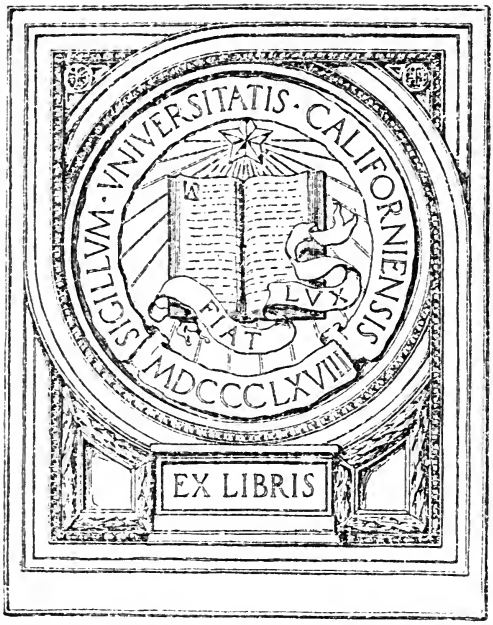
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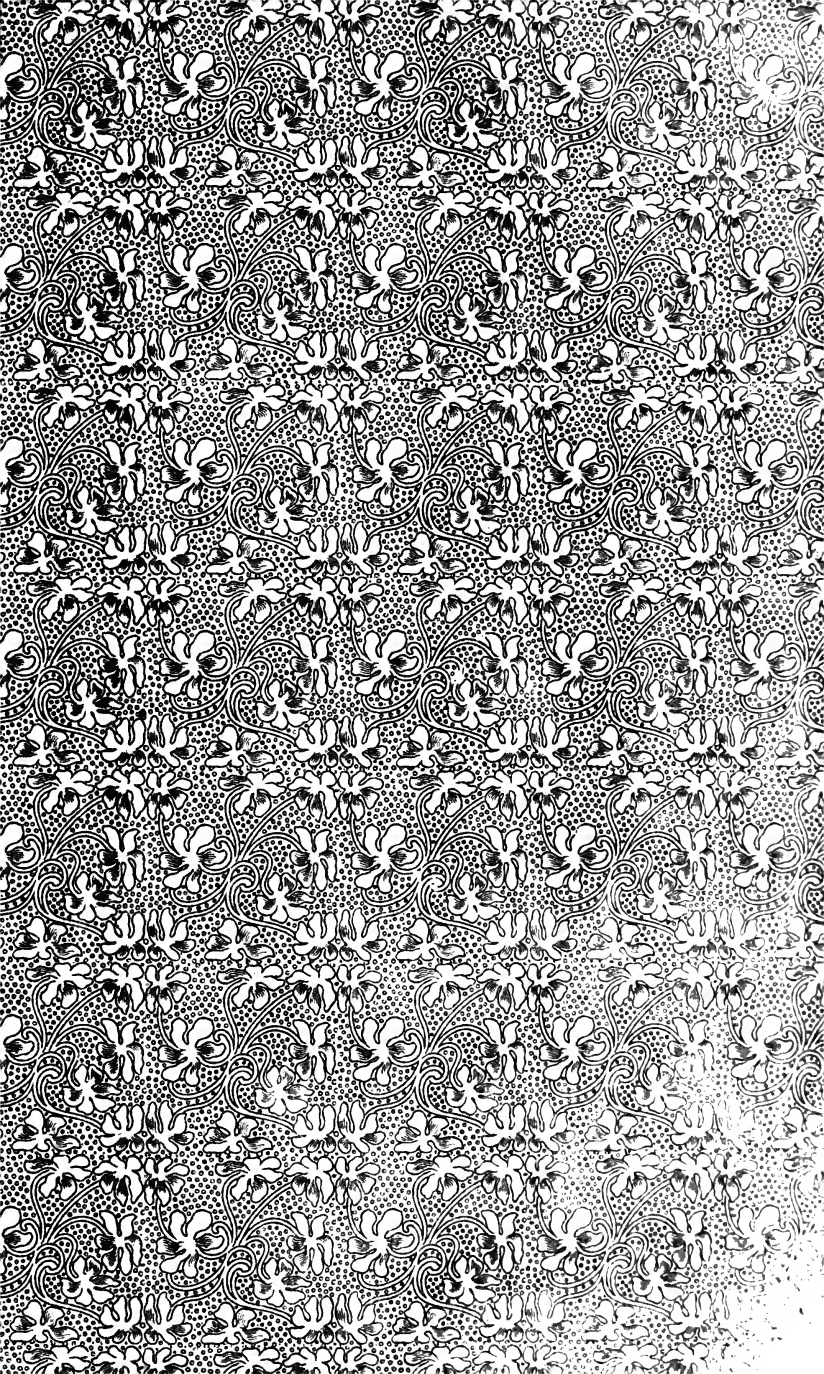
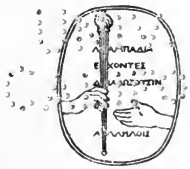


PRINCIPLES OF CONSTITUTIONAL GOVERNMENT

BY

FRANK J. GOODNOW, LL.D.

PRESIDENT JOHNS HOPKINS UNIVERSITY



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APPENDICES *

* These constitutions are reprinted from *Modern Constitutions*, by Walter Fairleigh Dodd, by the courtesy of Professor Dodd, and of the publishers, the University of Chicago Press.

AUTHOR'S PREFACE

This book on "The Principles of Constitutional Government" is based on lectures which were delivered in the year 1913–14 before the students of The Peking University. The author has been led to publish them in book form because of his belief that they might possibly contribute toward the answer to the question—What are the essentials of constitutional government? As legal adviser of the Chinese Government at a critical period in the history of the country, he was called upon to answer this question and to endeavor to answer it in such a way that the answer would be measurably clear to a people who had had no experience with constitutional government. Even the leaders of political thought in China at that time had but a theoretical knowledge of the subject. Their conclusions were for the most part derived from the study of constitutions framed for countries whose conditions and traditions were very different from those in the country for which they were essaying to act. The great mass of the Chinese people, even including the educated classes, had little if any idea as to the meaning or significance of constitutional government.

Because of the fact that the following pages were prepared for the purpose of presenting the problem of constitutional government to a people wholly unacquainted with its meaning, it is hoped that the volume will be found useful as a text-book for beginners in the study of the subjects in colleges and high-school classes.

In the appendices will be found the constitution of the United States, and translations of those of Germany, Belgium, and Japan, and the most important of the constitutional laws of France, as contained in *Modern Constitutions*, by Prof. W. F. Dodd, and reprinted by the courtesy of the author and the University of Chicago Press. The reasons

for the choice of these particular constitutions are as follows: The constitutions of the United States and Germany set forth the fundamental laws of a republic and a monarchy which have adopted the "Presidential System" of government. The constitutional laws of France endeavor to provide in a republic for the "Cabinet System." The constitution of Belgium has been selected because of the influence which it has had on the subsequent political development of Europe. Japan's constitution is interesting both because it is the latest of the important constitutions of the world, and because it is at the same time the consequence of the first attempt of an Asiatic people to replace autocratic by constitutional government. The fact that the Japanese constitution has been practically unamended during the twenty-seven years of its life is a tribute both to the ability of those who drafted it and to the political genius of the people who are governed by it.

The author's indebtedness is gratefully acknowledged to his colleague, Prof. W. W. Willoughby, both for reading his manuscript and for many helpful and valuable suggestions. The author is indebted greatly also to Professor Ogg's *The Governments of Europe*. This indebtedness is much greater than either the text or the foot-notes would indicate.

FRANK J. GOODNOW.

THE JOHNS HOPKINS UNIVERSITY, *April*, 1916.

EDITOR'S INTRODUCTION

The aim of the Harper's Citizen's Series is to supply a series of volumes which will serve both as text-books for college and university class-room use, and as interesting and instructive treatises for the general reader. The criteria of a good text-book are, indeed, not different from those of a satisfactory treatise for the general reader. In both the aim is to present in clear and logical form the essential principles which furnish the basis for, and give scientific consistency and unity to, the subject which is treated.

In this series the publishers, editors, and authors will cooperate in the preparation of a number of volumes which, while not fixed in number, will constitute a unity by reason of their harmony of purpose and their similarity in mode of treatment.

The general purpose of the volumes is indicated by the title "Citizen's Series." They will each discuss a subject, an adequate knowledge of which is indispensable to good citizenship; —a topic, therefore, which needs to be taught in our schools and universities, and which should be interesting to all persons who seek to understand the social, economic, and political phenomena by which they are surrounded and the principles which explain the conditions that so largely determine the welfare of every member of an organized community.

The mode of treatment which these topics will receive is indicated by the employment of the word "Principles" in the title of each volume. That is, the aim of each volume will be to reveal the fundamental principles which lie at the basis of the topic which is treated, and thus to provide the student or general reader with the instruction and information which will enable him not only to understand the facts which the volumes themselves furnish, but to appreciate the further

facts which his other reading and every-day experiences will necessarily present to him. It is further intended that the topics will be so treated that the student or reader will be stimulated to continue his quest for knowledge and understanding beyond the class-room and outside the covers of books. In order that this orientation of each field may be satisfactorily secured, and this indispensable stimulus to further study supplied, care will be taken that the discussion of each subject will be by a scholar eminent in the field within which his subject lies.

W. F. WILLOUGHBY.

PRINCIPLES OF CONSTITUTIONAL GOVERNMENT

PRINCIPLES OF CONSTITUTIONAL GOVERNMENT

I

CONSTITUTIONAL GOVERNMENT

Constitutional Government and Written Constitutions

"CONSTITUTIONAL GOVERNMENT" is the general form of government which has been adopted by all peoples whose civilization is of European origin. Its success, on the whole, has been so great that with the spread of European influences this form of government has been adopted by peoples which have in the past owed little to Europe. At the present time it would seem that some form of constitutional government is destined to be established wherever there is government worthy of the name.

What is it now that we mean by constitutional government? How does it differ from the other forms of government which the history of the world exhibits? What are the earmarks by which we may know it? By constitutional government is meant, in the first place, a form of government which, as opposed to what

may be called personal government, is based not on the temporary caprice and whim of those who possess political power, but which, on the contrary, is carried on in accordance with rules so clearly defined and so generally accepted as effectively to control the actions of public officers. Constitutional government is then, in the first place, a government of laws and not a government of men.

The fact that constitutional government is a government of laws and not of men has necessarily involved the formulation of the rules or laws which are to control the doings of government officers. These rules or laws may, so far as concerns the persons possessing political powers, be self-imposed, as the result of the promulgation by those persons of statements as to what they will or will not do or as to the methods of action which they will adopt in the doing of those things which they have determined that they will do. Or these rules may be imposed upon the rulers by those whom they rule. In either case these rules may be and as a matter of fact often are contained in some one document or instrument which is regarded as controlling those in charge of the actual conduct of government. Such is the origin of many of the constitutions in European monarchies.

These rules or laws, however they may have originated, may, on the other hand, result from custom or usage which has sprung up in connection with the conduct of the government and which those in control of that government find it impossible or inexpedient not to observe. The custom, usage, or precedent may in its turn owe its origin to the settlement of a struggle—even a violent struggle such as a civil war or a revolution—between

different elements in a state which are striving for supremacy. Indeed, it may be said that constitutional government owes its existence for the most part to custom and precedent formed in this way which may subsequently be incorporated in a written document. The result is that constitutional government is, in the second place, a form of government in which the different elements in a state participate and which is to that extent a popular government.

We may say, then, that constitutional government is a form of government in which laws rather than men control, and which to a greater or less degree is popular in character in that it admits to a greater or less degree the participation of the important elements in the state's life.

Prior to the close of the eighteenth century constitutional government as thus defined reached its highest point of development in Great Britain. The rules determining the methods of governmental action and the degree of participation in the government which was accorded to the different elements in the state were not at that time—and we may add are not even now—to be found in any one document. Some of them were and are not to be found in any document at all. They were not always even clearly formulated; but, on the contrary, were and are to be derived from the estimation which statesmen, lawyers, and political writers put upon certain actions, mainly in the nature of settlements of controversies, which came to be regarded as precedents. Some men thought these precedents meant one thing. Others thought they meant another thing. The difference of opinion would sometimes lead to new controversies which were settled in the same way, or, as

other similar controversies had been settled before, the settlement agreed upon would be set forth in a document of some sort—usually a law. In this law what had been agreed to would be stated with reasonable clearness and precision.

Various writers of books have from time to time endeavored to gather together in one place what they have considered to be the rules which had been thus evolved or which might properly be laid down as forming what came to be popularly known as the British constitution, and as thus regulating and controlling the British government. Probably the most important attempt which was made before the nineteenth century at such a generalization was made by Sir William Blackstone in a book entitled *Commentaries on the Laws of England.*

Sir William Blackstone was in 1758 appointed Vinerian Professor of Law in Oxford University, and prepared a series of lectures which were delivered before the students of that institution. These lectures formed the basis of the celebrated *Commentaries* which were subsequently published. The first of the four volumes appeared in 1765, the succeeding three volumes being published in the course of the next four years.

Blackstone's *Commentaries* had an important influence on constitutional government for two reasons. In the first place, they formed by far the best book that had up to that time been written on the subject. They were so remarkable for excellence of arrangement, for exhaustiveness of treatment, for breadth of thought, and for clearness of expression, that they still are read with profit by the student, notwithstanding the many changes in the law which have been made during

the century and a half that have elapsed since their appearance.

In the second place, the *Commentaries* of Blackstone appeared at a most critical time in the history of constitutional government. They could not therefore fail to have a tremendous influence on the political thought of the day and on subsequent political action. It may indeed be said that the United States has not even yet escaped from the influence of Blackstone, who, in addition to being a lawyer of repute, was regarded as a political philosopher of great learning and insight.

The critical character of the time at which Blackstone's *Commentaries* appeared is due to the fact that the struggle was then beginning between the Crown of Great Britain and the British colonies in North America, which resulted ultimately in the establishment of the United States. Professor Beard, of Columbia University, says in beginning his work on *American Government and Politics:*

> American government did not originate in any abstract theories about liberty and equality, but in the actual experience gained by generation after generation of English colonists in managing their own affairs. The Revolution did not make a break in the continuity of their institutional life. It was not a social cataclysm, the overthrow of a dominant class, the establishment of a new estate in power. It was rather the expansion of the energy of the ruling agricultural and commercial classes that burst asunder the bonds with which the competing interests in England sought to restrain their growing enterprise. . . . It was discontent with economic restrictions, not with their fundamental political institutions which nerved the revolutionists to the great task of driving out King George's governors, councillors, judges, revenue officers and soldiers. The American Revolution was not the destruction of an old régime, although it made way for institutional results which its authors did not contemplate; and it was not motived by the levelling doctrines with which the French middle class undermined the bulwarks of feudalism. There had long been executive, legislative and judicial

offices in all the colonies and the revolutionists merely took possession of them. Unlike the French popular party they did not have to exercise their political ingenuity in creating any fundamentally new institutions.

Because of this lack of desire on the part of the Americans to make a great change in the form of constitutional government which they then possessed, the existence of Blackstone's *Commentaries* was important. For in that work were found formulated in clear and precise statements the fundamental principles of the English government as it was then understood. Upon these principles American colonial governments had been based. These principles it was which were to serve as guides in the new system which America was called upon to establish.

Two influences were at work, however, which made it seem necessary that a departure should be made, in one particular, at any rate, from the general English scheme of government.

In the first place, the attempt which had been made to justify the English Revolution of the seventeenth century, in the course of which one king was executed as a traitor and another driven from the country, had resulted in the formulation of a political philosophy whose main contention was that sovereignty—that is, the ultimate and supreme political power—resided in the people as a whole and not in the crown. This doctrine of popular sovereignty was very generally accepted in the American colonies. Its acceptance was due partly to the fact that some of the colonies had been settled by those who either shared the responsibility for the execution of an English king or were in sympathy with these regicides as they were afterward called. Further-

more, the French political philosophy of the eighteenth century which was in vogue in the America of that day also laid great stress on this idea of popular sovereignty.

The recognition of popular sovereignty, however, seemed to the Americans to involve the framing of a written constitution. In such an instrument should be incorporated all the principal rules governing the conduct of public officers. Public officers, according to the doctrine of popular sovereignty, had no inherent original right to exercise political power. They were merely persons to whom for convenience' sake the sovereign people had delegated the right to act in specific cases and for specific purposes. It was therefore necessary that the sovereign people should state in one document, which would be known to all and be accessible to all, what officers of government the people desired to have and what general powers those officers might exercise.

In coming to the conclusion in 1776 that a written constitution was necessary, the Americans were, however, but following the example set them by their British forefathers, who, after having destroyed the monarchy and set up the short-lived commonwealth of Oliver Cromwell, drew up in 1654 a written constitution—the Instrument of Government—said to be the earliest written constitution of modern Europe.

Accordingly, most of the American states, as the colonies which had declared themselves independent were called, adopted written constitutions. Two of them, however, continued their government under the charters which in colonial times had been granted to them by the British Crown, and which served reasonably well the purposes of written constitutions. When in 1789 the present government of the United States was

formed it was deemed even more necessary to set forth in a written constitution the principles in accordance with which the new government was to be conducted; for it was imperative that the powers of the central government then established and the position of the states which were continued in existence should be fixed with a definiteness sufficient to avoid, as far as might be, the possibility of conflict. We may say, then, that America is the birthplace of the written constitution.

The example thus set by America has subsequently been all but universally followed by the nations which have been called upon radically to change their governmental organization, particularly if the change has involved a transfer of the sovereignty from the crown to the people.

The next attempt that was made to frame a written constitution was that made by France in 1791. This constitution was in operation less than a year, but was followed in that country by a series of written constitutions, which appeared with great rapidity from 1792 to 1815. A number of the smaller German states adopted written constitutions between 1815 and 1830. This early constitutional movement in Germany would appear to have been one of the results of the French Revolution. In 1830 the newly established kingdom of Belgium also framed a written constitution. The independence of the South American colonies of Spain also about this time brought constitutional government and written constitutions in its train. Other states in Europe adopted written constitutions, particularly as the result of the revolutionary movement of 1848. Among these may be mentioned Prussia and Italy. The move-

ment for national unity which is to be noticed in Europe about 1870, and which resulted in the consolidation of Germany, also brought with it a number of written constitutions, among which may be mentioned those of Austria-Hungary and the German Empire. Nineteen years later a written constitution was provided for Japan, when that empire joined, in 1889, the ranks of the constitutionally governed states, and within the last few years Turkey, Persia, and China have drafted written constitutions.

We find, therefore, that the movement originating in the United States in 1776 has at the present time encompassed almost all of Europe and America, and has entered even Asia. It is not, however, usually remembered that the Constitution of the United States, which went into force in 1789, is, apart from a few American state constitutions, the oldest existing written constitution. Its century and a quarter of existence confer upon it, notwithstanding the comparative newness of the country, the hoariness of age when compared with such constitutional infants as the French and German constitutions. The Constitution of the United States may be said to surpass in the length of its existence even the British constitution. For such radical changes were made in the British system of government in 1832, by the passage of the reform bill, as almost to mark that year as the year of the establishment of the existing system of government in Great Britain. It would seem to be necessary thus to call attention here to the duration of the United States Constitution, and to its consequent importance in any treatment of the subject of constitutional government, since in the subsequent lectures mention will frequently be made of the

system of government which is based on this oldest written constitution of the world.

The result of this development is, then, that at the present time almost every European state has a written constitution. The most important exceptions are Great Britain and, possibly, France. The government of Great Britain is regulated, as it always has been, by usage and custom to be found in statute, practice, and precedent. The government of France is fixed mainly by three constitutional laws, as they are called, which were adopted in 1875. Only the main outlines of the French system are to be found, however, in these laws. One who would know their real meaning as well as the actual methods of French government must, as in Great Britain, have recourse to both preceding and subsequent legislation, as well as to custom and precedent.

While Great Britain, and to a lesser extent France, do not thus have written constitutions in the sense that their systems of government are based on any one document containing an outline of their political organization, it would be a mistake to suppose that all of even the important principles of government in those countries possessing written constitutions are to be found within the four corners of the written instrument, or even that all the principles set forth are applied in actual practice in the way in which the student would expect them to be applied. For as Judge Cooley, one of the greatest constitutional lawyers that the United States has produced, well says:

> We may think that we have the Constitution all before us; but for practical purposes the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens, recognize and respect as such; and noth-

ing else is.... Cervantes says: "Everyone is the son of his own works." This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government and it represents at last the acts done under it.

In other words, a written constitution is only a proposed plan of government set forth in one document. It does not necessarily exhibit the actual form of government of the country. It is like the rules of a game. If the game as actually played is not played according to the rules, then the rules as set forth do not give an accurate idea of the game as played. So if those living and acting under a written constitution play the political game according to the rules, and it may perhaps be said they seldom do this for a long time—the written constitution may give a fair idea of the actual governmental system. If, however, they do not thus play the political game, then the student of government must, if he would know the political system, find out how the political game is actually played.

What has been said with regard to the effect of written constitutions has not, however, been said in order to minimize the importance of a written constitution. It has been said rather to emphasize the point that written constitutions are not nearly so rigid and inflexible as some would seem to think that they are. The remark is attributed to a President of the United States, that the United States Constitution is to the country what a coat too small in size is to a man. If he buttons it up in front he splits it open behind. Such a characterization of the American Constitution is, however, hardly justified by an examination of the constitutional development of the country. For this cannot fail to corroborate

the statement just quoted of Judge Cooley, who had this very development in mind when he made the statement which has been attributed to him.

It is, however, true that it is a mistake to make the process of amending a written constitution too difficult. For conditions in almost every country are continually changing and a constitution must change as conditions change. If provision for a reasonably easy amendment is not made, either the constitution will become out of harmony with conditions as they exist or else changes will be made in the actual system of government by a strained interpretation of the constitution. This was probably what the American President who has been quoted had in mind when he compared the Constitution of the United States to a coat that was too tight.

If, therefore, we sum up the case for and against the written constitution we are probably justified in saying that the almost universal experience of the European world is in favor of this method of determining the principles of constitutional government. We may add that the argument of inflexibility and rigidity, which is often used against it, is justified only partially and only to that extent where the methods of amending the constitution are made unreasonably difficult.

The general principles may perhaps be laid down that the process of amending a written constitution should permit an amendment to be made when it is the opinion either of somewhat more than a majority of those in control of the government, or of the majority of the people voting upon the question that the amendment is desirable. The necessity of large majorities or of long delays in order that constitutional amendments may be made tends to foster revolutionary rather than gradual

change, or brings about a strained interpretation of the constitution on the part of those who may be intrusted with the power of interpretation.

The doctrine of popular sovereignty has had for one of its effects in the United States the submission of the original state constitutions as well as amendments thereto to the voters of the states. Such submission to the people in the case of constitutional amendments is not required by the United States Constitution nor by most of the written constitutions of the world. The ordinary method of amendment is through the process of legislation, but with the necessity of a greater than ordinary majority vote, and the observance of special formalities. Thus in France an amendment of the constitutional laws of 1875 is made as follows: Each of the two chambers of the legislature determines by a majority of all its members that amendment is necessary. After both chambers have thus separately reached this decision they unite in a joint assembly. The decisions of this joint assembly for amendment must be made by a majority of the members forming the assembly.

If we may judge from the experience of European nations, we may conclude that the ordinary country having constitutional government should have a written constitution, and that this constitution should be amendable in some such way as are the French constitutional laws of 1875.

II

THE PROBLEMS OF FEDERAL GOVERNMENT

HISTORY would seem to show that almost all modern states owe their existence to the combination or union of smaller communities, which at some earlier time enjoyed a greater or less degree of political independence. England thus originated in the union under one king of old Saxon or Danish kingdoms. When Scotland was added to England the new state formed by the union of the two kingdoms was called the Kingdom of Great Britain. When Ireland was added to Great Britain the existing state, called the United Kingdom of Great Britain and Ireland, came into being.

Thus again modern France has resulted from the extension of the power of the former dukes of Ile de France over a series of districts such as duchies, counties, etc. These districts were finally under the reigns of the Bourbon kings, and as a result of the French Revolution consolidated under one government, now known as the French Republic.

In the case of the French Republic the consolidation of the former independent communities was complete. One government and one law are in force everywhere throughout the country. In the United Kingdom of Great Britain and Ireland, however, Scotland still has its own law and its own courts, while the Irish Home

Rule Act will, when put into operation, accord still greater independence to Ireland.

In other words, the United Kingdom of Great Britain and Ireland is still, to an extent, at any rate, an imperfect union. The imperfect nature of the union which is thus characteristic of the United Kingdom is still more noticeable in the case of other countries, where we find, on the one hand, a central government with certain powers, and, on the other hand, state or provincial governments, to which the exercise of other powers is intrusted.

The determination of the position of such a central or imperial government, and of that of the states or provinces which have been joined together but do not as yet form a perfect union, and the fixing of the relations which shall exist between such a central government and these state or provincial governments, become questions of supreme importance, however, only in a country whose geographical situation and historical traditions have brought about great diversity in local conditions. As a rule such diversity is found only in a country of great extent. Exceptionally, however, it is the case that this diversity will exist in a country of comparatively small size. Where such diversity is to be found under these conditions it is due to the peculiar geographical situation of the country. Thus in the case of the United Kingdom of Great Britain and Ireland, Ireland is an island and is separated from Great Britain by a body of water large enough to make communication between it and Great Britain somewhat difficult. Ireland's consequent isolated situation has resulted in the development within it of conditions which are quite different from those obtaining in Great Britain. Dif-

ferences in race, in religion, in general economic conditions have arisen. Ireland is in the main Celtic, Roman Catholic, and agricultural; while Great Britain is in the main Teutonic, Protestant, and industrial. These differences would seem to demand political recognition. A complete consolidation of Ireland in the United Kingdom would seem to be impossible because of its geographical situation, notwithstanding the fact that the United Kingdom of Great Britain and Ireland is a country of comparatively small extent.

