company*. There are many New York companies and many watchful insurance commissioners.

The cost of insurance could be reduced if we had national instead of State regulation. Such a system would undoubtedly have been established long since, were it not for the Supreme Court's ruling in *PAUL v. VIRGINIA*, 8 WALLACE 168, 1868, that insurance is not commerce and is therefore not subject to the national power. Some States operate a public life-insurance system. But the wisdom of this plan is doubtful. Life insurance is not the mere collection of premiums and payment of benefits. One of its chief phases is the intelligent, far-seeing investment and management of huge reserve funds. The difference between a good and a poor use of this money means lower or higher rates of insurance. No State officials chosen under present political conditions are qualified to conduct this business with safety. Undoubtedly the private company can offer better management and safer life insurance than the State. The same applies to a less extent to fire and fidelity insurance but not to insurance against factory accidents. Here the reserve fund is comparatively small and the State insurance bureau can without solicitation secure a large business and operate at a lower cost than private companies.

**Insurance or Charity?** — We must distinguish sharply between insurance and almsgiving. Charity is a contribution or dole made to the deserving poor. Insurance is a coöperative plan by which all contribute for mutual protection. When a State system runs on its own resources or at a profit this is insurance. When it ceases to do so and calls upon the State treasury to make up losses, the taxpayers shoulder an added burden. This is charity. Americans have an innate dislike and suspicion of all payments from the public treasury for the benefit of private individuals and special classes.



Only partisan politics and competitive bidding for factional support by rival demagogues make possible such raids on the common purse. When the slipshod, incapable, or dishonest State management of such business as insurance causes a deficit, and we make up this deficit from the State taxes, we do not avoid a loss — we simply conceal it by calling it “taxation” instead of “poor management.” The community pays more and gets less. Under private operation the keen incentive of profit makes for better management. Experience shows that the public interest can best be protected by regulative laws without State operation.

**Blue Sky Laws.** — Should the State permit the sale to its people of any and every kind of stock and security issue? Or should it make some inquiry into those types of stocks which are most commonly used for purposes of fraud? In 1909 an investigation by the Kansas Bank Commissioner, Hon. J. M. Dolley, indicated that Kansas investors had lost from four to six million dollars annually in worthless stocks and bonds, which had been promoted largely by outsiders. From this study of the question he proposed that the State should devise some means of inspection which would protect its people from the grosser forms of imposition. It was not his thought that every Kansas investor should be safeguarded against all possible loss in speculation, but rather that it should be rendered difficult, if not impossible, for the promoter of worthless securities to perpetrate what was in substance if not in form a fraud upon the investing public. The commissioner calculated that the loss from this source was greater than from failure of banks. He reasoned that banks throughout the world are government-supervised with the greatest care, and that no objection to this principle has been raised for decades. He asked pertinently why one branch of the investment business should be scrupulously controlled, while men in another branch are allowed to offer stocks which have no basis except the blue sky above and the paper on which they are printed. He estimated that fully 99 per cent of all the money placed in mining stocks at that time was a complete loss.

Following his recommendations a law was passed which, as later amended and copied widely in other States, provides that persons desiring to sell certain doubtful types of stocks and securities within the State must first secure a permit from the Banking Commis-

sioner and furnish him with essential information about the company whose stock is to be sold. This includes full details as to the business basis of the proposition, its properties, assets and liabilities, and such additional information as is necessary to make clear whether the stock is or is not a fraudulent one. If necessary, an investigation may be made to ascertain whether the concerns really own the property reported, or not. A few States require that brokers and dealers in investment securities obtain a license for conducting business within the State. If the people as a whole realized the immense waste of capital arising from the promiscuous sale of fraudulent securities, even more drastic legislation would speedily be enacted.<sup>1</sup> For example, an inquiry by the Federal Trade Commission into the promotion of a motor corporation showed that stock was sold to 54,000 persons representing an aggregate of \$4,720,000. Nearly \$1,200,000 was paid to salesmen as commissions and \$650,000 was retained by the chief promoter as "fiscal agent," while over \$500,000 went for advertising and other expenses. That is, over \$2,300,000 was paid out to get a net cash sum of \$2,400,000. During the fiscal year 1920 under the Illinois law applications for the sale of stock amounting to \$66,000,000 were rejected. These were 40 per cent of the total applications. Although the Blue Sky laws have been strongly criticized, they have saved vast sums from the raids of confidence men and bogus mining and oil promoters. The constitutionality of these laws has been attacked on the ground that they interfered with interstate commerce, and they have been modified to meet this objection. There is no doubt, however, that a State can prohibit the retail sale within its borders of fraudulent securities as well as adulterated foods or drugs.

#### RAILWAY REGULATION

Much of the State's reputation for bungling and harmful interference with business has been earned in the field of railway regulation. As we have seen when considering the Federal control of commerce, the Commonwealths have been permitted by Congress and by the Supreme Court to extend their regulations over a wide expanse of national trade which lay within their borders, so long

<sup>1</sup> See *Bulletin of the National City Bank of New York*, April, 1920, pp. 4-7.

as the question involved was a distinctly local one. They have used this power to the utmost, both wisely and unwisely. Whether animated by the desire to protect their people or in some instances by other motives, they have left almost no point untouched in the whole department of railway transportation. At first this regulation was carried on entirely by the State legislatures themselves, which saw in it a valuable opportunity to increase their popularity. In doing so, they provided rules and regulations on every conceivable question and finally fixed even the charges for freight and passenger traffic. After some successful and many disastrous attempts of this kind it became clear that the legislature, even when honestly desirous of establishing only the best and the wisest standards, could not possibly master all the infinite, technical detail of the railway business sufficiently to make practical or wise rules for it. Nobody who examines the State laws of the period which has just closed can believe the State legislature qualified for this important and difficult task.

The complete breakdown of legislative control suggested the idea of a small administrative body which would avoid the temptations to eloquence and oratory, and the necessity for making political capital out of a business question. This latter pitfall has been the greatest cause of legislative failure. Anyone who arose upon the stump and suggested that the rights of the railway be reduced or its duties increased or its charges and rates diminished, acquired instantly a political following which the opposing party could only combat by making still higher and more urgent demands. Undoubtedly the railways had done their part to bring about this popular hostility. In the past their promoters and some of their directors and managing officials had violated every known rule of common honesty towards the public and the stockholders, and had then abandoned the properties to the vengeance of the public. Many of the construction company heads, promoters, financial agents, and railway wreckers have been among the first and loudest to declaim against any "government interference with legitimate business interests" — a fact which has greatly beclouded and retarded the proper settlement of the whole problem and has not softened public opinion towards the companies. But whatever the position of the railways has been the people have nothing to gain from persecution. Rather must they maintain the carriers

in a thoroughly efficient state under a more scientific plan of public regulation.

**Railway Commissions.** — The Western States, where the farmers had found the railway rate problem of special importance in shipping their grain, were the first to adopt the commission plan. The body usually consists of from three to seven members, appointed for a long term by the Governor, and assisted by a small force of inspectors, accountants, and clerks. It is modeled on the Interstate Commerce Commission, both as to form and general authority. The commission is usually given power: (a) to regulate rates — by fixing the maximum figure, by determining what shall be a reasonable charge, and by suppressing discrimination as between the large and the small shippers; (b) to control the service — by requiring fair treatment of shippers without discrimination, adequate service, and facilities; special emphasis is also laid upon safety of rolling stock and roadbed; (c) to supervise railway accounts — by requiring reports and uniform accounting methods; (d) to control the capitalization of the railways — by granting or disapproving increases in capital or permission to construct new lines, and by valuation of the properties, for purposes of rate control; some of the commissions have worked out an excellent system of valuation.

But railway regulation by its very nature cannot be carried on by two conflicting authorities and in spite of the efforts of legislatures and courts, the State laws have slowly but surely encroached upon those national railway matters which ought either to be left free from interference or subjected only to the national control. The States conflict also with each other, their regulations are diverse and even based on different principles. A line running through two States is subject to three regulations, each made by a separate, independent authority. Such diversity cannot but injure the carriers and hold back their proper development by many years, while depriving the people of their benefits. This is especially true of the *charges* for transportation. The commissions have at times worked serious injury by lowering rates below the margin of profit. Whatever may have been the sins of the carriers in the past, their present managements cannot justly be held responsible nor can the present stockholders be fairly deprived of a return on their investments. Even where the State commission does not desire to inflict such an injury, it is often incapable of establishing

an official system of rates without seriously changing the whole conditions of interstate business.

The entire problem of railway charges is so inseparably bound up with outside traffic conditions that in most Commonwealths it is impossible for a State authority to regulate with fairness to all concerned. Both the making and the regulation of rates are national in their scope. Aside from their attempts to control railway rates the State commissions have been a satisfactory step in advance over the old system of regulation by detailed laws.

**National Control of State Rates.** — The Act of 1920 as interpreted by the decision in *R. R. COM. OF WISCONSIN v. C. B. & Q.*, February 27, 1922, points to the ultimate control of most local rates by the Interstate Commission. Since this body is already overburdened by its present duties, an increase in its activities would require some change in organization. The most feasible solution of the problem seems to be to add a series of Federal district commissions, perhaps six in number, each with the present powers of the national commission in its district, and with a right of appeal by either party from their rulings to the central body. Such a plan would offer a quick and uniform settlement of rate problems and would avoid expensive, time-consuming, and destructive diversity of regulation, while preventing the delays due to excessive centralization in one body. Every year makes it clearer that State control of railway rates must cease. The Federal Act of 1920, which rightly assumes this power for the national government, has been under constant attack since its passage. Some of the critics of this law are local State politicians who want to retain State control over the railways regardless of its effect on the transportation system. Others for their own ends are seeking to cause the failure of the Act of 1920 in order to force the railways back under government ownership and operation.

**Public Service Commissions.** — As popular sentiment has developed, other public companies besides the railways have been regulated by the State: the express company, water supply, warehouses, telephone and telegraph, gas, electric lighting and power, street railways, etc., have all been placed under public supervision. To do this work the State has created a "public service commission," which is simply a railway commission intrusted with broader powers to include the other enterprises just

named. The purpose of this plan is to divorce all corporate regulation from politics by taking it out of the hands of the legislature and placing it in the control of a small administrative body, copied after the national commerce commission. The decisions of such a body are not based on excited oratory. Its work is to examine the facts of the case, to hear both sides and render a decision which is just and equitable to both the consumer and the corporation shareholder. Its proceedings are for this reason more like those of a court, but are much more informal and rapid, and are divested of many of the technicalities and expenses of court procedure.

The public service commission plan satisfies three important needs — (a) A suitable protection of the public both as to service and rates.

(b) The safeguarding of the corporation itself from those radical and violent political attacks by the legislature which cripple public service undertakings.

(c) The protection of investors in public utility stocks and securities.

**How a Commission Operates.** — Each commission has besides its own membership, a staff of attorneys, engineers, accountants, and a clerical force. It is upon these technical members of the staff that much of the body's practical efficiency depends. These men secure the facts which form the basis of the commission's decisions and orders. All the commissions are authorized to hear complaints, to make investigations, and to conduct proceedings on their own motion without complaint. The secretary usually sets up two "dockets" or lists of cases — the informal, which includes complaints that are disposed of without a hearing; and the formal, which includes cases requiring a hearing and order. A review of the various types of complaints considered shows the wide diversity, breadth, and importance of the commission's jurisdiction to the people of the State. The following are illustrations chosen from the docket of several commissions:

Complaint by a borough against excessive charges, inadequate service, and unreasonable rules and regulations by a street railway company.

Application by a telephone company for approval of an agreement which it has made with a city.

Application for the right to operate auto-busses as a common carrier.

Application of a borough for permission to acquire the rights, franchises, and water works system of a private water company.

The complaint of the State Highway Department against a railway company for maintaining a dangerous grade crossing.

Petition for establishment of a passenger station in a rural district.

Application for permission to sell first mortgage bonds of an electric company.

**Special Problems of Public Service Regulation: Valuation.** — If a city decides to buy out a public utility company the price to be paid is fixed by valuation made by the State commission. Also when a company claims that a commission has fixed its rates too low to enable it to earn a fair return on the value of its property, the question at once arises — What is the value? This likewise must be fixed by the State commission. Valuation is the most complex and difficult of all the problems of utility regulation, because of the many disputed items which the company tries to insert and the others which the complaining party seeks to exclude.

Is the franchise or permission to operate in the streets of a city (a permit granted freely by the city) to be appraised at so many hundred thousand dollars and included in valuation? Are the services of legal counsel in organizing the company, the unusual skill of engineers in drafting its plans, or the unusual expenses for extra paving bills, or the losses sustained by the company in the early years of its operation — all to be included as parts of value — in order that the company may be allowed to earn a return on these expenses? Experts are employed by both sides, and freely swear to exaggerated or underestimated appraisals of value. There are numerous experts who willingly distort their estimates of value entirely according to the figure which their client desires to prove. The difference between such estimates by opposing witnesses may easily run into many millions of dollars. In one recent case a city valued the traction company's transit system at one and one-quarter millions while the company valued it at three millions. Gradually the commissions are working out theories and formulas

of valuation which determine the items to be included and excluded, and the practice of engineers is slowly approaching a standard.<sup>1</sup>

**Service at Cost.** — This pleasant-sounding term is used to describe a plan by which the utility company is granted a valuation by the State commission and is then allowed by agreement to earn about 7 per cent on this value. A special reserve fund is created and it is provided that when this fund by profits from the business exceeds a certain point fares shall be lowered 1 cent. When it sinks below a certain point fares are raised. In this way the earnings of the business automatically determine the rates to be charged.

A variation of this plan, called the sliding scale, has been used for gas and electric companies in Massachusetts. A valuation is agreed on and a fixed percentage of return of about 7 per cent is provided. As business grows dividends may be increased only provided rates and charges to consumers are lowered. Several other States have recently adopted this plan under commission supervision.

**Limiting Competition.** — If free competition in water, light, trolley service, etc., is allowed, there will always be hosts of new companies formed, securing permission to compete with existing concerns, and then selling out to the latter at a handsome profit for the promoters of the new company. The combined capital

<sup>1</sup> In *GALVESTON ELECTRIC CO. v. GALVESTON*, April 10, 1922, the United States Supreme Court laid down some interesting principles on these points. The City after allowing an increase in passenger fares from five to six cents during the War period, reduced the fare again to five cents in 1919. The Company brought suit under the Fourteenth Amendment to prevent the reduction, on the ground that the five-cent fare did not allow a fair return on the value of the Company's property, and was therefore a deprivation of property without due process of law contrary to the Amendment. The Supreme Court held that in making up its value the Company could not include past losses in the business as a part of the sum on which a return must be allowed. Nor could it include the value of "good will" or of effective organization. Nor could the Company assume that the future prices which it must pay for materials and supplies would always be 60 or 70 per cent above what it had paid in the past, previous to the War. Nor could it even ask a return on the extra sums spent on bringing its property back into good shape after the War. All of these items had been previously regarded with favor by the State commissions and the companies had been allowed to include them in making up a total sum on which a fair return could be earned. The decision marks a severe and drastic change in valuation methods.



devoted to the business will thus be double what is needed. In order to earn dividends on this larger capital, service is skimped, fares kept up, and wages kept down, while the consumer, the wage earner, and the purchaser of the company's securities all alike suffer. This has been so often repeated that the competitive theory in public utilities is completely discredited. The State commissions are now usually authorized to grant or refuse franchises for such new companies, and their action is based on the needs of the locality. In using this power they have frankly rejected the competitive idea and have established the principle that public regulation rather than the loose competition of duplicate concerns is the solution of this question.

**Results of the Commission Plan.** — The practical working of the State commissions has been partly successful and partly unsatisfactory. Its great success has been the fair-minded solution which, on the whole, it has given to some of the most pressing, urgent disputes between utility corporations and the public. It has removed most of these from the sphere of partisan politics and has introduced a stronger tendency to coöperation and mutual good will. The commissions have not shown the expected desire to lower rates, except on the railways, but have rather tended to improve service. Most of them are still new and are trying to develop systems of accounting, are making studies of new classes of public utilities, examining service conditions and establishing principles on the large classes of complaints and grievances which had accumulated under the old system. The unsatisfactory sides of commission regulation have been the delay in securing a final settlement of important cases; the ultra-conservatism of some of the commissions; their interference with public ownership of utilities by the cities; and to some limited extent, partisan politics in the appointment of commission members, notably in New York City.

**Criticisms of State Commissions.** — The most serious objection urged against the new plan has been the delay caused by dilatory appeals to the courts. Undoubtedly this is an important defect which requires correction. Some of the States provide that appeals from the commission on any subject shall be concentrated in one court, choosing for this purpose the county court in which the State capital is located. Such appeals take precedence over all other business except election cases and suits for damages. This

has been adopted in the Pennsylvania Act of 1913. From this court an appeal may be made to the State Supreme Court. Even this is unsatisfactory because it permits two judicial proceedings after the order of the commission has been handed down. Some States provide for a direct appeal from the commission to the Supreme Court. This is the proper solution but in most of the Commonwealths it is impossible because the original jurisdiction of the Supreme Court is limited by the State constitution. Another criticism is the heavy expense of deciding the more important cases, especially where a valuation is necessary. After the commission has heard the estimates of both sides it must usually employ special experts of its own to make an independent appraisal; this is highly expensive. At times it has taken a year and a half and hundreds of thousands of dollars to make the valuation of a single company, in addition to the amount spent by the company itself and by the complainant.

But these are exceptional cases and the general run of business before the commission is both quickly and cheaply dispatched. We must remember that until commissions were created a vast number of complaints which are now readily settled by those bodies could not even be considered, because of the cost and delay of court procedure. The small matters involving lower sums form the vast majority of commission cases and these are attended to without difficulty.

Many observers have recently pointed to what they consider<sup>1</sup> an excessive conservatism in the rulings of the State commissions and have condemned the failure to secure lower rates, the unwillingness to force better service conditions, and the appraisal at excessive values of public service plants which were about to be purchased by the city governments.

Undoubtedly there is weight in some of these charges. The commissions, as we have seen, have not striven to reduce rates as a general policy but have laid greater emphasis upon improved service. While no comprehensive survey of the rulings of State commissions has been prepared, a partial examination of their

<sup>1</sup> A partial summary of these criticisms is given in an article, "State v. Local Regulation," by S. P. Jones, Secretary, Voters' League, Minneapolis, published in *The Annals*, May, 1914.

decisions clearly shows the general improvement in service rules for the benefit of the consumer. The delay in securing a settlement of important questions is usually not chargeable to the commission but to the companies which make full use of their rights of appeal and delay. This, as we have seen, is not an inherent part of the commission plan but may be improved by constitutional or legislative changes. As to the excessive valuation of public utility plants which are about to be purchased by the cities and the consequent defeat of municipal purchase because of the prohibitive price which results, the commissions have probably given cause for some criticism. They have made many allowances of claims of value by the companies which could probably not be justified in detail nor even itemized by the commissioners themselves. Some members are secretly, if not openly, opposed to municipal ownership and their decisions reflect this hostility.

In California, Colorado, and other States each city has local option in the matter of establishing its own municipal commission or in subjecting its public utilities to the State body. The league of Nebraska municipalities, the league of commission-governed cities in Illinois, the Voters' League of Minneapolis, and the city authorities of Chicago have all made strong efforts to prevent the extension of State authority over the local public service. The principle of municipal home rule has been invoked. Thus far the State commissions have come off victorious but there is a widespread demand for improvement, and a further adjustment allowing for greater local activity seems advisable.

**Is the Small Consumer Protected?** — Another criticism is that the commissions have become too sympathetic with "big business" interests and that their decisions reflect this bias. For example, many commission rulings have allowed lower rates for the larger users of gas and electric power. This seems a discrimination against the masses of the people in favor of a few large companies. But a glance beneath the surface of the problem reveals that this charge is partly unfounded. When an electric plant is operated at full capacity it can produce current at lower cost than when it runs only on part time or uses only one section of its plant. Its main expenses are more or less constant and if these are to be charged on only one-half the amount of current which it might produce the cost per unit of current will be higher. This is only saying that large-

scale production is cheaper than small. The commissions have found that if electric companies can sell enough current to keep busy at full capacity they can afford to charge the householder less for his current. But how can they sell up to their full capacity? The answer is by furnishing electricity to industrial users, factories, street railways, etc., at an even lower price than they charge the householder. While apparently discriminated against, the householder in reality profits by the difference in rates.<sup>1</sup> This, however, does not justify a difference between small and large business concerns, in the rates for electricity.

Few, if any, critics of the commission plan would go back to the system of legislative regulation. The 2 cent per mile limit placed on passenger fares by many of the State laws about 1910, proved the futility of the old idea. So also did the later "full crew" laws, in which the legislator unwisely attempted to regulate a detail of railway management. Ostensibly to protect the public safety, but in reality to compel the employment of more trainmen, the law provided that cars of thirty freight trains must have at least six trainmen, those of less than thirty must have at least five, passenger trains with four coaches must have five; with six or more coaches, six. This one arbitrary, foolish measure added many millions of unnecessary cost to railway operation. Later this measure was generally repealed and the whole matter turned over to the State commissions for regulation.

#### STATE REGULATION OF TRADE AND COMPETITION

All the States prohibit, either by statute or common law, any combination to restrain trade unreasonably. These prohibitions have lain dormant upon the books until the recent Federal prosecutions under the Sherman law aroused new interest in the subject. It was found that for many decades the courts both in this country and in England had held that since the public were entitled to the benefits of free competition, every competitor must be allowed to sell as low as he pleased. But in fact certain large corporations, using this freedom to undersell their competitors in one section, made up their losses from higher prices in other districts where there

<sup>1</sup> *The Annals*, May, 1914, article by Halford Erickson.

was no competition, and when the competitor in the first section was driven from business, prices were then run up to a higher level than before. The legal principle of free competition was used to destroy competition; an intended protection became an instrument of oppression. Many efforts have been made to remedy this situation, one of the most effective being the South Dakota Act of 1907, which provides that if any person or corporation engaged in the production, manufacture, or distribution of any commodity in general use within the State, knowingly, for the purpose of destroying competition, discriminates between different communities in the State by selling its product at a lower rate in one community than in another (with due allowance for distance from the point of manufacture, freight rates, etc.), such person or corporation shall be guilty of unfair discrimination, and subject to a heavy fine. The constitutionality of the law was attacked but has been upheld by the Federal Supreme Court in *CENTRAL LUMBER CO. v. SO. DAK.*, 226 U. S. 157, 1912.

All the States, either by common law or by statute, forbid unfair methods of competition. But instead of providing an administrative body to enforce this principle, as has been done by Congress, the States have left it to the ordinary courts. Consequently a company whose business is injured by unfair methods must depend for redress on a lawsuit with all of its delays and expense. The State laws on unfair competition are well illustrated by the decision in *INTERNATIONAL NEWS SERVICE v. ASSOCIATED PRESS*, 248 U. S. 215, 1918. The "Associated" is a national body of daily papers banded together to secure and distribute news. Membership is highly valuable; such a franchise sells for many thousands of dollars. The "International" was a rival group giving more limited service. The Associated sought an injunction to prevent the International from bribing employees of Associated papers to furnish news to the International, also from copying news from Associated bulletin boards and from early editions of Associated papers, and selling this to members of the International either bodily or in rewritten form, as International news dispatches. The International claimed that there was no property in news, and that even if there were, it would not survive after publication, but became common property, once it was published. Also that the International's policy in appropriating matter from

bulletin boards of the Associated was not unfair competition in trade under State laws.

The Supreme Court held that one who gathered general information or news at considerable expense, for the purpose of publishing it, has such an interest in its publication as to give him a kind of property right which the policy of the law protects from interference. The collection and transmission of news required elaborate organization, large expenditures of money, skill, and effort. The news so collected had an exchange value that was dependent upon its novelty and freshness, regularity of service, reliability, thoroughness, and adaptability to public need.

Because of the differences in time from the earth's rotation, the distribution of news by press associations is chiefly from East to West. It is therefore physically possible for a person who has not gathered the news to take press dispatches published in early morning editions on the Atlantic seaboard, and wire them westward in time for the appearance of all the Western papers. An agent of the International in New York could thus secure news which the Associated had gathered at much expense and effort, and wire it westward as International news. The real question, said the Court, was as to the right of a competitor to take Associated news and distribute it to other papers, to the detriment of the Associated. In doing so the International admitted that it was taking material gathered by the Associated, which was salable for money, and was selling this material as its own. Such a transaction was unquestionably unfair competition and should be stopped by an injunction. This did not give the Associated any right to monopolize the gathering or distribution of news. Anyone might take part in this business. The injunction only prohibited one company from taking its competitor's property and distributing it as its own.

A host of other State laws have been passed regulating not only the issue of stock but also the purchase and ownership of one company by its competitor for the purpose of restraining competition or establishing a monopoly, the formation of pools, price-fixing agreements, and arrangements to limit production.

**Are the State Trade Laws Sound in Principle?** — Two general purposes are apparent from all these laws, first, to prevent fraud, stock watering, and manipulation of prices, and second, to force

competition by prohibiting combinations of competitors. The first of these purposes is economically sound and feasible, the second is not. A combination or consolidation may be advantageous to the public and if-so, should be permitted. A review of State experience in corporation control shows that the next steps should be (a) the establishment of some permissive boards or commissions which would sanction or disapprove important competitive trade practices of those companies which are not already under the control of the public service authorities or the banking and insurance commissioners — that is, the ordinary manufacturing and commercial corporations; and (b) a relentless, insistent extension of the publicity principle. The first would prevent the grosser forms of extortion, business piracy, and assassination, without in any way preserving the inefficient or wasteful producers. The second would protect the investor on a side in which such protection is much needed, for outside of farming and real estate the funds of the community must be invested in corporation shares. It is no longer possible to tolerate concealment and irregularity in corporate affairs, under the pretext of encouraging freedom of enterprise; for with every new stage of growth in manufacturing and trading, the interdependence of all interests upon each other increases and becomes more apparent, so that some State-assured minimum of safety from corporate dishonesty is as essential as a State protection against the other forms of fraud. In our regulations of business we have given too little attention to the small investor, the man or woman whose savings are often placed on the advice of some alluring advertisement or attractive circular which later turns out to be misleading. Or if the savings are well invested they may be "shaken down" in the ordinary processes of manipulation and reorganization. We may never hope to protect the fool from his folly nor the inveterate gambler from his vice, but we must offer some degree of safety to those who, having earned and saved, wish to take part in the general prosperity by placing their share in the general capital.

There is probably no stronger influence towards genuine conservatism in America today than the profitable and well-protected investment of small funds. It behooves the State in a special sense to care for the safeguarding of these and to encourage their growth. The administrative obstacles to publicity are serious but not insur-

mountable; it is even now difficult and at times impossible for the State officials to secure proper, accurate statements on financial matters from the companies which are already subject to control, and it might be still more so from other corporations; there are also such differences between the rules of different Commonwealths and in their comparative efficiency that no general solution of the problem could be worked out by the States. If, as seems probable, it shall become clear that the States are unequal to the task, then the jurisdiction of the National Government might well be extended to obtain the desired result, by some such device as that suggested at the close of Chapter 7.

**Land Registration.** — Of all the State activities for the protection of business none is more fundamental than the efforts made by several of the States to establish a modern system of land registration. The transfer of land in this country has always been surrounded by needless difficulty, uncertainty, risk, and expense. Every buyer of real estate takes title subject to possible flaws in the ownership of any and all of his predecessors in possession. If such a flaw occurs in a transfer made perhaps generations or a century before, the present buyer has a cloud on his title. To meet this, title insurance companies have been formed all over the country. They search the records of transfer down to the original grants of the land and charge a heavy fee for insuring the title. If a house-owner wishes to mortgage his property a search of titles must again be made so that the lender or mortgagee shall have a clear claim to the real estate which is to be security for the loan. To these expenses for search and insurance must, of course, be added the cost of preparing deeds, and agents' commissions, so that a transfer of real estate involves a burden and expense out of all proportion to its value, especially on small properties.

The Torrens system was devised in Australia to meet such a situation. It provides for a land court in which the owner of a plot of ground may bring suit for the registration of his title. After public notice and warning to all concerned, a hearing is held and a decree is issued registering the title in the name of the owner, describing the land in question, reciting liens or claims against it, and all other important matters affecting it. This decree is registered in the county offices and a copy goes to the owner as his certificate of title.



In order to protect the interests of parties whose legal rights may have been overlooked a small fee is charged the purchaser to be paid into an assurance fund. If at any later time a neglected claimant appears and makes good a claim of interest in the land, this does not affect the registered title of the purchaser but the claimant is recompensed from the assurance fund. It will be asked — If the purchaser must go through this procedure, what advantage does the plan confer over the present system? The answer is that registration occurs but once. After that a merely nominal fee, often as low as \$5.00, is charged for recording transfers. All the expense of repeated searches and insurance is thereby avoided. After registration is once made, the time required for subsequent transfers under the new system is negligible; it is usually possible to secure a title within a few days of the agreement of sale. Fourteen of the States have already adopted this plan. In spite of the opposition of those who are financially interested in maintaining the older system, the Torrens method is gradually making headway and its general acceptance would be of the greatest benefit to all property owners, and more especially to the small home-buyer.

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### QUESTIONS

1. Why does a State government regulate business conditions?
  2. Explain the general lines along which regulation has run.
  3. What is a corporation charter?
  4. Can a corporation transact business not mentioned in its charter?
- Reasons.
5. Why do so many business concerns incorporate in Delaware and West Virginia?
  6. Your company has a Delaware charter and wishes to open an office in Chicago — does its charter entitle it to do so without further formality? Reasons.
  7. You are discussing the necessity of State regulation of banking and insurance contrasted with State regulation of the farming business. What would be your view and why?
  8. (a) What is a bank deposit guarantee fund? (b) Read NOBLE STATE BANK v. HASKELL and report on the constitutionality of a State law establishing a compulsory fund.
  9. How are insurance companies inspected by the State?
  10. Explain fully the defects of this system. Example.
  11. Would you favor or oppose national regulation of insurance companies? Why?
  12. Explain fully, with constitutional reasons, why the National Government does not regulate insurance, and cite authorities on this point.
  13. Resolved that the State should not sell life insurance. Defend either side.
  14. Resolved that the State should abandon attempts to protect investors and security purchasers. Take one side.
  15. Have you a Blue Sky law in your State? If so, what are its provisions?
  16. The Doe Manufacturing Company sells its product in Trenton and Camden, New Jersey. The legislature forbids companies selling in more than one place within the State to lower prices in one place with the intention of destroying competition there. The Doe Company claims that the law deprives it of the equal protection of the law and is discriminatory, applying only to companies selling in more than one place, and thereby violates the Fourteenth Amendment. What would the court decide and why? Cite an authority.
  17. Give an example of unfair competition contrary to State law.
  18. What is the difference between the State and the National method of enforcing the rule against unfair trade competition?
  19. Which is the better method? Reasons.

20. Why is the transfer of land slow and costly in this country? How does this affect a man who wants to secure funds by mortgaging his property?
21. How has this been remedied in Australia and some of our States?
22. Why have corporations received special attention from the regulating power of the State and why are they of special importance to the small investor?
23. Explain what authority the States have over interstate railways.
24. Give some examples of laws passed for this purpose.
25. What is the disadvantage of regulation by State legislatures in this field?
26. Explain some of the more important causes of popular hostility to the railway companies.
27. How does this affect a solution of the regulative question today?
28. Why was the railway commission plan adopted and what is the difference between it and legislative regulation?
29. What are the powers of the railway commissions?
30. What practical benefits have they secured for the public?
31. Where have they failed and why?
32. Show from the Minnesota Rate case the State's power to regulate State rates even though these affect national commerce.
33. Show from the Shreveport and Wisconsin cases, the national supremacy in rate making, where national commerce is affected.
34. It is claimed that the National Government should control all local freight rates which directly or indirectly affect interstate trade. What is your impression of this claim?
35. It is argued against this claim that the Interstate Commission is already overburdened. Explain and discuss any practical proposal for relief.
36. What is a public service commission and why is it so called? What is the difference between a public service and a railway commission?
37. What are its advantages over legislative regulations?
38. How would you show that the commission plan met present needs?
39. Explain the powers of a commission and give some examples showing the nature of its work and decisions.
40. Explain how appeals from the decisions of a commission are usually regulated by the State laws.
41. How is excessive delay in appeals avoided?
42. An electric light company has been established in a small city. There are occasional complaints as to rates and service. Some of the citizens talk of the need of competition. What would be your attitude and why?
43. Taking advantage of some discontent with the existing company, a new company is formed, but the law requires the approval of the State public service commission before the new company can operate. What would the commission probably decide and why?
44. Do the commissions as a rule favor reduction of charges or improved service? Why?
45. John Doe owns some stock in a water supply company. It is proposed to establish a State public utilities commission. Would Doe's financial interest be helped or injured by the establishment of such a body? Reasons.
46. Why do the State commissions appraise or value the property of public service companies?

47. Why is valuation difficult?
48. Cite the clauses in the State and National Constitutions which affect this problem.
49. Secure from a newspaper editor his impressions of the most successful aspects of commission regulation.
50. Of the unsatisfactory sides of commission work.
51. What are the causes of delay in carrying out the rulings of the commissions?
52. How do the commissions' powers affect the purchase by cities of their local public service plants?
53. The State Utility Commission allows gas companies to supply factories at 70 cents a thousand feet and householders at 85 cents, and at the end of the year lowers householders' rate to 80 cents. A group of householders claim that they must in fairness receive the same rates as factories. Explain the principles to be applied, with reasons.
54. Show why the following questions should be regulated by the legislature or by a public service commission:
  - (a) The weight of rail required for railways carrying heavy traffic.
  - (b) The number of passenger trains which must be stopped at cities of a certain size.
  - (c) The rate of taxation on railway companies.
55. Prepare an essay on the advantages and disadvantages of public service regulation by commissions.
56. Write up a summary history of any complaint made to the public service commission in your State and of the action taken upon it.

## CHAPTER 18

### THE STATE: LABOR

ALTHOUGH "labor questions," as we call them, have existed from prehistoric times, the exact form which they have now taken is new and brings with it a new view of the State's authority and duties. The needs which the State is striving to satisfy are:

1. Increased efficiency of the worker.<sup>1</sup>
2. Reasonable working conditions, including hours.
3. Compensation for accidents to workmen.
4. The wage rate.
5. The settlement of disputes between employer and worker.
6. Improvement of the worker's status in legal disputes.

**Factory Laws.** — The intervention of the State in factory and workshop has done more than any other government measure, except education, to civilize modern industry. However critically we may regard government interference in other fields, in this department it has undeniably wrought a great improvement. In the smaller workshops and tenement houses there is still need for thorough regulation. During his waking hours the worker's health and safety are determined by the conditions of the factory or workroom; his welfare demands healthful and reasonably comfortable surroundings. If we followed him through a day's labor we should find that he is constantly confronted by a number of dangers to both safety and health, under conditions which he is often unable to avoid but which may be improved by State action. The prevention of these dangers is a public service which benefits directly one-fifth of our people. Each commonwealth has established a special department of factory inspection with a chief inspector and a force of deputies. Their duties are to enforce the

<sup>1</sup> This improvement in the worker's effectiveness is second to none in practical importance; the means by which the State can assist are shown under Vocational Education in the Chapter on The State and Education.

provisions which require safeguards around dangerous machinery,<sup>1</sup> adequate ventilation and sanitation, fire protection, legal limits of hours of labor, and the sanitary condition of so-called sweat-shops or manufacturing workrooms in private dwellings. In hours of labor, the States began by limiting the hours of children and women and forbidding the employment of children under fourteen years of age. Later they limited the hours of adult men in dangerous industries. Still later, the hours of men, women, and children in all industries — dangerous or safe — were regulated by some States. The Federal courts have upheld such regulation as a protection of health.

**Modern Type of Factory Act.** — The details of sweat-shop and factory regulation are extremely difficult to adjust with fairness. If the law prescribes minute rules on ventilation, machinery safeguards, etc., these rules will not fit the different types of shop and factory to which they are applied. They will be excessive in some cases and inadequate in others. After experiments by many States Wisconsin adopted a new type of law which has been copied in the other commonwealths. The Act without prescribing details requires that all factories, shops, etc., shall be maintained in a "safe" condition, but leaves the exact interpretation of "safe" to an industrial commission which regulates details and administers the law. The deputy inspectors are instructed by this commission how to enforce the law and a series of administrative regulations are drawn up and published by the commission. Employers and others may appeal from the acts of any deputy to the commission and from its decision to the courts. The advantages of this plan are greater reasonableness and elasticity of the rules governing safety. In New York the State Commission is even permitted to grant variations from the fire escape laws after a special inspection report and hearing.

The New York Act applies the excellent Wisconsin principle not only to safety, but to all important questions affecting the labor

<sup>1</sup> Great improvement in the large factories is being wrought by such associations of employers as the National Industrial Conference Board and the National Metal Trades Association; the latter sends to its members a full description of the latest inventions for safety purposes. A notable reduction in number of accidents has been effected by a systematic campaign of education among both workers and employers.

law and enables the industrial board by its regulations to keep that law thoroughly up to date and fit it to the special needs of each industry. The various rules of the board are immediately published and distributed, in a "labor bulletin"; they supplement "the industrial code" and have the binding force of law. The practical benefit of this administrative type of regulation, as compared with regulation by the legislature, is clear the moment that we glance at the work of the board in such a subject as ventilation. Section 86 of the New York Act, adopted in 1913, provides — "The industrial board shall have power to make rules and regulations for and fix standards of ventilation, temperature and humidity in factories and may prescribe the special means, if any, required for removing impurities or for reducing excessive heat, and the machinery, apparatus or appliances to be used for any of said purposes, and the construction, equipment, maintenance and operation thereof, in order to effectuate the purposes of this section." This allows free play to the administrative officers, responsible for the execution of the law, to adopt all proper means necessary for its fulfillment. It has also been followed in other States.

**Workmen's Compensation for Accidents.** — When injured in the pursuit of his duties, shall a workman obtain compensation, and if so, how and from whom? In spite of its seeming simplicity this problem has never been solved in this country. Its import to the community is clear from the fact that many thousands are completely, and hundreds of thousands partially disabled every year by industrial accidents.<sup>1</sup> We must remember that most working families are living on the narrowest margin, and that even a temporary stop in earnings means immediate deprivation while a permanent or complete loss of earning power means acute poverty and destitution.

Three different answers to the question have been offered — First, find out whose fault caused the accident and make him pay for it — this is known as employers' liability. Second, require the employer to give to the injured man a moderate sum, regardless of whose fault or neglect caused the accident — this is called the compensation system. And third, a State insurance plan, by which

<sup>1</sup> It is estimated that over 75,000 persons are killed and many more injured seriously every year in American industry.

taxes are laid on the industries according to their risk of accident, a State fund is created and injured workmen compensated from this fund, again regardless of whose fault caused the injury. Two-thirds of the States now use the second or compensation plan.

They abandoned the older liability system because of the serious injustice which it imposed on the worker. At a time when he was most in need of support he was supposed to be collecting evidence to show that the employer's neglect caused the injury and that the worker himself was not negligent. Having secured this evidence he must enter a lengthy lawsuit which might be protracted through several years, to recover damages from his employer. Under the old laws the employer could escape liability by various technical defenses, such as "contributory negligence" — that the injured man had himself been neglectful; or the "fellow servant rule" — that a fellow employee, not the employer, had been neglectful, and had caused the accident; or "assumption of risk" — that the worker assumed the ordinary risks of the business when entering it. The long delays, heavy expense, and great uncertainty and injustice of the liability plan became a scandal in our industrial system and led to its abandonment.

*The New Laws* provide that whenever a workman is injured in the course of his duties the employer shall pay him a certain sum definitely provided by the law and fixed according to the extent of the injury. No lawsuit need be held, but a referee or compensation board ascertains the extent of the injury and makes the award. The employer does not prove that the accident was caused by the workman's own negligence, or by a fellow workman's carelessness, or by the ordinary natural risk of the business — because none of these defenses affect the case. On the other hand the workman, by accepting the law, agrees to limit the amount of damages demanded, to the exact sum fixed by the Act. These laws have reduced litigation to a minimum, have prevented the inordinate delays of the old system, and have increased the total sums actually received by injured persons.

*Elective and Compulsory Laws.* — Some States make the compensation plan compulsory. But in others the courts hold that in order to preserve the liberty and property rights of the parties the compensation plan must be elective. They allow a choice of the compensation or the older liability system at the time the



employment contract is made. The general trend is toward the compulsory plan.

**State Insurance.** — The State of Washington has provided by law for a public insurance system in certain dangerous industries. Each employer pays to the State a fixed tax according to the risk of his business and the number of his employees and these payments form an insurance fund for the benefit of injured workmen. The fund is administered by the State government and the exact amount paid to injured persons is fixed under a scale of rates similar to a compensation act. A few other States are now experimenting with the insurance plan.

The validity of this system was upheld by the Supreme Court in *MOUNTAIN TIMBER CO. v. WASHINGTON*, 242 U. S. 219, 1917. The State had abolished the liability law and required compulsory contributions from employers to a State fund, according to the class of business. Each class of enterprise or industry was assessed according to the amount necessary to pay for accidents in that class. The Timber Company objected under the "liberty and property" clause of the Fourteenth Amendment, urging that in private occupations where no general public interest existed, the legislature could not deprive an employer of his property by taxing him for accidents according to the risk of the group or class of employers rather than the risk in his own particular plant. The risk in his enterprise might be low while in the class to which he was assigned it might be high. This was depriving him of his property.

On these points the Court asked three questions: (a) Is the chief object of the law of private and particular interest or of such general interest as to furnish a just cause for interference with personal liberty and property? (b) Are the charges reasonable in amount or so burdensome as to be oppressive? (c) Is the burden fairly distributed with regard to accidents that occur in the industry? It answered all these questions in favor of the law. The police power covers interference with property and liberty by such regulations as are appropriate to public welfare and protection. The act was not arbitrary or unreasonable in providing compensation for injury and hazardous occupations. The problem of accidents to employees was one of general public interest. "Certainly the operation of industrial establishments that, in the ordinary course

of things, frequently and inevitably produce disabling or mortal injuries to the human beings employed, is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed." The Court found that the same reasons which enabled a State to provide pensions for disabled soldiers, justified it in providing for those who were disabled in the industrial occupations that were necessary to develop the wealth and prosperity of the State. "A machine as well as a bullet may produce a wound and the disabling effect may be the same."

The Court held that the rates levied for insurance were apparently high but that the law provided for an accounting system to be kept in each class of industry and an adjustment of rates should be made according to the experiences of each class. To the further objection that it was a deprivation of liberty to impose the entire costs of accident losses upon the industries in which the accidents occurred, therefore these losses should be shared by the community as a whole, the Court answered that since the State where necessary could even disregard the question whose fault caused the accident, it could also impose the entire burden upon the industries in which the losses occurred. "The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay roll, the repair account or any other item of cost." The act was not oppressive to any class or occupation unless the loss of life and limb was so great that the industry could not bear the burden. "But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether."

**Sickness Insurance.** — Even more serious than industrial accidents are the effects of illness and premature death of the family head. Many sociologists have pointed out that if some effective means of meeting this danger could be found the families of wage-earners could be kept together, the wife or widow would be able to continue her care of the children and the latter could remain in

school until they had secured a training for better paid positions. Professor Henry R. Seager who is a leading authority on this question, has shown<sup>1</sup> that all the leading nations have progressed far beyond us in its solution. "Through organized illness insurance, obligatory and all-embracing, such as Germany has had since 1883 and the United Kingdom is just beginning to have through the national insurance act of 1911, the burden of illness and premature death which now falls with crushing weight on the individuals and families affected, can be in part lifted and in part shifted. Under the systems of these countries, illness for the wage earner no longer means income cut off at the very time when necessary expenses are increased by doctor's bills, medicines, and special dietary. Instead, on the one hand, part of the previous wages continues to be received by the family, while on the other, organized and systematized machinery for restoring the victim of the illness as quickly as possible to health and full earning capacity is set in operation."

Both the British and the German plans have shown good results in increasing the resources and attention devoted to hospitals and sickness prevention, also in directly reducing the death rate from industrial accidents. "Neither one of these systems operates perfectly. On the basis of European experience it should be possible for us to introduce a still better system of illness insurance here. But when we do so we shall experience the same beneficial effects as regards relieving the congestion in the unskilled and underpaid labor market that Germany has experienced."

**The Wage Rate.** — The minimum wage proposal is new to American government. In England for many centuries the county courts were authorized to fix farm wages at their quarterly sessions, and a statute of Elizabeth's reign provided minute, detailed rules as to hours of work, wages, meals, periods of rest during the day, etc. This was in line with the other laws of that time which regulated prices, quality, and size of cloth and other staple articles. The reaction against all forms of government regulation swept away price, quality, size, labor hour, and wage regulation and ushered in the complete free trade, free labor era in England. It was this principle of individual freedom that was adopted by the

<sup>1</sup> In the *Annals of Political and Social Science*, July, 1913.

early American States as best suited to their farming interests and to the scarcity of labor and capital and the abundance of free land. With the employment of great numbers of women and children it has been found that through lack of labor organizations for these new elements there was no check on competition in wage rates and the women and children not only lowered the wages of men but lowered their own pay to a figure below the cost of living. This has been shown by so many statistical inquiries in widely separate parts of the country as to be incontestible.

Following an English precedent, Massachusetts and several other States have sought to alleviate this condition by minimum wage acts applying only to minors and women who are employed on full time. The laws provide for a small State Minimum Wage Commission. Upon receiving a complaint this body appoints a local board which investigates the conditions in the plant or industry complained of, ascertains the cost of living in the locality, and recommends what it considers to be a fair minimum rate of pay for women workers in the plant. This rate does not apply to learners nor to partially disabled persons working on part time nor to adult men. Nor does the board's action require any employer to retain a worker nor to take on new workers.

The recommendation is received by the State Commission and a public hearing is then held at which all interested may appear. The Commission then either approves, modifies, or rejects the board's recommendation. If approved the recommendation becomes a rule which prohibits the employment of women and children below the rates fixed, during a definite period, usually one year. At any time the Commission may reconvene the board and ask for a new inquiry and recommendation.

The boards, however, are not permanent but are recruited afresh for each new complaint. Employers who pay less than the rates fixed are subject to prosecution, but this is seldom necessary. The Commission is usually authorized to grant special licenses for persons who are to be employed at less than the minimum wage.

In Massachusetts the Commission is authorized not to enforce the wage fixed but only to publish the names of those employers who fail to observe it and to seek by notices and persuasion to secure the adoption of the official rates. This plan is not to be re-

commended as it enables an employer who is willing to ignore public opinion to employ his help on lower terms and thus defeat the purpose of the law. A considerable number of employers have resorted to this practice in the past. Other States make the minimum rate a binding rule.

Experience under these laws has, on the whole, been favorable. An investigation conducted by Lindley D. Clark, an authority in this field, shows "not only have these laws secured to women increased pay in large aggregate amounts, but they have at the same time standardized competitive conditions in the locality, and largely done away with the secrecy that many employers have practiced as to individual rates, by which unwarranted discriminations have been made possible inside their establishments—results of great value from both moral and economic standpoints." "The conclusion is inevitable that the allegations of injury to the workers as a result of minimum wage laws are without foundation and that employers find it at least feasible to operate under the law, while many of them are its ardent supporters. General legislation to equalize interstate competition, for which a number of employers expressed a wish, would appear to be desirable if practicable; though it was repeatedly pointed out in the Pacific Coast States that their very considerable industrial development of recent years had taken place under this type of legislation."

It has not prevented the employment of large numbers of women nor has it led to the discharge of many. The rates fixed have usually been extremely moderate and have been based on carefully ascertained and detailed budgets of living costs of working women. There is no evidence that the minimum rate has become the average rate. It has been found advisable in some States to limit the proportion of learners and other persons employed at less than a minimum wage in each establishment, in order to prevent evasion of the spirit of the act. In practice the rates are frequently changed to conform to the cost of living. Many progressive employers have expressed themselves as strongly favorable to the laws and have stated that the cost of operation has not been materially enhanced. There is a growing sentiment favorable to such statutes although their importance is probably somewhat exaggerated. They leave the employer entirely free to take on or discharge any person whom he chooses; the only restriction being that he must

pay what in some States is termed a "living wage" to those employed.<sup>1</sup>

**Constitutionality of Acts.** — Numerous attacks have been made on the minimum wage laws on the ground that they were unconstitutional violations of liberty and property contrary to the Fourteenth Amendment. In all cases except in Washington, D. C., the laws have been upheld however, under the police power to protect the health and safety of women and children. The Washington law was held unconstitutional in *CHILDREN'S HOSPITAL v. ADKINS*, 1923, on the ground that it interfered with the freedom of contract of adult women and their employers, and thus violated the liberty and property clause of the Fifth Amendment. During the Great War the minimum wage principle was applied to adult men in the chief industries of all the warring countries. In some cases this was done by arbitrary awards which fixed rates for men and in other cases by decrees and rulings of the governments concerned. Our Constitution forbids this in peace time.

**Cash Payment of Wages.** — Many corporations formerly paid their employees part or all of their wages in orders upon a store, run by the company. This is frequently done in the mining regions where the miners sometimes live at a distance from village stores. The men object to this practice, claiming that a high scale of prices is charged which actually makes their wages less than the face value. On demand of the unions most of the mining States have passed laws requiring corporations to pay wages in cash, but in some of the States these laws have been held unconstitutional as interfering with the freedom of contract. Another similar law has been directed against the practice of reserving part of the wages as a deposit, or as security, or as a deferred payment, which keeps the laborer from leaving without notice or engaging in strikes. Sev-

<sup>1</sup> The low wage rate is a question of peculiar importance to women; most of them do not intend to remain permanently in employment, or they work in order to supplement the family income — not to support themselves entirely — and for these reasons they will accept a lower wage rate than men can afford to take. Also they do not provide themselves with the technical training which would otherwise be necessary. When they apply for positions as unskilled workers, willing to take whatever employment they can secure at whatever terms are offered, they necessarily are given wages at such a low rate that those who have no family aid soon find it difficult if not impossible to live in comfort and health upon their earnings and to lay by a reserve for the future.

eral States have passed Acts requiring the payment of wages at least semi-monthly, to prevent this custom and while some of the State tribunals have held these also to be violations of the liberty and property rights of the contracting parties, others have upheld them as protections of the laborer's against injustice.<sup>1</sup>

**Unemployment.** — In calculating the wages of labor, we must remember that in all trades and occupations the dull period often causes extended loss of work — the less the skill required, the greater the irregularity of work in most of the industries.

In foreign countries an extensive system of free employment bureaus has been operated by government authority with excellent results. In America a few of the States have established employment services under their Industrial Commissions and during the War the national government started and has since maintained such a service in the Department of Labor.

These bureaus also render an important service by collecting and publishing official information as to the occupations that are overcrowded, and those in which a demand exists. Great Britain in 1911 took a further step by enacting a law requiring insurance against unemployment — this Act covers several million employees — the cost of the insurance is paid partly by the employer, partly by the workman, and partly by the Government. All laborers who are out of work must register with the public employment bureau; refusal to accept employment at the wages of their usual trade, results in a stoppage of insurance benefits.

**Settlement of Labor Disputes.** — Our State governments are commencing to render most valuable service in the settlement of strikes and lockouts. The waste from such disputes, it has been estimated, equals the loss by fire, and exceeds \$500,000,000 every year. Most of this sum might readily be saved to workers and their employers; one of the best means of doing so is by the voluntary arrangement between labor union and employers' associa-

<sup>1</sup> The constitutionality of such laws has been upheld by the Supreme Court in *ERIE RAILROAD v. JOHN WILLIAMS*, 233 U. S. 671, 1914. The Erie Company claimed that the New York law requiring the semi-monthly payment of wages to its employees was an interference with its property and liberty under the Fourteenth Amendment. The court ruled that while there might be some extra expense connected with such payments, the State had a constitutional right to regulate the matter as a protection to those who worked for a living.

tion to submit all controversies to a joint arbitration committee, under what is called a "trade agreement." These trade agreements have been formed in a great variety of industries and cover the rate of wages, hours, apprenticeship, and other conditions of labor. The great advantage of this plan is that it leaves open to dispute as few questions as possible and promotes amicable relations on both sides. Whenever a difference arises it is automatically referred to the joint committee which decides the matter, usually by a compromise. A still better voluntary plan has been perfected in certain branches of the clothing trade where even the smaller grievances in the shops are immediately taken up by a labor expert, paid by the employer, and a just and satisfactory solution found if possible, with an appeal, if desired, to the arbitration committee. This second plan is based on the sound principle that the immediate "smoothing out" of petty differences is the most effective way of avoiding serious disputes. It has proven highly satisfactory and is being adopted in other industries.

But aside from these plans, originated by private firms and individuals, there is urgent need of some public authority which shall aid actively in the decision of labor controversies. If all employers were well informed and able to make use of up-to-date methods of coöperation among themselves, no public action would be necessary, but a majority of the smaller employers are not, and in consequence our private and voluntary means of preventing industrial strife are still archaic and ineffective. Such strife is still in the condition of justice in the dark ages, when disputants settled their differences by ordeal of battle.

**State Arbitration.** — The heavy losses from strikes and lockouts have led Congress and the more progressive States to establish permanent boards of arbitration and conciliation. Massachusetts led the way by the Act of 1886 which as amended now provides that the Industrial Commission shall act as the official board for the State. This body is aided by experts trained in labor problems who secure information for the board and enable it to act in each case with a full knowledge of the facts. Its work is of two kinds, (a) conciliation, that is the bringing together of the parties so that they will themselves find a settlement of the affair; and (b) arbitration, which is the decision of the affair, not by the parties, but by the Board. The Board's first effort is to con-



ciliate. When notified of an impending strike or lockout it at once offers its services as a mediator and tries to persuade both sides to settle the matter amicably between them, or, failing this, to submit it to arbitration. It may also investigate the causes of the difficulty and render a public report with recommendations, showing what steps should be taken or changes made to secure peace. The effect of such a public report is usually to force an arbitration of the question at issue. If the parties agree to arbitrate they sign an application to the Board accompanied by a written promise to abide by its decisions and to continue in business or at work until the decision is rendered. The Board then proceeds to the spot and holds public hearings, making a final decision within three weeks. This decision is published and recorded with the clerk of the city or town concerned. It is valid for six months unless either party gives a written notice of 60 days that it will not be further bound by the award.

No arbitration is undertaken in any case which is in the courts, nor can any case be arbitrated without the consent of both sides. If the parties prefer they may take their disputes to a local board of arbitration composed of one arbiter appointed by each side and a third by the other two; the decision of such a local board is binding in the same way as that of the State Board. The Massachusetts system has been successful. The Board's influence has been persuasive, not compulsory; it has steadily and insistently urged the parties to form trade agreements and has thereby sought not only to settle the cases before it but to forestall and prevent a large number of future controversies.

Where conciliation has not succeeded arbitration has been resorted to, in most cases with satisfactory results. Much of the success of the Massachusetts board is attributed to the fact that most of the disputes coming before it are in the shoe industry and both the Board and its agents by making a special study of that business are able to familiarize themselves with conditions and to render decisions of a practical nature. But the Board has also succeeded in the textile industry and in local railway disputes, both of which have been numerous.

It is the experience of most State boards that conciliation is often more valuable than arbitration, because the dispute has not yet grown to the serious stage which it might later reach. The

parties are often inclined to be more reasonable in this earlier stage.<sup>1</sup>

**Compulsory Settlement: The Kansas Plan.** — In 1920 Kansas took an advanced step by an Act requiring the compulsory settlement of employment disputes both in public utility industries and in the food, fuel, clothing, mining, and transportation businesses. A State Industrial Court was created with power to investigate and hear controversies, to decide them, and to issue orders for their solution. It was made illegal for an employer to evade the orders of this body by retiring from business without the consent of the Commission. Nor could the employees in the businesses named organize a strike. The theory of the law was that the public had a direct interest in the continuous operation of these businesses, all of which were essential to the public welfare.

In *WOLFF PACKING COMPANY v. COURT OF INDUSTRIAL RELATIONS*, 1923, the United States Supreme Court held this Act unconstitutional as a violation of the liberty and property clause of the Four-

<sup>1</sup> We may give here brief summaries of two recent instances showing the handling of disputes by the Massachusetts Board.

Two hundred employees struck at a steam boiler works at Holyoke because the president of their new union had been discharged. The company stated the discharge was because of bad work.

Places of strikers taken by outside men. Other crafts threaten to go out. The board intervenes and persuades workers in the local electric plant not to strike. The board held three hearings at Holyoke and urged agreement between parties.

First the strikers and later the employer accepted the suggestion of board and two months after the commencement of the strike, the controversy was ended by agreement.

A strike of 1500 men on the Boston & Maine and Boston & Albany Railroads took place in 1920 because of the failure of the Federal Director to give definite information as to when a decision would be rendered on their claim for increased wages, which had been pending for some time. The strike would cause heavy loss and throw a great number of men out of employment. The following steps were taken — The board conferred with employees' representatives and ascertained the cause of the strike. Secured assurance that they would return to work after a date for a decision of their claim was made. Communicated with Director General and secured promise to render decision within ten days. The employees returned to work pending the decision and gave assurance that they would confer with the board before striking if future difficulties arose. A similar danger occurred later when the railroads were returned to private ownership but the board conferred with employees and secured their continuance in employment.

teenth Amendment. The State sought to justify the law under the same constitutional principles as had been laid down in *WILSON v. NEW*, 243 U. S. 332, 1917. There, as we have seen, a Federal act regulating interstate railway wages in a temporary emergency of national importance, had been held valid. The national danger threatened by a general railway strike justified Congress in passing an emergency measure for a short time, to protect national commerce (the Adamson Act). But in the *Wolff* case the Court distinguished the Kansas law from the Adamson Act in that the latter was a temporary measure only while the State law was permanent. Interference with the freedom of contract by a legislature was only justified under exceptional conditions. As such exceptional conditions did not exist in the industries named in the Kansas law the State could not permanently limit the freedom of contract of the parties without violating the Fourteenth Amendment.

A Texas railway statute passed October 5, 1920 is based upon the same general principles as the Kansas law. It declares the uninterrupted management and operation of the common carriers of the State to be of vital importance to the public welfare and forbids any person or association of persons or corporation to interfere with or obstruct the operation of the railways, either by physical violence or by the annoyance of workers or their relatives. The Governor after inquiries showing that transportation is interrupted contrary to the act may take full jurisdiction over the localities in which such interruption occurs and exercise the police power of the State, superseding the local officers. Acts modeled on the Kansas plan are being considered by other States.

**A Change in Popular Attitude.** — Public opinion is now in a transitional stage, in which public interest in the just and fair settlement of labor disputes and in the continuous operation of essential industries is slowly but steadily securing recognition. Both employers and workers, with some noteworthy exceptions, are willing to take advantage of momentary crises and emergencies to gain their ends, but there is a steady advance in the education of the public to a clearer grasp of its own interest, and a growing impatience with the selfish, violent, and uncompromising policies that have been pursued by both sides in labor disputes. The Industrial Court and the arbitration plans adopted by the States may prove a boon to the public, which always loses, whether the

strike itself is a failure or a victory. State settlement is a recognition of the public interest in industrial peace. There is no more reason why warfare should be needed to settle a labor controversy justly than it is necessary in a dispute between two parties claiming the same land. In the latter case we have set up judicial courts to decide the issue, and we should do so in the former, in industries affected with a public interest.

**Objections.** — Against compulsory settlement of industrial disputes it is strongly urged both by employers and the workers that the State may not properly limit the freedom of contract or the right of collective bargaining — that industry prospers and the public interest is best served by leaving the widest possible range for individual liberty. It is even claimed that to force a settlement of a labor dispute would be to reestablish “slavery.” Both of these claims are based upon peculiar selfish interests which seek to win their objectives at no matter what cost to the public.

It has long been the policy of free peoples to limit business and occupational rights in industries affected with a public interest, such as ferries, roads, and the like. No employer or property owner has an absolutely unrestricted right to use his property in a public business without submitting himself to public regulation. Both courts and public opinion have insisted that the rates which may be charged and the service rendered in such businesses must conform to the predominant public interest. In occupations of an exclusively private nature no such regulation is attempted — in them also compulsory settlement of labor disputes is not provided.

The “slavery” argument is used only for oratorical effect. No cry of “slavery” can controvert the fact that a peculiar responsibility attaches to both the employer and the worker in a public business. The man who invests his capital or who seeks employment in an electric lighting or railway enterprise knows in advance the special obligation to the public which he assumes. It is idle for him to say that his liberty is unfairly restricted when the public insists upon a continuous operation of the business and provides the best means that it can for the settlement of employment questions.

**Foreign Systems.** — The Canadian government has recognized this public interest clearly by the so-called “Industrial Disputes Act” drafted by Mr. Mackenzie King, a former Commissioner

of Labor in the Canadian Cabinet. This law provides that no strike or lockout may be begun in any public service industry until the Commissioner has been notified in order that an official investigation may be made. This inquiry is made immediately by a board composed of three members one chosen by each party and the third by the other two. Witnesses are examined on the scene of the difficulty and a brief report of findings of fact and recommendations for a settlement is made. This report is published at once and the decision which it recommends then becomes a basis for intelligent public opinion. The report of the board is binding on nobody. It is simply a statement to those concerned and to the public, that an impartial official body with full power to investigate, has examined the facts and recommends a solution. Its usual effect is to force an early settlement along the lines laid down in the report. It will be noticed that the Canadian law forbids a strike in a public service industry until notice is given to the Labor Office. Such a provision could probably not be placed in any American law on the subject because it would interfere with the liberty of the individual and would thereby violate the Fifth or the Fourteenth Amendment to the Constitution of the United States. But the Massachusetts Act, already described, secures many of the advantages of the Canadian plan by requiring mayors of cities and towns to notify the State Board of any impending labor controversy in their localities, which has or may become serious, and by authorizing the Board of its own initiative to investigate and report and publish its findings.

In New Zealand a compulsory plan exists, under which the dispute is first investigated by a local district board of conciliation which tries to secure a voluntary agreement between the parties. If this effort fails the case goes to the central court of arbitration where it is decided with much the same binding force as a lawsuit. Either party may make the application to the court and the other is obliged to join in the proceedings of arbitration and be bound by the decision.

**The Worker's Legal Status.** — The worker has demanded and received a special legal position in certain cases, especially in his claims for wages. For example a carpenter or mechanic who has worked on a building but has not received his wages, has a claim against the real estate which takes priority of everything except

taxes. This "mechanic's lien" as it is called, exists in all the State laws and is an effective method of protecting the worker's interests in the building trades. In suits for debt against laborers their tools of trade are also exempted from seizure by the creditor. In some of the States the new liability and compensation laws require the employer to take out liability insurance to cover the cost of claims which his workmen may legally have under the new laws. This is done because an insolvent employer would be unable to pay such claims, which would leave the injured workmen without legal compensation. Such a claim now becomes valid against the insurance company. The representatives of labor also demand still further exemption from the law in the shape of a complete change in the methods of granting injunctions in labor disputes and in the punishment for violation of these injunctions. This demand has been considered in the Chapter on The Judiciary.

For several years the annual appropriation for the Federal Department of Justice has contained a proviso that no part of the funds so appropriated should be used for the prosecution of associations of laborers or farmers under the anti-trust laws. The annual appropriations for navy and coast defense also contain clauses to prevent measurement of the time of labor operations by stop watches. These latter are foolish and harmful provisions which have no basis in justice or fair treatment in a democratic system of government. If a law is not expedient it should be repealed — not amended to exempt a particular class.

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## QUESTIONS

1. Point out the main aspects of the labor problem which now face the State governments.
2. Why should the State intervene to regulate factory conditions?
3. If you had a model factory with good, sanitary conditions, would you favor State factory inspection? Why?
4. Explain the chief purpose of factory legislation.
5. Outline the executive authority which enforces the laws in your State.
6. What is the difference between your State system and that of others described in this chapter?
7. Summarize your State's rules on dangerous machines.
8. On ventilation.
9. On safety in case of fire.
10. On child labor.
11. A State law provides that children over fourteen may work in factories if their age is attested by their parents in an affidavit. What are the practical weaknesses of such a law?
12. How are the hours of labor of women regulated?
13. A uniform child labor bill is proposed for all the State legislatures. What would be your views as to its desirability?
14. What are your views as to the State constitutional authority to limit the hours of labor of men in dangerous industries? Why?
15. In safe industries. Why?
16. What is a "sweatshop"? Your State's sweatshop rules?
17. Why is it difficult to regulate?
18. Ought the State to attempt to regulate this question? Reasons.
19. Explain the general weaknesses of factory inspection.
20. Your State legislature is considering two methods of factory inspection: (a) The detailed regulation by law of all safety and health questions arising in the factory and (b) A general rule requiring safety and sanitation, to be enforced by an administrative board which will work out the details. Which method would you favor and why?
21. Why is the question of damages for industrial accidents so generally discussed in America today?
22. Explain the three most important solutions of the question thus far attempted.
23. What is meant by the employer's liability plan?
24. Explain the workmen's compensation plan.
25. Explain the difference between compulsory and elective compensation acts.
26. Why is not the compensation plan made compulsory?
27. Would it be constitutional if a State required the compensation plan in all dangerous industries? Reasons.
28. Which plan has your State?
29. How has the constitutional difficulty been avoided in the elective plan of workmen's compensation?

30. What is the Washington plan?
31. Resolved that the Federal Constitution should be amended to allow Congress to regulate insurance. Defend either side.
32. Explain the need of sickness insurance for working men and outline the plans which have been adopted in other countries in this field.
33. What is a minimum wage law?
34. Why and how has it been adopted in England?
35. Explain the particular importance of the problem for women.
36. Summarize the Massachusetts Act, giving the powers of the commission.
37. How does this differ from the Wisconsin law?
38. How does the Wisconsin Act affect those persons who cannot work full time?
39. What are your impressions as to the relative value of the Massachusetts and the Wisconsin types of minimum wage law?
40. What have been the results of minimum wage laws?
41. What can the States do and what have they done to relieve unemployment?
42. How can a State government help settle strikes and lockouts?
43. What is your impression as to the need for such action?
44. What is the Kansas plan of settlement of disputes?
45. In a debate you are advocating a State system of arbitration. Outline your argument, with the powers to be given the State authority and show from actual experiences of a State the advantages of your plan.
46. Give some examples of successful State arbitration.
47. How does the system affect the public?
48. Prepare a report on State arbitration showing what your State system is and any possible improvements that might be made in it.
49. Are laborers and mechanics given any special status under our laws? How and why?
50. Have their unions any special exemption from the Federal anti-trust law?
51. Resolved that some form of Federal regulation of labor questions be permitted to supersede the State systems. Defend one side.



## CHAPTER 19

### THE STATE: EDUCATION

**Changed Ideas of Public Education.** — The remarkable growth of our school and college systems is chiefly due to the popular grasp of three ideas: (1) that education is not a luxury for the few, but the need of all, so that we must open up the higher and highest grades of training to all who are qualified; (2) that no one fixed, rigid, exclusive group of courses is “educational” but many newer subjects must be included; and that (3) education does not end at age twenty-one — it is continuous, many forms of adult schooling repaying both the student and State which conducts them. At the same time the number and variety of subjects to be taught has broadened out until there are at present few fields of human knowledge which are not included in the programs of the State-supported institutions. More of us are “going to school”; we are going for a longer time and are studying an endless variety of new subjects with great advantage. Literally, the nation is now in training.

A foreigner visiting this country might gain the impression that our public school system was on the verge of final destruction. It is discussed, criticized, praised, surveyed, and analyzed from every angle, because it touches all classes. The very publicity attached to these discussions and criticisms has been one of the chief advantages enjoyed by the system. Its efficiency is under constant observation at every point. Of all the parts of our State governments, it can claim the most consistent and steady improvement. In such important points as the percentage of children of school age who are attending school, the average number of days of attendance, the length of the school term, the percentage of high school attendance, and the unremitting and effective efforts to improve its courses, there has been a constant improvement since 1880. Only in the ten years from 1870 to 1880 was there a stand-still or slight retro-

gression — caused by the financial depression following the Civil War.<sup>1</sup>

**Old Problems Rediscovered.** — Meanwhile, the startling disclosures made during the enrollment of the American Army and the experiences in the training camps of 1917-1918 showed that an immense amount of educational work which was supposedly accomplished still remained to be done. Reliable military authorities estimate that of the men drafted for Army service 24.9 per cent could not read and write. In the words of Franklin K. Lane, "What should be said of a world-leading democracy wherein ten per cent of the adult population cannot read the laws which they are presumed to know? What should be said of a democracy which spends in a year twice as much for chewing gum as for school books, more for automobiles than for all primary and secondary education, and less per week to the teacher than to the average laborer? What should be said of a democracy which permits men and women to work in masses where they seldom or never hear a word of English spoken? Yet this is all true of the United States of America." But the disclosures did not end here. The Army camps showed that vast numbers of the young men of the nation were utterly unacquainted with the principles of American government and that the mere teaching of a few patriotic maxims in some of the lower schools was not sufficient to train citizens.