But generally in countries which are small in extent and whose geographical situation is not peculiar, as in the case just mentioned, the ordinary means of communication which have been attendant upon a settled life under the conditions of Western European civilization have been such as to prevent the development of permanently isolated districts and the diversity which accompanies such isolation. Original differences of race, of language, and even of religion tend to disappear before the unifying influences which are incident to continuous intercommunication. Each originally independent community exerts an influence on all the others until a civilization develops which is common to all. A common language and literature grow up, common methods of thought and action are formed, and common economic interests arise so that the once-separated communities feel the need of a closer union.

In the case of these unions of political communities an economic and social similarity or unity sometimes develops before the separated communities are politically united. Where such is the case, there is usually to be found a strong movement on the part of the people concerned for a greater measure of political unity and

the communities sometimes unite peacefully as the result of the adoption of a form of government in the making of which all parties to it play a rôle.

In other and, it may perhaps be said, in most cases of political union or consolidation of separated communities, the political union has preceded the attainment of economic or social unity, and has been due to the resort, or to the fear of the resort to forcible or violent methods. As Professor Jenks has said:[1]

> All through modern history there has been but one determining cause of political union between communities—physical force or the fear of physical force. . . . No community has consented to link its fortunes with the fortunes of another save when instigated by the fear of violence from that other or a third power. Many attempts have been made on other grounds, many other excellent motives have suggested themselves to thinking men. But the determining cause, the dead lift over the hill, has always been force or the fear of it.

While this statement is perhaps too general and too sweeping, it cannot be denied that political unity owes much to conquest. If such conquest has long preceded real economic and social unity or if the policy of the new political consolidation is not successfully directed toward the maintenance and improvement of existing means of communication, the tendency is for such artificial political unions to fall apart and for the once separated communities to resume their former independence. But a union resulting from conquest is frequently permanent. This is so because of the fact that the union which is sought has its basis in favorable geographical conditions, or because the conquerors have had the imagination and foresight to comprehend that the pursuit of a proper policy will have the ultimate

[1] *Government of Victoria*, p. 373.

result of uniting on a firm and lasting basis what have hitherto been separated districts. Such a policy must of necessity consist in large degree in the improvement of the means of communication. For without abundant and good means of communication it is impossible for real social and economic unity to exist. And without a large measure of social and economic unity permanent political unity is impossible.

Political unions which have been brought about forcibly and as a result of conquest are thus often permanent in character. Indeed, it is probably true that the development of most European states owes more to war and conquest than to peaceful means. Germany and Italy have secured within the memory of living men such national unity as they now enjoy largely through the exertions of the soldier. That these unions show at the present time every evidence of permanence is due to the facts that they are based on a high degree of geographical unity, and that those in charge of the policy of the central government have evinced great wisdom in the measures adopted since the union was attained.

It is, of course, better that political union shall be secured without the application of force and the shedding of blood. At the same time it is to be remembered that political unity, however it may have been brought about, is desirable wherever it may be in accord with existing economic and social facts, or wherever the economic and social basis for it may be laid. For nothing so favors the development of those conditions of peace, under which the greatest prosperity is possible, as the enlargement of national boundaries. The wonderful civilization which has developed in China is in no small degree due to the fact that there has existed in the China

of the past one great state. After its formation foreign war practically ceased and the energies of the Chinese people could with safety be directed toward the improvement of internal conditions and were not wasted in the carrying on of wars against outside peoples. Her more recent history shows the great disadvantages which are attendant upon the existence near her borders of rival political powers.

What has been true in the past of China is even more true of the United States of America. Protected as it has been by the great oceans lying both to the east and to the west, and embracing as it does a territory the extent of which permits the carrying on of internal commercial operations of the greatest magnitude, the United States offers a remarkable example of the advantages of political unity. It was the appreciation of these advantages which caused the people of the North, during the Civil War, to make the extraordinary sacrifices which were at that time made to maintain the political unity which then existed. The "preservation of the Union" became a battle-cry whose potency was almost irresistible.

We have seen, then, that where geographical conditions are not somewhat exceptional in their character local differences exist only in countries of large extent. It is in the main because of their small territorial extent combined with a high degree of geographical unity and simplicity that in countries like France and Spain the position in the governmental system of the local districts does not present a question of supreme importance. This geographical unity and simplicity had resulted in little if any real difference between their different parts. The union of separate communities was, largely because

of ease of communication, early attained. All their recent historical traditions thus make for political unity. The power to determine what the position of the local districts shall be is in these circumstances placed in the hands of the government of the country as a whole. What shall be its determination in specific instances is governed by the facts of the particular case. The general policy which may be adopted may be one of centralization or one of local self-government, as the facts seem to warrant. But the problems which arise are problems of administrative expediency rather than of sovereign power. No question of the constitutional rights of the local districts is involved. For the political unity which has been secured and which is based upon an actual social and economic unity recognizes in the central government of the country the absolute constitutional right to determine the position and powers of the local districts. Nothing that that government does is regarded by the people as violating any rights of those districts and as thus justifying resort to arms for the protection of local liberties. If what the government does is not looked upon with favor by the people of the local districts—if, for example, they feel that the policy of the government is too centralizing in its tendencies—they may try, by resort to political agitation, to secure an amendment or an abandonment of the policies which are thought to be objectionable.

In other European countries, partly because of geographical conditions, partly because of historical traditions which in their turn have been largely the result of geographical conditions, greater diversity between the local districts exists, and in consequence greater insistence is laid upon local independence. Thus in the Ger-

man Empire something in the nature of separate states still exist. These states even now regard with jealousy the extension of the powers of the Imperial government. Their powers are fixed in the written constitution, and in some instances may not be changed without the consent of the states concerned. The facts, however, that with one or two comparatively unimportant exceptions all the states of the German Empire are inhabited by the same German race, and that the means of communication between all the parts of the Empire are good, have made both possible and desirable the establishment of a strong central government which, under the law, has the ultimate determination of the general position and of most of the powers accorded to the separate states of the Empire.

In Austria-Hungary we find a still greater geographical diversity accompanied also by greater racial differences. The Carpathian Mountains, for example, divide the country into pretty distinct parts which are occupied by Germans, Hungarians, and Slavs—separate races each of which has its own traditions and speaks its own language. The governmental system which has been developed is not a unified one. Indeed, almost the only respect in which political unity has been secured is the fact that the Austrian Emperor is the Hungarian King. It is true, of course, that as the result of something in the nature of an agreement between Austria proper and Hungary provision is made for the common management of certain government activities. Apart, however, from these exceptions there is really no one government for the two countries. The double eagle of the Austro-Hungarian arms speaks to those who know the conditions of the Empire, as it is called, of the two parlia-

ments which sit at Vienna and Budapest, respectively.

The history of the countries of vast extent which have been called upon in the last century or more to organize their systems of government offers proof of the proposition that the position of the local district and its relation to the central government must be determined in the light of existing conditions. These countries are the United States of America, the Dominion of Canada, the Commonwealth of Australia, and the South African Union. In most of these countries the climate varies from the temperate to the tropical or sub-tropical. All of them have sea-coast districts and regions far in the interior from which access to the sea is difficult. In most instances they are traversed by great rivers or divided by high mountain ranges. In all of them the original settlements were made in large measure independently of one another, with the result of developing separated and almost independent local communities.

All of the countries, it is true, are inhabited by English-speaking peoples. But this fact is significant only in that English-speaking peoples have been notorious for their love of local self-government and their hatred of political centralization. Perhaps never was there in a people of the same race and speaking the same language such insistence on local rights as has been noticeable in both the United States and Australia. Thus in the United States "states' rights" was a sacred principle for whose maintenance in its integrity many persons gave up their lives and sacrificed their fortunes. Many for a long time believed that allegiance to the state was paramount to loyalty to the nation. This being the case, anything that these countries have done in the

direction of political centralization must be considered as compatible with a due regard for local rights. Such political unity as has been secured in these great English-speaking confederations cannot fail to offer a proof that their experience in the century and a quarter which have elapsed since the adoption of the United States Constitution has convinced them that modern economic and social conditions make necessary an increasing degree of political centralization.

III

FEDERAL GOVERNMENT IN THE UNITED STATES BEFORE THE CIVIL WAR

THE country of wide extent which was in modern times first called upon to solve the problems arising out of the relations of a central government and local communities upon the union of which that central government was based was the United States of America.

Beginning with the early part of the seventeenth century, settlements or colonies of European peoples had been established on the Atlantic coasts of North America, stretching from sub-Arctic Labrador through temperate regions to sub-tropical Florida. The French were in the north, the English and Dutch in the center, and the Spanish and French also in the south. By the latter part of the eighteenth century the English had acquired the colonies of the Dutch as well as the northern colonies of the French. The acquisition of the Dutch possessions was, however, made as early as the latter part of the seventeenth century.

At the end of the eighteenth century, thus the colonies extending from Canada to Florida were distinctly English in character. For the century of English domination of the Dutch colony of New York had had great effect in modifying its original conditions and subjecting it to English influence.

But while English influence was thus predominant in all these communities, most of them had originated in the desire on the part of the settlers to realize particular ideals which had developed as a result of the political and religious struggles following upon the inauguration in England of the movement known as the Protestant Reformation. The democratic and ultra-Protestant Puritan had colonized the northern districts. The middle districts originally colonized by the Dutch had lost much of both their original Dutch and rather democratic character, because of the introduction of aristocratic English institutions which was incident to the English conquest in 1674. South of the original Dutch district were to be found the Quaker colony of Pennsylvania and the originally Roman Catholic settlement of Maryland. South of these still were what were known as the Southern colonies, of which Virginia was perhaps the most important. These colonies had been founded in large measure by the aristocratic classes of England. What the Puritan was to New England the Cavalier was to Virginia.

The difference between the Northern and the Southern colonies, due to the fact that the first were democratic while the latter were aristocratic in character, was made greater by the difference in climate incident to the latitudes in which the colonies were to be found. The comparatively severe climate of the North made it impossible in New England to grow crops for the cultivation of which slave labor could be used. The institution of negro slavery, therefore, never secured a foothold in the North as it did in the South, from which, on account of its economic importance, it was impossible or even difficult to dislodge it. Indeed, in the Northern

colonies climatic conditions combined with the economic situation of England, the only European country with which commerce was in colonial days possible for the Northern colonies, made it impossible for a money crop of any sort to be raised within them. The land was suited only for the growing of those products of which England itself had an abundance.

The energy of the Northern colonists over and above what was necessary to obtain their subsistence out of the land was on this account directed to the development of fishing and navigation. They found a profitable trade with the West Indian sugar-growing colonies of Great Britain, and made what may be called three-cornered voyages between Africa, the West Indian colonies, and New England. They transported negro slaves from the West African coast to the West Indian colonies. They took on at these colonies cargoes of molasses, which were brought to New England to be made into rum. This rum was taken to Africa to be used to buy slaves, which in their turn were to be transported to the West Indies.

In this way the New England colonies developed a lucrative commerce. The capital they accumulated in the West Indian trade was used after the colonies became independent to build up the manufactures which are at the present time characteristic of that part of the United States. Opposed to commercial and industrial New England we find a distinctively agricultural South devoted to the production of money crops, through the use of slave labor. These crops were at first tobacco, which soon was in great demand in Europe, and later cotton. Both of these crops were money crops. That is, they were raised not for local consumption, but for

export. They were both crops which could be grown to advantage in the climatic conditions of the Southern colonies. They were both also crops to which slave labor could be profitably applied. They were both finally crops for which the free labor then available could not have been used. For the white man of northern Europe, from which practically all of the settlers of America came, could not work to advantage under the burning Southern sun.

These different American colonies, then, differed from one another greatly, and largely as a result of their geographical situation. In some slave labor was the rule; in others free labor was predominant. Some were mainly commercial, others mainly agricultural, in character. Some were democratic in their inclinations, others were aristocratic. Some were ultra-Protestant in religion, others were Anglican or Roman Catholic.

The means of communication between these colonies available at the end of the eighteenth century were not such as to permit easy and frequent intercourse. The colonies were connected with each other by a sea which, certainly as judged by the then state of navigation, was tempestuous in character. Railways had not then been invented, and of roads there were practically none worthy of the name. No one had even dreamed of the electric telegraph, much less of the telephone.

Thus the differences due to climate, geographical situation, and economic and social conditions were not subjected to processes of assimilation due to frequency of intercourse between the different colonies. The aristocratic New-Yorker tended to regard the democratic New-Englander with dislike, while the Pennsylvania Quaker was inclined to turn up his eyes in horror at what he

considered the easy-going ways of the Anglican Virginian. All the colonies were so permeated with local jealousies and prejudices that intercolonial co-operation was extremely difficult. All attempts at federation before the Revolutionary War were thus unsuccessful. The common consciousness of outside oppression was needed to force them together. The belief in such oppression was produced by the policy which Great Britain adopted toward the American colonies, when the attempt was made at the end of the eighteenth century to impose taxes upon them without their consent. While they had for a long time been restive under the British colonial policy, which practically forbade them to have commercial dealings with other than British countries and prevented the development of manufactures within them, they offered no serious and organized resistance to Great Britain until attempts at taxation without representation were made. These attempts fanned the embers of discontent into a flame of open resistance.

Furthermore, the British conquest, in 1763, of the northern French colonies, in what has come to be known as Canada, dissipated all fear of foreign conquest and caused the American colonists to feel that they could with safety dispense with the protection accorded to them, as parts of the growing British Empire, by the mother country.

On July 4, 1776, thirteen of these colonies, all of the English possessions in North America except the original French settlement of Canada, declared their independence. With the thought that they could not succeed in their revolutionary movement unless they took united action, they almost immediately formed a loose confederation. The great defect of this confederation was

noticeable even during the Revolutionary War which followed, but became more clearly evident after independence had been achieved. This defect consisted in the weakness, the impotence, indeed, of the central government for which it made provision. Everything which was to be done by that government had to be done practically as the result of the unanimous action of the states, as the members of the confederation—the former colonies—had come to be called. The central government had no financial resources of its own, but was dependent entirely upon the grants of money made by the states which were by no means generous in their treatment of the central government. That government resorted to all sorts of means to replenish its empty treasury. Among these may be mentioned the making of foreign and domestic loans and the issue of paper money —"continental currency" it was called—which fell so much in value as ultimately to become practically worthless. The central government under this confederation was so weak, furthermore, that the satisfactory conduct of the foreign relations of the country became impossible. Treaties made by it were not observed by the states, which had the real power. On the other hand, the states exercised their powers to control commerce almost solely with the idea of promoting state interests, and the result was that commerce was so hampered by local restrictions as to be incapable of any extensive development.

An attempt was made, in 1786, to remedy these defects. Commercial difficulties having arisen between two of the states, a conference was held. At this conference it was seen that all the states must agree in order that any agreement reached might be effective.

This conclusion was reported to the legislatures of the states concerned. The legislature of one of them—Virginia—proposed a commercial convention to be held at Annapolis in September, 1786. Alexander Hamilton, who had long been convinced that the "Articles of Confederation," as the first American Constitution was called, would have to be amended, saw his opportunity. He secured the acceptance by the legislature of New York of the invitation to attend the Annapolis convention, and his own appointment as a delegate.

When Hamilton reached Annapolis he determined to have the commercial convention changed into a constitutional convention for drafting a new constitution. Application with this end in view was made to the Confederate Congress, the only organ of the existing central government. The Congress took the action requested, and a convention composed of delegates from all the states except Rhode Island met at Philadelphia in May, 1787.

This convention, which had in its membership nearly all the great men of the country, assumed that it represented the entire American people. It drafted by majority vote and proposed for adoption a constitution which differed greatly from the then existing "Articles." Probably the most notable provision which the draft contained was that which made the going into effect of the new instrument dependent upon the affirmative vote of nine only of the thirteen states united in the old confederation. As a matter of fact, the Constitution went into effect as the result of the affirmative vote of only eleven of those states.

The present Constitution of the United States must therefore be regarded as forming a new government rather than as amending the former Articles of Con-

federation. For the method of amendment provided by those articles required that all modifications of the articles should have the unanimous approval of all the members of the confederation. But subsequently the two states whose approval was not originally obtained gave their consent, and any technical constitutional irregularity in the formation of the existing Constitution of the United States must be regarded as cured by the acquiescence of all the American states and the American people as a whole.

This new Constitution differed from the "Articles of Confederation" in the fact that the powers of the new government, which it established, were to be exercised directly upon the people, and not as before through the medium of the states. If a tax was to be levied its collection no longer depended upon the good will of the states, but was assured by the action of officers of the new national government dealing directly with the individual citizen, who was regarded as owing a direct and immediate allegiance to the national government. This government might under the Constitution have its own army and navy—indeed, the states were forbidden to have one—its own revenue and other administrative officers, and its own judicial system. All of its officers had no connection whatever with the states, but were under the direct and immediate control of the national government.

The comparative geographical isolation of the states of the new American Union, and their diverse social and economic conditions, as well as their originally independent status, caused them, however, when the question of making a new constitution was presented to them, to regard the maintenance of a high degree of

local independence as of the greatest importance. In order to secure this local independence, and at the same time to provide for the management by a central government of what their experience had shown them to be their common interests, they resorted to the device of "federal government."

This system of federal government was based on the fundamental proposition that there should be two governments somewhat co-ordinate in constitutional power. There were, first, the old state governments which were permitted to continue in existence, subject only to the limitations on their power contained in the new Constitution; and second, the new central government which was provided for by that instrument. The principle to be applied to the determination as to what powers were to be accorded to each of these two governments, respectively, was that the new central government then established was to exercise only those powers clearly granted to it by the Constitution, and that all powers of government not so granted were to be regarded as reserved by the states. The new central government was to be, to use legal phraseology, a government of enumerated powers. The presumption was, therefore, to be in favor of the power of the state governments. It was, however, provided that where the new Constitution granted a power to the new central government, the action of that government should be binding upon the states; that state law, in other words, should give way to national law in the case of those matters as to which the national government under the Constitution was competent and had taken action. The central government, though a government of enumerated powers, was to be supreme in the exercise of those powers.

There were, however, one or two serious defects in this general system. The most important was that the nature of the Constitution was not clearly stated. There never was until comparatively late in American history unanimous agreement as to whether the Constitution was in the nature of a treaty or compact made between sovereign states, or was an act of legislation adopted by the sovereign people of the country as a whole. Soon after the adoption of the Constitution divergent views as to this matter became apparent. In 1792, only three years after the new government of the United States went into operation, the Supreme Court held that it had the right, under the Constitution, to entertain a suit brought by an individual against the State of Georgia. The legislature of that state declared that it regarded the decision as unconstitutional and would not obey it, and passed a law providing that any person attempting to seize property of the state to pay the judgment awarded by the Supreme Court should be "guilty of felony and" should "suffer death by being hanged." The ultimate result of the protest of the State of Georgia was that the United States Constitution was so amended as to deprive the Supreme Court of the power which it had claimed the right to exercise.

In 1798 certain unpopular laws known as the Alien and Sedition Laws were passed by the United States Congress. The passage of these laws led to the adoption of resolutions by the legislatures of the States of Kentucky and Virginia. The resolution passed by Kentucky was, it is said, written for the most part by Thomas Jefferson, and declared that "every state has the right in cases not within the compact [as the Constitution was called] to nullify of their own authority all assump-

tion of power by others within their limits." The Virginia resolution, which was written by James Madison, also treated the Constitution as a "compact." These resolutions were sent to the legislatures of the other states. Almost all of the states which commented upon them did so unfavorably.

About ten years later the legislature of the northern State of Massachusetts, in protesting against what were known as the Embargo and Enforcement Acts of Congress, which interfered seriously with the commercial interests of the state, resolved that these acts were "unconstitutional and not binding upon the citizens of the state." The troubles incident to the French Revolution, and the struggle between France and Great Britain, which appeared for the first time in the United States in connection with these Embargo and Enforcement Acts, reached their culmination about the time of the War of 1812 between Great Britain and the United States. The distress caused by this war to commercial New England brought about what has been called the Hartford Convention, consisting of delegates from the New England states, all Northern states. Among the resolutions adopted by this convention was one to the effect that the states should adopt the measures necessary to protect their citizens from the operations and effects of all acts of Congress relating to military conscription not authorized by the Constitution.

During all this period and after its expiration, the Supreme Court of the United States was, however, making a series of decisions which extended the power of the central government. These decisions were based upon the theory that the Constitution was not a compact whose interpretation could properly be made by

the states, one of the parties to it; but, on the contrary, was an act of legislation which had been passed by the sovereign American people and could finally and authoritatively be interpreted only by the representatives of that people, *viz.*, the authorities of the central national government, of which the Supreme Court itself was the most important.

This attitude of the Supreme Court, while of incalculable benefit to the constitutional development of the United States, was not, however, universally acquiesced in where it conflicted with the most powerful economic interests of particular districts. The most important instance of such dissent prior to the Civil War of 1861 is to be found in the action of South Carolina in 1830, which is spoken of in American history as "Nullification." This incident arose in connection with the attempt made at that time by Congress to provide a tariff for the protection of home manufactures.

Attention has been called to the fact that at the time the United States obtained their independence the Northern colonies were for the most part engaged not in agricultural, but in commercial pursuits, and that the South was for the most part devoted to agriculture, carried on by slave labor. The separation of the American colonies from the great British Empire had for the moment disastrous results for New England. Their trade with the West Indies was practically destroyed. For British legislation closed those islands to all but British ships.

Now one of the features of the policy of Alexander Hamilton, who was the first Finance Minister of the United States, was a protective tariff which was expected to develop domestic manufactures. The tariff

which was adopted had the desired results. But soon after the conclusion of the War of 1812 began a movement for an increase in the tariff rates. These rates were raised so high in 1828—the tariff then adopted has been called the "Tariff of Abominations"—that the agricultural South, which did not share the benefits but supported the burden of the policy, protested under the leadership of South Carolina against the whole protective policy. In 1830 the legislature of South Carolina resolved that it was "the right and duty of the State to interfere in its sovereign capacity for the purpose of arresting the progress of the evil occasioned by . . . unconstitutional acts" of Congress. The claim had been made that a protective tariff act was not authorized by the Constitution. The announcement of this theory of nullification was followed in 1832 by a series of state laws which forbade United States officers to enforce within the limits of the state the objectionable acts of Congress. These laws of South Carolina also announced that the State of South Carolina would regard any attempt on the part of the national government to employ military force against the state as absolving the people of the state "from all further obligations to maintain or preserve connection with the people of the other states; and" that the state would "forthwith proceed to organize a separate government and to do all other acts and things which sovereign and independent states may of right do." In this action on the part of South Carolina is to be found the origin of the doctrine of "secession," which subsequently became of such importance in the troublous days before the Civil War.

The national Congress and President Andrew Jackson were in no manner daunted by the action of South

Carolina. They passed what was known as the "Force Bill," which enabled the President to enforce the tariff laws of Congress, and ordered both the national army and two war-vessels to the scene of the threatened disturbance. Neither side would apparently give way. Civil war seemed to be about to break out, but was avoided by a compromise which left the question open for future settlement.

IV

FEDERAL GOVERNMENT IN THE UNITED STATES AFTER THE CIVIL WAR

THE doubt as to the position and powers of the states in the American system of federal government which had caused so much trouble in the early history of the country, and particularly the claim made in 1832 by South Carolina that each state was sovereign and as a consequence might secede or withdraw from the Union, which was said to be a compact or treaty made between sovereign states, had finally to be settled by resort to arms.

The immediate occasion of the Civil War, in which this resort to arms was made, was the institution of slavery. Slavery was, as has been said, the labor system of the agricultural South, and had by the middle of the nineteenth century become of much greater importance than it had originally been. This increase in its importance was due partly to the discovery that short-fibre cotton could be grown on the uplands of the South, and partly to the invention, in 1792, of a machine called the cotton-gin. The cotton-gin was invented by a Connecticut Yankee, Eli Whitney by name, who had made a journey to the South in the latter part of the eighteenth century and had seen the necessity for such an apparatus. Prior to the invention of the

cotton-gin it required the full day's labor of a slave to separate one pound of cotton fibre from the seed. The invention of the cotton-gin multiplied the effectiveness of slave labor to such an extent that the culture of cotton became immensely profitable. On the other hand, the discovery of the possibility of raising short-fibre cotton on the uplands of the South vastly increased the extent of the cotton-growing area. The result was a tremendous increase in the production of cotton, which was naturally accompanied by a great increase in the number of slaves. In 1784 eight bales of cotton, which had been shipped to Liverpool, were seized on the ground that so much cotton could not have been raised in America. In 1790 the production of cotton was nearly 2,000,000 pounds; in 1793, 5,000,000; in 1800, 60,000,000; and in 1806, 80,000,000. The first census in 1790 shows 697,000 slaves; the eighth census in 1860, just before the war, nearly 4,000,000.

The money crop cotton, "King Cotton" as it came to be called, together with the system of slave labor, had a tendency to exhaust the soil. The slaveholding classes had, in order to keep up their profits, to search continuously for new and fertile lands to cultivate. When the lands in the South were exhausted these classes attempted to have new slaveholding states admitted to the Union in the territory to the west of the Mississippi, which had been acquired from France and Mexico. It may perhaps truthfully be said that the slaveholders' demands for expansion had caused the war with Mexico. The result of this war had been the acquisition of the great State of Texas and other territory reaching to the Pacific coast.

The attempts of the slaveholding South to acquire

new lands where slave labor might be employed met with opposition from the North. In the North slavery had, because of climatic conditions, not been profitable. It had consequently been abandoned. The prevailing morality of the people of the North, further, did not countenance slavery.

The struggle between the North and the South with regard to the expansion of slavery lasted for more than a quarter of a century, and when it seemed as though the North was about to win as a result of the election which made Lincoln President in 1860, the Southern states declared their independence and attempted to secede from the American Union. On the 20th of December, 1860, South Carolina, which had threatened to leave the Union in 1832, actually did make the attempt by passing what was known as the Ordinance of Secession and declaring itself no longer a part of the Union. A month later the Senators of the United States from the States of Florida, Alabama, and Mississippi withdrew formally from the United States Senate—a dramatic episode in the history of that body—and in February, 1861, the seven states which had by that time seceded formed a new government which was known as the Confederate States. Four more states joined this Confederacy before the expiration of June.