Professor Strayer has well said, "We have come to understand that the ideals and purposes of American democracy are not understood by little children, and that the period of education must be extended if we are to lay any significant foundation in training for citizenship in our public schools. We have learned that a large part of our adult population may profit from the opportunities presented in our public schools for continued study, for recreation, and for discussion of community problems. An effective school system is one that is organized to serve the whole population."

**Expansion of the State System.** — These older problems yet unsolved, and the new ones which have crowded upon us, show the need for an extension of the State's work. They point to the inspiring possibility of strengthening and increasing individual and

<sup>1</sup> Col. Leonard P. Ayres, when with the Russell Sage Foundation, prepared an admirable "Index Number for State School Systems," published by the Foundation, 1920.

national effectiveness by investment in education. The growth of the public school system may be seen in part by recent figures. In 1918, the latest year for which statistics are available, there were enrolled in the public schools 20,800,000 pupils, or 75 per cent of the persons of school age. The average attendance was 120 days per year. The teachers numbered 523,000. The average payment of teachers was \$635 yearly. The value of school property was nearly two billion dollars, and the expenditures for the year were \$763,678,000. This represents \$7.26 per capita of the population, or \$49.12 per pupil in attendance.

**The Subsidy System.** — To satisfy school needs, the States have built up and strengthened their administrative machinery by many devices chief among which are the State subsidy to local school districts and the State minimum standard for all local schools. The effect of these has been to extricate the weaker districts from hopeless poverty on the one hand, and to bring order and system out of the chaos of local inefficiency, on the other. The State Board of Education or the Superintendent recommends for a share in the State appropriation those districts which have kept their local schools open for a sufficient length of time during the year and have maintained adequate standards and teaching force in the subjects required by the State. Sometimes the State appropriation equals one-third of the whole local school expense. This large subsidy from the State treasury is an essential item in the income of the local district and no effort is spared to satisfy the prescribed standard, and to share in its benefits. This plan, which is adapted from the English "Grant in Aid" system, has become necessary because of the extreme and bumptious independence of the local district authorities, which resisted all other efforts to raise the standard, while the legislature on its part was unwilling to force a change by compulsory methods.<sup>1</sup> The plan would work far more effectively if the State Superintendent were more freely furnished with his own agents to inspect the local schools and if we could rescue our local school administration from the handicap of party politics.

The Great War gave an immense impetus to this development. After the first feverish efforts to enroll and draft large numbers of

<sup>1</sup> Massachusetts now supports the public schools entirely from the State treasury.

men, the military authorities saw the need of a large personnel for the technical departments. Plumbers, carpenters, electricians, mechanics of all kinds were immediately needed for the gigantic task of preparing and operating military equipment. Time did not allow of the training of any men for this work. The entire personnel was combed for those who possessed mechanical skill or educational training in any line. This at once gave opportunity for advancement to those who could qualify. The object lesson which this gave to all concerned will never be forgotten. Incidentally it also showed that the nation as well as the individual has a direct interest in education.

**The Central Authority.** — The question as to the form of the central authority has been answered differently in different commonwealths. Most of them have established a department of public instruction under the control of a single official, the superintendent. Others have given the power to a board, with a superintendent as nominal head. At first glance the difference seems slight but a serious question of principle is involved. A single-headed authority, the superintendent, possesses the advantages which arise from any centering of authority at a definite point, viz., quickness and efficiency of action, greater willingness to accept new ideas and to keep abreast of the times, and definiteness of responsibility and power. A board is more conservative and gives greater deliberation to disputed questions of policy, but is less capable of drafting and executing a strong, constructive program. The board should therefore be an advisory body to aid the superintendent.

**The New York Plan.** — The system adopted by New York has had excellent results. This is a central board of regents with authority to grant, alter, and revoke the charters of universities, colleges, academies, etc., distribute to them the funds appropriated by the State, inspect such institutions, require annual reports, establish examinations, and confer certificates, diplomas, and degrees. But, in addition, the board by its power to fix the standard of examination for all degrees granted by the State, controls all the schools, since under this power it prescribes a certain preparatory as well as college course for the degree. In this way a high and uniform requirement is kept in all the secondary schools of the State. The executive work is conducted by a Commissioner of Education chosen by the board. His powers in the main are like those of other

State Superintendents. Numerous other Commonwealths have recently followed the New York plan and have given extended powers to the central officials so that the tendency toward central State control is strong and growing.

**Local Authorities.** — Each county has its own superintendent of schools who watches over the local district schools and reports to the State authority on their condition. In some States he also issues local teaching certificates and holds an annual teachers' institute for the purpose of stimulating and inspiring the instructing staff. The county is divided into school districts with an elected local board in each district; these boards choose the teachers, manage the school property, and generally administer educational affairs; they have also the power of taxation for school purposes, and when necessary they may sell bonds to build new schoolhouses, etc. The entire control over higher education including colleges, universities, and all bodies which grant degrees, is exercised by the central State authorities, either through a State board or a special Council. These latter determine when an educational institution shall have the degree-granting power, and recommend or oppose the granting of charters of incorporation to new institutions by the Secretary of State.

**New Problems.** — Among the problems now facing the State is: How to make the Universities and Colleges of greater public service and usefulness. A University is an investment of from 10 to 50 millions or even more. Many colleges have cost the community the former sum. How can this investment be made to render the greatest return to the people? The chief aims of higher education are scientific research and discovery, the education and training of persons of sufficient maturity, in both broad cultural and technical vocational subjects. They no longer appeal to a select few but reach out to guide, stimulate, and develop men and women from all classes, who are prepared to profit by their instruction. The University's aims are therefore to discover and to teach.

**University Extension.** — It is this new usefulness to larger circles which has opened up a remarkable vista of public service and democratic spirit in our higher institutions and which promises to make them one of the chief supports of constructive democracy. In this work the University of Wisconsin has led the way and we shall examine briefly some of its achievements, which have been

widely adopted at other institutions. An extension department reaches the homes, farms, shops, and factories of the State. "Sending the University to the people" means additional late afternoon and evening courses, the creation of local centers at a distance from the campus, the sending of University staff members to these centers, the establishment of bureaus of information and reference, the maintenance of correspondence schools, and an active coöperation with every group of qualified adults wherever they may be in the State, who desire the guidance and assistance of University leaders for educational work.

The late President Van Hise pointed out that scientific knowledge has grown far more rapidly than the means of spreading it; the people are being left behind. We have a great store of information, of practical and scientific principles, and other useful knowledge, but it is in the keeping of scientists and experts and has not been made available to the masses. The Wisconsin idea is to open up this fund of helpful knowledge to the immediate use of the community.

The University has also paid special attention to the business needs of the people. Wisconsin is an agricultural State—a number of brief, intensive courses in problems of farm and dairy management are offered, with the result that the State's farming interests have been incalculably advanced and aided.

Along with all this has gone the active participation of University men in the public service of the State. Wisconsin was one of the first to make a broad, extensive use of the scientific services of experts. From the University alone it has drawn many men who are employed both by the State government and as members of the faculty, while it has taken very many more into the permanent public service. This has meant much to both University and State administration, it has increased the practical knowledge and breadth of vision of the teacher, and enabled the public administration to attack and successfully solve problems that would otherwise have defied solution. The gain has been mutual, but the State has profited more. The work of the experts, both in law making and administration, has been constructive. Whether it be the framing of a just tax measure, the regulation of the services of public utilities, or the drafting of a safety act, the aim of the expert is always to secure a practical, workable plan; he has no political ends or

ambitions to serve, his concern is to find and use the experience of other legislatures and adapt it, with all the skill at his command, to local conditions. Accordingly the popular confidence in, and public use of scientific help are growing in those commonwealths where it has been tried. This plan has been followed with much success abroad, and as a result of the War it is now becoming a feature of our American system also.

What the University possesses has in these ways been made available to all who can use it. In line with this same tendency is the low tuition fee now charged to residents of the State in all the Western State institutions, which makes it easy for those who can afford the time to pursue a course of study in residence. The same desire has led many municipalities in all sections to provide city colleges in which the needs of the larger number of students will be better served, both by lower rates of tuition and by new courses of greater practical benefit. The success which these local institutions are winning is rapidly changing our views of the possibilities of higher education.

We have dwelt with emphasis upon the work of a particular University, because it has been a pioneer type, opening up new vistas and possibilities from which all can profit. The service rendered to the people of Wisconsin is inestimable. The institution has served as the center of intellectual life as a matter of course, but its influence has gone far beyond this, it has become a prime means of guiding business and social progress along feasible, practical channels. Much of the energy usually devoted to progress in all lines is wasted because of chimerical plans which are half worked out, propagated, and abandoned, and because of the useless friction and conflicts between forces that would be harmonious if properly guided. The University has been a leader in the preparation and dissemination of scientific methods, and more than any other single force, it has guided the development of the State into constructive channels rather than mere fruitless agitations.

**University Finances.** — The financing of a modern university's work can no longer depend solely upon endowments from private gifts. The State itself must pay for an increasing share of the broader phases of higher education and training. The Western institutions have parts of a public-land fund reserved for their use, and some also receive a fixed proportion of the State tax rate in

addition to regular appropriations by the legislature. This, of course, means that the State must be represented in the management of these institutions and in some cases complete State control is exercised.

**Vocational Training.** — The more we use machines in industry the more we create a sharp difference between skilled and unskilled work. This is true from the humblest manual laborer to the highest business executive. The machine intensifies a thousand times the natural differences between men in intelligence, education, skill, foresight, and opportunities. It not only makes the modern distinction between employer and factory hand but it also creates conflicts of interest between different classes of workmen and raises new questions of policy and divisions of opinion among the workers themselves. One of the most noticeable of these distinctions is between those who are expert in some craft and those who possess no such skill or training. This difference shows itself above all in the pay envelope. The unskilled laborer seldom receives more than \$3.00 or \$4.00 per day in spite of the most strenuous efforts of the union, because he competes with millions of his own kind. The Mergenthaler linotype operator in the printing trade receives from \$30 to \$50 weekly and the supply of skilled men is small and the demand growing. Neither in the grimy shop nor in the brass-railed office is there high reward for the unskilled "average man." The farm offers him no better chance, for it is on the farm that those remarkable new methods, the product of chemical laboratory, experiment station, and scientific text-book, have made such revolutionary progress in the last two decades. The business of farming is now an applied science. Wherever we look we find the line between the skilled and the untrained being so sharply drawn in all vocations that the community must use every means in its power to provide a vocational education for all who will take it. Such a work is needed because of the great numbers of people whose welfare is involved, while the sums expended are more than doubly returned to the community by the greater effectiveness and success of the businesses concerned. The movement for vocational schooling has advanced rapidly in the last few years and all the more progressive Commonwealths are now taking steps to provide the groundwork for a future system of industrial and agricultural training.



**The Open Road.** — Such training is the only means by which we can preserve "the open road" of opportunity for all classes, so that men and women can come up out of the lowest to the highest positions in industry, business, and public life. It is only this policy of "the open road" that stands between us and revolutionary political movements. Vocational training not only helps create harmonious relations between worker and employer but is the means of developing the future executives of business. The best workers and executives do not come from any class. The talent for industrial management is not borne exclusively among the poor or rich. The masses of the people can and do contribute more largely to the ranks of managers, superintendents, foremen, and organizers than do the wealthier classes. Any system of education which overlooked or neglected those elements from which the greatest number of prospective leaders must come would be a failure. By offering abundant opportunity to these, the system of vocational training helps not only the individual but the industry and the State as a whole. It is in proportion to the opportunity for securing such education that the workman and the clerk and the salesgirl are able to escape from the routine of drudgery, by making themselves more valuable to the enterprises in which they are employed and by opening up opportunities for advancement. In doing so they escape also the discontent which surrounds the monotony of routine work. From the viewpoint of business, such education is especially needed at this time. The more organized labor concentrates its attention upon its grievances, and attempts by artificial means to force up wages and reduce hours, the less the productivity of our business enterprises. Vocational Education is the best solution yet proposed for the difficulties which are constantly arising in employment relations.

**Growth of the Vocational Idea.** — The whole movement for industrial training shows in an interesting way the many stages through which an idea struggles to ascendancy in American government. Originally a few enthusiasts who were ridiculed for their radicalism started the movement. For many years it was ignored; at times it was absorbed by the general manual training movement from which, however, it has now become distinct and separate. The labor unions at first paid little or no attention to the new idea and the large manufacturers regarded it as a plan involving too

remote benefits to deserve support. It was not until Massachusetts, the pioneer in so many meritorious services of the State, had investigated and approved the principle, that business men began to recognize its wonderful possibilities. The idea has had to depend chiefly upon the activities of local trade bodies and manufacturers' associations. Once it obtained headway, however, it has spread with surprising rapidity in all the manufacturing States. A few of the more progressive labor union leaders have come out strongly in favor of it, and in 1908 a Committee was appointed by the American Federation of Labor, under the chairmanship of John Mitchell, to investigate the subject. Its report marks an epoch in the attitude of the labor union and strongly favors the technical education idea.

**State and Federal Coöperation.** — Each State at first essayed to handle vocational education on its own initiative. But it soon became apparent that this plan would unduly delay the nationwide measures necessary to meet the urgent, even critical, need of the people. The national government then stepped in and by a series of recent laws has aided the States financially and raised the standard of their work to an effective plane. This Federal aid is now granted towards agricultural education, home economics, trade and commerce, and industry, as described in Chapter 30.

**Industrial and Commercial Education.** — These branches of vocational training include the following types of schools :

The all-day trade school, in which a definite complete trade or craft is taught ;

The continuation or part-time day school ;

The alternating day school ;

The evening school.

Each of these types is well designed to meet the needs of definite groups of young people. The all-day trade school gives a full, complete, and high-grade training in any important mechanical craft. Machinists, carpenters, plumbers, painters, electricians — and even designers — are prepared by these schools. Some even offer courses in advanced industrial art. Such schools require much costly equipment, they offer a one- or two-year course and take all of the student's time. They can therefore reach only a very small number of persons. But they give the highest types of intensive training and are invaluable in their field.

The continuation school meets the needs of that vast army of young people from 14 to 18 years of age who are obliged to earn their living. Each student takes four or five hours weekly, usually all one morning or afternoon, which the employer permits during the regular working-time. This period is devoted one-half to subjects of immediate technical value to the student in his present occupation<sup>1</sup> and one-half to general educational subjects such as History, English, Citizenship, Economics, etc.

It is called a continuation school because it offers to those who are employed an opportunity to continue both their vocational and their broader education, without serious interruption to their earning power. Such schools formerly met in the evening but both here and abroad they are now held during the daylight hours because of the better results that can be obtained.

In the alternating school the student spends his full time alternately in school and in the shop or factory for periods of several weeks. While in school he pursues both the broader subjects and scientific or semitechnical studies. A strong effort is made to make these latter useful to him in his shop-work. This is done by sending teachers from the school to visit the student in the factory and to show him the relation of his school to his shop activity.

The evening school has been more widely experimented with than any other vocational type in this country. Every State in the Union has sought to give supplementary training in both broad educational subjects and in distinctly vocational studies. Almost universally the experience has been that the student is too tired after a day's employment to follow the general cultural or broader subjects. His mind must be led along some line of special interest either of recreation or of economic bearing. Therefore either purely vocational, or a mixture of vocational and broader courses is given.

Evening work succeeds when based upon the student's keen interest in securing a higher salary. Courses of the most advanced grade can well be offered at night, for this reason. Engineering, shop mathematics, advertising, stenography, commercial law, ac-

<sup>1</sup> For example, electrical wiring and installation, furniture making and repairing, cabinet work, printing, machine work, garment making, plumbing, or, for the girls, office work, millinery, designing, embroidering, housekeeping, etc.

counting, mechanics, and even higher technical studies have proven highly successful and have met the needs of a large and meritorious class of students. Many large corporations today let it be known that in making promotions they will give preference to those who are taking evening technical work. There seems to be almost no limit to the courses of this kind which may successfully be conducted by the State and by private institutions.

**Experience with Vocational Education.** — Massachusetts and New York have led the way in creating trade schools. Wisconsin has been the leader in the continuation system. Followed by Pennsylvania, it provided a compulsory continuation law which has now been adopted by all the important industrial States. These laws require all persons between fourteen and sixteen years of age who have not had a high school training or its equivalent to pursue at least four hours weekly in a continuation school during the period from 8 A.M. to 5 P.M. The laws outline in only a general way the subjects to be taught, specifying that they shall be both technical and cultural. The salaries of vocational teachers are placed on a plane with those of the other parts of the school system and in some States special vocational boards or authorities to conduct this part of the educational work, are provided.

**The Alternating School: Cincinnati and Fitchburg Plans.** — The alternating plan arose in the engineering school of Cincinnati University. Dr. Herman Schneider, Dean of the School, developed a plan of coöperation with the manufacturers and business men of the city by which the engineering students devote a period to college training in the class room and then a similar period to shop work in the factories and mills of Cincinnati. Their shop work is supervised by members of the faculty and their class work is made to include a discussion of all the principles which they have applied in practice in the shops. In this way the University has been freed from the heavy expense of establishing its own mechanical shops while the students have the advantage of practical work, to complete and fill out their study of principles. This idea was applied in successful form to the high school in Fitchburg, Massachusetts, by Professor W. B. Hunter. Through coöperation of local employers, students commencing with the second high school year alternate one week in school and one week in the shops. Shop work consists of instruction in all the operations necessary

to the particular trade. Boys receive pay for the time they are at work in the shops.

Professor Hunter, from whose publications and reports this description is taken, found that the system offers a strong inducement to boys to continue in school. They can earn some money, in fact more than they could by taking ordinary places in stores or offices. Again, many parents cannot afford to keep their children in school under the usual conditions. The Fitchburg plan allows the boys an opportunity to earn their education. A strong feature of the plan is the agreement entered into between the boy's parents and his employer. It is in substance an apprentice's agreement, and allows the boy a trial period of two months in which to satisfy himself that he really wants to learn a trade, and that he has selected the right one. If the boy is apprenticed the manufacturer then agrees that he shall remain as an apprentice for three years under the above-described arrangement. The subjects taught in the school are English, Mathematics, from elementary arithmetic, through Algebra and Geometry, but adapted closely in all cases to the practical needs of the shop, Freehand Drawing, Physics, Mechanism of Machines, Chemistry, Commercial Geography, First Aid to the Injured, Civics, and Current Events, etc. In drawing up the study course, Professor Hunter has cast aside all tradition and attempted to build a curriculum which will meet the exact needs of a special class of boys. The interest of the students has been maintained throughout their course, and they are enthusiastic and industrious. The plan offers a practical solution of an important problem in vocational training. The Cincinnati plan and its adaptation to high schools has spread throughout the country and is showing remarkable results wherever adopted. It is the almost universal testimony of those who try this plan that although the difficulty of coördinating school and shop work is great and in some cases insurmountable, it immensely increases the student's interest in both his school and shop work. Beyond question this also makes his scientific and theoretical instruction more real and gives him a more thorough mastery of what he learns. Likewise it retains in school to a later period a large number of boys who would otherwise lose all educational advantages.

**Agricultural Education.** — Both State and National governments are showing great willingness to promote the farmer's interest in

education, and an extensive series of courses have already been established with success. The aims of this work are :

- (a) To make the farmer more successful in his business,
- (b) To render farm life more attractive and increase its social pleasures and usefulness,
- (c) To fit the young women of farming communities for the management of their homes and keep them in touch with the intellectual progress of their day.

The national government has granted heavy subsidies both in the form of public lands and land funds, and annual appropriations of cash which are met by similar appropriations from the State under the subsidy system already described. This plan is more liberal to agriculture than to any other form of training.

In addition to the regular class-room instruction the Federal government aids through the appointment of State and county agricultural experts who confer directly with the farmer and advise him in the solution of his technical problems. They also conduct farm institutes and assist in the general courses of lectures, conferences, and other instruction in this field.

**Vocational Guidance.** — The large number of people who are "square pegs in round holes" is probably due to our failure to analyze the abilities of school and college students and to advise them as to their respective chances of success in different occupations. Because of this they have drifted into whatever offered itself at the moment, oftentimes into positions and vocations for which they were unfitted. The first vocational bureau in the public school system was established in Boston; it has been followed on a large scale by other cities. These bureaus train and employ a staff of men and women who talk with the school children individually or in small groups and learn their special aptitudes and the subjects in which they are strongest and advise them as to the vocations for which they are apparently best fitted. The bureaus also train some teachers in this work. No attempt is made to direct a pupil into a particular position or business but rather to aid in choosing the general type of employment in which the pupil will probably have the greatest chances of success. The qualifications required for office work or bookkeeping and accounting are totally different from those needed for shop and factory employment and these again vary from what is required by a salesman.

Vocational guidance involves a careful survey and analysis of the principal callings such as the professions, agriculture, manufacturing, selling and distributing, railroading, etc.<sup>1</sup> This analysis covers the qualities of character and mind most required for success in each vocation. Next there follows a similar analysis of the qualities shown by each pupil and a careful estimate of those which he may possess in latent form. A series of conferences with the pupils and, if necessary at times, with their parents, then follows. But this is a field in which general coöperation and exchange of experience would be especially useful and the benefits of a State-aided plan would far outweigh its trifling expense. We need as a part of every school system a department of vocational advice, with a trained expert at the State capital, working under the Superintendent and directing the local departments. Such a system would increase many fold the usefulness and value of our public schools.

**School Finances.** — There are many other problems of vital interest besides the few that have been summarized above. The extension of the school term to thirty-six weeks, the all-year school, the increase in teachers' salaries to a reasonable level, the complete modernizing of the methods of training the exceptional pupil whether advanced or deficient, the systematic school survey to analyze the educational methods, and facilities of the community — all these and a host of others are now receiving attention in a way that promises steady and continued progress. But all of them depend upon a thorough and complete re-financing of the school system. Professor Strayer has said <sup>2</sup> that public opinion seems to have reached the point at which about one-fifth of the teachers have something more than a high school education with two years of professional training, whereas every teacher should have at least this minimum. If this one change alone were made in our teaching standards we must provide at least \$250,000,000 annual increase for teachers' salaries. Building-extensions, supplies, and reduction in size of classes, together with other increased costs, added to the above salary item would double the amount needed for schools as compared with pre-war years.

<sup>1</sup> For a typical recent example of this method see "Vocational Guidance" by R. L. Hamilton, in the *Rotarian Magazine*, May, 1921.

<sup>2</sup> See *School Life*, June 15, 1920.

These changes involve the levy of new forms of taxation and the increase of existing taxes by the State. Some of the burden will be passed on to the national government in higher subsidies, but this is not a lightening of the taxpayer's lot but merely a change in the officials to whom he shall pay a higher tax. Unquestionably the community must contribute more toward education, not because it costs more to do the same work but because an incomparably larger amount of work is to be done.<sup>1</sup>

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### QUESTIONS

1. At a public meeting called to discuss school taxes the following argument is advanced in an effort to reduce school expenses: (a) The State and local governments are overburdened with school charges — "schooling" is a matter for those who can afford it — let every one take as much as he can pay for in private institutions; (b) there are too many "fads" in education. Let every one be given the good old-fashioned "three r's" without the many additional "trimmings" that have been loaded on to our school system — if the old system were maintained, school expenses would be materially reduced. What would be your attitude toward each of these arguments and how would you express it?
2. Show how the educational work of the State has been increased by new ideas of education.
3. America is the most thoroughly educated Nation in the world. How would you prove or disprove this statement?
4. Did the experience of our young men in the Army increase or lessen the demand for education? Why?
5. Give some idea as to the extent of the public school system and its expenses.
6. In your State how much is paid by the State treasury and how much by the local districts?
7. Is the individual spending a longer or a shorter time in school than formerly and how does this affect the kind of studies taught and the educational work of the State as a whole?
8. Outline the general plan of subsidy system followed in most of the States.
9. Explain the New York system and its advantages.
10. Explain the usual organization of the county school system.
11. How are colleges and universities being made more useful to all classes of people?
12. Outline the Wisconsin idea and explain why it was adopted in that State.
13. Why have the Western universities been able to charge lower fees than those of the East?
14. How does a constitutional provision of a certain proportion of taxes for the University benefit the institution?
15. Resolved that the Wisconsin plan of university extension should be adopted in this State. Defend either side.
16. What is meant by vocational training and why has it become popular?
17. How does the Federal government aid in vocational training?

18. What is a continuation school?
19. What is the difference between continuation and the full time trade school?
20. Which would be of the greater advantage to the individual and to the State — improving the condition of workers by requiring the payment of a certain minimum wage or by offering industrial training? Why?
21. Explain briefly the Wisconsin continuation school law which has been adopted in other States.
22. Report on the system in your State.
23. Prepare a short essay on the subject of industrial training and include in it an outline of the various types of school required in a State system.
24. Describe the Cincinnati alternating school plan? What do you consider its advantages?
25. How can it be applied in a high school?
26. "The Fitchburg plan leads larger numbers of boys who would otherwise take a broad cultural high school course, to take instead a narrow technical training; it should therefore be abandoned by the cities that have adopted it." Is this correct?
27. What are the views of manufacturers and labor unionists on industrial education?
28. Explain the purposes of State and national aid for agricultural education.
29. How do the States grant this aid?
30. What does the National Government do towards this end?
31. What is meant by vocational guidance and how is it carried out?
32. Select one problem in public education and prepare a report on it from material secured in the publications of the U. S. Bureau of Education, and from your own interviews with local educators. Suggested topics: the continuation school, agricultural training, school finances.

## CHAPTER 20

### THE STATE: HEALTH, CHARITIES, AND HIGHWAYS

#### HEALTH

**Health and the State.** — The germ theory has greatly broadened and enlarged the usefulness of the State. So long as people believed that disease was a "humor" in the blood, to be cured by drugs, there was little to be done except to wait until a malady appeared and then cure it. But with the germ theory there has come a new idea and a new department of medical work — that of detecting and destroying the disease bacillus. With this change we have passed from the *remedial* to the *preventive* policy. But prevention is a gigantic task which far exceeds the resources of the individual; it means community action. We now expect our State governments to establish a healthful environment for all classes and to keep our streets, offices, and schools as free from unsafe conditions as possible. This means that State activity in health affairs is multiplied one hundred fold. While the germ theory is a discovery of medical science, its effects upon government are most striking.

The progress of science now urges our States and cities to conduct thorough and exhaustive investigations of all forms of disease;

To maintain laboratories of hygiene;

To establish a systematic medical inspection of schools and other public institutions;

To enforce vaccination;

To inspect tenements, factories, sweatshops, etc.;

To disinfect dwellings;

To establish sanatoriums for consumptives, open air and recreation grounds for all classes;

And to maintain a reasonable standard of purity in foods and drugs and accomplish scores of other tasks, all directed towards the one great aim of providing a sanitary environment. Most of these new duties have fallen upon the local governments, and these

bodies are supervised by a central State office. Another result of the germ theory has been the determination of the people to make public health a matter of general, not purely local, concern. The active passage and interchange of persons and goods between all parts of the commonwealth has made it imperative that some central authority be established to watch over the physical welfare of the entire State.

**The State Health Bureau.** — The central body is fast becoming the strongest single force in the fight for a higher health standard. It is usually composed of six to ten members appointed by the Governor, the majority being physicians. Its duties and powers are: Suppression of epidemics; for this purpose an emergency fund of several thousand dollars is placed at the disposal of the Board; Investigation of diseases and their causes; Vital Statistics; Power to act as a local board of health in those districts where no local board exists; Power to assist and encourage the existing local boards.

As the State Board usually meets only at certain periods or in case of emergency, its continuous work is assigned to a paid secretary who devotes all of his time to such duties. Under the direction of the board and its secretary is a corps of special agents, chemists, inspectors, and local district physicians. The board also maintains a central laboratory in which its chemists conduct analyses and investigations, while the inspectors examine on the spot and report to the board any local conditions which the board directs.

**New Problems of Health Administration.** — Prominent among the questions confronting the State authorities are: (a) The creation of pure water supplies; (b) Purity of foods, beverages, and drugs; (c) The campaign against tuberculosis; (d) The administrative question — what shall be the powers of the central authority?

**The Water Supply.** — Every town and city faces the problem of water supply. The universal nature of the demand has raised this question to the front rank. It is a peculiarly difficult one because of the rapid increase of small towns and cities which cannot afford an expensive plant. Again, the sources of pollution in the supply of any town are usually beyond the limits of the town itself and are not subject to its jurisdiction or control. This in itself is enough to warrant State supervision and protection. The central State

authorities are now trying to stop the widespread practice of emptying sewage into streams which supply other communities. With the exception of Massachusetts, none of the States enforce vigorously and effectively the laws prohibiting this custom — an administrative weakness which costs the lives of thousands each year. The laws of Massachusetts not only forbid pollution of supply streams and ponds, whether through sewage or otherwise, but they also authorize the officials of any town, city, or of any water or ice company to bring a complaint before the State board, setting forth the cause of such pollution. The board, after a public hearing, may order the causes removed. As no appropriation is made for this purpose, however, the State board is obliged to make its regulations and rely upon local boards for their enforcement.

These provisions give the Massachusetts board some means of protecting the water supplies of the State against the more open sources of impurity, but it is in its advisory capacity that the board exerts a more typical influence. No town is authorized to provide for a new water supply or sewerage system without first consulting the State Board of Health. Most of the plans for local sewerage and water supply require the authorization of the State legislature, the latter body usually refuses to allow a change without the approval of the State board.<sup>1</sup>

In Pennsylvania, where conditions of highly developed manufactures and dense population also prevail, the State board of health has for years advocated the establishment of a force of "river wardens" under the direction of the board, to police the water supply of the entire State; but the recommendations of the Board have thus far been ignored by the legislature. This appears to be the only permanent, satisfactory solution of the problem since pollution becomes every year more extensive and dangerous.

*Food Inspection.* — The use of fraudulent or harmful food adulterants and preservatives has become a question of deep popular

<sup>1</sup> The Massachusetts Act of 1886 and 1888 "To Protect the Purity of Inland Waters," etc., provides that the State Board shall have authority over all inland waters for sanitary purposes. Its agents shall examine purity of such waters and it may recommend to the legislature measures to prevent pollution. It advises with city and town authorities or companies or individuals on the disposal of drainage and sewage and the installation of water supply systems. Such persons and communities are required to secure the approval of the Board for their plans.

interest as we saw in considering the National power to regulate commerce. Unfortunately the practice has not been confined to luxuries and delicacies. Since it is the less wealthy who demand a cheap diet, adulteration and harmful preservatives are most prevalent in the ordinary necessities of the table, such as meat, salt, sugar, milk, butter, flour, meal, canned and preserved fruits, and vegetables. The evil falls heavily upon that class which is least able to protect itself. In view of such conditions, the States have enacted measures similar to the Federal Act of 1906. The laws now in force are of two general kinds: First, those aimed to prevent fraud, and second, those intended to eliminate *injurious* adulteration and preservatives of all kinds.

Under the first class of laws, for example, are those regulating the manufacture and sale of oleomargarine. This substance is not considered harmful; it is claimed to be cleaner than butter and is certainly much cheaper. The sale of oleomargarine as butter, having reached a point where it threatened to displace the genuine article, several States provided that oleomargarine must be sold as such. Dealers were required to be licensed, the packages to be plainly marked, and the use of coloring matter to imitate butter was in some cases prohibited. Here the objection is not to the sale of the article in question, but to the fraud perpetrated when this article is artificially colored and sold as butter.<sup>1</sup>

Many of the State laws also require that the presence of certain dangerous drugs in a food or beverage or in a medicine must be stated on the label. These laws so far as they affect products brought from other States are subject to the general food and drug laws of the Federal Government and may not conflict with the requirements of the latter.

**Pure Food Laws.**—The second class of laws, those directed towards the suppression of harmful adulterants and preservatives, is more important. The extension of the vegetable and fruit canning industries has been in the main beneficial but has brought with it the wholesale use of certain conserving compounds which are considered harmful by medical authorities. The use of these drugs, notably salicylic and boric acid, is now forbidden by several

<sup>1</sup> The same applies to manufactured vinegars, etc., many of which are harmless preparations such as diluted acetic acid, but their sale as *vinegar* can no more be permitted than can other forms of fraud.

of the commonwealths, as are also certain coloring extracts because of their injurious effects.

The executive force employed to administer these laws is organized either under the Health Bureau or a special Food Commission. At the office of the central authority, in each case, there are located the necessary chemical laboratories, with a staff of expert analytical chemists, to test all products suspected of being manufactured or sold in violation of the law. In addition, a corps of inspectors is employed to secure samples of food for analysis.

The heads of the State food bureaus and of the National bureau have formed a league known as the Association of State and National Food and Dairy Departments. They hold an annual meeting which has become a clearing house for the exchange of experiences and improved methods. At this meeting the results of chemical analyses are talked over, new forms of adulteration are brought to notice, proposed changes in National and State laws are considered, and the ever-present problem of cheap substitutes is viewed from the practical standpoint of the administrator.

*The Tuberculosis Campaign.*— It is in the fight against the chief cause of death that the State's usefulness shows the greatest possibilities. Consumption is curable and preventable. In both cure and prevention it is peculiarly subject to environment. The efforts of medical experts are accordingly aimed to cure those already afflicted by placing them in open air camps and sanatoria, and if this is impossible, then by inducing them to change their diet to simple flesh-producing foods and securing as much fresh air as they can; while to prevent the spread of the disease the specialists urge the separation of those who have it, wherever possible, and the most widespread, universal dissemination of knowledge as to ventilation, exercise, foods, and cleanliness. This maps out the work of the State. By a combination with the public forestry reserves there have been established State camps where at a low charge patients may take the out-door cure for several months, while for those who are unable to leave their own localities special hospitals, dispensaries, and educational measures are provided. Many State and city boards of health issue pamphlets of instruction free to the people and furnish to the newspapers material which is spread broadcast, so that a constant agitation

among all classes is beginning to produce its results in the local mortality tables.

*The Powers of the State Board.* — Two widely differing types of board have evolved: the early Massachusetts plan which is an educational and informational board with little regulative power except in epidemics and water supply problems; and the Indiana type in which the board has strong positive powers over all the local health authorities and may even remove local boards and health officers where this is necessary. In many States the board also holds an annual conference of all the local health officers for the exchange of ideas and for instruction in the latest advances in public hygiene. The Indiana plan of establishing a more adequate control by the central over the local authorities has thus far proved successful and seems well adapted to the needs of most of the States. Many State Health Bureaus now publish a monthly magazine which is distributed free to interested persons.

The State Boards cooperate with the U. S. Public Health Service in holding short conferences at strategic points to stir up and arouse public interest in health administration. Some large life insurance companies, notably the Metropolitan, have also organized campaigns of education, cooperating with the local and State health authorities, and have materially cut down the mortality rate.

**How Shall the Central Authority Be Organized?** — Much of the effectiveness of health administration has been lost because most of the States have adopted the board plan. In New York, instead of a board, there is a Department presided over by a single Commissioner of Health who must be a physician of at least ten years' actual practice, appointed by the Governor. Under his direction are the Secretary, Medical Expert, Registrar of Vital Statistics, Director of the Bureau of Pathology and Bacteriology, Director of Chemistry, Director of Cancer Laboratory, Consulting Engineer, etc. The powers of the Commissioner are to make inquiries and investigations concerning causes of disease, especially epidemics, the effect of localities, employment, and other conditions upon public health, health statistics, etc.; he may approve or modify ordinances of a local board of health so far as they affect the public health beyond the jurisdiction of such local board; he exercises exclusive jurisdiction over all lands acquired by the State for sani-



tary purposes, prescribes statistical methods for the various municipalities, examines into nuisances, exercises powers of the local board of health where a municipal corporation fails to establish such board, appoints clerical and other assistants, and subpoenas witnesses where necessary.

This centralized plan is in accord with the latest experience in our municipal governments and is far more satisfactory than a collective body in all cases where rapidity of executive action is necessary. It has however been charged that the change was made in New York for political reasons, that a single Commissioner is apt to be more subservient politically than a Board and that the salary expenses are higher than under the board plan. In spite of these objections, the New York system has worked satisfactorily, and has been adopted by several other states.

**A New Public Health Policy.** — In this whole struggle of the State to offer its people a more healthful environment there is now emerging a choice of two policies, a parting of the ways. As Doctor Wm. H. Allen has shown in his *Civics and Health*, the public authorities may either take upon themselves the entire burden of creating the new environment of the people, which policy Dr. Allen calls, "doing things" or they may perform directly only what is necessary to establish a certain standard of health and then inspire the home, the church, the school, the civic society, and the patriotic citizen in general, to do the rest — this latter Dr. Allen calls, "getting things done." "Getting things done" is far better because it enlists the intelligence and the voluntary coöperation of all forces while the policy of doing everything directly by State agents often arouses opposition and does not stimulate that preëminently American quality of initiative — it loses the benefit of team work and leaves latent and unused the potent force of self-help. As an example of the remarkable value of preventive public hygiene, Dr. Allen cites the results of the New York committee on physical welfare of school children. An investigation by physicians under the direction of this committee showed that 71 per cent of the children examined had adenoids — an easily removable deformity which invariably reflects itself in the backwardness, ill health, irritability, or slothfulness of the child. The same investigation showed 48 per cent of the children in rural schools to have defective vision. How shall these conditions be treated? Under the policy

of "getting things done" by showing children and parents the facts and how to remedy them and, in a few instances, where necessary, by providing surgical assistance; under the policy of "doing things" by having school surgeons extract the adenoids and school opticians treat the eyes. The former is the educational plan.

The committee found further that physical defects in public school children occurred frequently in the families of the wealthy as well as in those of the poor; that many types of physical weakness were apparently in no way connected with malnutrition but came from poor ventilation, or poor light, or bad teeth; that the families of native born required attention as much as those of immigrants. From these and other data gathered the committee drew a number of conclusions bearing directly upon the work of the public health authorities. A few of these only may be cited:

In the lower schools there was no evidence of physical deterioration of race stock — on the contrary the vast majority of physical weaknesses noted were easily removed.

Home and street environment were more responsible than poor nutrition — free meals in schools would not essentially improve conditions.

All classes of school children require attention, not only those of the poor.

Parents can be relied on to correct the greater number of defects, if shown what steps to take.

Where parents are unable to pay for necessary treatment, private philanthropy or State action is necessary.

Basing his proposals chiefly upon the conclusions of this committee, Dr. Allen has worked out a plan by which the State, health, and school authorities can develop and inspire general coöperation. Such a program possesses so marked an advantage over a general movement for free meals, free eyeglasses, free medical care, free relief in school, that an outline of it is presented here. Its principal features are:

A National bureau of health which shall gather and disseminate the facts among the communities of the United States and an active central State bureau of health in each commonwealth which will carry on the immediate work of educating, guiding, inspiring, and, where necessary, compelling local coöperative effort.

The State could work chiefly through the school with a clearing house of information to be maintained in each State, at the disposal of local authorities and those interested, a corps of State agents to make special inquiries and inspection of the school teaching of hygiene, a special instruction staff to carry on the propaganda among county superintendents, physicians, teachers, normal schools, etc.

A bureau of experts to pass on the plans of every new school building.

A county clearing house of information, a physician, and nurse to organize inspection and instruction in schools and to show officials and teachers how to interest parents in the physical welfare of school children.

In each township an examining physician, and a record of the physical history of each child from the time of entrance to the school.

In the city a special department of school hygiene with an officer giving his entire time to that work, a subcommittee on hygiene of the board of education; a local clearing house of information; a special examination of applicants for teachers' positions with reference to hygiene. A revision of the school curriculum to adapt it more closely to the needs of different physical classes of children; the supervision of indoor and outdoor playgrounds; a staff of examiners of children to ascertain, record, and supervise the correction of defects; a staff of nurses to assist medical examiners in demonstrations of cleanliness and proper care of health.

Dr. Allen's program is here given somewhat fully because it is the most comprehensive, the sanest, and most feasible of the proposals made for the State care of health from a preventive standpoint. It is no exaggeration to say that this program, if carried out — and it is slowly becoming the ideal of the more advanced States — would remove the greater part of preventable diseases and defects and vastly simplify the whole public campaign for health. It has also the great merit of involving comparatively slight expenditure and little direct action by the State. It is in the main a stimulative, educational, and inspirational campaign, to which the school and public authorities would be readily adapted.

**Lengthening Life.** — Insurance authorities have calculated that the average length of life has been increased four years by the

organized efforts of the last twenty-five years and it has been confidently predicted that at least ten years more in the average length of life may be added by further education in health matters, development of stronger public sentiment to support health officials, and the general systematic cultivation of personal hygiene. In the words of the Secretary of the American Insurance Union "within another generation the allotted three score years and ten will be a thing of the past."

**Registered Professions.** — The State laws require that in order to practice certain professions which affect the public safety and health, a State permit or license must be obtained. This permit is only granted after the authorities have ascertained the fitness and skill of the applicant. At first the health and medical authorities granted these permits but with the licensing of new professions additional boards of examiners, one for each profession, have been established. So we have boards which examine and issue permits for the practice of medicine, nursing, dentistry, embalming, pharmacy, etc. Each of these has extended the training necessary to pass the examination until each now requires a high degree of technical proficiency which as a rule can only be acquired in a professional school. Other professions have rapidly followed the same tendency, notably those which involve fiduciary and confidential relations such as certified public accountants, lawyers, etc. In all these callings it is impossible for the client to know fully the reliability and skill of the professional man to whom his interests are intrusted. These interests are so important, even vital, that for the protection of the public the State must fix some minimum standard of honesty and efficiency which shall be satisfied by all the members of the vocation. A further statement of recent legislation in this field is given in the Chapter on the Police Power.

#### STATE CHARITIES AND CORRECTION

**New Methods of Work.** — In examining the State's work in both health and schools, we saw that the recent growth of State power was due in each case to some new scientific idea, discovery, or method. As this new idea gradually pervaded public opinion people began to see that its adoption required State action. This is peculiarly true of the field of charities and correction. The old

idea of charity was to provide free soup for those who lined up at the door, or to gather them into the almshouse — in short to relieve the *immediate wants* of the poor; the new thought is to help a family to regain its *earning power*. The old system produced a class of chronic dependents; the aim of the new is to remove the cause of dependence by cultivating self-support. But the modern method involves endless visiting, inspection, and supervision. In our treatment of criminals and insane a like change has taken place; instead of the belief that all men are to be classed as either sane or demented, good or bad, we now recognize that no such sharp distinctions exist, but that it is a question of degree. Individual treatment may often overcome or remove the difficulty, but individual care means a reorganization of our system, and in this change the rôle of the State government has necessarily become a vital influence.

Again we have discovered that public charity and correction where left entirely to the local town or county have failed. Even the freedom until recently given to each reformatory, asylum, orphanage, hospital, almshouse, and penitentiary to manage its own affairs, is no longer satisfactory; the State must set a standard of efficiency, as in the schools, and must see to it that the public institutions are kept well up to this standard.

**The Central Authority.** — This authority is variously constituted in different States. Two general types have evolved, first, the *supervisory State board of charities*, and second, the highly centralized *board of control*.

The "supervisory board" plan has arisen partly from the needs of public charities run by the State, but chiefly from the practice of making State appropriations to private charities. There must be some authority which will watch over these institutions and keep the legislature informed of the use to which the public moneys have been put. This is one of the first duties of the board. Again when a new institution applies for State aid, its merits must be investigated. From these simple functions the scope of the board's activity has in many States been gradually enlarged. In the public institutions under its supervision the board may audit accounts and prescribe general rules governing the admission of inmates. It also acts as an advisory council recommending changes in methods of administration and in the laws. It also establishes rules for the reception of inmates to certain State institutions, visits, or inspects

the same and in some States recommends the continuance or discontinuance of State aid to private institutions which are seeking public subsidies. This system, still existing in most of the States, has usually proven too weak to meet the needs of greater efficiency and economy.

**The Board of Control.** — The second plan is that of centralization. The board's functions are not limited to inspection, but include the actual management of the charitable institutions, insane asylums, and penitentiaries of the commonwealth. It appoints and discharges superintendents and employees, makes regulations, changes methods, purchases supplies, and in every practical sense administers the charitable and penal establishments of the State. It has sometimes received powers of visitation and inspection in State universities, normal schools, colleges of agriculture, etc., and represents therefore by far the most advanced type of centralization in this field. Many Western States have adopted this general plan with individual modifications.

An example of the advantages of central control is found in the experience of the Iowa board. At the time of its creation in 1898 the State institutions of Iowa were so disorganized that an investigating committee had been appointed and had reported, showing a condition bordering on chaos. To remedy this the board was established. The standard of efficiency has been raised in all institutions, regular visits are made at least twice each year, modern ideas have been introduced, purchases of supplies are made in quantity for all institutions, and a material saving has been effected. In Ohio the operation of the State institutions under central management resulted in a saving of \$3,000,000 in six years. This was secured largely by introducing business principles into what had previously been utter confusion in the management of the State's charities — a central purchasing and accounting system was established, industries were installed in penal institutions and prison labor used in the manufacture of clothing, shoes, furniture, soap, and other articles of common use in the State institutions. The inmates of both the charitable and penal institutions were allowed to cultivate garden and farm land and to undertake dairy work on a large scale.

The underlying idea of the extreme centralized system is the control of all institutions from a single center. Arbitrary as this

sounds, its real character must depend on the men who compose the central board; should they be so disposed, they may administer the office in such a way as to make it a means of stimulating and developing the initiative of the various officers under their control. This seems to have been the policy of most of the boards. Central control need not destroy the spontaneity of the individual subordinate; it may mean the highest development of the spirit of co-operation with the added advantage of a means of enforcing immediate action where this is required.

But the mere change from a supervisory board of charities to a board of control will produce a modern system. Such a change usually follows the stirring up of public sentiment and a keener sense of the importance of State institutions. This is reflected in the type of men appointed and the support given them so that the change in system is often made under the most favorable circumstances. Where politics has crept in to determine the appointment of subordinates the board of control may prove as great a failure as the old board of charities but as a rule the chances for its success are greater because it possesses the power and authority to introduce new ideas and to keep all the institutions of the State up to the standard of the best. It can and does employ specialists on the one hand while on the other it has all the opportunities that were possessed by the old type of board for stimulating, arousing, and guiding public sentiment. Eventually a State Bureau of Charities under the head of a single official, with an advisory council or board would assure greater definiteness of responsibility and would avoid the weaknesses which are inherent in all boards.<sup>1</sup>

**Private Charities.** — A strong authority is especially needed because of the widespread attempts to raid the State treasuries for the benefit of thousands of small ineffective and badly managed private charities. "Charity" covers a multitude of sins including both waste and graft in flagrant form. It is a well-known practice for a group of physicians who are desirous of increasing their practice to found or reorganize a hospital for this purpose. Their friends aid in the worthy enterprise, the benevolent are invited to contribute, local pride, religious zeal, and genuine public spirit are all exploited to the full limit in order to put and keep the "insti-

<sup>1</sup> See Mathews — *Principles of State Administration*, p. 360.

tution " on its legs, and then as a last resort the legislature is asked to cover the deficit. With the aid of political influence the attempt usually succeeds, and once on the list of State beneficiaries the hospital never lets go its grip nor ceases its demands for a larger subsidy. Is it well managed? Do its patients receive proper care? Could they be better and more reasonably treated at other better equipped institutions already in existence? What is the cost per patient per day? In brief, how much of the time, effort, and money devoted to it is wasted and how much actually reaches the community in benefits? None of these questions is ever asked by the legislature. Nor is the hospital the only charitable spendthrift; the "home," the asylum, the reformatory, the refuge, the charitable school, the college — those which perform service and are meritorious charities and those which represent only faith and hope, and have not yet become charity — all are included in the glad procession to the State treasury; even sectarian institutions which should not receive government support either because of their denominational control or the preference given to certain applicants for admission, are nevertheless "well heeled" politically and able to win their places on the favored list.

A conservative estimate would place at 90 to 100 millions of dollars, the amount annually wasted or improperly granted by the States to charitable institutions. Prominent physicians have repeatedly urged that the inhabitants of a State would be better off if nine-tenths of the hospitals were closed and a part of their funds devoted to the few well-managed institutions. In one commonwealth the managers of certain State-aided institutions refused to make the reports required by law from all those which received public funds, yet they were able to secure a renewal of the appropriation. In this whole situation which is ripe for a constructive reorganization, we apparently need the strong arm of an administrative charities bureau which can administer the public institutions. But we need even more a courageous legislative policy which will absolutely cut off all privately managed institutions from State appropriations. The payment of State funds without State control is wrong in principle.



## HIGHWAYS

It is not a coincidence that backward nations have poor roads nor that civilization decays in proportion to the breakdown of roads, canals, and railways. A large part of the Russian *debacle* has been due to the destruction of that country's rail lines. Roads are the very blood-vessels of the body-politic. Poor roads mean poor circulation, which in turn means stagnation. Of all the means that promote the growth of a national spirit, few are so helpful as the active circulation of persons, ideas, and merchandise between different sections of the country. The old notion that the roads of a locality were exclusively a matter of local concern, that it was for the people of each village or township to decide whether their highways should be roads or trails and ruts, is akin to the former idea that health and education were purely local matters. The idea of a State interest in and State control of roads comes after the population has grown to some density; this point has been reached earlier in the Atlantic States, than elsewhere. Others are fast adopting the Eastern plan.

Certain main arteries are now generally conceded to be properly subject to exclusive State control, the more willingly conceded because the State thereby assumes the cost of construction and repairs. These form the so-called "State roads." But more recently a new movement has sprung up to relieve the local government of part of the burden of road expense. The idea of a subsidy from the State treasury, which was so successful in strengthening the local school system has been adopted here also. The Commonwealth contributes a certain fixed part of the cost of building new roads, the township or county raising the remainder by taxation or loans. In New Jersey a compromise has also been arranged between the State, the township, and the abutting property holders, each paying a fixed proportion. The amounts paid by the central treasury vary in different Commonwealths, from one-third in New Jersey to three-fourths in Connecticut. This subsidy grant is an open recognition of the economic and social interest which the people of the State *as a whole* have in the maintenance of free communication between all its parts. The acceptance of the subsidy is left to the option of the local governments but it has been the experience of all the States that the townships have accepted the

provisions of the law with such eagerness as to exhaust the State appropriation and to require the establishment of a "waiting list."

The keystone of the new system is a State Superintendent of Highways or a Board of Highway Commissioners. This officer or board investigates the road materials and possibilities of each region, prepares road plans, employs engineers, and superintends the allotment of the subsidy to the townships. The office is a means, in fact, *the* means of keeping road-building and maintenance up to date.

As in the schools, so in road administration, only those localities whose highway plans conform to the standard fixed by the State commissioner, may receive assistance. This requirement uniformly means the construction of a macadam or other durable high-class road. The amounts appropriated by the States for this purpose have heretofore been small, but many are now devoting huge sums to this purpose. Pennsylvania and North Carolina have each issued 50 millions of road bonds, California 58, and others are rapidly following suit.

**Federal Road Subsidies.** — The National Government by the Act of 1917 makes an annual gift to each of the States for the construction of roads. This is contingent upon the appropriation by the State of a like sum for road building and maintenance. The subsidy is administered by the Secretary of Agriculture and the plans and projects for roads must be approved by him. If the State at any time abandons its maintenance of such subsidized roads or fails to keep them in adequate repair the Secretary is required by law to discontinue further subsidies to that State. Large amounts appropriated by Congress under this plan have stimulated the commonwealths to renewed activity and under its influence and that of the motor-car organizations a vast network of new roads of modern type is now being built by the States at the rate of 7000 miles yearly. The two governments cooperate in highway experiments to determine which kind of road is suited to the needs of different classes of traffic. The problem has assumed a more important aspect since the development of motor truck transportation for hauls below 200 miles. A further discussion of this system is given under Federal Subsidies in Chapter 30.

**A Transport Survey.** — In the near future our system of transportation which has "just grown" will probably require a thor-

ough analysis and modification to bring it up to a state of reasonable efficiency. Such a survey must include railway, water, roadway, and air transport and the type of traffic suitable to each. This would mean the diversion of large amounts of freight and passenger traffic to other routes and means of carriage than those which they now patronize. It is, socially speaking, a waste to run expensive highways for motor truck freights parallel with the railways unless the latter are overburdened. Similarly, it is an extravagance to build a system of canals giving cheap transportation for heavy products and slow freight and then allow them to fall into decay. Our road and canal building programs are not complete. A large part of them is only beginning. This new construction ought to be planned on well recognized principles in order to form a main trunk line system with auxiliary routes, all classified according to slow, heavy, and cheap transport and fast express and passenger carriage, respectively. A relatively small initial expense would save us vast outlays in the future. The States, in coöperation with the Federal government, might readily conduct such a survey and plan for future construction accordingly.<sup>1</sup>

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<sup>1</sup> President Terrace at the Washington State Good Roads Association meeting in 1922 summarized the present waste in road building and pointed out that the roads built for all the people were being destroyed by a few trucks. Five per cent of the traffic was annihilating roads that were built for the other 95 per cent. The cost of building an average 16-foot road for ordinary travel for 95 per cent of the total traffic was about \$30,000 per mile. For the abnormal truck traffic the cost would be \$50,000. In New York a single 5-ton truck is known to have caused over \$100,000 damage to a light built road.

## CHARITIES AND CORRECTION

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## QUESTIONS

## HEALTH AND THE STATE

1. Explain how the germ theory of disease has increased the work of the State government and give some examples.
2. How has it affected the division of power between the central and local authorities?
3. Explain the usual organization and general powers of the central health authority.
4. What is the form of central authority in your State?
5. Which do you consider the most important health problems in State government today?
6. Why is central supervision and regulation of local water supplies necessary?
7. Outline the Massachusetts system of water supply protection.
8. How do the States regulate fraud in food production?
9. Outline the usual provisions of a pure food law and the organization which administers it.
10. Explain fully the practical obstacles encountered in the execution of these laws.
11. What can the State do to prevent and cure tuberculosis? Examples.
12. Contrast the educational and the executive types of a central State board of health and give illustrations.
13. A legislative committee is reorganizing the State health office in your commonwealth. Outline the plan of organization which you would favor and your reasons.
14. In a large city it is proposed that the standard of health shall be immediately raised by an active campaign in the city schools. At a public meeting called to consider the question it is proposed that free eyeglasses, free lunches, free medical and surgical treatment, free dental care, and other free facilities be furnished by the city government to the school children in the school building. Explain fully whether you would favor this proposal or not, with reasons and examples. If opposed, what policy would you advocate and why?
15. What are your impressions as to the wisdom of government compulsion in all matters of health?

16. As to the possibility of relying *wholly* upon the voluntary action of the individual, after attempts have been made to educate him on health questions?

17. Give your impressions as to the desirability of a national board of health, with reasons.

18. Outline and discuss the proposal for State and local health administration advanced by Dr. Allen.

19. How much of this plan already exists in your State?

20. Secure the views of a physician as to the wisdom and feasibility of the Allen plan.

21. Explain the general system followed by your State in controlling the medical and allied professions.

22. How would you prove that the National and State governments are or are not doing their full work in protecting the health of the people?

23. Resolved, That each local community should be allowed to determine its own health policy and regulations free from outside control or interference. Take one side.

24. How much is spent per capita by your town or community for health protection?

25. What is the system of water supply protection practiced in your State?

26. Can the State lengthen life? Explain your answer.

#### CHARITIES AND CORRECTION

1. Explain how the present methods and purposes of charity differ from those of former times.

2. How and why has the treatment of criminals and insane changed?

3. Do the changes above noted call for greater or less State work, and why?

4. Prepare a report showing the organization and powers of your own State Board of Charities.

5. Contrast the New York and Iowa central authorities. Contrast the New York and New Jersey authorities.

6. Resolved that the "Central Board of Control" is the best plan of State administration for Public Charities. Defend either side.

7. What should be the work of the central State authority?

8. Resolved that all charitable institutions which appeal to the public for contributions should be under State supervision. Defend either side.

9. Resolved that the present legislative methods of appropriating State funds to charities should be abandoned. Defend either side.

10. Prepare a report showing what the State legislature should do as to funds for public charities.

11. Resolved, That the State should make no appropriations whatever to charities under private control, or sectarian management. Defend either side.

12. Explain the Mother's Pension system.

13. Secure from some experienced social worker a practical opinion on the pension system.

14. Cite from the report of your State Board, its view of the distribution of State funds to privately managed charities.

15. Resolved, That State funds should be appropriated only to institutions managed by the State and local governments. Show exactly how a business administration of public charities can save money for the State.

16. Resolved that the building and repair of roads should be left entirely to the counties and townships of this State. Defend either side.

17. Make a brief report on the following points, securing the information from your State Highway Department or other reliable sources: (a) The relative cost of construction of an ordinary dirt road, and a good macadam road, an asphalt surface road, or a concrete road. (b) The relative cost of maintenance of the old dirt road compared with the newer types. (c) Any instances as to increased value of property served by the new types of road.

18. Describe the system of highway administration in your State.

## CHAPTER 21

### THE STATE: FINANCES

THE increases in State activity have naturally enlarged State expenses and have increased taxes and debts or loans. Within the last few years a complete revision of State finances has been undertaken. This has raised three important problems: (1) the creation of adequate revenue by taxation, by bond issues, etc.; (2) the arrangement of the State's expenditures within its income; (3) the creation of a modern system of State accounting which will make clear the cost of operating the State and the funds available for it, and will aid in the supervision of local expenses so far as the State has this duty.

**Revenues.** — The revenues of most of the commonwealths come chiefly from taxes, partly from public property such as school lands, originally granted by the National government, public works, canals, sales of material, etc., and partly from fees. Examples of fees and licenses are the charges for incorporating companies, a very heavy item in some States, payments from foreign corporations for the privilege of transacting business within the State, and automobile licenses. In several States this latter item runs over \$5,000,000 annually. The States also receive heavy subsidies from the National government either for schools or roads or similar purposes.

**State Taxes.** — The more important features of the tax system are:

(a) The general property tax. This levy is one of the oldest and most widely used and has been resorted to by all the States. It usually yields the largest single item of revenue. Lately it has fallen into disrepute because of the great difficulty of making a complete, thorough, and honest collection. By general property is meant both the realty and personal wealth of the taxpayer. Mortgages, stocks, bonds, notes, securities, and similar personal property are so easily concealed that from one-half to two-thirds

of this property escapes assessment. At a meeting of State executives in 1912 Governor McGovern of Wisconsin reported that an investigation of 473 estates by the State Tax Commission "revealed taxable securities, such as stocks, bonds, etc., worth \$2,266,105, which had been assessed the year before at only \$74,995, or less than 3½ per cent of their true value." The Governor also set forth startling inequalities in the assessment of personal property in different counties of the State, producing a vicious system of discrimination which worked largely against the poor in favor of the richer classes. It was this highly unjust, inequitable system of personal property levies which led to the adoption of the Wisconsin income tax. Real estate lends itself more readily to local taxation and the commonwealths usually leave it to the counties, cities, and townships except so much as may be included in the general property tax.

(b) Formerly mercantile and liquor licenses were both resorted to by the States, the latter especially yielding a large revenue. Since 1919, however, this item has dwindled into insignificance. The mercantile license, that is, a tax on the privilege of selling goods, has always been unpopular and has never yielded sufficient return to make its continuance advisable. In some States the larger portion of the receipts from mercantile taxes have been consumed by the collection costs.

The newer forms of revenue which are now finding favor are:

(c) The inheritance tax, which has lately been adopted by a number of States; some have levied as high as 15 per cent upon collateral inheritances, that is, property left to heirs who are not in the direct line of family descent; while still others, notably Wisconsin and California, have adopted a progressive scale of rates, higher upon the larger inheritances. Professor Seligman has shown that a much greater return could be secured through the inheritance tax if only the National government were to levy and collect it and to return part to the States for their use.

(d) Taxes on special natural resources such as lumber, coal, etc. In Pennsylvania where the greater part of the nation's anthracite deposits lie, a special anthracite tax yields a large return.

(e) The corporation tax. This in many States yields such a large revenue as to make other heavy forms of taxation unnecessary. It is extremely popular because it supposedly falls upon capital,



but it is ultimately paid in part at least by the consumers in the form of higher prices. A vigorous and successful attempt has been made in some States to force corporations to pay, not a special corporation tax, but their full share of the general property tax upon the real estate and personalty that they own. When the State taxes corporations it is customary to classify them, the public utilities being more heavily taxed than others. Some States levy a capital stock tax on corporations with good financial results.

(f) The income tax. The growing unpopularity of the property tax has led to new attempts to apply the income tax, which in several States have now been successful, and it is rapidly growing in favor among the legislatures. As a rule, the graded form, similar in principle and method of collection to the National tax, is employed. In order to make it more popular a heavy proportion of the receipts, in some cases 30 per cent, is left with the counties and townships which collect it, and only 70 per cent goes to the State Treasury. Corporation incomes are usually assessed and collected by the central State offices. It has been found that the tax reaches a class of persons who ordinarily escape State levies. From the standpoint of justice and fairness, if it can be properly administered, it offers the most feasible new source of State revenue. A Census Bureau report in 1919 shows that of a total revenue of 675 millions received by all the States, the general property tax produced \$237,000,000, taxes on special classes of property \$104,000,000, and corporation and business taxes \$122,000,000. These were the three principal items of receipts.

Dr. Mathews has pointed out that the income tax, which is levied by both the National and State governments, should be assessed and perhaps collected by Federal officials and a suitable proportion paid to the States. This would avoid duplicate assessment and collection by two separate staffs of officers. In Wisconsin the income tax is assessed by agents of the State Commission, each appointed for a local district. In this way the inequalities and favoritism of local assessment are avoided.

**State Tax Commissions.** — Some of the more progressive States have established central State Tax Commissions. These bodies seek to equalize assessments of property for taxation in different sections. They also assess the properties of large corporations and utility companies which are located in more than one local district.

They aid in establishing greater uniformity of local financial accounts, they investigate the operation of the tax laws of the State and seek to improve the methods of assessment.

**Budget System.** — All the more progressive States are now adopting or have already established the budget plan. The need for this has been considered in Chapter 5 but the conditions of expenditure and taxation are much more chaotic in the States than they have been even in the National government. The practice of log-rolling by different interests for State funds has become so general that no one wishes to incur the antagonism of influential groups in the legislature by voting against a raid on the State Treasury.

There has been no definite system or plan followed in appropriating funds. Such was the general unchecked scramble that the legislature often appropriated many millions more than the revenues. In order to end this financial chaos the budget plan has been adopted. It requires a balance of revenues and appropriations enacted by law.

The best type is the executive budget plan. It consists of the following important steps or operations — (a) the Governor secures from all the State offices a carefully prepared estimate of their expenses; (b) an accurate estimate of the probable revenues during the budget period; (c) a thorough overhauling and revision of the expense estimates by a responsible authority, usually the Governor and special financial advisers chosen by him; (d) the presentation of the revised expense estimates in clearly itemized form to the two Houses of the legislature; (e) a careful consideration and discussion of these items by legislative committees and by the Houses themselves in order to afford full public information as to the amount of funds to be spent and the reasons for such expenditures; (f) the passage of new revenue measures to provide such changes in the total amount of revenue as may be required to meet the expense budget; (g) it is highly advisable that the Governor have authority to veto individual items in the expense bill as finally passed, so that a real balance between expenses and revenues can be established.

**Real and False Budget Systems.** — It is especially important that the budget be considered and adopted *as a whole*. One of its chief advantages is that it fits appropriations into a general plan. If this advantage is destroyed by considering appropriations piecemeal under the old log-rolling method we cannot call

such a system a budget plan. Wherever a real budget system has been established in our State and local governments, it has been impossible to conceal the former waste, extravagance, and fraud, and on the other hand it is easy to direct public attention to the advantages of productive expenditures. A simple, clear method of stating the uses to which the public funds are devoted enables the people to grasp the relative importance of each group of expenses, and leads to necessary changes in the State appropriations. When State funds are misused the cause is usually some special interest which has fastened itself upon the party system. Any proposed appropriation is judged by the standard — how will it help the friends of the party? The grant of funds may be unjust, it may favor a powerful clique or group of interests, it may discriminate in an unfair manner, or it may be positively illegal, but will it help the party? This is the very opposite of the common welfare — it is the service of special groups, interests, and intrigues. The first step in the overthrow of this parasitic growth which has flourished for years in all the States is to show the people clearly where the public moneys go, what proportion of them is devoted to each general purpose, and exactly what use is made of them by each of the officers and organizations to which they are granted. Added to this is the great practical need of reorganizing the State administrative offices so that their expenses can be controlled by a responsible chief executive. Administrative and financial efficiency go hand in hand. It is impossible to neglect the one when establishing the other.

**Constitutional Regulation of Finances.** — All of the State constitutions have devoted much space to the limiting of the financial powers of the legislature. They set forth in much detail a long list of powers over which the legislatures shall exercise only the most restricted powers. The more important of these are: Appropriations to charitable institutions; these must not be made for any denominational or sectarian purpose, and in some of the States they require a two-thirds vote of each House for their approval. Each tax must be uniform; there must be no exemptions except the property actually used for religious and charitable purposes. Ordinary corporations may not have their property exempted from taxation, nor may corporation debts to the State be cancelled by any official. A surrender of the power to tax corporations is for-

bidden. But a few of the States allow special exemptions by local communities for manufacturing corporations for a limited time in order to induce them to settle in such localities. There are strict rules on the public debt.

**The State Debts.** — Because of heavy bond issues and obligations piled up by the legislatures a century ago, to aid in canal, road, and railway building, and because of other excessive outlays the Constitutions have placed severe limits on debts. Debts are limited to certain purposes. An indebtedness which is contracted to cover a casual deficit in revenue must not exceed a certain amount fixed in the State constitution. Larger amounts may be contracted to suppress insurrection or repel invasion. The total State indebtedness in 1922 was slightly over one billion dollars, or \$10 per capita. The highest was that of New York, nearly 270 millions.

The larger State obligations usually represent productive enterprises such as canals, roads, etc., which are in the best sense dividend paying, and are not burdens upon future generations. Sixty per cent of the total State debt was of this nature.

**Local Debts.** — The debts of cities or communities, townships, school districts, etc., must not exceed a certain proportion of the value of their taxable property. This varies from 5 per cent to 7 per cent. But they may exceed this amount in borrowing funds for the purchase and operation of public utilities, such as gas, water works, etc. Some States even provide a further limit that any increase of debt beyond 2 per cent of the value of taxable property must be approved by the voters at an election. All the States provide a certain time, ranging from 25 to 30 years, within which such local debts must be extinguished, and require the localities at the time of contracting the debt to levy a tax providing for interest and principal of the loan.

The money borrowed by the State must be used for the purpose specified in the loan, and a sinking fund must be provided for each loan. The State's credit may not be given or pledged to any person or corporation, nor may the State subscribe to stock of a corporation.

**State Accounting.** — Few of our States have a modern or genuine accounting system. Yet in business companies the accounting department has now become one of the chief aids in directing the enterprise. No more remarkable and complete change has taken

place in business methods than the rise of an effective system of cost accounting which now runs into every branch of corporate service and enables responsible managers to determine questions of policy intelligently and accurately. That our State managers must have the same service to do their work aright, requires no argument. The more vital functions performed by an adequate accounting system for a State are:

(a) General cost accounting; this includes an intelligible estimate of the relative cost of performing the same piece of work in different departments.

(b) The State accounts are the only means which the responsible executives and the legislature have of determining the amount of money used by each department and the purposes for which it was employed.

(c) They serve also as the basis for next year's budget.

(d) The accounts of a State offer its government a means of checking up at any moment the results secured by each department. An intelligently conceived and administered accounting branch should enable the Governor, legislature, and the public press to see not only money spent but also the work done. Few of our States have yet grasped this point.

The accounting work of a State is usually intrusted to a State Comptroller or Auditor. This official checks up all appropriations and expenditures of the State offices and supervises the disbursing agents. His O.K. should be required for the legality of all disbursements. He sees that no department exceeds the total funds allotted to it, also that the funds are spent for the purposes named in the appropriation law.

On repeated occasions the State Auditor has been the means of prying up the lid of the State Treasury and exposing illegal expenditures on a vast scale. Acting independently on his own initiative he can prevent wholesale raids on the public funds. In collusion with the Treasurer he can make such raids possible to an extent which will empty the State's coffers. He and his agents can determine whether the necessary expenditures of State officials and employees shall be approved in itemized or un-itemized form, whether clothing, automobiles, phonographs, extra typewriters, etc., are justifiable expenditures, whether furniture for the State shall be bought by cubic measurement and, in short, whether the doors of the Treasury

shall be open to every ingenious scheme of loot and graft that a "capitol ring" can devise. All the above expenses have been recently incurred by State officials.

The Comptroller or Auditor has in some States the duty of prescribing the forms of accounts to be observed by the administrative officers. In some he shares with the Superintendents of Schools and Highways, the duty of supervising the expenditure of State appropriations to the local districts. In many he must solve the difficult problem as to which charitable institutions are sectarian and therefore cannot receive State aid. He is often a member of the State Tax Commission and he may in the future become the nucleus or starting point of a State system of supervision of local accounts — a consummation devoutly to be wished. The State has a direct interest in these accounts not only because of its appropriations for schools, roads, and public charities but also because the township and county officers usually collect the general property and inheritance taxes for the State. The constantly recurring irregularity in the work of these local officers calls for active State supervision.

**Improvement of State Taxation.** — The more serious weaknesses of State taxation lie not only in law-making but more especially in the unsystematic and often discriminatory methods of enforcement. Dr. Mathews has suggested a number of valuable changes in administration, all of which deserve adoption. Among them are the following:

1. Require the publication of assessments of property in newspapers of the county as has been done in Illinois and Ohio.

2. Consolidate the work of assessment under county assessors working on full time instead of local assessors in the townships and districts on part time.

3. Assessors should not be elected but appointed, in order to avoid the favoritism practiced in aid of influential interests in their local districts.

4. They should be equipped with tax maps and should be chosen with greater regard for their knowledge and character; they should be trained in annual tax conferences.

5. A State Tax Commission or some other central State authority should exercise a stronger central supervision of local assessments.  
(a) It should prescribe uniform records, blanks, rolls, and uniform

accounting. (b) It should supervise the administration of all State tax laws. (c) It should require reports from local assessors and require them to attend an annual tax conference in the State, as noted. (d) It should investigate assessments in the localities and see that they are made according to a uniform principle. (e) It should have the power to remove local assessors for incapacity, neglect, or dereliction. (f) It should have authority to appoint county assessment and revision officials. (g) It should order re-assessments of particular pieces of property, or of entire districts when necessary, as is done in Ohio and Wisconsin. (h) As in several of the States, it should have authority to assess directly certain classes of property such as large utility companies which are located in a number of local districts.

**Protections against Unconstitutional Taxes.** — In order to safeguard both the individual and the corporation against a misuse of the tax power, numerous provisions of the Federal and State Constitutions have been applied in a protective sense by the Courts. Of these the most important are the liberty and property, the equal protection, and the commerce, clauses. We shall consider some of the more usual questions that arise under these clauses.

**Public Purpose of Taxation.** — May a State or city tax its people for any purpose that it pleases? If the object for which the tax is laid is a private one, that is, to help a private individual or class, the courts hold that such a levy is a taking of property without due process and therefore contrary to the liberty and property clause of the Fourteenth Amendment. A tax is a levy for a *public* purpose, not a private one. In *LOAN ASSN. v. TOPEKA*, 20 WALLACE 655, the Court held that a city's action in making a money grant to a manufacturing company to induce the latter to locate within the city, was a levy for a private purpose and therefore unconstitutional. Can a State use the public funds to establish and operate its own grain elevators, storage warehouses, flour mills, banks, etc.? The Non-Partisan League in North Dakota secured the passage of such laws, and an attempt was made to prevent their enforcement on the ground that the operation of ordinary businesses, such as those named, was not a public purpose and that public funds could not constitutionally be devoted to it. But the Supreme Court held that since North Dakota was chiefly an agricultural and grain-raising State, and that the mills, elevators, and banks mentioned

were in the opinion of the people of the State essential aids in the milling and storage of their grain, the purpose was a public one and a tax for such purpose was constitutional; *GREEN v. FRAZIER*, 253 U. S. 233, 1920.

**State Taxes on Federal Powers.** — We have already seen that a State must not tax the various means used by the Nation in carrying out its powers, because such a tax would be an interference with the power of the Federal Government. This was first decided in *MCCULLOCH v. MARYLAND*, 4 *WHEATON*, 316, 1819. Among the important results of this principle is the exemption of Federal bonds from State taxes. In the case of *WESTON v. CHARLESTON*, 2 *PETERS*, 449, 1829, the city had levied a tax on many kinds of personal property, including the 6 per cent bonds of the United States. The tax was collected from all residents of Charleston owning such property. Weston owned several national bonds; he paid the tax under protest, afterward suing the city to recover the amount paid. The Supreme Court decided in his favor, holding that (1) the Constitution, Article I, section 8, gives to Congress the power "to borrow money on the credit of the United States"; (2) the borrowing power is usually exerted by selling government bonds to the people; the money from the sale of these bonds forms a loan to the government; (3) a tax by a State, or by its agent, a city, upon these bonds would reduce their value, make them less desirable investments, and interfere with their sale, thereby also *interfering with the borrowing power of the Government*. Accordingly the State tax was declared unconstitutional. Since the same principle would apply to any State taxes on national bank stock and national bank notes, and since the Nation does not wish to deprive the States of their tax revenue from these sources, Congress has provided by Act of 1894 that the States may tax, as money on hand or on deposit, the national bank notes belonging to private individuals, and that they also may tax as personal property the shares of national bank stock (Act of 1864) owned by persons within the State, provided this taxation is at the same rate as on other similar classes of personal property, and provided that each State taxes only its own residents on this property.

**Can a State Exempt Its Own Products from Its Taxation?** If it were possible most of the States would adopt a protective tax system in favor of their own industries. But the Supreme Court holds that



State taxation must not interfere with the Federal power to regulate national trade. In *DARNELL CO. v. MEMPHIS*, 208 U. S. 113, 1906, Tennessee levied a general tax on manufactured goods but exempted those made from the soil of Tennessee. The Darnell Co. had in its yards some \$19,000 worth of logs which were purchased in other States; it claimed that to tax these products which had come from outside, while exempting products from inside the State, would be to place a burden on interstate commerce. The Supreme Court upheld this objection and declared the tax, so framed, to be an unconstitutional interference with the Federal power to regulate national commerce.

**Taxes on Interstate Trade in Transit.** — In *COE v. ERROL*, 116 U. S. 517, 1886, a local tax collector tried to apply a tax to two sets of logs owned by Coe in the town of Errol. One lot Coe had placed on the bank of the Androscoggin River to be carried down when the spring freshets arrived. A second lot also belonging to Coe had come down stream from another State and were frozen in the river within the town limits. The Supreme Court held that the local tax could be applied to the first lot because they had not yet started in interstate commerce. But the second lot could not be locally taxed because they were already in interstate commerce.

The Court had long before applied a similar principle to a State tax on imports. In *BROWN v. MARYLAND*, 12 WHEATON 419, 1827, the State had laid a license tax of \$50 on importers who had brought in foreign articles by wholesale bale, package, barrel, etc. Brown imported dry goods and sold them in the original package of importation. The Supreme Court held that a State license fee could not be exacted from him for such importations, because such a State tax was distinctly a burden on interstate commerce and therefore an interference with the Federal power to regulate.

The owner of goods who has brought them into a State from outside may usually sell them once in the original package without paying a State tax. But if he stores them for an indefinite time, meanwhile offering them for sale in various places both inside and outside the State, the Court will usually allow the States to tax them, on the theory that they have become a part of the wealth within the State; *AMERICAN STEEL CO. v. SPEED*, 192 U. S. 500, 1904.

**Drummers.** — If a traveling salesman passes from State to State securing orders by showing his samples, can each State through which he passes require him to take out a salesman's license and pay a tax for it? The Supreme Court in *ROBBINS v. THE SHELBY TAXING DISTRICT*, 120 U. S. 489, 1887, held that this was in substance a State burden on interstate commerce. Manufacturers had to secure trade by the personal solicitation of their sales forces. If salesmen could be taxed by every State which they visited, the free passage of trade from State to State would thereby be interfered with and to that extent the Federal power to regulate trade would be usurped by the States. Salesmen taking orders for interstate commerce were therefore free from State license taxes.

But if they carried a stock of goods into the State and sold direct from this stock they became peddlers at retail and were no longer in interstate trade. Hence the States could tax them. Also if an interstate salesman takes an order for goods to be delivered from another State but agrees that he will do some local construction work for his customer in attaching the goods to a building when they arrive, he is engaged in local commerce and industry and is subject to State law. In *BROWNING v. WAYCROSS*, 233 U. S. 16, 1914, a lightning rod salesman from one State sold rods to a customer in another and agreed to erect them on the customer's house. The Court held that the State might require him to take out a local license because this was local construction work and not interstate commerce.

**State Taxes on Interstate Railways.** — As the need for a larger State revenue grows, the legislature is tempted to increase its taxes on the great interstate railway lines which run through its borders. This raises several important constitutional questions: (a) Can a State require a railway to pay a tax for permission to engage in interstate commerce? Such a tax is a direct burden on interstate commerce and is therefore an unconstitutional interference with the power of Congress to regulate interstate commerce. For this reason if a State levies a tax upon a railway agent for the privilege of soliciting interstate freight business, or if it requires the payment of a license fee for the privilege of opening an interstate telegraph office, or if it expressly taxes a railway company's privilege of engaging in national trade, it is laying such an unconstitutional burden on commerce and interfering with the Federal power. This was

decided in CALIFORNIA *v.* CENTRAL PACIFIC, 127 U. S. 1, 1888; LELOUP *v.* MOBILE, 127 U. S. 640, 1888; MCCALL *v.* CAL., 136 U. S. 104, 1890.

(b) Can a State tax interstate railway property lying within its borders? In THOMPSON *v.* UNION PACIFIC, 9 WALLACE 579, 1869, a State had laid a general property tax on all railways and had sought to collect from the Union Pacific on its real estate, etc. The company claimed exemption from the tax on the ground that it was an interstate railroad, and the Supreme Court answered that the State tax was constitutional when levied upon the *physical property* of all railways both State and interstate, within the Commonwealth. That is, if no discrimination against interstate carriers was made, the State could tax the physical property of all railways, so long as it did not tax their franchises received from the Federal Government. In later cases the Court pointed out the important difference between a State tax on the *operation* of interstate commerce, such as a charge for the permission to engage in national trade, and a tax on the physical *property* of interstate commerce companies when such property lay within the State. The former was an interference with Federal trade and unconstitutional, while the latter was an ordinary property tax that might be laid on all wealth within the State. UNION PACIF. *v.* PENNISTON, 18 WALLACE 5, 1873.

(c) Can a State tax the total capital stock of an interstate railway? In general, No, because the total capital stock represents partly interstate traffic, and the State has no right to tax such traffic. In WESTERN UNION AND PULLMAN CO. *v.* KANSAS, 216 U. S. 1, 56, 1909, the State had levied such a tax on the total capital stock of foreign corporations, and tried to justify it on the ground that it was charged for permission to engage in local business. Since a State unquestionably had authority to admit or exclude companies to local business it might, so Kansas urged, charge a fee for this local privilege, so long as it did not tax interstate trade. But the Supreme Court said that a levy on the entire stock of an interstate company was a burden upon its entire business, both local and national. The tax therefore was invalid as an interference with interstate trade. The total capital also represents, in part, business transacted outside the State. On this the State has no right to lay a tax.

The principles set up in these cases may be summarized as follows: A State may control local business. An interstate company may carry goods into or out of the State without the latter's permission since this is national trade. But a company may not carry local traffic without a State's consent. A State may require the payment of a license tax for this permission. But it must not levy this tax on the total capital of an interstate concern nor of a company whose business and property lie outside the State boundaries.

**Capital Stock Taxes on Ordinary Trading Companies.** — If the company taxed is not a railway or a carrier, but an ordinary interstate trading concern, the State may lay a very light capital tax, strictly limited in amount, for the privilege of transacting local interstate business within the Commonwealth. The reasoning here is that the State has full authority to determine who shall engage in purely local business within its boundaries so long as it does not interfere with national trade nor lay a heavy burden on such trade. In the moment, however, that the State tax on the total capital stock of an interstate company becomes a real burden, it is unconstitutional, both as an interference with national commerce and as an attempt to tax property which is not within its boundaries; *INTERNATIONAL PAPER CO. v. MASS.*, 246 U. S. 135, 1918.

**The New-Old Problem : Protection of National Trade.** — We have always proceeded on the theory that the Nation and the States could and would arrange their taxes independently of each other without disturbing the public interest. This theory is no longer tenable. Now that a single corporation may own property in one-third of the States, and a large and ever increasing capital is needed to maintain the flow of national commerce, it is idle to say that the national and State taxes may be levied regardless of each other. We need: (1) A survey of the sources of revenue, national and State, (2) A statement of the present conflicts between national and State taxation, (3) A statement of those points at which the State taxes conflict with and duplicate each other, (4) The determination of a clear and definite limit of State taxing power, to free national trade from State burdens, also to prevent the States from taxing property outside their own borders and from laying duplicate burdens on property which other States have taxed.

**Equal Protection of the Tax Laws.** — Can a State tax large inheritances at a higher rate than the small? Or can it tax large incomes at a higher rate than the moderate incomes? Is such a difference in tax rates a denial of equal protection contrary to the Fourteenth Amendment? In *MAGOUN v. ILLINOIS TRUST CO.*, 170 U. S. 283, 1898, the Supreme Court held that such graded, or as they are called, progressive, tax rates were not a denial of equal protection. This denial meant the unequal, partial treatment of individuals. The legislature might classify individuals, businesses, or inheritances and lay a different tax upon each class, so long as it treated equally all within the same class and so long as the classification was made upon a reasonable principle. The Illinois law taxed larger inheritance at a higher percentage. This was a reasonable basis of classification because the larger estates were better able to pay a higher rate.

**Double Taxation.** — The Court has also held that the liberty and property clause of the Fourteenth Amendment does not prevent double taxation unless the tax rate is so heavy as to amount to confiscation. In *DAVIDSON v. ORLEANS*, 96 U. S. 97, 1878; *FORT SMITH LUMBER CO. v. ARKANSAS*, 251 U. S. 232, 1920, the taxpayers objected on the ground that the same property was being taxed by two States, but the Court decided that unless the total amount so taken by the States was unreasonably heavy the taxpayer was not deprived of his property without due process of law.

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### QUESTIONS

1. Why are problems of State revenue more important now than they were a generation ago?
2. Explain some of the chief sources of State revenue other than taxation, in your State.
3. Prepare a summary report on the more important financial provisions of your State constitution, covering the following clauses:
  - (a) Limits on taxation;
  - (b) Limits on State debts for various purposes;
  - (c) Limits on local debts for various purposes;
  - (d) Limits on use of State funds and appropriations;
  - (e) Exemptions from taxation.
4. Resolved that these constitutional limitations should be repealed. Defend either side.
5. Prepare a summary statement of the public debt of your State and show the purposes for which it has been contracted.
6. Show the growth of your State debt and the reasons.
7. Contrast the forms of tax levied by the National Government with those employed in your State.
8. Which of your State's taxes produce the most revenue? Show how much.
9. Prepare a brief report showing the form of the personal property tax in your State, if it exists, and secure some competent opinion as to the evasion of this tax.

10. What are the advantages of classifying property for taxation?
11. Resolved, That a tax of  $\frac{1}{100}$  of 1 per cent of the total business transacted should be laid on all persons selling goods within the State, including stocks, brokerage, real estate offices, and banks, and that special mercantile tax officers be appointed in each county of the State to assess and collect this tax. Defend either side.
12. Prepare a brief report on the practical operation of the income tax in either Wisconsin, Oklahoma, New York, or Virginia and show its advantages and disadvantages there as compared with a personal property tax.
13. Resolved that the general income tax should be adopted in this State. Take either side.
14. Are inheritance taxes easy or difficult to collect and why?
15. Resolved, That a progressive inheritance tax on all legacies above \$30,000 should be established in this State. Defend either side.
16. Explain the sources of revenue of the local authorities in your State.
17. Resolved that local administration in all branches should be free from interference of State officials. Take either side.
18. Why are State expenses growing so rapidly? Prepare a brief table showing recent increases in your State, and the purposes or causes of such increase.
19. Does your State legislature try to balance State income and expenditure? Show the plan adopted at its last session, or the difference between receipts and expenditures, if no plan was adopted.
20. Explain the purposes of a State budget.
21. Outline any system or systems now in use, and show their advantages.
22. Resolved that the budget plan should be adopted in this State. Take either side.
23. Does the State budget assure any advantages other than economy?
24. What should be the functions of the State accounting system?
25. Resolved, That State appropriations should be made separately for each purpose or department. Take one side.
26. Mention and explain any improvements which have been suggested in the administration of the State tax system.
27. Prepare a brief summary of the Oregon Act governing the State audit of the expenses of local officers, and explain its purposes.
28. Resolved, That such a plan should be adopted in this State. Take either side.
29. Why are corporation taxes so popular in the States? Could the entire State revenue be advantageously raised from this source? Reasons.
30. Resolved, That the entire system of State taxation should be reorganized to bring it into better relations with national and local taxation. Defend either side with explicit points.
31. Summarize the chief constitutional clauses which safeguard us from illegal taxation.
32. What is a tax?
33. The State tax collector of New York attempts to levy on the battleships

at the Brooklyn navy yard under the personal property tax of that State. Constitutional? Reasons.

34. Could New York tax the United States bonds owned by its residents? Cite reasons and authority.

35. The authorities of a new town which is on the boom promise all manufacturers locating within its boundaries in the first year, a bonus of \$1000 each. Constitutional? Reasons and precedent.

36. If Connecticut, a manufacturing State, created a State fund for the promotion of housing of industrial and agricultural workers and the Supreme Court of Connecticut held this to be a valid law, would the State tax and bond laws necessary to carry out the project be constitutional under the "due process" clause of the Fourteenth Amendment? Reasons in full.

37. The New York legislature wishing to discourage the excessive sale of foreign hats in the State requires hat importers to pay a license fee of \$50 annually. The importers object to payment of the license. Decision, reasons, and precedent.

38. Richard Roe is a traveling salesman for a Chicago house; he is required to pay a license fee in Kansas, but protests. Decision, reasons, and precedent.

39. Silas Wayback starts from Bytown Center, N. J., with a wagonload of tomatoes. He crosses to New York and sells them by the bushel *direct* to householders in that city. Can he be required to take out a peddler's license, and pay 50 cents for it?

40. Richard Roe takes orders for windmills which he receives from another State. His contract with the purchaser includes the putting up of the windmills and connecting them with water tanks. Can the State require him to take out a license for erecting these devices?

41. When do goods first become a part of interstate commerce and therefore become exempt from State taxation? State and illustrate some principles governing this problem.

42. A State taxes the real estate and roadbed of an interstate railway so far as the property mentioned lies within the State. The railway objects, claiming that it carries the United States mails, and is engaged in national trade. Decide with reasons.

43. An interstate railway wishes to engage in local business within a State. The State charges for its permission to do this a license fee on the total capital stock of the railway. Constitutional? Reasons.

44. Is double taxation unconstitutional? Give illustrations and show why it is or is not.



## CHAPTER 22

### THE CONSTITUTIONAL PROTECTION AND SAFEGUARDING OF BUSINESS AND PERSONAL RIGHTS

**The Value of Constitutional Protection.** — In how far are life, liberty, and property secure from the momentary whims of the party in power in State or Nation? How is the private citizen or the business man protected against an oppressive, tyrannical use of the machinery of government? May the State and National Governments regulate every business whatsoever in any way that they please, may they single out any industry or occupation and ruthlessly destroy it? May the executive interpret the laws oppressively against the rich, or the poor, or may the courts or the legislature discriminate between different persons, favoring some and persecuting others? What safeguards does the Constitution offer against such abuses of the regulative power? These usually arise in some of the following practical forms:

The dangers of a sudden violent change in the Constitution.

How are corporations, as well as individuals, protected against government oppression?

Which businesses may be regulated and how?

How far may prices, rates, or charges be fixed by law?

How far may the quality and kind of goods or services offered be regulated by law?

May government authorities discriminate by class laws?

**Changes in the Constitution.** — In the method of amending the Constitution we see one of those ingeniously devised inventions of the Fathers which, they confidently believed, would preserve the government from popular excitement and turbulence. Article 5 provides that an amendment may be proposed either by Congress itself, through a two-thirds vote in both Houses, or else by a national convention which shall be called by Congress on the application of the legislatures of two-thirds of the States. Even after an amendment has been proposed in either of these ways, it does not

take effect until it has been ratified either by the legislatures of three-fourths of the States or by special conventions in three-fourths of them. This most difficult method of amendment, more involved and complex than that of any great nation of the world, was chosen with the idea of preventing changes, of raising the Constitution far above the ordinary law and making it something beyond and apart from the changing majority of the moment. And it has succeeded. Nowhere among civilized peoples is there a greater respect and reverence for a political document than is shown by Americans for the Great Law of 1787; as each decade passes, this admiration of the broad general outlines of our system grows.

But we must remember that the Fathers themselves, were they alive today, would consider some clauses more fundamental than others; some were bed-rock principles which should last as long as the Nation itself endured, while others were based on the needs and conditions then familiar — conditions which might change and have indeed since changed. Among the permanent features were the republican or representative system, the elected executive and the Federal Union of States. Among the less vital matters of detail were the exact method of choosing the legislature and the executive, the number of members of the Congress, and the exact distribution of powers between the Nation and the States.

Our reverence for the Constitution is centered on its permanent principles — while upon the wisdom of retaining the other, more detailed parts, our views must change according to the conditions of each epoch. Certain it is that many of these latter, less vital clauses have not worked out in the way intended, so that we have had either to change the wording of the document or to give its words a new meaning or, by means of party organization, to build up a machinery entirely outside of the Constitution which in many ways defeats or hinders its spirit.

**The Unwritten Constitution.** — A young, strong, growing people cannot tie itself down to the proceedings of any convention, if those proceedings conflict with the vigorous growth of the national life. Our Constitution must make provision for such changes in its text and meaning as will correspond to the new developments and progressive steps in our existence as a people. As the body is more than raiment, so is our national life more than the political

garb that we wear. We do not escape changes by refusing to change — we only render them more violent when they come. We cannot prevent our fundamental law from following the real opinions, views, and standards of the people. A Constitution which is not the real sentiment of the people soon fails of enforcement — variations from it are winked at, the courts “interpret it broadly,” and there soon arises in place of it an “unwritten Constitution” composed of customs, habits, precedents, court decisions, and party rules. This is exactly what has happened to those parts of our Constitution which do not fit the real conditions of our national life; they are shelved, or superseded, or supplemented by the unwritten law.

In his admirable little booklet on the *Unwritten Constitution*, Judge Tiedeman says of the great document, “But by making a popular idol of it, we are apt to lose the very benefits which its excellencies insure. It is the complete harmony of its principles with the political evolution of the nation, which justly challenges our admiration.” And again, speaking of Lincoln’s action in declaring martial law, which was apparently illegal under the written Constitution, he states, “Whatever may be the proper deduction from the written Constitution, it is an established rule of the unwritten Constitution that the President, in the exercise of his war powers, may substitute martial law for civil law as far as the public exigencies may in his judgment require. For the time being, the written limitations upon his power are completely laid aside, and he appears in the rôle of an almost absolute dictator.” We have already seen other instances, such as the method of electing the President, in which it was clearly intended to remove the choice from the hands of the people, yet the formation of political parties soon completely reversed the written Constitution and established such a popular choice. Since the time of Washington we have by tradition limited the President to two terms in office. Likewise by custom we allow the Senate to propose revenue bills by the simple expedient of amendments and substitutes for the House measures. In these ways the fixed rigidity of the fundamental law has led us to evade it in order to grow. For we must grow.

Judged then by either standard, as a means of preventing hasty changes in extraordinary moments of popular passion, or of securing the gradual adoption of reasonable, moderate changes in ordi-

nary times, the present method of amendment has failed. We must even admit that the very thought on which it is based, viz., a distrust of the people, is now obsolete. We should seek, not to make the method of amendment impossible, but rather to assure that such changes as are made shall not be the result of a mere momentary whim. This might be done as in many of the State Constitutions, by requiring an amendment to be passed by two successive legislatures by simple majority vote and then approved by a vote of the people.

**The First Ten Amendments.**—Each group of amendments has been adopted for a separate purpose: the first ten were to prevent the National Government from violating the liberty of the people or usurping the powers of the States. The Thirteenth, Fourteenth, and Fifteenth were intended to free the negro slaves, to protect them from persecution by the State governments and to prevent any State legislation which would deprive them of their votes for racial reasons. The first ten amendments were all inserted at one time and are usually called the “Bill of Rights” of the Constitution.<sup>1</sup>

They were suggested by the State Conventions which ratified the Constitution.

Since they were intended solely to limit the Federal Government, *they do not apply to the State authorities.* The protection which they offer to all persons, both citizens and foreigners, covers the following points:

Religious freedom, freedom of speech and of the press, protection of person and home against unwarrantable searches and seizures, safeguards of procedure, jury trial, etc., in criminal suits, safeguards of liberty and property in civil suits, the rule of interpreting the Constitution. (Amendment Ten.)

Many of these safeguards and protections are repeated in the Fourteenth Amendment *which applies to the States only.*

The owner of certain wharf property in the city of Baltimore brought suit against the city, *BARRON v. BALTIMORE*, 7 PETERS, 243,

<sup>1</sup> When in the great English Revolution of 1688-89 the British Parliament declared the throne vacant and called William of Orange to the vacancy, the Houses of Parliament passed a “Bill of Rights” which was signed by the new King, thereby binding him and his heirs to observe it. It contained a statement of what the Crown could not do, just as our first ten amendments, drawn exactly 100 years later, contained a list of rights which the new American National Government could not violate.

1833, because of the damages done to his wharf by the city in diverting certain streams of water so that they deposited sand in front of the wharf. He held that this action was a taking of his property in defiance of the Fifth Amendment. The Supreme Court ruled that the amendment did not apply to the State governments but was intended solely as a limit upon the powers of Congress. A long line of later decisions has upheld this view and applied it to the other provisions of the first ten amendments.

**The Thirteenth Amendment; Peonage Laws.**—The Thirteenth Amendment, prohibiting slavery or involuntary servitude, has some practical importance even today. The Amendment forbids slavery not only in the United States but in any place subject to their jurisdiction. One of its recent applications was the repeal of an agreement made by the American army with the Sultan of the Sulu in 1899, because the agreement expressly recognized all the domestic institutions of the Sulu Islands, among which were both polygamy and slavery. The Amendment also renders invalid the so-called peonage laws of some of the Southern States. These acts punished with penal servitude any person who secured advances of money or goods on a contract for personal service and then refused to perform the service. The aim was to prevent imposition on employers by workers who obtained funds in this way. Such laws usually declared that the simple failure to perform such service was an evidence of fraud. In *BAILEY v. ALABAMA*, 219 U. S. 219, 1911, the Supreme Court held that such acts violated the Thirteenth Amendment by creating involuntary servitude. The mere failure to perform a contract was not necessarily fraudulent; to punish simple debt without fraud by imprisonment was to create involuntary servitude contrary to the Amendment. Bailey was accordingly freed from the imprisonment and forced labor. Similar peonage laws in other States are no longer enforced.

**The Fourteenth and Fifteenth Amendments.**—The original purpose of the Fourteenth Amendment was to prevent the State legislatures of the South from passing hostile laws against the freed Negroes. Although the Negro slaves had been emancipated by the Thirteenth Amendment their attitude towards the white population and that of the whites towards them was so hostile that constant rioting, bloodshed, and revolting race warfare followed. The Northern people, in control of the Federal Govern-

ment, sided with the freedmen and decided to protect them by (1) granting them United States citizenship with all of its privileges and immunities, and (2) by forbidding the States from interfering with United States citizens' rights. But up to that time citizenship had been conferred only by State laws. The Fourteenth Amendment changed this by declaring that all persons "born or naturalized" in the United States were citizens of the United States, and forbade the States to violate the rights of United States citizens. Since practically all the former slaves had been born in the United States, the Amendment conferred citizenship upon them. It was later followed by the Fifteenth Amendment, which declared that the State must not deprive a citizen of the United States of the right to vote, *because of his color or race*.<sup>1</sup>

This clumsy method of protection had at least the effect of preventing persecution of the Negro by the State legislatures, but it failed completely in its purpose to establish the Negro race in economic independence in the South. The Negroes had been useful and had a definite place in the economic system. But when the race conflicts began after the Civil War, industrial coöperation between the races became almost impossible and the blacks rapidly became a heavy burden and danger to the communities in which they lived. The industries of the South were for a long time shattered by this convulsion, due both to the war and to the unreasonable and impossible legal conditions which the North had imposed. Like all other peoples who have experimented in government, we Americans often give way to the notion that anything can be done by law. Nowhere has this idea failed more disastrously than in the attempt to make useful citizens of former slaves solely by a *constitutional amendment*. The situation created by this unfortunate fanaticism is being slowly and painfully worked out by both races in the South. The Negro is coming to his own by the gradual spread of mechanical and technical training, which gives him a recognized place as a useful member of the community, and above all a desire

<sup>1</sup> But the State may deprive a person of the right to vote for any other reason, such as illiteracy, crime, pauperism, insufficient age, or insufficient residence within the State. Most of the States do so limit the suffrage. The Fifteenth Amendment gives no one the right to vote; all it grants is freedom from discrimination because of race.

to acquire property by skilled work, and thereby attain a position of real independence. Grover Cleveland with his gift for epigram described the problem by saying — “ Before we have a citizen we must first have a man.” The citizenship of the Negro, like that of any other group of our people, is becoming a reality in proportion as he can learn to work and to make himself a helpful and needed factor in our civilization.

But the Fourteenth Amendment is not confined to the race which it was intended to protect; its terms are so broad as to include all “ citizens ” and “ persons ” and in this way it has come to have an important bearing upon business and property rights as we shall now see.

**The Last Four Amendments.** — The Sixteenth Amendment authorizes Congress to levy an income tax which need not be apportioned among the States according to population. The Seventeenth Amendment provides for the popular election of Senators. The Eighteenth enacts National prohibition of the manufacture, sale, and transportation of intoxicating beverages. The Nineteenth or Woman Suffrage Amendment declares “ the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”

The Eighteenth has been much discussed because it marks the transfer to the National Government of a power which was formerly held exclusively by the States. Also because it restricts individual freedom to manufacture and sell an article of commerce. All four amendments, however, correspond to a real, widespread, and persistent public opinion.

The adoption of the last four amendments marks a new era, because the conviction had been steadily growing that the Constitution could not be amended; it is the hope of many that further changes may be made now that the “ ice is broken.” Among those recently suggested are:

The direct election of the President,  
 Presidential power to veto individual appropriation items,  
 Repeal of tax exemption for all government, state, and local bonds,

The grant to Congress of power to reenact by a two-thirds majority in each House, any Federal law which has been declared unconstitutional by the Supreme Court,

Prohibition of child labor,  
National control over insurance, manufacturing, and corporations.

**The Protection of Corporation Charters.** — The Constitution declares in Article I, Section 10, that “no State shall pass any law impairing the obligation of contracts.” When a State government grants a charter of incorporation to a new company, the State in reality makes a contract or agreement with the incorporators, by which a new legal person, the corporation, is created and its powers are defined in the charter or agreement. The charter so granted is a contract in the sense of the Constitution, and cannot be revoked or changed or “impaired” by the State without the consent of the corporation. This principle was established in *DARTMOUTH COLLEGE v. WOODWARD*, 4 *WHEATON* 518, 1819.

In order to regain some of the regulative power over corporations which the State had lost by the earlier decisions, all the commonwealths have passed general corporation laws which provide that companies chartered in the future shall be subject to the regulation and general police laws of the State. A description of these laws is given in the Chapter on the Police Power.

**Private Contracts.** — The protection given by the “obligation of contracts” clause is a broad and substantial one; it covers not only those contracts which the State itself has made, but also agreements made between private individuals, and safeguards them from destructive State laws. In *STURGES v. CROWNINSHIELD*, 4 *WHEATON*, 192, 1819, the defendant Crowninshield had made two promissory notes, both executed in New York State. Afterward the State passed a bankruptcy act providing for the usual judicial proceedings and the discharge of insolvent debtors, and making the discharge apply *to past* as well as future debtors. The Supreme Court held that the State could only regulate and control future contracts, and did not possess such a power over debts contracted before the passage of the law; these latter debts were contracts in the sense of Section 10, Article I, and although they were made by private parties, the State was none the less bound to respect them. A State act changing the terms of a previously made private contract, making them more favorable to either the debtor or the creditor, or releasing the debtor from his obligations, even under the form of a bankruptcy law, was a violation of the obligations of the



contract, and as such was unconstitutional. This ruling of course applies only to past debts, not to those contracted after the passage of the State law. Although Congress has now passed a national bankruptcy act which supersedes the various State statutes on the subject, the *Crowninshield* case is still of practical importance since it shows that ordinary contracts by private persons are immune from later State laws intended to destroy their binding force.

**Which Kinds of Business May be Regulated?** — Every business is subject to regulation, whether it be manufacturing, banking, trading, transportation, or professional work. But not every business may be regulated in any way that the legislature sees fit. There are two general kinds of regulation, (a) the protection of safety, health, and the prevention of fraud; examples are seen in the factory acts and the incorporation laws, which are to be examined later. (b) The other is a fixing of prices, rates, and service. The first kind may be applied to any business; the second, price and service regulation, is constitutional only when applied to businesses of a *public* nature. What is a public business in this sense? Chiefly one which large numbers of people are obliged to patronize, such as a ferry or a street car line, or a gas company — all of which are therefore largely natural monopolies; or again a business in which the public interest in honest, efficient service may at times outweigh all considerations of private liberty, such as the auctioneer, the railway, the cab driver, etc.

The courts hold that government interference with the price or quality of a man's goods in a *private* business is depriving him of his liberty and property to make such quality and price as he pleases. This would violate the Fifth or Fourteenth Amendment. But they also hold that the words "liberty" and "property" are to be so understood only in private industries, and that the rights of the individual are subordinate to the public interest in a business of a public nature.

A business which is ordinarily private may, in a great emergency, become of such public interest as to justify Government regulation of its rates and charges. A good example of this is the rent of private real estate, as explained in the next Chapter.

**The Regulation of Rates, Prices, and Charges.** — From our earliest history callings of the above described nature, called oc-

cupations "affected with a public interest," have been subject to public control as to both rates and the kind of service to be rendered. An interesting summary of these principles was given in the noted case of *MUNN v. ILLINOIS*, 94 U. S. 113, 1876.

In 1874 Illinois by law fixed the maximum charge for the storage of grain in warehouses. This Act was resisted by the owners of grain elevators, who urged that it was unconstitutional, because it deprived them of property without due process of law. The Supreme Court declared that the State law was constitutional so long as the rates fixed were reasonable. The Court found that from the earliest times in England, as well as in this country, government had exercised the right to regulate rates in all sorts of *public* industries and occupations, when such regulation became necessary for the public good. This was notably true of such occupations as ferries, hackmen, common carriers, inn-keepers, millers, wharfingers, chimney sweeps, draymen, auctioneers, warehouses, turnpike roads, bridge-tolls, etc. In all of these the *public interest* in honest service and reasonable charges was so strong and urgent that regulation was essential to the public welfare. Any person who entered these fields did so with full knowledge of the community's general interest in his business and of its legal authority over that business.

The Court also held in *INSURANCE CO. v. LEWIS*, 233 U. S. 389, 1914, that insurance was a business affected with a public interest, and therefore subject to public regulation of its rates.

**Freedom of Contract.**—Property is acquired usually by contract. If Congress, or the Legislature, could take away from any person or corporation the right to make a contract, it would remove that person's ability to acquire property. Therefore the courts declare any law limiting the freedom of contract to be a violation of the Constitution, unless it can be shown to present some exceptional or unusual features. What these exceptions are will be shown in the sections dealing with the Police Power. In *ALLGEYER v. LOUISIANA*, 165 U. S. 578, 1897, the Court, in referring to the Fourteenth Amendment, said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the

right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." Liberty and property accordingly include "freedom of contract" which is the right to make any contract that is not against the general policy of the country's laws. An arbitrary, unreasonable interference with this freedom by the legislature is a violation of liberty without due process. In *FRISBIE v. U. S.*, 157 U. S. 160, 1895, the Court also held that this freedom could not be absolute and unlimited. The national pension laws, in order to protect pensioners from extortionate charges by attorneys, had provided that no person acting as an attorney or solicitor for an applicant should charge more than \$10 as a fee. Frisbie was a lawyer who, as agent for Julia Johnson, the widow of a soldier, had secured a pension but had charged more. When convicted he appealed to the Supreme Court on the ground that the Act was unconstitutional because it interfered with the price of labor and thereby violated the freedom of contract. This claim the Court overruled, and upheld his conviction as valid, saying — "It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

**Due Process of Law.** — Neither Nation nor State may deprive any person of life, liberty, or property "without due process of law," but much of the value of this safeguard depends on the meaning of "due process." Its equivalent in the English Constitution was used in Magna Carta which in 1215 pledged the King not to

deprive persons of liberty or property without the law of the land.<sup>1</sup> "Due process" in our law means (a) the right to a fair hearing before some tribunal or court and (b) freedom from arbitrary, unreasonable government acts. That is, a law must afford persons affected an opportunity to be heard in court by the usual procedure, and it must not be an oppressive, tyrannical act out of all reason, and it must be sufficiently definite and clear so that the enforcing officials and the courts cannot exercise arbitrary action. If a law fails at *any one* of these points it is not due process.

Under (a) the courts have repeatedly declared that no man's property can be taken from him by a simple act of the legislature, nor can he be imprisoned or deprived of his life or freedom without the proper judicial procedure. The courts have for centuries been the bulwarks of the individual against the oppression of the government. Their procedure has often changed; court fees have been high, or low; procedure has been slow or quick, but always there has stood between government oppression and the citizen, the latter's right to his "day in court." Any legislative act which deprived a person of his property without this opportunity to be heard in court would not be "due process." On the other hand, we must remember too that court procedure must inevitably change. Some States have a jury trial for civil and criminal cases, others provide for a jury of 8 persons only, still others have abolished the jury trial for most civil cases and some even in criminal cases for offenses which are not punishable with death; yet all of these are due process as was decided in *MAXWELL v. DOW*, 176 U. S. 581, 1899 and *WALKER v. SAUVINET*, 92 U. S. 90, 1875. Some States allow a majority verdict of the jury to prevail, while others require a unanimous verdict; either of these may be due process.

In the National Government "due process" is more definitely fixed. The Fifth and Sixth Amendments prescribe in more serious crimes, for example, a Grand Jury presentment or indictment, and in all criminal cases a Petit Jury trial, the right to confront opposing witnesses, the right to compel witnesses to attend for the de-

<sup>1</sup> The exact wording of this much cited clause is "No freeman shall be taken, imprisoned, disseised, outlawed, banished or any way destroyed, nor will we proceed against or prosecute him except by lawful judgment of his peers, or the law of the land."

fense, etc.<sup>1</sup> In civil cases also the U. S. Courts are obliged to grant a jury trial when the matter in controversy exceeds \$20 in value.

(b) The right to substantially reasonable, clear, and impartial laws is, in America, an equally important element in due process. If by an act of the legislature, a person has been flagrantly and unjustly deprived of his liberty and property, such an act violates "due process" even though the courts give him all the regular forms of procedure. It is not due process for Congress or the State to take the property of a corporation, or a person, by reducing its or his earning power below a reasonable point, and it does not become due process even though the defendant or injured party is given a hearing in court. The law itself must not be unreasonable, extortionate, partial, or oppressive. For this reason excessive taxation or regulative laws which prevent a recognized business from earning returns would both be violations of the due process clause, no matter what court procedure was applied in their interpretation.

**Definiteness of the Laws.**—A Federal *criminal* law which forbids "unreasonable," "excessive," or "unjust" acts, without defining what these terms mean, is not sufficiently definite to enable a defendant to understand the intent of the law or to know what is forbidden. It therefore is not due process as required by the Fifth Amendment. Nor does it inform him of the "nature and cause of the accusation" as is required by the Sixth. Because of this weakness, Section 4 of the Lever Act of 1919, which forbade persons to exact unjust or unreasonable rates or excessive prices for necessities during the war, was held unconstitutional; *U. S. v. COHEN CO.*, 255 U. S. 81, 1921.

But the rule is different in a *civil* law. For example, a State in a war-time crisis may provide that a landlord cannot sue a tenant to recover an unjust and unreasonable rent or to enforce an oppressive agreement. This was decided in *LEVY LEASING CO. v. JEROME SIEGEL*, March 20, 1922. The difference between the rules in

<sup>1</sup> The Grand Jury is usually a body of twenty-three men who hear sufficient of the evidence against an accused person to determine whether there is a reasonable ground to hold him for trial. If the Grand Jury decides that there is sufficient ground, the accusation is marked a "true bill" and turned over to the District Attorney for prosecution; if it decides not to hold the accused, the accusation is dropped, or "ignored."

these two decisions is that the courts always allow a broader constitutional protection against a criminal law than a civil one.

**Changes in Court Procedure.** — Must all persons accused of crime be held for trial under a grand jury "indictment," or may they be charged and held for trial upon a simple hearing before a magistrate? Although the National Government under the Fifth Amendment requires the grand jury action, the States are not so limited, as was decided in *HURTADO v. CALIFORNIA*, 110 U. S. 535, 1883. Hurtado had committed murder. He was tried upon a charge after a hearing before a magistrate, instead of a grand jury indictment. He objected that this procedure was not due process, and was therefore unconstitutional under the Fourteenth Amendment. After declaring the State's procedure constitutional the Court made some important observations on the practical meaning of "due process": "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"

**The Prohibition of a Legitimate Business.** — Can the State upon finding that certain enterprises in a legitimate business are wrongfully conducted, prohibit the whole business? This question was presented to the Court in *ADAMS v. TANNER* 244, U. S. 590, 1917. Here the State of Washington by Act of 1915 in order to prevent certain fraudulent and extortionate practices of private employment agencies, had set up free State employment bureaus and forbidden private agencies to charge a fee of any person seeking employment. Since the fees charged of employers were not sufficient to support the business, the act practically abolished private agencies for profit.

Adams, a private employment agent in Spokane, sought an injunction to prevent the Attorney-General, Tanner, from enforcing

the State Act. The Supreme Court held that the State law violated the Fourteenth Amendment in depriving Adams of his liberty and his property, that is, his right to engage in a legitimate business.

There were undoubtedly serious evils connected with private employment agencies, but this did not justify the total destruction of the business and the denial to all persons of their rights of engaging in the business in an upright way. There was no business without some reprehensible practices. "Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked." There was nothing inherently immoral or dangerous in the service performed. The business was a legitimate one and was subject to regulation but not to prohibition. The law therefore exceeded the proper limits of the police power and was a denial of liberty and property.

**When Is a Corporation Deprived of Its Property?** — Whenever a government authority, in regulating public service companies, fixes a charge which is so low as to reduce the earnings below the usual rate of return on such investments, the courts hold that the company has been deprived of its property and the Constitution thereby violated. Governing bodies and commissions may reduce rates to a level that is reasonable, so long as they allow the corporation to earn a fair return on its value. What percentage this return must be has never been definitely fixed. The question presented to the courts is always this — under the regulation in question can a fair rate of income be earned on the value? The courts decide that the rate either is or is not excessively low. In general if the corporation can make a six or seven per cent return the courts will not declare that its property has been taken without due process of law, provided the other features of the regulation are also reasonable. The public service commissions are forced to observe this feature of the Constitution with care. Were it not for these clauses some commissions might so harass public service companies by their regulations as to destroy the earning power and thereby drive capital out of the business.<sup>1</sup>

<sup>1</sup> Dean Hall has well said — *Constitutional Law*, page 135 — "Deprivation of property may take place in a variety of ways besides sheer confiscation. The

A good example is presented in *SMYTHE v. AMES*, 169 U. S. 466, 1898. Here the legislature of Nebraska had passed various acts regulating the railways and authorizing a State board to fix passenger and freight rates, etc. The companies complained that under this act their charges were reduced to such a low point as to prevent them from making a reasonable return on their property and that they were thereby deprived of their property without due process of law. They showed that the reduction in rates on local hauls within the State amounted to about 29 per cent, which would diminish their revenues from local business to a point below their operating expenses and thereby wipe out their earning power on business within the State. The Court said: "These principles must be regarded as settled:

" 1. A railroad corporation is a person within the meaning of the Fourteenth Amendment, declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

" 2. A State enactment, or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."

**Fair Return.** — The percentage of return is calculated on a fair valuation of the entire property of the company which is *devoted to the public service*. If a railway owns lands and investments not connected with transportation purposes, it may not claim rates high enough to yield a return on these outside properties. In all rate cases the company naturally seeks to show a high valuation,

State may place such restrictions upon the possession, use, or the transfer of property as to amount to a deprivation of some or all of its essential incidents. Legislation may attempt to change the character of an owner's title to property, or to compel special expenditures on account of the ownership or control of certain kinds of property, or to enlarge the owner's liability for damage resulting from the condition or use of property, or to limit the owner's remedies for infringement of property rights. If even such small interferences with property rights are merely arbitrary, and do not serve any reasonable or legitimate public purpose, they may be declared unconstitutional."



while the consumer or shipper tries to reduce this valuation. Experts are employed by both sides who testify emphatically and "authoritatively" that the company's property is or is not worth a certain fixed sum. This whole procedure has tended to discount the sworn opinions of experts. Their chief value now is in securing and presenting statements of fact, rather than opinions. When the commission secures a fairly accurate estimate of the "value" of the utility concerned it then renders a decision as to the fair return to which this value is entitled. The Supreme Court has held that in finding the value of a company, "the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the rates prescribed by laws and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of property." *SMYTHE v. AMES*, 169 U. S. 466, 1898. The newer principles governing this problem are set forth in the Galveston case in Chapter 18.

**Regulation of Service.** — The important principle just described applies not only to the rates which a public service company may charge, but also to the service and facilities which the government may require of it, such as fitting trains with automatic brakes, providing a frequent train service, etc. Here again the expense imposed upon the corporation by a government regulation might reach such a point as to interfere with the earning of a reasonable dividend. The corporation would then be deprived of its property without due process of law.

**Class Legislation.** — The Fourteenth Amendment, Section I, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This clause is the great safeguard against class legislation of the States. The danger of discrimination is constantly present in the modern State legislature. Such a body is always beset by influences which demand special favors, privileges, and exemptions from the law. So many of these have been granted in the past that most of the State constitutions also forbid special legislation. The Fourteenth Amendment, which as we have seen was passed to protect the Negroes against

hostile and discriminatory laws, has been broadened in its interpretation little by little. Its protection is no longer confined to Negroes but now includes all races, foreigners, or other persons, and even corporations in its scope; it has been interpreted by the courts to forbid any State laws which create arbitrary, *unreasonable* or unnatural distinctions between individuals or between different groups of people, conferring on some, special privileges which are denied to others, or visiting some with disadvantages or penalties which are not imposed on others. May certain persons be denied the right to sue in the courts? Clearly not, since such a law would be a discrimination or denial of equality. May foreigners be denied the equal protection of the laws? The Constitution in this clause protects any "persons," the word used is not "citizens," but "persons." Equal protection, therefore, extends to the alien.

In *YICK WO v. HOPKINS*, 118 U. S. 356, 1885, the city of San Francisco had by municipal ordinance provided that no laundries should be established in frame dwellings without the permit or certificate of a city inspector. The ostensible reason for this ordinance was to prevent fire in the frame dwelling section, and to protect the health of the community. The ordinance itself, if fairly enforced, was constitutional, but the city inspector in granting permits to laundries discriminated sharply between the Chinese and natives; 200 Chinese being denied permits, while 80 natives who applied were all given the required certificate. The real purpose of the local administration seemed to be to prevent the Chinese from engaging upon equal terms in the laundry business. This unequal, discriminating execution of the law was held to be unconstitutional, and Yick Wo and several other Chinese who had been imprisoned under the ordinance were released upon an appeal to the Supreme Court. Said the Court:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . .

"It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with

its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

**Growth of Class Legislation.** — The formation of blocs and cliques in the law-making bodies is now producing a larger number of acts based on class feeling and special group interests. The interpretation of the equal protection clause is therefore fast becoming a more vital matter. In order to grasp the real meaning and value of this safeguard, let us examine a number of class laws and observe the way in which these have been treated by the Supreme Court.

**Laws Classifying Industries.** — In practice the State Legislature is obliged to classify occupations as safe or dangerous, as proper for persons under age or not, or as subject to special State regulation such as railways, or banks, or insurance companies — and to enact legislation for each of these classes. But it is unconstitutional for the State to single out one establishment, a factory, a bank, or a railway and regulate it differently from the others or to classify businesses in such an arbitrary unnatural way as to practice favoritism. In *CONNOLLY v. UNION SEWER PIPE COMPANY*, 184 U. S. 540, 1902, an attempt had been made by the legislature of Illinois to pass an Anti-Trust law, which would prohibit combinations among all producers to restrict competition, but which excepted from this rule the producers of farm products or

livestock. Here the U. S. Supreme Court declared that the legislature, in *excepting farmers* from the Anti-Trust law of the State, had not classified businesses in any proper sense but had shown an arbitrary desire to exclude, in an unreasonable way, a particular class of producers from the action of a general law. The law was therefore declared invalid as violating the "equal protection" clause of the Fourteenth Amendment.

**Exemption of Laborers from State Anti-Trust Laws.** — But if farmers cannot be exempted from the operation of such an Act, can labor unions? This was the question presented in *INTERNATIONAL HARVESTER COMPANY v. MISSOURI*, 234 U. S. 199, 1914. Here the State statute of 1909 had forbidden producers or sellers to combine in the way mentioned but it contained an express exception of laborers and their associations. The Harvester Company being prosecuted under the Act claimed that the exception was an unequal treatment of two classes of producers — laborers and manufacturers — and that this inequality, being forbidden by the Fourteenth Amendment, rendered the State law unconstitutional and void.

The Supreme Court, however, upheld the law and declared that the State if it was to regulate at all must have some latitude in classifying the subjects to be regulated. The Court contrasted the vast power of a combination of companies of \$120,000,000 capital, with the slight possibilities of monopoly that might come from combinations of labor at that time. The danger was entirely disproportionate from these two sources. A classification which subjected combinations of capital to the law and exempted associations of labor was a reasonable one from this viewpoint and therefore was not a denial of equal protection.

If such an anti-monopoly act, however, had applied only to limited fields of business, it would probably have been declared unconstitutional. The Supreme Court of Kentucky, in *COMMONWEALTH v. HATFIELD COAL CO.*, 217 S.W. 125, declared invalid a State law which contained the clause — "The provisions of this Act shall not apply to any organization or association having no capital stock or not engaged in the business of mining, manufacturing or transporting any article or commodity." Here a classification of businesses was made in such a way as to exempt all but mining, manufacturing, and transport companies, while imposing on these

latter a restriction as to combination which did not apply generally. The classification was unreasonable and the exemption of other businesses, therefore, was a denial of equal protection to the concerns affected by the law.

**Meaning of Equal Protection.** — “Equal protection” does not mean that all businesses must be subject to precisely the same regulation, but that the classification must be reasonable and that every enterprise within the same class of business must be equally treated. An especially dangerous business such as powder manufacture may be subjected to special safety regulations; and establishments which cause annoying odors, as soap or fertilizer factories, may well be declared a nuisance and required to remove from the vicinity of a crowded section while other factories in other classes of business are allowed to remain. This is not depriving the owner of the fertilizer or powder factory of equal protection. (See *NORTHWESTERN FERTILIZER COMPANY v. HYDE PARK*, 97 U. S. 659; 1878.) Nor does it mean that every person must be treated by the public authorities in precisely the same way as all other persons in the State. For example, a foreigner in many States may not vote nor serve on a jury, nor be enrolled in the militia; insane persons are not allowed to roam freely at will; children are subjected to school laws; women are not allowed to work more than ten hours daily in a factory, yet these are not deprived of the equal protection of the law, so long as all in the same class are treated alike.

**The Basis of Classification.** — How can we tell whether the classification which a State makes of persons, companies, vocations, or transactions is a reasonable one and therefore valid, or is unreasonable and hence a denial of equal protection? The chief principle here hangs on the purpose of the law and the basis on which the classification is made. If these are in no way connected with each other, the classification denies equal protection. For example if the purpose of a State law were to tax and the persons taxed were classified according to their names, those beginning with A being taxed 1 per cent and with B 2 per cent, etc., the basis or principle followed in the classification would be totally unconnected with the purpose of the law, and wrong in principle. If, however, the persons taxed are divided into groups according to their ability to pay as judged by their condition of wealth or income, the classification is directly

related to the purpose of the act and is a natural one. If the legislator seeks to provide greater safety in dangerous occupations he may classify businesses in groups according to the risk and may fit different regulations to each group. This is not a denial of equal protection, because his classification is related to his purpose. But if he for this purpose classifies industries according to the wealth and income of those engaged, his classification becomes an arbitrary one unrelated to his law. This classification, valid for a tax measure, may render a safety law unconstitutional.

An admirable summary of the entire doctrine of equal protection is given by the Court in *BARBIER v. CONNOLLY*, 113 U. S. 27, 1885, as follows:

“The Fourteenth Amendment, in declaring that no State ‘shall 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,’ undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment — broad and comprehensive as it is — nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulation 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 prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special

burdens are often necessary for general benefits — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. . . .”

**Other Safeguards against Government Interference.** — Besides the above-mentioned protections of business and personal rights the Fourteenth Amendment, Section 2, provides that “no State shall make or enforce any law abridging the privileges and immunities of citizens of the United States.” We have already seen the origin and purpose of this section. But it overshot the mark in threatening to place all citizens under the protection of the Federal Government. The ominous words in the last section of the amendment “Congress shall have power to enforce the provisions of this Article by appropriate legislation,” seemed to empower Congress to intervene actively in State matters and threatened to wipe out the powers of the States at a single stroke. What could not Congress undertake in legislating to protect citizens of the United States against State action? Would not the entire business and civil rights of the people be henceforth regulated by National, not State, legislation?

These questions were answered by the Supreme Court in the **SLAUGHTER HOUSE CASES**, 16 WALLACE, 36, 1873, and **CIVIL RIGHTS CASES**, 109 U. S. 3, 1883. The State of Louisiana had conferred upon a Live Stock Company a monopoly of the slaughter house business within the city of New Orleans. A number of independent butchers complained that this act prevented them from carrying on their business within the city limits — that in the words of the Fourteenth Amendment the State must not violate the

“privileges and immunities of citizens of the United States” and that the law in question did so and was therefore unconstitutional.

They set forth that it was certainly the right of a citizen of the United States to engage in business and that whenever a State deprived him of this right it violated the Fourteenth Amendment. The answer of the Supreme Court shows in an illuminating way the methods by which our courts are often obliged to give a new meaning to the words of the Constitution in order to prevent such words from becoming too drastic or revolutionary in their scope. The Court declared that it was not the purpose of the Fourteenth Amendment to blot out the State governments nor to place them at the mercy of Congress nor even to give Congress control over all the business regulation of the country, but only to authorize Congress to protect the rights of *United States citizens*. There are, said the Court, two kinds of citizenship — State and National. Citizens of the United States residing in any State enjoy the rights of both State and U. S. citizenship. What was the difference between these two classes of rights? In general a man’s rights as a State citizen were those which he derived from the State constitution and the State legislature. On the other hand, the rights of a United States citizen were those derived from the Federal Constitution and the Federal laws and treaties. “Generally speaking,” said the Court, “we may ascertain whether a given right is a right of a State or United States citizen by tracing it to its source. If its source is in the Constitution and laws of the United States we must look to the National Government for its protection. If it be founded on State constitutions and State laws, we must look to the State governments for its protection.”

Some illustrations of these two classes of rights are as follows:

**RIGHTS OF  
U. S. CITIZENSHIP**

To come to the seat of government to transact business with the National Government, to seek its protection, serve in its offices, to enjoy access to its seaports and to the sub-treasuries, land offices, and courts of justice. *CRANDALL v. NEVADA*, 6 WALLACE, 35, 1865.

**RIGHTS OF  
STATE CITIZENSHIP**

To secure protection from the State government.

To acquire and possess property of every kind.

To pursue their happiness subject to State legislation for the general good. *CORFIELD v. CORYELL*, 4 WASH. C. C. 371, 1823.



RIGHTS OF  
U. S. CITIZENSHIP

To demand the care and protection of the Federal Government over his life, liberty, and property when he is on the high seas or abroad.

To use the navigable waters of the United States and to secure the privileges guaranteed to American citizens by National treaties.

To acquire State citizenship upon acquiring a domicile or residence within the State.

RIGHTS OF  
STATE CITIZENSHIP

To engage in business.

To maintain suits in State courts.

To enjoy the general rights of State citizens when resident in other States.

Applying this to the Slaughter House cases, the right to engage in the business of butchering, the Court found to be based on State laws. It was therefore a right of State citizenship and was protected by the State, *not by the United States*. If Louisiana decided to regulate sanitary conditions by limiting the general freedom of its citizens to engage in the abattoir business, it could do so, and its action did not in any way violate the rights of United States citizenship under the Fourteenth Amendment. This sweeping decision had the immediate effect of reestablishing the State control over domestic business and personal rights.

Does the Constitution Protect One Person as Against the Acts of Another? — The Fourteenth Amendment forbids States, not individuals, from violating the rights of persons. It applies to State government action, not to private acts. If one *individual* deprives another of his property or liberty, illegally, the remedy is to appeal to the State laws, not to the Fourteenth Amendment. This is shown by the unconstitutional national Act of May 31, 1870, which was passed to enforce the Fourteenth Amendment. The Act provided that citizens of the United States should be free from intimidation, injury, or oppression while in the exercise of their rights under the Constitution and Federal laws, and that *if any person* should interfere with that freedom, or attempt to injure, oppress, or intimidate a citizen, to prevent his enjoyment of his rights under the Constitution, such person should be guilty of a felony and liable to fine and imprisonment. A violation of this statute had occurred in Louisiana through the disorderly interference of a band of white persons with a number of colored people who were about to hold a meeting.

The whites were arrested and prosecuted under the Federal Act mentioned, and were charged with conspiring to intimidate citizens of the United States who wished to avail themselves of the right of assembly. The case being taken to the United States Supreme Court, *U. S. v. CRUIKSHANK*, 92 U. S. 542, 1876, it was decided that the whites could not be convicted under the Act because the Fourteenth Amendment gave Congress no power to pass such a law. The Amendment protected the rights of citizens of the United States *against the State Governments*, not against private individuals. The Amendment declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property." If a private person injured the rights of another person, such action was a violation not of the Fourteenth Amendment but of the State law. Federal laws could be passed to enforce the Amendment but not to go beyond it and reach over into the powers of the States. Congress could legislate to prevent a State from violating personal rights, but not to prevent private individuals from doing so. The Amendment, said the Court, "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which apply to every citizen as a member of society."

For the same reason Congress could not by a law based on the Fourteenth Amendment protect colored people in the full and equal enjoyment of hotels, inns, theaters, and public places of amusement as against the acts of private persons such as hotel keepers, theater managers, etc. It could only protect them against State laws or State action violating their rights in such places, as was decided in the *CIVIL RIGHTS CASE*, 109 U. S. 3, 1883. Nor does the Fourteenth Amendment forbid railway companies to provide separate cars for persons of the colored race. Even a State legislature may require this as a means of preserving order and avoiding race conflicts, if the accommodations for the two races are equal. But a city may not by ordinance forbid colored people to move into a block in which the greater number of houses are occupied by whites or a white person to move into a colored block, as was decided in *BUCHANAN v. WARLEY*, 245 U. S. 60, 1917. While these principles have been established chiefly in race questions, they apply

as well to other affairs not connected with racial differences. The Fourteenth Amendment does not regulate business or other matters between private individuals but only between the State and the individual.

**Constitutional Protection in Labor Disputes.** — We are now having some difficulty in seeing clearly and fairly the true rôle of our Constitution as a safeguard against government persecution and abuse in employment disputes. The strong class antagonisms aroused by these differences, the importance of the issues, the vast interests affected, and the close organization of the conflicting forces have made a temperate or impartial discussion well-nigh impossible. Every student of these problems and every journal which comments on them is immediately branded by one side or the other either as "anarchistic" or "unfair to labor." If a State liberalizes its treatment of injured workmen under the compensation laws, this action is arraigned as a "heavy burden on industry." If a court protects either an employer or a non-union man against any action whatsoever by union agents, an immediate outcry against the "capitalist-controlled courts" follows. It may be said that these are the words of extreme radicals and reactionaries, but they are the unrepudiated expressions of official leaders. They at least make clear that neither side may hope to receive a fair consideration of its case from the other and that constitutional protection is vital.

**The Right to Work.** — Numerous State acts have forbidden employers and other persons from conspiring to prevent the employment of individual workers. This protection may be secured either by a suit for damages or an injunction. The latter offers the advantage of immediately halting the conspiracy. When a similar protection is sought against union efforts to deprive the worker of employment, it seems to arouse the same hostility which any safeguard against class activity causes, regardless of the merits of the dispute.

Can a State abandon its protection of the individual because organized groups seek his economic destruction? This is the constitutional problem which arose in *BOGNI v. PEROTTI*, 224 MASS. 152, 1916. The State, acting under radical pressure, had passed a law declaring that the right to work was not a property but a personal right and that no injunction should issue to protect a per-

sonal right. It is clear that if this law were allowed to stand the worker who was deprived of his employment by an illegal conspiracy could not stop the combination by an injunction but must rely solely on a suit for damages or on the criminal law, for his protection. Both of these, as we have seen, would prove inadequate; rarely could a worker finance a long suit for damages, nor could he secure redress by criminal prosecution. The new State act came up for interpretation in *BOGNI v. PEROTTI*. Here the complainant, a hod-carrier, strange to say was a member of the I. W. W. This organization was bitterly opposed by the other unions in the building trades and one of them, the Hod Carriers Union, sought to exclude from building operations in the district all I. W. W. hod carriers. The complainant, about to lose his job pursuant to this conspiracy of the rival union, asked for an injunction to protect his right to work, as a property right. This the new State law prohibited. The case coming to the State Supreme Court that body held that the right to secure employment was a property right and as such was protected by the State Constitution against any State law which rendered property rights defenseless or removed their substantial safeguards. Accordingly, the State must not deprive any person of property by withdrawing from him the ordinary safeguards of court procedure, such as an injunction. It may seem a paradox that a member of the most violent and subversive union should seek Court protection of his property rights through an injunction but it is also noteworthy that the very institutions which his union seeks to overturn, protect him from assaults on his fundamental rights by hostile groups.

**The Employer's Right to Business Protection.** — Can a State strip from the employer his right to secure an injunction to protect his business and property from false and malicious statements that are being circulated to ruin his business? This point arose in *TRUAX v. CORRIGAN, COOKS' AND WAITERS' UNION, ET AL.*, 1921. Truax conducted a restaurant in Bisbee, in which a dispute arose over terms of employment between him and his employees. Several members of the Cooks' and Waiters' Union started a strike and were aided by a boycott, picketing, and the circulation of statements, which Truax held were false, concerning him and his restaurant. The destructive use of these methods caused a substantial loss in his business and he applied to the State Court for an injunction to

prevent the repetition of the false and injurious statements. The Arizona law of 1913 prohibited the grant of an injunction or restraining order in such a labor dispute and he was refused. On appeal to the U. S. Supreme Court that body held that the Arizona law was a violation of the Fourteenth Amendment.

If a State could deprive the individual employer of the legal safeguards for his property it would leave him remediless and defenseless. It was futile to say that a man might have property but that he might have no legal protections for it. The obstruction of free access to Truax's restaurant by the pickets, the injurious attacks on his reputation, and similar measures taken by the union against him were of such a nature as to destroy his business, unless some legal safeguards existed. A law removing these safeguards was a denial or deprivation of his property rights.

The Arizona Act also denied equal protection of the law in that it set up a class of persons, employers in labor disputes, who were deprived of the injunction to protect their rights while others might still secure an injunction. Classification must be reasonable. If this one were upheld there might also be a special legislative treatment of assaults upon an employer or his workers in case of labor disputes. Such assaults commonly happen in strikes. Would this justify the legislature in exempting former employees from criminal prosecution for such assaults? For these two reasons, the denial of due process and equal protection, the act was unconstitutional.

**Freedom of Speech and Press.**—In ordinary times the extent and limits of this freedom may be readily ascertained but in emergencies such as the Great War its exact interpretation presents much difficulty. In *SCHENCK v. U. S.* and *BAER v. U. S.*, 249 U. S. 47, 1919, a typical illustration is seen. The U. S. Espionage law of June 15, 1917, forbade any effort to cause insubordination in the military and naval forces of the United States, to obstruct the recruiting and enlistment of troops, and to transmit through the mails any matter designed for use to these ends. Schenck was general secretary of the Socialist party in Philadelphia and had charge of the headquarters. Mrs. Baer was a member of the executive board and kept its minutes. The two were convicted of a conspiracy to violate the above clauses of the Espionage Act. They claimed that the law abridged the freedom

of speech and of the press contrary to the First Amendment. The Supreme Court held that freedom of speech varied according to conditions and circumstances. That the Amendment did not protect a man in the utterance of words that might have all the effect of force had been decided in *GOMPERS v. BUCKS STOVE CO.*, 221 U. S. 418, 1911. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, causing a panic." "We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done." "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."

Accordingly a limitation of freedom of speech as provided by the Act, in war time, was not a violation of the First Amendment.

**Protection of Minorities: Reason for It.** — We have based our government upon the "will of the people." This in practice means the votes of a majority at election time. But is this majority to have absolute power? All government is a compromise. Rarely, if ever, is there a clear-cut issue in which a vast preponderance of the people wishes exactly and precisely the law which its representatives enact. Political issues are rather general and approximate; they are not measured in definite quantities and exact amounts. Too often also the expression of popular opinion is fleeting. It is followed by reaction, swinging the pendulum far in the opposite direction. The "will of the people" is sometimes a definite reality and sometimes a working hypothesis rather than a quantity that can be accurately stated or exactly fixed.

The same people that demand peace at one time may two years later be enthusiastic for war, and two years later still they may consign to oblivion all who guided the war. A political majority based on high wages, factories full of orders, an inflated business boom, and widespread demand for a greater share in the distribu-

tion of prosperity, may dwindle and disappear when in the next swing of the economic cycle, empty factories, creditors demanding payment, low interest rates, stifled business, and long lines of men awaiting employment, all change the people's attitude towards politics. Political changes and government progress generally are most frequent in times of prosperity while in the reactions of adversity men want jobs, not votes. There are lengthy periods when great numbers of the people remain at home, abstaining from elections. It is generally conceded that this stay-at-home vote is sufficient to decide two-thirds of our electoral contests.

Public opinion is therefore at times a granite foundation for government, at others, a shifting sand. Those who seek to establish a government upon the basis of the "will of the people" must bear in mind this cycle of political activity and clear-cut thought, followed by sluggishness and dense political fog. Could we safely give to the will of the majority under these conditions an *absolute* power?

**How Minorities Are Protected.** — In viewing the broad outlines of our Constitution, we are struck by the many safeguards which the Fathers have thrown around minorities, and the limits that have been placed upon the legislative will and whims of a momentary majority. They dreaded the temporary gusts of popular emotion and were far too experienced in political life to allow absolute sway to the controlling clique of the moment. They also plainly feared the conflict of interest between those who held property and those who did not. So for example they insisted on freedom of speech and of the press, and sought to rescue it from the bigoted and violent onslaughts of partisanship. Again, knowing the tendency of politics to produce a spirit of persecution, and having themselves suffered from such persecutions by agents of the Crown, they established firmly that important list of safeguards for the accused in criminal trials. Not satisfied with this they inserted the "due process" clause in the Fifth Amendment, restricting the Congress in its control over the property and persons of the people.