In this way the theory that the Constitution was a compact was attempted to be put into practice. The states of the North and the West clung, however, to the view that the Constitution was not a compact or treaty made between sovereign states which could be repudiated by them when they saw fit, but was, on the contrary, the legislative act of the sovereign American people, and bound all the states until it had been

amended in the way which it itself provided. The people of the North and West took this view because they were convinced that only through the "preservation of the Union," which was their battle-cry, could be secured in North America those conditions of peace under which the greatest progress could be made. They believed that such conditions of peace would be impossible if rival political powers were permitted to develop.

The contention between these two political theories was then, after various efforts at compromise had failed, transferred from the halls of Congress to the battle-field. A long, bitter, and bloody war followed, which was ended only in April, 1865. During the war much was done in order to suppress the rebellion, as it was called, which could with difficulty be justified under the Constitution, framed as it was as a result of peaceful negotiation and for times of peace. But the people of the country, in the hope of preserving the Union, submitted without serious protest to much arbitrary action on the part of the President, which under other conditions would have aroused their indignation if not their resistance. Persons arrested for treason or conspiracy were denied access to the courts, as the result of the suppression of the privilege of the writ of habeas corpus. Others were tried and even sentenced to death by military tribunals whose decisions could not be subjected to judicial review.

But finally the success of the North fixed in the law of the United States the principle that the Union is, to use the words of the United States Supreme Court, "an indestructible Union composed of indestructible states," and that final and supreme authority is vested in the people of the American Union and not in the states.

Attention has been called to the long struggle in the United States over the position of the states and their relations to the central government in order to emphasize the point that the solution of this particular problem often involves great dangers. Notwithstanding the fact that the Constitution of the United States was framed, not as the result of a war, but, on the contrary, was due to peaceful negotiation, its interpretation, so far as concerns the position of the local communities which were united by it, led to one of the longest, bitterest, and bloodiest wars of modern times—a war in which hundreds of thousands of lives were lost, hundreds of millions of dollars' worth of property were destroyed, and a large section of the country devastated. The endeavor to preserve the Union finally resulted in endangering American political institutions. The long-continued arbitrary action on the part of the President, acquiesced in by the people, accustomed them to the existence of an executive power of which they had probably never dreamed before the war began. That this experience did not have the effect of causing permanently autocratic government to develop has hardly as yet been satisfactorily explained. The reason may perhaps be found in the long-continued habits of local self-government and of respect for law, which were characteristic of the American people. On the other hand, it is, however, to be remembered that the conclusion of the war was almost immediately followed by a strenuous if not feverish economic development. The material conquest of the American continent, which had only just begun in the middle of the nineteenth century, called for the services of immense numbers of workers. The men in the disbanded armies found, for the most part,

employment without great difficulty, and it was thus a comparatively easy matter to convert the sword and the spear into the plowshare and the pruning-hook.

But while American political institutions survived the shock of a long civil war, the troublous period from 1861 to 1865 left an indelible impress on the political life of the country.

In the first place, the position of the President assumed an importance which it has never lost. All tendencies toward the development of a system of Cabinet Government in accordance with which the center of government might have become fixed in Congress were checked, and the President was able to influence that body even in matters of legislation in a larger degree than he was controlled by it in matters of administration.

In the second place, the actual powers of the central government were greatly increased as the result of a broader construction of the Constitution than was possible during the time when a large portion of the American people entertained the view that that instrument was a compact between sovereign states. This broad construction of the Constitution has, further, been facilitated by the change in American conditions due to the improvement in the means of communication. The former geographical isolation of the states of the American Union has all but disappeared as the result of the building of railways and the digging of waterways. The invention of the telegraph and the telephone has brought into close communication with one another districts which formerly were widely separated. Commercial transactions which were at one time confined within the limits of rather small local districts now extend throughout the entire territory of the United

States. State lines have almost ceased to have any economic or social significance.

It would, of course, be impossible in the space available to give a comprehensive and exhaustive enumeration of the specific powers which may now be constitutionally exercised by the central government of the United States. For such an enumeration would involve the attempt to make a technical presentation of many of the rules of American constitutional law.

It may, however, be remarked that the great increase in the action of the central government of the United States is due to the interpretation given by Congress and upheld by the Supreme Court to a number of powers granted to Congress in rather general terms by the Constitution. The most important of these are the power "to regulate commerce with foreign nations" and "among the several states." It should be noticed that the Constitution does not either define or describe what "commerce" is or state what is the meaning of the words "regulate" and "among the several states."

At first governed by the particularistic state rights ideas of the time, which were justified in large measure by the existing economic conditions, both Congress and the Supreme Court took a rather narrow idea of the extent of this power. Thus when it came to be regarded about 1820 as necessary that the central government should make some provision for establishing means of communication between the Eastern states and the new states which had been established west of the Alleghany Mountains and in the Mississippi Valley, it was believed that the only authority possessed by Congress was to build roads which after they were built should be handed over to the states. The states alone, it was thought,

might administer them and care for their maintenance and repair.

The gradual centralization of economic conditions, which has been characteristic of American development, has caused the adoption of a much more extended conception of national power under the Constitution. Thus the meaning of the word "commerce" has been greatly enlarged. Commerce as a subject of Congressional regulation embraces at the present time, in the first place, transportation by both land and water and the means and instrumentalities of transportation. Commerce therefore includes not merely the act of transporting persons or things from one place to another, but as well both artificial land and water routes and their terminals such as harbors, the vehicles by which the act of transportation is performed, and the persons, both carriers, shippers, and consignees on the one hand, and employers and employed on the other, who are engaged in the act of transportation.

In the second place, commerce embraces purchases and sales and the negotiations entered into in order to lead to sales of all articles ordinarily made the subject of trade, as well as agreements for such purchases and sales, made both between the purchasers among themselves, and the sellers among themselves, on the one hand, and between the purchasers and sellers with each other on the other.

Finally, while commerce does not include manufacturing, the tendency is to regard manufacturing as a part of commerce where its regulation is necessary to the effective regulation of what is admittedly commerce.

All of these things, operations, and processes are regarded as within the regulatory power of Congress, pro-

vided they can be regarded as a part of commerce "among the several states." Commerce of such a character is held to be commerce, as above described, which originates in one state and terminates in another, as well as commerce which originates and terminates in the same state, provided the regulation of such commerce is necessary to the effective regulation by Congress of what is recognized as commerce among the several states.

The word regulate is given an equally wide meaning. Thus it is held that the power to regulate commerce includes the powers:

First to construct, or provide, even by the chartering of companies, for the construction of routes by land or water over which commerce among the several states is possible, and to lay down the rules to be observed by those making use of such routes.

Second, the power to regulate includes the power to determine the private legal relations which shall exist among those persons engaged in commerce among the several states, so far as those legal relations may affect the carrying on of commerce. Thus Congress may regulate the contracts and liabilities between shippers and carriers, between carriers and their employees, between sellers and between purchasers, and between sellers and purchasers.

Finally, the power to regulate includes the power to prohibit commerce in certain articles and certain methods of carrying on commerce and to license those engaged in commerce.

The enormous extension which has been given to the power of Congress to regulate the commerce among the several states is causing the old distinction between a

commerce among the several states which is subject to Congressional regulation and commerce within the limits of a single state which is subject to state regulation, almost to disappear and to subject all commerce to the power of Congress. This distinction has disappeared with regard to commerce carried on by water, which is spoken of as navigation.

The extension of the power of Congress has also brought within the regulatory power of Congress many subjects such as the private legal relations between employer and employed, and between purchaser and seller which were formerly regarded as exclusively within the jurisdiction of the states.

Another power which is possessed by the United States Congress, and which has been considerably expanded since the Civil War, has been the power to "lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States." This clause has been interpreted as giving to Congress the power to expend money in cases in which it has no power of regulation. Thus Congress may expend money to further the development of agriculture, though it may not regulate agriculture. It may finance irrigation schemes, though it may not regulate in the states the waters used for irrigation purposes.

In this way the powers actually exercised by the national government are vastly greater than they once were, and they are exercised with the general approval of the American people, although occasionally there is a protest against the increasing centralization, as it is called, on the part of the believers in states' rights, many of whom still exist.

But the constitutional theory of the American Union remains as it was in 1789. The central government is still a government of enumerated powers. The actual powers which it exercises are, however, much more numerous and much broader in their extent than would have been deemed possible in the days before the Civil War. The states are also still recognized as possessing, subject to the limitations of the Constitution, all powers not granted to the central government; but the powers which the states may actually exercise are fewer and narrower in extent than they were once believed to be. This change in the conception of state powers is due to the extension of the activity of the central government and to the more frequent application of the original idea that the central government is supreme in its constitutional sphere of action.

In other words, the positions of the central government and of the state governments are not really the same in this, the twentieth century, that they were in the eighteenth century. This is true, although there have not been many formal amendments to the Constitution. It must be admitted, however, that most of the formal amendments which have been made have been in the direction of enlarging the powers of the central government, or of imposing limitations on those of the states. The most important of such amendments is the Fourteenth Amendment, which has placed the civil liberty of the individual under the protection of the United States national government.

We must therefore conclude that the history of the United States would seem to show that, in a developing country whose economic conditions are changing, it is impossible to fix in detail, and beyond the possibility

of change, the position of either the central government or the state governments. The enumerated powers of the United States national government have changed their meaning with the progressive changes in the social and economic conditions of the country. As the country has become economically and socially more closely united, more interests common to all parts of the country have developed, and its political institutions have had to be brought into accord with economic and social facts. The process of adjustment has been for the most part peaceful, and has been possible largely because of the broad and statesman-like views which have been held and expressed both by Congress and by the Supreme Court, the final and authoritative interpreter of the Constitution. We cannot, however, forget that one factor in the tremendous change which has taken place was the great Civil War, which ravaged a large section of the country during the momentous four years from 1861 to 1865.

V

FEDERAL GOVERNMENT IN CANADA

THE next attempt, after the adoption of the American Constitution, to solve the problem involved in the determination of the relations between provinces or states, on the one hand, and a central government, on the other, was that made in Canada by the British North America Act of 1867, which provided for the organization of the present Dominion of Canada.

The conditions which existed in Canada at the time of the passage of the British North America Act were in many respects similar to those obtaining in the United States in 1789. There were in existence at that time a number of separated and almost independent political communities. The climatic differences between these, however, were not as great as was the case in the United States at the end of the eighteenth century. For all were situated in northerly latitudes and all, therefore, had a rather cold climate. The main obstacle to a firm union in the United States was thus not present in Canada.

Furthermore, the means of communication in Canada, in 1867, were much better and more abundant than was the case in the United States in 1789. The waterways to be found in the Atlantic Ocean and its embrasures, such as the Gulf of St. Lawrence and in the

St. Lawrence River and the Great Lakes, which are so important a feature of Canadian geography, practically united all of the then settled provinces of Canada. In 1867 the railway had not only been invented; it had also received quite a development in Canada. At that time comprehensive railway systems had been constructed or projected, which either brought or were expected to bring the existing provinces into close relations with one another and to unite with them the new districts in the western part of the continent which were to be opened to settlement.

The economic conditions of most parts of the country were similar in character. Apart from the sea-coast, where fishing and navigation had been somewhat developed, the country was in the main agricultural in character. The products raised were not, however, like the tobacco and cotton of the Southern American states of such a character as to permit slave labor to be profitably applied to them. Furthermore, the conscience of all peoples having a western European civilization no longer tolerated slavery as a labor system. The result was that the conflict of sectional economic interests, which had been the bane of all attempts at political union in the United States, did not exist.

But while the geographical and economic conditions of Canada were much more favorable to political union than those to be found in the United States when the American Constitution was adopted, the racial and social conditions were such as to make the preservation of considerable local independence a practical political necessity.

Attention has been called to the fact that Canada was originally settled by the French, and became a British

possession only a few years before the other American colonies of Great Britain obtained their independence. One of the results of the war, which was incident to that struggle for independence, was the immigration into Canada of a large number of Americans, the "loyalists," as they came to be called, who preferred to live under the British Crown to joining in the struggle of their American fellows for independence. These persons settled chiefly in the west of the then province of Quebec, along the banks of the St. Lawrence River, and in the neighborhood of Lake Ontario and Erie, a district which was not at the time densely populated.

The Quebec Act of 1774, under which the province of Quebec was then governed, made little provision for the self-government to which British colonists had been accustomed, and demands were made by the new British settlers in Canada for the establishment of a less arbitrary and more representative government than was possible under the Quebec Act. The final result was a partition of Quebec into two provinces, which were at one time called Upper and Lower Canada, and finally were given the names they now hold—*viz.*, Quebec and Ontario.

Quebec was and still is for the most part French in race and Roman Catholic in religion. Ontario, on the other hand, was and is for the most part British in race and Protestant in religion. Quebec was and is still in some measure governed by the old French law. Ontario was and is still mainly governed by English law. In Quebec the semi-feudal institutions introduced by the French have had a great influence on the character and life of the people. In Ontario more modern ideas have practically always prevailed.

The other important provinces which formed a part of the new Dominion were Nova Scotia and New Brunswick. Mainly British in character, with all the incidents to that character, they still had quite a large number of French inhabitants whose presence tended to disturb the otherwise rather homogeneous character of the population.

The presence of these two markedly different racial elements in Canada caused considerable trouble from almost the very beginning of the nineteenth century. The various attempts at political organization prior to 1840 were not successful. A rather serious rebellion broke out in 1837, which was largely caused by racial animosity, and even now it may not be said that the relations of the two races have been satisfactorily adjusted. Neither the French nor the British race is so numerically preponderant as to be able to control the situation. For while immigration has tended to strengthen the English element, the extraordinarily high birth-rate of the French has enabled them to maintain themselves in a position of considerable influence.

Beginning with 1840, however, a system of government had been put into operation which to a considerable degree alleviated racial animosities, and it was possible about a quarter of a century later to take up seriously the question of political unity.

After these racial and religious rivalries had in a measure abated, the conditions of the country as a whole thus rather favored the establishment of a political system under which much larger powers could be given to any central government which might be established than it was possible to grant to a central government in the conditions existing in the United States in

1789. The country was, apart from racial and religious differences, really united. Geographical and economic differences hardly existed. The means of communication, which in 1867 were both good and abundant, and might be expected continually to improve, made it reasonable to expect that the different sections of the country would grow still closer together. It was, however, still true that in 1867 the Dominion of Canada was so extensive that local differences did exist for which provision must be made in the new government.

The result was that it seemed necessary to resort to the same device of "federal government" to which the Americans had had recourse in 1789. That is, the old provincial governments, which corresponded to the American states, were permitted to continue in existence, and over and above them was formed a central government called the Dominion government, which was to take the place in the new Canadian system which the United States national government had taken under the United States Constitution.

Furthermore, the same principle which lay at the basis of the American Constitution was applied in the new Canadian constitution. That is, the powers of one of the governments were enumerated while the powers of the other were presumed.

The British North America Act differed from the United States Constitution, however, in that the governments whose powers were enumerated were the state or provincial governments, while the government whose powers were presumed was the central or Dominion government. It is, of course, true that the British North America Act, in addition to enumerating the subjects as to which a provincial legislature "may ex-

clusively make laws," also enumerates a series of subjects with regard to which the Dominion Parliament may legislate. The act specifically says, however, that this enumeration is made "for greater certainty, but not so as to restrict the generality" of the legislative power granted to that body "to make laws for the peace, order and good government of Canada with regard to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

The main difference between the American Constitution and the British North America Act, so far as concerns the position of the two governments for which provision is made and their reciprocal relations, is then that the presumption in Canada is in favor of the central government, and that the provinces have only those powers expressly granted; while in the United States Constitution it is the powers of the national government which are enumerated, and the powers of the states which are reserved and therefore presumed. A glance at the enumerated powers of the provincial governments will show that the intention of the framers of the British North America Act was to confine the provinces to the exercise of powers, for the most part of a local administrative character. It is to be noticed that among these powers was not included the regulation of the private law governing the relations of individuals, one with another, except with regard to the "solemnization of marriage within the province," and with regard to "property and civil rights in the province." The legislative power of the province with regard to the private law and the relations of individuals is not, however, so great as it would at first appear to

be, since the British North America Act specifically mentions, as included within the legislative power of the Dominion Parliament, the subjects of banking, interest, bills of exchange, promissory notes, trade and commerce, and the entire field of the criminal law.

A comparison of the American Constitution and of the British North America Act, as they have been interpreted by the courts, would seem to produce the impression that:

The American Constitution attempted to give to the central government only those powers which experience was believed to have shown must be given to that government in order to permit the efficient management of what at the time were considered to be interests common to all the states; but that:

The British North America Act intended to confer all powers of government on the Dominion government which did not have reference to:

First—matter of purely local administration, such as provincial taxes, provincial debts, provincial charities, provincial works; and,

Second—the peculiar provincial laws and customs with regard to such matters as the solemnization of marriage and property and civil rights, which found their origin in provincial history and traditions. The Roman Catholic religion and the French race and law, which are such important characteristics of Canadian life, as we have seen, would seem to have made necessary this concession to local feeling.

The attempts made both in the United States Constitution and the British North America Act to determine the position of the two governments, established by the process of enumerating the powers which one or

the other of the governments was to exercise, has had the same result in both countries. It is a result which would seem to be inevitable.

This method of enumeration has made it necessary to grant to some judicial tribunal the power to determine whether an act of either the central or the state legislatures is in accordance with the constitution, whenever it is alleged in an action arising in the courts that a legislative act which it is attempted to apply, has been passed in excess of the powers of the legislative authority passing it. In the United States, as has already been said, this tribunal is the Supreme Court, which itself was established by the Constitution. In the case of Canada the British North America Act makes no provision for such a tribunal, but an act of the Dominion Parliament, as interpreted by the courts, provides that the judgments of the Dominion Supreme Court established by it shall be appealable to the Judicial Committee of the British Privy Council, if permitted by that body. In the United States the final authority for constitutional interpretation is thus an authority of the central government, one of the governments established by the Constitution. In the case of the Dominion of Canada that authority is an outside authority. The British North America Act provides also that the Governor-General may disallow the acts of the provincial parliaments. This power is frequently used in the case of legislation, which is regarded as illegal, or as not in harmony with the legislation of the Dominion Parliament, where there is concurrent power, or as affecting unfavorably the interests of the Dominion.

Both in the United States and in Canada, in the latter country notwithstanding the power of the Governor-

General to disallow provincial acts, this method of enumeration has seemed to necessitate the grant to a judicial authority, the power to interpret the fundamental constitutional act, and has led to an enormous amount of litigation and to the continual raising of extremely perplexing questions. It is a matter of great difficulty for any one who is not technically qualified, and who has not made an exhaustive examination of the decisions of the courts, to say whether either the central government or the local government may constitutionally exercise specific powers of government.

In the United States the difficulties which have arisen have been perhaps greater than those which have presented themselves in Canada. This is probably due to the facts that the line of decisions is longer there than in Canada, and that greater changes in economic and social conditions have taken place in the United States than in Canada since the adoption of the constitution. The Canadian constitution is, partly, at any rate, because it was adopted only fifty years ago, more closely in accord with existing conditions than the Constitution of the United States, as it was originally interpreted, may be said to be. The changes in conditions in the United States have been so great that the American Supreme Court has been obliged on several occasions to reverse or refuse to follow decisions which it once made, and which when made were in all probability suited to existing conditions. Although such action may have been, and probably was, necessary, it was nevertheless unfortunate. For it is difficult for the ordinary man in the street to understand how the same words meant one thing before 1860 and mean another thing now.

Many of the questions which under the method of

enumerated powers combined with judicial interpretation must be settled by the courts are, further, really more political than legal in character. In so far as this is the case their decision by a body which is primarily a court is unfortunate, since it gives a political complexion to a body which is and should be primarily judicial in character.

Canada has been saved much embarrassment in this respect, since the grant of the power of the final determination of these questions to a body like the Judicial Committee of the British Privy Council, which is in no way connected with either of the governments concerned, prevents decisions with regard to constitutional questions from becoming questions of practical partisan politics as has sometimes happened in the United States. It is hardly the case, however, that a thoroughly independent and sovereign country will be so situated that it will be either able or willing to refer its constitutional questions to an authority which is not a part of its own governmental system. If it adopts the American principle of the constitutional enumeration of governmental powers and their interpretation by the courts, it will be obliged in the nature of things to vest in some national domestic court the power to determine in specific cases whether the action of the different legislative bodies provided by the constitution is in accord with the provisions of that instrument. The exercise of such a power subjects the courts which have it to the strongest sort of political influences. Serious consideration will have to be given to the question whether the courts will be able to stand up against such a strain.

VI

FEDERAL GOVERNMENT IN AUSTRALIA

ABOUT a quarter of a century after the British colonies in North America adopted the federal form of government, a movement for a similar form of union reached its culmination in the British colonies at the other end of the world, far south of the equator. The year 1900 is marked by the passage of the Commonwealth of Australia Act, which formed a federal union of all the Australasian colonies except New Zealand.

At about the same time that the Americans were struggling to obtain the adoption of the Constitution of the United States the first Australasian colony was founded. In the year 1788 Captain Phillip took formal possession of Sydney Cove. This settlement of Australia may be said to have been one of the incidental results of the American Revolution. Prior to the independence of the American colonies the British government had adopted the practice of transporting to the American colonies many of those who had been convicted of crime. This method of disposing of criminals was satisfactory both to the colonies and to the mother country. On the one hand, it aided the colonies in solving the labor problem which was, as is usually the case in new countries, a difficult one. On the other hand, it permitted the mother country to dispose, often at a profit, of those who by reason of misfortune or evil-

mindedness were a burden upon her. It was finally believed to offer to the person transported an opportunity to reform in a new country and away from his former evil associations.

Transportation to America, however, became impossible after the American colonies achieved their independence, and Great Britain was, perforce, obliged to seek a new outlet for her undesirables. The establishment of a penal colony was thus the purpose of Captain Phillip's expedition.

The commission granted to Captain Phillip by the British Crown embraced the territory now forming the states of New South Wales, Tasmania, Victoria, and Queensland, as well as part of New Zealand and of the western Pacific. The original colony of New South Wales, as it soon came to be called, thus included within its limits all of eastern Australia. But influences came soon into play which caused a division of this vast dominion. The discovery that the new continent could be advantageously settled and cultivated by the white race thus caused new colonies to be established in parts of the continent not included in Captain Phillip's commission. Immigration into Australia of persons not convicted of crime soon began, and was greatly furthered at first by the economic distress in Great Britain which followed the conclusion of the Napoleonic wars, and later by the discovery of gold in Australia.

At first this immigration was for the most part directed to the district which now forms the state of Victoria. These free immigrants were not satisfied to be members of a colony whose penal character was still maintained, and in 1851 secured the separation of Victoria from New South Wales.

The northern district of New South Wales was eight years later, apparently partly for similar reasons, and also because by reason of its distance from Sydney and of its tropical character it needed special treatment, given a separate existence under the name of Queensland.

In the mean time, settlements of free colonists were made in the western part of the southern continent, which were formally recognized as British colonies in 1829 and 1834, respectively, under the names of Western and South Australia.

Van Diemen's Land, or Tasmania, as it came subsequently to be called, it was found, could be governed from Sydney with difficulty. This difficulty was due to its distance from Sydney, and also to the fact that it was from an early time made the place of confinement for incorrigible criminals. Tasmania was, therefore, at quite an early time accorded a somewhat special treatment and was recognized as a separate colony in 1823.

In these ways different colonies grew up in and about Australia quite independent of each other. Differences in climate due to difference in latitude, difference in rainfall, which had the result of making some districts much more arid than others, the distance of the separate colonies one from the other at a time when the means of communication were bad, and finally the difference in the character of the original settlers, caused differences in occupation and in general views which made the subsequent union of the Australian colonies a long and somewhat tedious process.

Attempts at such a union seem to have been made at about the time that the separation of the colonies

began. These attempts were, however, unsuccessful until the means of communication had so improved, through the building of railways and the improvement of navigation as a result of the use of the steamship, that reasonably easy intercourse was possible.

By the end of the nineteenth century great progress had been made in this direction. By that time all the continental colonies except Western Australia were joined together by the railway, and great fleets of coasting steamers offered an abundant and excellent system of transportation to most of the Australian cities, which for the most part were situated on the sea-coast. Finally a telegraph line had been constructed across the continent, with the result of bringing the outlying colony of Western Australia into close communication with the other colonies so far, at any rate, as concerned the transmission of intelligence. So important was the question of means of communication believed to be that Western Australia for quite a time refused to participate in the union unless a transcontinental railway was provided in order to insure communication by land between it and the other colonies.

As soon as this system of communication had been improved as described there were, however, few serious obstacles to political union except local pride and jealousy, which are so characteristic of isolation. As an Australian writer says:[1]

> Rarely has any group of states been so singularly marked out by nature for political union as are the six States of Australia. Though new countries whose whole life lies within a period characterized by great movements of the population of the old world, there is less diversity of nationality amongst them than is to be found in most

[1] Moore, *The Commonwealth of Australia*, second edition, p. 55.

European countries. Religious differences there are in plenty, but sectarian strife, though bitter enough, affects or interests but few. The State has been strictly unsectarian, and there has been no party of irreconcilables. The population has long been sufficient to enable an united Australia to stand with the nations of the old world; it was in 1900 almost the same as the population of the United States and the British North American Provinces at the time of their respective unions. In distribution of population the colonies satisfy the condition of union laid down by Mill that there should not be any one state so much more powerful than the rest as to be capable of vying in strength with many of them combined; and again we may glance at the successful union of the Canadian Provinces where the numbers of Upper and Lower Canada bore much the same relation to each other and to the other provinces as do the numbers of New South Wales and Victoria to each other and the other Australasian Colonies. The six states are the sole occupants of a continent and its adjacent islands with an extent of territory little less than that of Europe. There is no "No Man's Land"; the territories of the states are coterminous; every state on the mainland except Western Australia touches the borders of two of her sisters; South Australia touches four. The state boundaries are generally no more than conventional lines, and at the present day the judge who goes on circuit from Sydney (N. S. W.) to Broken Hill travels *via* Melbourne (Vic.) and Adelaide (S. A.), while a large part of New South Wales, the rich "Riverina," has its natural outlet at Melbourne (Vic.). Every state has an extensive coast-line well furnished with harbors unaffected by the seasons. The coast districts are the places of closest settlement, and from the first the sea has been the great highway of colonial traffic, so that the difficulties of internal communication and notably the absence of rivers, have not prevented intercourse between centers of communication. In all these respects the Australian Colonies greatly differed from the British Provinces of North America, which fell into four distinct groups, sharply severed from each other by natural obstacles and finding their access to the world by foreign outlets. The distances in Australia, it is true, are great—from Brisbane to King George's Sound is twenty-five hundred miles. But distance is a relative thing; to men who have made a journey of twelve thousand miles, and perhaps spent four months in the passage, two thousand miles traversable in little over a week is little more than neighborhood. . . . There is nothing in the life or occupation of the people to cause deep divergence among the states. The real conflicts of interest are between town and country rather than between state and state, and while the fact that a great part

of Australia is within the tropics would naturally tend to conditions of life there different from those in the temperate parts, there is no policy to which the colonies were more devoted than a "white Australia" with all that that implies. To the solution of the same problems of government—the holding of the public lands, the regulation of mining, fiscal policy, the relation of the state to religion, national education, and a host of others—the colonies brought the same stock of political ideas. They brought with them the same common law; they received and developed similar institutions.