In a broader sense the theory of checks and balances is a means of protecting minorities from destructive and ruthless majority action. Realizing also the tyrannical methods often employed by the dominant groups in law-making bodies, the Fathers set

up extra safeguards against impeachment, the expulsion of members of the legislature, and the passage of laws over the President's veto, which stipulate a two-thirds or a three-fourths vote for these emergency measures. Remembering the oppressive use of taxation to which controlling cliques are always prone, they inserted those strict limits on the tax power which are described in Chapters 5 and 21. These were intended to protect property holders against a possible legislative onslaught by the shiftless. Having in mind the favorite method of exterminating minorities by prosecutions for "treason," the Fathers carefully prescribed the methods of proving treason and limited the punishment to be inflicted. In these ways the absolute right of a majority to use the government for special private or group objects, to persecute their enemies or to destroy all opposition, was restricted and denied.

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### QUESTIONS

1. You are explaining to an European how our Federal Constitution is arranged to prevent sudden changes in the form of government. Outline your explanation.
2. Make a brief list of the main features of the Constitution arranged in two groups; (a) those which you consider the essential fundamental parts and (b) those which you think might be changed without altering the essential nature of the government. In which group would you place the powers of Congress? Would you favor any changes in these powers?
3. Why is the present method of amendment so difficult to operate?
4. By which method was the income tax amendment passed?
5. How long did the agitation in its favor last?
6. Why was the amendment providing for the direct election of senators so often and so easily defeated?
7. In a discussion of the Constitution it is urged that the fathers in 1787 were gifted with such unusual ingenuity that they invented a well-nigh perfect instrument and that we should not attempt to improve on their work, in these troublous and unsettled times. What would be your view of this opinion?
8. In a discussion you are desirous of showing the existence of an unwritten Constitution in the United States. Outline your argument with examples.
9. You wish to show that the Supreme Court has sometimes changed the meaning of the words of the Constitution. Example.
10. Resolved, that the method of amendment of the National Constitution should be made less difficult — take either side.
11. Why were the first ten amendments to the Constitution adopted?
12. Do they apply to the National Government, to the States, or to both?
13. The owner of a building finds that its value has been reduced by the erection of a large public playground next door. He complains to the courts on the ground that the State in establishing the playground has lessened the value of his property and thereby deprived him of property without due process of law, contrary to the Fifth Amendment. What would be the answer of the courts and why?
14. The first man condemned to be electrocuted in New York appealed to the United States Supreme Court on the ground that the punishment was cruel and unusual — it being at that time new in this country — and that it therefore violated the Eighth Amendment which declares that "excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishments inflicted." Decide the case with reasons.
15. Why are the first ten amendments sometimes called the "Bill of Rights"?
16. How would you explain to a foreigner the chief liberties and safeguards contained in the Federal Bill of Rights?

17. Why were the Thirteenth, Fourteenth, and Fifteenth Amendments passed?

18. Explain the chief differences between the purposes of these amendments.

19. Your State legislature passes a law providing that bankrupt debtors shall be imprisoned at hard labor. John Doe fails in business. Must he go to jail? Reasons.

20. A colored man is denied the right to vote because he cannot comply with the State law requiring voters to pass an educational test. He claims that the law is unconstitutional under the Fifteenth Amendment. Decide with reasons.

21. The Doe Baking Company establishes its plant in the State of X where the State Constitution provides that any person or corporation may engage freely in the baking business upon compliance with reasonable standards of sanitation and purity of products. Five years later the State Constitution is revised and an article inserted allowing cities to regulate the baking business. The city in which the Doe Company has located passes an ordinance requiring all bakeries to secure a permit and to pay \$500 therefore, before transacting further business. The Doe Company protests on constitutional grounds. Decide with reasons.

22. In 1915 John Doe makes a promissory note to Richard White with interest at 5 per cent. The note is renewed and in 1916 the State legislature passes a law cancelling all promissory notes made within the last year at more than 4 per cent interest. Doe, under the law, refuses to pay and the case comes to the Supreme Court. Decide with reasons.

23. Explain the Supreme Court's decision as to whether the Dartmouth College charter of incorporation made by the King of England was a contract. Give reasons in full.

24. Show exactly how the enlargement of the Board of College Trustees by the New Hampshire Legislature was or was not a violation of the U. S. Constitution.

25. How do the States now regain the power over corporations which they have lost through the DARTMOUTH COLLEGE v. WOODWARD decision?

26. Explain the constitutional difference between price or rate regulation and safety regulation; also the different types of business to which these forms of regulation apply.

27. Which of the following enterprises might be constitutionally regulated in the way mentioned, and why:

(a) State law providing that shoes must be labelled on the box "all leather" or "composition leather," according to the materials used in manufacture.

(b) State law providing that oleomargarine colored to resemble butter must be marked "oleomargarine," if manufactured for sale within the State.

(c) State law fixing the price of shoes at \$4.00 per pair.

(d) State law requiring that all shoes shall be made only of thoroughly seasoned calf skin leather.

- (e) State law providing that all barber shops must remain open until 12 midnight on Saturdays.
  - (f) State law requiring that railway stations within the State must remain open until one hour after the last train has passed through, each day.
  - (g) State law requiring that alcohol used for medicine if manufactured for sale within the State must be 90 per cent pure.
  - (h) A State law fixing the charges of storage for grain in elevators within the State.
28. Explain whether a business subject at one time to no state regulation of charges may at another be so regulated. State clearly the principles involved.
29. What is "freedom of contract" and how is it protected by the Constitution?
30. The State Legislature enacts a law declaring that "all corporations which do wrong" shall be fined \$1000 for each offense. Constitutional? Reasons.
31. Congress passes a law providing that attorneys who secure or aid in the securing of land grants for homesteaders must not charge more than \$15.00. Mr. Sharpe, an attorney, secures such a grant for his client and renders a bill for \$50.00. When prosecuted under the Act he claims that the law interferes with his freedom of contract. Decide with reasons.
32. An official inquiry shows that many newspapers are printing false news and suppressing the true to please certain advertisers. The State Legislature forbids the publication of newspapers for profit and establishes its own papers, published at cost. Constitutional? Reasons.
33. Prepare a brief essay on "due process of law" showing its origin, and its present meaning in the United States.
34. John Doe is arrested for violation of a speed ordinance requiring automobiles to observe the fifteen-mile limit. He protests, claiming that the automobile is his property and that he may not be deprived of his liberty or property nor his right to do as he pleases with it, without due process of law. Decide with reasons.
35. The city councils pass an ordinance authorizing the police to seize and sell immediately any automobile which exceeds fifteen miles per hour in speed and pay the proceeds into the city treasury as a fund, without further formality or other procedure. Explain the constitutional status of this ordinance and the exact part of the Constitution which applies.
36. The State legislature provides by law that the manufacture of shoes shall no longer be permitted in the State. Is the Act constitutional? Reasons.
37. A provision is inserted in the California constitution allowing persons to be tried for crime, either upon an indictment found by a grand jury or an information (accusation and hearing before a magistrate). Would such an information be valid under the Federal Constitution? Reasons.
38. Congress passes an Act providing for a similar procedure by information in Federal criminal cases. Is it constitutional? Reasons.
39. A State constitution provides that the legislature may by law dispense with jury trials in civil cases. Is the State constitution valid under the Federal Constitution?

40. Congress passes a law providing that in all civil cases the trial shall be without a jury. Is the law valid? Reasons.

41. A State legislature, pursuant to the State constitution, provides that a simple majority verdict of the jury shall be sufficient to convict in criminal cases. Is the law constitutional?

42. Do the words "due process" as used in the Fourteenth Amendment mean the same procedure in all the States and at all times? Explain.

43. A State Commission passes two resolutions, one providing that the old rolling stock of a poorly managed city trolley company shall be taken from it by public officials in order to force it to buy new cars; the other resolution provides that street car fares must not exceed 1 cent each and that free transfer tickets must be given to all intersecting lines. Explain in detail the constitutional status of each of these resolutions.

44. The legislature provides that reasonable room for sitting or standing without excessive crowding, must be provided in every street car and that passengers must not be allowed to ride on the front or rear platform. Is this constitutional?

45. In another law the State requires that all passengers must be provided with seats and that street cars must be run with sufficient frequency to accommodate all who desire passage; further that only steel cars may be used, that flag men must be stationed at every intersecting line and that an extra brakeman must be carried on every car to aid in its control. Explain fully the constitutional status of this Act.

46. A railway subject to State regulation claims that the rules of the State are so burdensome as to deprive it of its property; the State claims that it is able to earn a handsome return on its investment. How would the question be decided?

47. What is class legislation? Give an example.

48. Does the Constitution expressly forbid class legislation by the United States, or by the States, or by both? Cite the clause in question.

49. The mayor of Bytown acting under a city ordinance which forbids Italians from carrying arms proceeds to disarm all unnaturalized Italians within the city. One of them protests claiming that the mayor is violating the Federal Constitution, to which the official answers that the equal protection clause safeguards only citizens, not unnaturalized foreigners. Decide with reasons.

50. A State law provides that no person shall practice medicine without a license or permit from the State to be granted by the State medical board. This board then proceeds to admit all applicants who are American born and to reject all foreigners. A foreign applicant protests and shows that he is qualified but has been denied a permit. The board answers that the law itself is a perfectly constitutional, protective measure and has been adopted in one form or another in all the States. Decide the controversy with reasons and precedent.

51. A State provides that doctors, dentists, and druggists must be licensed before practicing their profession but requires no such license for the practice of accountancy. A dentist protests on the ground that he is denied the equal protection of the laws because of the discrimination in favor of accountants. Decide with reasons.

52. A State law forbids combinations in restraint of trade in all forms of industry except the manufacture and sale of agricultural implements. Is the Act constitutional? Reasons in full.

53. John Doe and Company, Richard Roe and Company, and others are engaged in the manufacture of gunpowder. Owing to frequent explosions and loss of life and property, the State government builds a special gunpowder plant and rents it to the Safety Powder Company giving the company an exclusive monopoly of powder manufacture within the State. The Doe and Roe Companies claim that this is a violation of the Fourteenth Amendment in that it deprives them of the privileges and immunities of citizens of the United States. Decide with reasons and precedent.

54. You are explaining to a friend which of his rights are the privileges and immunities of a citizen of the United States and why. Outline your explanation.

55. Give some privileges of citizens of a State with examples. Several colored citizens are holding a meeting with the purpose of passing a resolution declaring their constitutional rights. They are interfered with and the meeting broken up by a disorderly mob of white persons. The Federal law passed in 1870 provided that citizens of the United States should be free from intimidation or oppression by other persons while exercising their rights under the Federal Constitution and laws. Could members of the mob be punished under the above Act? Explain with reasons and precedent.

56. Congress passes an Act forbidding the proprietors of hotels, public conveyances, and places of amusement from discriminating against citizens of the United States on account of their race or color. A hotel keeper refuses admission to a colored man on that ground. Can he be punished under the Federal law? Reasons and precedent.

57. May a railway company constitutionally provide separate accommodations for whites and colored within a State?

58. May it constitutionally provide inferior accommodations for either race?

59. May a State constitutionally require railways within its boundaries to provide separate accommodations for the two races?

60. May it require such railways to provide superior accommodations for the colored race?

61. Summarize briefly the last four amendments to the Constitution.

62. Which classes of the people would be most interested in the passage of an amendment repealing the exemption from taxation of all forms of government and state bonds? Reasons.

63. Which classes would be interested in an amendment extending the power of Congress over corporations and labor questions? Reasons.

64. During the War, John Doe, from the top of a soap box, urges all and sundry not to enlist in the American Army. When prosecuted for interfering with recruiting, his defense is that the first amendment guarantees him freedom of speech. Decide with reasons.

65. If it is unconstitutional to fine or imprison men under Federal laws which are excessively vague and indefinite, would a State law be constitutional, which provided that telephone rates must be "reasonable"? Explain.

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66. What do you understand by a Government based on the will of the people?

67. Give several instances in which the American Constitution limits majority rule and explain the reasons for each instance.

68. Resolved, that legislatures should have absolute, unrestricted government power. Take one side.

69. Secure from the debates of the Constitutional Convention of 1787 some examples of the views of men in that Convention who desired to limit majority rule.

70. A party representing the Mohammedan Church secures a majority at the polls and elects representatives to a State legislature. This body then passes a law providing that in controversies on religious questions no injunction shall be granted to prevent the destruction of property or life nor to protect persons from the effects of illegal religious conspiracies. Is the act valid? Reasons.

## CHAPTER 23

### CONSTITUTIONAL PROTECTION: THE POLICE POWER

**What is Liberty?** — In all our discussion of the protection of the citizen's rights we have come upon the constantly recurring word "liberty." The old idea of liberty was freedom from government interference. For this reason the State and National Constitutions were drafted with an idea of preventing government action. Surprising as it seems, it is yet true that our constitutions devote more space to what the Federal and State governments may *not* do than to what they may. But as we ask more and more of the government, and as its usefulness grows, we cease to think of liberty as freedom from government action, and realize that such action must be increased. This brings on the conflict between an "individualistic" and a "social" policy of government — the conflict that is now waging with full vigor in American politics.

*The Individualistic View.* — We have always believed that each individual was entirely responsible for his own success or welfare. A man was a criminal because of his own vicious propensities which he would not control; he was a pauper because he was shiftless and dissipated; he was a successful man because of his superior self-denial, his saving, and his general ability; he was educated because he used the schooling that others neglected; or he was ignorant because he refused to do so. This belief is a bracing, stimulating doctrine without which we should never have conquered the oceans, the forests, the mines, and the natural resources of our continent. It fits exactly the era of the pioneer, with unlimited free land and an abundance of natural wealth — an era when it was "every man for himself." It is a belief which is still much needed among us to sharpen our ambition and strengthen our efforts. But it no longer offers a complete public policy. It does not take into account the new and rapidly growing force of environment in a dense and crowded population; it does not explain how two individuals of about the same ability, honesty, and ambition, placed in two differ-

ent sets of surroundings may turn out, one a failure and the other a success, one an honest man and the other a criminal. This weakness of the individualistic view has become more and more apparent until it is now being slowly modified by the environmental or social viewpoint.

*The Social View.* — According to this newer standpoint some share of the results secured by individuals, their successes and failures, their moral or dishonest acts, is due to their surroundings. The "social environment" of a man, the newspaper, the school, the church, the office, the home, and the movie, bring to bear upon him such a constant, overwhelming, and irresistible stream of influences that they *determine* what his action will be under most circumstances. The abnormal man or the insane may not respond to these influences, or he may react against them in an entirely unexpected way; but the normal person is guided largely by this social force. When the public school system teaches hygiene, when the magazines and newspapers discuss health problems, when the street-car advertisements preach breakfast-foods, and the boards of health of large cities issue bulletins on individual health and efficiency — the average man inevitably begins to think of and care for his body, because his entire social environment guides him.

If his health is so strongly influenced by his environment, how much more so his moral and educational training, his recreation, his efforts towards industrial efficiency and a comfortable standard of living — in short, his personal welfare! As the importance of environment in this welfare increases, we must put forth every effort to make that environment more favorable; our government authorities must coöperate much more effectively towards this end than they have in the past. In all these many ways in which the community influences us, the community must make its influence more useful. In brief, we have made a start on social "team work." This new point of view, which sets a newer and higher standard of government work, is to be seen in the most unexpected and interesting ways and places; the platforms of our political parties, the programs of new societies, the magazine and newspaper editorials, the drama and fiction of the hour — all show a gradual but impressive strengthening of the belief that we cannot foist upon the individual all responsibility, but that the government itself as an agent for the whole people must now do its utmost to open up the



avenues of progress. The government must help. This is the "social" view.

**The New Liberty.**—Seen from this angle, "liberty" takes on a new and greater meaning. Freedom from disease, from the handicap of inefficiency and illiteracy, from overcrowded and indecent dwellings, and uncleanness, are incalculably more important to us than the old legal freedom of contract which once occupied the center of the stage. In order to contrast the older, more formal ideal with this new substantial liberty let us place the two side by side in parallel columns.

THE OLDER CONSTITUTIONAL RIGHTS

NEW ECONOMIC AND SOCIAL RIGHTS

1. Right to the equal protection of the laws.

1. Equal opportunities for all in the Open Market:

(a) The equal use of public facilities such as railways, canals, terminals, warehouses, wharves, etc.

(b) Freedom from unfair and corrupt methods of business competition — fraud, misrepresentation, combinations to destroy a competitor, exclusive contracts to stifle competition, etc.

2. The right of persons accused of crime to be safeguarded in criminal trial procedure.

2. Right to real protection *against* criminals. Cheaper and quicker justice.

(a) A simplified, less technical procedure in both civil and criminal suits.

(b) A more complete, efficient, and thorough police system in both city and country districts.

(c) A more careful sifting of the chance offender from the habitual criminal.

3. Freedom of speech, press, and religion.

3. The freedom of the consumer from extortionate and oppressive charges in all articles of common use, meats, foods, drugs, beverages, shoes, clothing, coal, tobacco, sugar, oil, express, and transportation charges.

4. Freedom from searches and seizures in homes and dwellings.

4. Freedom from overcrowded, unsanitary houses, factories, and stores;

- right to tenement and factory inspection and regulation.
5. Right to bear arms.
5. Right to æsthetic and other higher enjoyments of civilization.
6. No person shall be deprived of life, liberty, or property without due process of law.
6. No person shall be deprived of the opportunities for improvement, education, and recreation, even with due process of law.

We must see clearly that the old legal freedom was a means to an end. When men were fighting a tyrant king or a selfish mother country they wanted liberty "to pursue happiness" or "freedom of speech" both of which were denied them. When their business is assailed by a conspiracy, or their own and their children's chances of advancement are blocked by one or another cause, they demand greater "freedom of business opportunity." The obstacles to progress are different, the meaning of "liberty" changes.

**The Police Power.** — These new economic and social rights are threatened less by the *government* than by organized *private* "groups" and "interests" which, in a strong desire for profit, are willing to ignore the public welfare. Such conditions must needs be regulated by the public authority. Our economic rights accordingly call for fewer safeguards against the government and more against private abuses. How can we adapt the old legal liberty of the 18th century to the new economic and social freedom of the 20th? How can we harmonize an intentionally inactive government system with the new demands for greater activity? This problem is being worked out by the "Police Power" of the State — that is, the authority to protect the health, safety, and welfare of the people, and by the commerce and tax powers of the Nation.

Our modern idea of the Police Power starts from the Supreme Court decision in *DARTMOUTH COLLEGE v. WOODWARD*, 4 WHEATON, 518, 1819, which has already been considered. The ruling in that case took away from the State government such a vast share of the regulating power over the corporations which it had chartered, that it seemed as if, after a company had once secured a charter of incorporation, it would be forever exempt from further State action. In order to reestablish this authority for the State the courts invented the doctrine of the Police Power. In a series of remarkable decisions they declared that the authority of a State to protect the lives, health, and safety of its people was such an essential, inherent,

vital power as to be of the very core and substance of State government and that the "obligation of contracts" clause of the Federal Constitution was never intended to interfere with this *protective* authority of the commonwealth.

The Police Power could prevent even a chartered corporation from doing anything which was dangerous to the people and so long as the State used this power within reasonable bounds, and for the purposes above mentioned, no corporation could claim that its charter was a contract exempting it from all State regulation, especially on such necessary and fundamental points in which the whole community had an immediate public interest. Nearly all the legislative measures now in the forefront of public discussion are exercises of the police power. The creation of boards of health with authority to prevent the spread of contagious diseases, the establishment of compulsory continuation schools, the prohibition of railway rebates or discriminations, the encouragement of agriculture, and the requirement of fire escapes and proper standards of safety in building construction are all examples from widely different fields of the use of this authority.

**New Problems under the Police Power.** — As the power has steadily expanded, it has come into conflict with the liberty and property clauses of the Fifth and Fourteenth Amendments. This conflict has grown more and more serious until it has become clear that we must either change the wording of those Amendments and allow the State and National Governments to regulate and alter property rights and personal liberty and contracts — or we must let the words stand, but have a new series of court decisions changing the meaning of "liberty" and "property" so as to allow of their regulation by the government. We have adopted the second way out of the dilemma. Let us consider a number of these judicial rulings, focussed mainly on the following points:

1. Does the Police Power apply to all persons and corporations or may it be evaded by any?
2. Can a corporation escape regulation by a clause to that effect in its charter?
3. How far can the Police Power interfere with "liberty" and "property" as guaranteed by the Constitution?

**The Power Controls All Corporations and Persons.** — Nobody except a foreign diplomat or consul can disobey the protective regu-

lations of the Police Power. The Supreme Court has even declared that a State government may not constitutionally bargain away this authority. In *STONE v. MISSISSIPPI*, 101 U. S. 814, 1879, the State of Mississippi had granted a charter to an association to conduct a lottery within the State. Afterwards the State amended its constitution and inserted an article prohibiting all lotteries. The association appealed to the Supreme Court claiming that this was a clear violation of its contract as expressed in its charter, and that under the decision in *DARTMOUTH COLLEGE v. WOODWARD* already described, the State could not constitutionally repeal or change the charter of a company without its consent, but was legally bound to allow the company to continue its lottery business regardless of later State legislation.

The Supreme Court said: "The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. *No legislature can bargain away the public health or the public morals.* The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Again, referring to lotteries: "They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get

by such a charter is suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

**Can Any Business Be Exempted from the Police Power?**—The principle just stated is of special importance in prohibition laws. In *BEER CO. v. MASS.*, 97 U. S. 25, 1877, a brewing charter had been granted the Company, but a local option law was later enforced against the sale of beer. The Company claimed that since its charter gave it the right to transact its business, a later State or local act prohibiting this business was an impairment of the obligation of the charter contract, and therefore unconstitutional. The Supreme Court held that the charter could give the Company no such exemption from subsequent police laws of the State. "The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

**The Police Power over Nuisances.**—Is a charter to conduct a legitimate and moral business an inviolable agreement if the business occasions discomfort or annoyance to the people of the sur-

rounding district? Or may the enterprise be regulated despite its charter? In the case of the *FERTILIZER COMPANY v. HYDE PARK*, 97 U. S. 659, 1878, the legislature of Illinois had chartered a company with the right of manufacturing fertilizers within the State, no limits being set to the location of the company's plant. The factory having been situated in a suburb of Chicago, and the population having grown up around the plant, some complaint was made to the local sanitary authorities that the fertilizer factory caused obnoxious odors and constituted a nuisance. The authorities ordered that the nuisance be abated or removed, whereupon the company appealed to the courts. The case ultimately reaching the United States Supreme Court, a decision was rendered upholding the authority of the sanitary officials to order the abatement of the nuisance, despite the charter. The court declared that the original charter of the fertilizer company undoubtedly was an agreement between the company and the State, under the Dartmouth College ruling, but that this agreement did not and could not exempt the company from the police power of the State to protect its people from unhealthful or obnoxious nuisances. If the company's business necessarily caused such noisome odors, it became its duty to prevent these odors from annoying or injuring the surrounding population. Even the fact that the company had located its plant in its present situation before the surrounding residences were built, could not exempt it from the police power as represented by the sanitary authorities. This case is especially interesting because it shows that even where the charter is construed as a contract, the courts uphold, whenever possible, the protective, regulating power of the State.

And where a public utility company makes a contract, let us say, to deliver electric current for five years at a fixed charge, the State Public Service Commission may lower or raise rates regardless of such a contract. Were it otherwise a company could by the simple use of contracts remove itself from the police power; *HUDSON WATER CO. v. MCCARTER*, 209 U. S. 349, 1908.

**Control of Professions.**—For the protection of health and safety the States have limited the practice of the medical, dental, and other professions to those persons who can prove their proficiency. In 1882 West Virginia provided that no person should practice medicine until he had obtained a permit from the State Board. To

secure this he must have completed a course of study at "a reputable medical college," or its equivalent. In *DENT v. W. VA.*, 129 U. S. 114, 1889, the Board had refused a permit to Dent on the ground that his certificate was not from a reputable medical college. Dent claimed that to exclude him from practice in this way was to deprive him of his liberty and property, contrary to the Fourteenth Amendment. But the Court upheld the law.

"The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

**Arbitrary State Regulation.** — In regulating a vocation the State must take care not to fix arbitrary and unreasonable rules — its regulations must conform to actual principles and facts and may not without reason bar out of the occupation large classes of well-qualified persons. In *SMITH v. TEXAS*, 233 U. S. 630, 1914, the Supreme Court considered a law of Texas forbidding any person from acting as conductor on a railroad train within the State without having previously served for two years as a brakeman or conductor on a freight train. The purpose of the Act, although somewhat obscure, was probably to insure a more thorough training of railway passenger conductors. Smith was a man 47 years of age who had been 21 years in the railway business. He had served for 12

years as engineer on freight and passenger trains. In 1910 he acted as conductor of a train without previously having been a brakeman. He was evidently a thoroughly competent man for the position and conducted his train in safety; but, having failed to serve as a freight brakeman before acting as conductor, he had violated the State statute and was prosecuted and fined. On appeal by Smith to the Supreme Court the State argued that it was the practice for brakemen on freight trains to be promoted to the position of freight conductors and then to the position of conductors on passenger trains; the law, the State contended, was in substance an enactment of the prevailing usage on the railway.

But the Court pointed out that the rule fixed by the State law excluded all persons from the position of conductor except freight brakemen or freight conductors, regardless of their competence, training, or ability. It showed further that an engineer was conspicuously well fitted for the work of a conductor and, in fact, shared the responsibility of a train with the conductor and, under the rules of all railways the freight engineer acted as conductor in the event of the regular conductor being disabled *en route*. By thus limiting unduly the class of persons who could contract to serve as conductors the law denied to Smith and to many other well-qualified persons the freedom of contract which is secured by the liberty and property clause of the Fourteenth Amendment, and was therefore unconstitutional. "A statute which permits the brakeman to act — because he is presumptively competent — and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety, but denies to many the liberty of contract granted to brakemen."

**Morals.** — In regulating morals, also, the greatest latitude has been allowed to governmental authorities. This has been true especially of laws to suppress or limit the sale of intoxicating liquors, gambling, and vice. State laws against lotteries are upheld, as we have seen, even though such laws destroy property in the lottery business. But the amount of property invested in lotteries is but trifling as compared with the hundreds of millions of dollars invested in the brewing and distilling industries. When the State governments began to pass prohibition laws forbidding the manufacture or sale of intoxicating liquors, the question at once arose —



is this not a destruction of property within the meaning of the Fourteenth Amendment, and if so can the State law be upheld in face of the provision that no State shall deprive any person of property without due process? This question was decided in the case of *MUGLER v. KANSAS*, 123 U. S. 623; 1887. In 1881 Kansas had passed a prohibition law which forbade the manufacture or sale, except for medicinal purposes, of all intoxicating liquors. Mugler being convicted under the State law of selling beer, appealed to the national Supreme Court, claiming that the law violated the liberty and property clause of the Fourteenth Amendment. The Court however upheld the law, and ruled that although "the buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say that if the statutes are enforced against the defendants, the value of their property will be very materially diminished" yet "there is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."

The same holds as to other regulations of public morals.

The Fifth Amendment protects "liberty and property" against encroachment by the Federal Government; yet Congress has been upheld in the passage of laws designed to protect the public against immoral uses of interstate commerce facilities, as we have seen in Chapter 8.

**Safety.** — In legislation for public safety we have the most sweeping recognition of the Police Power, even when in opposition to property and personal rights. Employees and the public may be

protected in factories, stores, and shops; hours of labor in dangerous businesses may be limited by law; safety appliances of various kinds may be required. In short, the right of the individual to do what he will with his own is subjected to the most rigid scrutiny and regulation for safety's sake.

*Example: Employment in Dangerous Industries.* — An interesting illustration is seen in the State laws regulating the hours of employment of children, women, and men. At first the courts held that women and children, for physical reasons were in a sense the wards of the State, subject to its special protection. The State might therefore limit the number of hours for which they might be employed. This was not a violation of either their "liberty" or that of their employers; *COMMONWEALTH v. HAMILTON MFG. CO.*, 210 MASS. 383, 1876. At first, also, the courts held that with adult men the situation was different; since a man was capable of protecting his own interests, any attempt by the State to protect him by limiting his hours was an interference with his own and his employer's liberty and property rights — therefore a violation of the Fourteenth Amendment.

The next step was taken when the courts declared in *HOLDEN v. HARDY*, 168 U. S. 366, 1898, that even an adult man needed protection *in dangerous industries* such as underground mines and smelters. His hours of employment might be limited by State law without violating the Fourteenth Amendment. The Court pointed out that the law was a progressive growth and that changes were necessary in it, to correspond with the changes in our industrial progress. As dangerous industries arose the condition of those who work in them must be protected by the State. Freedom of contract which the Fourteenth Amendment sought to protect by the liberty and property clause was not an absolute freedom. It must change with the rise of new conditions in business. When an occupation became exceptionally dangerous the freedom of contract of those engaged in it must be limited in order to protect them. This was not a violation of the spirit of the liberty and property clause. Fire escapes in hotels, theaters, and factories — the safeguarding of machinery in factories, the protection of walls, elevators, ventilation shafts, and destructive harmful gases in mining — all these, said the Court, are new kinds of legislation designed to meet the new conditions arising from the development of our coal and iron supplies.

Yet these laws have been upheld as constitutional and they do not violate the spirit of the Fourteenth Amendment by limiting property or liberty further than is necessary for the protection of the general safety.

The next step was taken in *BUNTING v. OREGON*, 243 U. S. 426, 1917, when the Court upheld a State law regulating the hours of employment of all persons *including adult men, even in safe industries*. Ten hours a day was named as the limit, but with the proviso that over-time might be permitted not exceeding three hours, if such over-time were paid at the rate of time and half—that is, for each over-time hour the worker must receive one and one-half hours' pay. Bunting was prosecuted for employing a man in a flour mill for 13 hours in one day and not paying him the prescribed over-time rate. He protested that the State law was unconstitutional in that it violated the liberty and property clause of the Fourteenth Amendment. He set forth that the Act was not an hours law, but a wage law, in that it regulated the wage rate for over-time work. The Supreme Court upheld the law, ruling that the provision as to extra pay was simply a penalty to discourage over-time employment, and that the main purpose of the Act was to regulate hours. The Court pointed to the custom in Oregon industries not to exceed ten hours per day; therefore the Act was not unreasonable or arbitrary, even when applied to a safe industry. The evils of excessive hours had been shown by many investigators, and it was well within the authority of the State to guard its people against these evils by fixing a reasonable limit of employment hours.

**Labor Contracts.**—The Courts regard labor contracts in a different light from ordinary property agreements. They will not compel by equity writs any worker to perform the exact terms of a labor agreement. He may be sued for damages but is not forced to do the work. Again; a workman injured through his employer's fault has a claim for damages against his employer; the legislature and the Courts usually forbid him from signing away or selling this claim in advance of the injury, because they wish to protect him from being imposed upon; yet both courts and legislatures allow the sale or waiver of many other rights or claims. In many States also the Courts refuse to enforce against a worker a labor contract for services for a longer period than two years, in order to prevent oppressive agreements.

In all these respects both the workman and the employer find that their freedom of contract, and thereby their general liberty, are limited for the better protection of the weaker party, yet the courts will not interpret this as a denial of their liberty or property as prohibited in the Fifth and Fourteenth Amendments.

**Other Limitations of Freedom of Contract.** — Debtors who are being oppressed by extortionate rates of usury are also shielded by special legislation from money loan "sharks," and the bankruptcy law of all countries provides that an honest debtor may, after a court distribution of his available funds, be discharged from his debt altogether. Here is an undoubted limitation of the property right of the creditors and its only excuse is to prevent the crushing of the debtor under the accumulated burden of his obligations, just though they may be. Again the State and National lawmakers have passed statutes to prevent oppressive combinations in trade, which might suppress competition and drive out of business the weaker competitor. Such laws are difficult to enforce but they unquestionably prevent the grosser forms of trade abuses and their constitutionality is admitted. Here the lawmaker frankly avows his intention of preserving the weaker competitor and in doing so he deliberately fixes limits upon the freedom of competition and the use of property.

**Fraud.** — The power to prevent fraud is also widely recognized by the courts at the expense of both liberty and property rights. The adulteration of foods and drugs is being rapidly made both illegal and unprofitable by State and National laws, and the popular demand is rapidly growing that similar frauds in other articles of common use should be forbidden. The Supreme Court has allowed a State to forbid the sale as "ice-cream" of any product containing less than 8 per cent of butter fats; *HUTCHINSON CO. v. IOWA*, 242 U. S. 153, 1916; also to require that lard sold at retail in kettles must be made up in packages of certain net weights and these net weights must be clearly marked on the package; *ARMOUR v. NORTH DAKOTA*, 240 U. S. 510, 1916.

**The Police Power and Social Justice.** — This brief survey shows that the courts have really modified the meaning of the terms "liberty" and "property" and have placed the general welfare above these rights of the individual. The Police Power may regu-

late harmful businesses, and at times prohibit them; it may require even legitimate enterprises to observe the public convenience and comfort; it may protect the public health, safety, and morals, and in doing so it may even interfere with fundamental private rights, if necessary.

We come next to the important problem of regulation for the purpose of improving the economic and social conditions of the people; this is the constitutional side of the great "social problem" which is becoming the storm center of American politics. Is it constitutional for government authorities to protect the weak against the strong even to the extent of interfering with liberty or property? Is the simple principle of "social justice" sufficient to render a law constitutional? Our courts have never admitted this. But they have established a number of exceptions which do expand the police power in this direction. Some of these are the laws affecting sailors, laborers, debtors, women, and trade combinations. An excellent description of the gradual progress of the courts in this field is given by Dr. Ernst Freund in his valuable work *The Police Power*. From the early days of our history the judges have upheld laws to protect the weaker classes in all the above mentioned list, on the ground that such classes were peculiarly liable to exploitation. Sailors are proverbially unable to care for themselves on land; they are especially subject to imposition and extortionate practices, a fact which has been freely recognized by both law-makers and judges. The Federal statutes, upheld by the courts, have accordingly protected the sailor in the following ways:

Masters or owners of vessels in the coasting trade must pay a seaman's wages within two days after termination of the agreement, or at the time when the seaman is discharged; in the foreign trade the payment must be made within 24 hours after discharge of cargo, or within 4 days after the discharge of the seaman. Any failure to do so entitles the seaman to his usual wages while waiting. The seaman cannot make an agreement to give up his lien or claim on the vessel for unpaid wages, nor can he agree to forfeit his claim for wages in case the vessel should in the future be lost, nor may he assign his claim for wages nor for salvage of another ship, nor may wages be paid in advance. The seaman's contract or "articles" must be signed by him in the presence of the shipping commissioner. All these regulations are frank recognitions of the fact that the sailor

needs unusual protection — they all limit his and his employer's freedom of contract.

**Recent Extensions of the Power.** — In this policy the weak have been protected *because they were weak*, and the lawmaker, upheld by the judge, has taken strong measures to limit property and rights of contract in order to establish "social justice." In the now famous decision of the U. S. Supreme Court in *NOBLE BANK v. HASKELL*, 219 U. S. 104, 1911, Justice Holmes said that the police power "extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

For example, when the legislature of Iowa provided that railway companies must be liable to their employees for injuries received through the company's neglect, and that no company insurance or relief plan should exempt a railway from such claims, the Supreme Court held in *C. B. & Q. v. MCGUIRE*, 219 U. S. 549, 1911, that a man who was injured and had accepted \$822 under a company relief plan was nevertheless entitled to sue the company for damages. The company urged that McGuire, the injured employee, having made a contract for relief and accepted funds under it with the understanding that he would not sue for damages, could not turn around and violate this contract nor could the State law interfere with his freedom to make such a contract. The Court answered that the State law, for the necessary protection of railway employees, had limited the freedom of contract in a reasonable way and that all agreements made contrary to this law were illegal. The employee's right to sue could therefore not be contracted away.

**Emergency Rent Laws.** — Can the legislature in a great housing crisis, protect tenants who are willing to pay a reasonable rent, from ejection by the landlord? This question arose in *BLOCK v. HIRSH*, 256 U. S. 135, 1921, in Washington, D. C. and *MARCUS BROWN HOLDING CO. v. FELDMAN, ET AL.*, 256 U. S. 170; 1921, in New York City. In the Washington case Congress had provided by Act of 1919, that for a two-year period a tenant might hold over after the expiration of his lease, subject to regulation by a Commission provided for this purpose, so long as he paid the rent and performed the conditions fixed by the lease or as modified by the Commission. Block was a tenant holding over on the cellar and first floor of a

building, on which his lease had expired. Hirsh had bought the building and notified Block that he would require possession at the expiration of lease. Block refused to surrender his premises, relying on the Act of 1919.

Hirsh claimed that the Act was a violation of the liberty and property clause of the Fifth Amendment. The Supreme Court upheld the law on the following grounds: A special emergency or crisis in the housing situation had led Congress to recognize the fact that the letting of buildings in the District was clothed with a public interest for the time being so great as to justify regulation by law. "Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."

The Court referred to the decisions in *INSURANCE CO. v. LEWIS*, 233 U. S. 389, 1914 (as to insurance), *CLARK v. NASH*, 198 U. S. 361 (as to irrigation), and *STRICKLEY v. MINING CO.*, 200 U. S. 527 (as to mining), pointing out that the rates and charges in a business might become of public interest, and therefore subject to regulation, not alone because of the number of people who patronized the business but also because of its peculiar nature and the circumstances surrounding it at a given time.

"They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair." Under the police power, the right to erect buildings in a certain quarter of a city might be limited from 80 to 100 feet. Safety pillars might be required in coal mines. Bill boards in cities might be regulated. Watersheds in the country might be kept clear. So, also, in a public exigency property rights might be restricted. "But if, to answer one need, the legislature may limit height, to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of

a public interest justifying some degree of public control are present."

The regulation here was only temporary. "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." A Commission was established to assure the landlord a reasonable rent. The fact that he might not secure the full profit which the national misfortune would otherwise enable him to reap, did not make the regulation of rents in the public emergency unconstitutional. In *BROWN v. FELDMAN*, a similar New York law of 1920 was upheld as against objections based on the liberty and property clause of the Fourteenth Amendment.

**Freak Legislation.** — A State power which is so sweeping as that which we have just studied may, of course, be abused or unwisely employed. The crank or association of cranks, the fanatic, the reactionary, and the well-intentioned but inexperienced person who has a panacea for all social ills — these are familiar types that haunt our legislative lobbies. There are times when the police power appears as a sharp and dangerous plaything in the hands of children rather than a sovereign State power employed for sober ends, as, for example, when laws are passed requiring that railway passenger fares be limited to two cents per mile, fixing arbitrarily the number of employees on trains, providing that all trains upon approaching every grade crossing must be slowed down so that they may stop if traffic appears on a crossing road, forbidding the wearing of women's hats in theaters, the sale of insurance within a State by others than citizens of the State. At one time South Dakota made it a misdemeanor "to do or attempt to do the hoochee-koochee, grizzly bear, turkey trot, snake wrestle, or bunny hug."

**A Law May Be Constitutional but Unwise.** — The use of the police power in a given case may be entirely constitutional and yet most foolish. We must distinguish between the State's right to use a power and the wisdom or folly of its use. The State may, under its tax and police powers, establish a bank guarantee fund to insure the depositors in the State banks against the loss of their money by bank failures. This was decided in *NOBLE STATE BANK v. HASKELL*, 219 U. S. 104, 1911. Yet the policy itself proved a failure when the great agricultural depression of 1921 set in, and, when insurance against loss was most needed, the guarantee fund was speedily exhausted. When the State Commission which



administered the law was unable to pay the guarantees which became due, it issued warrants or promises for their future payment, which entitled the holder to 6 per cent interest while waiting for payment. By December, 1921, the outstanding warrants amounted to two and a quarter millions, and all the State appropriations for the fund were needed to *pay the interest* on these warrants. Many of the State banks changed to national banks in order to escape from this system.

The Supreme Court, in 1920, upheld the power of North Dakota to use public funds to build, own, and operate business enterprises such as banks, grain elevators, etc., but this is far from saying that the State can use the power successfully or that its use will be a real benefit to its people. The same distinction appears frequently in the use of national powers. The Adamson law professed to regulate the hours of interstate railway labor, but in reality produced simply an increase in railway wages; it was held to be within the constitutional power of Congress by the Supreme Court in *WILSON v. NEW*, 243 U. S. 332, 1917, but its unfortunate and serious consequences were soon shown in the fantastic rise of railway operating costs. The public often confuses constitutionality and advisability. The Courts are seldom called on to decide the question of policy or wisdom. Their duties are to determine the meaning of an act and to decide whether it lies within the power of Congress or the State.

One cause of this craze for freak legislation is the extremely emotional and at times hysterical state of public opinion. Another is the lack of responsible control of legislation. The real legislative leaders have a definite interest in only a few bills, including those affecting the special interest which they represent. Responsible executive leadership in drafting programs of legislation would go far to solve the problem.

**The Police Power and Prosperity.** — We cannot close this consideration of the police authority without a word as to its true place in government. The wonderful results which seem almost within our reach by a proper use of this important protective power have led some of our people to believe that prosperity is only a matter of proper law-making, that if we choose the right public officials, elect good law-makers and appoint competent judges, our business and social problems will be solved and happiness and peace must reign within the land. This idea that the government, instead of the

man, is at the root of all prosperity is an extreme form of the social viewpoint. Frederick the Great, of Prussia, declared that *he* would make his subjects prosperous, whether they wanted to be or not. In some of the Central American Republics the more ignorant class of peons are persuaded that political liberty means freedom from work. So, among our own people there are numbers who firmly believe that if the National and State governments did their part, property would be fairly divided, each individual having a good share, and that wealth and affluence must prevail in all classes. They accordingly hold that the Police Power should not only protect and promote all forms of business and social improvement but must relieve the individual of all responsibility for his own success. The logical result of this reasoning is a theory of the State according to which all means of production, land, factories, and movable capital, must be taken over by government authorities and administered for the welfare of all the people. While very few Americans believe practically in this doctrine, some are already asking that the sphere of government operation be enlarged to cover such industries as mining, iron and steel making, warehousing, banking, insurance, transportation, and many other forms of industry and commerce.

For we must remember that the Police Power of both Nation and State is first and foremost protective. It can prevent dangers to health, safety, and morals, it can safeguard us against the grosser forms of exploitation — in short it can save us from the sacrifice of all our natural and human resources to the interest of a few favored, privileged classes or individuals, but it cannot guarantee each man success in the "pursuit of happiness;" it cannot act as an over-seeing providence to guard a man against all his own mistakes. What the Police Power must do is to train personal efficiency, open the doors of opportunity, mark out certain limits of social responsibility, and within these limits provide an open road and a favorable environment. Beyond that point each man must assume his own responsibility and work out his own salvation.

True it is, that government may and does affect the efficiency of business — that political changes affect economic conditions. But the economic conditions are fundamental and basic. We cannot create prosperity by purely political action. We cannot make all men rich by law.

## REFERENCES

As in Chapter 22.

*Labor Review*, Feb., 1923, Government Printing Office.

## QUESTIONS

1. Mention some of your most important constitutional rights. Place them in column form on paper.
2. (a) State opposite each right whether the Constitution guarantees it against the National Government, the States, or both, or against other persons.  
(b) Give any interpretation of each of these rights in a court decision which you may have studied.
3. Outline briefly the individualistic view of personal welfare and public policy. Explain its advantages.
4. Summarize the social view of this same problem and show how environment affects personal welfare.
5. Contrast the formal, legal view of liberty with the newer demands for economic and social freedom and give examples. Explain why persons who have complete constitutional liberty under our present conditions are dissatisfied with our constitutional and legal system.
6. What are your impressions as to the practical importance of the new demands for economic freedom?
7. Are the regulative laws which are now being passed in both State and Nation intended to protect us from government authorities or from the encroachment of private interests? Reasons.
8. Explain the doctrine of the police power, showing its origin.
9. Why does the police power necessarily come into conflict with the amendments of the Constitution?
10. Show the various possible ways of settling this conflict and state which one we have adopted and why.
11. Does the power apply to all persons and corporations? Reasons.
12. Upon payment of a large sum of money to the State treasury a Casino Company is given the right by a State law to conduct gambling at a large seashore resort in the State. Later, in response to public sentiment the State legislature passes a law forbidding gambling at any point within the commonwealth. The Casino Company protests on the ground that its business is expressly permitted by the former State law and that this right cannot be taken from it without violating the obligation of contract clause of the Federal Constitution. Decide with reasons and precedent.
13. The Grandfather's Rye Distilling Company is incorporated under a State law permitting the business. The Company's charter authorizes it to manufacture and sell spirituous liquors. Later a prohibition law is passed by the State legislature. Can the company be prevented from conducting its business? Reasons and authority.
14. The Acme Slaughterhouse Company is chartered by the State of Nebraska with the expressly mentioned right of slaughtering, preparing, and pack-

ing animals and meats for food and industrial purposes. It has many by-products, among others, glue. A small town grows up around its plant and many of the citizens complain of the odors from the glue factory. Can the local board of health compel the company to stop the inconvenience or discomfort to the citizens? Reasons.

15. The State enacts a public service commission law with authority to fix rates in public utility businesses. In order to prevent interference by the Commission, the steam railways of the State make 10-year contracts with their chief customers agreeing to carry freight at certain fixed rates. Later, when the State Commission seeks to change these rates, an objection is raised that such a change would be a violation of the obligation of contracts clause of the Constitution. Decide with reasons in full.

16. A board of health compels all persons in a given district to be vaccinated against smallpox. John Doe objects on the ground that his liberty is violated contrary to the Fourteenth Amendment. Decide with reasons.

17. The State passes a law limiting the number of hours of work for women in factories and stores. The All-Day Department Store employs Mary Ryan for a longer period than is permitted by the law. Both the store and Mary Ryan testify that their liberty and property are taken from them by the Act, the store because it will have to pay other persons for the rest of the day and Mary Ryan because she cannot earn as much commission as she otherwise would. Decide the case with reasons and precedent.

18. A State requires druggists to take out a license after passing an examination showing their proficiency. The Prescription Drug Store Company is fined for violation of the Act and appeals to the Supreme Court on the ground that its liberty and property have been taken from it by the Act. Decide with reasons and precedent.

19. An additional Act is passed requiring druggists before receiving a license to have served at least two years as salesmen in some kind of a retail store. Constitutional? Reasons and authority.

20. The State enacts a law limiting the hours of work of women and children to ten per day in factories, shops, and stores. Constitutional? Reasons.

21. Would such a law be constitutional if it included adult men in dangerous industries? Reasons.

22. In safe industries? Reasons.

23. The D. T. Distilling Company owned a large distillery in a State where intoxicating liquors may be sold on payment of a license fee. The State legislature passes a prohibition act reciting in the Act that the purpose is to reduce crime and immorality due to intoxication. The D. T. Company objects on the ground that its property is worthless except for purpose of distilling and that it will be an almost complete loss under the new prohibition law. Decide the case with reasons.

24. Congress passes an Act prohibiting the passage of obscene literature in interstate commerce or through the mails, on the ground of immorality. A large publishing company prints objectionable postcards, sends a shipment of the cards to a dealer in another State. The company is prosecuted under the Federal law and protests that its cards are its own property which, under the

Fifth Amendment it can use as it pleases. Outline the company's defense more fully and the decision of the court with reasons and authority.

25. Congress forbids the sending of lottery tickets in interstate commerce or through the mails. The Success Lottery Company ships its tickets from Sacramento, Cal., to Reno, Nev., and is prosecuted for violation of the Act. Its defense is that if the sale of lottery tickets is immoral, such sale took place within the State of Nevada and is subject only to the laws of that State. It is not subject to the regulation of Congress as the tickets were not offered for sale while in transit. Decide the case with reasons.

26. Could Congress forbid the passage interstate of persons as well as articles, for an immoral purpose?

27. Can the hours of labor for men be constitutionally limited to nine per day in the railway business? Reasons and authority.

28. Trace the growth of judicial opinion on the following question—Does the liberty and property clause of the Fourteenth Amendment forbid State regulation of employment contracts?

29. Mention several classes of workers whose labor contracts may be constitutionally regulated by the State because of special reasons.

30. A State passes a law forbidding the sale of imitation silk within the State unless the imitation cloth is so branded or marked or labeled, the purpose being to prevent fraud and deception. A retail dealer who is arrested for violation of the Act claims that the imitation silks which he sold were brought in from another State and were therefore in interstate commerce, having been sold in the original package. Decide the case with reasons and authority.

31. Would the decision have been different if the law had forbidden the sale of imitation silks under any condition? Reasons and authority.

32. May the State legislature pass any law that it pleases to remedy social injustices? Reasons.

33. Could it provide that all property must be surrendered to the State which would then divide it equally among all the people? Reasons.

34. A Federal law requires that sailors' wages must be paid within two days after the end of the agreement. A vessel owner complains that this is a violation of his liberty in making contracts and is therefore unconstitutional. Decide with reasons.

35. A State usury law provides that no more than six per cent interest may be charged on ordinary debts. Is this in violation of liberty and property under the Fourteenth Amendment? Reasons.

36. A corporation prosecuted under the Sherman Act claims in its defense that the law is unconstitutional because it prevents persons from making such contracts and agreements as they please and therefore violates their liberty and property under the Fifth Amendment. Decision with reasons.

37. A State forbids employers making contracts with their workmen to provide that the workmen will not sue the employer for damages if they are injured in the course of employment. Would such a law be constitutional? Reasons.

38. An employer makes a contract of this nature with one of his workmen and gives him \$500 to sign it. Later the workman is injured and sues his employer in violation of the contract. Is the contract binding?

39. Give Justice Holmes' doctrine of the police power in *NOBLE STATE BANK v. HASKELL* and explain the reasoning of the Court in that case.

40. Could the State in 1920 regulate the rental charged for houses? Reasons in full.

41. Prepare a short essay on the extent and nature of the police power showing its limits, its necessity, and its dangers and giving your impressions as to the extent to which individual welfare is dependent upon government action and individual effort respectively, with examples from your own observation.

## CHAPTER 24

### THE PARTY

**Party Usefulness.** — In the words of Edmund Burke, "Party is a body of men united for promoting by their joint endeavor the national interest upon some particular principle in which they are all agreed." Its chief usefulness is, in the words of A. Lawrence Lowell, that of "framing issues for the popular verdict." This does not mean simply the forming, guiding, and molding of public opinion. A party may often prefer not to deal with opinions but to arouse enthusiasm by some personal appeal of its candidates. It is interested in getting as many people as possible of widely conflicting opinions to support the party candidates. In theory it is the cooperation of voters to elect their candidates or to urge their political principles upon the government. In practice it is a close, compact organization of business interests, racial groups, and social — and unfortunately sometimes even religious — bodies. These are all cemented together by the party leaders and organizers through the use of every known means of stirring up the patriotism, the devotion, the fear, the greed, the hatred, and the prejudice of their members. No human emotion or quality is left untouched in the effort to attract and hold the party man.

We often criticize the party without remembering that there is nothing peculiar or unusual in it; it is one of the many forms by which men go in crowds, boys in "gangs," investors in corporations, and athletes in teams. Although a party is supposed to be made up of those who believe in its principles, and a change of principles is supposed to lead to a change of parties, in fact this rarely happens. The law of inertia holds men to their "crowd" even after they can no longer give enthusiastic support to its policy. We all dislike the mental effort required to make a series of important decisions and many of us dislike responsibility. The party worker relieves us of this burden and besides he is constantly at hand to strengthen the party's influence over us by his personal

relations with us, his help when he can offer it, and the thousand and one little services which involve contact between the individual and his government. The party grows to be a social as well as a political unit.

But in this growth, artificially aided and stimulated as we have seen, it often falls under the domination of a group, an interest or a clique which seizes control of the party machinery and uses it for selfish purposes. This parasitic tendency is everywhere visible in political struggles. It has produced that curious and interesting conflict between the organization of the party, its committees, its conventions, and sometimes its leaders on the one hand, and the vital force and life of the party, its real representation of the people on the other. Every human organization soon produces a crust of form, ceremonial procedure, and tradition which binds it and hampers it from adapting itself readily to new conditions or even carrying out its original purpose. This has usually been the fate of party organizations — they have become so rigid, so self-centered, and so exclusively controlled by a compact minority of the membership that they seek to become the master, not the servant, of the people. Once a party reaches this stage nothing but the chastening influence of defeat at the polls will bring it back to its true representative rôle. We shall accordingly consider first, the organization and second, the work of the party.

**Party Organization.** — The words "important business will be transacted and your presence is earnestly requested" now recur in the meeting notices of all types of societies, organizations, and even business corporations. The greatest railway company of the world, with over 140,000 shareholders, seldom has at its annual meetings one hundred persons in attendance. Let anyone who has sought to interest his fellow men and women in a civic cause, consider for a moment how small is the number of persons who will not only come to the first meeting but will stand by a project until it has been carried to completion, and he will understand why parties readily fall under the control of a few men.

In every social, religious, or business concern, even in every college or high school class, there are a few members who "stick," who can survive the monotonous routine of "proceedings," who attend meetings, who carry the burden and heat of the day, who bargain and deal with each other on the offices, who stand the



public criticism, furnish the programs and policies, and make the decisions for the masses of the membership. These men are "the organization." They were present in and ran the New England town meetings. They guided the ultimate democracies of Switzerland. They manage aristocratic, monarchical, and democratic forms of government. The names of political systems and institutions change — but the substance of "the organization" goes on as before. We cannot get rid of it because it is a part of the way men do things, by coöperation. We can overturn a particular crowd in control of a party, but we do it only by putting another crowd in their place. Let us therefore at the outset recognize the essential, vital rôle which must always be played by the party machine and bend our efforts rather toward securing the participation of larger numbers of people in it, rendering it more flexible and responsive, and bringing it closer to the standards of morality and efficiency demanded by the people. We shall now consider the more important machinery in this party organization and observe the way in which it is controlled or sought to be controlled by the party members, the work which it performs and its relation to those fundamental social, moral, and economic issues which arise in modern states.

**The National Committee.** — Each party nominates its Presidential candidate in a great national convention held in June or July of the election year. In all political gatherings and conventions, where hostile factions are struggling for supremacy, the control of the preliminary arrangements is all-important; the naming of the delegates, the decision of contests for seats, the temporary presiding officers, and the committees — all influence directly the chances of each candidate for the nomination. The seasoned politicians who act as managers for each candidate and his "boom," concentrate their efforts upon getting control of this preliminary machinery, the most important part of which is the national committee. This body carries on its work quietly behind the scenes. It, rather than the convention, is the real head and center of the party, organizing, financing, and managing the presidential campaign. It is made up of one member from each State and territory, chosen by the delegates of the State in the national convention. This illustrates how we often preserve the form of representative democracy while in substance we are establishing a thoroughgoing ab-

solutism or oligarchy. In form the body is only an obedient committee of the national convention — in substance it controls the convention. So sweeping are its powers that rival candidates within the party always do their utmost to gain its support, for usually he who controls the committee rules the convention.

1. *The committee decides the time and place of holding the convention.* Much depends on this. The marching throngs, the oratory, and the enthusiasm of convention time will do much to strengthen the wavering party allegiance of a large city and State. The minority party usually decides to hold its convention after the majority's in order to take advantage of any mistake and to draft a stronger platform.

2. *The committee makes the first decision on all contests for delegates' seats in the convention.* A preliminary roll of the convention must be made by some authority of the party and this work falls to the national committee. The roll is subject to revision, as is also the decision on contested seats — a committee on credentials is later chosen which goes over every contest and makes a report with recommendations to the convention. But this body seldom makes any radical changes in the report of the national committee itself, so that a victory in the preliminary decisions by the national committee is of the utmost importance. Clearly then, this gives to the committee the power to seat enough delegates provisionally, from one side or the other, to influence the vote of the convention. As a rule, partiality is shown but seldom enough to decide the nomination. An exception occurred in 1912, when there were 234 contests in the Republican convention, because of factional differences. The national committee worked over-time for a week on these contests and the decision so made had an important bearing on the choice of a candidate and widened the breach in party ranks, which afterward caused defeat at the election. The convention machinery thus falling into the hands of the conservative element of the party, the liberals were defeated on every proposal which they advanced in the convention. They remained in the body until the end, however, and then called a seceding convention and formed the Progressive party, carrying with them the bulk of the Republican vote in the election of that year.

3. *The committee chooses the temporary chairman of the convention.* The temporary chairman opens the proceedings, presides until the

permanent chairman is elected, and makes a lengthy address which is usually called the "keynote speech" of the party's campaign, because it is supposed to reflect the mature sober thought of the party leaders upon the chief issues of the election. It is during the preliminary manœuvres and the "jockeying for position" at the beginning of the race that both sides try their hardest to score an advantage. Motions are made to appoint special or temporary committees, points of order are raised and supposedly subtle devices are planned by the skilled parliamentary strategists of each faction to gain an advantage over the others. Since the temporary chairman must rule on these, his choice is always made with greatest care by the controlling group in the national committee, in order to maintain their supremacy.

4. *The committee watches over political conditions in all the States during the intervening 3 years when there is no presidential election; it also acts as an executive body to conduct all important party affairs during the interval.* The convention being a turbulent unwieldy meeting cannot carry on the continuous administration of the party affairs. We are apt to underestimate the scope of this activity, which must be conducted year in and year out by the organization.

Parties do not win great victories by a single burst of enthusiasm nor by a short campaign immediately before the election but rather by slow, persistent, and steady work in season and out of season and by the perfection of a system which brings the party workers into close personal touch with every voter. Such a system is not of mushroom growth; it must be developed with the same patience, energy, skill, and persistence that are needed to build up any business machine. This is the work of the national committee. We hear of it only amid the excitement of a presidential campaign, but its members are constantly in touch with the political conditions of every State and it is their business to know the effect of party policies on the political opinion of the country. The members of the committee are business men, lawyers, and political leaders of unusual administrative ability. The chairman of the committee must especially possess executive force and talent. When the campaign opens he establishes national headquarters in some large city, usually Chicago or New York and from this center keeps in touch with all parts of the country and especially with the leaders in each State.

5. *The first work of the national chairman is to raise funds for the campaign:* this is done both by letter and personal solicitation. In the campaign of 1908 a public statement of the principal contributors was made by both sides for the first time. This set a precedent which ought to be followed in every campaign, for that of 1908 was exceptional. The corporations of the country were prohibited by law from contributing to the campaign, and for this reason the expenditures from the national headquarters were probably less than in preceding elections. In 1920, the Republican National Committee spent over \$5,000,000, and had a deficit of a million and a half, and the Democratic Committee spent \$1,300,000 and had also a deficit.

When a great economic problem is at issue such as the currency, corporate regulation, or tariff, large sums are freely contributed by the business interests affected and for this reason a prominent business man of marked executive ability or a promoter is usually chosen, either as chairman or treasurer of the committee. He appeals directly to the "pocketbook nerve" of the manufacturing, banking, or other interest on the conservative side, or he originates a system of small contributions if the party be a liberal or a radical one. Owing to the strong public opinion against corporate interference in political affairs it seems likely that we are approaching an era in which party funds will be collected chiefly from small contributors. The newer parties have already established a plan of this kind, the most effective, in proportion to the wealth of its members, being that of the socialist party. In this organization a small fee is asked of every member as an ordinary duty of membership. The progressive party attempted to establish a similar method, but with less success.

6. *The national chairman through a Speaker's Bureau controls the orators and distributes funds in the various sections of the country.* It is also his duty to cooperate with the congressional committee which is composed of either a Senator or Representative from each State or territory in which the party is represented in Congress. The work of this committee is to conduct party campaigns in congressional elections and to cooperate in presidential years with the national committee of the party. It does this by selecting those States which are considered doubtful and sends them funds and speakers for their work. In some presidential elections it even

builds up its own party machinery in the doubtful States, reaching down into the counties and even villages when necessary.

7. *The national committee prepares a campaign text-book for speakers and public workers in the presidential election.* This text-book contains the platform of the party, the speeches of its candidates, and a large amount of statistics and information showing that the party in the past has stood for popular issues while its opponent has been guilty of grave mistakes.

8. *The national committee is authorized to fill vacancies in the ticket in case of death or resignation of any candidate provided there is not sufficient time to reconvene the Convention.*

**The Convention.** — The call for the Convention having been issued by the national committee, delegates are selected by the party in each State, the number being about twice the number of Congressmen and Senators to which the State is entitled. The Democrats choose their delegates at large in the State; the Republicans select their delegates, two from each congressional district, in primaries, or by a district convention, and four, at large, representing the Senators, by a primary or a State convention. The territories are each allowed two delegates by the Republican party and six by the Democrats. Hitherto neither party has shared its delegates among the States according to number of party members. A Democratic State has had as many delegates in a Republican convention as if it had voted solidly for the Republican ticket, and vice versa. This system of apportionment has worked serious harm in all the recent conventions of both parties. In the Republican convention the balance of power, varying from one-fifth to one-third, was formerly held by delegates from the South and Southwest where there are no Republican voters. To "corral" these delegates was the first effort of a prospective candidate, and the delegates from this section were "seen" and "conferred with" long before the convention opened.

*Change in Republican Convention.* — For years attempts were made to change this by giving to each State a number of delegates proportioned to the party's strength therein. In 1921 a partial change was adopted. First, the State is allowed, as before, two delegates for each Senator and Congressman. Second, it is given two additional delegates at large if it has cast its electoral vote for the Republican presidential nominee in the previous election.

Also a district delegate from each congressional district which had a party organization and which cast 2500 votes or more for the party's candidate for President or Congressman in the preceding election. Also additional district delegates for those districts in which it cast 10,000 votes or more for the party's presidential or congressional candidates or which elected a Republican Congressman.

**Presidential Primary.** — In the election of 1920, presidential primaries were widely used. The preference expressed by the voters, however, was not considered binding and was necessarily disregarded after the first ballots in the conventions. The primary was found to involve an immense amount of campaign work by every candidate who wished to place his name before the people in advance of the primary. Posters, pictures, and newspaper advertising were all used on a large scale and vast sums were employed. The expense of leading candidates for the Republican nomination ranged from \$100,000 to \$1,500,000. Even those who severely criticized the use of money in securing the nomination resorted to the same methods, the difference being one of degree only.<sup>1</sup>

**Work of the Convention.** — The convention serves many purposes:

It brings together the national leaders and workers of the whole party and stimulates them to renewed effort.

It makes the choice of the party's candidates although, as we have just seen, it is not the best means of doing so.

It drafts the party platform for the election.

It chooses the party authorities, especially the national committee, for the following four years.

<sup>1</sup> "Money counted heavily, for to canvass the greater part of the United States, even in the simplest homespun fashion, is an expensive job, and the mere task of getting one's name on the ballots in all States takes such a staggering amount of organization that none of the candidates achieved it. Myriad voters went to the polls only to find that no delegates favoring their candidate were running in the precinct. In some States the primary came too early; perhaps it was too early in all States, asking for opinion before opinion had taken form. . . . All told, the Republican primary performed important service in putting candidates through their paces, and inducing an earlier crystallization of public opinion. . . . It may be safely predicted that future years will see a progressive reduction in the discretion allowed the conventions, but the presidential preference primary will need a lot of technical improvement first." *National Municipal Review*, June, 1920.

It stirs up partisan enthusiasm and revives the flagging interest of the public. The convention represents the sentiments, feelings, the patriotism, and the eloquence of the party. There is a renewal of old traditions and, above all, an enthusiastic belief that the party represents some great popular cause. In this way the convention unites the contending factions, harmonizes discords, electrifies into new life the party workers, and sends every man home with an invincible determination to do or die "for the ticket." The balance of power in every convention of the majority party is controlled by office-holders and in both majority and minority conventions the Senators and Congressmen play an important rôle. The proceedings of the body usually follow the same general course:

1. *The preliminary decision of the national committee on the convention roll.*

2. *The calling to order of the convention itself by the chairman of the national committee.*

3. *The choice by acclamation of the temporary chairman who is decided upon in advance by the leaders in the national committee.* He delivers a lengthy speech which as we have seen is the "key-note" utterance of the campaign, from the viewpoint of the national committee.

4. *The roll of the convention is called by States, each State nominating one of its delegates for each of the following committees: credentials, permanent organization, rules, resolutions.* The committee on credentials is to decide officially the contests for seats in the convention, that on permanent organization nominates a set of permanent officials, that on rules proposes a set of rules for the parliamentary procedure of the convention; these are usually the rules of the House at Washington. The committee on resolutions drafts the party platform which is usually approved on the last day of the session.

5. *While these various bodies are preparing their reports the stream of oratory in the convention is let loose and allowed, in fact compelled, to flow uninterruptedly so that the convention soon warms up to the required fervor of enthusiasm.* During this period the friends of each candidate are on the alert to take advantage of every opportunity which may show the supposed popular enthusiasm for their hero. Tons of buttons are prepared bearing the pictures of their candidates and are distributed freely to every one in or near the

hall. Fans printed with the names of candidates are likewise circulated freely. At the slightest mention of a candidate's name in any speech, the most studied and systematic efforts are made by his friends to set up and maintain a prolonged applause. Parades about the convention hall are organized with brass bands hired for the occasion; spectators in the visitors' gallery are coached to make a demonstration at the proper moment. The observer finds it hard to estimate how much of this by-play is genuine and how much is machine-made. If the friends of one aspirant adopt these methods, the others must do likewise. This is especially noticeable in the cheering, which is organized with greater care than at a college football game. It must be remembered that the 1100 delegates themselves make up a goodly throng; then there are the alternates, all of whom are seated in the convention, and, in addition, there are 10,000 spectators ready and anxious to show their preference for some "favorite son" of their State. In the Democratic convention of 1912 Mr. Underwood's partisans demonstrated their feelings by cheering over 20 minutes for him. Naturally the Clark partisans must show their enthusiasm, which they did by applause and uproar for 1 hour and 5 minutes. This was a challenge to the Wilson adherents who organized and kept going their demonstration for 1 hour and 15 minutes. Mr. Bryan's name was cheered for 1 hour and 27 minutes in the convention of 1908. These are no mean feats when it is considered that the thermometer often registers well over 90 in the shade.

6. *The convention having "loosened up" somewhat the committee reports are next presented.* The committee on credentials reports as early as possible on the contested cases, usually following the lines laid down by the national committee. It is at this point that the "steam roller" appears amid loud cries of protest from the unseated delegates who sometimes call on high heaven to witness the injustice done them, and predict dire defeat for the party which permits such crimes. Permanent organization is effected by ratifying the report of that committee and electing the permanent officials.

7. *At the end of the second or third day the convention is ready for nominations.* The Democratic convention requires a two-thirds majority for this action. The candidates are proposed by a roll call of the States, the chairman of each delegation having the right to place a name before the convention. This right is usually waived



after the leading candidates have been presented and the roll call is then discontinued by common consent. Speeches are made both in nominating and seconding each name, and it is here that the gallery is called on to do its best. In the Republican conventions of 1904 and 1908 an immense number of tiny flags had been distributed to the spectators and these were suddenly waved at a given signal when Mr. Roosevelt's name was mentioned. The result was picturesque and effective. It led to similar manifestations in all the conventions that followed. The names having been presented, the States vote in alphabetical order.<sup>1</sup> Until 1912 the Democratic party used what was known as the "Unit Rule" by which all the votes of a State go to the same candidate. At the Baltimore convention this rule was broken and seems likely to be abandoned. It works much injustice and inaccuracy in expressing the real sentiment for the respective candidates. When it becomes clear that one of the candidates will gain the desired majority, all the remaining States turn into line and when the vote is announced the representatives of other aspirants move that the nomination be made unanimous. With surprising promptness an immense banner portrait of the successful nominee is then brought into the hall where it is displayed during the remainder of the convention.

8. *The vice-presidential nomination is made separately.* Great care is exercised to choose a nominee who will strengthen the ticket by attracting the voters from some doubtful State. Certain of these may be swung into the party column by the choice of a favorite son. New York, Ohio, and Indiana are often called on to furnish either the head or the tail of the ticket. Not infrequently the vice-presidency is also a sop thrown to the defeated faction in the party to enlist their support of the ticket.

9. *The platform is presented by the committee on resolutions.* It has a difficult task to perform. The document must take a definite stand on many important questions, yet it must be worded in such a way as to catch as many votes as possible. For these reasons it is usually made up of general statements which can well be interpreted to suit the wishes and hopes of all factions of the party.

<sup>1</sup> Often the contests for disputed seats are so close and the evidence on both sides so doubtful that if the committee on credentials wishes to placate both sides, it will seat both contestants and give each one-half a vote. This explains the fractional ballots which sometimes occur.

A glance over recent platforms shows a surprising unanimity verging on monotony in the methods of expression employed. The party "views with alarm" the evil machinations of its rival; it "deplores the lack of patriotism" shown by the foolish and blundering attempts at legislation, of which that rival has been guilty; it "points with pride" to the constructive efforts of its own followers and to the "sterling honesty and far-sighted statesmanship" of its candidates; it advocates "wise and well-considered laws" on disputed subjects; it demands "fearless honesty and rigid economy" in the public administration; nor does it forget to mention both the "toiling masses" and the "plain people" many times and with affection.<sup>1</sup>

<sup>1</sup> The following extracts from the party platforms of 1920 on some of the most discussed problems before the people at that time, show how closely the party policies coincide on important questions and how strenuously the parties try to show that they do not.

## REPUBLICAN

We recognize the justice of collective bargaining as a means of promoting good will, establishing closer and more harmonious relations between employers and employees, and realizing the true ends of industrial justice.

The strike or the lockout, as a means of settling industrial disputes, inflicts such loss and suffering on the community as to justify government initiative to reduce its frequency and limit its consequences.

But sound policy equally demands the early accomplishment of that real reduction of the tax burden, etc.

We condemn the unsound fiscal policies of the Democratic administration which have brought these things to pass, and their attempts to impute the consequences to minor and secondary causes.

We condemn the Democratic administration for failure impartially to

## DEMOCRATIC

Labor, as well as capital, is entitled to adequate compensation. Each has the indefeasible right of organization, of collective bargaining, and of speaking through representatives of their own selection. Neither class, however, should at any time nor in any circumstances take action that will put in jeopardy the public welfare.

The continuance in force in peace times of taxes devised under pressure of imperative necessity to produce a revenue for war purposes is indefensible and can only result in lasting injury to the people.

The Republican party is responsible for the failure to restore peace and peace conditions in Europe, which is a principal cause of post-armistice inflation the world over.

We pledge the Democratic party to a policy of strict economy in government expenditures, and to the enact-

10. *The election of the national committee for the ensuing four years is carefully prearranged and carried out with precision.* Each State is entitled to one member on this committee and the State leaders instruct the delegations as to who this shall be. The fiction is that the convention elects this committee. The fact is that the delegates from each State transmit to the convention the name of the man chosen by "the chief" to represent the State on the national party Executive. It is not a surprising coincidence that this name is usually that of the chief himself.

11. *The final action in the convention is the appointment of a notification committee which later, at a time fixed by the candidate, waits upon him and announces to him his nomination.* This is made the occasion of a lengthy address by the nominee, in the nature of a statement of his political principles, an elaboration of certain points in the platform, and sometimes his own independent additions to it.

On the whole the convention offers many picturesque, interesting, and dramatic scenes which lend intensity to our political life, but we may not escape the question — does it do its work? An impar-

enforce the anti-profiteering laws enacted by the Republican Congress.

We declare it to be our policy to encourage and develop water transportation service and facilities in connection with the commerce of the United States.

This Commission properly organized and its duties efficiently administered should afford protection to the public and legitimate business interests.

We favor liberal appropriations in cooperation with the States for the construction of highways, etc.

We indorse the principle of Federal aid to the States for the purposes of vocational and agricultural training.

ment and enforcement of such legislation as may be required to bring profiteers before the bar of criminal justice.

We call attention to the failure of the Republican National Convention to recognize in any way the rapid development of barge transportation on our inland waterways, which development is the result of the constructive policies of the Democratic administration.

The Democratic party heartily indorses the creation and work of the Federal Trade Commission, etc.

We favor a continuance of the present Federal aid plan under existing Federal and State agencies, etc.

Coöperative Federal assistance to the States is immediately required for the removal of illiteracy, etc.

tial examination forces on us the conclusion that as a means of choosing the party's candidate for the presidency the convention should be superseded by some simpler, more direct, and less easily manipulated method. All our political machinery today is undergoing the same searching test of effectiveness. There is no longer any reason why we should resort to unduly roundabout and indirect means. Nor is machine-made applause the best test of popular favor. Why not allow the voters themselves, by preferential ballot, to make the nomination?

**State Party Organization.** — The local machinery of a party is organized on its national model. In each commonwealth there is a State committee, a large body which seldom meets, most of its work being performed by the chairman. The State leader, who is usually one of the Senators, controls this committee completely. He consults with its members and with the local leaders from each county and congressional district, but all of the committee's resolutions, decisions, and other acts are approved by the leader before being presented to the committee itself. Nevertheless the committee may be important in times of emergency or crisis or factional warfare for control of the party organization. This is clear from a glance at its chief powers, which are: (*a*) to draft the platform of the party in the State, (*b*) to fill vacancies which may occur among the party candidates shortly before election, (*c*) to conduct correspondence with the various local, county, city, and congressional district committees and with the national committee.

This latter authority is much more important than it seems — it gives the State committee power to determine which is the officially recognized party head in any local district. The local office-holders and those who want office are continually bickering for control of the local party organization. In a dispute between two rival factions the State committee makes an authoritative decision and by this means is often able to put down an insurrection in the party. (*d*) It is in the State committee, too, that the slate of delegates at large to the national presidential convention is usually prepared, and advice given to the leaders in congressional districts as to the choice of their delegates to the convention. The State committee is chosen either by the county committees — one member from each county or by direct primaries, according to the State law.

These primaries also nominate candidates for State and local offices but where conventions exist the latter make the choice. (e) One of the less important functions of the State committee about which, however, much enthusiasm is shown, is the indorsement of the national platform in presidential and congressional elections. This is done by a series of high-sounding resolutions which are intended for "domestic consumption" among the voters of the State. (f) The collection and distribution of funds for the State campaigns. Many State laws now provide for the publication of receipts and their sources, and of expenses for all purposes connected with nominations and election campaigns.

**Local Party Organization.** — Whether conventions or direct primaries are used, there are always certain important committees for control of which the rival factions struggle: (a) the city or county committee, (b) the ward committee, and (c) the district committee.

The city — or in the rural sections the county — committee, is a body of 40 or 50 men chosen by the ward committees or elected by the voters at the primary. Its powers correspond to those of the State committee, and it uses to the full its prerogative of recognizing and supporting the local division committeemen and leaders and thereby determining who shall have the official party control in each locality.<sup>1</sup> It is the city committee which "steam-rollers" all dangerous independent leaders within the party fold. Its control of the funds also is unquestioned and despite laws requiring public statements of receipts and expenses most of the city committees today are still irresponsible; they are often accused of misappropriating a part of the funds which pass through their hands.

The ward committee or, in the rural sections, the township committee, is chosen directly by the party members at the primary and is a miniature city committee. Under it come various district committees of which there are often 30 or 40 in a city ward, according to the density of the population. These are also chosen by the voters and it is to these latter that the real work of getting out the

<sup>1</sup> A faction which is not "recognized" by the city committee has no official party standing, its leaders and workers are dismissed from the city offices, and being separated from the "pay roll" it speedily languishes unless it is based on something stronger than the favor of the organization; or can secure extensive public support.

vote is delegated. Each district chairman has a certain sum of money allotted to him by the county committee; he also directs the party workers under his control. The central county or city committee is kept well informed of the conditions in every subdivision at all times. The personal interests and affairs of each voter or the means which may be used to influence him must all be familiar to the local workers in the party organization.

For this purpose each district is divided into small voting divisions or precincts under the control of responsible workers and it is the duty of these men to keep in the closest possible touch with every voter in the division. The worker keeps a book giving the name, residence, and occupation of his neighbors and he carefully records before election time the way each man is expected to vote, with a list of those who are doubtful. If this work is well done the city or county committee is able to report to the State committee the apparent result of the election over a week before it takes place.

**Personal Work in the Party.** — We must understand clearly that the work of the party is after all personal in its nature. The voter must be appealed to by a personal talk and through direct influence rather than by circulars or campaign letters. The party is therefore built upon the division worker as its foundation stone. If he is active and intelligent, and if he keeps in friendly touch with the voters frequently from one election to another, the party does well in his division. The committee chairmen recognizing this, hold frequent meetings with the workers to keep up a spirit of watchfulness and devotion. Observe the clever way in which the worker is made to feel that he is responsible for results in the following speech delivered before the city committee in one of our largest municipalities, by an exceedingly capable and "practical" leader:

"We just went through a campaign in the last primaries, which shows something lacking in some sections of the city which demands reconstruction. Part of that condition is due to some men in this room. No man here is better than his fellow, and we demand the same thing from all, party loyalty and the polling of the party vote at every election.

"I want to say that in the twenty-one years that I have been in politics I never saw a Moses come down and assume leadership. That must come from work and the support of machinery all along the line. We have nothing really to fear in the coming election if

that loyalty is evinced and the men stand by their guns. We have a great asset in the honest and straightforward administration at City Hall. At the head of our ticket is S. P. R. who is a man for whom the workers can ask support fearlessly. He has shown fidelity and uprightness in all his acts and proved himself a most fearless official."

Taking up an analysis of the causes of the revolt at the last primaries, the speaker concluded :

"As a result of experience some ward leaders imagine that they dominate the entire locality. As long as they hold themselves above the people and do not continue the work necessary at election times and throughout the year, so long will they be sure to get such a jolt as they received at the last primary. Let us remember that we must not treat with disdain or pass over men who said something harsh against us in the past. If we go to the offices or homes of these men and discuss conditions with them instead of having their opposition we will have their support. That is one thing we have got to do to win in November. All kinds of criticism have been made against us. There is no act of mine that I am ashamed of. I and all of you weigh us against the opposing leaders. To-day we find the same old outfit attempting to revive the same old conditions of a few years ago. So what we must do to overcome this is to get out among the people, learn their needs, what they are complaining about, and do what we can to rectify conditions. Office-holders — men who owe their livelihood to the organization — have been derelict. It is up to the ward and city committeemen to make the office-holders recognize the duty of maintaining the organization. If they go along on that platform and do what is required of them, we will have a larger majority for the ticket in November than before.

"In one division there were twenty-four office-holders and only nineteen votes were cast for the head of the ticket at the primary election. That condition cannot remain. In some sections of the city there are 6000 office-holders. They did not come up to their duty in the primary, while 4000 were required to carry the ticket to victory." Before the meeting adjourned the leader cautioned the committeemen to be alert during the summer. He requested that they leave their addresses if they left the city, as it might be necessary to summon them at any time.

**The Party's Care for Its Workers.** — There is a popular impression that the party takes care of its workers by giving them government positions, but this is only partly true. The advance of the civil service movement has limited the scope of party resources in this respect and the leaders find it necessary to cast about for outside positions for their subordinates. There is a rich field of opportunity in the many corporations which have city contracts or franchises or which manage public utility businesses such as lighting, street railways, and the like. Factories and large industrial plants may enjoy some special privileges or protection from the politician or may hope for favorable ordinances and laws which the leader can give. To all of these the recommendations of the party leader for the employment of his men are more or less a command. The men so placed have not the precarious tenure that they would have in a purely political job and it is the practice of many corporations and business concerns to deal with the leaders of *both* parties, following the principle of "safety first."

Then, too, when a party worker falls upon hard times he may go to his local leader or feudal superior and secure a loan, a new position, or a job for some member of his family. When trapped in the meshes of the law a word in season spoken to the committing magistrate by the chief will secure his discharge and later his immunity from further prosecution. This beneficent protective influence follows him even to prison, if he is so unfortunate as to be convicted; large numbers of politically befriended criminals are allowed greater privileges while in jail and often escape the full service of their term. Nor does the party worker's special privilege stop here. When he is on the "out," that is, when the opposite party is in power, he will nevertheless be treated with greater consideration than an ordinary citizen. It is an undoubted fact that a minority party worker going into the city hall or county offices can secure favors from his political rivals which are not granted to others. Every successful leader carries on his roll of the faithful, the names of those who have fulfilled instructions. Though the popular indignation of the moment may condemn them, the policeman who commits an illegal act in the course of his party "duties," the ballot-box stuffer whose zeal for the party's success leads him to be caught, the minor henchman who, taking his instructions too literally, intimidates the voters of a rival faction—all these men may safely reckon



on the leader's utmost protection and what is more important, a later reward in the shape of some suitable office when the leader returns to power. The public wrath is fleeting, the "organization's" care of its own is tireless.

But let it not be supposed that this faithful care and intense loyalty are personal in their nature; far from it. They represent the carefully thought-out policy of an intelligent self-interest. Once the leader has permanently lost his power all his subordinates must perforce flock to the new successor and tender their services like vassals to a new feudal chief. The boss is absolute while he is boss but let him lose his ability to furnish jobs and funds and he will at once realize the truth of the aphorism that "there is nothing so dead as a dead politician."

**Sources of Party Funds.** — The chief sources of supply for the party treasury are: (a) assessments upon office-holders, (b) voluntary contributions from large "interests" to the party, and from candidates, and (c) "tribute" exacted by the management from the underworld and from corporations which require special privileges and favors.<sup>1</sup>

**Underworld Tribute.** — Both contributions and taxes on office-holders are totally inadequate to cover political expenses. From the wasteful and costly way in which the "organization" does its work there must be some additional source of revenue. This is found in "tribute." The extent to which it may be levied is limited only by the conscience of the organization — and it has a conscience — and the complacency of the public. There are always contractors who want municipal and other public work on street and road repairs, water supply systems, buildings, sewers, etc. There are great public service corporations, street and steam railways, gas

<sup>1</sup> On this interesting subject Henry J. Ford in his *Rise and Growth of American Politics*, page 323, says, "The cost of party subsistence cannot be computed. Exact data are unattainable. Although various estimates have been made, they are all worthless and are all probably below the mark, although some of them mount into many millions of dollars. It is quite probable that party organization costs more than any one of the regular departments of government. It is a fond delusion of the people that our republican form of government is less expensive than the monarchical forms which obtain in Europe. The truth is that ours is the costliest government in the world." Mr. Ford is a vigorous defender and apologist of modern parties and his view as to their extravagance is probably correct.

companies, electric light and power concerns, all of which want to erect their poles, lay their conduits and pipes, and secure permission to transact business within the city or State. There are countless small dives, speakeasies, gambling places, and the resorts of vice which are operating contrary to the law and which need "protection" from police raids. Not a dollar collected from any of these sources is legally paid. Yet a continuous series of revelations in large cities from New York to San Francisco show that the amount so turned over to individuals and to party agents must reach a staggering total — much of it paid as personal graft. A great deal leaks through the collector's fingers into devious channels of officialdom but some of it reaches the party treasury and forms either directly or indirectly one of the chief means of rewarding the party workers. Looking at it from a slightly different angle, the party *asks* contributions from the office-holders and the protected, vested interests — it is *offered* tribute by the underworld for freedom from prosecution, while individual vampire leaders demand and *take* from both legitimate and illegitimate enterprises their personal quota. This process goes on until either the underworld revolts, as in the Rosenthal case in New York, or through some chance combination of circumstances, an investigation into political graft is ordered and the public has proved to it what it has for years suspected or known. The whole sordid list of sources of tribute is then laid bare.

We often make the mistake of thinking that the party leader is necessarily allied with evil influences and prone to evil. In truth he regards himself as the manager of a political department store. The manufacturer wants quiet and order about the factory, police protection in time of trouble, and occasionally the eye of the law to be closed at minor infractions of the health ordinance, or a word to the factory inspector.

The merchant wants "reasonable consideration" by the tax appraiser and a lenient construction of the police ordinance on obstruction of the sidewalks, also a liberal interpretation of the fire escape laws; the church people want the grosser forms of licentiousness and gambling stopped and the underworld wants protection. To all of these demands the political leader, like a good store-keeper, supplies his wares. True, at times their requirements conflict — the manufacturer wants protection for his workers during a

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strike while the union wants freedom for a little rough house with the "scabs." The church people find gambling and vice have reached a point of scandal during a convention or other public occasion, while the underworld demands its chance to reap a harvest, or more politely expressed, it protests against "driving legitimate business away from the city by Puritanical restrictions of individual liberty." Here the leader must think and think quickly. He can usually appear to give both sides what they ask and receive in return the support, moral or more substantial, of each. His personal preference is for peace—let everyone have what he wants. The leader wants to be reasonable and to live in harmony with all while receiving support or tribute from all.

To many these conditions of party finances present a hopeless picture of decadence, but on the whole there is every reason for encouragement in the rising standard of honesty and a growing public unwillingness to be hoodwinked by party shibboleths and slogans. It is impossible to wax enthusiastic or remain servile under the direction of party leaders who are known to be supported by such questionable means. Political organizations, particularly in the local governments, which are so unfortunately based on illicit sources of revenue, cannot command the same unquestioning obedience from the masses of the voters as before the disclosure of their predatory nature. The change in party standards is slow but it is undoubted and with every demand for the increased efficiency and greater usefulness of our governments, a lever is placed under the party system to raise it towards a higher standard of honesty. *In all this change we must remember that the improvement is not wrought by stronger prohibitions of dishonesty nor heavier penalties on political crime, but by the action of new forces which attract public attention to higher and more useful standards of government.*<sup>1</sup> The demand for clean streets, cheaper light, better car service, more efficient schools, purer water supply, and other improved living conditions is incompatible with and strongly hostile to loose, corrupt, and dishonest party methods. It is not the stronger prohibition of corrupt partisanship but the new ideal of government usefulness, which is raising the party from its ancient conditions.<sup>1</sup>

<sup>1</sup> Professor Ford believes that the party's lack of responsiveness to the popular will and its exclusive control by professional politicians, and by corrupt elements

**Public Regulation of Party Finances.** — The same popular sentiment which decreed that party organization, committees, and primaries must be subject to government control, has led to the passage of numerous acts providing for publicity of campaign accounts and forbidding corporate contributions to party funds. Most of the States have laws containing both of these provisions.

They forbid any corporation except those formed for political purposes, to "pay, give, or lend, or authorize to be paid, given, or lent, any money or other valuable thing belonging to such corporation to any candidate or to any political committee, for the payment of any election expenses whatever." The spirit of the law, however, is evaded by the heavy contributions from the directors and chief stockholders of the same companies which formerly contributed.

**Party Clubs.** — An important aid in retaining political allegiance of members is the strong influence of social connections and personal friendships within the organization. This is noticeable in the large cities where the political leaders form party clubs which play an active and continuous rôle in the social life of every neighborhood. These clubs offer an inexpensive and attractive social center for the men of the district, and it is made the duty of every party worker to frequent them regularly and cultivate the acquaintance of his neighbors in them. The dues are not high, nor are the rules oppressively strict. Here one sees the local leader in his most accessible mood, and here, too, one may rub elbows with the division and precinct workers and call them by their first names. The club is the great clearing-house of political information and rumor; it serves all the purposes of a trade union or a business or professional body and keeps the younger element interested in and acquainted with their fellow workers. It helps to make "the party" a living reality.

But in spite of the undoubted strength of the system that has been so shrewdly built upon this basis, party allegiance is rapidly weakening. It is a peculiar result of modern inventions that human

masquerading as friends of the party, are chargeable to our failure to make the party responsible, by giving it full control of the government. We should unite executive and legislative authority so that the same persons would wield both. He holds that if we gave to the party majority control over both these departments, we should force responsibility on the party and by the same act place it under popular control.

interests, occupations, and pleasures are rapidly broadening. The former narrow and intense interests no longer control our actions. We are still influenced by the strong personality of a great leader, but we refuse to follow with enthusiastic, unquestioning obedience the commands of any party organization. Our broadened horizon has clearly led us to do an ever larger share of our own thinking. The old parties demanded Stalwarts; the new conditions are producing Independents. It is no longer a shock to learn that our neighbor has changed his vote. The party is being called on like ordinary, commonplace institutions, to produce results.

**The Rise of Party Issues.** — Party strength in any section is due to its espousal of the business and social interests of that section. The great manufacturing regions of the Mississippi Valley, Pennsylvania, and New England demand the protective tariff; the farmer requires either protection for his products or a reduction in the tariff rates on the manufactures which he buys; when his lands are extensively mortgaged in times of depression he wants cheap money to pay off these debts; the sugar-cane planters of the South and the beet growers of the central West want foreign sugars excluded; in the South the race issue is the basic factor; race questions are also uppermost on the Pacific Coast; in many sections the people demand low freight and passenger fares and public utility rates; the need of renewed trade with Europe and the complete change of our political attitude toward that section has rapidly implanted itself in broad sections of the country. Here are the "makings" of political differences and alignments.

In reality then, party issues are only questions of business, race, or social condition, transferred to the field of politics.

**Rise of New Party Leaders.** — What makes a new era in politics? What is the real importance of a new leader? We like to think that all political progress is the work of great personalities who "create" new principles; we commonly say that Jackson suppressed Nullification, that Clay produced the Missouri Compromise between slave and free States, that Lincoln abolished slavery, that McKinley established the gold standard, and that Roosevelt created our policy of government regulation; but history gives us a different and far more interesting view of the facts. What really happens is that a gradual shift of conditions produces some great new need which is at first only dimly felt by the

people. Some politician possessing a rare combination of qualities seizes upon it. He must have unusual foresight to grasp the future importance of the need, pronounced courage and decision of character to espouse it with uncompromising vigor even at the expense of momentary unpopularity, and a keen sense of the political "grand stand." Many politicians possess this last quality but few combine with it the first two. When such a man grasps the true significance of a new idea and states it with force and clearness so that it can be understood by the masses, the "idea" becomes an issue and the politician a leader. He does not create the new thought but his clearness of vision, strength of purpose, and close touch with the people enable him to see the need of the hour, to make it an issue and to lead a political movement for its success. Lincoln did not invent a new idea; he saw, with the eye of a prophet, that the slavery issue could not be compromised. The whole territory of the Nation must be either slave or free. McKinley did not establish the gold currency. When first nominated in 1896, he was inclined to avoid the issue. But becoming convinced that there could be no compromise he enlisted with all his energy and enthusiasm in an educational campaign for the gold standard. Roosevelt was not the first to suggest a strong Federal regulation of corporate affairs, but at a time when popular thought was chaotic and unformed he grasped this solution firmly and by his wonderful genius in guiding and molding public sentiment, he led the way towards a solution. No one doubts where our presidents stand on any important problem. Our new leaders in all parties today have less desire to "wobble" and to please all men by compromise, and more willingness to face rather than dodge an issue. We are developing a more straightforward and forceful type of politician because our political questions require more positive action.

**Party History.** — The natural line of division between parties is between the conservative and the advanced or liberal-radical groups. This has proven true in the long run of all the great permanent parties of the world. Among the conservative group are usually found the bulk of the landowners and their adherents together with the representatives of large corporations, a great section of the middle class which is naturally conservative by environment, and many farmers. In the liberal class are usually found a

large group of professional and commercial interests, the higher type of trade unionists, and, in general, the small property holder. On the outer fringe of this group are the radicals representing the people with little or no property, the unskilled workers, and those who for one reason or another have been neglected by society or consider themselves such. These latter have nothing to lose and much to gain by any change in our social organization. They espouse the "isms" with glad enthusiasm. Parties never divide solely and exclusively along these lines, but an examination through a long period shows this to have been the main line of cleavage. Our first parties, the Federalists and Republicans, divided on the issues of strong versus weak government, foreign policy, and business interests. The Federalists led by Hamilton favored broad construction to establish a strong national government, also the development of industry and commerce. The Republicans, led by Jefferson, wanted a narrow sphere of government, strict construction of the Constitution, and an alliance with France against England. Later the slavery issue emerged, and in 1848 a free soil party was formed which in 1856 became the present Republican party, the former Republicans having meanwhile assumed the name of Democrats. These latter represented the more conservative element until about 1890.

Since the Civil War the Republican and Democratic parties have divided chiefly on the tariff and State's rights but these issues have now been placed in the background and the natural division of parties has disappeared. Both Democrats and Republicans have split internally into liberal and conservative groups. As it is impossible to maintain this division within the party for any length of time we may expect to see one party becoming conservative while the other takes up a radical-liberal platform. The great questions now facing us are: international leadership, employment and labor relations, a modern system of education and industrial training, a nationally planned system of communications, and a complete shift of government activity from defensive to productive effort. These and a host of similar issues are spread out before the two parties like a promised land, inviting them to enter and possess it.

**Blocs.** — Into the midst of these constructive problems there sometimes plunges a purely negative issue which for the moment

confuses and generally overturns all normal, healthy progress. Such an issue is usually based on hatred, bigotry, fear, and distrust. Although they appeal to the baser, less noble traits of human character their influence is none the less strong; at times they arouse the fiercest violence and ferocity of political life. Examples abound in our history, such as the bitter racial antagonisms formerly existing in the South, the anti-Masonic and Know-Nothing parties of the East, the sand-lot meetings and the anti-Chinese movements of the Pacific coast, more recently the anti-Japanese movement, and the Ku Klux Klan. All these are negative because they do not propose a constructive solution of any great public question. They incite to hatred just as the I. W. W. and the American agents of Russian communism seek to stir up class hostility and violence. Because they are negative they burn intensely for a short time but they cannot in the long run carry the good sense, patriotism, and sober approval of the people as a whole.

Somewhat the same weakness attaches to the "blocs" which have now formed in many parts of the country, although these seek a positive self-interest. The manufacturers were first in the field with an industrial bloc which was able to secure a rearrangement of our tax system to meet its special desires. Next followed the farmer's bloc which has already obtained many important concessions and is in a fair way to secure more. Following this came the labor bloc demanding freedom from the law and exemption from legal responsibility for injuries inflicted upon others. There is even the possibility of a woman's bloc whose professed purpose is to free woman from those legal and social disabilities which have heretofore hampered her. There are also religious and moral blocs each seeking either the adoption of some special program or the creation of some special privilege. As these blocs multiply they become less dangerous because they often counteract each other. They are the evidences of a transition period in which the older issues are dying out or assuming new forms.

**Minority Rule.** — One of the inherent weaknesses of all party action is the large and disproportionate influence which small organized cliques and groups within the party may exert. If these cliques are willing to move freely from one party to another and thus shift the balance of power in order to reach their desired ends, both parties may cater to them by passing legislation *which a vast*



*majority in both parties do not approve.* The intensity of feeling and strength of organization of these small groups may in this way produce minority rule on certain issues, as both Lowell and Lippmann have shown. In England in 1906 there was a large majority in both parties who apparently did not believe in exempting trade unions from responsibility for injuries which the unions inflicted on others. But both parties needed the labor vote and both allowed a bill to become law which so exempted the union. In America in 1912 the same took place when neither the Republican nor Democratic parties possessed moral courage to prevent adoption of the clause in the appropriation bill for the Department of Justice providing that the funds then being appropriated should not be used to enforce the Sherman Act against labor unions and farmers' associations. There can be no doubt that the vast majority of the people would refuse to create such special privileges under the law, yet there were sufficient numbers of labor and farmers' votes which might be shifted from one party to another to change the balance of power. This is one of the dangers of bloc politics. It inevitably leads to special privileges for minority factions.

**Cycles of Public Opinion.** — If all voters followed their own interests or those of the Nation intelligently at all times, political progress would be fairly steady. As our economic experts now profess to foretell the growth, culmination, and decline of periods of prosperity, so we could probably foretell the direction in which political opinion would take its course and the goal which it would reach at a given time. But as there is no "economic man" such as the older political economists imagined, so there is no political man whose movements may be foreseen and calculated like the hands of a clock. The successful politician is happy if he can tell, one or two years in advance, the general direction of public thought and can prove that he is a "leader" by following it. Political scientists, however, can say definitely that public opinion and with it the party vote move in cycles and that these movements correspond to certain other economic and social influences which may be weighed and appraised. The general public believes that political changes are caused by economic depression — that is when people have no money they blame the party in power and vote against it.

Quite the contrary is usually true. In hard times the one thing that the people do not want to hear about is politics. Outside the farming districts it is impossible to change party control of State or National government, to secure a new city charter, or to revise a State constitution in any period of extreme depression. The people are too interested in hunting for work or reducing expenses, to consider politics. Most of us regard politics as a diversion rather than a regular part of the day's work.

With every business depression the number of voters who go to the primaries and to the final elections, falls to a minimum. Recent attempts to amend the constitutions of New York, Pennsylvania, and Illinois corresponded to periods of hard times and all of them failed. Of State legislation the same is true. When business is slack, party control is strong. No city reform movement can muster the votes in hard times that it does in periods of prosperity. A line showing the ups and downs of economic expansion would probably show the same of political interest. This is not true of the farmer. In times of depression he readily grasps at legislative remedies. In the great depression of 1896 he seized upon the free silver issue in order to pay his mortgage interest with cheaper money. In 1921-23 he grasped at a whole series of legislative relief measures from the tariff down to exemption from the Sherman Act, in order to remedy the drop in price of wheat. But other classes steadfastly refuse to go to the polls at these times and demand rather a chance to work, to produce, to sell their goods.

Let factories fill up with orders and the stores with customers, let the demand for labor expand and the standard of living rise, and immediately political discontent rises. It is now a well-accepted principle of economics that in times of prosperity certain human traits are strongly manifested while their opposites appear in times of depression. In the words of Roger W. Babson, a well known economic statistician, each era of hard times may be divided into two halves, in the *first* of which the people suffer from extravagance and corruption which existed in the *latter* half of the preceding prosperity era. Similarly, the period of prosperity is divided, and during the first half the people reap the benefits of the economy, industry, and righteousness developed during the hard times just preceding. The effect of these changes upon politics requires no comment.

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## QUESTIONS

1. Secure by letter to the Secretary of the State committee of either party in your State the following information:
  - (a) How many delegates is the party in this State entitled to in the National Convention?
  - (b) How are they chosen?
2. How is the national committee chosen and why do candidates for the party nomination seek to control the committee?
3. What is its exact power over contesting delegations for seats in the convention?
4. How are funds raised for presidential elections?
5. What are the other powers of the committee?
6. How are convention delegates apportioned among the States?
7. Explain how the apportionment system makes trouble for the convention and the party.
8. How could the system be improved? How have the Republicans changed their apportionment?
9. Explain the chief features of any State presidential primary act.
10. What are the defects of the presidential primary?
11. What do you consider the main work of the national convention?
12. Explain the influence of office-holders in the convention of the majority party.
13. Outline the usual order of business of the convention.

14. Explain the importance of the choice of the chairman.
15. Describe the practical methods now employed to impress the delegates with the popularity of a candidate.
16. What is the work of the committee on credentials?
17. How can a delegate have half a vote?
18. What is the Unit Rule and why has it fallen into disfavor?
19. Explain the methods followed in the preparation of the platform.
20. Explain the guiding principles followed by the leaders in selecting the nominee for Vice-President?
21. Give your impressions of the usefulness of the national convention.
22. Resolved that each party should nominate its candidate for the Presidency by a preferential primary system. Take either side.
23. How is the State committee chosen? Is it the real or nominal authority of the party and why?
24. Explain its chief powers and duties?
25. How can it suppress independent tendencies in local divisions of the party?
26. Are candidates for State offices nominated by convention or primary in your State? Summarize the law.
27. Outline the city, ward, and district authorities of the party.
28. What are the powers of the ward committee?
29. Who does the work of getting out the vote?
30. How far are the various committees held to strict accountability for the funds which they handle? What does your State law provide as to campaign and publicity law?
31. Explain the methods used in getting the voters registered and voted.
32. Explain the point of view of the leader in his conference with the members of the committee.
33. Why do men of intelligence often submit to objectionable leadership in the party organization?
34. Visit a political club and report on its constitution, by-laws, and the social and political features of the club.
35. Explain how party platforms and business and social interests are connected. Examples.
36. Why have so many new leaders and new issues come into the political arena in recent years?
37. Give your impressions of the influence of personality and of business and social conditions, respectively, in the rise of party issues.
38. Why are positive leaders superseding the older, issue-dodging type of politician?
39. Resolved, that I can secure greater progress for the community by submitting to the rules and leaders of the two older parties. Defend either side of this question.
40. Prepare an essay on "The Real Value of the Party to the People."
41. Explain how any business question has become a party issue.
42. What do you understand by a negative issue in politics?
43. When men are out of work they are discontented with the party in power

and a change in the government results. Do you agree with this? Give an example.

44. By forbidding corporation contributions to political parties the law prevents the undue influence of big business upon the party. Do you agree? Reasons.

45. Why does a voter often stay with his party even when he does not approve its program?

46. Describe the State organization of a party from the lowest to the highest authority.

47. If you were running for an office would you prefer to try for the party's nomination under the convention or the direct primary system? Why?

48. Explain and illustrate how the party takes care of its workers.

49. The political boss of a city is allied exclusively or chiefly with its evil and corrupt influences. Is this correct? Explain and illustrate.

50. Prepare a brief report on the issues represented by any two opposing politicians in your State and show how these issues are connected with the business or industry of the State.

## CHAPTER 25

### PUBLIC OPINION

If we scratch beneath the surface at any point in our government we come upon "public opinion." The Acts of Congress, the orders issued by the President, the decisions of the courts, are only the results of this force, they are the mere surface of our political life. Underneath all these is the real, vital power itself. How does this opinion arise? How is it expressed? In what way does it act? The answer to these questions shows us some of the most interesting features of our political system.

Modern writers have shown that a real public opinion can only exist under certain conditions, among them being:

(1) That both majority and minority agree that the subject is one within the sphere of government, and that the government has authority over it. A mere majority is not sufficient to form public opinion on every question. As President Lowell has pointed out — two highwaymen and a belated citizen may meet in the middle of the night and the former may take from the latter his watch and valuables. This does not mean that public opinion among them approves a redistribution of property. Our people hold that religion should not be supported by the State nor should sectarian doctrines be taught with the aid of public funds. If any sect secured temporary control of the government it would be idle to claim that public opinion favored the establishment of that sect, when in truth matters of religion were by general agreement outside the power of government. If in some temporary crisis an army of unemployed seized political power and decided to abolish all private property we could not truthfully say that a real public opinion to this effect existed any more than we could say that the triumphant orgy of a lynching mob represented a public opinion favoring murder.

(2) There must also exist, in order that we may have a real public opinion, some considerable degree of harmony and concord

in the attitude of different groups of people within the same nation towards each other. If violent race, class, or religious antipathy arises, destroying all coöperation between these groups, public opinion ceases to exist. The efforts of radical leaders to incite to sabotage, to create a bitter class feeling and hostility, must be set down as palpably destructive of public opinion.

(3) Another essential is adequate diffusion of information on public questions. Without this, as both President Lowell<sup>1</sup> and Mr. Lippmann have pointed out, there can be no real opinion but only prejudices, dislikes, emotions, and vague beliefs.

Mr. Lippmann in his *Public Opinion* even goes so far as to say that we must have in America a complete reorganization of the fact- and information-distributing agencies of the country. The true duty of the press, he holds, is not to form opinion but to furnish the facts on which it is to be based, although this view is not generally held.

(4) Again, public opinion can only exist on certain limited types of question of a general, nontechnical kind. The complexity of government is increasing so much faster than the spread of knowledge on government questions, that we can find a real opinion on only a few questions. Lowell points out that a hundred years ago when only the three r's were taught in the public schools, a farmer might have been a fair judge of the general qualifications of a teacher. Today with the broader ideas of education, the selection of good teachers is a matter for the expert. A general public opinion cannot determine the exact way in which subjects shall be taught or interoceanic canals dug, or roads built, but only the general outlines of policy on these questions.

When we speak of public opinion, therefore, we are dealing with something which is hard to measure accurately but which does appear to run in currents and tides that may be clearly seen. It is real in so far as it is enlightened, self-restrained, and truly public.

**The Private Association.** — Next to the press, the chief means of organizing and influencing American public sentiment today is some association or society. Here we find the prime difference between the politics of the Anglo-Saxon and other races. The

<sup>1</sup> *Public Opinion and Popular Government.*

Anglo-Saxon, is given to tolerance and coöperation with his fellow men in every department of life. "Team-work" is almost instinctive with him, he organizes clubs, committees, and societies and devotes himself to their purposes with a readiness, skill, and persistence that mark him as a special type. Whether in affairs of the church, the shop, or the athletic field, the Saxon has through long centuries developed traditions and habits of joint action. In doing so he has become the master politician of the world. A race which can coöperate can govern itself, for self-government is team-work transferred to the field of politics. Team-work means that each man is willing to submit himself to the welfare of the whole body, that he controls his personal likes and dislikes enough to submerge them in the common effort for a common good, that after many trials he has learned to discuss with some tolerance, moderation, and fairness the problems of his group, and has formed *the habit* of steady, concerted effort. Other races have greater enthusiasm and intensity of spirit, brighter flashes of genius, and higher inspirations of artistic taste — the Saxon has the ability to work with his fellow men. He is not an inventor of brilliant political theories but is blessed with that humbler yet rarer gift of making theories work. Bryce has well said that we have not a great political system but a great ability to work a poor system.

In America group action by associations, both business and civic, is more widespread than in any other country of the world. The purposes and number of such associations are legion, but certain of them exert such a strong influence on government as to deserve special mention:

(1) Trade and business associations, *e.g.*, the National Association of Manufacturers, the National Grange of Patrons of Husbandry, the American Bankers' Association, American Publishers' Association, American Federation of Labor.

(2) Those intended to promote social progress and the improvement of economic and social conditions, *e.g.*, the National Child Labor Committee, the Public Health Association, the National Conference of Charities, the National Education Association.

(3) Those concerned with the improvement of our government, such as the Short Ballot Organization, the Bureaus of Municipal Research, the National Municipal League.

Without exaggeration it may be said that such associations de-



velop and guide public opinion on every important question in their respective fields. If tariff legislation is to be passed in Congress each important manufacturers' association in the country informs its members and asks their active interest and support in influencing the new bill. It also keeps a representative in Washington. If the bill be one affecting the currency or the financial conditions of the country the American Bankers' Association, the State Associations of Bankers, or the various bank Clearing Houses and Boards of Trade of the large cities send committees to urge their views. So systematic has this work become that every large business association now has its legislative committee whose duty it is to oppose hostile bills and especially to bring to bear on new law-making the full force and influence of its membership.

**Expert Service.** — A prominent feature of the business or civic league is its employment of experts. When the bankers sought to win the country to a central bank plan they secured research specialists on money and currency, on credit, and on banking organization. These men brought to the report of the National Monetary Commission a full knowledge of such problems both here and abroad. When an industry is to be unionized or a strike conducted against heavy obstacles, the American Federation of Labor and the special trade union involved send their strongest, most experienced organizers upon the scene. When a serious labor dispute threatens the member of an efficient employers' association, that body hurries to his aid a skilled and seasoned specialist in labor troubles, who brings to bear the methods and resources born of many a struggle. When the members of a telephone or electric lighting combination are asked by a public service commission to show cause why their rates should not be lowered or their service improved they have at their command the best engineering, accounting, and legal skill obtainable. When any associations such as those above described seek to influence legislation, they present a measure drawn by the best technical ability available. Whether the effort be to amend the national tariff or to improve the local school administration, the change is drafted by "a man who knows." It is this element of professional service in our opinion-guiding associations that has lifted them to their present importance and usefulness and given them their positive and constructive features, which we shall consider later. In addition, all the larger bodies have a professional

secretary. He usually edits a periodical magazine for the society, secures new members, and devotes his time to its propaganda and purposes.<sup>1</sup> We shall consider the practical work of some of these organizations.

**The Woolen Manufacturer.** — One of the most efficient bodies in molding public opinion is the National Association of Wool Manufacturers formed in 1864 for the double purpose of supporting the protective tariff and of diffusing information about the industry. The Association publishes a quarterly bulletin containing articles on the technical sides of the business and explaining proposed legislation which may affect the industry. An excellent instance of this is the special tariff number of March, 1909, and that of September, 1910. This bulletin is sent regularly to all members of the Association, to other manufacturers in the industry, and to a selected list of influential newspapers, also to college and public libraries. Whenever a notable address or argument bearing on the industry appears, it is published in the bulletin and republished in pamphlet form for wider distribution. Often thousands of such copies are sent to the press, to public men, and to business men in all parts of the United States. When a revision of the tariff is proposed the Association carefully prepares a brief for the wool manufacturer, which is drawn up and presented by a special committee representing all branches of the industry. This brief is placed before the Committee on Ways and Means in the House of Representatives and the Senate Committee on Finance. The care and thoroughness with which these are prepared have made them models in form and have even led to their publication by Congress. They are also printed in the bulletin and in pamphlet form and are sent broadcast to the members and to leaders of public opinion. It is a significant fact that aside from the merits of the case the woolen schedule of the tariff has been kept at a higher point than that on most other industries. But the influence and activity of this association are not limited to times of emergency; scarcely a week passes but that some statement is given to the press concerning the industry or some expression of opinion of its members as to public policy. It is not easy to measure the exact strength of this

<sup>1</sup> These secretaryships offer positions for which college men may well prepare themselves. Many of them are well paid, the salaries running from \$2500 to \$6000; a few even higher.

constant and systematic effort, but judged by its practical results the influence must be strong.

**The Farmer.** — For many generations the farmer has been inadequately represented in public life and elsewhere, because his industry is not well organized. The National Grange of Patrons of Husbandry was established to remedy this defect and to make the influence of the farmer felt in national legislation and other fields. The Grange is divided into State granges which hold local meetings in various sections of each commonwealth and discuss a wide range of topics, both technical and political. The selection of subjects for discussion at these meetings determines largely the thought of the agricultural community on questions of public policy, and an expression of this thought by representatives of the grange is in the best sense authoritative. There are also several other successful organizations in this field, representing various shades of opinion on every question of agricultural interest which comes before the public.

These bodies interest themselves in the tariff, railway rates, grain-elevator charges, grain exchanges, marketing of farm products, farm credits, and banks, etc. The State granges take a more active interest in technical questions of farming and in the State laws to suppress fraudulent food substitutes for farm products. The managing editor of the journal of one of these bodies writes: "The State Grange has done much as an organization toward securing and having enforced pure food laws. We have also fought all compromise with benzoate of soda, saccharin, and the like. We do our work through personal solicitation, personal letters to legislators, memorials, and petitions. We build sentiment by having matters discussed in our grange meetings, 1700 of which are held every year, participated in by nearly 100,000 men and women." These bodies mold a decisive public opinion on all the governmental questions in their fields. Numerous other farm organizations with large memberships follow the same methods.

**The Labor Interests.** — The American Federation of Labor, representing the great majority of organized labor in the country, is constantly on the watch to push favorable laws in both National and State legislatures. It has a membership of over two million, and publishes a monthly journal, *The Federationist*. A paid president and secretary devote their entire time to the interests of the organization. It has also 1100 organizers stationed throughout the

country for the purpose of strengthening trade-union sentiment and organizing new unions. The Federation itself unites all the leading unions of the country, except the railway brotherhoods, in its annual convention. It is therefore preëminently well qualified to speak for the interests of the organized wage-workers. Typical instances of its constant effort to secure favorable public opinion and guide legislation are to be seen in the Clayton Act and its modification of the law on strikes, boycotts, and injunctions.

In pushing these claims before the public the Federation has used its magazine and those of its subsidiary unions, and it has organized mass meetings and furnished an arsenal of arguments for public speakers; but its chief reliance has been on a committee on legislation composed of several leaders in the Federal executive council. This body has steadfastly brought to the attention of legislative committees in the House and Senate its demand for a change in the national law on the points mentioned.

**The Employer.** — Another good illustration is seen in the employer's attempts to present to the public his arguments against changes in the labor laws of the country and to safeguard his interests against possible excesses of labor sympathizers and against mob violence. An extensive series of employers' associations has been formed for this purpose. Prominent among these are the National Metal Trades and the National Manufacturers' Associations. In these and other bodies the members are frequently addressed from headquarters on problems of public policy affecting their interests. At the beginning of each Congress and often during the sessions letters are sent urging that Congressmen be addressed directly by the members in favor of or against pending bills which affect their interests.

The associations above mentioned have for many years solidified and strengthened the sentiment of unity among the employers and although they have necessarily aroused some antagonism, they must be recognized as one of the important factors in molding and expressing public opinion in this field and in influencing governmental action. The need for a general employers' association combining all industries has been felt for many years. A National Industrial Conference Board with representatives of several employers' bodies has been created and conducts a careful research into the chief facts of employment and

industrial conditions and furnishes to its members statistical summaries and scientific data in these fields. It serves as a clearing-house of information on employers' problems and either it or some similar body may eventually develop into a policy-forming and planning organization.

**Improvement of the Public Service.** — Let us next take an example from the field of public administration — the civil service idea. Shortly after the Civil War public attention was attracted to the urgent need of a reorganization of the national service on more modern lines. A number of progressive citizens of Boston and New York established local civil service reform associations in those cities. These bodies began to discuss the best methods of making civil appointments and to attract public attention. They studied the problem of appointment with great care and drew up a new plan based on the merit principle. They were laughed at as dreamers and "mugwumps." But other associations were formed in various cities and these soon united in a National Civil Service Reform League which continued the agitation of this important governmental problem until the newspapers and magazines of the country were one by one interested and drawn into the discussion. In a few years most of the thinking people of the Nation were being educated on the subject and were expressing their views in unmistakable terms. The League drew up a bill which was presented by a member of Congress favorable to the new plan and all the local associations urged their Congressmen to support the measure. When in 1883 the pressure finally became irresistible, the Act was passed. Public opinion had been formed and had triumphed. Such is the history of the United States Civil Service Act. Equally interesting is the work of the various Child Labor Committees in all the industrial States of the Union. The blighting effects of child labor in our factories and workshops have been seen for years, but it was not until the National Child Labor Committee, in cooperation with the Committees in each State began to bring strong pressure to bear upon the States and National Government and upon the public, that the question received the attention which it deserved. Public opinion was crystallized and every manufacturing State in the Union has now passed or is considering the passage of a law prohibiting the labor of children under fourteen in mills and factories.

**Molding Opinion on the Currency.** — After the panic of 1907 there was a general demand that the currency of the country be established on a more elastic basis. After a national monetary commission established by Congress in 1909 had studied our own and foreign currency systems it presented a plan to concentrate banking or credit resources in a national reserve which could be called upon in times of stringency or panic. But the people were opposed to any concentrated financial power. How could they be made to see the merits of the new proposal? The answer was the formation of the National Citizens' League coöperating with the Monetary Commission. These two bodies sent speakers, pamphlets, literature, and magazine articles to all the banking and credit associations of the country and to all persons whose positions made them influential in forming popular opinion. A monthly journal "Currency Reform" was issued. An honest campaign of genuine education was started and maintained at high pressure for over three years. The Federal Reserve Act of 1913 was the outcome. Although it differs in minor points its main features are the same as those proposed by the National Commission. Similar results followed the long, hard struggles of the Woman's Suffrage Societies and the Anti-Saloon League.

**Special Need of Organization.** — From what has gone before it is clear that public opinion counts only when organized. There may be a strong undercurrent of feeling among the people, there may be addresses, mass meetings, and parades — but no public movement can win permanent recognition until it is placed on a sound basis by some practical organization. Here is one of the chief services of the business association or civic society. It gathers, forms, and brings into coherent, definite shape the tiny particles of public sentiment, and by organization renders them lasting and permanent. The many ideas, suggestions, and proposals which arise from year to year in the politics of the Nation are like the millions of eggs in a fish roe. Ninety-nine per cent of them have a fleeting existence of a few weeks or months at best and then are heard of no more. The work of the "club" or "league" in selecting the good material from among the useless, in drafting feasible plans, in enlisting and holding public interest in these plans, and ultimately forcing them upon the attention of the government, is an invaluable force in our public life. Nor does its service end

here. When the law is once passed the association must watch over its practical enforcement by the executive. The statute book is already crowded with measures which are so difficult if not impossible of execution that the executive must *select* the laws to be administered. In this general competition among laws, those receive the most attention which are backed by the force of an *expressed* public opinion. The business or civic association makes this opinion felt. If the laws on health, schools, or roads are administered with laxity the county medical society, the public education association, or the motor club learns of it and brings pressure to bear upon the State executive. And the law is enforced.

**How Civic Associations Set the Pace for Government.** — This brief description of the work of business and civic bodies shows what service they render in making government worth something to the people at large. But within recent years they have entered a newer field of activity which has now made them an indispensable part of our system. Until a short time ago the civic and good government clubs were mainly critical; they pointed out weaknesses and defects, inefficiency, and dishonesty in government. Today they are positive and constructive, proposing and suggesting plans of public action. A criticism or protest is negative, it stirs up popular indignation and often leads to an explosion of popular wrath in an election, sweeping out of office the majority party and all connected with it. But an explosion is destructive, and no successful system of government can be built on indignation. Following the outburst of popular wrath there must come the slow, painstaking reconstruction of the political or social system; otherwise the old abuses quickly reassert themselves. The *permanent* reform movements of political history have all had this positive character. The English Revolution of 1689 destroyed the doctrine of the divine right of kings but put in its place the positive idea of government by the Parliament. The American Revolution abolished British sovereignty over the Colonies, but it was incomplete until it was followed up by the formation of a strong national government in 1787. The British Reform Bill of 1832 not only ended the control of the "rotten boroughs" over Parliament, but it set up a political control by the middle classes. The destruction of Negro slavery in America was successful only in so far as it was followed up by the education and industrial training of

the Negro. Always there must be this positive element of constructive progress, otherwise a reform becomes a mere paroxysm of blind anger.

"A familiar phenomenon in the political life of America is the outburst of indignation over some particular piece of legislation, some particular extravagance on the part of Government, or some particular advantage which a class of citizens has obtained. Our best citizens, so called, rise in their wrath and howl, and for a week or two there is great show of activity. Indignation meetings are held, and with a fine flow of oratory the audience is stirred to its profoundest depths of civic righteousness. Having become overheated and seen their names listed in the newspapers as among those present, the upholders of the Constitution and the laws return to their business and their amusements with a consciousness of public duty well performed. A month later, so far as they have any bearing upon the conduct of affairs, they have passed into a state of complete hibernation.

"Meanwhile the people who know what they want, and are willing to work for it, have returned to the field from which they may have been temporarily dispossessed. They never tire of watching the place holders, high, low, or prospective. They are never weary of the long-winded debates in Congress and the State Legislatures. Familiarity may breed contempt, but the contempt is concealed and shrewdness grows apace. Then comes opportunity, and the object of all this watchfulness, . . . is attained."<sup>1</sup>

The constructive efforts of our business and civic associations, in developing new solutions of public problems and proving their practical value, have now assumed prime importance in government. Instead of denunciation, the club or league now devotes its time to the planning of new measures. By this changed attitude the society has gained stronger and more permanent support for its plans and a more practical result than it could have reached by stirring up indignation. The strength of the new system lies in its practical appeal and in publicity. When a public official is now told by an association that its experts have studied conditions with care, and have worked out some proposals for improvement, he must either adopt the new proposals or bring out another plan.

<sup>1</sup> *The Budget Magazine*, May 1, 1922.



**Experimental Work.** — In some of the larger cities, societies have not confined themselves to the simple proposal of plans for government action but have placed these plans in actual operation with the aid of private funds, have demonstrated the feasibility of the proposed improvements, and have then turned over the material, plant, and experience thus gained to the municipal authorities.

Our public baths, playgrounds, vacation, sewing, singing, and cooking schools, our investigations of the proper method of treating tuberculosis, yellow fever, and hook-worm, and some of the most valuable phases of social work, are all examples of private experiments which first demonstrated their ability to produce results and were then handed over to the city government. Such private associations have undeniably "set the pace" for our public machinery, and in doing so have opened up a new method of work whose value is hard to overestimate. This activity is not a simple expression of public opinion; it is a demonstration of what can be done and what should be done by our governments to improve the individual welfare.

The besetting sin of modern governments is a constant tendency towards the stagnation of routine work — the hostility to new ideas. At this point the experimental activity of the private association steps in to show what is and what is not feasible. This experimental activity is yet in a most primitive stage. Its possibilities are not clear even to those who have done most to further its growth. Independent experiments and investigations supported and conducted by private societies may be undertaken in nearly all the new fields of work now devolving upon public government. The strongest obstacles to progress are the official "dry-rot" just described, and a widespread popular disbelief in the *possibility* of improvements. But if it is shown by actual demonstration that the government can be made more useful and helpful, and if private means are devoted to a series of experiments to discover the best methods of administration, these obstacles are removed.

**Local Bond Elections.** — The methods of developing and directing public opinion all come to a severe practical test when public improvements requiring a bond issue with approval of the voters are to be made. Here we see in action all the typical forces of opposition and inertia in an intensified form. There is honest, sincere doubt as to the wisdom of the new enterprise, fear that it

will be made the football of politics and used as graft to line the pockets of the politicians. The rivalry of competitive schemes, the "pull back" influence of all those who object to any improvement because it may increase the tax rate, and the hostility of the chronic opponent of all change — all these may be shrewdly fostered and incited by those who have a political ax to grind and who are seeking for an issue in local politics. These factors have become so well known and exist so universally that they may be called standard obstacles to governmental progress and they are met by standardized methods that have been worked out in detail with great success. We may briefly summarize these methods by reference to the practical experience of engineers who have to meet this problem as a regular part of the day's work.<sup>1</sup>

If the election be on the question of issuing bonds for, let us say, a new water-works plant, the general method pursued is as follows: Preliminary plans, maps, estimates, and salient points from the engineer's report are prepared on a large scale for window displays. A large number of stereopticon slides are made and shown before mass meetings and civic organizations. At open-air gatherings, such as municipal concerts and the like, all features of the project are explained in short, pithy speeches. The engineering points are set forth in such popular terms that the man in the street cannot fail to get them. The daily newspapers are asked to run a set of articles on water-works, illustrated by views showing the present condition and the proposed improvement. The cost of operating an antiquated system compared to a modern plant and the losses that come from unsafe drinking water are set forth.

The fire damage is surveyed and the amount per capita is stated. This is contrasted with the quick extinction of fires under the new system which will give a sufficient head of water to protect any building. Leakage is analyzed and its costs shown. Exhibits of worn-out pipe together with the material which will replace it are made on prominent street corners. The per capita cost under the proposed plan compared with that in other cities is given. A series of meetings among civic organizations, women's clubs, and factories

<sup>1</sup> See R. E. McDonnell, *Modern Methods of Carrying Bond Elections*, a paper read before the Annual Meeting of Kansas League of Municipalities, 1922.

at the noon hour are held. Slides are distributed to the moving-picture shows and ten-minute talks are given after each show. The churches ask all good citizens to vote for or against the plans, leaving them to form their own opinions. Prominent business men are invited to contribute full-page advertisements recalling former water famines, and bad fires, and showing what the new improvements can do for the city. Where the change will not involve increased taxation and the plant will be self-supporting, this point is strongly brought out. These steps, together with carefully prepared statements by public officials, are usually found sufficient to create a favorable public sentiment for a meritorious proposal.

**The Democracy of the Newer Methods.** — One serious danger threatens the public usefulness of the work just described. Many civic societies are unintentionally aristocratic in character and methods. They are strongest in their research and experimental activity, in examining and working out new ideas, plans, and methods; but they sometimes do not reach out to include all classes of the people in their membership. Composed of the more advanced and educated classes and acquainted with the latest developments of science and the useful arts, they sometimes demand public policies which are not fully understood by the majority of the voters. A society or club may be unquestionably right as to the benefits from its proposed measures, and may yet make the mistake of taking for granted a popular support and sympathy for such measures. Such support must be created.

No amount of temporary good government can compensate for the decline of an active public opinion among the masses of the people. Many of our civic leagues have yet to learn this simple fact. From the ousting of the Tweed Ring in New York by a Citizens Committee and the Philadelphia Gas Ring by the Committee of One Hundred, down to the most recent events in city politics, numberless instances might be cited in which private committees and associations of undoubted popularity and strength have gradually lost public sympathy by failing to carry on a continuous educational campaign. This fact is all the more surprising because in all other fields the value of advertising is clearly seen. The civic society too often secures a good department of charities or an honest award of franchises or a model health department and

then considers that it has done all that is necessary to enlist popular support.

But what would we say of the manufacturer who should produce the best goods and neglect to advertise them? The people like good government but they are busy about other things; their attention must be drawn to the practical results gained and the desirability of new measures. Advertising is a form of education, good government must be advertised — the business or civic society must add this to its duties. Nor can this process of education be left until two months before the election. No manufacturer or merchant delays advertising his wares until his customer prepares to purchase. Vast sums are now spent in advertising to *develop new wants* and to suggest new ideas to those who have no notion of buying. Similarly the civic society, to achieve a substantial or permanent result, must devote a large part of its energies to the process of educating and interesting the people in civic improvements. When such a society regards its work to be wholly or even principally the righting of a particular abuse, the dismissal of a particular official, the election or defeat of a certain candidate for office, the adoption of a new public service, or the passage of a much desired law, it has mistaken the very nature of democratic government under American conditions. The result is a temporary improvement followed by a discouraging relapse. All of the most successful associations are now following the educational policy, and are pursuing accepted commercial methods.

**Research Bureaus.** — As progressive citizens realize more keenly the need of unbiased, impartial inquiry and determination of the facts, new agencies for investigation have been created and supported at private expense to fill this need. Probably the greatest of these is the Research Bureau which now exists in all our more advanced communities and at Washington. The purpose of these Bureaus is to make detailed scientific investigation of any and all branches of local, State, and National government service, to examine the methods followed in private business, and to compare these with the public system in order that the latter may have the advantage of the best private practices. The Research Bureau is nonpartisan — regardless of which party is in power at the moment, the Bureau's facilities and staff are at the government's disposal for the examination of any problem. Such

questions as methods of purchasing, accounting, organization of personnel, personnel management, the relative cost of government work and private work in a given field — all these and many similar problems are examined by a bureau and the results turned over to the public official concerned or to the newspapers.

**The Manufacture of Public Opinion.** — No public opinion endures unless it is organized, but it cannot be manufactured by a simple process of organization. Many energetic advocates of some "Cause" make this mistake. Seeing the successful results of strong and influential "machinery" directed along effective lines, these persons fondly imagine that by establishing a new society or league, electing officers, and inviting the public to membership, they can then turn on the printing press, grind out a few thousand petitions and resolutions to be signed and circulated through the mails by wholesale, and ultimately foist these upon the legislator or congressman as genuine expressions of a profound and widespread public opinion. It would be invidious to mention by name associations of this sort but the country is honeycombed with such bodies. They are usually composed of a nominal membership, with figure-head officers, and an uninterested executive council of "prominent citizens." The chief assets of such paper organizations are usually a paid secretary, a typewriter, a large supply of postage stamps, and the use of the mails. Such investigation as has been made seems to show that they are fruitless unless they represent some genuine popular feeling.

The Washington correspondent of a great metropolitan daily has well said: "There is little use to attempt to mold public sentiment unless there is a real demand for something." Says a member of Congress: "The mails are loaded down with prepared postal cards and circulars, protesting against this or demanding that, which are sent to citizens throughout the country with the request that they sign them and forward them to Washington. Frequently a member of Congress first learns of a movement to manufacture public opinion by receiving hundreds or even thousands of such postal cards and circulars signed presumably by his constituents, but in many instances signed without reading or at least, without consideration, merely because a request has been made that they sign them. The great public are apt to comply

with a request to sign a petition, especially if the request is made in writing and costs nothing." From all the evidence we must conclude that the work of an association is not so much to create an artificial sentiment which does not exist, as to educate, make definite, pointed, and effective those beliefs and opinions and desires of the people which have a solid basis in business or social advancement.

**Factionalism.** — The difference between a genuine public opinion informed and molded by the methods first described, and a selfish factionalism seeking to profit at the general expense is that a real public opinion is public as Lowell has said; that is, it represents a normal, healthy, broad view of the community interest as a whole. Any clique or bloc which fails to fit its own interests into the broader popular welfare is not informing or molding public opinion but is seeking factional advantage.

Senator Cummins of Iowa has declared that the present tendency towards small, tightly organized cliques has created a very difficult and alarming situation and it is now virtually impossible for Congress to get an unselfish and unbiased opinion upon any public question. "The United States," he declared "is over-organized, and at the expense of independence of opinion. The safety of this country lies in a consensus of judgment among intelligent people. We are drifting toward a condition in which it is impossible to get this consensus, when every industry and avocation is closely and effectively organized."

In the words of a prominent industrial leader:<sup>1</sup>

"The politician knows that the majority of our voters are neither vocal nor aggressive nor do they possess long memories. They may be aggrieved for the moment over certain failures of Congress, but they usually forget their grievance by election day. On the other hand, the organized minority keeps up a persistent propaganda and can and does make things very uncomfortable for individual Congressmen and their parties. That is really the whole secret of the power and influence of minorities. They are persistent. They are vociferous. They frighten Congressmen into the belief that they are much more powerful than they really are, and the result is that the normal cowardice of the public man is intensified."

<sup>1</sup> National Founders' Association, weekly letter, March 2, 1922.

**Experimental Observation.** — Any student of government may without much preparation conduct some interesting experiments and observations of his own on public opinion, with no further material than a reliable text or reference book on government and a daily newspaper. We shall outline the methods, leaving the subject of the observation to be chosen by the inquirer :

Take up the morning paper and select the head lines of two or three articles of a political or governmental nature, giving preference to those to which the newspaper gives most space, as being most interesting to the public. Make a summary of the article. Turn to the editorial page and note what the editor proposes should be done on this subject. Next, turn to the Constitution, State or National, and find what authority the government has to handle this question. Look up the platforms of the two political parties and see what they say on this subject. Next, take up a textbook on government or economics and read up the facts in this field. Then make a careful selection of men and women whom you know, who will talk about this subject, starting with someone in your home and including the business men of largest influence with whom you can speak, a few professional men such as a minister, lawyer, doctor, teacher, also some storekeepers, a barber, several mechanics and a student. Talk with each of these for a few moments and ask their opinion, finding out if possible whether they belong to any organization which is interested in the subject and if so, what its proposal is and whether they agree with the proposal.

We are now in position to start a concentrated inquiry in any of these directions which will give us some interesting and even surprising information on the *reasons* for the opinions held by each of these persons and the groups which they represent — surprising because they will show us how completely wrong we have been in our beliefs and guesses as to how public opinion is formed. Or we may stop the inquiry right at this point and have some valuable material which will help us to answer the following questions: Did the newspaper article present a fair, unbiased statement of the facts without propaganda? Was its description of the question or the principles at issue fairly accurate? Do the facts as stated show that some organized group is at work in the field in which the event occurred, seeking to influence public action or to escape public regulation or public responsibility for its acts? Of the men

and women who expressed opinions what proportion were informed on the subject? What proportion had formed a strong and positive opinion? Of these, what proportion had an opinion based on some clear, accurate notion of the facts? How many had taken their supposed opinions without question from a newspaper or a propagandist society or organization? Which of the various occupations was represented by the best informed person with soundest judgment? Was the event or problem described in the newspaper article one on which, in your judgment, an enlightened public opinion could be formed?

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## QUESTIONS

1. You are explaining to a foreigner the relation between public opinion and Federal laws, presidential orders, and acts and court decisions. Summarize your explanation and give examples.
2. What do you mean by public opinion? Illustrate.
3. Which do you consider the two most important means of influencing public sentiment in this country? Illustrate by a case known to you.
4. What is the difference between public opinion and simple majority vote on any question?
5. Prepare a report or summary of the constitution, by-laws, purposes, and results of some association of business men.



6. Of some society to promote social progress.
7. Of some organization for the improvement of government.
8. Outline and explain the growth of the civil service idea into a national law.
9. Explain fully how the woolen schedule of the National Tariff Act has usually been kept at such a high level.
10. What has the farmer done to strengthen his influence on legislation?
11. The workingman?
12. The employer?
13. How was popular opposition to a concentration of banking control modified before the passage of the Act of 1913?
14. Interview a member of some women's club and secure a summary of the methods used in winning the adoption of equal suffrage.
15. Explain how business and civic associations make use of expert service in their affairs and give examples.
16. What are your impressions as to the exact advantages of this plan?
17. If the roads in your section of the State were in very poor condition what would be the most feasible method of securing their improvement?
18. In a city of 500,000 the public school system has not grown along with the needs of the community. The funds are not used to advantage, the teachers are poorly paid, and a large number of children are not enrolled. Also the school laws of the State are defective. A number of prominent citizens propose to hold a series of indignation meetings and accuse the school officials of incompetence and graft. What would be your suggestion? Outline fully a plan of action.
19. Summarize the main points of your speech at a meeting, showing the reasons for your proposal.
20. In a discussion on politics the argument is advanced that it is better for the business man to attend to his business and allow politics to be managed by politicians. You desire to show in answer, that the politicians promote the general welfare best when they are carefully guided by business and civic associations, and to this end business men must take an active part in such bodies. Outline your argument with illustrations.
21. In a large city there is some demand for the teaching of cooking and sewing in the girls' schools but the authorities claim that neither of these subjects can be taught by class work. How would you put the plan through?
22. In a modern industrial community a millionaire has let it be known that he will devote a certain sum of money to some public-spirited enterprise. A number of persons are about to call upon him asking for funds to endow a soup society. You are chosen to present to him the claims of the civic club which wishes to establish an experimental plan of technical education which, if it succeeds, will be turned over to the city. You arrive after the soup society advocates have made their plea. Present your case.
23. The civic club of your city is run by a few public-spirited citizens of intelligence and patriotism. Its membership is 100. It has a complete and well-planned program of city improvements which it desires to urge upon the city government. At the annual meeting it is proposed that all the members

visit the city officials and insist upon the adoption of this program. This is the only provision made for its execution. Summarize your speech on further measures.

24. The educational club in your community wants to build a new technical and liberal arts high school but the cost will require a bond issue to be approved by the voters. Draft a campaign to this end and show why you insert each proposal.

25. What are your impressions as to the possibilities and advantages of greater publicity in government through business and civic associations?

26. Write to your congressman or representatives in the State legislature and ascertain from them their impressions as to attempts to manufacture public opinion by mechanical methods. Prepare a short essay showing a successful and intelligent system of molding opinion as used by some association and contrast it with some plan of *manufacturing* sentiment.

27. You are engaged in a business which is subject to national legislation. It is proposed to change the laws governing your industry in a way which would injure your interests, and you wish to offset this by securing the passage of a different law. Prepare a full, complete statement of the various steps to be taken in order to realize your purpose, with the reasons for each.

28. Mention any subject on which you have made an inquiry into public opinion:

- (a) Was this opinion well informed as to facts? Illustrate.
- (b) Did you notice any difference between the opinions of persons of different occupations?
- (c) Between persons possessing high school and those possessing less education?
- (d) Were the uninformed persons less or more positive in their views than those who knew the facts?
- (e) Can you suggest anything that might be done to inform and improve public opinion on the question which you chose?

29. Describe from your newspaper reading some ill effects of factionalism, cliques, and blocs, and show how these have interfered with the growth of a normal, healthy public opinion.

## CHAPTER 26

### THE CIVIL SERVICE

**A Government Personnel Policy.** — “Big Business” has learned in the last ten years that a personnel policy is a vital essential for successful operation — that the conduct of this policy must be a part of the executive management, like a department of sales, finance, purchasing, accounting, or production. It is called by many different names such as employment management, or personnel department, but whatever its name, its importance is now universally recognized.

Such a policy in government would not mean merely keeping politics out of the civil service, although this is an essential thing, as has been freely admitted by all our Presidents beginning with Grover Cleveland. This is only one step; but a real personnel policy means making the service a career for men of ability and thereby establishing an efficient corps of government workers *in all grades and positions*. It means also the employment of these members in the most effective way on the work for which they are best qualified, under conditions of contentment and satisfaction; also the creation of that subtle, intangible thing called *esprit de corps*.

There are reasons why all this is much more difficult in government offices than in business concerns, but this difficulty does not justify failure. The task has already been well begun. Thorough surveys of the chief problems have been made and the type of solution required has been fairly well established. It remains for Congress to carry out this solution in a broad spirit of coöperation with the Civil Service Commission and the President. In the State and city governments progress has been slower, but here, too, the steps necessary to establish a real and effective personnel policy are fairly well understood and their execution only awaits legislative action. Such action both by Congress and the State law-makers will only be taken when public opinion demands in unmistakable manner that something be done.