The question may well be asked: Why was it that union was accomplished with so much difficulty and took so long a period of time? The answer must be that the union was not accomplished as the result of the application of force or as the result of any very great or vivid fear of foreign attack.

In the case of the United States it was the Revolutionary War which first really brought the American colonies together. In the case of the Canadian provinces there was to the south a powerful neighbor, the United States, "from whose territory had proceeded more than one act of hostility . . . and who in 1865 was flushed with military triumphs achieved for the cause of American unity in the teeth of what she regarded as the hostility of England."

Australia had no such dangerous neighbor, and was protected from foreign attack as a result of her membership in the British Empire, which practically controlled the sea. The political union of the Australian colonies was, therefore, even more than was the case with the United States and the Canadian provinces, the result of a conviction upon the part of the people of the country that there existed in Australia a social and economic community of interest with which their political system should be brought into accord. At the same time their

peculiar local history had fostered the development of local interests, prejudices, and jealousies which had to be taken into account.

Resort was therefore again had to the system of government called "federal government," which was based on the existence of two governments, the one a central government, the other the state government. Again also the attempt was made to fix the positions of these two governments and determine their relations to each other by the process of the enumeration of the powers of one of the governments concerned.

Notwithstanding the peaceful character of the union, perhaps in some measure because of that fact, state pride was strong enough to secure the adoption of the American principle that it was the powers of the central government which were enumerated, while it was the powers of the state governments which were reserved. But local and state pride having thus been satisfied, those responsible for the drafting of the Commonwealth of Australia Act proceeded to include within the powers of the new Commonwealth government some powers which, according to the British North America Act and the American Constitution, particularly the latter, are to be exercised only by the states or provinces.

In other words, the Australian conception of the extent of power which, under the local conditions existing in 1900, should be vested in the central government, is a much broader one than that adopted in the American and probably as well in the Canadian constitution. The greater economic and social unity of the country, which was due partly to its historical development and partly to the fact that the art of communication was more highly developed in Australia in 1900 than it had been in the

United States in 1789 or in Canada in 1867, made it desirable, if not necessary, to give to the new Commonwealth government of Australia wider powers than were recognized in 1789 as possessed by the United States national government, or were granted in 1867 to the Canadian Dominion government.

It will be remembered that the Constitution of the United States gives to the national Congress power to regulate only such commerce as is carried on with foreign nations and among the several states. The Commonwealth of Australia Act, while giving to the Commonwealth Parliament similar powers over "trade and commerce with other countries and among the states," adds specifically powers over most of the means by which commerce is carried on, such as banking, insurance, bills of exchange and promissory notes, and incorporation of companies, whether these means are employed in foreign and interstate commerce or not. This power of the central government is therefore wider than that of the United States national government, although it may not be any broader than that possessed by the Canadian Parliament.

In other respects, however, the power of the Australian Parliament is broader than that of the Canadian Parliament or the American Congress, since it includes complete control over both marriage and divorce.

Whether the power of the Australian central government is wider on the whole than that of the Canadian central government it is difficult to say. But it may safely be said that both the Australian and the Canadian parliaments have greater powers than the United States Congress. A hundred or more years of economic development, particularly in the domain of transportation,

have thus caused the evolution of a wider conception of central power.

The method of enumerating powers, which as we have seen is the method adopted in the Australian constitution for the determination of the position and relations of the two governments established, has led, as would be expected, to the necessity of providing an authority for the decision of the question whether the provisions of the constitution have been observed by either the central or the state parliament in the exercise of its powers of legislation.

The Australians were unwilling to follow the plan adopted in Canada of submitting such questions to the final decision of the Judicial Committee of the British Privy Council. Regarding such questions as peculiarly Australian in character, they wished to have them decided in Australia. It is the High Court of the Commonwealth of Australia which has the final power of decision in these cases. In other words, the system of the United States has been adopted which, as has been said, intrusts the decision of these cases to a tribunal of the central government, whose powers are under examination.

Somewhat the same difficulties have been found in Australia to be incident to this method of enumerating the powers of either one of the governments provided in the federal system, as have been experienced both in the United States and in Canada. Much litigation has resulted. Nice and close questions are continuously being raised. The law is very uncertain. And no one who is not technically qualified, and who has not made an exhaustive examination of the judicial decisions on the constitution, which are sometimes contradictory,

can speak with any degree of certainty as to the actual powers of either the central or the local government.

The experience of all of the three countries, which have attempted in this manner to distribute the powers of government under a federal system, would seem to prove that this method of enumerating the powers to be intrusted to one of the two governments in such a system must have as one of its necessary incidents the establishment of a judicial tribunal for constitutional interpretation. The grant of such powers of interpretation to a judicial body would, however, seem practicable and advantageous only in the case of peoples whose sense of legality is highly developed, peoples among whom there are judicial traditions of long standing; peoples, finally, who as a result of years of experience with their courts have great confidence in judicial integrity and wisdom, and on that account are willing to accept their judges' decisions on questions which are often political rather than judicial in character.

VII

THE SOUTH AFRICAN UNION

NINE years after the establishment of the Australian Commonwealth, the same general problem which the United States, the Canadian Provinces, and the Australian Colonies had attempted to solve was presented to the South African colonies of the British Empire.

The European colonization of this part of the world was originally begun by the Dutch, who used the Cape of Good Hope as a place where they might refit and revictual the ships employed by them in the East India trade. During the Dutch occupation there had been a considerable immigration into the colony from Holland. The Dutch population was also augmented by quite a number of French Protestants—the Huguenots—who had fled from France in order to escape the persecutions inaugurated in the reign of Louis XIV. The French Huguenots amalgamated with the Dutch, and under the name of Boers their descendants devoted themselves for the most part to agricultural and pastoral pursuits and solved such labor problems as presented themselves by enslaving the native black population, without whose labor it would have been difficult if not impossible for the country to prosper.

In 1806, as an incident of the Napoleonic wars, the

colony of the Cape of Good Hope was conquered and occupied by the British, to whom it was formally ceded in 1814. The government then established, like the Dutch government which preceded it, had few of the characteristics of representative government. All public powers were vested in a governor and council appointed by the British Crown.

Early in the nineteenth century there began in Great Britain an agitation for the abolition of slavery. Finally the British Parliament, about 1834, freed the slaves throughout the entire British Empire, and, largely because of the complete control which the mother country had over the government of the Cape colony, enforced the emancipation act in what seemed to the Boers a harsh manner. This action on the part of the British incensed the Boers, who believed that they were unjustly despoiled of their lawful property. Quite a large number of them therefore decided, in 1836 and 1837, to remove themselves and their possessions to the interior of the country beyond the jurisdiction of the British governor, where they might, unmolested by what they regarded as foreign oppression, live their lives according to rules of their own making.

One band of these emigrants established themselves in the fertile district along the coast, northeast of the Cape of Good Hope, which subsequently became known as Natal. Here they organized, in 1840, the Republic of Natalia. The British, who claimed that, as the Boers were British subjects, all settlements which they made belonged to the British Crown, sent a military force to Natal, conquered the Boers, and declared Natal to be a British colony.

Other bands of emigrants went still farther west

across the Orange River, and still others farther north beyond the river Vaal. In these districts they founded two more republics, known, respectively, as the Orange Free State and the Transvaal Republic. In 1848 the Orange Free State was annexed by the British, but in 1854 its independence was recognized. In 1852 also the independence of the Transvaal, under the name of the South African Republic, was recognized by Great Britain. The population of these states was, for the most part, composed of savage black tribes, with whom the white Europeans were in almost continual conflict. The European population was mainly Boer, but in both these republics, and particularly in the Orange Free State, there were quite a number of British.

The relations of these Boer states with Great Britain were on the whole not friendly. The Boers disliked the British, whom they regarded as their oppressors, while the British feared the effects of the policy pursued by the Boers toward the native black population, which was almost continually producing native wars. In 1867 the British therefore annexed the South African Republic whose independence it had recognized in 1852. In 1880 the Boers declared their independence, and after a short war that independence was recognized by Great Britain, subject to a somewhat undefined and unsubstantial right of suzerainty in Great Britain.

Finally, in the latter part of the nineteenth century the discovery of gold in the Transvaal led to a large immigration of foreigners into the South African Republic. The attempt on the part of Great Britain to exercise her right of suzerainty in order to protect what she professed to regard as the rights in the Republic of these foreigners, many of whom were of British national-

ity, brought about a second war between Great Britain on the one hand, and the two Boer republics on the other. The result of this war was the ultimate defeat of the Boers and the annexation of the two Boer republics, which took place in 1902.

The difference in nationality which characterized the various British colonies in South Africa, and the bitterness engendered by the more than half a century of veiled if not open hostility which had been incident to race rivalries, had made unavailing the early attempts at union, which had been made as far back as 1877. In addition to these obstacles to political union the various districts had been from a geographical point of view almost completely separated. Natal and the Cape of Good Hope were, it is true, connected by the sea, but the African coast northeast of the Cape does not present many good harbors. Apart from the sea the means of communication were very bad until the completion of railways which had come about only in comparatively recent times. In 1909, however, all the colonies were connected by railways, while in one or two instances branch lines led to points on the coast. In that year, apparently partly because of the belief that the colonies concerned had sufficient in common to justify their union, and partly in the hope that the union would be influential in causing the existing race hostility to diminish, the South African Union Act was agreed upon by the colonies concerned and was passed by the British Parliament.

The South African Union Act is based upon quite a different theory from that which lies at the basis of the constitution of the United States, Canada, and Australia. In the first place, it abandons the fundamental

idea of federal government. That is, it does not attempt to provide in the constitution for two governments whose powers are determined by enumerating the powers of one and reserving all other powers to the other. On the contrary, the South African constitution gives to the Union Parliament full and complete legislative power for the peace, order, and good government of the Union. This general grant of power is further not really limited by the grant of specified enumerated powers to the provinces, the name provided by the act for the former colonies which are united by it. The act does, it is true, give such powers as that of local taxation and of borrowing money for provincial purposes to the provincial councils, which take the place of the former colonial parliaments. But the exercise of most of these local powers must be made with the approval of the Governor-General of the Union, or in accordance with rules and regulations to be laid down by the Union Parliament.

In the second place, in order to continue in existence the provinces as they were at the time of the union, it is provided that all the laws in force in the colonies at the time of the establishment of the Union shall continue to be applicable in the respective provinces until amended or repealed by the Union Parliament or the competent provincial council.

Finally, the Union Parliament is authorized to delegate its powers to the provincial councils.

The method provided by the South African Union Act for determining the relations of the central and provincial governments consists then, in ultimate analysis, in the maintenance for the present of existing conditions subject to amendment by the central legislature. It has the great advantage that it makes unnecessary

any attempt to fix the permanent position of either the central government or the province. It also does not require for its successful execution the establishment of a judicial tribunal for the determination of questions of constitutional power, accompanied by all the disadvantages which the exercise of such powers has been shown to entail.

Finally, it is to be remarked that local rights are not liable to be infringed, since existing colonial law is continued until modified by either Union or provincial legislation. The equal representation which each province is accorded in the Union Senate may be relied on to prevent any centralization of government which is not approved by the provinces. On the other hand, the power which each province is inferentially recognized as possessing to change existing laws may not be made use of to the disadvantage of national unity and of the common interest. For all acts passed by the provincial councils must, to be valid, receive the approval of the Governor-General of the Union.

It may perhaps be said with propriety that such was substantially the form of government proposed for the United States by Alexander Hamilton to the convention which met in 1787. Its adoption was prevented by the prevalent states' rights feeling of the day.

This sketch of one hundred and twenty-five years of federal government would seem to show:

First. That there has been a continuous and persistent tendency to expand the powers of the central government, and to curtail those of the provinces or states. Almost each one of the confederate constitutions which have been adopted since the Constitution of the United States was framed has widened the sphere of activity

of the central government. Even the United States has been subjected to these centralizing influences. Constitutional amendments and judicial decisions have, on the one hand, curtailed the powers of the states, and on the other enlarged those of the central government. Improved methods of communication have produced everywhere a larger measure of economic unity. More common interests have developed which have demanded for their satisfactory treatment, harmonious and uniform action. These changes in economic conditions have necessarily involved as a consequence the adoption of a wider conception of central power and the grant of larger powers to the central government.

In the second place it is to be noticed that the latest constitution attempting to fix the relations between a central government and provincial or state governments has abandoned the original American idea of federal government; that is, the enumeration in the constitution of either the powers of the central government or those of the provincial or state governments.

It is perhaps impossible to say why the system of federal government has thus been abandoned. Any one who is acquainted with the details of American, Canadian, and Australian constitutional law will, however, immediately call to mind the difficulties attendant upon the attempt to differentiate central from state powers. This attempt has involved the establishment of a court of some sort with power to declare unconstitutional acts of legislation passed in excess of constitutional power. This method of constitutional interpretation has, as we have seen, led to uncertainty as to what are the powers of either the central or the state governments. In the United States it has had particularly

unfortunate results. At the present time in this country it is impossible to state with any degree of certainty until the Supreme Court has rendered its decision—this is seldom handed down in less than two or three years after the question is raised—whether any act of Congress or of a state legislature levying a new tax or imposing a new regulation of property or business is in accordance with the Constitution or not. This result is unfortunate, not merely because there is uncertainty with regard to the law, but also because a disrespect for law is encouraged. The fact that an act passed by a legislature is not for a long period regarded as having the full force of law tends to cause many unthinking persons to display disregard for all law. Such a method of solving the question is unfortunate, furthermore, because it imposes political duties on courts.

Whether it was the experience of the United States, and to a lesser degree the similar experience of Canada and Australia, which led the framers of the South African Union Act to abandon the whole idea of federal government with its incidental establishment of a judicial tribunal for constitutional interpretation, it is impossible to say. Certain it is, however, that the plan which they adopted will enable them to escape the evils incident to that form of government.

The consolidation of constitutional power in a central parliament which is characteristic of the South African Union Act will enable South Africa, through the action of one organ of the government, to adapt its political organization to its actual conditions as they change from time to time. When the means of communication improve, and, as a consequence, more matters become of common interest to the whole South African

people, the Union Parliament may at once and definitely make the necessary provision for their regulation.

Furthermore, the fact that the Union Parliament has practically all legislative power does not make it necessary that all matters shall be centralized and subjected to a uniform regulation. The act authorizes the Union Parliament to delegate its powers to the provinces. The act also continues in force in each of the provinces the laws therein existing at the time of the union, until such laws are changed by act of the Union or of the competent provincial council.

Little fear need be entertained of over-centralization. For the equal representation of the provinces in one house of the Union Parliament, and the fact that every member of the other house comes from a provincial district, will permit the demands of local provincial opinion to make themselves both heard and felt.

What now are the lessons which may be derived from the recent experiences in constitution-making which are applicable to present-day conditions in countries of great extent?

In the first place, it would seem that the modern constitution should abandon the attempt, now apparently discredited, to form a distinctly "federal government." That is, it should not attempt to enumerate the powers of either a central government or of provinces.

The reasons for this conclusion are:

First. Any enumeration of this sort which may now be made will have soon to be changed, no matter how successful it may for the time being be. For all countries, and particularly those which are undeveloped, would appear to be subject to great economic and social

changes which will greatly modify existing conditions. It is hardly to be doubted that in the very near future great improvements in navigation on both sea and river, will be made in each country. It is just as certain also that in the next few years many railways will be built, and it is to be expected that their construction will be accompanied by the building of many subsidiary means of communication. All these enterprises can hardly fail to do away with the isolation which is now characteristic of many local communities, and interests common to great sections and even to the whole of a country will develop which cannot be effectively cared for by any provincial action, however intelligent.

The changes which under such conditions are likely to be made will not, however, be confined to mere improvement in the means of communication. Many undeveloped countries, if we may believe the reports of those who have made even a superficial examination of them, have coal deposits and other mineral resources which will be developed.

Finally, all thickly populated countries are potentially consuming countries. There is every reason to believe that at no far distant time factories and other industrial enterprises will be established in many countries where they are not now to be found for the domestic manufacture of commodities which are now imported from abroad.

The development of such undertakings can hardly fail to have the effect of so changing existing economic and social conditions as to make any attempt now to regulate in detail the distribution of powers between a central government and provinces a futile if not a dangerous one. Such an attempt will be futile, since

a change in conditions will make necessary a change in the distribution of powers, and may be dangerous if constitutional amendment is made at all difficult. For the delay incident to such change may imperil the success of a movement from which a country would derive much benefit.

Second. The experience of the United States, Canada, and Australia has shown, as has been said, that the successful distribution in a written constitution of the powers of government between a central government and provinces has been accompanied by the grant to some sort of a judicial body of the power to declare unconstitutional the acts of either national parliament or state or provincial legislature. The exercise of such a power, it has been shown, has been followed by bad results in that the law has been made uncertain, and has also in the opinion of many lost to a degree the respect of the people on that account. Nothing is more important at the present time in most countries than to remove the courts from the influence of politics to which the exercise of such power necessarily subjects them, and to encourage among the people in every way possible respect for the law.

The second lesson, which it would appear may be derived from the experience of the last century, is that without resort to the device of "federal government" the relations of the central government and the provinces may be so regulated that on the one hand national unity may be preserved, and that on the other local autonomy be established.

The general legislative power of the country may be vested in a national parliament, which, however, will be recognized as having the right to delegate the exer-

cise of its powers to any provinces which may be established. All the laws regulating the organization and powers of provinces in force at the time of the adoption of the constitution may be continued in force until changed by the action of parliament or of the provincial authorities. If, furthermore, the province be recognized as possessing the power to pass laws which will be operative within its limits until parliament shall have taken action, provision will be made both for the continuance in the immediate future of existing conditions, and for a gradual development in accordance with changes in circumstances, and ample opportunity will be insured for all necessary local action. All requisite protection for national unity will be provided if it is enacted that the laws passed by the provinces in the exercise of these powers must secure the approval of the national executive before they become operative, and are subject to repeal at any time by parliament.

Such would seem to be the lessons which may be derived from a study of the most recent constitutions, so far as that study is applicable to the problem of determining the relations between a central government and provincial or state governments.

VIII

THE AMERICAN CONCEPTION OF EXECUTIVE POWER

MOST modern European states have an organization which is based upon the general principle that there should be three somewhat distinct governmental authorities. These authorities are ordinarily spoken of as executive, legislative, and judicial.

The position which these authorities occupy in the governmental system and the relations which they bear to one another are in large measure dependent upon the historical development of the particular country. In general, however, it may be said that the evolution of European constitutional government must be traced from a time when all powers of the state were centered in an absolute monarch. This monarch was at the same time the legislative, the executive, and the supreme judicial authority in the state.

In the course of time special authorities developed with the consent of which or through which all royal powers were exercised. The fact that particular methods were thus devised for special manifestations of the royal power had the necessary effect of subjecting the exercise of that power to limitations which greatly diminished the sphere of arbitrary and discretionary royal action. This result was reached in most cases through armed resistance to royal authority, which in many European countries was accompanied by revolution and civil war.

At the end of the eighteenth century Great Britain was the only European country in which this evolution had taken place. The British government of that time was based on the following principles:

In the first place, it was recognized that only with the consent of Parliament might the Crown regulate the legal relations of the people one with another or impose burdens or duties upon them. Parliament was a body which had sprung up that was more or less representative of the people. Its development will be noticed in succeeding chapters. The constitutional theory, however, still was and even now is that this power of regulation, which has come to be known as the legislative power, is exercised by the Crown. Thus the enacting clause of all British laws is as follows: "Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows":

In the second place, the decision of controversies to which individuals were parties was to be made in the name of the Crown by judges who were accorded a position of independence over against the Crown. This independence was secured by the fact that judges were appointed during good behavior, and might be removed only by action of Parliament. Here again it was the legal theory that it was the Crown which rendered the judgment, acting, however, through the judges. All writs and proceedings taken in the course of suits before the courts held by these judges ran, therefore, in the King's name.

Finally, inasmuch as the royal person was inviolable and irresponsible, since, as the English law expresses

it, "The King can do no wrong," some one who legally could do wrong must assume responsibility for every royal act. Thus was developed the doctrine of ministerial responsibility which made it necessary that a minister—a royal servant—should countersign every act of the Crown, and by so doing assume responsibility therefor. If wrong had been done by the act—*i. e.*, if it was illegal—the minister who had countersigned it had to assume the punishment for the illegality provided by law. In olden times this responsibility was a large one, and more than one minister had lost his head for countersigning an illegal act of the Crown.

Continental political writers of the eighteenth century, among whom a French philosopher, Montesquieu, is particularly to be mentioned, were inclined to regard English institutions as based upon the recognition of three general forms of government—*viz.*, the legislative, executive, and judicial. From a practical point of view, however, what was thus called the legislative power was the power exercised by the Crown acting with the consent of Parliament; what was called the judicial power was the power exercised by the Crown acting through independent judges; while what was called the executive power was the power exercised by the Crown acting neither with the consent of Parliament nor through independent judges, but merely subject to the responsibility of some minister. In England no serious attempt was made, certainly in the law, to give these names to the different manifestations of royal power. Almost the only really legal distinctions which were made had to do with what was spoken of as the "prerogative of the Crown"; that is, the power which the King might personally exercise without the

consent of Parliament, but subject to the principle of ministerial responsibility.

The theory of the "Separation of the Powers of Government," as Montesquieu's theory was called, thus had little influence on the English law. The English were content to consider apart from any general theory the concrete facts of their political life, and saw merely the actual powers of Parliament, the actual powers of the judges, and the actual powers left to the Crown, as they were determined by English law and custom.

The legal theory of the English government at the end of the eighteenth century was then that the Crown was not an authority of enumerated powers, but possessed all governmental power subject to limitations, mainly as to the method of its action. The Crown, therefore, had the power to do anything that it was not forbidden to do, provided its method of action was legal.

In Great Britain the limitations imposed upon the royal power were not to be found in any one written document, but were the result of acts of ordinary legislation and of precedents which had been made, and of customs which had been followed. When, however, the British colonies in North America obtained their independence their inhabitants endeavored, for perhaps the first time in the history of European constitutional development, to incorporate into one written document the political organization which they intended to establish. It is, however, of course true, as has been pointed out, that the Commonwealth of Cromwell, which lasted only a few years, was based on the so-called "Instrument of Government."

The adoption of the idea of a written constitution was

not the only or even the most important departure which the Americans made from British precedent. They made also serious modifications in the whole theory of British constitutional government. At the time the American colonies declared their independence all existing ideas of royal sovereignty and monarchical government thus were abandoned. The new political system which was subsequently established was based squarely on the idea of popular sovereignty. Thus the first constitution of the State of New York, adopted in 1777, after reciting the fact that "the good people of the said colony . . . reposing special trust and confidence in the members of this convention," have appointed, authorized, and empowered them "to institute a new government," goes on to say:

"The convention therefore in the name and by the authority of the good people of this state doth ordain, determine and declare" what follows.

Many of the early state constitutions, like the first constitution of New York, were not submitted to a vote of the people of the states. Later, however, such submission became the rule, and the enacting clause of the present American state constitution has come to read, "We the people of the State of —— do ordain and establish the following form of government," or some such words. The present Constitution of the United States also contains a similar clause. It reads: "We the people of the United States . . . do ordain and establish this Constitution for the United States of America."

The transfer of the theoretical sovereignty from the Crown to the people, which was accomplished in the United States, has had an important effect upon the

position in the governmental system of the executive, and, indeed, on that of the legislature. For there could be no presumption in favor of the power of either executive or legislature except in so far as it was to be derived from the Constitution. This document was, it will be noticed, the expression of the will of the sovereign people as to the form of government.

The whole American constitutional theory was also much influenced by the theoretical political scientists of the day, chief of whom was Montesquieu. His theory of the separation of three powers of government was, in the opinion of the thinking public of that time, the basis of all free government. It was therefore incorporated into practically all the early state constitutions. Thus the first constitution of the State of New York provided in one article: "That the supreme legislative power within this state shall be vested in two distinct bodies of men . . . who shall form the legislature."

Another article declared "That the supreme executive power and authority shall be vested in a governor."

No such precise article disposed of the judicial power, but various sections provided for judges who should hold their offices during good behavior.

Other early state constitutions, however, made more specific and precise provision for the exercise of judicial power, and as well for the application of the principle of the separation of powers. The Constitution of the United States also adopted twelve years later, after providing that "all legislative powers herein granted shall be vested in a Congress of the United States," and that "the executive power shall be vested in a President," goes on to say in another article that "the judicial power of the United States," which itself is described

in the Constitution, "shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish."

In the early American state constitutions little if any attempt is made to define the "supreme legislative power" given to the legislature. But the clause granting the "supreme executive power and authority" is followed by an enumeration of powers which its possessor, the governor, may exercise. In the United States Constitution, similarly, the general grant of the executive power to the President is followed by an enumeration of specific powers. It is, of course, true that the powers of Congress are likewise enumerated. But the enumeration in this case is made for the purpose of securing a distribution of powers, as between the central government and the state governments, and the words vesting the legislative power of the United States in Congress are significant as impliedly denying to any other authority the right to exercise them. The Constitution says expressly that "*all* legislative powers herein granted shall be vested in a Congress of the United States."