**The Transition from the Spoils to the Merit System.** — As long as governmental activity did not closely touch the people at large, there was no interest taken in the formation of a strong, well-organized civil service. For almost the entire first hundred years of our present national government, the people were interested exclusively in legislative and constitutional questions. They took little or no interest in effective administration, apparently believing that if the laws were right, their enforcement would take care of itself. Government was less an instrument for public welfare than a possession to be passed around. "Rotation in office" was the policy. After Andrew Jackson in 1829 introduced the spoils system, a complete "clean out" in the Federal offices took place nearly every four years. This continued until the growing powers of the government made clear the need of a more permanent basis for the public service. Many important laws were lagging because of poor enforcement. The moral sense of the people, always an important influence in American affairs, began to advance beyond the stage represented by the venality and corruption of the public service. A few — a very few — far-sighted and public-spirited citizens banded themselves together in the National Civil Service Reform League to arouse popular opinion, in the belief that appointment to public office should rest on other than mere vote-getting qualities.

The result of that belief is the "merit system." Its central idea is that appointments should be made according to ability, the less able and the less desirable applicants should be weeded out by an examination. At first the new idea was hailed as the cleanser of the Augean stables of politics; such expectations could not possibly be fulfilled. But as the claims of its advocates have become less extravagant a more abiding faith in the system has been aroused. After many unsuccessful efforts to establish a practical method, the present national law was passed and approved on January 16, 1883. Since that date the movement has been making gradual headway and is now in force in several State and city governments. Nearly two-thirds of our public positions are now withdrawn from the spoils system and appointed upon the merit basis.

**Obstacles to the Merit System.** — The greatest obstacle to the universal adoption of the merit principle is the need of rewarding

those who bear the burden and heat of the day in party work. As long as a large proportion of the voters must be persuaded to perform their duty there must always be some group of men in every locality who will form the nucleus of a party organization, and who will do the detailed work of party management and "getting out the vote." These men may be temporary volunteers working from patriotism, or they may be regulars, pursuing politics as a permanent calling. The latter are the more efficient. The atom of all party molecules is the division or precinct worker. There are from two to a half-dozen of these to every polling place. In the aggregate this means that hundreds of thousands of workers must be cared for in public positions. Strong as this obstacle undoubtedly is, it is slowly giving way before the growing desire of the people that government work be placed upon the same plane of ability, thoroughness, and efficiency as other business enterprises.

**The United States Civil Service.** — On Armistice Day, 1918, the Civil Service contained slightly over 900,000 persons. Four years later it had been reduced to 560,000 where it remains with slight fluctuations. The Civil Service Act of 1883 applies to what is called the classified service. This includes all persons in the executive civil service except laborers and officers whose appointment is subject to confirmation by the Senate. The law authorizes the President also to except from the service by special order such offices as he may think fit. The classified service includes about 420,000 positions. Formerly the excepted places were dangerously numerous, but recent Presidents beginning with Roosevelt have brought them within safer limits and the law is gradually being extended to include most of the civil positions in the Federal Government.

**The Commission.** — The law provides a simple and effective method of enforcing the merit system; a Civil Service Commission of three members is appointed by the President with the consent of the Senate. It watches over the entire field of civil service appointments, dismissals, and promotions. With the President's approval the commission makes rules classifying the various positions according to salaries and duties, and providing an examination for each class. Other subjects governed by the rules are: the conduct of examinations, the keeping of service records, showing the results secured by each employee, and the prevention of

party taxes or "assessments" on the salaries of office-holders. These party assessments were formerly a serious drain upon the resources of all civil service employees. A congressional campaign committee once levied a tax of two per cent on the salaries of all office-holders in the Federal service, and sent requests for these amounts to every employee including janitors and scrub-women employed in Federal office buildings. The practice still persists in city and State positions.

**How Appointments Are Made.**—The various positions in each department having been properly classified, as already explained, an annual examination for each class of positions where vacancies exist is held under the direction of the civil service commission. The candidates who pass the examination with a certain required average are placed upon a list of eligibles in the order of their averages. When a vacancy occurs, the appointing officer notifies the commission of the vacancy and asks for eligible applicants. The commission certifies to the appointing officer the three names standing highest upon the list of eligibles for that class of position. From these the selection is made and a six-months' period of probation is allowed; at the end of that time the appointment is either made permanent or another set of three names is certified. To direct its examinations the commission employs a chief examiner and appoints examining boards in all the large centers of population. The law prohibits the recommendations of applicants for office by Senators or Representatives, and any solicitation, receipt of gifts or moneys for political purposes by Government employees to or from each other or to or from Senators or Representatives.

The Commission has divided the country into thirteen districts each with a secretary and with several local boards of examiners. The great majority of Federal positions are located in these districts, only about twelve per cent being in Washington. The district secretaries travel through as much of their districts as the funds permit and seek to supervise the operations of the local boards of examiners. In most of the larger government establishments "registers" of eligibles are kept. These are lists of persons who have passed the examinations with the required averages, arranged in the order of their grades with preference of Army and Navy veterans. The work of conducting examinations and preparing

eligible lists is thus largely decentralized but is kept under the general supervision of the Commission.

**Promotion.** — The Act of 1883 tried to distinguish between political places, that is, positions which must be in political harmony with the majority party, in order to carry out its policies, and those which need not be. The latter are chosen under the merit principle for the term of good behavior. The political places have a four-year term corresponding with that of the President, in order that they might be in harmony with his policies. Into this latter class the Act of 1883 threw all officers whose appointment required the approval of the Senate. There are over 15,000 of these. The other positions make up the classified service with the exception of those offices which the President exempts from the rules.

But this division has proved most unfortunate and harmful to the best interests of the Government. The number of offices which are genuinely political in nature, that is, whose occupants must necessarily be in political harmony with the majority party, should not exceed a hundred, at the utmost. The members of the Cabinet, some of their assistant secretaries, and a few of the fiscal and legal officers might be included in this list. The others should be placed in the classified service. No defensible grounds have ever been given for including among political places the postmasters, collectors — and even deputy collectors — of internal revenue, and the bureau, division, and office chiefs. There are two strong reasons why these should be subject to civil service rules: (a) They are, or should be, the backbone of service efficiency. They represent the executive ability of the system. A constant shifting and fluctuation in these posts is demoralizing in the extreme. (b) But more important is the bad effect on the rank and file of knowing that no matter how effectively they may serve their government employer, he will not raise them to the really desirable posts of advancement which they may deserve. This denial of promotion to the better positions in the service explains in large measure the mechanical, routine view of their duties which so many government employees take. Such higher positions should become rewards for exceptional talent developed in the service.

For years the Commission has pointed out that heads of bureaus and local offices, appointed from the outside without expert knowl-

edge, rarely serve more than a few years before giving way to others equally inexperienced. This requires the government to carry many more men on its rolls than would be needed to get the same work done by experienced officers. Said President Taft in two messages to Congress in 1912, "The government often pays two persons for doing work that could easily be done by one." He estimated that the loss so incurred amounted to \$10,000,000 a year. Speaking of these same political positions, especially postmasters, President Harding said on May 10, 1921, "Obviously these offices are business agencies of the Government in legal purpose and should become so in fact. The only certain ultimate way to bring this about is to certify first, second, and third-class postmasters. This will require an act of Congress. It is a step forward, measured by the requirements of progress, and is one which I hope will be made. Under existing laws the Executive has no power to require that these offices be placed in the classified service."

Commenting on this, the Commission in its report of that year declared "The hope of substantial advancement thus given to employees would quicken in the entire personnel of the public service those impulses which develop capacity in employees to deal with large affairs."

**Efforts to Extend the Merit Principle.** — In order to meet the situation just described, Presidents Wilson and Harding by orders of 1917 and 1921 provided that nominations for postmasters should be made to the Senate from lists of eligibles prepared under Civil Service rules. This does not mean an examination on academic questions but rather a careful and unbiased inquiry into the training, experience, and personal qualifications of applicants. The method has proven highly successful and has even been partially applied to first-class postmasters.

**Methods of Promotion.** — How shall promotions be arranged in such a way as to secure the advancement of the best fitted? There must be some fixed plan, yet such a plan is not easily devised. Length of service is not satisfactory; it begets a purely routine habit of mind which is the curse of all government work. It is no more feasible in public than in private employment. In the positions where originality, discretion, and judgment are necessary, the most efficient must be advanced regardless of age or length of



service. Our corporations are nearly all managed by men who have been promoted over the heads of their older or more experienced fellows. The other men may have been much higher on the list when measured by length of service; they may have been equally punctual in their performance of routine business, but they are passed over in the choice of a new head because they lack that unrecorded and unrecordable something which we call initiative and which distinguishes the better man for manager or directing head.

But to make such a departure from the rule of seniority, in business, implies the exercise of human judgment by those making the choice. Precisely the same condition exists in the government service. The appointing officer must use his judgment freely in making promotions to all important places; he cannot be bound by length of service nor by any ordinary routine tests. Examinations for promotion in the upper branches of the service are for this reason useful only in a limited way. As the Commission points out in its 19th annual report, "examination for promotion must be confined to subjects which do not test the executive or administrative qualifications required in the position for which the examination is taken. If such administrative qualifications predominate (in a position), a competitive examination is useless, because those qualifications are developed by experience and are best known to the appointing or promoting officer." In the purely clerical positions, however, such examinations are thoroughly practical, and they even may be used in promotions to posts requiring technical knowledge, since such knowledge can be tested by examination.

In making promotions to a different grade as well as a different salary, inequalities in payment for the same service often arise. Because of this difficulty the Commission has provided in Rule XI simply that "Competitive tests or examinations shall, as far as practical and useful, be established to test fitness for promotion in the classified service," but has left the character of the test to the promoting officer.

Before the adoption of the competitive examination system in the Railway Mail Service, errors averaged one to every 3931 pieces of mail. Under the examination system these errors have steadily decreased until they now average only one to every 11,300 pieces of mail. Or, differently expressed, the average number of errors

made annually by each employee was formerly 335 and is now only 183. Much of this remarkable improvement is attributed to the Civil Service rules.

**The Service Record.** — Of all the plans for measuring fitness for promotion, the most promising is the service record, sometimes combined with the periodical examination. The record includes everything that can be systematically filed on the results of the employee's work — his punctuality and promptness, his health, his absences from duty and their causes, his ability to get along with other employees, and most important, his ability and rapidity in the dispatch of his duties. This latter quality which is, after all, the real test of a man's usefulness and fitness for advancement, has never been recorded in many of the departments; it is often most difficult to fix in definite terms, yet its importance is such that the Commission on Economy and Efficiency has laid weight upon the necessity of dividing all work, even routine matters, into definite tasks and keeping some record of them which would be comparable to the measurement and accounting of tasks in a factory. The service record is still in its infancy and is little more than an effort in the right direction, but if this new feature can be incorporated in it with reasonable accuracy the problem of a promotion "system" will be solved.

**Removals.** — Among the Civil Service rules contemplated by the Act of 1883 we find "that no person in the public service is for that reason under any obligation to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so." To strengthen and extend this prohibition, Section 13 of the law provides that "No officer or employee of the United States mentioned in this Act shall discharge or promote or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or neglecting to make any contribution of money or any valuable thing for any political purpose." There is thus a definite provision against removals for failure to pay party taxes or perform party services. In the classified service it is also the understanding that no employee will be discharged for any other political reason. In the unclassified and higher positions, however, removals for partisan causes are the rule with all parties; so in these posts tenure of office usually runs four

years or to the next party reverse. Removals are made by the appointing officer.

Because the authority to remove is needed for discipline, it can only be regulated with the greatest difficulty. Somewhere between the two extremes represented by the Jacksonian method of dismissal "to make room" for political friends, and the German plan of requiring a formal trial by a disciplinary court with the production of written and oral testimony, etc. — there is a desirable middle course suited to our present conditions. Many enemies of the Civil Service system point sarcastically to the slothful spirit which they claim is engendered by the safeguards against removal. It was once said of the clerks and employees of New York City that they were more familiar with their rights under civil service law than with their duties to the public. In any organization whether it be religious, commercial, or governmental, a permanent, secure tenure is apt to breed sluggishness unless offset by some incentive to effort.

But the sloth and inefficiency which undoubtedly exist in several of the departments at Washington, are in no way due to freedom from *political* discharges. On the contrary this inefficiency was far worse before the Civil Service Act was adopted; it was a common practice to neglect official work entirely before election day, as it is now in political offices. Furthermore, since 1903 there has been no hindrance to the removal of any employee for good reasons. The rules as then amended provide that "No person shall be removed from a competitive position, except for such cause as will promote the efficiency of the service and for reasons given in writing . . . but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." (Rule 12, in effect from April 15, 1903.) This rule places no obstacle whatever in the way of the removal of an inefficient, a lazy, or an unsatisfactory employee, so long as such removal will promote the efficiency of the service. The real causes of departmental inefficiency are the absence of practical service records as we have already noticed, and the appointment of all important officials above the grade of chief clerk upon a purely partisan basis.

**Political Activity.** — Under the general authority over the Civil Service the President has issued a number of rules, the first of which

provides that members of the classified service "shall take no active part in political management or in political campaigns." It also forbids any person in the executive Civil Service to use his official authority to influence an election. The first of these has been interpreted to include membership on political committees, candidacy for nomination, or election to an elective office or prominent identification with any movement towards the success or failure of a candidate for elective office. Members of the classified service must not solicit votes nor engage generally in political discussions nor publish, manage, nor write for political newspapers in favor of or against any party or candidate. The wisdom of this rule is self-evident. The Act of 1883 was intended to take the classified service out of politics and the only effective way of doing this is to remove its members from political activity. Rule I, however, expressly states that members may vote as they please and express privately their opinions. A large number of violations of the rule occur annually but it has been the practice of the Commission to treat these in a broad, liberal spirit and to give for the first offense a warning or reprimand; on continued and persistent disobedience the Commission asks the appointing officer to remove.

**The Civil Service in States and Cities.** — A number of States led by Massachusetts in 1884 have established Civil Service systems. As a rule these are planned on the same general lines as in the National Government and are enforced by Commissions. A Massachusetts provision, later followed in other States, declares that cities and towns may, upon action by their authorities, adopt the State system and have their minor employees chosen by the State Commission under its rules. This is entirely optional with each town, however. The State acts, like the national law, do not apply the merit principle to positions for whose appointment the approval of the State Senate or Council is required. The same exception has been followed in city systems where the positions filled by the Mayor with the consent of the Council are excepted from Civil Service rules. There is no reason why such exception should be made. In fact, the approval of the executive appointments by a legislative body is in itself a direct evil which has shown harmful consequences in all our governments.

Under the Massachusetts law nearly all the more important cities of the State have formally accepted the new system and

applied the rules. The rules are not issued by city authorities, but by the State Commission, a plan which has the great advantage of taking the administration of the law out of the atmosphere of local partisan interests, and secures a more uniform and efficient application of the entire plan. Boards of examiners are appointed for each city, but they are in all respects subject to the direction and control of the general commission. A number of other States have adopted the Massachusetts plan and applied the merit principle to their cities.

The New York law has several characteristic features. In each city a commission is appointed by the Mayor to enforce the law by issuing rules governing the city service. These local commissions are removable either by the Mayor or by unanimous vote of the State Commission, for incompetence, inefficiency, neglect of duty, or similar causes. In such case the successors are appointed by the State Commission. The latter is also given power to rescind any rule, regulation, or classification made by the city commissions, provided that such action is taken on the ground that the municipal rules and regulations are not suitable for the execution of the State law. Disbursing officers are prohibited from paying salaries to persons illegally appointed, while employees and officials whose rights are injured by violations of the law are given the privilege of a writ of mandamus. Taxpayers may also bring action to restrain the payment of compensation to any persons appointed in violation of the law. Veterans of the army and navy and of the old volunteer fire departments may not be removed except for incompetence or misconduct shown by a hearing after due notice, upon stated charges and with the right of a judicial review by a writ of *certiorari*. So rapidly has the new system taken root in the cities that several commonwealths which have no civil service rules in their State government have passed laws allowing their municipalities to adopt the merit principle. A host of cities have already done so.<sup>1</sup>

**The Illinois System.** — The city of Chicago and, following its example, the State, have gone farthest in developing efficiency in

<sup>1</sup> An excellent summary of recent progress is given in the annual reports of the U. S. Civil Service Commission. See also the article by Albert S. Faught, in the *National Municipal Review*, April, 1914, "The Civil Service Laws of the United States."

the local service. Chicago created a special efficiency division of the local commission. This division made a study of the powers and duties of all the offices in the city departments, the number of employees, and the assignment of work, the adjustment of salary to work, the methods of supervision, and the means of measuring and recording the quality and quantity of work done by each employee and each office. This survey immediately showed great inequalities among employees who were doing the same kind of work, also considerable waste and duplication of labor, together with lack of adequate supervision and responsibility. Each department head furnishes to the commission on blank forms provided by that body, a report on the attendance, conduct, and quality of work of each of his employees. The efficiency division makes an immediate investigation of employees with exceptionally high or unusually low scores. Two marked advantages of this plan have already resulted — the department head is stimulated to more careful supervision of his force and to the removal of inequalities and favoritism in the treatment of employees; and the commission itself receives the benefit of a complete knowledge of all the departmental work done and is able to adapt its entrance requirements accordingly. Following the success of the Chicago system, the State government in 1911 enacted a law containing among others the following unusual provisions:

The entire service is placed under the control of the commission. The exempted political positions are limited in number. Even laborers are selected by competition. The person standing highest on the list among the competitors is chosen for the position. He is given a probationary period and may be discharged if unsatisfactory, but it is not necessary for the commission to certify the three highest names on the list as in other States. The commission fixes by rule the grade of each position and the highest and lowest pay for each grade. As a result, a great number of inequalities in payment and work have been removed. The Illinois plan is notable in that it does not confine the Civil Service Commission to the mere work of conducting examinations and supervising entrance, promotion, and removal rules but enlarges its scope to include what every commission should be authorized to do — study, supervise, and improve the efficiency of the public service. Several other State commissions including those of New York and Wis-

consin have conceived their work in the same useful spirit. The movement promises an increase in efficiency which is only limited by the reluctance of the legislatures to cooperate. A weak Governor or Mayor may also in a single administration undermine the entire plan, for no plan of civil service can be independent of the chief executive.

**Practical Results of the Laws.** — The National Act has brought about such a strong improvement in the public service that no President would consider a return to old conditions. Some of the departments have large numbers of employees chosen for efficiency and retained in office regardless of their political opinions, forming an admirable staff of subordinates who deserve high praise, and compare in intelligence, ability, and faithfulness to officials of similar rank in any country.

The Commission should be given full financial support by Congress. It is time for Congressmen of the old school who have secretly fought the merit principle, to recognize that times have changed and that the Nation needs and will have an efficient personnel. Even today the Commission is forced to borrow two hundred employees from other departments. In an organization spending as our National Government does, \$678,000,000 annually for salaries in the Civil Service alone, the allowance of a fair sum for personnel management would be an economy. This point of view can be enforced upon Congress at any time by the concentrated efforts of business and civic organizations. Eighty-eight per cent of the government staff is located outside of Washington. The Commission has repeatedly asked that its district secretaries be allowed adequate traveling expenses to keep in close touch with the work of offices in this vast territory. At present much of the work must be done by correspondence instead of by personal conference and discussion. The Commission also asks for funds to employ "extension agents" who shall establish a direct personal contact between the Commission and the larger government offices, study the conditions of the personnel in important units of the Service, see that the law is observed, and offer to appointed officers and all ranks of government employers the fullest cooperation and aid which the Commission can give.

**The Civil Pension.** — A serious question is presented in the proposal of a pension for all civil service employees who have been in-

injured while in the performance of duty, and also for those who have served faithfully for a long series of years and have outlived their usefulness. For the first class there is every reason to provide a reasonable annuity under proper safeguards. The service of the National Government, in particular, includes a wonderful diversity of occupations, from the sweeping of floors to the construction of battleships. Many of these employments are accompanied by great danger, as in the railway mail service; if an employee in this bureau or in a government navy yard is seriously injured in the course of his duties, he is as deserving of relief at the hands of the government as is the soldier wounded by an accidental explosion in time of peace. Yet the latter is awarded a pension for life. It is not a sufficient answer to argue that civil employees are aware of the danger of their occupations and voluntarily take upon themselves the attendant risk — so does the soldier — nor is it reasonable to declare that they are at liberty to insure themselves in accident companies.

The proposal of government pensions for employees injured in the course of service rests upon a broad principle which is being recognized in all forms of business, both public and private, viz., that those who render faithful and efficient service should in some way receive special protection from the hardships and loss of earning power incurred in the performance of their duties. Foreign governments have long followed this principle in their pension systems. Pursuant to this idea the law of May 30, 1908, provides that laborers, artisans, etc., employed in certain departments of the government service shall be paid a compensation for disability incurred by accident in the service. The amount depends on the severity of the accident and the length of time which it lasts. No person is paid more than the total amount of wages for one year. In case of death the payment is made to the family. This Act affects about seventy thousand employees. There are also disability payments made to the members of the Life Saving Service under the Federal law, but these measures do not apply to the clerical positions and the latter are entirely unprotected in case of accident in the performance of duty.

**Retirement.** — Regarding pension or retirement allowances for those who have outlived their usefulness in the public employment, the decision is more difficult. It depends largely upon the answer



to the fundamental query — shall we make public employment a life career? In case of clerks with a permanent tenure of office there is no reason why such employees should be any less favorably situated than those performing similar work for the great business corporations. One by one the more important railway systems and industrial concerns are providing retirement and disability pensions for their employees. Some of these plans are by no means liberal in their terms,<sup>1</sup> but practically all of them involve substantial contributions to the pension fund by the employer. These systems show that larger numbers of the people are obliged to devote themselves to a limited, salaried occupation in which there is no means of support after the earning capacity has been exhausted. Such a view should be taken by the Nation as a whole no less than by its business corporations.

**The Federal Retirement Act.** — A beginning has been made by the Act of May 22, 1920 which provides for a retirement annuity to be paid government employees, based on length of service and the average salary during the ten years preceding retirement. At least fifteen years of service are required before an annuity is paid; the minimum sum of 30 per cent of the average salary is then given, but not to exceed \$360 yearly. The percentage is increased according to the number of years of service up to a maximum of 60 per cent for those who have served thirty years or more, the maximum sum being \$720 yearly. Retirement is compulsory on reaching seventy years of age but with a possible two-year extension, for general classes of employees, while for mechanics, letter carriers, and postal clerks lower age limits are fixed. Even to secure this trifling sum as an annuity the employee must contribute two and one-half per cent of his salary annually. The Act is administered by the Commissioner of Pensions. This plan is entirely inadequate and should be superseded by a genuine retirement allowance of respectable proportions which will more fittingly become the dignity of the National Government and recognize the Federal service as a professional career.

**Reclassification Plans.** — In 1920 a joint commission of six members composed of Senators and Representatives made a survey of the entire Civil Service and submitted the draft of a bill to improve and strengthen it. Among the important recommendations made

<sup>1</sup> Most of them provide an allowance of \$20 to \$30 monthly.

were that the Civil Service Commission be given more complete control over the work of choosing, training, promoting, and dismissing the government staff, that a centralized responsibility for this work be created in the Commission and that adequate appropriations be conferred upon it; also that the employment of "extension agents" as requested by the Commission, be authorized, in order to insure adequate supervision and coöperative relations throughout the Service; also that an advisory council be created of twelve members, six chosen by the Federal employees and six appointed by the President, to give the Commission its advice on proposed changes, rules, and regulations affecting employees and to make suggestions to the Commission on any personnel matter; also the creation of local personnel committees in the more important government establishments, their duty being to present the employee's side of personnel questions and their selection to be made by the employees themselves; also an adequate system of health and safety regulation which would care for employees disabled by sickness and make provision for accident prevention; also the employment of personnel managers in the larger government establishments to act as agents and advisers of both the Commission and the appointing officers on questions affecting the service.

**Salary Reclassification.** — As Congress has created new offices from time to time, the salaries of these places have not been uniform for the same kind of work performed. In one department clerks will receive \$1800 for duties that in another are only paid at the rate of \$1600. The technical and scientific positions are similarly diverse in pay for the same class of activity. The Reclassification Committee in 1920 recommended a general survey of the Service to bring about reasonable uniformity in pay of similar posts, thus removing this cause for discontent. Congress is loath to face any problem in a large way and has been slow to follow the suggestion of its own commission but has preferred to take up the problem piecemeal. When the task is complete, however, and when to it is added a redistribution of the overlapping duties of the departments, an essential improvement will be effected.

**Esprit de Corps.** — The solution of all these problems by methods already adopted in industry would create a new spirit in the Federal service. It would produce the same change that has already

been noticed in those business concerns where they have been tried — the gradual growth of a spirit of coöperation instead of hostility, the dying out of the old sullen animosity and class feeling among employees, and the development of that genuine desire for harmonious relations which is the basis of effective service. There is no mystery nor cause for surprise in this change, it follows readily upon the intelligent, vigorous, and sincere efforts of the employer to maintain a human rather than an autocratic atmosphere in employment relations and especially the offering of reasonable opportunities for advancement, as an incentive to ambition.

**Summary.** — The program of improvement for the immediate future might well be summed up therefore in the following measures:

The appropriation of sufficient funds to give the Civil Service Commission a real power of supervision of the system, through its district secretaries and the proposed "extension agents" and employment managers;

The establishment of effective service records by which promotions may be made on the basis of merit rather than upon the paralyzing principle of mere length of service alone;

The complete abandonment of the present policy of making heads of offices, division and bureau chiefs, political appointments; The extension of the merit principle to these posts, the opening up of opportunity for "employees" to be promoted to "officials" and the stirring up of ambition among the hundreds of thousands of clerks who at present have little or no incentive to do more than a minimum of work sufficient "to hold their jobs";

The adoption of a moderate pension system which will at least assure to those who have served the government faithfully and well, that they will be taken care of when incapacitated;

The complete readjustment of salaries in the technical and intermediate positions, to afford a more reasonable return to those who carry the real burden of public work;

The creation of an esprit de corps among members of the service by the same methods that have proven so successful in private business;

Finally, but not least, the education of all classes of the public to see in the public service not "a plum" but a business organization. There are occasional delays and setbacks in this program, but

progress has been fairly steady and already it can be said that we are creating a government profession of moderate or fair rewards, increasing permanence and high ideals.

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### QUESTIONS

1. Explain the chief purposes aimed at in the reorganization of the civil service which is now progressing in National and State governments.
2. Why did we have no active movement for civil service before 1880?
3. Explain the central thought in the "Merit" principle.
4. How far has this principle progressed in the National, State, and local service at the present time?
5. Why is it weakest in the State governments?
6. Explain the practical obstacles to the progress of the "Merit" system.
7. Prepare a report showing: The rise of the demand for a modern system of civil service, and,
8. Number of positions in the Federal service, the number subject to the Civil Service Act, the types of position to which the Act does not apply.
9. Why is salary reclassification necessary?
10. Sketch the main provisions of the Act of 1883.

11. You are an applicant for a post in the classified service — show the procedure which you would follow and the chief rules governing your application.
12. How does the exemption of the highest officials from Civil Service rules affect the lower grades of the service?
13. How has the President sought to apply Civil Service principles in the appointment of postmasters?
14. Resolved, That promotion in the government service should depend on length of service. Defend either side.
15. What basis of promotion is usually followed in business houses?
16. Explain the examination as a basis of promotion as used in the railway mail service.
17. What is the difficulty in making a service record the basis of advancement?
18. Summarize the main provisions of the law on removals from the Federal Civil Service.
19. A clerk who is discharged from a Federal bureau appeals to the courts on the ground that he was not given a hearing as required by the rules. What would the court decide and on what authority?
20. A Democratic clerk in a Republican administration is discharged without being notified of the reasons. Has he any redress?
21. Explain the more important criticisms of the Civil Service and give your impressions of their weight.
22. Why does not the Civil Service Commission visit the various examining boards which conduct the tests for entrance?
23. What is the proportion of Federal offices located at Washington? In view of this fact how does the Commission administer its work?
24. Are appointing officials generally opposed to or favorable to the "Merit" principle?
25. Prepare a report on the Massachusetts Civil Service Act, showing its most important provisions and the regulations adopted under it.
26. How has it been applied to the cities?
27. Explain the unusual features of the Illinois law.
28. What are the advantages of the Chicago system?
29. Have you a merit system in your State? If so, outline it. If not make a draft of one which would be desirable and practical.
30. Are our business and political conditions becoming such as to require a professional civil service? Explain.
31. Why is it hard to retain exceptionally able men in the Federal service?
32. Explain the more important proposals for civil pensions and give your impressions of the value of these proposed plans.
33. Describe the present pension system.
34. Is it adequate to offer reasonable protection and support for permanent members of the service?
35. Prepare a brief essay on the civil service as a life career, setting forth also the views of two civil service employees of your community as to the advisability of entering the service of the City, State, or Nation.

## CHAPTER 27

### DIRECT LEGISLATION — THE SHORT BALLOT — PROPORTIONAL REPRESENTATION

#### DIRECT LEGISLATION

THE remarkable ease with which a compactly organized group in the State legislature or the city council can defeat a popular measure, or force the passage of an unpopular one has led to a vigorous search for some means of making legislation more truly represent the expressed will of the voters. This search has directed general attention to the plan known as Direct Legislation; which includes the Referendum and the Initiative. These institutions, which were first viewed with scepticism in this country because they were of foreign origin, have slowly grown in popular favor until in one form or another they have secured a firm foothold.

**The Referendum.** — In certain of the smaller Swiss cantons or States the entire population of male citizens acts directly on all legislation at a periodical gathering like a town meeting which is the direct descendant of the old Teutonic "Moot" or meeting.<sup>1</sup> This direct law-making is of course not possible in the larger States because the people could not be convened in one gathering. Accordingly they have chosen representative legislatures but have reserved the right to require that any law passed by the representatives must, on demand, be referred to the masses of the citizenship for approval. As legislation grew in volume and the cantons increased in population it became necessary to provide that when the citizenship wanted to vote on any law, a petition should be circulated among the voters and when a certain proportion of them had signed it, the law in question was then subjected to the popular vote.

<sup>1</sup> A good short description of the early moot and some of its later influences may be found in John Fiske, *American Political Ideas*.

In the United States the Referendum has been frequently used from early times. Most of the State constitutions may be amended only after a final vote of the citizens in approval. The city charters are often required to be approved by the city electorate. The temperance movement in its local option form was an application of the referendum to the liquor question, the voters in each township deciding at an election whether liquor shall be sold or not. The debt of cities and counties may not be increased beyond a certain proportion of the value of taxable property located in their borders, except with the consent of the voters, and in general all important changes affecting the fundamental constitutional law of a State, county, a city, or even a school district may only be undertaken after the voters have expressed their wishes at the polls. In this form the Referendum has been a conservative feature of our government, tending to restrain the momentary whims and flights of the legislatures, both State and local. The recent popular movement involved its extension to all legislative acts so that the people might defeat any State measure whatever, which they disapproved.

A typical Referendum plan is that used in Oregon, where a vote is held on any bill passed by the legislature when 5 per cent of the voters sign the petition, or when the legislature itself so orders. Petitions are filed with the Secretary of State within 90 days from the adjournment of the session. Copies of the full text of the measure are printed by the Secretary of State and distributed among the voters together with any arguments for or against the measure which any person or organization may deposit with the Secretary, accompanied by a sufficient sum of money to cover printing expenses. Heavy punishment is provided for any person who signs a petition with any name other than his own, or who signs his own name more than once on the same petition. A Referendum may be taken upon part of an act as well as upon the whole. The voters of any city or town may also have a Referendum on local ordinances upon filing a petition signed by 10 per cent of their number.

State laws which the legislature declares to be emergency measures necessary for the peace, health, or safety of the State may go into operation immediately without waiting for the Referendum to be held. If a measure is not so declared an emergency act, it be-

comes operative 90 days after the legislature has adjourned, unless a Referendum petition has been successfully circulated meanwhile. If such a petition, so signed, is filed within the required 90 days, the Act does not become operative until approved at the polls. Elections are held every two years.

**The Initiative.** — The Initiative is a more recent idea also taken from Switzerland. It provides that a certain percentage of the voters by petition may *propose* a bill, which becomes a law if approved by the legislature (in some States) or if approved at a subsequent referendum or popular election.

In Oregon and other States, the petition is circulated among the people, and after it has been signed by 8 per cent of the voters or more, it is filed with the Secretary of State, who places it upon the ballot at the next election. If a majority of the voters approve, it becomes a law without further formality — so that a bill which is proposed by the Initiative may be enacted without the aid of the legislature. If two or more conflicting measures are approved by the people, that one becomes law which receives the highest affirmative vote. The Oregon constitution also grants to voters in cities and towns the right to initiate local measures or ordinances requiring the signature of the petition by 15 per cent of the local voters. Some States require a higher and some a lower minimum percentage of the voters to sign the petitions; in some States the Initiative does not have the immediate effect of bringing a bill before the people for their approval but brings it first before the legislature. The fundamental idea is to give the majority of the voters a control not only of the membership of the legislature but also of the measures which that body passes.

Several States have also applied the Initiative to changes in their constitutions, enabling the voters to propose amendments independently of the legislature. Nineteen of the commonwealths have already adopted both Initiative and Referendum on their laws and several others are considering a like change.

**Publicity.** — All the Referendum States provide that the State shall issue a "publicity pamphlet" at each referendum election. This contains the bills on which the referendum vote is called, and a limited space devoted to the arguments for and against each measure. This pamphlet is circulated at State expense so that the voters may have full information on the issue. In addition



the political parties issue their own pamphlets, handbills, and advertising material on the questions at issue, and various voluntary groups and associations such as the farmers' granges, labor unions, bar associations, commercial groups, literary societies, and good government groups hold meetings to study and discuss the measures. Their conclusions often carry much weight. These agencies together with the usual press comment offer the voter a fairly adequate means of informing himself on the issue.

**Objections.** — Among the chief objections raised against the system of direct legislation are the following :

1. The masses of the people have no opinion on most of the subjects to be submitted by the Referendum. They care little or nothing about the merits or defects of a particular law, they therefore participate only irregularly in referendum votes — such a referendum cannot represent the will of the people because the final decision is made by a majority of only a small proportion of the people.

2. Direct legislation would tend to weaken the sense of responsibility of the legislature — it makes that body a mere drafting committee, which does not vote for or against a bill but votes to give the people a vote on the bill.

3. It also lessens the sense of responsibility of a voter who is called upon, in season and out, to register his will on a great variety of subjects with most of which he is not familiar. By overloading and overwhelming him the Referendum must eventually discourage even his performance of his ordinary political duties.

4. The Initiative has been especially objected to because it provides no careful drafting of the proposals or new bills which are to be submitted to the voters. These bills may be crudely drawn, they may be full of serious defects, yet they must be sent to the people in precisely the form in which they are filed.

5. It especially opens the way for radical and unwarranted interference by the government with private business and must inevitably increase this interference many fold. The danger to business interests from this source must soon become so serious as to form a grave menace to our industry and prosperity.

6. At one time strong objection was made on constitutional grounds that the Initiative and Referendum were measures of pure democracy while the Constitution in Article 4, Section 4, required the government of the States to be "republican." It was urged

that "republican" meant representative while direct legislation required direct action by the people in place of representative government. In *PACIFIC STATES TELEPHONE CO. v. OREGON*, 223 U. S. 118, 1911, the Supreme Court held that while "republican" government must be representative the main feature of the latter type of government was the choice of important officers and legislators by the people. The mere fact that if they were chosen, some of their actions might be submitted to a review by the voter did not destroy the substantial "republican" character of our system.

**Do the People Vote at Referendum Elections?** — It is pointed out that the direct legislation plan was put into several State constitutions at elections in which only small proportions of the voters turned out. On many subjects of the greatest importance a referendum now attracts but little attention.

The greatest percentage of voters who have acted on any of these measures is 90 per cent, and the smallest below 50 per cent. The general average vote on referendum and initiative measures is much less than the vote for State officials. Very few measures in recent years have received more than 80 per cent of the total vote for Governor. Of those measures which were passed, an insignificant proportion received a majority of the total number of electors registered. From this it is clear that measures are being passed or rejected as a regular occurrence without the active consent of the masses of the voters. When we come to examine the nature of the measures which have been so acted on, it is claimed that they are of great importance despite their inability to secure the popular interest in the form of a vote. Such important questions as the appropriations for the State university, the adoption or rejection of a single tax system and the State ownership of railroads have attracted the attention of only from 68 per cent to 80 per cent of those who voted for the State officials. If 39 per cent of the total number of those voting for Governor in Iowa at one election had favored the amendment the State would have been authorized to engage in the railroad business. The judicial system of the State was changed by a number which equaled 37 per cent of those voting for Governor.

**Answers to Objections.** — To these objections the friends of the system make answer: 1. That American experience up-

holds both the principle and the practice of direct legislation. In Oregon there have been four general elections. At these, 64 measures have been voted on, supported by 71 different organizations of citizens. Where there was no organized effort for or against a measure it was commonly rejected. No radical law attacking property rights, either of individuals or of corporations, has been enacted by the referendum. The Secretary of State is required to print and furnish to every registered voter a pamphlet giving the full text of the measure to be voted on with a brief summary of the arguments submitted and paid for by those supporting and opposing the several measures. In 1910 this pamphlet was 208 pages in length. The total cost to the State for the preparation and distribution of the pamphlet was about 20 cents for each registered voter. The submission of 32 measures in three different elections in Oregon has cost the State about \$781.00 for each measure. The cost to the 71 private organizations for conducting campaigns for and against the measures proposed, is estimated at about \$125,000.

2. The advocates of the system consider the vote on most of the measures to have been intelligent and that it has been of the highest educational value.

3. There has been little hasty, ill-advised legislation. Says Dr. Barnett in his book on Initiative and Referendum — "In spite of the difficulties in the situation, the results of the several elections are, in general, competent evidence as to the intelligence of the vote cast. That the voters have done remarkably well under the circumstances is generally conceded, even by opponents of direct legislation, although there is of course much difference of opinion as to the relative merits of many individual measures that have been approved or rejected at the elections.

"And whatever adverse criticism may be deserved by the action of the voters, it is believed that the results of direct legislation at least compare favorably with those of representative legislation."

4. The interest in government has increased to a remarkable extent. This is especially noticeable in the public schools and other organizations. "Brains, ideas and arguments rather than money and log-rolling govern the standard of legislation." The greatest of all changes has been that the exclusive control of government and of legislation by party leaders or bosses, has been abolished

and the independence of the voter has become an established fact.

W. F. Dodd in his valuable work on "State Government" shows that from 1900 to 1919, 717 measures were submitted to popular vote in the States having direct legislation. Of these, 307 were adopted. 429 of the total however were constitutional amendments and of these only 160 were originated by initiative petition.

**Some Conclusions.** — Undoubtedly the system has at times been extended on too large a scale, by applying it to an excessive number of measures in recent elections, but impartial observers must agree that the practical effects have been in some points good. No serious attacks have been made on private property or liberty, no revolutionary or subversive changes in the government have been made, nor have the people lost their sense of responsibility, as was predicted. Party ties have become looser, but this has in no way injured the general welfare. The people have displayed great independence of thought, and above all, the type of men who have come to the front under the direct legislation system is distinctly superior to that of the older régime.

**The Recall.** — In order to complete the popular control over State government the recall has been adopted in many of the States; it allows the voters to retire officials for any reason whatever which seems satisfactory to the electorate. The usual method is to file a petition signed by a required percentage of the voters; this has the effect of placing on the ballot at the subsequent election the question whether the official concerned shall be retired or not.

Meanwhile nominations for the possible vacancy may be made to be voted on at the same time as the recall. The present incumbent is considered nominated as a matter of course. In Kansas the petition may only be signed by those who voted for the officer but this is not common in other States. Several commonwealths have already adopted the recall, principally those of the Middle West, and others have provided for its submission to the people. In Minnesota the petition must be signed by 20 per cent of the voters; 200 words are allowed on the ballot to state the reasons why the official should be retired. In this State and in Kansas the principle has been extended to include appointive as well as elective officials, on the ground that many of the former exercise powers which are as fully political in their nature as those of the elected

posts. It is claimed that this will overcome one of the strongest objections to the short ballot — the danger that it would so greatly concentrate power in the appointing officer as to take all control of the State offices out of the hands of the people. The recall of both appointive and elective officials, it is claimed, would overcome this objection.

The first important use of the recall was the ousting in 1921 of the Governor of North Dakota who had secured the adoption of the recall provision in the State Constitution, as a part of the Non-Partisan League plan. In the successive waves and recessions of public opinion in that State he was first elected and then removed from office and later secured political control of the State in the senatorial election of 1922. In the same year a dispute arose as to telephone rates in Oregon; an increase appeared necessary and the Public Service Commission allowed it. A number of citizens objected and asked for a re-hearing which was granted. In its decision upon the case after the re-hearing, the original award of high rates was repeated with some unfortunate critical allusions to those who had asked for the re-hearing. Irritated by these allusions more than by the decision the protesting citizens successfully aroused the voters, circulated a recall petition, and at the ensuing election secured a recall vote ousting the entire Commission. This incident illustrates the extent to which an unpopular though possibly just decision of a semijudicial nature may be used to dismiss from office those who courageously render the decision. Such a use of the recall amply justifies the substantial criticisms that have been made against it.

**Recall of Judges.** — The official recall has been applied in several States even to the judges. The usual method of registering a petition with a certain number of signatures representing a fixed proportion of the total registered vote, is observed. California and Oregon provide for such a recall in their constitutions but no serious use has thus far been made of the provision. The constitution of New Mexico, when it applied for admission to the union, likewise contained a judicial recall, but upon the insistence of President Taft this was dropped and the territory was admitted with only the ordinary recall provisions, exclusive of judges. There are strong reasons urged against the judicial recall. It is forcibly argued that the judge should be removed from politics and partisan

intrigues as far as is practicable. In order to accomplish this, his decisions, however much they may be tinged by public opinion, should not be influenced by a desire to secure reelection. This result can only be produced by giving him some independence of tenure, with which a recall must inevitably interfere.<sup>1</sup>

**Recall of Judicial Decisions.** — Colonel Roosevelt in his campaign of 1912 proposed that when a Supreme Court declared that a law conflicted with a part of the Constitution, a popular vote might be held at the following election to decide whether the Act should stand despite its conflict. He urged that this would not lessen the respect for the courts nor the constitutions but would reduce the conflicts between the courts and the people. It would also make it unnecessary to amend an entire part of the Constitution in order to secure the passage of a single law. The American Federation of Labor has also proposed an amendment to the U. S. Constitution providing that the decision of the Federal Court holding a Federal law unconstitutional might be referred to Congress; if the law were approved by two-thirds of each House it

<sup>1</sup> In his special veto messages on the original resolutions admitting New Mexico and Arizona, President Taft said — “. . . judges, to fulfill their functions properly in our popular government, must be more independent than in any other form of government. . . . In order to maintain the rights of the minority and the individual and to preserve our constitutional balance we must have judges with courage to decide against the majority when justice and law require. . . .”

“Controversies over elections, labor troubles, racial or religious issues, issues as to the construction or constitutionality of liquor laws, criminal trials of popular or unpopular defendants, the removal of county seats, suits by individuals to maintain their constitutional rights in obstruction of some popular improvement — these and many other cases could be cited in which a majority of a district electorate would be tempted by hasty anger to recall a conscientious judge if the opportunity were open all the time. . . . On the instant of an unpopular ruling, while the spirit of protest has not time to cool and even while an appeal may be pending from his ruling in which he may be sustained, he is to be hailed before the electorate as a tribunal, with no judicial hearing, evidence or defense, and thrown out of office or disgraced for life because he has failed in a single decision, it may be, to satisfy the popular demand. Think of the opportunity such a system would give to unscrupulous political bosses in control, as they have been in control not only of conventions, but elections! Think of the enormous power for evil given to the sensational, muck-raking portion of the press in rousing prejudices against a just judge by false charges and insinuations, and the effect of which in the short period of an election by recall, it would be impossible for him to meet and offset!”

would stand as valid. This suggestion follows the procedure in the case of bills vetoed by the President and amounts to a congressional recall of judicial decisions.

**The True Rôle of Direct Legislation.** — In reviewing these various efforts to place political power more directly in the voter's hand we must conclude that the main principle, direct action, is sound when applied to the decision of a very few fundamental points of policy, or, in times of emergency when the machinery of representative government has escaped popular control. Such instances occur all too frequently in our cities and in the State legislatures. But we must also concede that direct legislation is an extraordinary remedy for extraordinary evils. It is not a common means of conducting the government to be relied on in the everyday management of public affairs. There is also a vast difference between the attempt to secure an expression of the will of the people by counting votes on many minor questions, and deciding those questions by the reasoned judgment of representatives selected by the people. The great majority of government problems should be handled in the latter way. We cannot remedy all government ills by excessive voting. The friends of the system have sought to ignore this fact while its enemies have concentrated their attention upon this one feature of the system to the exclusion of its real and great advantages. Of the three most urgent needs in government structure today, directness, simplicity, and concentration, direct legislation satisfies the first. The other two are more completely fulfilled by the Short Ballot.

### THE SHORT BALLOT

**The Need for a New Ballot.** — In sharp contrast to the movement for direct legislation is the Short Ballot plan. The former is an attempt to go back to pure democracy by submitting questions to the people. The Short Ballot idea, on the contrary, proposes that the people's action be concentrated on the election of a very few officials. These are to be given supreme administrative power; they are to appoint all other officers and to control the entire execution of the law. The practical basis of this new plan is unusually strong. We are today choosing so many officers at each election that no voter can tell anything about the real qualifi-

cations of nine-tenths of the men for whom he casts his ballot. He knows something of the men who head the ticket but the names of the others are unfamiliar. The candidates for aldermen, councilmen, coroners, surrogates, sheriffs, and a horde of others he has never seen nor heard of. He is forced to vote blindly under party direction. The great numbers of our people do not yet see this clearly, for they are still told that the most democratic form of government is one in which all the "servants of the people" are elected by them. This sounds plausible, and it would be true if these servants could be elected one at a time, and if we could actually find out their qualifications for office. But it is exactly by loading an immense number of choices upon the voter all at one time, that the task becomes superhuman, so that in despair he relies upon party action, that is, upon a machine leader.

"Unpopular Government." — This paradox, that by allowing the citizen to vote on everybody and everything we destroy his real control over elections is well stated by Prof. A. M. Kales in his *Unpopular Government in the United States*.<sup>1</sup> "The elector, by being required to vote too much, has been compelled to surrender to a large extent his right to vote at all, and to permit others to cast his ballot as they see fit. Formerly people were disfranchised when they were given no opportunity to vote. Today they are disfranchised by being required to vote too much. Formerly the legal rulers of the disfranchised masses were selected for them by the few without equivocation. Today our legal rulers are selected for us by the few through the subterfuge of the masses casting their ballots according to the directions of the few. In other forms of unpopular government the central figure has been the monarch, the autocrat, the oligarch, or the aristocrat. In ours it is the politician. We have avoided monarchy, autocracy, oligarchy, and aristocracy, only to find ourselves tightly in the grasp of a politocracy."

The politician has been quick to see the advantages to him of many elected offices and blind voting. He has multiplied these until it is the usual thing to find twenty to thirty offices on the ballot with from one to two hundred names of candidates. Occasionally the names run over four hundred, and in March, 1912, at the primary election in New York the ballot was 14 feet long. To offer any one of these ballots as a means of expressing popular

<sup>1</sup> University of Chicago Press, 1914.



opinion is a travesty on elections. They all show the need for some simple plan which will bring the theory and the practice of our institutions into harmony. The theory has been that the elector should vote because he has an opinion to express, while in practice the elector can have none because it is carefully smothered under an avalanche of candidates and offices.

**The Short Ballot Idea and its Application.** — The Short Ballot movement proposes to reduce radically the number of elected officers in all parts of the State and local governments. The principle as defined by its friends is:

First. That only those offices should be elective which are important enough to attract public attention.

Second. That all others be filled by appointment.

From this brief statement we see that the basic idea is simplicity and concentration. How has it worked in practice? It has been applied most completely in the commission form of city government, which, commencing in Galveston, Texas; has rapidly spread to many scores of cities all over the United States, ranging in population from 1000 to 250,000. The origin of the plan is interesting, and shows the practical advantages of the short ballot principle. In 1900 the city of Galveston was completely destroyed by a tidal flood. It had previously been governed under the typical mayor and council form of charter, with a long series of elected officials. It was controlled by political gangsters, who batted on the appointments and city contracts, and on secret funds paid by the denizens of the underworld for police protection. This form of government, confronted by a great natural catastrophe, broke down completely.

It was seen that no ordinary measure could succeed in the Herculean task of reconstructing the entire town, raising its level several feet above that of the Gulf to prevent future inundations, reconstructing the Health Department to cope with the epidemics that threatened, and reorganizing the financial system and the entire municipal administration. In the emergency the citizens grasped at the idea of a *small* commission, of five members, to be elected by the people and to possess all the power formerly controlled by the mayor and council. Each member of the commission took charge of an administrative department, and with his fellow commissioners formed a small legislative body. In this

way responsibility for every measure, whether it was a municipal ordinance or the appointment of an official, was immediately located in such a way that the department-heads could not escape the force of public opinion. The five men chosen to fill these positions were so successful in carrying out the task of reconstruction that they have been successively reelected in later years. The unusual results secured by the Galveston plan soon attracted the attention of other cities and one by one a long series of municipalities have adopted the commission form. In one or two instances only, has there been a partial failure, and these are directly attributable to the character of the men first elected. The failure has been retrieved by the early substitution of other officials. The testimony of the merchants, officials, and citizens generally in the small-commission-governed cities, has been so strongly favorable that the movement has now gathered headway all over the country. It has been adopted in several hundred cities both large and small. The reason for its success is to be seen in the short ballot principle, which it embodies. It has been strengthened by transferring all administrative power to a city manager who carries out the legislative rules fixed by the commission. The following analysis of the advantages of concentration in the ballot is given by Mr. R. S. Childs in a pamphlet<sup>1</sup> issued by the Short Ballot Organization of New York City:

"The commission plan of government is based on no false idea that the people want to elect every clerk. It gives the power to five men, who thereby become conspicuously responsible before all the people of the city. Each one of them is important enough to make it worth while for the citizens to inquire concerning his record and character. Each candidate for the office can attract a crowd to hear him speak, whereas an old-time councilman would have been utterly unable to get a hearing before the people. There are not so many commissioners but what every citizen can find out about all of them and vote intelligently on election day. There are not so many as to cause a citizen to depend upon tickets put together for him by political specialists. Each citizen can and does make up his own ticket, and the function of the professional ticket-making machines is thereby entirely disposed of.

<sup>1</sup> *The Short Ballot Cities.*

“The commission plan succeeds therefore because it puts the power where the people can see it. The vital feature is not the method of organization, but the method of popular control. It is the ballot on election day which is unique. It is so short that every citizen knows what he is doing and is not relying on a party label or on the guidance of a politician. The ‘average man,’ ‘the man in the street,’ or the ‘plain people,’ whatever you choose to call them, are in complete control of the government.

“The most marked phenomenon of commission government has been the increased interest of the people in their city government. All eyes have been focussed on the city hall month after month without interruption. The acts of the commission are the topic of conversation for the street car and the business men’s luncheon. Criticism is plentiful, and — better yet — knowledge of the facts is widespread. The people of the city oversee the government. The force of public opinion has been repeatedly illustrated in the commission governed cities. Few men, good or bad, would have the strength to resist popular demand when it is so intensively concentrated upon them. Each commissioner knows his responsibility for what is done, and knows that everybody else in town knows it too. Politicians of the average sort have been elected to office many times in commission governed cities, but their conspicuous responsibility has brought about a remarkable responsiveness to the opinion of the people.

“In our old-fashioned city governments we have committed two serious errors. First, we have scattered the powers of government among so many petty officials that it is quite impossible for the people to watch and control them all. Second, we have subdivided the power in such small fragments that no single part is really worth watching. A member of the city council for instance, under the old form of government, has so little power that it is really not worth while for the people of the town to become agitated over the question of who shall get the job.

“Those who promoted the idea of having a host of elective officials in the government have always taken it for granted that there was something democratic about this procedure. Democracy, however, does not consist in electing everybody, but in controlling everybody. The mayor’s office boy, for instance, may be appointed by the mayor, or elected by popular vote. He is a public servant,

but there is nothing democratic in electing him when he can just as well be appointed. The vital thing is that he shall be controlled by the people, and if he will be under better control through appointment than through election, it is more democratic to appoint him."

The author <sup>1</sup> has suggested the following arrangement of a ballot for each of four years, showing how readily the principle might be adopted (the State offices are given their New York titles):

FIRST YEAR	SECOND YEAR	THIRD YEAR	FOURTH YEAR
President and Vice President four years Congressman two years City Councilman two years	Governor four years State Assembler two years County Supervisor four years	Congressman two years Mayor four years City Councilman two years	State Senator four years State Assembler two years

**The Relation of Ballot to Party.** — The great advantage claimed for the short ballot by its friends is the restoration of the voters' real control over the party organization. No condition of American politics is conceivable in which we could dispense with parties. Some form of partisan system and organization is essential to every elective government. Since they are here to stay, our real problem is to make them responsive and it is at this point that the short form of ballot offers its greatest service.

Professor Charles A. Beard has prepared a strong and suggestive statement showing the utter impossibility of democratic government under the present overloaded ballot, and the facility with which this situation could be remedied by the election of a few officers with extensive appointing power, that is, by the short ballot principle.<sup>2</sup> In this article and in his admirable work on the Amer-

<sup>1</sup> R. S. Childs: "The Short Ballot" reprinted in part from the *Outlook*, July 17, 1909, and issued as a separate pamphlet by the Short Ballot Organization, New York City. The greater part of this stimulating article is reprinted in the Appendix.

<sup>2</sup> *The Ballot's Burden, The Political Science Quarterly*, December, 1909.

ican Government, Professor Beard has shown some of the undemocratic features of the present ballot system, as used to prevent any expression of real popular opinion, especially in the primary nominations — and it is in the primaries that our real control of government exists. Says Professor Beard:

“ It would be possible to summon a host of witnesses, publicists, men of affairs, and practical politicians, in support of the doctrine that our elective system has been so overdone that it has ceased to be in fact an elective system and has become the prize of the expert. It would be possible to show a number of instances in which corrupt influences have actually sought the establishment of elective offices for the very purpose of taking the control of them out of the hands of the electorate. It would be possible to demonstrate that no other country in the world wastes so much of its best political energy in overcoming the friction of its governmental machinery. But it seems a work of supererogation to push the argument farther.

“ The effort to attain a ballot short enough to assure real popular control, should begin in a reform of the central government of the State, by giving the governor power to appoint all of the executive officials, just as the President of the United States appoints the heads of departments. No good reason can be advanced why purely administrative officers like auditors, treasurers, and secretaries should be elected, for they have no large discretionary power and no share in shaping the policy of the administration. If the lieutenant governor is made the presiding officer of the upper house of the State legislature, some reason may be advanced for making the office elective; but it would be better to allow the Senate to elect its own president. It often happens that the governor is at loggerheads with the very men who are to assist him in ‘ the faithful execution of the laws,’ because they belong to different political parties or, what is often worse, to contending factions within the same party. . . .”

**Opposition to the Short Ballot.** — It has been a universal experience of all political leaders who attempt to make any change or improvement in either our laws or our government system that the whole plan of dissipated responsibility is the most serious obstacle to improvement. The compact professional organization of each party fights any change to the last ditch. Its leaders often unable to give their real reasons for opposition to progress, denounce

every attempt at improvement as an effort to overthrow the American government. Such is the nature of the opposition now directed against the Short Ballot proposal. It is not denied that the present ballot is beyond the possible control of the voter, nor that the short plan would give him a more direct action upon the many hundreds of officers which he now nominally elects, but really neglects, nor can it be doubted that the whole administrative system of the State or City would at once respond more vigorously and completely to the direction of its responsible executive chief. It is simply contended that the short ballot would concentrate power, and is therefore un-American. Unfortunately for this objection, it is advanced by the very men who themselves represent the last word in concentration of political power — the party leaders and bosses. Their real unspoken objection is that the short ballot concentrates responsibility.<sup>1</sup>

<sup>1</sup> Says Theodore Roosevelt in his Autobiography, writing of his early struggles in New York politics :

"The most important of the reform measures our committee recommended was the bill taking away from the Aldermen their power of confirmation over the Mayor's appointments. We found that it was possible to get citizens interested in the character and capacity of the head of the city, so that they would exercise some intelligent interest in his conduct and qualifications. But we found that as a matter of fact it was impossible to get them interested in the Aldermen and other subordinate officers. In actual practice the Aldermen were merely the creatures of the local ward bosses or of the big municipal bosses, and where they controlled the appointments the citizens at large had no chance whatever to make their will felt. Accordingly we fought for the principle, which I believe to be of universal application, that what is needed in our popular government is to give plenty of power to a few officials, and to make these few officials genuinely and readily responsible to the people for the exercise of that power. Taking away the confirming power of the Board of Aldermen did not give the citizens of New York good government. We knew that if they chose to elect the wrong kind of Mayor they would have bad government, no matter what the form of the law was. But we did secure to them the chance to get good government if they desired, and this was impossible as long as the old system remained. The change was fought in the way in which all similar changes always are fought. The corrupt and interested politicians were against it, and the battle-cries they used, which rallied to them most of the unthinking conservatives, were that we were changing the old constitutional system, that we were defacing the monuments of the wisdom of the founders of the government, that we were destroying that distinction between legislative and executive power which was the bulwark of our liberties, and that we were violent and unscrupulous radicals with no reverence for the past." And in his Columbus

This is the principle which is gaining such rapid headway in the city government of all sections of the country. That it has not yet secured an equal foothold in the States is owing to the greater slowness of all changes in their organization. But already the first proposals for a rearrangement of commonwealth government have been worked out along the lines of greater concentration, as we have seen in the Chapter on State Constitutions. It would seem that there remains only the cultivation and development of public opinion on this point to bring about a general adoption of the principle. Its strength lies in the one fact that it simplifies political action, forces it out into the open, and makes it responsible — and simplicity, publicity, and responsibility are essential needs of our government today.

#### PROPORTIONAL REPRESENTATION

The members of a body such as the House, Senate, State legislature, city council, may be chosen by one of three methods: (1) By districts, one member from each district. Under this plan each voter votes for one member only. (2) Or, by general ticket, all voters balloting for the entire number of members to be elected. If there are 30 councilmen to be chosen each voter

address in 1912 Mr. Roosevelt brought this same reasoning to bear upon ballot improvements: "In the first place, I believe in the short ballot. You cannot get good service from the public servant if you cannot see him, and there is no more effective way of hiding him than by mixing him up with a multitude of others so that they are none of them important enough to catch the eye of the average workaday citizen. The crook in public life is not ordinarily the man whom the people themselves elect directly to a highly important and responsible position. The type of boss who has made the name of politician odious rarely himself runs for high elective office; and if he does and is elected, the people have only themselves to blame. The professional politician and the professional lobbyist thrive most rankly under a system which provides a multitude of elective officers, of such divided responsibility and of such obscurity that the public knows, and can know, but little as to their duties and the way they perform them. The people have nothing whatever to fear from giving any public servant power so long as they retain their own power to hold him accountable for his use of the power they have delegated to him. You will get best service where you elect only a few men, and where each man has his definite duties and responsibilities, and is obliged to work in the open, so that the people know who he is and what he is doing, and have the information that will enable them to hold him to account for his stewardship."

selects 30 councilmen at large. (3) Or, by proportional representation, which enables each party to choose a number of members in proportion to its numerical strength. If a party has 20 per cent of the voters it should secure about that proportion of the members.

**Proportional Representation: The Hare Plan.** — "P. R." as it is called, is generally used outside the United States. In parts of Great Britain, Ireland, the Dominions, and in many business and public associations, the Hare plan is followed. In continental countries the so-called List System is used. Either may be applied where there are several members of a legislature or council to be chosen. The Hare plan requires no primaries, but the candidates are first nominated by petition signed by a certain percentage of the voters. Each voter ballots for only one candidate as his first choice, but also expresses his second, third, etc., preferences. These later preferences are counted whenever the first choice is not chosen or whenever the first choice has a surplus of votes. So, in an election, *e.g.* for five members of a city council, the names of the candidates are arranged alphabetically on the ballot with blank squares at the side in which the voter places a number, 1 for first choice, 2 for second choice, etc.

*Sample Ballot.* — The sample ballot on the next page is taken from Leaflet No. 5, issued in 1919 by the American Proportional Representation League. It has been used in actual elections under the Hare plan.

**The "Quota."** — As soon as the total number of ballots cast is known, the election officers ascertain the "quota," that is the smallest number of votes required to elect a candidate. This is obtained by dividing the number of places to be filled plus one into the number of valid ballots. The next highest whole number is the "quota." Supposing there are 5 places to be filled and 400 valid ballots have been cast,  $\frac{400}{5 \text{ plus } 1}$  equals  $66\frac{2}{3}$ . The next highest whole number is 67 which is the "quota."

**Summary of Rules of Hare System.** — 1. Voter may vote for as many candidates as there are names on the ballot, expressing his order of choice. 2. The "quota" is obtained by dividing the number of valid ballots by the number of places to be filled plus one, and taking the next highest whole number. 3. All candidates receiving first choices equal to the "quota" are declared elected.



## DIRECTIONS TO VOTERS

Put the figure 1 opposite the name of your first choice. If you want to express also second, third, and other choices, do so by putting the figure 2 opposite the name of your second choice, the figure 3 opposite the name of your third choice, and so on. In this way you may express as many choices as you please. **THE MORE CHOICES YOU EXPRESS, THE SURER YOU ARE TO MAKE YOUR BALLOT COUNT FOR ONE OF THE CANDIDATES YOU FAVOR.**

This ballot will not be counted for your second choice unless it is found that it cannot help your first; it will not be counted for your third choice unless it is found that it cannot help either your first or your second, etc.

**A BALLOT IS SPOILED IF THE FIGURE 1 IS PUT OPPOSITE MORE THAN ONE NAME.** If you spoil this ballot, tear it across once, return it to the election officer in charge of the ballots, and get another from him.

## FOR THE COUNCIL

	Charles Abrams
	Henry Alworth
	Henry Boland
	Martin Crossman
	Albert Dalton
	Mary Dagerberg
	William Dorner
	Walter Dukes
	Howard Goldman

4. Should these successful candidates have more first choices than the "quota" the excess ballots, chosen at random, are transferred to the second choices. If the second choice on the ballot is elected also the ballot is transferred to third choice, etc. 5. If when the transfers are made the number of candidates receiving the "quota" is not equal to the number to be elected the lowest candidate is eliminated and his votes are transferred to the second choices, etc. This process is continued until all the places are filled.

Among the advantages claimed for the Hare system are, that it increases the power of each voter by giving him first, second, third, etc., preferences, and by concentrating his first choice upon one candidate; that the Hare system removes the danger inherent in the present plan, that illegal efforts may be made to gain a close district, scraping up a few deciding votes through crooked methods; that the plan revives the interest of those voters who at present must choose between their party's nominees whom they do not want and the candidates of the opposing party, with political views which they dislike; it prevents minority rule as now so often practiced in close elections; it enfranchises large numbers of minority voters who are now excluded from all say in the government.

**A Recent Test Case.** — It is useless to form our opinions of new methods by general arguments and theories alone. We should ever be ready to learn from the experience of those who, with open mind and practical instinct, have sought with success to improve the structure and method of government. Let us examine a typical case of proportional representation and consider its results. Such an example is offered by Sacramento, a city of 30,000 registered voters, which in 1921 conducted the first choice of a municipal council on a large scale under the Hare plan. Nine councilmen were chosen, and the issues of the election were complicated by important initiative proposals to be voted on. A new city charter was put into operation at the same time, and there was a long tradition of light voting and civic lethargy to overcome. Usually less than one-third of the voters had turned out on election day. There were dire predictions that the system would be "worked" by the politicians for their secret aims, that the people, not understanding it, would stay away from the polls, and that many of the ballots would be illegally marked, etc. Various "slates" had been prepared to sweep the council election, by a ring of politicians,

by labor unions, and by a citizen's committee, respectively. None of these was able to secure its desired end, but each elected a share of the council members about proportionate to the voting strength of its group. The women concentrated upon one candidate and elected her.

Many of the voters were unacquainted with proportional representation; an intelligently planned campaign of education was successfully conducted by the Chamber of Commerce, the labor unions, and the newspapers. It was later found that the system conflicted with a clause of the California Constitution which requires that voters be allowed to ballot for all officers, while the Hare system gave them only one vote with preferences. But this constitutional obstacle did not prevent the demonstration of the unusual merits of the plan. The results were significant. A larger number of voters than usual took part. No group was able to "work" the system or to put through a complete slate. The number of spoiled ballots was less than 2 per cent, and did not affect the election. There were no indications of fraud. After the election there was a general expression of satisfaction, even from defeated candidates, and all concerned felt that the system gave the fairest representation to the various groups of contestants. The only substantial complaint made was as to the amount of time required to count the ballot — about 23 hours in all.<sup>1</sup>

**The "List" System.** — In nearly all continental countries the list plan has been adopted. Each party or group of voters may nominate by petition a list of candidates. Each list is usually given a separate column on the ballot and must have a space at the top, at which the voter can mark a cross indicating that he votes for that list. It usually contains as many nominees as there are council (or legislative) members to be chosen. Each voter then votes not for each member but for one list only; by placing a cross in the square at the top of that list. The central board which counts the votes first calculates the total number of votes cast in the election and divides this by the number of council (or legislative) positions to be filled. This gives the "quota," which each successful candidate must secure. The board then divides the number of votes for each list by the "quota," the resulting figure being the number of candidates on that list who are elected, begin-

<sup>1</sup> See *Proportional Representation Review Supplement*, July, 1921, Philadelphia.

ning at the top of the list. Let us suppose that there are ten members of a legislative body to be chosen at a city election in which 20,000 voters take part, and that one list has 12,000 voters, another is supported by 6000, and a third by 2000. The election board divides the 10 seats into the 20,000 votes and finds a "quota" of 2000. The first list of 12,000 voters divided by this "quota" of 2000 wins six seats, these being given to the first six names on its list. The second list with 6000 divided by the "quota" wins three seats and the third list one seat.<sup>1</sup>

The natural growth of P. R. is at first in the city and local elections, but it can be readily applied to the broader fields of State and National elections, with even better results. The plan commends itself as so eminently fair in both spirit and results that it has been widely adopted in business corporations, in labor unions, and in many national congresses and parliaments.

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<sup>1</sup> The Proportional Representation League in its leaflet of April, 1920, gives the following testimony concerning proportional representation from continental politicians:

Count Goblet d'Alviella, of Belgium, "There is now no political group of any importance which would dream of proposing to suppress or even to curtail the application of the proportional principle."

Hjalmar Branting, of Sweden, "Of the opponents of P. R., when it was first proposed, there are scarcely any that have remained so, nearly all of them having by degrees become convinced both of the fairness and of the practical advantages of the new method."

Dr. Horace Micheli, of Switzerland, "Everywhere it has given entirely satisfactory results."

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## QUESTIONS

1. What is the "general ticket" plan of election? Give examples of this plan from your own State. Have you ever heard of injustices arising from it?
2. What is the "single member district" plan of electing representatives? Give examples from your own State. Does it secure a fair proportion to both parties? Reasons.
3. Can there be a combination of one and two above? Explain.
4. What does proportional representation try to accomplish?
5. Where is the Hare plan used?
6. Explain the method of voting under it.
7. What is the "quota"? If 800 valid ballots were cast at an election in which there are five councilmen to be elected at large, what would be the "quota"?
8. On counting the votes in this election it is found that A has 200 first choice votes and B 195. No other candidate has received the quota. What is the next step?
9. Explain how the first election operated in Sacramento under the Hare plan.
10. How could it be applied in college class elections?
11. Organize your class and demonstrate the answer to the above question.
12. What is the "list system" of P. R.?

13. How would you explain the widespread movement for direct legislation in the United States?
14. Explain the origin of the referendum in Europe.
15. How is it applied in Switzerland to constitutional changes?
16. Explain its use in American cities.
17. Would you consider it a conservative or a radical measure? Why?
18. Outline the Oregon referendum plan.
19. If a special emergency law has been passed by the assembly, what can the legislature do to give it immediate operation?
20. If no special action is taken by the legislature, when does a law take effect?
21. What is the initiative? Show how it arose in Switzerland.
22. Explain the Oregon initiative.
23. How has the initiative been applied to constitutional changes?
24. Give some idea of the extent of direct legislation in the governments of the various States.
25. How are the arguments for and against a "referred" bill presented to the voters?
26. Outline the objections to direct legislation with reference to the legislature's feeling of responsibility.
27. How are signatures to a petition ordinarily secured?
28. What objection is made to the form of bills presented by the initiative?
29. What criticisms are made as to the number of voters participating in direct legislation?
30. Outline any other objections to the system.
31. Explain the chief arguments advanced by its advocates.
32. Give your own impressions as to the relative weight of the objections and advantages.
33. Outline some uses of direct legislation in your State constitution.
34. In your local government.
35. How does it affect party ties and why?
36. Get the opinion of a political worker on direct legislation.
37. What is the recall?
38. To what extent has it been adopted? Can it be applied to appointed officials? Explain its relation to the short ballot.
39. Have you a legislative referendum in your State? If so how would you proceed to have a law referred?
40. What are your impressions as to the advisability of calling on the voter for action more or less frequently? Reasons.
41. Prepare an essay on results of Direct Legislation, showing how far the system has realized the advantages claimed for it.
42. Resolved, That the recall of State officers except judges should be adopted in this State. Take either side.
43. Resolved, That the recall of judges should be adopted in this State. Take either side.
44. Resolved, That the recall of judicial decisions should be adopted in this State. Take either side.

45. Explain the difference between the two principles of direct legislation and short ballot respectively.
46. Secure a list of the officers chosen at the last election in your State and city. Ask a few voters the names of the men chosen to these offices and report what percentages of officials' names were known.
47. Secure a copy of a "sample" ballot used at the last election in your election district. Report on the number of offices to be filled at the election and the number of names on the ballot.
48. Ask several voters in your district why they favor voting on so many elective positions, and give your impressions as to the force and strength of their replies and arguments.
49. Explain fully with examples from your own city or election district what advantage it is to the political leader to have a large number of elected offices.
50. Summarize briefly the proposal for the short ballot.
51. Explain its adoption in Galveston, with reasons.
52. The results in Galveston.
53. Outline the present extent of the short ballot plan in the city governments of the country, and contrast briefly the organizations of two cities, one under the old system and one under the commission plan.
54. Make a draft or plan showing how the short ballot idea could be applied in your State government.
55. Resolved, That the Short Ballot principle should be applied in the local and central offices of the government of this State. Defend either side.

## CHAPTER 28

### LOCAL GOVERNMENT

**Local Self-Government.** — A vast proportion of the government activity of today is managed by local authorities. Most of us come into direct contact with the Federal Government chiefly through the letter carrier and the tax collector. With the State Government we have only a bowing acquaintance and that mostly in the regulation of our business. But those of us who live in cities rely on local government for our schooling when we are children, for the supply of water, lighting, and transportation, the protection of our health, the lighting and paving of our streets, and fire and police protection. The rural governments also touch us closely in that they not only collect our taxes but also keep in repair the roads, conduct part of the health administration, maintain the local courts, and assure such a standard of law and order as the community desires.

Local units are also the basis of the State and National systems. We elect our State legislators in local districts and counties, we choose officers at elections held at local polling precincts. From the time of the earliest English Parliament down to the present, national representative institutions have been based on local means of crystallizing and expressing political sentiment. The same is true of national political parties. The local unit is the atom of the political molecule. We shall consider first, city government, and second, the rural county, township, and borough.

### CITY GOVERNMENT

**The City: Its Special Problems.** — Most of the people of the United States now live in cities. Manufacturing, merchandising, commerce, and banking, are centered there. So are the headquarters of most of the political movements and propagandist efforts of the day. The city is a center — all roads lead to it. Anyone, anywhere who wants to set up a business, to market his



goods, to spread his ideas, to start a new movement, to borrow or lend money — instinctively comes to the city. In the second place, the needs of city life are more advanced. The demand for both the necessities and the luxuries of existence, is more insistent. Transport must be quicker, lighting better, school facilities more perfect, market conditions more favorable — in short, all that government does must be better and more quickly done in the populous urban centers.

But third, along with this need of a higher standard comes a greater difficulty of securing it. The urban man has little time for reflection. His psychology is one of quick reaction with widely varying and shifting interests. His thought is emotional and superficial. He reflects and ruminates little. The latest newspaper broadside, moving picture film, or bill board advertisement affects him unduly and influences his action disproportionately. Add to this, fourth, the fact that an immense proportion of our urban people are either foreign born or are subject in their homes to the influence of foreign born parents and we may realize some of the obstacles to progress. The foreign born voter is as honest as the native, but his ignorance, prejudices, and dependence for employment can be exploited by political parasites and his vote thereby controlled. Recent elections, both city- and State-wide, have shown that the tendency to sway the hyphenated vote by appeals to hatred and blind prejudices are too often successful. The true American spirit of progress, tolerance, and fair play commends itself to all immigrants when understood, but it is not something that is born over night. It must be instilled by the gradual process of education before it can be put in practice.

Fifth, the cities have grown with prodigious speed. An increase of 20-30 per cent in numbers in ten years is quite common. Many have a rate of 50-60 per cent and a few of 100 per cent. Bryce, in his *American Commonwealth*, has shown that this sudden expansion has immensely complicated government problems; the cities have been overwhelmed by the needs suddenly thrust upon them. Too often the city fathers have been unable to withstand the temptations which this over-night growth offered. Vast real estate developments, special concessions, the routing of new transit lines, the grant of valuable franchises — all these have intensified the dangerous influences of abrupt expansion. Too often also there has been a

collapse of civic ability or an absence of civic spirit in the new centers until they could "find themselves" and develop a sense of unity and common interest. We can see this in most acute form in the war industry towns of 1917-19, but the same thing has been going on for several generations in all parts of the country. The city's growth has been too quick for its organization.

**The City Charter: Home Rule.** — Since cities are agencies of the State to carry out local government, their plan of organization depends upon a State law, which we call a charter. This statute usually determines the powers and functions of the municipality, or what it may or may not undertake, the administrative departments and their duties, the methods of choosing officers, their terms of office, and sometimes even the details of organization.

If we had given the city a free hand within broad limits to undertake what it chose and to organize itself as it pleased, subject only to the supervision of its finances, accounts, and administration by executive officers of the State, many of our troubles would have been avoided. But instead we have granted it grudgingly only such limited powers as were mentioned or implied in the charter. Accordingly whenever it wanted something not so granted it must ask the State legislature for a change in the law. These charters have been subject to disturbance at each session of the legislature. In recent years the people have demanded that some definite principles be followed in city government, and responding to this, many States have passed general laws classifying cities and providing a standard charter which may be adopted by popular vote in the cities of each class. This enables the people of a community to determine whether they want a more complex or a simpler form of organization, a larger or a smaller number of officers, and a broader or more restricted sphere of city functions. New York has even gone so far as to confer wide powers on her metropolis and to provide that any change by State law may be vetoed by the mayor of the city. This veto is final unless the proposal is then repassed by the legislature.

When a great city reaches a size sufficient to wield the balance of power in the State legislature, the problem of "home rule" becomes a vital one. The county representatives sensing a danger from the concentrated, machine-controlled power of the city members, seek to limit the number of city memberships. This usually leads to a

lively struggle between the two sets of representatives as in New York, Philadelphia, Pittsburgh, and Chicago. The solution is to limit the number of State legislators who may be chosen from a single city but to give to the city a greater freedom in settling its own affairs without State regulation of details. This is the tendency of modern legislation. The National Municipal League which has done an invaluable service in promoting modern scientific city organization, has drafted a Model Charter based on recent experience. This charter offers a definite standard or goal toward which to work and has been a helpful influence in the revision of many local systems.

**City Organization : Mayor-Council Plan.** — There are two main types of city organization, the mayor and council plan, which is the older traditional form, and the city-manager-commission plan which is now rapidly making headway. The older type is modeled after the State system.

Under it the mayor as responsible head of the administration has the executive power including appointments. Commencing about 1880 a wave of reorganization led to the concentration of authority in his hands in all the important cities. He makes appointments usually with the consent of the council, although in New York he is not thus limited. He thus directs and controls the action of all important city officials except those who are elected. He is a member of boards and commissions which have such vital functions as preparation of the city budget of revenue and expense, or the transit commission which may lay out the future development of surface, subway, and elevated lines. In practice he also prepares ordinances for introduction into the council and in general he represents the same combination of executive power and responsibility with initiative in legislation as does the President in the national system.

He possesses the veto power, in many cities he drafts a budget, in conference with the city's financial officers, he sometimes approves and signs important municipal contracts and receives reports from departments. He is usually called to represent the city in important hearings affecting legislation or before the State Public Service Commission. The mayor's power in large cities has become so extensive that political leaders seek to place an amiable figure-head in the position, and to control his actions through the familiar practices of "invisible government." This may happen whenever

public opinion is dormant or when there are no important issues at stake on which the people feel strongly. It cannot as a rule occur in times of civic awakening or when the electors face an issue of vital importance. He is elected in most cases for only two years, but the more progressive cities have long employed the four-year term. He may be reelected to succeed himself in most cities, although not in Philadelphia or Boston.

The same tendency to concentrate public attention on the executive's doings as has already been noticed in the National government, exists in our cities. The mayor is everywhere becoming the leader of the municipal government. But unfortunately our city charters have not always invested him with power commensurate with his political responsibility. Nor have the people at election time backed him up by choosing councilmen who would support his program. We may thus often see the curious spectacle of a progressive mayor seeking to carry out advanced and liberal policies to which he has been pledged at election, while a factional council nags, hinders, and attempts to balk his every move.

The chronic friction between these two vital factors in city government must be reduced if the city's interests are to advance. One method of reaching a solution would be to remove the provision contained in some city charters which forbids the mayor to succeed himself. By making him eligible for reelection the law would permit him to build up his own political organization, and thus to a large extent escape from the clutches of "invisible government." Another method already adopted in New York is to enlarge the mayor's powers at the expense of the council to such a point that he becomes in fact, as he is in theory, the responsible head of the government. The New York plan has worked out so satisfactorily as to invite a similar change elsewhere.

**The Council.** — The council was formerly composed of two bodies, but in most cities has now been reduced to one. Formerly both houses were large and unwieldy, being arranged on a division, district, or ward basis and growing in numbers as the divisions grew. A council often had over 100 or even 150 members. This is being gradually abandoned for the small council plan in order to concentrate responsibility and to make the body more effective in its procedure. Chicago now has 70; New York 73; Philadelphia 21; Boston 9. Many cities are choosing their councils on a general

ticket, "at large," and not by wards. It has been found that with each step in concentration a marked benefit follows, and the time that can be given per member to genuine discussion and examination of measures is increased without any loss of effectiveness.

Where the body is small the councilmen are usually paid for their full time, from \$3000 to \$5000 yearly. The election of councilmen at large on the general ticket not only attracts a better type of man but also opens the way for the adoption of proportional representation when this is desired. The meetings are held at least once a week. The business is prepared in advance by committees whose reports are generally accepted. The council deals chiefly with legislative work, local ordinances, resolutions, taxes, appropriations, loans, etc. In England the council, through its committees, conducts also administrative work, but this method would not be satisfactory here because of the greater need for concentrated definite responsibility — a factor which can only be secured by turning over administrative matters to the mayor. When the council is given authority to approve appointments the effect is to peddle out appointments among the members as in the National and State Senates. One of the council's powers which in the past has attracted much public attention is its authority over public utility companies. If a gas, electric light, traction, or steam railway company wishes to establish a plant within the city limits it must first have the approval of the council. Formerly even the rates of fare and service conditions were subject in detail to the approval of this body, but these are now more usually determined by the State Utility Commissions.

When the council clashes with the mayor it is not uncommon for that body to invade his administrative authority and seek to hamper him by petty regulations passed under its legislative powers. In general the council uses its police ordinance power too freely and in too much detail. Whenever the Fourth of July brings with it a harvest of accidents, or the toll of injuries and deaths from motor casualties mounts up, or whenever the loss of life and property from some local cause arouses popular indignation, the councilmen hasten to "square themselves" by enacting copious police regulations to prevent a recurrence of these fatalities. Many of these are already on the books, most of them conflict with each other and are unenforceable, but for political purposes their futility is of no moment ;

they are loaded upon the administration, greatly diminishing its effectiveness and even preventing a satisfactory solution of the real problems at which they are aimed. If the mayor and his officials were allowed to regulate these matters by flexible administrative rules and with proper checks of publicity and an annual report of results, there would be less councilmanic playing to the "grandstand," but far greater public protection and satisfaction.

The same is true of the authority exercised by many city councils of approving or even awarding city contracts. This power usually degenerates into a distribution of favors, or worse. Individual councilmen under it soon become known as adherents or even subordinates of certain contractors. It is impossible to focus public attention upon the committees of council as may be done upon the mayor or any of his directors. The evasion of responsibility is so easy in a collective body that the best thought of publicists today has turned against the awarding of any contracts by councils.

The same sharp contrast between the executive and the law-making body in breadth of view and political capacity is noticeable here as in the State and National systems. The mayor is usually far in advance of the council on these points. He faces problems from a city-wide viewpoint. He is less apt to be corrupt or petty in his treatment of city questions. Also he more truly represents the popular interest as against selfish cliques, factions, or group influences.

**The City-Manager-Commission Type.** — Under the city-manager-commission plan as we have seen, a small commission of five to seven men is elected by the people and this body in turn chooses the city manager. The commission has the general legislative and financial duties of a council. The manager becomes the administrative head of the city in making contracts, choosing employees, and generally carrying out the policies fixed by the commission. He attends the meetings of that body, advises it on matters when requested, and may recommend measures for its consideration. The commissioners are business and professional men, usually meeting weekly. The manager is an expert in municipal affairs, devoting all his time. This plan has been adopted in Dayton, Wheeling, Grand Rapids, and a host of other cities.

The manager tends to become a professional official like the general manager of a railway. In practice he is often an engineer

with experience in city work. When a manager's position is vacant it is now usual for the commission either to advertise or to consult authorities on municipal affairs and secure a list of well qualified men. This is a remarkable step forward from the old political idea that the city must be managed by purely "home talent." The problems of water supply, street cleaning, lighting, sewerage, recreation grounds, health, etc., vary only in detail in different cities. They are substantially the same in principle everywhere. On the other hand, professional experience in the solution of these questions is a rare possession which should be at the disposal of every city regardless of its political complexion or the beliefs of the manager himself. The fact that a man is a Republican or a Democrat does not substantially affect the solution which he must make of a transit problem nor the financing of the plan which he must undertake.

The city manager has enormously reduced city expenses and increased the effectiveness of the administration. The people get more for their dollar and pay proportionately fewer dollars in every branch of the municipal service. The commission plan without the manager is not advisable because under it each commissioner administers a group of executive departments, thereby dividing the power and responsibility of executive action. This means that there is a rivalry between departments for funds and support, that the city government has no real administrative head, and that there is a lack of unity between the departments. The manager removes this weakness and gives to the commission plan the indispensable features of efficiency and responsibility. At first the plan was adopted only in the smaller cities, but there is no reason why the largest metropolis should not be operated under it. The politicians in many cities prefer to keep the council and mayor system in order to avoid that very directness of responsibility and concentration of power which the commission-manager plan seeks to establish. The modern ward or district leader knows that his influence, like that of the feudal barons of old, is endangered by every step towards concentration. He therefore seeks to retain both in the organization of the party and in the administration of the city and State, all the local control possible. Naturally he cannot defend this stand by making public his real reasons, hence he talks loudly of local autonomy, home rule, ward and district

interests as against "oppressive centralization," "autocracy," and "czarism."

With the advance of political education the public is more and more inclined to put the test of results upon its city governments. By this test the city-manager plan is making steady and rapid progress.

**City Administration.** — The mayor or the city manager runs his cabinet on the departmental basis, the departments being usually fixed by charter or by city ordinance. The more important divisions are usually fire and police, sometimes called public safety, public works, transit, public welfare, health, law, and finance. The latter is often an independent office outside the cabinet.

It is in Public Safety that our mayors find the most difficult, if not insoluble, problems of their administration. The police system of every large American city offers an abundance of ready material for a scandal at any moment. This is partly because the politicians use it to sell "protection" to the underworld, partly because of the unusual and well-nigh irresistible temptation to graft which it offers every patrolman and detective, partly from the discouragement and petty persecutions that too often beset the honest policeman if he insists on carrying out his duties, and partly also from the undeniable fact that the whole community demands the impossible from its police department. Every policeman today knows that a rich source of revenue lies open to him the moment he is willing to compromise with the automobile thief, the bootlegger, the disorderly house manager, or the thousand and one small and large interests which require immunity from the law. When we consider this astounding array of influences the marvel is that so many members of the force remain honest. The most effective means of combating these sinister influences are a group of alert and courageous officials in command, a genuine system of civil service appointments, promotions and service records to recruit and maintain the force, a sympathetic support from the police courts, and a watchful newspaper press. All of these constructive forces are growing stronger, and with them the basis for an effective police administration.

The fire department is now receiving an increasing share of attention from business circles. Insurance rates vary in direct proportion to fire protection. Our modern cities are spending large



sums on the increase of high pressure water supply in central business zones. The building inspection bureaus are more faithfully enforcing the requirements governing fire hazards. Special rules surround the location of establishments involving extraordinary risk, such as garages, warehouses, etc. Insurance companies and public officials are cooperating for the education of the public through lectures, pamphlets, etc., on the means of preventing conflagration. Thus prevention is assuming its proper place in cutting down the enormous fire loss, which is greater in this country than anywhere else in the world. In all the larger cities the department staff has been placed under civil service rules for its protection against political influence.

Public Works includes water supply, street construction and repair, lighting, sewerage and other engineering tasks, and property maintenance. In undertaking each of these projects the best governed American cities usually employ first a temporary commission of experts to make a survey of the question, let us say, water supply. This survey includes the amount needed in the near future, the available sources of water, the methods, and cost of impounding and transmitting the supply. This has been extended to distances of over a hundred miles. The plan is then laid before the city council or commission and given full publicity, together with the method of financing it through the sale of bonds, extra taxation, etc. The council or commission adopts a plan and makes the necessary additions to the administration to manage the new plant.

In street cleaning the contract system was formerly employed to the great dissatisfaction of all concerned. Favored bidders secured the awards and straightway arranged with the city inspectors for proper leniency in enforcement. Several of the larger cities have made studies of this problem, estimated the cost of a municipal street cleaning service run by the city, and adopted the plan, with highly favorable results. In street paving and repairs the contract system still persists.

**Public Welfare.** — This department usually groups together the bureaus of charities, correction, tenement inspection, recreation, and legal aid. Some of these, such as legal aid and charities, deal with the interests of the submerged elements of our people. Other bureaus, like recreation, handle the interests of every class. Long-continued illness, extreme poverty, uncivilized housing conditions,

unemployment, and all the endless chain of consequences flowing from these, require the attention of the city authorities unless we are willing to allow the victims of these social mishaps to lapse into semi-barbarism. The city has met these needs by a Department of Welfare with a bureau for each special branch of administrative work, each bureau in charge of a director subject to the department head. Some of these deserve special note, for example, Recreation. The origin of this bureau is typical of many city welfare activities. The modern recreation system has been created by public-spirited citizens who formed societies, collected funds, established play grounds, and invited the children of the neighborhood in to use them.

These local societies made a study of the effects of recreation upon character. They became convinced not only that, as has been said of England, her national victories were prepared on the cricket field, but also that the qualities of persistence, fair play, unselfish service, mental and physical endurance could be developed and strengthened in recreation fully as well as in the school room. Starting from a purely physical basis the play-ground movement thus expanded into a broad educational campaign. The need of supervision was soon discovered, and competent young men and women were employed to act as counselors and be present during play hours, preserve order, and see that all the children enjoyed the facilities under adequate protection. This plan having succeeded, the societies in different cities formed a national association and gradually persuaded the municipal governments to take over the play grounds as a city function. Today every progressive city operates such a system, with from half a dozen to a score of recreation centers, many of them being connected with or adjacent to social settlements. This work is all under a single bureau with a professional permanent head.

**Parks.** — The earlier park plans were mostly confined to the purchase and maintenance of large tracts of land in the environs of the city to be used for popular picnics and excursions. The modern policy is to set up a series of small, readily accessible parks within the city itself. At each of these there is a recreation center, thoroughly equipped for all sports from baseball to tennis, that can be adapted to the area, and a building for indoor recreation, dancing, concerts, lectures, library, etc. This makes the parks what

they should be, a part of the recreation system of the city government. To administer this system most cities have created either a park board with separate existence and authority, or a Bureau of Parks, or have brought the parks under the regular Recreation Bureau. One of the best known of the former is the South Park Board of Chicago. Its remarkable work in developing a whole series of outdoor and indoor recreation centers for the congested parts of the city has been an inspiring example to other towns. If the board plan is adopted the members are usually chosen either by the city judges or by the mayor, while if the bureau plan is followed the mayor appoints the director. The method of choice is less important than the type of men chosen. Either method will yield good results if there is an active, vigorous public opinion insisting upon strong appointments. Citizens of ability and character can be readily induced to take a creative interest in this branch of work if backed by popular sentiment.

**Legal Aid.** — Another illustration is the Legal Aid Bureau. This is a fixed permanent part of the department, with a bureau chief, who is assisted by a staff of other attorneys. Its work is to advise persons who are financially unable to employ their own legal counsel, also to conduct their litigation in the courts. The majority of cases are those of poor persons who have claims which they cannot collect. As a rule criminal cases, divorce suits, and bankruptcies are not taken by the Bureau. Each applicant for legal help files a statement of his property and income, along with his claim. The cause of the suit is usually examined by an investigator for the Bureau to verify the statement of facts. Once having begun a case the Bureau makes every effort to see a deserving client through to the end. Some Bureaus are even allowed to advance the original cost or fee required for filing a suit in the courts. Many thousands of poor claimants who in the absence of such help would suffer loss, are able through this means to collect what is due them.

**Health.** — The Health Department is closely related to Welfare, and in some cities is a part of it. The strongest form of organization is a department or bureau under a commissioner with a small council or advisory board. Formerly most health departments were managed by boards, but this plan was found both inefficient and irresponsible, so that the single-headed bureau has now gained

adoption. Its work is to collect and publish health, birth, and mortality statistics, combat epidemics, inspect the sanitary conditions of both public and private buildings, and order the removal of nuisances, examine the physical condition of school children, inspect food supplies, and furnish to the local district attorney evidence of violations of the food and drug laws. As we have seen in the State Government, so also in the cities, the Health Department is now turning its attention more directly to the positive prevention of diseases in order to assure a healthful environment for the city dweller. In this work its activity is largely educational as well as regulative. It seeks to create a public opinion favorable to higher sanitary standards while at the same time giving an object lesson of the benefits of these standards intelligently applied. All city health bureaus must depend for their greatest future effectiveness upon the public school system. Here the ideals of cleanliness, decent living, first aid, the chemistry of foods, and the methods of retaining physical health are taught. Supplementing these are the weekly publication by the Health Bureau of bulletins containing special precautions against typhoid and other infectious diseases. All Health Bureaus now conduct extensive municipal laboratories for the analysis of materials and for experimental work.

**Law.** — The Law Department directs the extensive litigation in which the city is constantly involved. This includes suits for damages, mandamus, the enforcement of city ordinances, protection of property owned by the city, and in general all its legal interests. These are usually under the jurisdiction of a city solicitor. The work of prosecuting offenders falls to the city prosecutor or district attorney and has already been summarized in Chapter 17. Some cities are now setting up in addition to the free legal aid bureau, already described, a public defender. He is a professional attorney paid by the city to take up the causes of those persons accused of crime who have no legal counsel of their own. In all courts it is customary for the judge to appoint an attorney who may be present in the court room to act as counsel for such persons. But this haphazard system does not satisfy modern needs, and the public defender chosen for his knowledge of criminal law and permanently engaged in this work is apt to become a fixed institution in our city courts.

**Transportation.** — Every great city today has an overcrowded, congested central business section into and out of which there pour hundreds of thousands, even millions of people daily. The higher the office buildings and the narrower the business and shopping districts, the more swiftly must the morning and evening tide of human traffic flow. How shall the entire population of these sections be taken in and out within a two-hour period, twice every twenty-four hours? This is one part of the city transportation problem. The second is — How can the growing expansion of suburban population be accommodated so that the city system shall not only get people out of the business section but deliver them at their suburban homes from two to ten miles distant? The development of every new suburban plot and the erection of every new city office building intensifies these problems. The extension of lines both of subway and elevated construction involves a vast expenditure. In most cities large parts of this work have been undertaken by the cities themselves because of their greater ability to secure funds. The subway once completed, it is then leased to an operating company having control of the rest of the city lines. Interference by the city authorities thereafter is required, if at all, chiefly on the questions of service, fares, and wages. These are adjusted according to the changing currents of population and costs of living.

The city transit system is usually administered by a bureau or department of transit, the director of which is appointed by the mayor. It employs a limited staff of accountants, engineers, and attorneys, and when it applies to the State utilities commission for changes in rates or service, it secures the temporary help of utility experts. Our early handling of the transit problem has been most unsatisfactory, but the authorities now in charge of these questions are in nearly all cities planning the urban needs well in advance and are taking more adequate care of the public interests.

**Water and Rail Transport.** — A similar question on a larger scale is the provision of port and railway facilities for the modern city, the dredging and maintenance of a deep-water harbor, the building of docks, wharves, and warehouses, adequate regulation of the use of the port, its policing, and protection. These are all matters of first importance to the community which is so fortunate as to be located on navigable waters. The metropolitan district about

New York has recently solved this by the creation of a body known as the port authority of New York. This body, established under the direction of the Federal and New York and New Jersey State Governments, unifies the regulation of all general harbor questions. In other cities there is either a special bureau appointed by the mayor to administer the port facilities or a board created by the State for this purpose.

**Public Ownership and Operation.** — Though several cities have built their own subways because private companies could not secure the funds, yet municipal operation has been rare, all the cities preferring to lease out their transit properties to private companies. In the field of gas and electric lighting, numerous experiments have been made in public operation, some with success. In street cleaning a more general satisfaction has been won by this plan. The city has also found it necessary to build or assist in the construction of belt lines or railways to connect the chief business centers with trunk line terminals and shipping districts in order to facilitate the ready transmission of goods from line to line or from rail to water. Here it has preferred to avoid direct operation and has leased out the property to private companies. Many cities have also established municipal wharves, docks, and piers, and have rented these out or managed them through city bureaus. Foreign cities have gone much farther in these experiments. Some have borrowed vast sums of money, purchased outlying plots of ground, and built numbers of workingmen's dwellings. These have been either sold or rented at a moderate figure sufficient to carry and pay off the investment. Others have gone in for the wholesale operation of all utilities, lighting, street railways, and ferries, often with unfortunate results. The modern city is feeling its way among these problems, thus far without developing any definite guiding principles. From American experience it would seem that private operation is to be preferred if an adequate and effective system of public regulation by utility commissions, or otherwise, can be maintained. In such services as water supply, wharves, docks, sewage disposal plants, hygienic laboratories, and the provision of outdoor recreation, city operation has unquestionably proved itself. With some notable exceptions, our experience with the other, more complex, industries which cities have attempted to manage, has not been such as to encourage public operation.

## RURAL GOVERNMENT

Two main types of rural government have struggled for supremacy in America: (1) the town, beginning with the New England settlements, and (2) the county, established in the middle and southern colonies. In New England many of the early settlers were townspeople. Their early occupations were largely trade, shipping, handicrafts, and manufacturing. Many of the people came largely because of religious persecution at home. Their settlements were formed around the church. The central building of each little town was used for church, school, and town meeting. The dangers from hostile Indians forced the people to remain close to their settlements and to maintain a system of quickly mobilized military forces. Even before the ships bearing the immigrants reached America the custom of frequent assembly for worship and conferences on future plans was established. What more natural than that this meeting plan should become a system of government when the settlements started to grow?

**Rise of the County Plan.** — In the southern and middle States the settlements were more spread out. The relations with the Indians had been either more friendly, or the Indians, if hostile, had been driven out or subdued. The need for military concentration was not as great. A larger area of cleared land made expansion possible. The religious motive did not play as strong a part nor was there any previously formed custom of holding frequent meetings of all the settlers for conference on religious and political matters. There soon grew up in the South a system of large land holdings which could not arise in New England because of the different economic conditions. Settlements were few and far between in the South.

Because of all these influences the county rather than the town became the center of the government. Of the middle States, New York adopted a compromise — the town-county plan. Here the town with its meeting prevailed, but from each town, representatives were chosen to a county board. In Pennsylvania, the proprietor, William Penn, had from the earliest times adopted a policy of peaceful relations with the Indians. The mutual trust and confidence arising out of this policy permitted the Colonists to spread out over a wide expanse of thinly settled territory to the

mountains on the West. Aside from the settlements along the Delaware and one or two large interior centers, populous towns were rare. The more extended county system fitted the needs of the people.

**Western States.**—The great drift of population westward began in the nineteenth century. Settlers from New England, the middle States, and the South took with them not only the names of their streets and towns but also their respective distinct ideas on local organization. Where southern and Pennsylvania immigration was uppermost the county system prevailed, where New England held control the town and meeting plan was followed.

The public lands in the northwest were nearly all thrown open to settlement under a uniform plan of survey, by which each township was divided into ranges, sections, and quarter sections for distribution to settlers. In each township the Government reserved two sections for the benefit of the local school fund. Although settlements and towns were few, the rural townships became universally recognized as local units throughout the West. They were grouped into counties for election and court purposes. In some of the Western States the New England organization still continues, with many important local powers and duties in the hands of the town, and the latter governed by an annual meeting. But in most States a strong county system has grown up controlling the essential functions.

**The County.**—There are three types of county government which deserve mention—the Southern, the Pennsylvania, and the New York forms. The Southern county controls practically all local powers and duties. Townships are not required for its operation. It is often divided into “precincts,” that is, mere arbitrary divisions like the election districts in a city. It is governed by three commissioners. The Pennsylvania county is composed of a group of townships each of which has a definite important share of local functions. It also is governed by three commissioners. The New York form attaches slightly more importance to the township, provides a town meeting to govern it, and sets up as the county authority a “board of supervisors” chosen one from each township. The Pennsylvania and New York types are thus alike in having townships as necessary units. The southern and Pennsylvania counties are alike in the small, three-man board which governs



them. The New York county is distinctive in having a larger board of from 16 to 26 or more men and in making this board representative of and elected by the townships. Even in New England there are now weak county organizations for judicial and tax purposes. The size of counties varies, but the usual area is about 600 square miles with somewhat over 20,000 inhabitants.

**County Officers and Their Powers.** — The commissioners, or supervisors, have to care for the county property, elections, public charity, and the appointment of those county officials who are not elected. In many States also they conduct the appraisal of property and the levy of taxes. There is always a court in the county with judges, court officers, a sheriff, district attorney, jury commissioners, and a recording officer for wills and deeds. Besides these there are in nearly all counties a superintendent of schools, a surveyor, a clerk, a board of tax appeals, highway supervisors, election overseers, poor directors, a treasurer, and an auditor. Some of these, such as the treasurer, judges, sheriff, district attorney, etc., are elected. The others are usually appointed by the county board for a term of three or four years.

**The Duties of the County.** — The most important work performed by the county might be grouped under the following heads:

(1) *Public works*, including roads, bridges, drainage, and irrigation.

(2) *Elections*, including the preparation and printing of ballots, the supervision of elections, the appointment of certain election officials, the counting of election returns, and the official reporting of results of both nominating or primary elections and final elections. The county is almost universally the election district for members of the legislature. All party organization turns upon county units.

(3) *The administration of justice*, including the maintenance of the county courts, the enforcement and recording of their decisions, the official registering of legal documents, the certifying of these documents for use outside the county as in law suits, inheritance, etc. Under this head might also be mentioned the issue and service of writs, the prosecution of persons accused of crime, the selection and maintenance of juries, the support of reformatories, prisons, etc. In most States also the county is responsible for the maintenance of law and order, and its sheriff may call on the

Governor for troops or may organize his own posse to suppress disorder.

(4) *The conduct of public charity.* In many States the townships have little to do with this field of work, which is concentrated in the county. The latter finances, builds, and maintains a county workhouse, or poorhouse. It also distributes the State funds for mothers' pensions and conducts visiting nurse or other welfare work.

(5) *The county is a unit for the appraisal or valuation of property for taxes, also for the collection of both State and local levies.* Its officers manage a budget of county expenses and fix a county rate to cover these, unless special boards like the Poor Commission and the school boards have been given the tax power for their respective interests. The county therefore is authorized to collect and distribute its own revenue by appropriation. Recently the counties have undergone the same extension of powers as the cities. The vigorous Federal policy of agricultural training is administered by counties with farm experts in each. The conduct of health administration also depends upon county health officers. There are frequently local libraries established at the county seat, and in some of the more densely populated sections there are embryo community-welfare centers.

**State Supervision.** — As we have seen in Chapter 22 there is a steady drift towards some State supervision of local finances. This is taking the shape of uniform local accounts and reports, a State tax board to equalize the assessment of property for local taxation in the counties, and some inspection of the accounts of local tax officers. Some States also establish a central power to remove local assessors.

The State also exercises both supervision and a potential control over local health officials. The same tendency is growing stronger in the public school system. An authority on local government<sup>1</sup> has strongly advocated the creation of a single State authority to conduct this supervision. This would remove the danger of confusion from a control by four or five State authorities over the local officers. This danger is not as great as it seems, however, under the present system, since there are few instances in which a local officer is supervised by more than one central official. The school superintendent reports to the State Commissioner of Education,

<sup>1</sup> H. G. JAMES, *Local Government*, page 436.

the local health officers to the State Health Board, the local road supervisors to the State Superintendent of Highways, etc.

**The Revision of the County System.** — Mr. Gilbertson in his admirable book *The County* calls that district the dark continent of American politics. Its organization is the most slipshod and incoherent of all American political units. The officers have no relation to each other. They are not grouped one under the other, and no one of them can direct, guide, or control the county system. Responsibility is almost unknown. The officials are chosen almost solely on the basis of political convenience and utterly without regard to their knowledge of the duties to be performed. The county poorhouse management, the subordinate officers of the court, the recorder and register of deeds, the coroner, and even the highway superintendents may or may not be fitted for their duties, according to the haphazard of political exigency. The county funds may be ill or well managed. "Influence" may and often does determine the drawing of jurors and the assessment of properties for taxation. The county has been called "a political jungle." Yet the duties which it performs are vital to our public welfare.

Numerous proposals for change have been made, the most promising being the plan of the County Government Association of New York. This would allow any county to adopt a county manager plan, the manager to be chosen by a board of five supervisors who in turn would be elected by the people. As in the city manager form, the administrative work of the county would be controlled by the manager, while the matters of general policy would be determined by the board of supervisors. An administrative code adopted by the board would guide the manager in the discharge of his duties. The result of such a plan if adopted would be to bring the county out of its present state of chaos, to organize its work upon a systematic basis, to reduce the expense of county administration, and to make its government definitely and clearly responsible.

Such changes and improvements must naturally await the rise of some active interest by the people in county affairs. Despite the immediate and direct importance of the county to the people, this interest is only beginning. Most of the voters leave to the party machines the distribution of the spoils, in the comforting

belief that county action makes little or no difference. Yet they are quick to complain when the tax rate rises or when scandals are unearthed in the local government. Slowly a change in this condition is coming to pass. Our universities and colleges are seeking to stimulate interest in rural systems. A number of excellent new books have recently appeared. Civic bodies, voters' leagues, and the National Municipal League are devoting attention to county and township administration, and there is every reason to believe that the same change which has been wrought in the city and is slowly taking place in the State will gradually extend to the county and township.

**Towns and Townships.** — Although the New England town was originally governed by a periodical meeting of all the qualified citizens, it soon became necessary to turn over those matters which required more constant attention to an executive committee called the "select-men" and these eventually acquired real authority over town affairs. The New England meeting is now as a rule only an annual occasion and approves what is prepared for it in advance by the inside clique. Besides the "select-men," from three to nine in number, the meeting chooses the other town officials, such as the justice of the peace, treasurer, clerk, the poor officials, the town constables, tax collectors and assessors, and health, highway, school, and public works officers. From this list it will be seen that in New England many of the duties otherwise cared for by the county are town affairs.

In many States the township is composed of the rural sections around a town or borough or city. The main duties of the townships are the maintenance of roads, the assessment of taxes, the management of local elections, the enforcement of local justice. The township is governed by elected officers, the more important of whom are the supervisors or, in some States, free holders or trustees. There are also a few financial officers such as assessors, collectors, treasurer, and the usual justices of the peace and constables and clerk. In many States the township is separately organized as a school district with a rural board having the power of taxation, appropriation, and borrowing for school purposes. In Pennsylvania and New Jersey most of the burden of road construction and repairs, subject to State control and aid, is divided between the township and county.

**The Incorporated Town or Borough.** — The difference between a town and a township in the modern use of these words is that the township includes no large settlements but only villages and thinly settled rural sections of open country, whereas a "town" outside of New England is more often an actual settlement of considerable size, while in New England the "town" includes both the settlement and the open territory around it.

When a rural section becomes densely populated it must change its form of government. A large factory may be erected, a railway station may increase the size of the village, the building of a new road may attract more residents. The settlement which then springs up has its own government needs distinct from those of the general township. When its population reaches, let us say, two or three thousand, it wants fire and police protection, later perhaps a system of sewerage, may be even water works, a more elaborate lighting system, separate traffic rules, and various public works. The ordinary township government does not afford these, so the settlement asks to be organized as an incorporated village, town, or borough. Its governing body under the new plan is an elected council of small size with authority to regulate the matters just described. This council is given different names in different States, the town trustees, board, or, in a borough, the council of burgesses.

The borough also has an officer called the chief burgess who presides at the council meeting and acts as executive to enforce the council ordinances. The incorporated town or borough may also grant or refuse permission to public utility companies to enter its boundaries. It is an embryo city with narrower powers, fewer officials, and a lower tax rate. It also has the same financial, clerical, and judicial officers as an ordinary township. These little units are growing up over the country at a rapid pace. Each year many of them pass on to the final stage of incorporation as cities, being influenced to the change by the wider authority and powers which they enjoy under a city charter, as well as the larger number of offices for aspiring local politicians. The township stands in the same need of reorganization as the county, although its duties are less extensive. Its government should be simplified and put together in more responsible form. Its officials should be brought into closer relation with each other and with the county and State. It should have a budget.

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## QUESTIONS

1. How would you explain the slight interest shown by most Americans in local government?
2. Are the cities in your State organized under separate, special laws for each city, or are they classified, with a charter for each class? Which is the better plan and why?
3. Is it better to give the people of each city much freedom in organizing their government and deciding what powers it shall have, or to play safe by having the legislature fix the details of organization and the exact powers which all cities of a certain population shall possess? Why?

4. Mention three questions of local government which are now before the people in your district.

5. Show how higher standards of service are required from cities than from other local units. Illustrate.

6. Explain any obstacles to good city government in your State or neighborhood.

7. Secure the latest census statistics on growth of cities in your State and give a brief explanation of these figures.

8. Summarize briefly the reasons why it is more difficult to get reasonably good government in the city than in the county districts.

9. How would you explain to a foreigner the chief difference between the mayor-and-council, and the city-manager-commission plans of city organization?

10. What are the chief powers of the mayor? Illustrate by any recent acts of city mayors in your State.

11. What are the powers of the council?

12. Give from recent newspaper memoranda the substance of any measure or action taken or discussed by a city council.

13. How many members should a council have in a city of 100,000 persons? What would be the advantages of the number which you propose?

14. Should the members of a city council be chosen at large on a general ticket or by wards or divisions, one member to each ward? Why?

15. The city is about to establish a new water reservoir. Should the city council advertise for bids on this contract and decide who shall have the job? Reasons.

16. "The city council should make detailed ordinances on all matters which it regulates, because this will protect the people against arbitrary action by executive officers." Give your views on this subject.

17. "It is better to retain as much power as possible in the hands of the city council rather than the mayor, in order to make the government democratic." What do you think of this statement?

18. How and why has the mayor's power been increased in recent times?

19. What is the difference between the city-manager-commission and the straight commission plans?

20. Which has shown itself to be the better plan, and why?

21. Mention the chief departments of city administration.

22. Show some of the principal problems facing the Department of Public Safety. Illustrate from any city in your State.

23. Mention some problems of Public Works and show how any city in your State administers this problem, giving a list of the bureaus organized in the Department, and their duties.

24. What is the work of a city Welfare Department? Send for the report of such department of any city and from it give a summary of its organization and recent results.

25. Why should a city government have a Bureau of Recreation? Investigate and report on the work of such a bureau in some city, showing the extent of its activities and how they are managed.

26. Describe the work of the Law Department of a city in your State after obtaining its report.

27. Make a similar inquiry into the organization and results secured by a city Department of Transit.

28. At a city election the following question is submitted for decision — Shall the city undertake all public utility enterprises which operate within its limits? State exactly how you would proceed in trying to form a conscientious judgment on this question.

29. Contrast the organization of any city in your State with the model charter issued by the National Municipal League.

30. Why have we different types of rural local government in America? Illustrate.

31. What are the principal types of county?

32. Which type have you in your State? Why?

33. Prepare a list of the chief county officers and their duties in your State.

34. Give a brief report on the extent to which important county affairs are supervised by central State officers in your Commonwealth, with any suggestions for improvement that you consider justified.

35. Contrast the organization of the city and the county from a scientific point of view as to (a) responsibility to the people, and (b) effectiveness of administration.

36. Examine Gilbertson's *The County* and state in how far you think his ideas applicable to counties in your Commonwealth.

37. What are the duties of townships in your State?

38. Give a brief list of township officers.

39. Show the difference between any incorporated towns or boroughs and ordinary townships in your State.

40. Prepare a brief summary report with reasons on the following subject — How to arouse popular interest in local rural government.



## CHAPTER 29

### INTERNATIONAL GOVERNMENT

**Rise of International Coöperation.** — Trade routes do not stop at national boundaries. Railway lines ignore the colors of the map. Chicago must phone to Toronto and the City of Mexico. Local metes and bounds — what are they to a wireless current with its freight of ideas, trade messages, and even political propaganda? Against these ambassadors of world coöperation the forces of isolation and separatism now wage a losing contest.

But they struggle right valiantly, and their present influence and power are not to be underestimated. There are still great inequalities in civilization which form barriers between peoples. There are differences of race, of language, of beliefs, and standards of living, which, under the guise of patriotism, may always be fanned into violent hatreds by the zealous agitator. There are abundant trade rivalries and territorial ambitions which may be used to arouse latent distrust and suspicion. Most potent of all, there are powerful interests and cliques in industry, trade, and finance, whose aims conflict with international understandings and who seek to exploit national power in order to promote their own ends. Recently there have developed in several leading countries, special journalistic interests which on all occasions fan the flames of national prejudice. With avidity they seize upon and exaggerate or distort any slight international difference, even the casual utterances of minor politicians and newspapers abroad. This is a cheap and profitable way of building both a large circulation and a reputation for watchful patriotism. The real costs are paid by the broader commercial interests of the country. In appraising the list of forces just described we find that as between individuals so also between nations, the real differences are less important than the fancied ones. An adroitly fed suspicion is a stronger cause of national belligerency than is a real competition in business. This fact must be fully recognized in estimating the possibilities of coöperation among peoples.

**The Forms of Coöperation.** — How shall we coöperate? What shall be the method, the form, and the leadership of that closer relation which greater nearness and accessibility are now creating? Some have said, the overlordship of a single nation or race of "supermen," to which all others by sheer force of conquest must bow the knee. Others say, the universal revolutionary uprising of the international "proletariat" which, casting aside all fetters of law, government, caste, and property, and ignoring racial and national differences, shall unite to form the world state. Still others say, the peaceful, voluntary gathering together of existing nations in an association of peoples, with regular organs for expressing and applying world public opinion.

Although it seems clear that a more effective world coöperation is now impending, it is still far from certain which of these methods shall ultimately be employed. That all three should be tried on a gigantic scale within the short six-year period from 1914 to 1920 is unmistakable evidence of the trend of events.

The third plan makes a strong appeal to those who believe in growth rather than revolution. It is not only voluntary and peaceful, but it also follows the natural tendency of certain definite, well-established precedents in existing unions. We are prone to speak of all international plans and systems as pleasing and perhaps harmless dreams for the future, but in truth they have been a steadily growing reality since 1865. There are already several distinct fields in which the nations, recognizing their mutual interests, and with no thought either of "superman" or of "revolutionary proletariat," have voluntarily come together and devised legal unions to conduct their common enterprises. Let us glance at some of these unions and observe their operation and value.

**The International Telegraphic Union.** — This association was first formed in Paris by the treaty of 1865 and was somewhat remodeled by the treaty of 1875. It possesses two regular organs of government: the Conference, a legislative body composed of delegates from the member states, and the Permanent Bureau, an administrative body for continuous action. The Conference makes the administrative rules of the Union and prescribes the various details of the international telegraphic business. But it may not change the treaty or convention on which the Union itself is based.

This can be done only by a formal action of the national govern-

ments which are members. The chief work of the Conference and of the Permanent Bureau under its direction, is to provide apparatus for rapid transmission, to fix the hours for the transaction of telegraphic business at international offices, to determine the form in which telegrams are to be written, their classification and the methods of counting words, the charges or rates, the codes or methods of transmission, the settlement of accounts between the national administrations, and the regulation of international telephone service. The Union is chiefly composed of States which have government telegraph systems; but private companies are admitted to membership without a vote.<sup>1</sup>

**The Universal Postal Union.** — Formed in 1875, this essential system performs the following services: transmission of postal matter through all the countries belonging to the Union; the fixing of charges for transit through intermediate countries; arbitration of all postal differences and disputes among the national administrations; the fixing of responsibility for loss of mail matter; and the establishment of a Union postal rate.

The principles upon which the Union rests and operates are set forth in a treaty or convention signed by the members. This treaty also provides for administrative regulations to be made by the Congress. These cover the details of postal management such as the charges for postage, the regulations of size and weight of mailable matter — which matter shall be excluded from all international mails — the preparation of postage coupons — which are accepted in all countries — the details of transport, and the postal accounting system.

The authorities of the Union are: A Congress, meeting when two-thirds of the members request; it may make changes in the organization and powers of the Union to take effect when ratified by the member nations; a Conference of delegates to handle the details of administrative rules; this body seldom meets because the other authorities are sufficient; and the International Postal Bureau at Berne, Switzerland. The Bureau arbitrates disputes, publishes an international postal magazine, settles accounts between the member nations, collects and distributes information on postal

<sup>1</sup> *The Wireless Union.* Substantially the same form of international government and administration has been adopted by the Union for the regulation of wireless telegraphy, founded by the Convention of 1906 and amended in 1912.

regulations, receives proposals for changes in the regulations of the Union, and circulates these between the different sessions of the Congress.

There are over eighty nations, including colonies, represented in the Congress, each by one vote. Expenses are divided among the members according to their classification in seven groups, each group being determined by its size and the amount of postal intercourse which it originates. Each nation retains the postal charges which it receives for matter sent out by it.

This Union shows several features of unusual interest. It operates with such quiet effectiveness that its organization is comparatively unknown and only the results of its work are seen. The newspapers give it no space on the front page. It is not an arena for the dramatic and sensational clash of national interests. Yet it offers a striking proof of the possibilities which lie in genuine international coöperation. Again, it is unusual in the remarkable confidence which the national governments show in its administration, and the comparative freedom which the Postal Congress enjoys. This body usually assumes that the changes which it proposes in the rules and organization will be adopted by the member nations, and goes ahead sometimes without even waiting for their final acceptance. In America the President has even been allowed to enter into postal conventions or agreements affecting the Postal Union without the usual consent of the Senate, which is required for treaties.

**Protection of Patents, Trade Marks, and Copyrights.** — Is there a common interest in the safeguarding of literary and industrial property? Should an author or inventor in one country be aided and encouraged through the protection of his writings and discoveries by other countries? Or are science, literature, and art to be dealt with as strictly national products and shall each people pirate the intellectual property of others? Shall each allow its citizens to take without payment the music, literature, and inventions of foreigners because they are foreign?

The expense and inconvenience of separately registering a trade mark, taking out a patent, or securing a copyright in each civilized country early attracted attention to the possibilities of international coöperation in these fields. The Conference of Paris in 1880 led to a series of later agreements protecting patent rights and trade

marks. They established certain rules by which the citizens of any member nation could readily avail themselves of the patent laws of other members. A central Bureau was established at Berne, Switzerland, which conducted the administrative work of the Union, while legislation and proposals for changes in national laws were prepared by a general Conference of delegates. The Bureau investigated national patent laws, collected and distributed statistics and information, and published a magazine dealing with trade marks and patents. At first its powers were limited to this list, but later it was authorized to register trade marks. By this important step a simple recording of the mark in Berne automatically registers and protects it in all the countries subscribing to the arrangement. The registration fees are distributed among the States adopting the plan.

In 1886 and 1908 a similar protection for copyrighted works was established. Later these systems were combined in the Bureau of Industrial Property and placed under the control of the Swiss Department of Foreign Affairs. The expenses of the associated bureaus are borne by the member States in proportions fixed by the agreements. The United States has a limited membership in this Union, but does not protect foreign copyrighted publications unless printed in this country. Fortunately the foreign nations have not taken a similar view, but have adopted a broad policy of reciprocity in the safeguarding of literary property.

**International Institute of Agriculture.** — In 1905, at a Conference called by King Victor Emanuel, of Italy, at the suggestion of an American, Mr. David Lubin, the International Institute was formed. It is a clearing-house of information on farm conditions, conducts research in coöperation, farm credits and insurance, wages, markets, prices, and statistics. Its estimates of crop yields are universally used. It also gives notice of the rise of new plant diseases, their location and the methods of combating them; it brings to the attention of all governments the important resolutions of international farming congresses and societies, or other scientific bodies which bear on agriculture. The permanent office is at Rome. Although the founders intended the Institute to be an active exchange for farm products, a labor office, a sales and purchasing agency, and a credit and insurance bureau, also a means of securing protective laws for agriculture, these objects were not approved by

the governments represented, and as a result private associations have been forced to undertake this work. The Institute has become a means of exchanging information only.

**International Unions in Europe.** — A number of highly successful international governing bodies have at various times been formed on the Continent. When competition between beet-sugar producers became so acute that government subsidies were offered by each nation to promote its foreign sugar trade, such an extreme rivalry developed that the beet-growing countries were exporting sugar to America and England at a loss and making this up out of their national treasuries. In order to end this ruinous competition an international commission was formed which abolished all direct and indirect government bounties and laid taxes on sugar coming from nations that granted such bounties. The commission succeeded in its efforts and greatly benefited the nations concerned.

Some large European rivers such as the Danube and the Rhine flow through different national territories. When each of these nations makes its own rules on the river channel, the tolls and fees to be charged, the dredging arrangements, and similar regulations, there is apt to be an excessive burdening of river traffic by heavy taxes and the gradual choking up of the river channel. Yet such rivers may form a remarkably cheap avenue of entrance to points many hundred miles in the interior and may be the means of marketing immense quantities of goods to and from a great distance. In order to maintain this important traffic, international commissions have been formed both for the Rhine and the Danube, with such success that none of the nations concerned would now go back to the old plan. Such a river commission fixes the duties or taxes to be levied on navigation through the river, dredges the channel by its own machinery, makes rules for safety and navigation of the stream, fixes the toll charges, licenses pilots, lighters and tugs, sets up channel markers, manages some of the more important wharf and dock centers at the mouth of the river, etc. The Danube commission has brought order out of chaos, has increased the minimum depth of the channel from 9 feet to 24, reduced wrecks by 90 per cent, and lowered navigation duties 60 per cent.<sup>1</sup> The international regulation of freight rates on railways traversing

<sup>1</sup> See Sayre, *International Administration*.

several countries has also been successfully undertaken in Europe. A union of railway freight transportation fixes through freight rates, provides for the free interchange of freight between different railway lines, makes rules governing the kinds of merchandise which shall be carried, the packing and transport of dangerous and breakable articles, the responsibility of each railway line for losses and delays, the arbitration of controversies between different railway administrations, uniform bills-of-lading, and provides for through tickets and through freight shipments. A central bureau at Berne, Switzerland, acts as a clearing-house of information and settles claims between administrations.

**The Union of American Republics.** — The Pan-American Union, as it is called, is chiefly a bureau of information. But it also drafts projects of arbitration and promotes by diplomatic, financial, and economical conferences a better understanding of and a more harmonious relation between the nations of the Western Hemisphere. Its permanent office is at Washington and it has established a special commission on international law at Rio Janeiro. One of its most valuable functions is an attempt to simplify the rules of customs administration in the Americas. It undoubtedly forms the nucleus of what may readily develop into a permanent Pan-American Conference to deal with the distinctive problems of the Western Hemisphere.

**The League of Nations.** — The League was established by a Covenant annexed to the Treaty of Peace of January 10, 1920. The League Constitution, or Covenant, in a preamble states its purpose to be to promote international coöperation and achieve international peace and security by the acceptance of obligations not to resort to war, by the fixing of open, just, and honorable relations between nations, by the establishment of principles of international law as the actual rule of national conduct, and by the maintenance of justice and treaty obligations in dealings between peoples.

The official authorities of the League are: (1) The Assembly, consisting of representatives of all the members, each member having one vote; (2) The Council, consisting of Great Britain, France, Italy, Japan, and four other members of the League. A place was reserved for the United States on the Council, but not accepted. The Council meets at frequent intervals between ses-

sions of the Assembly; (3) A permanent secretariat at Geneva, where many other international offices are located.

**Field of the League's Activity.** — For their decisions on more important matters, the Assembly and the Council require the unanimous agreement of those present. On minor matters a majority vote is sufficient. Among the functions of the League are: to prepare plans for the reduction of national armaments, to take necessary action to prevent the outbreak of war, to provide for the arbitration of disputes, to establish a permanent Court of International Justice, to conduct a trade or financial boycott of nations which violate the League Covenant, to register international treaties and engagements, to assist those peoples and nations which are unable to maintain themselves as the result of the late War, to establish mandates or commissions for the protection, development, and care of dependent nations, to encourage and promote the National Red Cross, to take charge of such already existing International Bureaus as the parties concerned may wish, to found an international organization which shall promote fair conditions of employment for labor. Amendments to the Covenant may be made by the Assembly, ratified by the members represented on the Council, and by a majority of the member nations. A member dissenting from an amendment may retire from the League and is not bound further by the Covenant. The League's expenses are borne by the members on the same plan as in the International Postal Union.

**League Procedure.** — The procedure thus far followed in the League's activities has been, first to prepare all important projects in the Council. During the first year of the League's existence ten Council meetings were held. The Council works through Committees, the committee reports being acted on only after detailed discussion. Then the project is presented to the Assembly. The first meeting of this body was held at Geneva, and immediately six important committees were established, dealing with constitutional questions, technical organization, Permanent Court of International Justice, Secretariat and Finances, Admission to the League, Mandates, Armament, and the Economic Weapon. The Assembly proceedings are public and the committee reports on the projects submitted by the Council are thoroughly discussed, with abundant opportunity for free expression of opinion. The most



important step taken at the first meeting, which lasted 5 weeks, was the establishment of the long awaited International Court of Justice, subject to the approval of the member nations. The deliberations of the Assembly have shown clearly the possibility of uniting the representatives of two-thirds of the world to consider problems of common interest.

**An International Court.** — In 1921 the League of Nations adopted the plan for a permanent Court and in May, 1922, this important tribunal was formally opened at the Hague. To it the members of the League have agreed to submit their international differences. There is much opposition to compulsory decision of disputes in this way but as soon as precedents are created and the habit of judicial settlement is established, the opposition should speedily disappear. Previous to this a series of conferences at the Hague had set up general rules for arbitration of international disputes and had succeeded in securing a number of arbitrations. An attempt by the Hague Conference to regulate the laws of war, however, broke down when submitted to the crucial test of 1914. The new international court set up by the League offers a far better prospect of success because although it is nominally independent of the League it is strongly backed by that organization.

**America's Interest in Coöperation.** — In all the discussion of national differences one fact emerges clearly — America now has an interest in the preservation of international order and peace, and in providing means for the just and equitable decision of disputes. As the outbreak of a conflict between Serbia and Hungary brought on a war with results which we could not view with indifference, so the alignment of hostile forces in Europe, Asia, or South America might, at any moment, become a matter of direct, immediate interest to us or to any other great nation. The theory that individual nations may fight out their differences without involving others is now no more tenable than that individual citizens may carry on war with each other while their neighbors look on in benevolent neutrality. Nor is the issue changed by regarding wars as of economic origin. Even if we take the prevalent view that war is caused by conflicts of economic interest it is ridiculous to claim that such conflicts cannot be fought out in an international court or that their settlement requires the destruction of the parties concerned and of the prize for which they fought.

In America we can no longer say that our geographical position frees us from the concerns of the outside world. Our moral, commercial, and political interests are becoming those of a world power and our attitude towards peace and the means of protecting it must conform to those interests. No statesman of repute today believes that international peace can be maintained without a large measure of active coöperation between the greater powers. This means that every nation assumes its share of responsibility. America can command an unusually strong influence in all such common enterprises because she has no imperialistic designs for the extension of her boundaries nor the conquest of foreign peoples.

**Summary of International Unions.** — A survey of the more important unions shows (1) that, as might be expected, the most common duty and power is the exchange of information. All the unions fulfill this function.

(2) A common feature is the attempt to secure the passage, by the member nations, of uniform laws on the subjects covered by the union. The conflict of statutes on matters of common interest is a serious barrier between nations, and its removal is one of the most useful duties which a union can perform.

(3) Many of the unions publish magazines which are circulated among the leaders of opinion in the member States and tend to develop and strengthen a sense of common international interest, thereby laying the foundation for international authorities with stronger powers in the future.

(4) Many, as we have seen, possess a permanent international office or bureau, which is the nucleus of the central administrative authority. In some of these, experiments are undertaken, researches made, and records or archives of those matters which affect the special interest of the Union are preserved.

The above powers, when analyzed, are of an informative and recording nature. They do not regularly administer or manage any important matters. In addition to these, however, a few of the more important unions have genuine administrative power. Among these are:

(5) To conduct international accounts, such as postal and freight, and clear these accounts between nations.

(6) To classify the goods or messages or other matters circulating between nations, as a basis for charges and rates and collections.

(7) To determine what matters may not pass between nations, as in the mails, publications, and articles of an immoral nature.

(8) More rare is the power to fix rates and even to make regulations affecting the use of international trade routes, such as the Danube River, or the taxes levied through the International Sugar Convention.

(9) The arbitration of disputes arising between national administrations, such as freight and postal mails.

(10) The arbitration of any international dispute, as through the World Court.

(11) The formulation of principles of international law which are recommended to member states for adoption, as in the case of the Hague Conference and the League.

(12) The combination of diverse separate activities of certain of the unions in one great international association, which shall express the commercial, political, and the peace-preserving interests of all the members.

**Disarmament.** — Before 1914, the strongest argument for national armaments was that they were "war insurance"—that the greater the sums so expended, the greater the security from danger of war. This argument will not now be heard for some time. It is also clear that the costs of up-to-date armaments have risen far beyond what was considered excessive before 1914. In the land forces, the technical equipment alone has reached unthought-of dimensions, while in the navy the cost of a single super-dreadnought already runs between 30 and 40 millions. Nor has the life of these new weapons been prolonged by the greater expenditure. Rather the reverse, for the rapid pace of invention and research more speedily renders them obsolete. A new airplane model or a new type of ship now goes out of date more rapidly than ever before, and takes with it to the scrapheap much of the equipment based on its use.<sup>1</sup> We thus have not only higher original armament costs, but also a higher *rate of increase* of costs, with each improvement of method and device. This truth seems so nearly incredible that an illustration may be needed.

When the submarine and the bombing airplane were perfected, many experts announced that the day of the big battleship of

<sup>1</sup> In 1921 the British Admiralty sold 30 obsolete warships of various sizes and types for \$12,000,000.

fabulous price was past — that one torpedo or one bomb would wreck a dreadnought. But the real result has been to increase the outlay for defensive craft to form a screen around the battleship and drive off the bomber or the "sub." Also the hull of the capital ship must now be more carefully (and expensively) subdivided into compartments and differently lined. Likewise an airplane carrier must be added to the navy. Such a special ship, carrying 80 planes, costs \$25,000,000. Can a navy without these newer devices claim to rank in the first class? And does any patriotic and high-spirited nation want anything less than a first-class navy? The answer is — we must transfer a larger proportion of national funds from productive to defensive purposes.

Ninety-three and six-tenths per cent of the total national government expenditures in 1920 were for military purposes, including the cost of past wars. Only 6.4 per cent were for civil purposes.<sup>1</sup> No comment could make clearer the indescribable folly of competitive armaments and the need for immediate international action.

**The Washington Conference.** — The continuance of excessive armaments after the Great War and the growing hostility between Japan and the United States led the President to invite representatives of European Governments, China, and Japan, to a Conference on Limitation of Armaments and on Far Eastern questions, which met at Washington in November, 1921. Several agreements were drafted and later accepted by the governments represented.

The chief subjects covered by the treaties were: (1) The limitation of naval armament; (2) the use of submarines and poison gases; (3) the safeguarding of the Eastern possessions and dominions of America, Great Britain, France, and Japan; (4) the territorial and administrative integrity of China, and the Open Door; and (5) the Chinese Customs administration.

Of these the first was the most important and in the words of Secretary Hughes, Chairman of the Conference — "This treaty ends, absolutely ends, the race, in competitive armament." It limited the size of the navies of the five contracting nations in

<sup>1</sup> See the invaluable work of Dr. Edward B. Rosa, "Expenditures and Revenues of the Federal Government," in *The Annals*, May, 1921. In later years the civil appropriations have risen but still amount to only 30-40 per cent of the total.

capital ships, fixing a total tonnage for each nation and its proportion to the others. Light auxiliary vessels under 10,000 tons or with guns of not more than six inches in caliber were not limited nor were submarines. The nations interested at once began to scrap sufficient battleships to reduce their navies to the required size. The treaty on Eastern possessions pledged the contracting parties to respect each other's rights in their far Eastern territories and dominions, and to communicate with one another for an understanding to protect these from aggressive action by any other country.

The fourth treaty pledged the nine signatory powers to respect the sovereignty of China throughout her entire territory. It put an end to the spheres of influence and special political concessions which had threatened to involve America, Europe, and Japan in a new conflict.

At the same time supplementary treaties were made to reduce the friction between China and Japan due to Japanese occupation of Chinese territory.

**Private Associations; the Maritime Committee.** — Much of the work of establishing international cooperation in commercial matters and removing obstacles in the shape of conflicting national laws, is being done by private or semi-public associations. Two examples will be of interest. The wide diversity in navigation laws has led to frequent efforts to unify national legislation. These bore no fruit until the formation in 1898 of the International Maritime Committee. This body is composed of representatives of National Maritime Associations, one of which has been organized in each of the chief shipping countries. These national associations are composed of ship owners, insurance companies, etc. Seventeen National Associations are represented on the International Committee. Its objects are: (1) To further unification of maritime law, by conferences, publications, and investigations; (2) to encourage the formation in each country of a National Association devoted to this work; (3) to maintain communication and united action among these Associations.

The method pursued by the Committee is to select a subject requiring a common understanding, to prepare a questionnaire on this subject and circulate it among the National Associations. The replies are collated in such a way as to show the chief points of

harmony and those on which variance exists. The Committee then seeks to compromise the more important differences and to establish general principles which the national bodies will accept. Such a program having been prepared, a conference is summoned and an agreement secured on the draft of a convention. The governments of the nations concerned are then asked to call a formal diplomatic conference at which the convention or treaty is presented. If this conference adopts the convention, it then becomes effective when approved by the governments represented. This plan has the advantage of establishing a uniformity based on the real business needs and existing conditions of maritime peoples. It has resulted in the successful unification of some highly important parts of shipping law, notably on salvage and collisions at sea. Other problems which are now engaging attention are maritime mortgages and privileged liens on vessels, and the limitation of ship owners' liability. Also uniform regulation of safety at sea. It is claimed that three-fourths of the world's ship tonnage is now regulated by uniform principles that were developed by the Committee.

**The International Chamber of Commerce.**—This body was organized June 23, 1920, at Paris, by representatives of Belgium, France, Great Britain, Italy, and the United States. It is controlled by a Board of Directors with three representatives from each nation. A permanent office at Paris is in charge of a Commission composed of one member from each nation. There is in each country also a national section of the International Chamber. This section aims to carry out, as far as possible, the resolutions of the international body and to keep the latter informed as to commercial, financial, and industrial conditions in the country. It also presents membership applications to the international body. Members are either organized associations, such as Chambers of Commerce and trade associations, or firms and individuals.

Among the purposes of the International Chamber are to act as a clearing-house of information on all questions of a business nature throughout the world, to correct the evils of trade-mark piracy, to standardize law affecting commercial intercourse, to unify customs, tariff regulations, and the terminology of customs tariffs. The Chamber has a Research Department for the collection and distribution of statistical data to its members. Com-

mittees have been established on finance, transportation, production, raw materials, taxation, and unfair competition. The Chamber has already placed itself on record as favoring the abolition of all business subsidies by the member nations, excepting those for shipping services.

**New Problems.** — In International Government modern nations face a wide range of opportunity for common effort. We can appreciate the extent of this new field from the following partial list of subjects, on all of which international action is needed.

In the field of communications: a reciprocal regulation of airplane traffic; the control of wireless; the adoption of a standard railway gauge in contiguous countries; uniform international bills-of-lading; the adoption of some one of the proposed international languages for commercial use.

In measurements: the adoption of the metric system by English-speaking nations which are almost the only ones which have now failed to do so.

In finance: a standard international currency; the extension of international credit instruments.

In shipping: a more uniform standard of regulations for safety at sea, of labor and working conditions, of marine insurance.

In commercial law: the development of a common code on all essential trade transactions; a simple, inexpensive system of private commercial arbitration.

In all fields we need a greater willingness by the governments to carry out the undoubted desire of their peoples for world cooperation.

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### QUESTIONS

1. Why has international coöperation arisen?
2. Mention three plans of coöperation that have been proposed.
3. How have any of these plans been tried?
4. Name the international unions which have been formed in Europe.
5. What is the scope of the Universal Postal Union?
6. How is it administered?
7. What features of unusual interest are evinced by this Union?
8. Describe the organization and work of the International Telegraphic Union.
9. Why was the Wireless Union formed?
10. How are patents, trade-marks, and copyrights protected internationally?
11. What is the nature of the work of the International Institute of Agriculture?
12. What was the importance of the Sugar Commission?
13. Why are international river commissions particularly important in Europe?
14. Describe the administration of some such commission.
15. Explain the International Union of Railway Freight Transportation.
16. Describe the Union of American Republics. Why was it formed?
17. How was the League of Nations brought into existence?
18. What are the official bodies comprising the League for the administration of its business?
19. Summarize the functions of the League.
20. What principal purposes have been served by the Hague Conferences?
21. What obstacles were encountered in formulating this plan?
22. Why was the International Court established? By whom?
23. Summarize the usual functions performed by international unions.
24. What has been the influence of armament costs upon international unions?
25. How do private associations promote international coöperation?
26. What are the objects of the National Maritime Association?
27. Discuss the work of the International Chamber of Commerce.
28. Suggest some new fields for international coöperation.
29. Prepare a report on the results of the Washington Disarmament Conference.
30. Resolved, That the United States should join the League of Nations. Take one side.



## CHAPTER 30

### SOME UNSOLVED PROBLEMS

WE shall now consider a number of constitutional and political questions of the first rank, for which some solution is urgently needed:

The distribution of power between Nation and States, including also,

The policy of Federal subsidies to the States.

The need of greater efficiency in democratic government.

The need of productive as contrasted with defensive government.

The creation of a closer, more harmonious contact between Government and people.

The adoption of a scientific method of business regulation.

#### RELATION OF THE NATION TO THE STATES

**The Distribution of Power.** — It now seems clear that we are about to revise the distribution of authority between Nation and State at several points. If this change is to be a benefit rather than an injury we must face and solve some important problems:

(1) How large is it possible to make the administrative and judicial arms of the National government?

(2) What will be the effect on the political capacity of our people, of transferring a constantly growing series of powers from the State to the Nation?

(3) What are the methods by which the needed uniformity of action can be secured on matters of National concern?

At the outset we must distinguish sharply between those things that are handed over to the National government in order to secure uniform regulation, and those whose transfer is demanded because of the incompetence and slowness of the States. Not all of the demands for Federal action belong in the first class. Many arise from the popular failure to attend to State government, so that

when it is suddenly discovered that an important question requires State action and that the State does not handle it effectively, the people refuse to meet the issue squarely and take the easiest way out by shifting the new problem to the Federal government for solution. This is not because it is a National question but because the people want action, and doubt their ability to get it from the State governments which they have neglected. Washington is therefore called on to handle many affairs which belong at the State capital.