This attempt, made in the early American constitutions to distribute what at the time were regarded as separate powers of government, has had important constitutional results.

In the first place, the American Executive—governor or President—is, different from the British Crown, an authority of enumerated powers. The courts when called upon in specific cases to decide whether he has the power to act or not have held that the general statement that "the executive power" shall be vested in him, has little if any legal effect, and that for the most

part it is to be explained by the powers which are later specifically mentioned.

The executive power in the United States is, therefore, quite different from what it is in England. The holder of it is for the most part merely to exercise the powers which have clearly been given to him by the Constitution, and the Constitution itself is regarded as a grant of power not otherwise possessed, rather than as a limitation of power already in existence.

In the second place, the fact that the legislative power is granted in the American state constitutions to the legislature in general terms not followed by an enumeration of specific powers, and the necessity that some disposition, either positive or negative, shall be made in the constitution of all the sovereign powers of government, have led the American courts to the conclusion that the American state legislature is an authority of general and not enumerated powers. That is, the state legislature may do anything which it has not been forbidden by the constitution to do, or the doing of which has not been intrusted to some other authority. Inasmuch, however, as the executive power has been specifically granted to the governor and the judicial power to the courts, the legislature may not, if not expressly authorized so to do by the constitution, perform what are regarded as either executive or judicial acts. In determining what is the legislative power of the state legislature the courts of the United States have also been influenced by British precedents. What the British Crown might do in Parliament, the state legislature may likewise do where no provision of the constitution prevents.

The fact that American courts have the right in the

proper way to declare unconstitutional any governmental acts, even the acts of the legislature, when in their opinion such acts violate the constitution, has resulted in a host of decisions as to what are, respectively, legislative, executive, or judicial acts. What was in England merely a general principle of political science, to be observed where it produced no serious inconvenience, has thus become in the United States a rule of law applicable in the proper case by the courts. By this rule the legislature may not do an executive or judicial act, the executive may not do a legislative or judicial act, and the courts may not do a legislative or executive act, unless the constitution in the specific case has made an exception to the principle of the separation of powers.

The difficulty of finding a satisfactory standard by which the inherent character of specific acts of governmental power may be judged in accordance with the principle of the separation of powers, the differences in the various state constitutions, and the divergent decisions of the courts, which have been called upon to express their opinions, have, however, led to endless trouble. It is practically impossible for the student to derive from an examination of the judicial decisions upon the subject any but the most general ideas with regard to the nature of legislative, executive, or judicial power. Certainly it may not be said that the courts have been able to work out anything in the nature of a scientific theory on the subject, which is not subject to numerous exceptions.

The early American state constitutions, and particularly the United States Constitution of 1789, are extremely important documents in the general history of con-

stitutional government. It is, of course, true that they are all based on English institutions, as those institutions existed at the end of the eighteenth century, but they were also profoundly influenced by the idea of popular sovereignty and the French doctrine of the separation of powers. But it may truthfully be said that the clauses in these constitutions, which treat of the executive power, embody the first attempt made by men of European origin to express in legal form their ideas as to the content of that power. These clauses are interesting both on this account and because the United States Constitution itself has had a great influence on subsequent constitutional development. They are therefore particularly worthy of study.

The United States Constitution, as we have seen, vests the executive power in a President. The meaning of the power thus granted is, however, to be obtained from the powers subsequently specifically enumerated. These are:

1. The power to appoint all officers of the government except inferior officers, who, if so provided by law, may be appointed by their superiors or by the courts. This power, where not otherwise provided by law, is to be exercised with the approval of the Senate. No mention is made in the Constitution of any power of removal from office. All that is said with regard to the termination of office is contained in the provision with regard to impeachment, which is applicable to all civil officers, and that giving the judges a term of office during good behavior. The practice is, however, that the President has the power to remove arbitrarily almost all civil officers of the United States, not judges. This power has been recognized as belonging to the President as a part of the executive power granted to him.

2. The power of military command, not including the power to declare war, nor any power to declare a state of siege or martial law.

3. The diplomatic power which consists:

(a) of the power to receive ambassadors and other public ministers, thus impliedly including the power to recognize new governments; and

(b) The power to make treaties with the consent of the Senate, to be given in this case as the result of a two-thirds vote of the members present.

4. The power to grant reprieves and pardons for offenses against the United States except in cases of impeachment.

5. Powers affecting Congress and consisting

(a) of the power to convene both Houses of Congress or either of them on extraordinary occasions.

(b) of adjourning them in case of disagreement between the two houses with respect to the time of adjournment.

(c) of the power to veto or disapprove of all acts of legislation, such disapproval not having any effect in case the act disapproved is re-enacted by a two-thirds vote of each House of Congress.

(d) of the power to send messages to Congress containing such information and recommending such measures as he shall judge necessary and expedient.

It will be noticed, first, that the President has no power of prorogation or dissolution; second, that he

has no formally recognized power of initiating law; third, that no provision is made for responsible ministers;[1] and, fourth, that the appointment by the President of certain, generally the more important, officers must be approved by the Senate, which also must approve the treaties which he makes.

The omission of the first two of these powers, which did, as a matter of fact, belong to the British Crown, is due to the influence of the theory of the separation of powers. The omission of any mention of responsible ministers is due to the fact that the President is not recognized by the Constitution as irresponsible. The provision for senatorial approval of presidential appointments is probably exclusively of American origin, and is due to the fact that the Governor's Council in colonial days exercised a somewhat similar control over the colonial governor.

It is to be noticed also that no power of ordinance or regulation is given to the President. Such a grant of power would have been regarded at the time as inconsistent with the great principle of the separation of powers. While no serious attempt has been made to derive such a power from the general grant to the President of the executive power or from the duty expressly imposed upon him to see that the laws be faithfully executed, the more recent decisions of the Supreme Court would seem to recognize that Congress may delegate to the President the power to issue regulations having the force of law where such regulations are intended to aid in the execution of laws already in existence. This is the only power of regulation which the

[1] It may be said that the Constitution expressly forbids officers of the government to be members of Congress.

President of the United States may have under the Constitution, and its extent is thus entirely dependent on legislation.

It is usually considered that the duty which is imposed upon the President by the Constitution, "to see that the laws be faithfully executed," authorizes the Congress to impose duties upon the President which he is obliged to perform. As a matter of fact, many powers and duties of a special character are thus conferred or imposed by Congress upon the President. During the Civil War thus Congress authorized the President by proclamation to suspend the privilege of the writ of habeas corpus. The effect of the suspension which followed was almost equivalent to the declaration of martial law, since persons imprisoned by executive action found it practically impossible to get their cases before the courts.

It is to be noticed finally that the Constitution of the United States specifically provides that no money shall be drawn from the public treasury except in consequence of appropriations made by law.

The American conception of executive power as contained in the Constitution was thus distinctly that of a power to execute the law through the discharge of specifically enumerated functions, such as the appointment, removal, and direction within the limits of the law of administrative officers. On the one hand, it included hardly any powers of control or influence over legislation or over the legislature. On the other hand, while generally free from legislative control, it was subjected to such a control in three instances—*viz.*, the appointment of officers, the making of treaties, and the necessity of obtaining the consent of Congress for the

expenditure of public moneys. The President, finally, was an authority of enumerated powers to be found in the Constitution and was not made irresponsible. Such is the conception of executive power to be found in the Constitution of the United States.

IX

THE EUROPEAN CONCEPTION OF EXECUTIVE POWER AND PARTICULARLY OF CABINET GOVERNMENT

THE French constitution of 1791, which was the first written constitution of modern Europe, was based on the same general principles as the then existing American constitutions. In the "Declaration of the Rights of Man and of the Citizen," which prefaces this document, it is stated that "the representatives of the French People being organized as a National Assembly," the National Assembly recognizes and declares certain enumerated rights, and, "wishing to establish the French constitution on the principles which it has recognized," abolishes certain privileges. In the main body of the constitution thus established it is stated that "sovereignty belongs to the nation; no section of the people, no individual can attribute to himself its exercise." The constitution further "delegates"—this is the word which is used—the legislative power to the National Assembly and, as the government is to remain monarchical in character, the executive power to the King; and the judicial power to judges to be elected for a term by the people.

Subsequent sections define both the legislative and the executive powers by granting the exclusive exercise of a series of specific powers to the assembly and of another series of powers to the King.

Although this constitution was in force only a few months, it is interesting both as evidence of the adoption of the American idea of popular sovereignty with the consequent change in the position of the Crown, and as indicative of the desire on the part of constitution-makers to distinguish and define the three powers of government.

After the restoration of the monarchy, in 1814, the idea of popular sovereignty was abandoned in France, both the constitutions of 1814 and 1830 purporting to have been made and put in force by the Crown. None of the subsequent French constitutions, except the republican constitution of 1848, is explicitly based upon the theory. Furthermore, few, if any, of the monarchical constitutions which were framed in Europe during the nineteenth century, except the Belgian constitution of 1830, have recognized the principle, although it is expressly mentioned in the republican constitution of Switzerland.

But the attempt is often, indeed generally made, in even the monarchical constitutions of Europe, to distinguish a legislative power which usually without definition is given to a parliamentary body of some sort acting in conjunction with the Crown, and an executive power which is given to the Crown. The grant of this executive power is not infrequently accompanied by an enumeration of a series of powers which the Crown is expressly authorized to exercise. This is true, thus, of the constitutions of Belgium, Prussia, Italy, and Spain.

A perusal of the provisions enumerating the powers of the Crown in some of the more important European constitutions of the nineteenth century will show also

that the general conception of the framers of the Constitution of the United States, with regard to the executive power, was held as well by European publicists.

Thus the ill-fated French constitution of 1791 states that the supreme executive power is vested exclusively in the King, who is declared to be the chief of the administration, and is intrusted with the duty of maintaining public order and peace and the external safety of the kingdom. It then proceeds to give the King:

1. Wide powers of appointment of officers subject to no legislative control. Among the officers so appointed were the ministers, whom the King may also remove.

2. The power of military command, but no power to declare war without the consent of Parliament. Power to declare a state of siege or martial law is not mentioned.

3. A diplomatic power including the power to make treaties subject to the ratification of Parliament.

4. Powers affecting Parliament consisting of:

   (a) The power to call special sessions.

   (b) The power to disapprove the acts of legislation, such disapproval having no effect in case two successive legislatures re-enact the bill disapproved.

As the person of the King is made inviolable every act performed by him must be countersigned by a responsible minister.

It will be noticed that no power of ordinance or regulation is clearly mentioned among the specific executive powers enumerated, nor is there granted to the King any power of dissolving Parliament. Finally, the King has no power of initiating legislation. He "may only

invite the legislature to take some proposition under consideration," a power similar to the power of the American President to send messages to Congress.

All the written French constitutions subsequent to that of 1791 and prior to the constitution of 1814 were republican constitutions. The next monarchical constitution was that granted by Louis XVIII. in 1814. This constitution states that the executive power belongs to the King, who has the power of military command, and may declare war, make treaties, appoint all public officers, and issue regulations and ordinances necessary for the execution of the law and the safety of the state. The King is also to exercise legislative power in conjunction with the legislature, each having practically the power to initiate legislation. But the approval of the King is necessary to the validity of any legislative action of the Parliament. The ministers of the Crown are responsible since the person of the King is said to be inviolable and sacred.

The general position of the Crown remained about the same in the constitution of 1830. In both of these constitutions, it is to be noticed, express mention is made of the power of ordinance for the execution of the law. That of 1814 adds "for the safety of the State," while that of 1830 inserts the proviso that these ordinances may not "suspend the laws or dispense with their execution." The revival of the idea of royal sovereignty would seem to be responsible for this extension of the executive power possessed by the King.

In 1830, also, the newly established kingdom of Belgium adopted a constitution which has had great influence on the constitutional development of Europe. This constitution provided, as has been said, for popu-

lar sovereignty, and distinguished also between the legislative power which was to be exercised conjointly by the King and the Parliament, and the executive power "as it is fixed by the Constitution," which was given to the King. His powers are, however, enumerated. These are:

1. A wide power of appointment, including the power to appoint ministers. As the King is sacred and inviolable the ministers are made responsible.

2. A power of military command, including the power to declare war.

3. Diplomatic powers, including a power to make treaties subject to legislative control.

4. A power of pardon except in the case of ministers.

5. Powers relative to Parliament. These consist of:
   (a) Power to dissolve and adjourn Parliament.
   (b) Power to initiate law.
   (c) Power to disapprove acts of legislation which results from his participation in the exercise of legislative power.

6. Power to issue regulations necessary to insure the execution of the laws, provided, however (the words of the French constitution of the same year being used), that this power is not used in order to suspend the laws nor dispense with their execution.

Finally, the constitution says that "the King has no other powers than those expressly given him by the constitution and by laws passed in accordance with the constitution."

Most of the other monarchical constitutions contain very similar provisions, but few, if any, are so explicit as to the fact that the Crown finds the origin of its powers in the written constitution.

Finally, the present French republican constitution is framed along the same lines. The President has:

1. A wide power of appointment and removal of officers.
2. The military power, but no power to declare war.
3. The diplomatic power subject to a legislative control over the making of treaties and the declaration of war.
4. The power of pardon.
5. Powers with regard to Parliament consisting in
   (a) Power to dissolve the lower house with the consent of the Senate.
   (b) Power to initiate law.
   (c) Power to demand merely a reconsideration of a law, but no power of disapproval.
6. Power to adopt ordinances and regulations in execution of the laws.

The President is, like a king, recognized as irresponsible except in case of treason, but his ministers are responsible both individually and collectively.

What is often spoken of as the French constitution is not, however, strictly a written constitution. Most of the powers of the governmental authorities are, it is true, provided for in the three constitutional laws of 1875. But these laws are not comprehensive nor exhaustive. It is necessary, in order to determine exactly what are the powers of the French President, to examine both the preceding constitutions of France, whose provisions, so far as not repealed or amended by the constitutional laws of 1875, are often even now important sources of power. Acts of legislation must also be consulted. Thus the French President has wide powers of substantive legislation with regard to certain of the

French colonies, which find their origin in legislation, constitutional in character, passed in 1852.

Partly by reason of this fact, and partly because of the provision in one of the constitutional laws of 1875 giving to the President the power to "watch over and ensure" the execution of the laws, the French President has somewhat the same ordinance power which was recognized as possessed by the King in the earlier monarchical constitutions of France.

The first attempt to introduce constitutional government into Asia was made in the Japanese constitution.

This constitution, following the ordinary European monarchical constitution, provides for monarchical rather than popular sovereignty, but particularly states that the Emperor, who is sacred and inviolable, shall exercise his rights of sovereignty according to the provisions of the constitution. One of these provisions is to the effect that his acts must be countersigned by ministers, who are responsible for the acts they countersign.

The Japanese constitution adopts the idea of enumerating the powers of the Emperor. These are:

1. A wide power to appoint and dismiss officers. Indeed, the Emperor may fix the administrative organization and official salaries except as provided by the constitution or by law.

2. The treaty-making or diplomatic power not subject to limitation.

3. The power of military command, including the power to organize the military forces in time of peace, and that of declaring war, and a state of siege in accordance with the law.

4. Power of pardon.

5. Powers relating to Parliament consisting of
   (a) The power to disapprove all acts of legislation.
   (b) The power to summon, close, and prorogue Parliament and to dissolve the lower house.
   (c) The power to initiate law, since the legislative power is by the constitution vested in him conjointly with the Parliament.

6. The power, when the Parliament is not in session, and in case of urgent necessity, to issue ordinances in place of the law, in order to preserve the public safety and to avert public calamities. Such ordinances are to be laid before Parliament at its next session, and if Parliament does not approve of them the government must declare them to be invalid for the future. In addition to these ordinances the Emperor may issue ordinances, not contrary to law, which are necessary for the execution of the laws, the preservation of public peace and order, and for the promotion of the public welfare.

The Japanese conception of the executive power possessed by the Emperor thus differs from the European conception, mainly in that a considerably wider power of ordinance and regulation is recognized as included within it. The Emperor may also declare war and make treaties without the consent of Parliament.

It will be noticed that the conception of the executive power to be found in the United States Constitution is much the same as that formulated by the subsequent constitution-makers of Europe. The only really essential points of difference are as follows:

1. The powers, such as dissolution which the European executive commonly has over the legislature;

2. The recognition in the executive of a power to pass regulations or ordinances, for the most part merely in execution of law. Such a power, however, it will be remembered, may constitutionally be, and, as a matter of fact, frequently is, granted to the President of the United States by act of Congress.

3. The European constitutions also commonly provide, because of the irresponsibility of the executive, for the countersignature of his acts by a responsible minister. No such provision is made in the Constitution of the United States, since the President is not declared to be irresponsible.

There would appear then in the constitutional provisions of most of the monarchical states of Europe the basis for a conclusion as to the character of the executive power similar to, if not identical with, that reached in the United States—*viz.*, that while the legislative power is general in character, the executive power simply consists of the right to exercise the powers enumerated in the constitution.

As a matter of fact, however, a different view is often held. Thus in Germany, and to a certain extent also in Italy, the Crown is, like the British Crown, regarded as having wider powers than those enumerated, and the constitution is more in the nature of a limitation than a grant of power. The question arises how is it that a different view is taken? The answer is to be found in the facts that historically the Crown was once supreme, and that a different development has taken place in most European states from that which is noticeable in the United States.

It is, in the first place, to be remembered that the American idea of popular sovereignty is, apart from

Belgium and Switzerland, not clearly expressed in European constitutions. The old view which was held in England at the end of the eighteenth century, and is even still held—*viz.*, that the Crown, which once possessed all powers of government, still possesses inherent rather than delegated powers, that the constitution is, so far as the royal power is concerned, a limitation of existing powers rather than a grant of power not already possessed, seems to have come into force again with the conservative reaction that followed the French Revolution. The Crown thus has something more than the executive power described in the constitution. This idea has had some influence even on the present republican constitution of France.

In the second place, European development differs from American development in the two following particulars:

In no country in Europe have the courts, even where permitted, exercised freely the power to define the exact meaning of the constitution through, for example, the declaration that acts of the legislature are unconstitutional. The whole principle of the separation of powers, and to an extent as well the principles governing the position of the Crown or executive, are in Europe principles of a theoretical political science rather than rules of law enforceable in the courts. Violations of such principles, if such exist—that is, if they are to be derived from the provisions of the constitution—cannot so easily be made the ground for action in the courts. Thus we do not find in judicial decisions such precise statements of authoritative juristic value either as to the position of the executive, or as to the extent of the different powers of government granted to either the Parliament, the Crown, or the courts, as we find in the United States.

Furthermore, there has developed almost everywhere throughout Europe, apart from Germany, and we may add apart also from Japan, the idea of the collective political responsibility to Parliament of the ministers of the Crown. The cabinet system of government, which has grown up as a result of its application, originated, as is well known, in Great Britain. The history of its development in that country will be taken up when we come to consider the organization of the legislature. All that is necessary to say here with regard to it is that it would appear to be a somewhat spontaneous, extra-constitutional evolution. Cabinet government would appear to have been resorted to as a means of preventing conflict between a Crown, which is still theoretically sovereign, and a Parliament without whose concurrent action the Crown cannot actually govern.

Apart from France, European written constitutions do not expressly provide for such a system. It has, however, been evolved from the personal responsibility which some minister must, through his countersignature, assume for every act of the Crown, and from the power which almost every Parliament has to refuse its consent to the expenditure of money by the Crown. Where ministers have lost the confidence of Parliament the Crown has in most instances, outside of Germany and Japan, found it advantageous to dismiss them and appoint those who may be expected to secure that confidence.

In Great Britain, where this method of securing harmony between the Crown (the executive) and Parliament (the legislature) finds its origin, and where it has received its highest development, the loss of confidence by Parliament is expressed in a somewhat formal way by the refusal to pass a measure which the government

considers to be important. In such case the Crown may either dissolve the House of Commons, which has now practically all powers in this regard, or may dismiss the ministry. In the former case a new election is held, and if the majority is adverse to the ministry they resign; if it is favorable they continue in office. If the Crown dismisses the ministry he "sends for" the leader of the opposition and requests him to form a government.

The development of this system of Cabinet government has made it really unnecessary to attempt to fix with precision the content of the executive power, for the reason that its exercise is always subject to the control of the Parliament. The members of the Cabinet, who exercise it in the name of the Crown, are in reality a committee of the Parliament. The successful attempt made by the adoption of Cabinet government to harmonize the Crown and Parliament has really resulted in large measure in the abandonment of the attempt to keep the exercise of the legislative and executive powers in different hands. It is probably for this reason that in some countries in which the Cabinet system has been adopted the Parliament shows no uneasiness when the Crown exercises very wide powers of legislation either based upon the power it has, similar to that of the French President, to watch over the execution of the laws, or upon the delegation of power to it by Parliament of a real power of legislation. This, for example, is the case in Italy.

In the German Empire with its states, in Japan, and in the United States with the states of the American Union, Cabinet government has not, however, developed.

Its failure to develop may not be said to be altogether due to the presence in the constitutions of the states concerned of insurmountable obstacles. It is true that in Germany and Japan the power of the legislature over expenditures is not so clearly expressed nor so great as in most European states. Thus in the German Empire the constitution provides that all income and expenses must be estimated for a year, and set forth in the imperial budget, which before the beginning of the fiscal year is to be regulated by a law; but it subsequently states that expenses, while regularly to be provided for annually, may nevertheless in special cases be voted for a longer period. Somewhat similar provisions are to be found in the Prussian constitution. In Japan a number of provisions in the constitution would seem to evidence the intention to give to the Crown the power to conduct the government without obtaining for the necessary expenditure of money the consent of the legislature. This consent is required only in the case it is desired to extend the sphere of governmental activity. The Japanese constitution thus provides that the expenditure and revenue require the consent of the legislature to be given in an annual budget, and that all expenditure exceeding the appropriations shall require legislative approval, but it also provides that estimates for expenditures necessary to satisfy the legal obligations of the government, and such as may be based on a law, shall not be reduced or rejected by the legislature without the approval of the Emperor, and that when the budget proposed by the government is rejected, the government shall carry out the budget of the preceding year.

The United States, on the other hand, specifically

provides that "no money shall be drawn from the treasury except in consequence of appropriations made by law," but that "no appropriation of money" for the support of the army "shall be for a longer term than two years." This provision subjects the President to the control of Congress, which may, if it sees fit, make all its appropriations for yearly periods. Congress, however, in practice makes a considerable number of permanent appropriations or appropriations for periods longer than a year. Similar conditions exist in the American states in the matter of appropriations.

In both Germany and Japan provision is, however, made for responsible ministers. The imperial German constitution provides a Chancellor to be appointed by the Emperor, who must countersign all his orders and decrees, and assume responsibility therefor. What is the nature of his responsibility, and how it is to be enforced are not, however, stated. The responsibility of ministers in Japan is just as ill-defined, and the methods of its enforcement just as unclear. It must, however, be said that in case of neither Germany nor Japan is ministerial responsibility more vague or more unenforceable than it is in many European countries where it has been made the basis of the development of Cabinet government. Such, for example, is the case in Italy.

In the United States, as we have seen, there is no provision for ministerial responsibility. There was believed to be no need for it, since the President is not declared to be irresponsible. But the United States Constitution itself expressly provides that the appointment of all important officers, among whom are to be included the members of what has come to be called

the President's Cabinet, must receive the approval of the Senate.[1]

It may therefore be said that the control possessed by Congress over appropriations, and the power possessed by the Senate over the appointments of the President, could have been made the basis for the development of Cabinet government in the United States national government had that form of government been deemed desirable.

In the United States, however, almost every attempt which has been made to subject the President to the effective control of Congress over what are regarded as his constitutional powers has met with the disapproval of the people.

The Constitution of the United States provided that the President should be elected by what are called presidential electors, who are to be appointed in each state as the legislature of that state provides. The present method of appointment provided by the states is election by popular vote. In the early history of the country the attempt was made to influence the action of the presidential electors by securing in advance of the election the nomination of candidates for the office of President by the members of the various parties in the Congress who met in what came to be called a "Congressional caucus." As the presidential electors were elected on the understanding that they would vote for the candidate of the party by whom they were elected, this method of action gave Congress a large control over presidential elections. This method was

[1] In the states of the United States it is to be remarked, however, that commonly the most important state officers are, like the governor, elected by the people.

not approved by the people, who voluntarily organized what came to be known as national party conventions. These bodies have for more than half a century nominated the party candidates for the President, for whom the electors elected by the people have subsequently voted. In this way the Presidents of the United States have come to be in actual fact elected by the people of the country.

In the second place, the attempt was made about forty years ago to impeach a President—President Johnson—for what were really his policies. The failure to secure a conviction in the Senate, where a two-thirds majority was necessary, fixed, it is believed, in the constitutional practice of the United States the principle that Congress may not use the power of impeachment which it possesses to oust a President from office for actions which are not really criminal in character.

The desire on the part of the American people to give the President free hand in carrying on the administration of the government has had the further result, that although by the Constitution all the members of his Cabinet are to be confirmed by the Senate, this body always confirms such nominations of the President as a matter of course.

In the third place, when, by reason of conflict between the President and Congress, which sometimes occurs as a result of the fact that the President represents one party, while one or both houses represent another, Congress has refused to vote the budget, the people have usually supported the President, and Congress after some delay has voted sufficient money to permit the government to be carried on.

In the fourth place, the people of the United States

are so satisfied with the present position of the President and his relations to Congress, that all attempts which have been made to give by law to the ministers or heads of executive departments, as they are called—*i. e.*, the members of the Cabinet—seats without a vote in Congress have failed. It might almost be said that they have not been seriously considered.

In Germany and Japan somewhat the same conditions exist as are to be found in the United States. The ministerial responsibility provided in the constitution might have been, indeed may be, made the basis for the development of Cabinet government. It is, of course, true that the control over expenditures accorded to the legislature is by no means as clear as it might be with regard to government activities, for which provision has already been made by permanent law. At the same time the inevitable tendency of expanding states like Germany and Japan toward a continuing increase of expenditure would seem to involve the possession by Parliament of a wide enough control over expenditure to enable it to insist upon the recognition of the principle of Cabinet responsibility if the adoption of that principle is deemed desirable by both the Parliament and the people which it represents.

But, as in the United States, where the legislative control over the budget is by the Constitution complete, there is little if any tendency in Germany, at any rate, in the direction of adopting the Cabinet system.

For these reasons then it would appear that the European conception of executive power differs from that held in the United States. The European conception is a wider one embracing a large power of regulation or ordinance, although such a power is not clearly

included within the enumerated executive powers. Often also the enumerated executive powers in Europe are more numerous, including—*e. g.*, the power to declare war and make treaties. The difference between the American and European idea would appear to be due to the fact that popular sovereignty has not generally been adopted in Europe, and that the system of Cabinet government has very generally developed with the effect of making unnecessary so clear a distinction as is made in the United States between executive power on the one hand and legislative power on the other.

X

PRESIDENTIAL GOVERNMENT AND ITS COMPARISON WITH CABINET GOVERNMENT

IN the last lecture we saw that while most European countries possessing constitutional government have adopted the Cabinet system, the United States, Germany, and Japan have not done so, though at the same time there is in their constitution no absolutely insurmountable obstacle to the development of that system. These countries have a system which does not make it necessary that the ministers of state shall have the confidence of the legislature. This system of government thus gives the executive large independence of the legislature. It is often spoken of as Presidential government.

The question naturally arises why is it that these countries are so out of accord with what would appear to be a general movement, from the influences of which almost all European monarchies as well as the present French Republic have not been able to escape?

The answer is to be found in part, at any rate, in the geographical situation or in the historical development of these countries. The geographical situation of the German Empire, lying as it does in the middle of Europe, with both eastern and western frontiers unprotected by natural barriers against hostile attack from its neigh-

bors, makes it absolutely indispensable to the maintenance of national independence that there shall be in Germany a stable government which may pursue a reasonably continuous and consistent policy, and, as will be pointed out, the following of such a policy is difficult under the Cabinet system. Japan, on the other hand, although amply protected from foreign aggression by her insular position, was, when she adopted her present constitution, making her first step in the path of constitutional government. No wonder that she has as yet been unwilling to follow the example of those nations which had behind them traditions of self-government. When she feels that she can walk with firmness and confidence along the path she has chosen, there will be little if any difficulty for her under her present constitution to adopt the principles of Cabinet government.

Furthermore, it may be said with regard to the United States and Germany that, different from Great Britain, France, and Italy, they are federal states. As will be pointed out later, the adoption of Cabinet government in a federal state is difficult. The demands of the states in a federal system for representation as states seems to make necessary the existence of one legislative house based on the representation of the states. National representation would seem to require another house based on the representation of population. Cabinet government is, however, inconsistent with the existence of two legislative houses of equal power.

Finally, apart entirely from the somewhat peculiar situation of the United States, Germany, and Japan, it is believed by many in those countries that Presidential government is in all countries to be preferred to

Cabinet government. Cabinet government has unquestionably been adapted to the country which gave it birth. It has unquestionably worked successfully there. But its success has been attained in connection with the existence in the past of two, and only two, well-organized and powerful political parties, one of which is willing and able to take up the work of government when the other lays it down. Such were the conditions which were present in Great Britain when the system was developing, and under these conditions ministers might be certain of sufficiently long-continued support to be able to develop a reasonable continuity of policy.

In most of the countries, other than Great Britain, which have adopted Cabinet government, two strong parties have not, however, developed. Ministries have often resulted and do now commonly result from the coalition of small political groups, which are not long held together. Thus in France the last thirteen years have seen as many as nine ministries. Somewhat the same instability is to be found in Italy.

Indeed, it would almost seem as if the two-party system, which developed in England in connection with the evolution of Cabinet government, was its accidental coincident—an exception to the general rule as to party organization. For at the present time not only have two strong parties been unable to develop in the countries of continental Europe, but, even in Great Britain itself, the home of the two-party idea, the two great parties show symptoms of disintegration. What is true of Great Britain is also true of the United States, where up to very recently two strong political parties have been the rule. If the two-party system may not be expected to develop in countries new to constitu-

tional government, and if even in those countries where it has long been adopted the two-party scheme shows signs of breaking up, it would seem that we must expect to see Cabinet government accompanied by considerable instability, owing to the short terms of ministries based on the union of small parties. For coalition ministries are notoriously short lived.

The adoption of Presidential government, with its independence of legislative control, makes it extremely desirable, if not absolutely necessary, to fix with a considerable degree of precision the powers of the executive. For it is only in this way that the courts may exercise a control over executive acts when they come before them in suits, the parties to which are individuals claiming that their rights have been infringed.

This is what has been done in the United States, where, as has been pointed out, the courts have in the cases coming before them taken the view that the executive may perform only those acts which he is authorized by the law to perform. If the executive issues an order or regulation, and the attempt is made to punish an individual for failing to obey it, that attempt must be made in the courts, which, being independent of the executive, may take the view that the order or regulation is illegal, and so decide. While it is, of course, true that in the Cabinet system of constitutional government as we find it, for example, in Great Britain, the courts may have the same powers, yet because of the existence of the Cabinet system they are not called upon so frequently to exercise those powers. For an executive, who may lose the confidence of Parliament as the result of the exercise of arbitrary power, is careful not to be autocratic.

In Germany, and also in Japan, however, the relation of the old idea of monarchical sovereignty has resulted in a wider and less precise conception of executive power than is to be found in the United States. With the development of judicial traditions it is unquestionably the case, in Germany, at any rate, that that conception is becoming better defined, and the idea that the executive may do anything which it has not been forbidden to do is not having the result of causing any serious infringement of private rights. This result is furthered also by the fact that the field open to executive ordinance is being narrowed day by day by reason of its being occupied by legislation.

The form of government which we call Presidential as distinguished from Cabinet government dates from the time when the Crown really carried on the government subject to a control to be exercised by the Parliament or legislature, and at the same time exerted a powerful influence over the Parliament in order to bring it into accord with its views. This is the form which the Presidential government of Germany and Japan now takes. It is the Crown which, in addition to executing laws and putting into force policies adopted by the legislature, itself initiates legislation and formulates policies by introducing bills and having them discussed in the legislature by its ministers. The Crown may further dissolve a legislature which refuses to approve its proposals. Under this system the executive has an influence if not a control over legislation, and the legislature makes few if any positive suggestions, but merely refuses to give its consent to the proposals of the Crown in case it disapproves of them.

This form of government was not, however, deemed

to be sufficiently popular in the United States when the Constitution was adopted. It was believed for a long time in that country that the distinctive work of the executive was to execute laws which had originated in the legislature, and over whose passage the executive should have little if any influence. This was, indeed, the original theory of the American constitutions. All these instruments did, it is true, permit the executive to send to the legislature messages with suggestions of measures to be adopted. But the principle of the separation of powers was believed to make it impossible for the executive either formally to initiate legislation by introducing a bill into the legislature or to participate either personally or by deputy in legislative debate, or to dissolve a legislature which would not follow such suggestions as had been made in presidential messages. The American President did, however, have almost as large a power of disapproving acts of legislation as did the ordinary European king. In the United States it will be remembered that the exercise of this veto power has no effect if the legislature repasses by a two-thirds vote the act disapproved. In most of the European monarchies, as well as Japan, this veto power is, however, theoretically an absolute one.

Recent tendencies in the United States would seem to show that the American system is changing and is coming to resemble more and more the German system. The executive is growing more and more important and, like the German executive, is exercising more and more influence, if not control, over the making of laws and the adoption of policies. Little important legislation is now adopted by the United States Congress which does not have the support of the President. What is

true of the United States national government is also in a measure true of the state governments. State governors are more and more influencing state legislation and state policy.

The methods by which this executive influence is exerted over legislation are naturally somewhat different in the different countries.

In Germany, as has been said, the executive—the Crown—is recognized by law as having the right to introduce bills into the legislature, and to have its views expressed by its representatives. Furthermore, the executive may dissolve the popular legislative body in case executive proposals are disapproved. In such a case new elections are held. It has sometimes been the case that the powers of the executive have been used to influence these elections. Furthermore, apart from the powers of control over the legislature recognized in the constitution, the executive by reason of its social and moral influence can do, and it is said does do, much to influence public opinion in Germany. Thus it is commonly stated that a person recognized to be a socialist can with difficulty obtain appointment as a professor in a German university, and if appointed as a civil servant finds it practically impossible to obtain promotion.

Generally speaking, it may be said then that the German executive—the Emperor, or King—is successful in getting almost any reasonable policy adopted.

What has been said of Germany may also in large measure be said of Japan. There is, however, in Japan evidence of dissatisfaction with present conditions. Whether this dissatisfaction will result in the subjection of the executive to greater legislative control

through the adoption of Cabinet government no one, of course, can tell.

In the United States the failure openly to give to the President constitutional powers by the exercise of which he can influence the passage of legislation, and the adoption of policies, has naturally led to the development of somewhat secret and indirect, if not underhand, methods. The President cannot introduce a bill into Congress. But there is nothing to prevent him from having a bill drawn and inducing one of his supporters in Congress to introduce it. The President has no power to send a representative of the administration to participate in the debates in Congress. But members of the administration are often heard by the committees of Congress to which bills are referred, and the President may easily persuade some member of the legislature to be his spokesman on the floor of either one of the houses. Furthermore, the President has wide powers of appointment, which have in the past been used to influence the action of members of Congress. It is thus commonly reported that President Cleveland used his power of appointment to obtain, in 1894, the repeal of what was known as the Silver Purchase Law. In fact, in the past the use of the President's power of appointment has been greatly abused. But the extension, by executive order of the Civil Service Act of 1883, to more and more classes of employees has done much to remedy the abuse.

Finally, the President in the United States uses his power to send messages to the legislature as a means of forming or influencing public opinion. These messages are often framed not so much with the idea that Congress will in the near future take favorable action

upon them, but rather with the idea of presenting to the people of the country the views of the executive in the hope of securing for them popular support. The President in the United States also takes advantage of the opportunity to speak on important occasions such as large public dinners, the anniversaries of important public events, to propose new policies or to support old ones. As everything which the President says in this way attracts attention—it usually appears in the newspapers in all parts of the country—it is possible for him to exercise a tremendous influence over legislation. President Roosevelt is reported to have said that the President of the United States occupies the most influential pulpit in the world.

In all these ways, then, the President exercises an influence, if not a control, over the members of Congress. Where the President's policies are approved by the people, it is not infrequently the case that showers of telegrams and letters descend upon members of Congress from those they represent, and do much to induce them to support the proposals of the President.

Cabinet government and Presidential government thus after all have the same general purposes, and lead to much the same general result.

The purpose is to secure harmony of action between the executive and the legislature, without which efficient and progressive government is well-nigh impossible. But these forms of government endeavor to realize this purpose through the reciprocal influences of the two authorities of the government, one upon the other. In both the legislature influences and controls the executive. In both, also, the executive influences and controls the legislature. The methods by which this in-

fluence may be exerted may differ slightly, but, after all, they are in essence the same. Sometimes they tend to make the government inefficient. This result has followed in the United States the improper use of the appointing power by the executive. A somewhat similar result has, however, followed in the Cabinet government of Italy. Here it is said that it was at one time impossible to run an express train on the government railways because the ministers were afraid to offend the members of Parliament, all of whom wished all the trains to stop at their own homes.

Sometimes these methods of influence have been or are corrupt. The development of the British system of Cabinet government was attended by the corrupt use of public money by Sir Robert Walpole. Walpole, it is said, did not hesitate to resort to this method to control the pages of newspapers, the votes of members of Parliament on government bills, and the votes of electors on the occasion of parliamentary elections. But it cannot be said that Cabinet government has by any means monopolized the use of corrupt methods. For it is a matter of history that important administration measures have in the past been carried through one or other of the houses of the United States Congress by the improper use of money or power.

Whether or not proper means to influence the action of the legislature shall be used would seem to depend not so much on the form of the government as upon the experience of the people in self-government. For it would appear to be the tendency of all enlightened and progressive peoples to eliminate one by one the most corrupt methods which have been used until the government becomes reasonably clean. But the attainment

of such a result seems to be dependent upon the building up among the people generally of a public opinion which will not permit the continuance in public life of those who are commonly believed to resort to the worst forms of corruption.

While the purposes and methods of Cabinet and Presidential government are thus in essence the same, these two methods of government may be distinguished in that Cabinet government makes provision for the speedy settlement of any conflict which may arise between the executive and the legislature, while Presidential government does not. Theoretically, long-continued conflicts may exist under this form of government which are absolutely incapable of settlement. This is the case in Germany, and also in Japan, where the executive is hereditary. As a matter of fact, however, such conflicts do not long persist, because the powers of the executive are so great that, by modifying slightly its policy, it can ordinarily obtain the approval of the legislature.

In the United States it would, however, be difficult for such a conflict to continue for longer than two years. For it is almost always the case that a newly elected President is in harmony with the House of Representatives, whose members are elected at the same time as the President. It is, of course, true that the Senate may not be in accord with the President, but as a third of its members are elected every two years, the expiration of two years is likely to see the two houses in harmony. In any case the disadvantages resulting from the presence of a second house in the legislature are no greater under the Presidential than under the Cabinet system.

As the President of the United States has a term of

four years, and the members of the House of Representatives one of only two years, the election of a new House occurring, as it does, in the middle of the President's term, may bring in a House opposed to the President. Any conflict which may develop between them, however, will probably last only two years, since at the expiration of that time a new President will be elected.

The disadvantage which, under Presidential government, results from the liability that a conflict will occur between the executive and the legislature not possible of speedy settlement is believed by many to find its compensation in the fact that the executive is assured under that system of a term of office long enough to permit of the accomplishment of substantial results.

In making the choice between Presidential and Cabinet government the opportunities under the former, for lack of harmony and for conflict to develop between the executive and legislature, must be offset by the inefficiency and lack of continuity of policy which may be expected to develop under the latter in those countries in which it is impossible to organize two strong political parties, upon one of which the Cabinet may with confidence rely for support.

XI

THE TERM AND TENURE OF THE EXECUTIVE

A CONSIDERATION of the executive authority would not be complete without some treatment of the term and tenure of the monarch or president.

At the end of the eighteenth century, in most of the states of Europe, which were practically all monarchies, the hereditary principle had been adopted. This hereditary principle was, apart from Great Britain, that of succession in the male line by primogeniture. That is, the kingdom was indivisible, only one heir being recognized. That heir was the oldest male in the direct male line, unless that line became extinct, when the succession went to the next oldest male line according to the same principles.

In Great Britain this was modified by the rule that females might inherit in case there were no males, the females in the direct line having the preference over the males in the collateral line.

This solution had the great advantage of certainty and prevented the dynastic wars which had occurred in some cases prior to its adoption. It also made useless all palace intrigues for the appointment of a successor, which usually develop where any option in the appointment of the heir to the throne is given to the reigning prince.

TERM AND TENURE OF EXECUTIVE

When the first great republic of modern times was established in the United States all ideas as to the term and tenure of the executive which were based on monarchical principles had necessarily to be abandoned. Their abandonment was necessitated by the adoption of the general principle of popular sovereignty which, as has been shown, was made the basis of American republican institutions. The early American state constitutions were not, however, agreed as to the method by which the sovereign people should select the individual to whom the executive power was to be intrusted. Some, like that of New York, provided for a popular election of the governor. Others, like that of Virginia, provided for his election by the legislature. The tendency of most of the subsequent state constitutions has been in the direction of popular election.

The framers of the United States Constitution had a considerable distrust of the people. They did not believe that a wide popular participation in the work of government was desirable. They therefore resolved not to adopt popular election as the method for filling the office of President. They wished also to provide an executive which should be independent of legislative control. They were therefore unwilling to provide for the election of the President by the legislature except as a means of preventing an absolute interregnum.

The attempt was therefore made to provide a separate organ for the election of the President. In this way what came to be known as an electoral college was established. To it was also intrusted the election of a Vice-President. He was to preside over the Senate, and was to replace the President in case of the latter's inability to act. This electoral college was to be repre-

sentative of the states united by the Constitution. The Constitution thus provided that: "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 Congress; but no Senator or Representative or person holding any office of trust or profit under the United States, shall be appointed an elector." The exclusion from the electoral college of the Senators and Representatives was a necessary consequence of the desire that the President should not be elected by the legislature. But together with the exclusion of all United States officers it had the result of causing the electoral college to be composed of second-rate men. For all leading statesmen and successful politicians were thus disqualified by the Constitution.

The Constitution as later amended provided, further, that these 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." The electors are to name in their ballots the persons voted for as President and Vice-President, and 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. These lists are to be transmitted to the seat of government of the United States, and are to be opened and the votes counted in the presence of both houses of Congress. The person having the greatest number of votes for President, being a majority of the whole number of electors appointed, is declared to be the President. If no person have such majority, then from the persons having the highest numbers of votes not exceeding three

on the list of those voted for as President, the House of Representatives chooses immediately by ballot the President. But in choosing the President the votes are taken by states, the representatives from each state having one vote. A quorum for this purpose is a member or members from two-thirds of the states, and a majority of all the states is necessary for a choice.

Provision is made for the contingency that a majority of the votes of the states is not obtained by giving the Vice-President the Presidency. Congress, further, is authorized to provide by law for the case of the inability of or vacancy in the offices of both President and Vice-President. Such a law has been passed. There is therefore little danger of an interregnum under the American system of electing the President.

This method of electing the President and Vice-President had, however, a fatal defect. It made no provision for a common meeting of the presidential electors. On the contrary, it specifically provided that those of these electors chosen in each state should meet in their respective states and vote by ballot. There were thus at the election of the first President thirteen different bodies which had to take action. Now the presidential electors of each of the forty-seven states must meet simultaneously. This has been provided by act of Congress. These bodies of electors do not therefore have the aid of mutual consultation in reaching their decisions. This defect in the system did not appear at the first election because of the unanimous feeling that Washington should be the first President. Washington was also unanimously re-elected at the expiration of his first term, and at the end of his administration the Vice-President, John Adams, was promoted to

the Presidency, but not by a unanimous vote of the electors.

In 1801, however, a majority vote of the electors was not obtained, and Thomas Jefferson was elected President by the House of Representatives. It became evident that some means would have to be devised to prevent the scattering of the votes of the presidential electors at their separate meetings in the various states. This was done through the nomination of candidates for both President and Vice-President prior to the action of the electors, by the members of Congress belonging to the political parties, a practice which began to develop early in the history of the country. This assumption of power by Congress was undoubtedly facilitated by the fact that the leading men in political life could not, as has been pointed out, be presidential electors.

The action which Congress thus took was contrary to the general theory of the Constitution in that it made the President practically the nominee of Congress. For this reason, as well as because of other reasons, it aroused dissatisfaction. About 1820, therefore, candidates for President and Vice-President began to be nominated by popular conventions. These conventions were composed of delegates supposedly representative of the people. This method of nominating candidates at conventions resulted from the voluntary extra-legal and extra-constitutional action of the political parties.

At the present time the national conventions, as they are called, control the situation. These conventions usually meet in June or July of the year in which a presidential election takes place. The popular election for presidential electors, which is now the rule in all the states, takes place early in November. The time inter-

vening between July and November is devoted by the political parties to what is known as the presidential campaign. During the campaign the names of the candidates for the position of presidential electors are probably never mentioned, although it is they, and not the candidates for the Presidency nominated by the conventions, who are to be elected at the November election. On the contrary, it is the candidates for the Presidency nominated by the conventions who are brought to the attention of the voting public. Thus, during the last presidential campaign, the names continuously mentioned were Wilson and Marshall, the candidates of the Democratic party; Roosevelt and Johnson, the candidates of the newly established Progressive party; and Taft and Sherman, the candidates of the Republican party. Probably it was only a small percentage of the American people who did not believe that Wilson and Marshall were elected on the first Tuesday after the first Monday of November, 1912, the day of the election of presidential electors. But the persons who were then actually elected were the presidential electors. The real election of the President by the presidential electors took place on the first Monday of the next January, when Wilson and Marshall received a majority of the votes of the presidential electors as President and Vice-President. Probably few persons were aware that such an election then took place.

The election of the United States President has become thus a really popular election. It has become so as a result of the abdication of their powers by the presidential electors. There is, however, no legal means at present of preventing the presidential electors from reassuming the exercise of these powers which they

have thus laid down. But the American people, having agreed to play this particular game in this particular way, no presidential elector who dared to play the game differently would be able to hold up his political head after so doing.

It may therefore be said that this popular election of the President has come to stay. There is at the present time no probability that the people of the country would be satisfied with any other method than a popular election for the choice of their Chief Executive. This popular election has vastly increased the hold which the President has on the people, and consequently the importance of his position. It is in no small measure due to his popular election that Cabinet government has not developed. For the people have come to feel that the President as their choice should have a large control over the government.

The popular election of the President of the United States, which has thus virtually grown out of the indirect election provided for in the Constitution, has on the whole worked successfully. In the year 1877, however, difficulties arose in connection with counting the vote of the presidential electors, which came perilously near to bringing on civil war. These difficulties afforded evidence of the dangers which have manifested themselves in connection with the popular election of the executive in countries like the South American republics, where the people have not had as long an experience with self-government as have the American people with their centuries of British traditions.

Indeed, the success of the United States in avoiding the danger of civil war in 1877, and in preventing the long civil war which was carried on from 1861–65 from

destroying the popular features of their governmental system would seem to go far to prove that the success which attends any written constitution is due as much to the habits and traditions of the people as to any excellence in the form of government which is incorporated into a written instrument.

The term of the American President is four years, but a President is, under the Constitution, indefinitely eligible for re-election. A tradition has, however, sprung up, not based in any way upon the law that no person shall occupy the presidential office for a longer period than eight successive years—another instance of an influence not directly due to the written Constitution which has molded American political institutions.

The term of the President of the United States may be shortened as the result of conviction on impeachment. This proceeding is in the nature of a judicial trial, which is instituted by the House of Representatives and is held before the Senate. That body when trying the President of the United States is presided over by the Chief Justice of the Supreme Court. It may convict only by a two-thirds vote of the members present, and its judgment may not extend beyond the loss of office and disqualification for office in the future, but the party convicted is subject to the process of the ordinary criminal courts.

The causes for impeachment provided in the Constitution are treason, bribery, or other high crimes and misdemeanors. Treason is the only one of these offenses which is defined in the Constitution, and consists "only in levying war against" the United States, "or in adhering to their enemies, giving them aid and comfort." Up to the present time there has been only one

case of the impeachment of the President. The decision in this case would seem to have made a precedent that this method of removing a President from office may not be employed, because of difference of opinion between the President and Congress as to policies to be pursued.

In the other great republic of modern times, France, the President is elected by majority vote of the Senate and Chamber of Deputies united in what is spoken of as the National Assembly. One month before the expiration of the term of the President the two chambers must under the law unite in National Assembly to elect his successor. In case of the death or resignation of the President they shall unite at once for the purpose of filling the vacancy in the presidential office. The person receiving a majority vote of the members of the National Assembly formed in this way is to be President. A President is indefinitely re-eligible, and his term of office is seven years. The term of a President may be shortened as the result of a proceeding in the nature of an impeachment instituted by the Chamber of Deputies, and tried by the Senate acting as a Court of Justice. Cause for such impeachment is an attempt against the safety of the state. What this is is not stated in the constitutional laws of 1875. But some of the commentators on the French constitution hold the view that the Senate may in this way try the President for any crime as well as for treason.

There have been no such proceedings brought against a French President. The provision is really almost unnecessary because of Cabinet government, and because also of the precedent arising during the term of office of President Grèvy. Parliament lost confidence in him,

and refused to give its confidence to any ministries which he appointed, so that he was finally forced to resign.

Inasmuch as the election of a new President is a comparatively simple matter, it has not been necessary to make provision for a Vice-President, as is done in the United States. The French law does provide, however, that in the case of a vacancy in the office of the President the executive power is vested in the Cabinet, which in the French law is called the Council of Ministers.

The French method of solving the problems both of electing the President and of filling the office in case of vacancy, would seem to be preferable to the methods adopted in the United States. A presidential election in the United States is an extremely serious matter. The presidential campaign, as it is called, lasts through several months, and raises the feelings of the people to a high and sometimes dangerous pitch of excitement. The present method of nominating presidential candidates revealed at the last election serious defects which the attempt is now being made to remedy. It is all but universally recognized that present methods are not satisfactory. On the other hand, the election of a President in France takes place smoothly and without any dangerous excitement.

What is true of the method of election is also true of the method of filling a vacancy in the office of President. The person usually elected as Vice-President in the United States is not one of the most prominent political leaders. The functions of the office, which consist merely in presiding over the Senate, are not such as attract the highest type of statesman, particularly because of the fact that for quite a time it has not been the case that a Vice-President has been promoted to

the office of President, except as the result of the death of the President.

It ought, however, to be said that the election of the executive by the legislature is hardly consistent with the fundamental idea of Presidential government. This is that the executive shall be independent of the legislature. For a President who is elected by the legislature must in the nature of things owe so many political debts to members of the legislature that he is hardly able to pursue an independent policy, while a President who wishes to be re-elected by the legislature is almost altogether the slave of his hopes.

Under these conditions the makers of a republican constitution have but a choice of evils. Perhaps they may profitably come to the conclusion that the lesser of the two is the loss of independence which the office of President will probably suffer as the result of his election by the legislature. Certainly those who desire to subject an otherwise independent President to legislative control will regard the French method with favor. Some even may regard the election by the legislature of a President under the presidential system of government as a reasonable compromise of the conflicting claims of Cabinet and Presidential government.

XII

THE BICAMERAL SYSTEM OF LEGISLATIVE ORGANIZATION AND THE UPPER HOUSE

THE distinctive characteristic of all governments which may lay any claim to be popular in their nature is to be found, as we have seen, in the existence of a body more or less representative of the people, which is called upon more or less frequently to express the popular will with regard to those subjects regarded as affecting most intimately the public welfare. Such a body, it has been shown, has very commonly been called a parliament or a legislature.

Such a representative body is peculiarly a creation of the European mind, and naturally so. For the popular government of which it is at the same time the result and the cause is peculiar, at least in its origin, to European peoples. We find a popular body in both the Greek and the early Roman political organizations at the time when they had not been subjected to Asiatic influences. When, however, those influences had made themselves felt on European political institutions, as was particularly the case after the fall of the Roman republic, the Asiatic conception of an all-powerful king or emperor was made the basis of European governmental organization.