In contrast to these is the genuinely National aspect of such questions as roads, schools, vocational training, corporation charters, and railway regulation, all of which call for an organized, systematic Federal treatment along lines which shall be laid out a generation in advance and on some broad comprehensive plan. In many of these fields the public favors higher standards established by Federal action.

**Size Limits of the Federal Government.** — Every attempt to make our National government more efficient faces the question, how large can the government safely be made? With a personnel of over half a million, widely scattered through the country, loosely organized in many cases, and with powers and responsibilities that partly overlap or duplicate and partly are ill-defined, our government staff presents anything but an encouraging picture to the advocate of effective public action. It offers only too strong a ground for the critic who believes that everything that the government does is poorly done. The limits to which the Federal staff can be increased must depend chiefly on the method of organization. A top-heavy personnel, poorly set up, with inadequate supervision, excessive centralization of authority, and out-of-date methods of recruiting, training, and promoting its members, must inevitably produce certain clearly apparent evils which have often been pointed out by observers. Such a staff will lack initiative because its members have little ambition and little opportunity to exercise what they have. It will be mechanical because many minor affairs will be referred to the central offices and there handled by routine clerks. It will be arbitrary and unsympathetic with special local conditions for the same reason, and it must be a complete failure as to results because such an organization, existing without service ideals, must fail to produce standards of work that

will bear the test of effectiveness. Contrariwise, it is perfectly feasible to build up a large staff as well as a small one, with a set of definite standards, a spirit of service, a willingness to be judged by results, a high degree of local and district initiative, and a carefully managed system of supervision which will compare favorably with these features of the large private corporation.

Our first problem, therefore, the limit of size, is one whose solution depends upon the organization rather than the inherent nature of government work. Aside from the test of profits there is nothing peculiar to government activity which does not exist at least to some degree in private industry. Even the element of politics, with all its paralyzing effects upon efficiency, is a well-known factor in corporate affairs. As this disturbing influence is reduced by civil service regulations and by the demand for greater economy and for results in government, administrative conditions will more nearly approach those in private concerns.

There is therefore no limit to the size of the Government staff provided it is well organized on the same sound principles that have abundantly proven themselves elsewhere. Those who fail to recognize this fall into some startling errors of judgment. An Attorney-General<sup>1</sup> has stated that the Courts of the United States were being "clogged" with a vast number of criminal cases. There were 15,000 of these under the Prohibition Act alone and over 500 under the mail fraud statutes. The trial of mail fraud cases would require all of the time of all of the Federal judges for 12 months. He therefore proposed that the enforcement of these and certain other Federal measures be handed over to the States in order to relieve the national administration. A moment's thought will make it clear that these figures are exceptional and are not a basis for making permanent changes in methods such as was suggested. The Prohibition Act must necessarily lead to an immense amount of litigation for several years until precedents are established and the leaks in law enforcement are stopped. This is true of every important new criminal statute. The very doubt of the possibility of enforcing the law, which the Attorney-General's address only strengthened, has been one of the strong temptations to its violation. The mail fraud cases present nothing startling, in that all species of frauds and violations are known to

<sup>1</sup> Before the Illinois Bar Association, Chicago, June 2, 1922.

increase after every war and to have been especially severe as a result of the Great War. No one who has made any examination of State Courts is ignorant of the fact that criminal procedure is the weakest branch of their administration of justice. All the evils which the Attorney-General complained of as a result of handling these matters through the Federal Government, exist in multiplied form in State Courts and procedure. The truth is, we must reconcile ourselves to the fact that the country is growing, and its public business is increasing even more rapidly. Its Government personnel must continue to grow and must be more effectively organized until the present era of increased regulation has passed.

**Disadvantages of Centralization.** — Numerous critics of centralization have pointed out the evils to be expected from this irresistible drift from State to National control. Among these may be mentioned the opponents of almost any Federal bill which is under discussion in Congress. A former Senator<sup>1</sup> has made what is doubtless the most complete arraignment of our present trend thus far published. Among the evils cited are — The subsidence and decay of State loyalty, and the rise of a doctrine that the Federal Government possesses some powers not granted to it.

The similar doctrine that it must exercise those powers which the States neglect.

The Federal assumption of jurisdiction over all waters of the country and over the development of hydro-electric power.

Similar usurpation of health regulation, the creation of markets for farm products, regulation of security issues, incorporation of companies, construction of merchant marine.

It has not stopped here, but has assumed to conduct vast landlord operations, to enforce public virtue and morals, to finance and direct construction of highways regardless of their use as post roads, to settle local industrial disputes, to supervise education, and to extend the Federal Court jurisdiction.

Following these has been the closely related evil of class and political sectionalism, the rise of blocs and cliques clamoring for class laws, the doling out of Federal aid to private enterprises, to localities and associations, the distribution of Federal funds for harbors without ships, for fantastic reclamation projects, for teach-

<sup>1</sup> Senator Charles S. Thomas, of Colorado, before American Bar Association, Cincinnati, September 1, 1921.

ing farmers the mysteries of agriculture " including the weaning of calves and the making of cottage cheese."

As a result of the topheaviness, incapacity, and general weakness of the National Government, Senator Thomas holds that rival parties now bid for popular favor on the basis of the class laws and sectional appropriations which they offer. Truly National interests have become submerged in this vast scramble for special privilege and are now almost without representation.

Candor compels the admission that many if not most of these evils now exist in our National Government to a serious extent, as they often have in past eras. Special conditions of industrial development have no doubt aggravated them and created some new weaknesses which were not formerly present. But do they come from the expansion of National powers? Their presence at the State capitals is equally familiar, and proportionately in as intense a form as at Washington.

The substantial truth underlying all these criticisms is the growing willingness of the people to shift responsibility for local affairs to Washington in order to escape their own local duties, or to secure a Federal subsidy which will pay a large part of the cost of a desired project. All representative systems are built upon local self-government. The village, the town, or the county not only conducts local affairs but also forms a unit from which the representatives to the larger areas to the national legislature are chosen. There is not and never has been a permanent national parliament or congress which did not in some degree depend upon the existence of local representative institutions.

Our own Federal Government is unthinkable without the States and their local districts. We elect Senators and Representatives by going to a voting precinct which is fixed by State law. We hand our ballots to an officer elected under State rules. Our voting qualifications are determined by the States, and the election is held at a time which they fix, while the nominees and the party rules are all chosen or made under State auspices. The successful candidate is certified to Washington by a State official as having been elected in the ——th district of his State. His duties, when elected, are not only to consider National policies, but also to secure " something for " his district and to peddle out appointments to his constituency. In a very real and practical sense, our National Govern-

ment is made up of State and local governments and is dependent on their activity.

**Effect on Political Capacity of People.** — It is charged that centralization in its effect on the political training and ability of the people — (a) tends to destroy local government, which is the basis of all representation; (b) creates a feeling of local irresponsibility by enabling the locality to get its work done by the Federal government and to have the expenses of such work paid at Washington.

We may dismiss the first of these without serious consideration. The local governments still have abundant work to do and continue to exist unimpaired. There is no proposal at any point to abolish or destroy the local townships, counties, and boroughs or incorporated villages. They will always be needed in connection with health administration and the management of poor relief, local roads, tax assessment, and collection, etc.

As to (b) however, there is undoubtedly much truth in the claim that the inhabitants of townships, towns, villages, counties, and even cities are inclined to be slothful in the enforcement of their local powers and duties, and often prefer to shift responsibility and expense rather than carry their own share of the burden. If we look at government as a whole it is clear that nothing can be gained by merely transferring work and expense from the local community to the Nation. The same work will have to be done and the total expense will be the same or even more. We do not escape expense by changing the pocket from which it is paid. Nor do we reduce our taxes by paying them to the National government. Unquestionably there is force in the criticism that our localities are dodging their share of work and that we need to follow more closely the principle that whatever can be done in the local and State governments should be left to them rather than to the Nation.

**Uniform Action on National Questions.** — How can matters of national concern be harmoniously treated without congestion in the National government? We may do this by decentralizing the National government into districts or by leaving power with the States and giving Federal subsidies to those which conform to national plans, or by persuading the States to adopt uniform laws on national matters.

**Government Districts.** — A new problem of broad dimensions is pressing into the foreground — the geographical basis of govern-

ment work. The division and corps areas of our army group the States on one basis, our Federal Reserve districts another, our Food and Drug Inspection is based on a third, our grouping of railways by the Interstate Commission is still different, our customs and internal revenue districts also vary, while our judicial districts are again different from all the others. Again inside these districts State lines are often ignored and a single district will include the whole, parts, or fragments from several States.

The bearing of this problem will at once be apparent. If we could find some effective, serviceable basis of government activity either by grouping States or creating new districts corresponding to the needs of the general government and to a real unity of district interests, we could decentralize much of the work now done at Washington and could set up new district authorities with greater initiative and responsibility. We should thus gain a system that would be both more efficient and more responsive to local needs than is now possible under our centralized form.

The Interstate Commerce Commission has long faced the possibility of establishing district Commissions based on the commonly accepted traffic districts of the country, with a review by a central commission at Washington to maintain the required uniformity of standard. The Federal Reserve System realizes this ideal to a greater extent than any of our other national government units. The Forestry Service does likewise, to the great advantage of its work. So does the Civil Service Commission. There is every reason to believe that a careful survey of the natural economic districts of the United States and the peculiar government needs of these districts would enable us to create a more decentralized National administration and to overcome some, if not all, of the weaknesses of political concentration.

**The Subsidy Policy.** — Whenever it appears that the Constitution hinders a transfer of power from the States to Congress, those interested seek some expedient by which to evade this obstacle rather than attempt to remove it by direct amendment. The process of amendment is so difficult that these evasions have occurred on a large scale. One method is to make the change in favor of the National government by judicial interpretation. A "broad" meaning is given to the powers of Congress to include the new purpose. Another method is to use the commerce regulat-

ing power or the tax power in such a way as to secure the desired end, either by excluding from commerce those objects which do not conform to the regulation desired or by laying a tax burden upon such objects. We have considered several examples of both of these methods. The third, and at present most promising way, is the subsidy plan. Congress grants to the States a fund, under its power to tax and to appropriate for the general welfare. This fund is given only on condition that the States appropriate a similar sum and that the total amount be used for a definite purpose fixed in the Federal law. This purpose may be and often is entirely outside the regulating authority of Congress.

**Forms of Subsidy.** — While there is nothing new in Federal grants to the States, they have suddenly assumed large dimensions. Congress by the Act of May 8, 1914, the Smith-Lever law, has aided farming by annual expenditures of \$5,000,000 for agricultural training extension. The Federal sum is partly evenly divided among the States and partly distributed according to the rural population.

By the Smith-Hughes law of February 23, 1919, Congress has made small grants to the States in aid of vocational education. Sums varying from three to four and one-half million are divided among the States according to population and are used in farming, trade, industrial, and home economics education, also in the training of vocational teachers.

By the Act of June 2, 1920, a subsidy of \$500,000 to \$1,000,000 is annually divided among the States for vocational rehabilitation and training of civilians, following the War.

By the Chamberlain-Kahn law of 1918, Congress grants to the States which make similar appropriations, a small fund to be used in the suppression of venereal diseases. It is divided on the basis of population.

By the Act of November 9, 1921, \$140,000,000 is annually appropriated to the States for road building.

By the Act of November 23, 1921 (Sheppard-Towner) \$1,250,000 has been divided among the States for the purpose of maternity and infancy hygiene.

In addition to the above and similar acts, Congress subsidizes the State National Guard by supplies, arms, equipment, and payments of money, on condition that the Federal organization and rules are maintained.



In all the above laws Congress has authorized some Federal body or officer such as the Secretary of Agriculture, the Bureau of Public Roads, the Federal Board of Vocational Education, the Children's Bureau, etc., to supervise the use made by the States of the funds granted and to withhold appropriations if the proper use is not made and the required standards are not observed. It has also designated some existing State authority such as the Highway Department, the Land Grant Colleges, the State Board of Health, etc. which must be authorized by State law to undertake the State's share of responsibility and supervision.

There can be no doubt but that by this means Congress has immensely extended its real control over matters which the Constitution does not authorize it to regulate. Urged on by the pressure for better roads, stronger health protection, a higher standard of individual efficiency through education, and the immediate needs of the farmer, Congress has departed from its traditional and constitutional sphere of powers and has used the Federal funds to regulate by "grants in aid" of particular purposes and systems of control.

**Criticisms of the Subsidy System.** — Federal subsidies to the States are open to the objections that lie against Federal centralization in general, except that they do not require a great increase in National employees and officials, but leave the work to be done by the State governments. When future subsidies reach a large amount, political influence in doubtful States may be brought to bear to secure their continuance even when the State has failed to live up to the standards required by law. This as yet is only a theoretical danger, but it may become a real one if the amounts at stake grow to sufficient size.<sup>1</sup>

**Alternatives of Centralization.** — Must we centralize government power at Washington in order to secure reasonable uniformity of regulation, or are there alternative courses that may be pursued? Three main lines of effort are now being put forth in this direction — (a) campaigns to unify State law, conducted by national bodies of business men and civic interests, such as the Bankers' Associations, the National Manufacturers' Association, the National Metal Trades Association, National Civil Service Reform League, the American Automobile Association, and similar bodies; (b) the

<sup>1</sup> See A. F. Macdonald, *Federal Subsidies*, 1923.

official Conference on Uniform State Laws, composed of delegates from the States for that purpose; (c) the annual and biennial conventions of various State administrators, ranging from Governor to factory inspectors.

Under (a) a growing pressure is being brought by voluntary associations to do away with some of the absurdities of divergent and chaotic State regulation. The motor car interests are leading examples of this. They recognize the need of uniformity of motor vehicle regulation and the difficulty of securing it through the National government.

But all such voluntary efforts meet a serious obstacle in the great number of legislatures which must be brought to realize the need in order to secure anything approaching the desired amount of cooperation. No body of private citizens has been able to obtain legislation even approaching uniformity on any point thus far.

(b) **The Conference on Uniform State Laws.** — The official efforts of the States themselves have been stimulated by progressive business interests. When a shipper delivers his freight to a railway he receives a bill-of-lading which he transmits to the consignee. This bill is accepted by banks everywhere as the basis for a loan. If the shipment is interstate a National law regulates, but if it is local only the State can control its form and contents, and a great diversity of forms at once arises to lessen its security as the basis of a bank loan. This diversity facilitates counterfeiting or forgery and fraud. A uniform bill-of-lading is more valuable to all concerned than a diversity of types. A warehouse receipt for the deposit of goods or grain is also the basis of a bank loan. It is subject chiefly to State regulation, yet bank credits are extended all over the United States upon this security.

What is true of these two instruments of credit might be said of numerous other matters now subject to State law — the protection of investors against sale of bogus securities, the probate of wills made outside the State, the compensation of workmen for industrial accidents and for occupational diseases, the rules governing marriage and marriage licenses, etc. Can the States avoid a transfer of power over such matters to the National government by establishing some reasonable degree of uniformity among themselves? It is not easy to determine which matters should be uniformly regulated and which should not. Some allowance must be made

for the very great diversity of moral ideas, of economic standards, and of social customs and race differences in widely separated parts of the country. A rigid, inflexible uniformity in such affairs as inheritance laws, taxation, hours of labor, and building inspection, is neither feasible nor would it be desirable.

The work of a State government in a farming community is different from that of one in which commercial, shipping, or manufacturing interests predominate; the regulation required by a sparsely settled community like Nevada is the opposite of that needed in Pennsylvania or New York. But there are certain underlying conditions which are common to all the States and in which either some amendment to the Constitution or some agreement among the States is necessary. These lie chiefly in the efforts to prevent fraud and crime, to facilitate commerce, and to aid in financial transactions between different parts of the country and foreign Nations.

**Attempts to Establish Uniformity.**— Recognizing these needs the States in 1892 appointed representatives to meet in a Conference on Uniform State Laws. This Conference holds annual sessions and hears the reports of a number of important committees charged with the preparation of drafts of model laws on a wide range of subjects.

The procedure is slow because of the many conflicting views and interests to be harmonized and the natural conservatism of lawyers. Many bills have been redrafted three or more times by their respective Committees and have even then failed to pass the Conference as a whole. Upon receiving Conference approval the bill is then recommended to the States represented and its introduction in the legislatures is secured. Hard as is the road which it travels in Committee and in Conference, the bill has a still more difficult time in the legislatures. Uniformity of law is a general, not a special, need. If one interest or group demands it there is usually another which opposes it. It belongs in that class of improvements which are said to "benefit the community as a whole," and which therefore have little political importance in the eye of the legislator. The measures recommended by the Conference usually have to wait several years before receiving attention in any State. Lacking the organized support of any group they are introduced and re-introduced, but die in committee with each session.

**Results of Movement for Uniformity.** — These may be briefly summarized as follows: The Conference has now been in existence over thirty years. In that time it has prepared twenty-six acts. If we divide these into two groups, those bills which have been approved by ten or more States and those approved by less than ten States, we find that only ten of the twenty-six belong in the first group, the remaining sixteen having a scattered number of approvals ranging from eight for the bill on Extradition of Persons of Unsound Mind down to none for the Occupational Diseases and Vital Statistics bills. The latter, however, are of comparatively recent origin. Only two States have thus far approved the marriage and marriage license bills.

These results seem trivial when we survey the entire field of subjects demanding coöperative State action. They give little support to those who would avoid the extension of National power. If the States are unable or unwilling to agree upon matters in which coöperation is of clear and apparent importance, such as the cold storage of foods, the protection of marriage, the regulation of child labor, the methods of proving statutes, the execution of wills probated abroad, the registration of land, and especially the collection of vital statistics and the protection to be afforded the victims of occupational diseases, then we must either abandon all hope of handling these questions with reasonable uniformity or transfer them to the sphere of National action. On even such matters as motor traffic regulation and aviation it has been impossible to secure harmonious rules.<sup>1</sup>

**Conferences of State Administrators.** — The insignificant results of the Conference have not prevented the growth of other efforts in this field. Agreements by the States for the regulation of local matters in which they have a common interest, such as bridges, harbors, the policing of waterways, etc., have often been made and have proved successful. There are also annual and biennial Conferences of Governors, the National Charities Conference, the meetings of State Food and Dairy Commissioners, of State Industrial and Factory Inspection Commissioners, of Highway Superintendents, Insurance and Banking Commissioners, etc., all showing that the administrator realizes the need, if the law-maker does not.

<sup>1</sup> See mimeographed report on Uniform State Laws by W. Brooke Graves in *American Government Seminar*, Univ. of Penna., 1921.

These meetings, however, serve more as clearing-houses of information for more effective methods of administration rather than as sources of uniform law. If the time comes, as it may be hoped, when the State executive will be intrusted with the initiative in law-making, the Conference of Governors and the annual meetings of administrators should rapidly assume a great practical importance in developing new laws along uniform lines. This is the most promising part of the whole movement. It represents a great potential force which may, at short notice, develop into a closely organized and effective method of interstate coöperation.

#### UNSOLVED PROBLEMS OF DEMOCRACY

**What Is Democracy?** — Probably no word is more abused, and certainly none is employed so loosely or with such an indefinite, vague meaning. An attempt was made in 1921 by the Committee on Democracy of the National Council of Education, to secure some analysis of its essentials.<sup>1</sup>

<sup>1</sup> Professor A. D. Yocum, Chairman of the Committee, offered the following as elements of the democratic spirit, taken from replies to an inquiry which had been addressed to one hundred leading Americans:

1. A vigorous self-assertiveness in those duties, rights, and opportunities which harmonize with general community and social duties and rights. This is sharply distinguished from socially unpleasant or offensive assertiveness, and is closely related to the "Let's go!" of the trenches.

2. Equal rights and opportunities, as distinct from equal abilities and achievements.

3. A keen sense of direct personal responsibility for the duties, rights, and opportunities of the individual and of others.

4. A close relation between duties and rights. This includes the willingness to serve in return for rights enjoyed.

5. The obligation to put forth the best effort of each individual.

6. A majority rule for common welfare. This is distinct from a majority rule for creation of privileged groups or sections. It involves a willingness to have questions examined by experts and to await the examination with patience.

7. The safeguarding of individual rights that do not conflict with common welfare and the surrender of those that do.

8. The leveling up rather than down. Individuals must be allowed to lead the way to higher levels and all must be encouraged to rise.

9. Education for fitness to take part in common undertakings, including such matters as speech, manners, skill in games and amusements, appreciation

One of these deserves special notice — a majority rule for common welfare was held to be distinct from a majority rule for the creation of privileged groups or sections. It was held to involve a willingness to have questions examined by experts and to await the examination with patience.

Can democracy fulfill this essential requirement? Its survival depends on its ability to do so. Many nations have continued without democracy, but the latter has never persisted unless it assured the maintenance of proper leadership.

An analysis of the difficulties which popular self-government must overcome in order to survive reveals the following: (a) Frequent victory of the demagogue over men of more statesmanlike ability; (b) the willingness to take professions, promises, and extreme claims at full value and in place of performance; lack of permanent policy or continuous program of action on important questions; and (c) violent emotionalism and even hysteria at irregular periods.

(a) The chief difference between the demagogue and the higher type of politician or the statesman is that the former plays upon the baser passions of the people, their hatred, greed, class selfishness, their fear, or their interest of the moment, while the more substantial leader appeals to their permanent interests, their positive and constructive ideals. It is the universal testimony of men long in high position that an undue influence and popularity falls to the leader who exalts local interests, secures local buildings and local grants from the National Treasury at the expense of broader National interests.

Sometimes the people take a long-range view of public policy. Sometimes a truly National leader with convincing force and eloquence, like a Lincoln or a Roosevelt, can at the cost of momentary losses of popularity develop a permanent mass following. But year in and year out the man who takes a broad gauge, statesmanlike view of National problems is apt to feel his tenure of office an insecure one; his hold on popular favor is often endangered or lost

of fine arts and familiarity with essential ideas through which the individual feels himself a part of society.

10. Democratic compulsion, including the individual's cheerful acquiescence in community standards that are more exacting than his own — in short, a willingness to conform in essential social matters.

by the sudden emergence of some local, racial, religious, business, or class issue on which men of more pliant conscience and glib tongue can beguile a momentary majority. The number of politicians of large caliber with continuous periods of service in the House or Senate is extremely small and growing smaller. This is one of the obstacles which democracy must meet and overcome. The willingness to recognize true leadership, to be guided by it, and to support and reward it, is a fair test of representative government.

(b) Closely connected with (a) is the problem — will the people accept the seductive promises, the violent professions of high ideals, and the loud protestations of love for the “plain people” — in place of results? This is a question of social psychology, but it is also an economic one. Education in the sense of learning is not sufficient. Practical training in the form of active service in social and political undertakings is a vital need. The politically untrained man cannot perform his duties as a citizen effectively because he lacks the judgment which comes only from experience. Let any one who doubts this observe critically the action of our so-called educated citizens; he will find them prone to loud abuse of the government, professing disgust with politicians and politics in general, unwilling to stand by any cause through several elections, and an easy prey to any specious leader who is willing to “turn the rascals out.” Education in the ordinary sense must be rounded out by a practical working knowledge of social coöperation — in plain English, of how people get along together. Democracy must insist on a casting up of accounts and results; otherwise it must be content with the crust of promises.

(c) This leads naturally to a third weakness which we must overcome in order to have and keep popular representative government — a greater continuity of program and policy. It is unquestionably true that the governments of the past which have had an aristocratic or monarchical base have been able to hold the even tenor of their way and secure practical results for their peoples to a remarkable extent. The history of democracies has too often been fleeting and evanescent because their programs of action were not steady but were subject to periods of flighty variation.

The difference between a progressive and a radical program is that the former insists on keeping the best of what we already have

and maintaining a steady rate of progress, while what men call a radical policy involves skipping *the next step* and jumping to a point so far in advance, or so different, as to have no connecting link with what is. Universal adult suffrage for men and women would have been a radical move in 1880, before the entrance of women into all other forms of modern life had at least begun to qualify them for political activity. The independence of the American Colonies would have been a radical instead of a progressive step if it had been undertaken one hundred years earlier, before the sense of unity among the colonists could be developed. In both it was necessary to prepare the way by a long development before the people could progress continuously from one stage to the next.

The immature mind, the untrained voter, and the demagogue all invite us to omit the next step and proceed without adequate preparation or connection with our present and past condition, to a stage far removed. They ask us, usually in the name of some high ideal, to discard the known means of reaching our goal. The less experience a Nation possesses, the more willing it is to pin its faith at a moment's notice to some new panacea which is guaranteed by its authors to give "immediate relief" after the first bottle. While the presence of large numbers of politically untrained foreigners among us aggravates our difficulty, we may not fairly charge the alien with all responsibility for this weakness. Our own people of native birth are still all too willing to drop political methods which have stood the test of time but which require thought, patience, and energy for their success, and to take up instead any and all devices and mechanisms of government which will give us democracy without effort.

The mechanism of our government can certainly be vastly improved and simplified to our advantage, but any system which we may set up in the future will always need the backing of hard work to make it go. This does not mean that we should avoid experiment. Our federal system is admirably adapted, as Justice Holmes has said, to the conduct of experiments within the insulated cells of the States. But we also need continuity — the ability to think things through, the willingness to discard even a pet remedy when it fails, the openness of mind even to keep what is, when it produces results. We need a greater steadiness, or what Professor Yocum calls *political patience*, to await inquiry.



Let us test out these generalities by a brief reference to recent government action. Our domestic policy on labor questions seems likely to attract strong attention for some decades. What have we done towards its solution in the years that it has been before us? At one moment we enact State laws and pronounce court decisions of a most rigorous nature designed to protect the public and the employer against assaults from labor interests; we enforce the trade laws against conspiracies and restraints upon labor, strikes, and boycotts. At the next, in obedience to the strong protests of labor unions, we profess to repeal this application of the trade laws. A moment later we interpret the repealer in a sense which acutely disappoints the labor interests. Meanwhile, in order to have peace in the family, we turn over all public utilities to union organization during the War and grant every demand, reasonable and unreasonable, for changes in wages and hours. Later comes the post-war reaction, and we proceed to a difficult, costly, and irritating process of "labor deflation." During the War itself, by a remarkable series of exemptions for both salaried and wage-earning men in so-called essential industries, we create that obnoxious and vicious distinction between the soldier in the trenches at \$30 a month, and the silk-shirt worker in the shipyards at \$300. The establishment of reasonable continuity is a problem of large dimensions. If it be said that the same charge may be laid against the monarchial and aristocratic governments of Europe, we find that while the same tendency arose there it was much more vigorously and firmly handled and that no such violent extremes have occurred as under our own system.

Our foreign policy shows an even stronger need of continuity. The American attitude toward Spain in the early months of 1898, the demagogic agitation of a chain of yellow newspapers loudly demanding war, the unwillingness to conduct a public, open inquiry into the causes of the explosion on the battleship *Maine*, and the rapid overpowering of the unwilling executive by an apparently organized and planned stream of public opinion which carried the nation into war, are not among the best achievements of our people.

The historian may later examine with greater calm and impartiality the events preceding our entrance into the Great War, but it would seem now that a stronger popular interest in foreign affairs

and a keener understanding of the real fundamental moral issues at stake might have enabled our Government to intervene at a much earlier phase of the struggle and to have shortened it for the incalculable benefit of all concerned. Democracy must overcome vacillation and acquire a greater appreciation of steadiness.

These considerations lead us to a problem which underlies most of the others. Can we establish an informed public judgment in place of popular hysteria? This question goes so deeply to the root of our psychology that it probably requires a trained mental scientist for its solution. We may say that if our people can overcome the craving for constant excitement as a dissipation, democracy has a fair chance. Just at present we are drifting in the opposite direction. All those phases of our life which involve calm, thoughtful, and quiet consideration are at a discount, while we pay handsome premiums for the "thriller," whether in speculative finance, social recreation, newspaper head-lines, moving picture scenarios, business promotions, or political slogans. There is a steady growth of nervous diseases which show some signs of diminishing stamina. Doubtless much of this is due to the peculiar conditions of city and suburban life. Its effects on government are plainly apparent. No one issue can long hold the front page. If any strongly entrenched group can defend itself against attack for a few elections, popular familiarity with the problem breeds contempt, and the whole issue passes into obscurity or the joke column. An outstanding Government abuse, a notorious injustice, a firmly fortified special privilege, or a fundamental issue of foreign policy, may all pass through the successive stages of Discovery, Denunciation, Vituperation, Supposed Legislation, and Obscurity.

The popular mind craves excitement. No one can be excited long over the same subject. Excitement requires novelty, and constant novelty is the order of the day, to which our politics, no less than our other activities, are subject. Far from giving grounds for pessimism, this development is one which has often recurred in former times and has been met by the gradual adjustment of the race to new conditions of environment. When this adjustment has been effected, the stronger, more substantial, and permanent human qualities reassert themselves, and we are once more able to think rather than to gasp about political questions. Such has been the past history of nations and such is doubtless the experience

through which we are now passing. Democracy, if it is to survive, must establish the healthy, normal, and reasoning consideration of public problems. When it does so it will have the basis for the natural selection of leaders, the sifting of promises and performances, and the establishment of a steady continuity of growth and policy.

**What to Do.** — What can be done to strengthen our democratic system at these weak points? There is a great host of panaceas ranging from the proposal to increase the mere forms of democracy by allowing the people to vote on all questions, down or up to the issuance of tracts and the pronouncement of orations on democratic liberty. We shall consider for a moment only one of these, and the one which promises most effective results. If the basic problem is not the *form* of democratic paraphernalia but rather a strengthening of the principle and spirit of democracy in the minds and *actions* of the people we should place a premium not so much on forms or methods as upon the training and exercise of the citizen, present and future, in a fraternal, coöperative, and democratic spirit. This is not a matter of classroom instruction, but rather of teaching by example and by practice. Every public school, every college and university, and every social institution should deliberately plan and devote a certain amount of its activity to the cultivation of this spirit. The participation of every pupil, student, and group member in some active kind of social or political work should be made a requirement. The influence of class and group athletics rather than feats of star performers should be emphasized. Rivalries and competitions between groups small enough to enlist most of their members should be encouraged. The ideal of effective social service and coöperation should be exalted as we now exalt the home-run batter. In short, democracy should be preached less and demonstrated more.

**Contact of Government and People.** — As the work of government grows, the contact between the public official and the individual increases. Does this mean increased friction, or can we provide means of protecting individual rights without blocking government action? In Chapter 2 we saw that the courts prefer to accept the judgment of administrative officers on questions of fact and matters of discretion or judgment, in order to avoid unnecessary conflicts in the government.

So when the Interstate Commerce Commission finds, after a full

hearing, that an important discrimination exists in the Los Angeles switching charges as contrasted with other similar points, the courts refuse to reopen this question of fact. When the proper immigration officer finds the existence of certain facts concerning an alien, after a proper hearing, the courts refuse to find otherwise. When the Postmaster-General, pursuant to the postal laws, ascertains upon inquiry and hearing of both sides that certain publications contain fraudulent matter, he excludes them from the mails and the courts refuse to change his finding of fact. Yet a difference of opinion on such matters may be of vital importance to the private citizens whose rights are affected. If an import duty is measured on an exorbitant valuation, if the discrimination found by a Public Service Commission is not real, if a so-called fraud is only a fancied one, a heavy property or financial loss may follow. In order to protect the individual from arbitrary use of this vast power the Europeans have set up what are called Administrative Courts. These are composed partly of judges, partly of high administrative officers in order to represent both the legal and the executive viewpoints. Their procedure is unusually quick and much less formal than that of the ordinary courts, so that neither the citizen who claims to be injured nor the administrator whose duties are interfered with will be unduly delayed. They offer a quick review of important administrative orders and decisions. We have already accepted the principle in establishing the Court of Customs Appeals for the review of decisions of customs appraisers in cases arising under the tariff law. A further extension of this principle over many other government fields, particularly in the regulation of business, would be of direct advantage both to the government and the citizen.

**Advisory Councils.** — Another problem in the contact of government with the citizen is the wide gap which often exists between the government authority and the persons and groups over which its power is exerted. The best body of law which the modern world has seen is the English common law — best because it has been built up by the judges upon the basis of trade customs and usages. English courts have for centuries felt it to be their duty to follow existing trade practices, recognize, and legalize them rather than ignore and suppress them, unless they failed to conform to the moral standards of the time. But the administrator as well as the judge

and the law-maker needs to know the individuals, the trade associations, and the other economic and social interests with which the law brings him into contact and to build his work upon the foundations which he finds among them. How can this be done? The answer has been worked out in part by some European governments through the creation of Advisory Councils. These are bodies appointed by the government, serving without pay and representing all sides and interests affected and each important branch of the National administration. We have already adopted this principle in the creation of our Federal Reserve Advisory Council, a body of bankers whose judgment is consulted by the Federal Reserve Board on all important questions. We should make this a permanent and universal part of our Federal system by the establishment of similar councils in railway administration, tax collection, postal affairs, and all the various fields of government work. On these councils there should sit not only the representatives of a single class, but care should be taken to assure complete representation of all important classes, producers, consumers, traders, and the like. This unsolved problem, which has probably done more than any other single feature to cause unnecessary friction and discomfort, will remain unsolved until a systematic and thorough organization is built up to reestablish government contact with individual and group interests.

#### SCIENTIFIC REGULATION OF BUSINESS

**Nature of the Problem.** — Can a Democracy be scientific in its methods? Can a government which seeks first to represent the "popular will," also handle public questions of a difficult technical nature? The answer must depend on which part of the government is to take the leadership. Can Congress by the exercise of self-restraint abandon the policy of playing to the galleries by political measures which it knows to be futile, can it and will it hand over to the Administration the treatment of important problems, and then hold the Administration responsible for their solution?

In the strictest sense no government question is purely political or purely technical, but is a mixture of both. In truth the "will of the people" extends only to the desire that certain problems be attacked and solved, the exact method to be followed being usually a matter on which the people have no genuine opinion that

can fairly be called a "will." We see a difference then between the general outline of a problem and the precise means to be adopted towards its solution. This applies especially to matters connected with public regulation of business. Failing to grasp the difference which we have just examined, our government has rushed in, largely from emotional reasons, and has attacked, assaulted, and at times even amputated the problem rather than solved it. It is hard to realize that a Nation which claims such shrewd common sense as we do should permit its financial, industrial, and commercial questions to be handled largely on sentimental and emotional grounds. In the midst of the most unreserved worship of science which the world has yet known we have steadfastly refused to apply scientific methods here, or even to make a study of such methods.

**Specifications for a Regulative System.** — Our brief experience in this field shows that any satisfactory plan of business regulation must possess the following features —

(a) Definiteness; the public regulations and principles to be followed by business enterprises must be sufficiently clear and explicit to enable industrial managers to calculate in advance whether a given method of competition, or company formation, or management, will be legal or not, before investing large resources in the plan concerned.

(b) It must operate at a minimum of cost in order to impose no undue burden upon the small competitor who is held to its observance and to give no undue financial advantage to the large concern with extensive resources.

(c) It must be based upon scientific economic principles ascertained from a survey of business data and an understanding of the growth and development of business enterprises; it must not arise from a simple desire to "smash the trusts" or to avenge the grievance of any class in the community.

(d) It must conform to the moral standards of the people as a whole; no regulative system can survive in America, no matter how well buttressed by economic reasoning, unless it satisfies the innate convictions and desires of the people for fairness and equality of opportunity.

(e) It must be administered by semi-judicial bodies or boards which will offer abundant opportunity for all interests concerned to appear and be heard in the decision of pertinent questions; such

boards must possess, as many of our commissions now do, a thoroughly trained and capable staff of investigators and research experts. The "facts" are often the only defense against illusory appeals to public prejudice, but the facts are not always at hand or on the surface. They must be dug out by the process of scientific research, processes which are too often unused by democratic governments.

(f) Flexibility; it must be adaptable to the rapidly changing conditions of business in a country where inventions and discoveries, reorganization of plant, change of corporate form, and adoption of new commercial methods are a regular part of the day's work. Given boards such as described under (e), Congress as the ultimate regulating authority should lay down a general principle expressing the popular will, to govern the field of business in question. The administrative board should then have the utmost freedom to carry out this principle by regulative orders, rulings, and decisions, in order that no mere quibble as to the form or wording of a law could defeat its essential purpose.

(g) Speed; a reasonable time limit should be observed both in the rulings of the administrative board and any subsequent decisions by Federal Courts to which appeals are taken. "Time is of the essence of the contract" in business regulation. A continued delay usually means a continued abuse. All the reasons which have been so ably marshalled by Chief Justice Taft in favor of quick Court procedure, apply with special force in the field of business regulation. This is a vital point in any scientific method of public control.

(h) Existing voluntary regulation; it must make free use of and cooperate with those important trade bodies, employers' associations, labor unions, and professional societies which already exist in vigorous form and which regulate their respective fields by voluntary action. These bodies are a natural connecting link between their members and the public regulative authority and they offer an unusually valuable means of securing private cooperation with government measures. The suggestions and proposals which they make are usually based on existing practices. These, being supported or followed by the influential members of the trade or profession, deserve recognition by the government, as a rule. Where they do not, a free open discussion will usually correct them.

## PRODUCTIVE GOVERNMENT

What shall be the principal work of the National Government? Where shall it devote its energies and funds? If we group its activities into two classes, (a) those which are purely defensive and protective, such as Army and Navy, Courts, regulation of commerce, etc., and (b) those which more directly and positively further the public welfare, such as education, encouragement of agriculture, reclamation of land, forestry, distribution of information, postal mails, fixing of standards of measurement, etc., we find that even now, with our army and navy reduced to normal size, 75 per cent of the National Government expenses are devoted to the first or *defensive* group while only 15 per cent are appropriated to the second, which we may call the directly *productive* group. In company with all other nations, America is now facing the problem of how best to expand and strengthen this latter part of its government work. Any animal or organism which devoted three-fourths of its energy to purely protective purposes would be rated low in the organic scale.

In any attempt to restore the balance between productive and defensive government we must recognize that most of our protective expenditures are in more or less permanent forms and cannot be easily or quickly reduced. For example, the interest on the public debt and the sinking fund amount annually to a billion and a half; veterans' relief accounts for another half billion; a soldiers' bonus would cost even a larger annual outlay.

There is little or no opportunity to reduce the total amount of these expenses until the Liberty and Victory loans have been paid off, an undertaking of many years' duration.

The growth of productive government therefore means that from decade to decade a larger proportion of the public funds will be appropriated to those purposes which make a direct return in efficiency, in culture, in economic welfare, and individual development of the people. By this is not meant that the State must undertake vast schemes of socialistic management but rather that its money and activity should be "invested" for production. Let us examine a few of these newer types of government usefulness.

**Some Examples.** — The best illustrations of productive government are found in the Departments of Agriculture, Interior, and



Commerce. In the first of these, the Bureau of Chemistry plays an especially useful rôle. Its experts aid in the enforcement of the Food and Drug law and assist food manufacturers to conform to that act. The Bureau also investigates the nutritive value of food products. It receives from farmers samples of soil, analyzes these, and informs the farmers as to the type of fertilizer or soil ingredient required for fertility. It coöperates with chemists at various experiment stations in solving problems of agricultural chemistry. The Bureau of Statistics of this Department investigates markets abroad and furnishes information as to openings for American farm products and the prospective future demand for them. Agricultural experiment stations, usually established at State Colleges, receive annually \$20,000 each and devote their energies largely to the examination and classification of local soils, thus developing to a higher point the farming possibilities of the States concerned. These stations also conduct extensive researches in plant and animal diseases and remedies, the proper rotation of crops in varying series, the solution of drainage, and similar engineering problems. The Bureau of Plant Industry ransacks the world for new crops for the American farmer, and its observations and experiments have been of incalculable money value to him. The Bureau of Animal Industry conducts a similar activity for live stock interests; it also enforces the National Meat Inspection Act.

In the Department of Commerce, the Bureau of Standards plays a leading rôle. It was originally created to establish a uniform system of weights and measures for the levy of customs taxes and for interstate trade. It has now become of vital importance to the business community. Interpreting the constitutional term "measures" in the broadest sense, it has extended its researches and its control of standards into the fields of science, engineering, manufacture, public utilities, and even education.

The Bureau follows the policy that wherever a measurement of general public interest is to be made, its experts and technicians may profitably devote their attention to the creation of standards. The average citizen has never heard of this Bureau. Yet his groceries are bought by measures which it fixes and his protection from fraud rests on their observance; the electric light in his home is furnished by kilowatt hours and other measures fixed in the Bureau; when ill his temperature is tested by a clinical thermom-

eter under Bureau standards. Measures of heat and light, the vast field of industrial problems included in the strength of materials, also the measurement of personal fatigue with its bearing on labor problems, and a great series of new standards of measurement in chemical, mechanical, and social questions lie under the jurisdiction of this Bureau. One of the fundamental needs in all regulative problems and in agreements between man and man is the creation of definite fixed measurements. This need is basic because all provisions of law, contracts, and agreements, and the negotiations leading up to them depend upon some acknowledged standard of quantity, quality, service, or commodity.

The Department of Commerce also coöperates with a committee of the American engineering societies in a project of nation-wide scope. The committee, after an extensive survey of avoidable wastes in industry, has estimated that these wastes amount to a high proportion of our present costs. The Department through expert members of its engineering and statistical bureaus aids in the formulation of methods of analyzing and preventing these wastes in all the more important branches of industry and distribution. The Bureau of Foreign and Domestic Commerce in this Department has recently been reorganized along lines which make it of direct value to many business interests. Its work is (1) the gathering of information on opportunities for American trade both at home and abroad; (2) the digesting and compiling of this information in convenient form; and (3) its distribution to persons interested. The Bureau coöperates with the Department of State and secures information from 600 American consuls abroad. It also has 28 commercial attachés and a number of traveling agents in foreign countries.

Each of these men sends in trade and financial data to the Washington headquarters, where it is carefully examined by a staff of experts, organized into 4 geographical divisions, 17 divisions based on the nature of commodities studied, and 6 special technical divisions.

As soon as this process has been completed the information is distributed through 9 district offices and 24 coöperating offices located in the chief industrial and commercial centers.

Whenever a change occurs in foreign tariff laws or decisions, in credit conditions, or in the demand for any important list of articles,

in any European country, the American producer is immediately informed and is able to adjust his own business policies accordingly.

Numerous other Bureaus and offices such as the Commissioner of Education, the Irrigation and Forestry Services might be mentioned to show the vast amount of productive return which the Government is now making to the people. If these receive the same amount of attention and financial support that have been devoted to military purposes they will strengthen the Nation's economic powers far beyond present calculation and remove many existing obstacles to social progress. And the Government will serve.

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#### QUESTIONS

1. Mention several subjects which are on the boundary line between National and State power or which are drifting from State to National control.
2. If a given subject could be regulated by either the National Government or the States which would you prefer and why?
3. Show exactly why large increases in the Federal personnel are undesirable.
4. Can these disadvantages be avoided or must all increases in numbers of government staff produce the evils considered under question 3?
5. Explain to a foreigner the demand for centralization which now exists in so many fields.
6. Mention some of the chief objections to centralization.
7. Take any field of regulation or control now exercised by the States and show the practical disadvantages to those concerned, of diversity of State regulation.

8. What are the practical methods thus far proposed to remedy this diversity?
9. Give some brief estimate of the relative value of each of these methods.
10. What do you understand by the Federal subsidy policy? Why has it arisen?
11. Give several examples.
12. How does the Federal Government assure that the funds appropriated for subsidies shall be used as required?
13. What are the chief objections to the subsidy plan?
14. Would you favor abolishing all Federal subsidies to the States at this time? State in detail your exact reasons.
15. Describe the operation of the State Conference on Uniform State Laws. Mention some measures which it has recommended, and show why these should or should not be uniform.
16. Which classes of laws recommended by the Conference have been most widely adopted? How do you explain this?
17. Which classes have secured least approval from the legislatures? Why?
18. Is the work of the Conference a promising method of securing the desired uniformity of State laws on important subjects? Why?
19. Write to your State Food Commissioner and secure from him the results of any action or resolutions adopted by the Conference of State Food Commissioners. Also any proposals for uniform regulation which the Conference has recommended. Has your State adopted this recommendation?
20. Secure from your State Highway Commissioner a copy of any proposed uniform motor vehicle bill. Make a report on the differences between this bill and your existing State law.
21. Examine the report of the Secretary of the Treasury and give a statement of the share of National appropriations which is devoted to purely defensive activity.
22. What do you understand by productive government? Does it mean that other branches of work are unnecessary? Reasons and illustrations.
23. Give six examples of Federal bureaus or offices which are devoted chiefly to productive government and show how their work directly affects the people.
24. Is it politically possible to increase productive government by increasing the appropriations for these bureaus or by cutting down the appropriations for defense from present levels? Why?
25. Prepare a list of the departments and independent offices and commissions in the Federal Government.
26. Which of these report directly to the President?
27. Explain the practical difficulty which any Chief Executive must encounter in directing the work of these offices and departments.
28. Analyze and illustrate some of the defects of our present organization as they have arisen in practice.
29. Explain and illustrate some principles on which an effective reorganization could be built up.
30. Why do we need some judicial control or court review of the acts of public officials?

31. Explain types or classes of official acts which are and others which are not reviewed by the Courts at present. Why are some exempt from Court review?
32. What are Administrative Courts and how would they help in this situation? Illustrate.
33. What do you understand by democracy? Illustrate.
34. Give any instances from your newspaper reading or other sources, of the victory of the demagogue over a statesman or high class politician. How do you explain this victory?
35. Describe and explain instances of hasty, ill-considered laws passed in response to popular emotion.
36. Do the American people work out definite government policies on any subject? Illustrate.
37. Does this popular emotionalism affect the administration or only the making of laws?
38. Can you point to any instances in which the public has been intensely excited over a question for a few weeks and dismissed it without effective action? How would you explain these cases?
39. Is lynching defensible from the standpoint of democracy?
40. If the "people's will" is always to govern in a democracy why should we not have the recall of judges, lynching when the majority of a community approves it, and a popular vote on all treaties and laws?
41. How does the lack of a steady popular interest and knowledge affect our foreign policy?
42. Prepare a detailed report on any one of these weaknesses or needs of democratic government, giving your own views and illustrations and your thought as to the best means of solving the problem presented.
43. Give an example of a government problem which is chiefly political and one which is chiefly technical in nature.
44. Which of these are the people most competent to decide?
45. Can you mention any scientific or technical government question in which the people are but little interested?
46. Explain to a foreigner the difference between the decision of a government question from a purely political, and from a scientific point of view, respectively.
47. Mention and illustrate some of the essential requirements of a scientific method of government regulation of business.
48. If you had a property or business worth \$100,000 in your present home community would you be willing to have the government regulation of this business or property determined by a majority vote of those who ordinarily attend the elections? Reasons.
49. Do you feel that you could intelligently decide or vote on the regulation of another man's business or property in your home district? Illustrate by definite points.
50. How do you reconcile these answers with the statement often made that democracy is the determination of all matters by majority vote of the electors?

51. Prepare a brief essay on — On what types of subjects should the people vote?
52. Why is a close contact between business bodies and organizations on the one hand and the government on the other, more important now than some decades ago?
53. Mention any fields of government action in which it seems to you that this contact is or has been lacking.
54. Prepare an outline of an advisory council plan for this field of government work and show that a council or councils could be established, the men whom they would enlist as members, and the exact work which they would do.

## APPENDIX A

### CONSTITUTION OF THE UNITED STATES<sup>1</sup>

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<sup>2</sup> 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.<sup>3</sup> 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.

<sup>1</sup> Adopted by the Constitutional Convention in 1787, ratified by State conventions in 1789.

<sup>2</sup> See the Sixteenth Amendment, below, p. 723.

<sup>3</sup> Partly superseded by the Fourteenth Amendment. (See below, p. 725.)

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.<sup>1</sup>

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.<sup>1</sup>

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.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

<sup>1</sup> See the Seventeenth Amendment, below, p. 726.



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 re-passed 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 a 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.<sup>1</sup>

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

<sup>1</sup> See the Sixteenth Amendment, below, p. 726.

<sup>1</sup> 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.<sup>2</sup>

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

<sup>1</sup> The following paragraph was in force only from 1788 to 1803.

<sup>2</sup> Superseded by the Twelfth Amendment. (See p. 724.)

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between a State and citizens of another State; <sup>1</sup> — between citizens of different

<sup>1</sup> See the Eleventh Amendment, p. 724.

States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

#### ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this 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 inva-

sion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

#### ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

#### ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

#### ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names,

GO: WASHINGTON —  
Presidt. and Deputy from Virginia

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

#### ARTICLE I<sup>1</sup>

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 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.

<sup>1</sup> The first ten Amendments adopted in 1791.



## ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

## ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI<sup>1</sup>

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII<sup>2</sup>

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

<sup>1</sup> Adopted in 1798.

<sup>2</sup> Adopted in 1804.

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<sup>1</sup>

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XIV<sup>2</sup>

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 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.

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.

<sup>1</sup> Adopted in 1865.

<sup>2</sup> Adopted in 1868.

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<sup>1</sup>

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XVI<sup>2</sup>

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<sup>3</sup>

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such

<sup>1</sup> Adopted in 1870.

<sup>2</sup> Ratified 1913.

<sup>3</sup> Ratified 1913 in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same Section as relates to the filling of vacancies.

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<sup>1</sup>

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 the Congress.

#### ARTICLE XIX<sup>2</sup>

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 sex.

SECTION 2. The Congress shall have power by appropriate legislation to enforce the provisions of this article.

<sup>1</sup> Ratified 1919, effective January 17, 1920.

<sup>2</sup> Ratified 1919.

# APPENDIX B

## THE SHORT BALLOT

A MOVEMENT TO SIMPLIFY POLITICS

BY RICHARD S. CHILDS

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### I

#### ANALYSIS OF PRESENT CONDITIONS

##### *Blind Voting*

Starting at the broad base of our structure, the voters, we notice one unique phenomenon which is so familiar to us that we usually overlook it entirely — that is *our habit of voting blindly*. Of course intelligent citizens do not vote without knowing what they are doing. Oh, no! You, Mr. Reader, for instance, you vote intelligently always! Of course you do! But whom did you vote for for Surrogate last time? You don't know? Well then, whom did you support for State Auditor? For State Treasurer? For Clerk of the Court? For Supreme Court Judge? And who is your Alderman? Who represents your district at the State Capitol? Name, please, all the candidates you voted for at the last election. Of course you know the President and the Governor and the Mayor, but there was a long list of minor officers beside. Unless you are active in politics I fear you flunk this examination. If your ballot had by a printer's error omitted the "State Comptroller" entirely, you would probably not have missed it. You ignored nine-tenths of your ballot, voting for those you did know about and casting a straight party ticket for the rest, not because of party loyalty, but because you did not know of anything better to do. You need not feel ashamed of it. Your neighbors all did the same; ex-President Eliot of Harvard, the "ideal citizen," confessed in a public address recently, that he did it, too. It is a typical and universal American attitude. We all vote blindly. Philadelphia has even elected imaginary men. The intelligence of the community is not at work on any of the minor offices on the ballot. The average American citizen never casts a completely intelligent vote.

Do you know the name of the new State Treasurer just elected? . . .	No 87%
Do you know the name of the present State Treasurer? . . . . .	No 75%
Do you know the name of the new State Assemblyman for this district? . . . . .	No 70%

Do you know the name of the defeated candidate for Assemblyman in this district?.....	No 80%
	(Knew both of above 16%)
Do you know the name of the Surrogate of this County?.....	No 65%
Do you know the name of your Alderman?.....	No 85%
Do you know whether your Alderman was one of those who voted against the increase in the Police Force last year?.....	No 98%
Are you in active politics?.....	No 96%

The intelligence (?) of voters in the most independent Assembly District in Brooklyn. Data collected immediately after election, 1908.

#### *Should We Blame the Voters*

This is not all the fault of the voter. To cast a really intelligent ballot from a mere study of newspapers, campaign literature and speeches is impossible because practically nothing is ever published about the minor candidates. And this in turn is not always the fault of the press. In New York City the number of elective offices in State, City and County to be filled by popular vote in a cycle of four years is nearly five hundred. In Chicago the number is still greater. Philadelphia, although smaller than either city, elects more people than either. No newspaper can give publicity to so many candidates or examine properly into their relative merits. The most strenuous minor candidate cannot get a hearing amid such clamor. And the gossip around the local headquarters being too one-sided to be trusted by a casual inquirer, a deep working personal acquaintance with politics, involving years of experience and study, becomes necessary before a voter can obtain the data for casting a wholly intelligent ballot.

Plainly the voter is over-burdened with more questions than he will answer carefully, for it is certain that the average citizen cannot afford the time to fulfill such unreasonable requirements. The voters at the polls are the foundation of a democracy and this universal habit of voting blindly constitutes a huge break in that foundation which is serious enough to account for the toppling of the whole structure. Let us see if we can trace out a connection between this as a cause and misgovernment as the effect.

#### *Blind Voting Leads to Government by Politicians*

No one will deny that if nine-tenths of the citizens ignored politics and did not vote at all on election day, the remaining tenth would govern. And when practically all vote in nine-tenths ignorance and indifference, about the same delegation of power occurs. The remaining fraction who do give enough time to the subject to cast an intelligent ballot, take control.

That fraction we call "politicians" in our unique American sense of the word. A "politician" is a political specialist. He is one who knows more about the voter's political business than the voter does. He knows that the coroner's term will expire in November, and contributes toward the discussion involved in nominating a successor, whereas the voter hardly knows a coroner is being elected.

The politicians come from all classes and ranks and the higher intelligence of the community contributes its full quota. Although they are only a fraction of the electorate they are a fair average selection and they would give us exactly the kind of government we all want if only they could remain free and independent personal units. But the impulse to organize is irresistible. Convenience and efficiency require it and the "organization" springs up and cements them together. Good men who see the organization go wrong on a nomination continue to stay in and to lend their strength, not bolting until moral conditions become intolerable. Were these men not bound by an organization with its social and other non-political ties, their revolt would be early, easy and effective and every bad nomination would receive its separate and proportionate punishment in the alienation of supporters.

*Politicians Can't Exclude Grafters from Their Ranks*

The control of an active political organization will gravitate always toward a low level. The doors must be open to every voter — examination of his civic spirit is impossible — and greed and altruism enter together. Greed has most to gain in a factional dispute and is least scrupulous in choice of methods. The bad politician carries more weapons than the politician who hampers himself with a code of ethics one degree higher. Consequently corruption finally dominates any machine that is worth dominating and sinks it lower and lower as worse men displace better, until the limit of public toleration is reached and the machine receives a set-back at election. That causes its members to clean up, discredit the men who went too far, and restore a standard high enough to win — which standard immediately begins to sag again by the operation of the same natural principle.

Reformers in our cities have given up the endeavor to maintain pure political organizations and elect reform administrations. A typical experience is that of the Citizens' Union of New York, whose leaders have always been sincerely bent on improving the condition of politics. The Union acquired power enough to become an important factor in elections. After the first such election, small political organizations which had aided toward the victory rushed in, clamoring for their share of the plunder. For a term or two the reformers were able to resist the pressure. Nevertheless the possession of power by their party inevitably attracted the grafters: they found themselves accepting assistance from men who were in politics for what there was in it, men who wanted to use the power and patronage that lay at hand unutilized, and it was clear that those men would in time, working within the Union, depose the original heads of the party and substitute "more practical" leaders of their own kind, until in time the Citizens' Union would itself need reforming. So the Union retired from the field as a party, broke up the district organizations which had yielded to corruption and became exclusive in its government in order to preserve its purity of purpose.

It is obvious that most political parties do not commit suicide to evade such internal contamination and lapse of principle.

Theoretically there is always the threat of the minority party which stands ready to take advantage of every lapse, but as there is no debate between minor candidates, no adequate public scrutiny or comparison of personalities, the minority party gets no credit for a superior nomination and often finds that it can more hopefully afford to cater to its own lowest elements. In fact, it may be only the dominant party which can venture to affront the lowest elements of its membership and nominate the better candidate.

*Misgovernment the Normal Result of Government by Politicians*

The essence of our complaint against our government is that it represents these easily contaminated political organizations instead of the citizens. Naturally! When practically none but the politicians in his district are aware of his actions or even of his existence, the office-holder who refuses to bow to their will is committing political suicide.

Sometimes the interests of the politician and the people are parallel, but sometimes they are not and the office-holder is apt to diverge along the path of politics. An appointment is made, partly at least, to strengthen the party since the appointee has a certain following. A bill is considered not on its simple merits but on the issue — "Who is behind it?" "If it is Boss Smith of Green County that wants it, whatever his reasons, we must placate him or risk disaffection in that district." So appointments and measures lose their original and proper significance and become mere pawns in the chess game of politics which aims to keep "our side" on top. The office-holders themselves may be upright, bribe-proof men — they usually are, in fact. But their failure to disregard all exigencies of party politics constitutes misrepresentative government and Boss Smith of Green County can privately sell his influence if he chooses, whereby the public is in the end a heavy sufferer.

*Summary of the Analysis*

Thus the connection between the long ballot and misgovernment is established: By voting the long ballot blindly, we entrust large governing power to easily-contaminated organizations of political specialists, and we must expect to get the kind of government that will naturally proceed from their trusteeship.

Every factor in this sequence is a unique American phenomenon. The long ballot with its variegated list of trivial officers is to be seen nowhere but in the United States. The English ballot never covers more than three offices, usually only one. In Canada the ballot is less commonly limited to a single office, but the number is never large. To any Englishman or Canadian our long ballot is astonishing and our blind voting appalling. A Swiss would have to live four hundred years to vote upon as many men as an American undertakes to elect in one day. The politicians as a professional class, separate from popular leaders or office-holders, are unknown in other lands and the very word "politician" has a special meaning in this country which foreigners do not attach to it. And government from behind the scenes by politicians, in endless opposition to government by public opinion, is the final unique American phenomenon in the long ballot's train of consequences.



## II

## THE VOTING THAT IS NOT BLIND

The blind vote of course does not take in the whole ballot. Certain conspicuous offices engage our attention and we all vote on those with discrimination and care. We go to hear the speeches of the candidates for conspicuous offices, those speeches are printed in the daily papers, and reviewed in the weeklies, the candidates are the theme of editorials and the intelligent voter who takes no part in politics, votes with knowledge on certain important issues.

In an obscure contest on the blind end of the ballot merit has little political value, but in these conspicuous contests where we actually compare man and man, superior merit is a definite asset to a nominee. Hence in the case of an obscure nomination the tendency is automatically downward, but in a conspicuous nomination the tendency is upward.

Accordingly while we elect Aldermen who do not represent us and the State Legislatures which obey the influences of unseen powers, we are apt to do very well when it comes to the choice of a conspicuous officer like a President, a Governor, or a Mayor. For Mayor, Governor or President we are sure to secure a presentable figure, always honest and frequently an able and independent champion of the people against the very interest that nominated him. We are apt to re-elect such men, and the way we sweep aside hostile politicians where the issue is clear shows how powerfully the tide of our American spirit sets toward good government when the intelligence of the community finds a channel.

And so in these conspicuous offices — those for which we do *not* vote blindly — we secure fairly good government as a normal condition, considering that the organized and skillful opposition which always faces us occupies a position of great strategic advantage in possession of the nominating machinery.

## III

## THE REMEDY

We cannot hope to teach or force the entire citizenship to scrutinize the long ballot and cease to vote blindly on most of it. The Mountain will come not to Mahomet; Mahomet then must go to the Mountain.

*First.* — We must *shorten the ballot* to a point where the average man will vote intelligently without giving to politics more attention than he does at present. That means making it very short, for if the number of these simultaneous elections is greater than the bulk of the citizens care to keep track of, then we have government by the remaining 40 per cent., or 20 per cent. of the citizens — and no matter whom we believe to be at fault, that plan in practice will have resulted in oligarchy and be a failure. The test for shortness is to inquire when a given number of offices are filled by election whether the people vote blindly or not on any one of them. For if they begin to require "tickets" ready-made for their convenience they are sharing their power with the ticketmakers — and democracy is fled!

*Second.* — We must limit the elective list to offices that are naturally conspicuous. The little offices must either go off the ballot and be appointed, no matter how awkwardly, or they must be increased in real public importance by added powers until they rise into such eminence as to be visible to all the people. The County Surveyor, for instance, must go, for the electorate will not bother with such trifles whether the ballot be short or not.

Why indeed should 50,000 voters all be asked to pause for even a few minutes apiece to study the relative qualifications of Smith and Jones for the petty \$1,000-a-year post of County Surveyor? Any intelligent citizen may properly have bigger business on his hands!

And the Alderman? — we can't abolish him perhaps, but we can increase his power by enlarging his district and lengthening his term and making his Board a small one. Till then how can we make people in Philadelphia agitate themselves over the choice of a Common Councilor who is only one-one hundred and forty-ninth of one-half of the city legislature!

That candidates should be conspicuous is vital. The people must be able to see what they are doing; they must know the candidates — otherwise they are not in control of the situation, but are only going through the motions of controlling.

It may be objected that to take the minor offices off the state ticket for instance and make them appointive by the Governor would be giving too much power to the Governor. Well, somebody, we rarely know who, practically appoints them now.

To have them appointed by a recognized legally-constituted authority is surely better than to have them selected by a self-established coterie of politicians in a convention committee room. There is no great peril in concentrating power, provided we watch what is done with it. (Suppose we were electing by popular vote not only the President and Vice-President of the United States, but the cabinet, the Supreme Court and the other Federal Judges, the Federal marshals, district-attorneys and postmasters! Can you see how our American political superstitions would block all efforts to secure the present conspicuous responsibility?)

How an overdose of electing creates oligarchy is illustrated in Tammany Hall, which would appear to be in its form of internal government the most perfect democracy conceivable. But the primary ballot contains from 300 to 1,000 names and bossism is thereby entrenched absolutely.

#### *The Short Ballot in Operation*

Fighting misgovernment now is like fighting the wind. We must get on a basis where the good intentions of the average voter find intelligent expression on the entire ballot so as to produce good government as a normal condition, i.e., good government which regularly gets re-elected as a matter of course by overwhelming majorities without a great fight. Impossible in this country? No! Galveston has it with its government by a Commission of Five. This Commission has without scandal carried through tremendous public improvements (raising the ground level to prevent another flood), and at the same time has reduced the public debt and the tax rate. That is good administration.

More than that, it gets re-elected by overwhelming majorities and has not been in peril at any election. The "Old Crowd" that misgoverned this city for years holds only 20 per cent. of the vote now, and concedes without contest the reelection of three of the five good commissioners. And the total campaign expenses of electing the right men are only \$350.

It has been thought that this was the fruit of correct organization, analogous to a business corporation with its board of directors. But there are many other elected commissions and boards in the United States — "County Commissions," "Boards of Education," "Trustees of the Sanitary District," "Boards of Assessors," etc. — and they are not conspicuously successful, but in fact such organization often serves only to scatter responsibility and shelter corruption. No! Good government is entirely a matter of getting the right men in the first place. Nothing else is so vital. No system, however ingenious, will make bad men give good government or keep good men from getting superior results. To get the right men is first of all a matter of arranging for the maximum amount of concentrated public scrutiny at the election.

Were it otherwise, we would find misgovernment in British cities which, except for this feature, are ideally organized from an American grafter's point of view. The British city authorities are hampered most unjustly by a hostile House of Lords, their machinery of government is ancient and complicated, and their big councils with committees exercising executive management over the departments, with ample opportunity for concealment of wrongdoing, with no restraining civil service examinations, with one-tenth of the laboring population on the municipal pay rolls would apparently provide an impregnable paradise for the American politician of the lowest type. But the ballot for an English municipal election can be covered by the palm of the hand. It contains usually the names of two candidates for one office, member of the Council for the ward. (The Council elects the Mayor, the Aldermen and all other city officers.) Blind voting on so short a ballot is hardly conceivable. Every voter is a complete politician in our sense of the word. The entire intelligence of the community is in harness, pulling, of course, toward good government. An American ward politician in this barren environment, unaided by any vast blind vote, could only win by corrupting a plurality of the whole electorate, a thing that is easily suppressed by law even if it were not otherwise a manifest impossibility. So there are no ward politicians in England, no professional politics, and misgovernment is abnormal.

## BALLOT PAPER

1.	<b>NETTLEFOLD.</b> (John Sutton Nettlefold, Winter- bourne, Edgbaston Park Road, Edgbaston, Gentleman.)	
2.	<b>TUNBRIDGE.</b> (William Stephen Tunbridge, Rock- lands, Woodbourne Road, Edg- baston, Solicitor.)	

This is a typical official ballot (actual size) for an English election. It shows the names of two candidates for a single office — Councilor from the ward. The people simply make one choice, and accordingly know just what they are doing on election day. The scrutiny of the people thus concentrated bars out unfit candidates almost automatically.

Similarly Galveston concentrated the attention of the voters sharply upon candidates for only five offices, all very important. The press could give adequate attention to every one and in consequence every intelligent voter in his easy chair at home formed opinions on the whole five and had a definite notion of the personality of every candidate. In such a situation the ward politician had no function. There was no ignorant *laissez-faire*, no mesh of detail for him to trade upon. He became no more powerful than any other citizen, and his only strength lay in whatever genuine leadership he possessed. Moreover, if he nominated men who could stand the fierce limelight and get elected, they would, *ipso facto*, probably be men who would resist his attempt to control them afterward. Or if they did cater to him it would be difficult to do his bidding right in the concentrated glare of publicity where the responsibility could be and, what is much more vital, *would be*, correctly placed by every voter. And so the profession of politics went out of existence in Galveston and the ward politician who had misgoverned the city for generations went snarling into oblivion.

The Galveston plan might be better yet if the Commissioners were elected one at a time for long terms in rotation. Then the public scrutiny at election time would focus still more searchingly on the candidates and merit would increase still further in value as a political asset.

"Politics," seeking re-entrance into Galveston, would make department heads, etc., elective ("make them directly responsible to the people and let the people rule").

Suppose that they should increase the Commission to thirty members elected "at large" with variegated powers and functions. Straightway tickets, cooked up by "leaders," would reappear, and the voter, facing a huge list of names,

most of which he had hardly heard of, would impotently "take program" and concede control to a little but active minority, the politicians.

But suppose again that the enlarged commission be elected not "at large," but by wards, one member to a ward. The voter again has only one decision to make, instead of thirty. Newspaper publicity is weakened by division, but this weakness is now repaired by neighborhood acquaintance and the candidate's opportunity to make himself personally known to a large portion of his constituency. Once more, the voter registers an opinion instead of blindly ratifying the work of a party organization. The ward politician is again left without a function. His popularity may avail in certain wards, and he may thus elect some of the commission, but he will not have from any citizen who is intelligent enough to do his own thinking that blind acquiescence which in other conditions had been the bedrock of his power.

#### *Conclusion*

Just how we are to get rid of the great undigested part of our long ballot is a small matter so long as we get rid of it somehow. Govern a city by a big Board of Aldermen, if you like, or by a Commission as small as you dare make it. Re-adjust State constitutions in any way you please. Terms of tenure in office can be lengthened. Many officers, now elected, can be appointed by those we do elect. But manage somehow to get our eggs into a few baskets — the baskets that we watch.

For remember — we are not governed by public opinion, but by public-opinion-as-expressed-through-the-pencil-point-of-the-Average-Voter-in-his-election-booth. And that may be a vastly different thing! Public opinion can only work in broad masses, clumsily but with tremendous force. To make a multitude of delicate decisions is beyond its blunt powers. It can't play the tune it has in mind upon our complicated political instrument. But give it a keyboard simple enough for its huge, slow hands, and it will thump out the right notes with precision!

There is nothing the matter with Americans. We are by far the most intelligent electorate in the world. We are not apathetic. Apathy is a purely relative matter depending on how much is asked. Ask much of the people and you will see more apathy than if you ask little. If the people of Glasgow were asked to attend caucuses, primaries, conventions and rallies in support of the best candidates for Coroner, they too would stay home by their firesides and let the worst man have it. If they had our long ballot they would be in a worse mess than we are with it. And if we, on the other hand, could get their handy short ballot, we too would use it creditably. For our human nature is no worse than theirs. The Scotch immigrant in our midst is no more active a citizen than the rest of us. We are not indifferent. We do want good government. And we can win back our final freedom on a short ballot basis!

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