The abandonment by Europe of its original concep-

tion of popular government with its distinctive representative assembly was not, however, permanent. Characteristic European institutions were again established when the incursion of the German tribes into the Roman Empire caused the influence of Asia to wane. Everywhere throughout Europe states were formed, mainly under Teutonic influence, as a result of the disintegration of the Western Roman Empire. In these states assemblies more or less representative in character grew up alongside the Crown, which, based upon Asiatic models, was still able to retain in its hands most of the powers of government.

In almost every case the assemblies which were thus developed were formed with the idea of representing the element or elements which counted for something in the economic or social life of the state. What these elements were, of course, depended upon the conditions existing in particular states. In one state almost the only element which counted was the landed aristocracy. Because of the position assumed by the Christian Church, an economic and social as well as a religious power almost everywhere in Europe, the landed aristocracy was composed of lords spiritual as well as temporal. The Church therefore received recognition. In another state the importance of the commercial classes was such that they also were able to insist upon being accorded consideration and representation. Finally, in a very few states the peasants or small landholding classes had maintained themselves in the face of the feudal system, which came to be the accepted organization of society in mediæval Europe. Where this was the case these classes also were able to secure representation.

The class representative character of the early Euro-

pean popular assemblies was recognized in the names which they received almost everywhere throughout continental Europe. Thus in Germany they were called *Stände* and in France *États*. These words have usually been translated into English as "estates,"—that is, status or classes.

The strongest and most successful of these popular bodies which were developed in Europe was the English Parliament. English constitutional development may, for all practical purposes, be said to have begun in the latter part of the eleventh century with the conquest of England by William of Normandy. At the time of this conquest the social and political system almost universally in force throughout Europe was, as has been said, the feudal system. This system was based on a series of reciprocal obligations and rights owed to and possessed by, on the one hand, a lord or master, as he was called, and on the other a vassal or servant. The highest lords of all, that is the kings, whose rights on account of the disintegrating tendencies of feudalism were in many instances very unsubstantial, were in most cases heirs of the old Roman Imperial power, and were thus representative of the Asiatic idea of kingship which, as has been said, was imported into Europe at the time of the fall of the Roman republic.

The isolated situation of England, and the fact that it was a conquered country, permitted William the Conqueror and his successors to establish and maintain in England a form of feudalism differing in certain respects from that which was at the time to be found throughout the rest of Europe. Under this English conception of feudalism the Crown had somewhat greater powers than elsewhere. But, nevertheless, the English political sys-

tem of those days could not escape from the influences which made for the development of representative government. In even the early days of the Anglo-Norman government the Crown was obliged to form a body which under the name of the Great Council exercised considerable power. Originally this Great Council consisted of the more influential and wealthy vassals of the Crown; that is, of the great landholding aristocracy, either secular or ecclesiastical, who in those days had in their hands most of the wealth of the community. By the end of the thirteenth century, however, economic and social conditions had changed considerably. The development of commerce and the consequent growth of cities, whose population was mainly commercial in character, produced a new and important class in the community. The power and influence of this class had to be considered if government was to progress satisfactorily and smoothly. The result was that the English Crown summoned two knights from each county and two burgesses or representatives from each of the important cities in the kingdom to act with the Great Council. Thus was laid the basis for the formation of the first great modern legislative body, the English Parliament.

After the people in the counties and the cities had thus been given representation in the representative body of the kingdom, the tendency was for those who had common sympathies, like birds of a feather, to flock together. The elements which after the end of the thirteenth century were to be found in the English Parliament were, it will be noted, really four in number. These were, first, the representatives of the Christian Church, the lords spiritual; second, the large landed aristocracy not belonging to the church, the lords tem-

poral; third, the smaller landholders, the knights of the county; and fourth, the business or commercial element, the burgesses from the towns or cities. The lords spiritual and temporal had, however, much in common. They were in both cases usually large landholders, and were often closely connected by blood relationship. They therefore ultimately formed what came to be and is now known as the House of Lords. This body was and is now composed for the most part, except in the case of the lords spiritual, of persons who have inherited the right to sit in the house, or who, if themselves the first appointees, will transmit to their heirs the right to sit in the house. There is no limit on the right of the Crown to make peers. And the power of the Crown is used to reward merit and in the past has been employed also to control the house.

On the other hand, the knights of the counties and the burgesses from the cities had much in common, and they consequently were ultimately united in one house, which to distinguish it from the aristocratic House of Lords, and to indicate that it was representative of the common people, was called the House of Commons. This is the origin of what has come to be called the bicameral organization of the legislature.

The development on the Continent was somewhat similar. The main difference in organization is to be found in the fact that the representatives of the different classes did not usually amalgamate to the same extent as was the case in England. Thus in France there were until the French Revolution three estates, or assemblies—*i. e.*, the lords spiritual, or the clergy; the lords temporal, or nobility; and the commons, or Third Estate —as it was called.

The legislative body was not, however, nearly so important on the Continent prior to the end of the eighteenth century as it was in England.

English precedents were consciously followed in the United States when new governments were organized at the end of the eighteenth century. During colonial days, prior to the declaration of the independence of American colonies, a bicameral organization of the colonial legislatures had been provided. What corresponded to an upper house was to be found in the Governor's Council, whose members were appointed by the British Crown. A body similar to the House of Commons was provided in the Assembly, whose members represented the voters of the colony.

After the declaration of independence this bicameral system was continued in existence in the new American states. Provision was made for a Senate, as it commonly was called, which in addition to acting as an upper house, often was called upon to exercise a control over the actions of the new state governor, similar to that which had been exercised in colonial days over the colonial governor by the Council.

In the early American state organization there was, however, little occasion for class representation. Indeed, there were legally no classes to represent. For the Declaration of Independence had stated that all men were born free and equal, a statement which was approved in the bills of rights in the early state constitutions. The Senate, or upper house, was, however, continued in the government of most of the new states, partly because of that formal adherence to tradition which is characteristic of all political development, partly because of the desire to subject to control the acts

of the executive, which was at that time regarded with considerable suspicion, if not with apprehension. For the people of the American states were accustomed to a two-chambered legislature, as well as to the control exercised over the executive by a council whose composition he could not influence. The absence of classes which might be represented in an upper house brought it about, however, that the members of the state Senates were usually to be distinguished from the members of the lower house merely by reason of the facts that they were fewer in number, that their term was longer, and that they represented a larger district.

The bicameral system was adopted by the United States Constitution which went into operation in 1789. The adoption of this system at this time, while to some extent due to the desire to follow the English model as it was found in the state organization, is mainly attributable to the necessity of giving representation, not so much to classes, as to communities. The new system of government then established was, because a union of separate political communities was being formed, based upon the representation not merely of the people of the whole country, but, as well, of the people of the particular communities or states as they had come to be called. This double representation was secured by providing that the people of the country generally were, roughly speaking, to be represented in the House of Representatives, the members of which were elected in districts formed in the various states on the basis of their population, and that the states as such should be represented in the Senate, two of whose members were to be selected by the legislature of each state.

The small size of the Senate, the long term of six years

of its members, and the more permanent character it obtained because of the fact that only a third of its members were to retire every second year, were all indicative also of the desire to give that body a greater influence over governmental policy than could be exerted by a body, like the House of Representatives, whose members served for only two years and might be entirely changed at every general election. Furthermore, the facts that the United States Constitution provided for the indirect election of the members of the Senate, and that Senators should be of an age greater than that required of the members of the House of Representatives, would seem to prove that it was also the hope of those who framed the Constitution to secure an upper house of a conservative and somewhat permanent character, which would be less responsive to the temporarily prevailing public opinion than would be the more popular House of Representatives. The Constitution was, as is well known, the product of a conservative reaction against what were believed by many to be the excesses of which the state governments were guilty in the years immediately succeeding the close of the Revolution.

The expectations of those responsible for the United States Senate were amply fulfilled. Partly owing to its more permanent character, and partly owing to the control given to it over executive action in imitation of colonial examples, it soon became a body of the greatest influence. By the beginning of the twentieth century, however, the Senate was commonly, and with considerable justice, regarded as peculiarly representative of the larger property interests of the country. Formed mainly to represent the states, that is, the local communities, it became a representative rather of economic interest

than of locality. It is in the hope of depriving it of this representative character that the American people have just amended their Constitution by providing for the popular election of Senators. They have done so because they have believed that, if the members of the Senate are elected directly by the people of the several states, and not by the members of the different state legislatures, they will become more responsive to public opinion. If this is the result, it is hoped that the Senate will cease to be representative of class, since it is more difficult for class influence to make itself felt in the case of direct than it is in that of indirect election. It is, however, doubtful whether the change in the character of the United States Senate as the representative of class interest will do away with the necessity of an upper house in the government of the United States. For, so long as the position of the states remains as it is, it would seem to be necessary to provide one house in the legislature in which the states as such may be represented.

In a number of countries which are not particularly aristocratic in character, and which have recently adopted constitutions, an upper, or second house, is also to be found. The Dominion of Canada, the Commonwealth of Australia, and the South African Union, which, it will be remembered, are all confederations or unions of what were once very nearly independent states, have all made provision for the representation of the states as such in one house of the new confederation parliament.

The upper house, which is called the Senate, in all these confederations, was originally or is now based upon the principle applied in the United States Constitution to

the Senate of the United States—*i. e.*, the equal representation of the states or districts forming the confederation. Thus in the Dominion of Canada the country was divided into three districts, Ontario, Quebec, and the Maritime Provinces, two in number, Nova Scotia and New Brunswick. To each of these districts were given twenty-four Senators. The admission of new provinces into the Dominion has, however, modified this general plan, so that at the present time the principle of equal representation of the provinces in the upper house has been abandoned.

In Australia also provision was made for the equal representation of the original states forming the confederation. As no new states have been admitted, the principle of equal representation of the states is still applied.

In South Africa peculiar conditions have caused somewhat of a modification of the principle, though it still has had a controlling influence over the composition of the South African Senate. The peculiar conditions have resulted in the grant to the Governor-General of the right during the first ten years of the Union to appoint eight Senators, four of whom shall have special knowledge of the colored races. Apart from this provision, each of the original provinces is to be represented in the Senate by eight Senators until, after the expiration of ten years, Parliament shall otherwise provide.

Of the three British confederations of colonies only one, Australia, provides for the direct election of Senators. In South Africa they are to be elected in each province by an electoral college consisting of the members of the Provincial Council and the representatives of the province in the lower house of the Union Parliament.

In Canada they are appointed by the Governor-General. The term is a comparatively long one; in Canada, for life; in Australia, for six years; and in South Africa, for ten years. In Australia one-half of the Senators retire every third year. In South Africa they are apparently all to retire at the same time.

In Canada and South Africa special qualifications of eligibility as to age, residence, or ownership of property are required of Senators, but in Australia any one qualified to sit in the lower house may be elected Senator.

Where the conditions which have brought in their train federal government do not exist, it may well be asked what is the purpose of an upper house if class representation is not desired? The necessity of the existence of the bicameral system was first seriously questioned by the radical republicans of the French revolutionary period. They knew that the division of the legislative body into several houses is to be explained historically by the desire to secure class representation. They also were called upon to organize a legislature representative of a society from which it was hoped that class had been excluded. Being more logical than the Americans, and less under the influence of English traditions, they naturally concluded that the bicameral system was both useless and inexpedient.

The single-chamber legislative body first appeared in France in the ill-fated constitution of 1791. The single chamber then established was, however, based upon both locality and property representation, as evidenced by the payment of taxes. The later republican constitutions adopted before 1875 also provided for a single chamber, but omitted the peculiar provisions of the constitution of 1791 with regard to locality and property

representation. It was not until the conservative reaction which resulted in the establishment of the government of the Directory, in 1795, that return was made to the bicameral legislature. Since then all the permanent constitutions of France, with the exception of the republican constitution of 1848, have made provision for two houses.

The present French constitution thus provides for two houses, although, unlike the monarchical constitutions which preceded it, membership in the upper house, or Senate, as it is called, is not hereditary in character, nor is the Senate itself purposely representative of either locality or class any more than is the lower house. The long term of office of its members, nine years, its greater permanence due to the fact that one-third of its membership is renewed only every third year, and the fact that the method of election is indirect,[1] all have contributed in bringing it about that the French Senate is a much more influential body than the more popular Chamber of Deputies. There is, however, little serious complaint that it is in any way representative of particular class interests.

In most other European countries which have a government that can be called popular the bicameral system has been adopted and the upper house of the legislature is frankly representative of either class or locality. Thus in the German Empire the Federal Council is composed of persons appointed by the governments of the different states of the Empire, which are, however, not as in the United States, equally represented. The Federal Council, while primarily representative of the

[1] The members of the Senate are elected by a college consisting of the members of various local bodies.

states, is at the same time secondarily representative of the aristocratic classes, which are largely, if not predominantly, represented in the state governments, by which the members of the German upper house are appointed.

In the other European monarchical countries an upper house is usually to be found, and is purposely intended to represent what are regarded as the upper social classes. It is to be noticed, however, that there is quite a marked tendency to endeavor to secure as members of the upper house, not merely persons of wealth or representative of wealth, but also persons of distinction in all lines of work. The power which the King has in Great Britain to appoint any one a peer permits him both to reward merit and to secure a person of distinction as a member of the upper house. The Crown possesses similar, though perhaps not such wide, powers in most monarchical countries.

Apart from the aristocratic countries where class representation finds its justification in the general social organization of the country, and apart from the countries having something in the nature of federal or confederated government, where the representation of states or provinces is deemed of importance, there is a slight tendency to abandon the bicameral system. Thus the policy of France has wavered in this respect, rather tending toward the one-chamber system during periods when democratic ideas have been in the ascendency. The present Republic, however, would seem to be definitely committed to the bicameral idea. Thus again in a number of the smaller British colonies, or rather in the provinces of the larger confederations, there is but one house. In all these provinces it is to be

noted that the Cabinet system of government has been adopted.

Furthermore, as will be pointed out later in almost all the European countries in which Cabinet government has been adopted, the upper house has lost greatly in power. This is particularly true of the British House of Lords and the Italian Senate.

It will be seen from this brief historical survey that the bicameral system of legislative organization finds both its origin and the reason for its continued existence in the desire to secure class or locality, and particularly class representation. The only modern countries having popular government in which this is not the case are the separate states of the United States and France. In the former its presence may be explained by the reluctance to change, which is perhaps characteristic of the American people. In France the bicameral system has also succeeded in maintaining itself also for no apparently very good reason, but notwithstanding two or three very serious attempts to overturn it.

It is also to be noted that in both the United States and France it is rather commonly believed that the Senate, or upper house, is more efficient than the lower house. That this greater effectiveness is due to the fact that it is a second house is hardly to be contended. It would seem to be due to the fact that the membership of the Senate in both cases is not totally changed at any one time, and that the term of office is a long one. Whether the method of indirect election has also had a beneficial effect it is impossible to say. Conclusions as to this matter can be expressed with greater certainty after the United States has had some experience with the new method of direct election just provided.

It would perhaps be improper to leave in the mind of the student the impression that in either the United States or France the people have retained the bicameral system merely because of dislike of change or because of adherence to a tradition which has really ceased to be applicable. Many persons both in the United States and in France honestly believe that great advantage is derived from the bicameral system, owing to the fact that every matter which is acted upon favorably by a two-chambered legislature is subjected to a double examination. But whether because of the desire to secure locality or class representation or double deliberation, it is at present the case that in almost all civilized countries in the world possessing an approximation to popular government, the bicameral system of legislative organization has been adopted.

XIII

THE BICAMERAL SYSTEM AND ITS RELATION TO FEDERAL GOVERNMENT

THE bicameral form of legislative organization was accepted as the proper form at a time when the general principle of the separation of the legislative and executive powers of government had great if not controlling influence over men's minds. In those days it was believed that permanent good government was possible only upon the condition that on the one hand the executive authority should be, so far as concerned his tenure of office and the exercise of discretion, within the limits of the law, independent of the legislature, and that, on the other hand, the legislature should in its exercise of the powers conferred upon it by the constitution act independently of almost any executive control. The principle further was believed to involve the grant to the legislative of all power to make the law and to the executive of all power to enforce the law.

Under the mistaken belief that this general theory lay at the basis of the British system of government as it existed at the end of the eighteenth century, the framers of the United States Constitution drafted their instrument on what they believed to be British lines. The founders of the American system of government derived their conceptions of the British system either from Black-

stone, who described the law of England rather than actual British institutions and practices, or from the incomplete and inexact appreciation of those institutions made by the French writer Montesquieu, whose work on *Esprit des Lois* had great vogue among the political thinkers of a century and a quarter ago. But about the time that Montesquieu was writing his book a movement had begun in Great Britain which was destined to have an important influence on the position and powers of the British upper house, the House of Lords.

As a result of the dying out of the last of the Stuart line of monarchs, who, under the Act of Settlement, were entitled to the British throne, the Hanoverian line obtained the crown at the beginning of the eighteenth century. George I., the first of his line, was a German and did not understand the English language. He could not with any pleasure or profit, and on that account did not, regularly meet with his ministers, but preferred to deal with only one of them. The result was the gradual development of what has since come to be known as the Prime Minister. To this minister the Crown, during the reigns of both George I. and George II., intrusted the management of public business. Among his other functions was the control of Parliament in such a way that the business of the country would be carried on smoothly. If he could not control Parliament he was expected to resign and give way to one who could.

The efforts of the various public men in England, either to keep or to get office, resulted in the development of political parties. At first almost each public man of prominence had his own following. There were many little parties, but gradually these parties united until two large parties were formed. One of these

usually supported the government, and the other opposed it.

This movement continued with only one serious interruption until 1832. This interruption was in large measure due to the fact that the third generation of Hanoverian kings learned to speak English. George III., who was the cause of interrupting this general movement, not only could speak English, but also was a good deal of a politician himself by nature, and learned the business very well during his more than ordinarily busy reign. When he ascended the throne he was dissatisfied with the position into which the Crown was being forced by the movement which has been described. This position was that of reigning rather than governing, for the attempt of the Crown and the ministers to control the Parliament had resulted, with the development of political parties, in subjecting the Crown to greater and greater Parliamentary control. George III., therefore, determined to be his own Prime Minister, and, partly because of his ability as a politician and partly because of the influence the Crown still possessed, he was able to become a power in the government of his kingdom.

It was probably, in some degree, at any rate, because the American colonies were, at the time they became independent, more familiar with the political conditions of the reign of George III. than with the previous political history of England that they mistook a temporary reaction for a permanent condition. But however this may be, the period of George III.'s influence came to an end, and the movement whose progress he merely interrupted proceeded with even greater rapidity than before.

Prior to about 1830 conflict between the two houses of Parliament hardly existed, because the House of Commons was altogether subservient to the House of Lords. This was so, although it was the confidence of the House of Commons which the Cabinet had to have. Although the House of Commons was in theoretical control of the government, members of the House of Lords practically controlled the election of enough members of the House of Commons to secure a majority in that body. But in the latter part of the eighteenth century and the beginning of the nineteenth century England was undergoing great changes in its social and economic conditions. The expansion of foreign trade, the increasing use of coal, the manufacture of iron, and the invention of the steam-engine and its application to manufactures, with the consequent development of the factory system in industry, all contributed to the formation of new kinds of wealth and new classes of property-owners. With increasing insistence these new classes demanded representation in the government, until about 1830 it became impossible longer to resist them.

A bill was at this time introduced into and passed the House of Commons, which later became famous under the name of the Reform Bill. It widened the suffrage considerably, and was therefore opposed by the House of Lords, but this opposition was overcome by the threat, which the Crown was compelled reluctantly to make, to appoint enough new peers in harmony with the views of the majority in the House of Commons to overcome the existing unfavorable majority in the House of Lords. The house having yielded, the bill was finally passed and became law without this threat being actually carried into effect.

Thus was passed the Reform Bill of 1832. Its passage is significant not merely because the suffrage was so enlarged that new social classes were given representation in Parliament, but because most important results attach to the method of its passage.

These results are, first, the decline in influence and power of the upper house, the House of Lords. The threat to pack that body, as the saying is, probably saved Great Britain from a violent revolution. It cannot be denied, however, that that threat was the most important factor in bringing about a peaceful revolution which quite changed the character of British government. As a result of the Reform Bill the balance of political power was transferred from the aristocratic landholding House of Lords to the rather more democratic and somewhat commercial and industrial House of Commons. All that the House of Lords could do, after the passage of the Reform Bill, was, by rejecting a bill passed by the Commons, to force a dissolution. If a majority were elected at the subsequent general election which supported such bill, the House of Lords was obliged to pass it. The subsequent constitutional history of Great Britain is mainly characterized by the facts that the suffrage has been continuously extended, and that the prestige of the House of Lords has continuously diminished, until now an active politician regards "promotion" to the House of Lords as ending a really influential public life.

The Parliament Act of 1911 is the last step in the downward progress of the House of Lords. By this act it is provided in the first place that a public bill passed by the House of Commons and certified by the Speaker to be a "money bill" shall, unless the Commons direct to

the contrary, at the expiration of one month after it shall have been sent to the House of Lords, become an act of Parliament if approved by the Crown, notwithstanding that the House of Lords may not have consented to it. The purpose of this provision is to assure to the House of Commons absolute control over the raising and the expenditure of public moneys.

In the second place, any bill not a money bill which is passed by the House of Commons in three successive sessions, whether or not of the same Parliament, and which, having been sent up to the House of Lords at least one month in each case before the end of the session, is rejected by that house in each of those sessions, shall, unless the House of Commons direct to the contrary, become an act of Parliament on the royal assent being given thereto notwithstanding the fact that the House of Lords has not consented thereto. But at least two years shall have elapsed between the date of the second reading of such a bill in the first of the sessions in the House of Commons, and the final passage of the bill in the third of the sessions. The purpose of this provision is to prevent the House of Lords from exercising a real controlling influence over the passage of legislation.[1]

Since the passage of this bill the House of Lords has therefore ceased to be a co-ordinate legislative chamber. It may not even force the dissolution of the House of Commons, and an appeal to the voters. It will have, hereafter, practically no control over money bills, and only the power to delay for two years the passage of other than money bills.

The circumstances connected with the passage of the

[1] See Ogg, *The Governments of Europe*, p. 112.

Reform Bill of 1832 further showed conclusively that two houses of equal or approximately equal strength were inconsistent with the system of Cabinet government which Great Britain had developed under the Hanoverian kings. This system consisted, as we have seen, in the general management of governmental affairs by a group of ministers which came to be popularly called the Cabinet. These ministers belonged to the same general political party and acted under the general direction of a chief called a Prime Minister. This Cabinet or ministry was permitted to hold office only so long as its members could manage and control Parliament. As soon as Parliament got out of the control of the Cabinet two courses were open to the Crown, which otherwise was, as has been said, placed in the position of merely reigning and not governing. The Crown might in the first place dissolve Parliament. In such case new elections were to be held for the House of Commons. If a majority was elected favorable to the Cabinet, that body continued in office and therefore in control of the government. If a majority was elected hostile to the existing Cabinet, the ministers were to resign and new ministers were to be appointed in sympathy with the views of the majority in the new house.

Dissolution of Parliament as a means of settling conflicts between Parliament and the Cabinet was not so important prior to the passage of the Reform Bill of 1832 as subsequent thereto. For the House of Lords, whose membership could not be changed by dissolution, both had greater influence in the government and greater control over the election of members of the House of Commons. The main purpose of dissolution prior to 1832 was to replace a House of Commons which had

manifested independence by one which would be more subservient to the House of Lords. With, however, the diminution of the influence of the House of Lords and the consequent transfer of the balance of political power to the House of Commons, dissolution took on great importance, because the new elections might change the membership of the house which really controlled the government.

But instead of dissolving Parliament the Crown might dismiss the ministry and form a new one. This was naturally the method most commonly resorted to prior to the passage of the Reform Bill of 1832. Dissolution before that time was, as has been said, resorted to mainly in order to get a House of Commons which would be in harmony with the House of Lords, the then seat of the balance of political power.

Neither dissolution of Parliament nor dismissal of the Cabinet was, however, an effective remedy when the two houses of Parliament claimed to have equal power. For where they differed as to policy a Cabinet satisfactory to one house would naturally be unsatisfactory to the other house.

The English, the inventors, or perhaps it would be better to say the discoverers, of Cabinet government, thus came to the conclusion that the existence of two houses of equal power was inconsistent with that form of government, and, just as soon as two houses of equal power made their appearance, saw to it that one of these houses was reduced to a position of comparative impotence. That the house chosen for the sacrifice was the upper house, the House of Lords, was due merely to the fact that it had remained representative of the upper classes, while the government of the country had become more popular in character.

The position of the upper house in Italy, where the Cabinet system of government has been adopted, is much the same as it is in Great Britain. The Crown has the right to appoint practically any number of members, and has several times made use of this power to obtain a majority in the Senate, as the upper house is called. The result is that the Senate is not the equal of the lower house, the Chamber of Deputies. The Senate at the present time no longer initiates laws or even checks the activity of the lower house. It merely revises the action of that body. Its legislative independence has, as Professor Ogg says, "been reduced almost to a nullity." [1]

The lesson that was learned in Great Britain in 1832 was so well learned and so well understood that it was not in any way either forgotten or misapprehended when the attempt was made to apply the principles of Cabinet government in the great self-governing colonies of the British Empire.

The first attempt of this sort was made in Canada about 1840. The adoption of Cabinet government in Canada is ordinarily attributed to a report made by Lord Durham on the occasion of his mission to Canada to investigate the troubles arising out of a rebellion which broke out there in 1837. This report advocated the adoption of what has come to be known in the British colonies as "Responsible Government." The main recommendations of the report were followed. The result was the relegation of the representative of the Crown, the Governor, to the position of reigning and not governing—the same position as that occupied by the British Crown. This result was reached in a very

[1] *The Governments of Europe*, p. 373.

simple manner, and involved merely one apparently unimportant change in the old British colonial system of government. It will be remembered that that system, as seen in the former American colonies of Great Britain, made provision both for a Cabinet of Ministers and for an upper house of the legislature, in the Governor's Council. This consisted, prior to 1840, in the colonies now enjoying "responsible government" of members who had a fixed tenure of office, incapable of termination by the Governor. This independence of tenure was accorded them, since one of the functions of the Council was to exercise a control over the Governor.

The system of "responsible government" was secured in the colonies by providing that the members of the Governor's Council should be removable by the Governor. After this change the Governor, who was instructed by the home government to conduct the colonial government so as to satisfy the members of the popular legislative body, had the right arbitrarily to remove the members of his Council. In other words, the Council ceased to have any of the characteristics of an upper house, and remained merely a Cabinet of Ministers who must have the confidence of the majority in the lower house. Provision was made, it is true, for an upper house called a legislative council, but it was unimportant when compared with the more popular assembly.

The principles of "responsible," or Cabinet, government have been applied in all British colonies in which there is a large European population. In some the upper house has been abolished. Apparently no fear has ordinarily been felt of the consequences of disagreement between the two houses where an upper house has

been permitted to continue in existence. For seldom is it the case that any provision for settling such conflicts has been made in those colonies in which an upper house has been provided where the house is not regarded as peculiarly the representative of the various provinces or colonies through the union of which a greater state has been formed.

In the great confederations of colonies where an upper house representative of the separate colonies has been provided some provision has had to be made for the settlement of conflicts between the two houses. The British North America Act, which, as has been shown, united a number of formerly independent colonies, in order to secure a representation of the provinces as such, provided for an upper house, but this was not placed on a par with the lower house, and its membership may be increased within limits by the Crown so as to bring about harmony between it and the lower house. It seems to be the feeling that the Senate of the Dominion, as it is called, is not a legislative body of first importance.

In both the other confederations which an increasing number of common interests has produced—*i. e.*, the Australian Commonwealth and the South African Union—the problem of reconciling the existence, on the one hand, of two houses, one of which is based on locality representation, and, on the other hand, of responsible or Cabinet government, has been solved in the following manner. The executive is empowered to convoke both houses in a joint session when disagreements between them either occur or persist. Such a joint session acts by a majority vote of the total membership of both houses. Since the lower house is much more numerous than the upper, a large majority in the lower house will

ordinarily be sufficient to overcome a small opposing majority in the upper house.

It will be noticed, however, that the solicitude for the states or provinces which has made necessary the attempt to provide approximately equal representation for them in the upper house, has been rendered almost futile by the attempt at the same time to establish the Cabinet system of government. For every matter of policy, even if it affects local and provincial rights, may be decided by a considerable majority of the popular body. It would seem that regard for state and provincial rights is inconsistent with the Cabinet system, which must in popular governments rest in the last analysis on the basis of popular majorities. For the impossibility of the existence at the same time of two houses of equal power and of the Cabinet system forces the control of governmental policy into the hands of the large popular house in which states and provinces as such are not represented.

The experience with an upper house of the present French Republic, which is the only other important country having Cabinet government, is not altogether conclusive upon this point. As has been shown, the French Senate is an extremely important body from many points of view more influential than the Chamber of Deputies. The present French constitution provides that "the ministers are collectively responsible to the chambers for the general policy of the government, and individually responsible for their personal acts." The political practice of the French has, however, in general confined the responsibility of the Cabinet to the lower house, although there are a number of cases in which French ministries have fallen as the result of an adverse

vote in the Senate. Indeed, one of the last ministries in France to fall as the result of a vote of loss of confidence did so because of a vote of the Senate.

The short life of French ministries may, perhaps, be attributed, on the one hand, to the fear of losing the confidence of the Senate, and, on the other, to the fact that the President may dissolve the Chamber of Deputies only with the consent of the Senate. This fact, together with the fact that the dissolution of the popular chamber is not regarded with favor in France, has brought it about that the right of dissolution has only once been exercised by the President. This dissolution occurred in 1877. If, however, the Senate adopts the view that the ministry is responsible to it as well as to the Chamber of Deputies, resort will have to be made to dissolution in the case of conflicts between the two houses. For it is only through an appeal to the people that the popular will may be ascertained. And it seems to be supposed by most French writers that the Senate would conform to the expressed will of the people, as evidenced by the election on such an appeal of a chamber opposed to it.

It is to be noted, however, that from a legal point of view the French system offers no way of settling a conflict between the two houses of Parliament. An obstinate Senate might, until its membership was changed as a result of the Senatorial elections, both prevent a dissolution and refuse to give its confidence to a ministry which had the confidence of the Chamber of Deputies.

This survey of the bicameral system and of the position of the upper house in modern countries would seem to show:

First. That the bicameral system is generally continued

in existence in the countries of the world having a popular government. This is particularly true of those countries which have not adopted the Cabinet system of government. Thus all of the states of the United States still retain the bicameral form of legislative organization. The reason most commonly given for its retention is the advantage which is believed to be found in the double deliberation which every legislative act receives.

Second. There is a tendency, however, to abandon the bicameral system so far as that system involves the existence of two houses of equal power, where the Cabinet system of government has been adopted and where it has not been deemed necessary to make special provision for state representation. This is noticeable in the smaller British colonies where locality representation is not a controlling motive. It is also seen in the less important position now accorded to the British House of Lords and the Italian Senate. France is the only country where the Cabinet system of government has been adopted in which the tendency is not a strong one, and even here practice seems to make the Chamber of Deputies rather more important than the Senate so far as concerns the enforcement of the responsibility of the ministers.

Third. But where something in the nature of a federation of colonies, states, or provinces has been formed, the bicameral system has been maintained in existence for the purpose of providing representation, in most cases approximately equal, for those districts. But it is to be noticed that where the Cabinet system has been deemed essential the equal representation of colony, state, or province has had in the nature of things to be

sacrificed. This is the case in all the great confederations of British colonies, like Canada, Australia, and South Africa.

In the United States and Germany, where the Cabinet system has not been adopted, the upper house, which is distinctly representative of the states of the confederation as such, has lost in no respect its position as the peer of the lower house.

We may therefore conclude that Cabinet government, being inconsistent with the existence of two houses of equal strength, is also inconsistent with a form of government which attempts to recognize in equal degree the claims of national unity and state or local rights by providing two houses of equal strength, one of which is to represent the nation as a whole, and one of which is to represent the states or provinces as such. Cabinet government may, however, be reconciled with locality representation by the device resorted to by Australia and South Africa, which in ultimate analysis consists in the formation of a single chamber in which both principles of representation are permitted to have their influence. But it is to be remembered that such a one-chambered system usually subjects local rights to national control, since the smaller state representation usually accorded is swamped by the larger national representation.

XIV

THE LOWER HOUSE OF THE LEGISLATURE AND PARTICULARLY OF THE SUFFRAGE AND THE METHODS OF REPRESENTATION

THE original conception of the European Parliament was, as we have seen, that it should be representative of special interests. This conception was carried so far that in many cases each interest recognized had its own house or chamber. This conception finally is responsible both for the existence of what has come to be known as the bicameral system of Parliamentary organization, and for the fact that even at the present day most upper houses are frankly more or less representative of some special interest.

We have seen that, apart from confederations, where the problem of state or provincial representation has presented itself, the ordinary upper house is constituted in such a way that it represents more or less effectively the interests of the property-owning classes, and is therefore somewhat conservative in character.

Furthermore, in those countries in which such upper houses are to be found the tenure of their members is often, indeed, usually for life—sometimes membership is even hereditary—and is the result of appointment by the Crown. Where royal appointment is adopted the Crown is sometimes limited in its choice to certain classes of persons, usually those possessing certain specified

amounts or kinds of property, certain official classes or persons who have attained a certain degree of distinction by reason of their intellectual attainments. In Great Britain, where no such limitations are imposed on the power of the Crown to appoint peers, it is said that as a matter of fact seldom is a person, no matter what may be his attainments, so appointed who is not possessed of considerable wealth.

The upper house is therefore at the present time usually so composed that it is not merely representative of class, but that it also contains in its membership persons who presumably are endowed with the highest intelligence existent in the nation. The upper house ought theoretically, at any rate under these conditions, to be capable of wiser action than the lower house if the intelligence of its members can be exercised free from the class ties and prejudice which have of necessity so much influence over all men. Its presumably high intelligence has not, however, it will be noted, saved it from being made subordinate to the lower house, which is regarded as more nearly representative of the general opinion of the country.

The lower house of the legislature as distinguished from the upper house was originally representative of the masses rather than of the classes. The House of Commons, in Great Britain, got its name because it was originally representative of the common people. But the tendency of the last one hundred and fifty years has been to make the European lower house—and we must include within the term "European" all peoples of European origin—something more than representative of the common people. For it has become the organ more or less effective of the whole people.

The really representative character of a lower house is, however, in large measure determined by what is spoken of as the law of suffrage; that is, the law determining who shall vote and how those entitled to the right shall vote.

In the old days, even after the establishment of the English House of Commons, the common people supposed to be represented in it were not so common or at any rate not so numerous as at present. Really, what was originally represented, and what was originally sought to be represented even in the House of Commons was property rather than men. The House of Commons was frankly intended to be representative of the small property-owners. Therefore only those could vote at elections of members of Parliament who had a certain amount of property.

In the latter part of the eighteenth century, however, all throughout Europe the idea began to be expressed that the existing principles of representation were wrong. It was claimed that it was not property but men that should be represented. This feeling was expressed in two great documents which are usually considered to have had great influence on political institutions during the years following their publication. These documents were the American "Declaration of Independence," issued in 1776, and the French "Declaration of the Rights of Man and of the Citizen," issued originally in 1789 on the eve of the French Revolution. The former declared that "all men are born free and equal"; the latter asserted that "men are born and remain free and have equal rights."

The logical result of the adoption of this principle of the equality of men would have been to give to all men

equal rights of representation in the government. The actual and practical effect of these two declarations was, however, merely an increase in the number of those who were permitted to vote. Thus in the United States, for quite a number of years after the publication of the Declaration of Independence, the property qualifications for voting which were at that time required were continued in existence. In Great Britain, where neither the American Declaration of Independence nor the French Declaration of the Rights of Man and of the Citizen was regarded with any particular favor, no attempt at all to enlarge the suffrage was made until the passage of the Reform Bill of 1832.

Even the early French constitutions, adopted immediately after the "Declaration of the Rights of Man and of the Citizen," were not based upon the general foundation of universal adult male suffrage. But later European constitutions and suffrage laws have taken long steps in the direction of adult male suffrage, while the later American state constitutions have almost all, where racial questions have not been important, as is the case in some of the Southern states, followed in the same path. In the United States, it should be stated, the qualifications of voters even for those officers of the central government who are elected by the people are determined by the several states. For the United States Constitution provides that the qualifications of voters for the members of the House of Representatives and of the Senate, the only officers of the national government who by the Constitution are to be elected by the people, shall be the same as for members of the most numerous branch of the state legislature. The qualifications of voters for the members of the state

legislatures are fixed by the states, subject at the present time to the provision of the Fifteenth Amendment of the United States Constitution, adopted after the Civil War, that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state by reason of race, color, or previous condition of servitude."

It may be said, therefore, that at the present time the members of the lower houses of most important European countries are elected by a numerous class of voters. These are practically the adult male citizens of sound mind who are permanently settled in the country. In some instances the payment of taxes is required in order to qualify for the vote. This is true, for example, of Great Britain. But the limitation is often more apparent than real. For the tax paid is usually paid for the occupation of a house, and may frequently be paid for the tenant by the landlord, who reimburses himself by adding to the rent. Therefore, as every adult male must in the nature of things occupy some sort of house or part of a house, and as such occupier has the right to vote, the vote is actually given to most adult males.

It is, of course, true that important differences in suffrage rights, and in the number of voters, will and do result from these particular qualifications. But probably just as great effects on the suffrage result from the methods of voting. In any case, roughly speaking, everywhere throughout Europe adult male citizens, or male citizens of a certain age, such as twenty-five years, permanently settled in the state, have the right to vote. In a number of states we must add adult females to these adult males. This is true in quite a number of the states of the United States and in Australasia.

The lower house of the legislature has thus come to represent not merely the common people, but all the people of the country. On the theory that it does thus represent the whole people, the country is usually divided into districts in accordance with population, and each of these districts is allowed to elect one representative. The basis of representation has thus come to be almost entirely territorial in character.

Territorial representation has, however, in the opinion of many, serious defects where it is made use of as a means to secure representation for the whole people of a state and not representation for particular localities, as is usually deemed to be necessary in confederated states. These defects are:

First. The emphasis which is laid on purely local needs at the expense of the general interests of the country. District representation has led to the practice known in the United States as "log-rolling." This consists in a combination of the representatives of different districts in accordance with which each member of the combination agrees to vote for the measures proposed by the others. It often leads to great financial extravagance. For every district looks with favor upon a representative who is able to secure the expenditure for an enterprise of particular interest to the district of money belonging to the general treasury of the country. Thus if a general system of state highways is to be provided, the power to locate these roads is apt, under a district system of representation where the legislature is to determine what roads are to be built, to lead to the construction of roads which are of local rather than of general significance.

Second. The district system sometimes does not secure

the representation of minorities. Suppose, for example, the country has two political parties which are nearly equally scattered throughout the country. Under these conditions the party which is in a majority in one district is apt to be in a majority in most of the others. If this is the case, there will be no minority party in the legislature, or a very small one. There was once an election in New York City, where the single district was in force, in which, although the minority party cast a vote of more than one hundred thousand, it did not elect a single member of the city council. In a very large country, however, this is not apt to be the case, for sectional differences are strong enough to secure at least sectional representation, under a district or territorial system of representation.

Under the district system it is thus difficult for special interests or bodies of opinion of considerable importance throughout the country to secure representation. For, though important when considered from the point of view of the country as a whole, these interests or bodies of opinion are not strong enough in any one district to control that district. The result is not infrequently the resort by such unrepresented interests to means such as bribery of voters and electoral corruption generally in order to obtain the representation which such interests believe to be their due. In this way special interests actually secure representation, but by improper means.

The belief in the seriousness of these evils has led to the attempt which, it must be confessed, is not as yet either very general or very important, to abandon or at least to modify the general principle of district representation.

The most important methods of securing minority representation which have been adopted are:

First. Cumulative voting. This method is based on the abandonment of the single-district system. Where the state concerned is large in area representative districts are still retained because of the desire under such conditions to provide for sectional representation. But in each district there are to be elected not less than three representatives. Each voter is given as many votes as there are representatives to be elected, and is allowed to cast those votes as he sees fit—*i. e.*, three votes for one candidate, one and a half for two, or one for three. Such a method of cumulative voting will absolutely assure to a minority which has twenty-five per cent. plus one of the votes the power to elect one-third of the candidates elected. Under such a system, where there is a minority party which can cast more than a quarter of the votes that party nominates candidates no greater in number than one-third of the places to be filled, and the majority party nominates candidates no greater in number than two-thirds of the places to be filled. The result is, where there are only two parties that nomination is equivalent to election.

Care must be taken by political parties, particularly where the number of places to be filled is a large one, not to nominate a greater or less number of candidates than that which is most advantageous to the party concerned, and the voters of all parties must be instructed not to concentrate their votes on a number less than the entire number of candidates nominated, else the minority which may vote with greater wisdom may secure a majority of the seats.

But cumulative voting with a small cumulation will

almost automatically secure representation of most interests or phases of opinion which are important enough in the election district to deserve recognition.

Second. Limited voting. This is also based on a district system which gives at least three representatives to each district. But no voter is permitted to vote for more than a certain proportion, usually two-thirds, of the positions to be filled. The results of limited voting are almost the same as those of cumulative voting, where there are only two main parties. The method does not, however, so automatically adapt itself to conditions in which there are more than two main parties. This is due to the fact that limited voting does not permit any freedom in the cumulation of votes.

Both cumulative and limited voting have been tried in some of the states of the American Union for the election of state and local officers.

Third. Proportional representation. The theory of pure proportional representation involves the abandonment of all district or sectional representation. On that account it has not been used except in the case of small countries, such as some of the Swiss cantons. It is, of course, possible to provide proportional representation for large homogeneous districts which have their own peculiar needs, interests, or opinions. The results of proportional representation will, however, be practically confined to the districts selected. That is, this form of representation will not secure the representation of interests whose influences are felt beyond the limits of the particular districts chosen.

The system, as we see it in the Swiss cantons, is thus based on the theory of representing social groups or opinions rather than districts. It therefore recognizes

the party or political group. Every one who votes must vote for a party rather than for a candidate. He casts, therefore, one vote for a party. His ballot usually contains, however, the names of a sufficient number of candidates to fill all the places to be voted for, arranged in the order of preference determined upon by the particular party. The method of determining how many of the candidates of each party are elected is as follows: The total number of votes cast is to be divided by the positions to be filled. The result is called the electoral quotient. If a party casts votes equal in number to the electoral quotient it elects one candidate; that is, the one standing at the head of its list. If it casts votes equal in number to twice the electoral quotient it elects two candidates; that is, the first two on its list; and so on. The result is that any body of opinion which has a number of votes equal to the electoral quotient—that is, the total number of votes cast divided by the number of places to be filled—will elect one candidate. If three places are to be filled, one-third, if four, one-fourth of the total vote, and so on will be sufficient to elect one candidate.

A method of proportional representation based on these general principles was adopted in Belgium by a law of 1899.[1] Professor Ogg says of it that "upon the desirability of maintaining proportional representation all parties are agreed, and it is probably only a question of time until the principle will be applied fully" in the local elections, as well as those to Parliament, to which it is now confined.

Fourth. Plural voting. Another method of securing

[1] A description of its details will be found in Ogg's *The Governments of Europe*, p. 546.

minority representation is to give a different weight to one man's vote from that which is given to another's. The most important states which have adopted this method are Prussia and Belgium.

In Prussia each province which is represented is divided into districts. Each of these districts elects electors of representatives, the election of representatives to the lower house of Parliament being indirect. One such elector is allotted to the district for every two hundred and fifty inhabitants. For the choosing of these electors the voters are divided into three classes, so arranged that the first class is composed of the taxpayers paying the highest amounts of taxes who collectively pay one-third of the taxes paid in the district. The second class consists of the taxpayers paying the next highest amounts of taxes who pay another third. The third class consists of the remaining taxpayers. The voters of each class elect by absolute majority one-third of the electors of each district. All the electors thus selected elect by absolute majority a representative for the district. This system gives great power to the wealthy taxpaying minority. In 1907 thus three per cent. of the voters belonged to the first class, about nine and a half per cent. to the second class, and the remaining eighty-seven and a half per cent. to the third class. At the elections of 1903, 324,000 conservative votes elected 143 representatives, while 314,000 Social Democratic votes elected none. In the Imperial elections of the same year, the suffrage in the Empire being universal adult manhood suffrage, the popular party elected eighty members.

In Belgium another method of obtaining a somewhat similar result is adopted. Every adult male has one

vote, every adult male who is head of a family has another supplementary vote, every adult male who has a certain amount of property has another supplementary vote. Every adult male who has certain educational qualifications has either one or two supplementary votes. But no one may have more than three votes.

Fifth. Preferential voting. Finally we find also a system of preferential voting. In accordance with such a system the voter is to be permitted in the case of the single-district system to indicate that A, for example, is his first choice, but that B is his second choice. Under this system of preferential voting no one can be elected unless he has received an absolute majority of the votes cast. The system has apparently been devised to avoid the evils which have followed the adoption of the principle followed in both England and the United States and some other countries of regarding a candidate as elected who receives the greatest number of votes, although less than an absolute majority of the votes cast. Where preferential voting has been adopted, if one candidate does not receive an absolute majority of the first-choice votes, the second-choice votes must be counted, and it is only when a candidate receives a majority of the two classes of votes that he is regarded as elected.

Sometimes the attempt is made to attain the desired end by providing for a second election. This is the method adopted in the German Empire. At this second election every voter is required to vote for one of the two candidates who received the highest number of votes at the first election. Under such a system what are really second-choice votes are thus counted. But the voter's choice is confined by the law. Such a

method, however, has the advantage of making it absolutely certain that at the second election an absolute majority of the voters for one of the candidates will be secured. This, of course, is not assured, at any rate theoretically, under the system of pure preferential voting.

Such are some of the methods which have been adopted to secure a real representation of the sovereign people. The number and variety of them would seem to indicate that a thoroughly satisfactory solution of the problems of representation has not as yet been reached.

We have thus seen that the tendency of European states is toward universal adult male suffrage and single-district representation in the lower house of the legislature, but that at the same time certain countries have gone further than others in extending the suffrage, and that there is evidence of dissatisfaction with the single-district system of representation.

But while adult male suffrage is the rule, it would not be correct to say that there are no exceptions. Italy provided for a long time an educational qualification; Prussia and Great Britain still provide a property qualification. There is thus no absolutely universal rule. Nor, we may add, is there an ideal which is desirable under all conditions. Conditions of suffrage, like most political conditions, should conform to economic and social conditions. Ignorant and economically dependent voters may not be expected regularly to act wisely. It may, however, be said that a country which has had considerable experience in parliamentary government may widen its suffrage with greater safety than one which has recently adopted such a form of government.

The exercise of power even by the ignorant often breeds wisdom. And it is always to be remembered that with human nature, as it is, it is probably wiser to have the suffrage as wide as the conditions of the country will safely permit. For history would seem to show that it is futile to trust exclusively to the altruism or benevolence of the so-called upper classes, which are usually the property-owning classes, for the elevation or even the protection of the so-called lower classes, which are usually the classes without property. The powers of government have often in the past been made use of by the classes, which possessed them in their own interest and to the detriment of other classes. The wider the suffrage the larger is the class which will be possessed of governmental powers, and in the interest of which those powers will be exercised.

On the other hand, we must not forget that if the suffrage is given to those who by reason of lack of intelligence or of economic dependence on others are unfitted to use it, they are liable to be wheedled by the intelligent but selfish classes or browbeaten by the overbearing. The result, therefore, may be that a weapon which was put into their hands for their protection will be used for their oppression.

What has been said with regard to the classes of voters may be said also as to the methods of representation. That is, no system is an ideal one capable of adoption under all conditions. The system actually determined upon must, if it is to be successful, be framed in view of the conditions to which it is to be applied.

It may, however, safely be said that in countries of vast area with varied climatic and topographic condi-

tions, which as we have seen usually carry in their train great variation of social conditions, particularly where the means of communication are neither good nor abundant, considerable recognition must be accorded to sectional representation. This is true as well of the lower house as of the upper house of the legislature. The experience of all confederated states corroborates this view. They all without exception provide for district representation, and sometimes that the districts formed for the purpose shall be districts exclusively of one of the states or provinces of which the confederation is composed. Furthermore, it may be said that usually the single-district system has been provided.

On the other hand, it may be questioned whether the single-district system is always a wise one. Such a system makes formal provision only for locality representation. There are, however, in all countries which have attained any degree of complexity other than local interests which believe they should be represented. Not being accorded any opportunity in the formal legal system to secure recognition, many of these interests, when they become important and powerful enough, resort to illegitimate methods to secure the representation which they believe they ought to have. Through bribery and intimidation and wheedling of voters they, as a matter of fact, try to secure and often do secure representation by getting control of some particular district or districts. Up to the present time it has seemed to be impossible to prevent the development of these practices.

If, however, through some of the methods of minority representation such as have been described, the representation of special interests were made possible, it is probable that the pressure would be relieved and

resort would be less frequent to practices which, if generally and persistently followed, will make difficult, if not impossible, the orderly and progressive development of the state—the largest and most important social group to which all men owe allegiance, and from which all men should receive protection.

XV

THE METHODS OF VOTING AND PARTICULARLY OF THE SECRET BALLOT

SOME of the most important features of a real representative government, but features to which comparatively little attention has until recently been given, are the methods of casting and counting the vote; in other words, election procedure.

In Great Britain, where voting at public elections was first adopted in a systematic and comprehensive manner, the original method of vote was the public vote. That is, where there was a contest between two or more candidates, what was called "a poll" was had. Every voter was called upon to express publicly his choice, which was recorded by the officer appointed for the purpose. This method was a very natural one. The voters were few in number. The progress of the voting was known to all as the voting went on, and the result was known at once when the voting was finished. Such a method, however, lent itself readily to bribery and intimidation in a country where, owing to the great inequality in the distribution of wealth, the poorer classes were in a state of economic dependence upon the wealthier classes. For every man's vote was known, and it was not at all infrequent for the displeasure of the wealthy to be visited on the poor in case they did

not vote as expected. Furthermore, the fact that the progress of the voting was at all times known brought it about that when the election was close the competition in the purchase of votes not infrequently became very keen during the closing hours of the vote. Large sums of money were frequently spent to secure the votes of those who were independent enough to be able to resist the browbeating of the more powerful social classes.

The evils connected with public open voting were seen by certain English political writers as early as the middle of the seventeenth century. Their writing first bore fruit, however, in the United States. The "secret ballot," as it was called, was adopted there as early as the latter part of the eighteenth century. The first attempt to provide for the secret ballot was made in the first constitution of the State of New York, adopted at about the time of the Declaration of Independence. This rather famous pronouncement in favor of a secret ballot reads as follows:

> And whereas, An opinion hath long prevailed among divers of the good people of this state, that voting at elections by ballot would tend more to preserve the liberty and equal freedom of the people than voting *viva voce;* to the end, therefore, that a fair experiment be made which of these two methods of voting is to be preferred:
>
> *Be It Ordained,* That as soon as may be after the termination of the present war between the United States of America and Great Britain, an act or acts be passed by the legislature of this state, for causing all elections thereafter to be held in this state for senators and representatives in assembly to be by ballot, and directing the manner in which the same shall be conducted.
>
> *And Whereas,* It is possible that after all the care of the legislature in framing the said act or acts, certain inconveniences and mischiefs, unforeseen at this day, may be found to attend the said mode of electing by ballot;
>
> *It Is Further Ordained,* That if after a full and fair experiment shall be made of voting by ballot aforesaid, the same shall be found less

conducive to the safety or interest of the state than the method of voting *viva voce* it shall be lawful and constitutional for the legislature to abolish the same.

The example set by New York was followed in the course of the next few years by other American states, until by the middle of the nineteenth century public or open voting had been all but universally replaced by the secret ballot.

The method adopted was that the voter no longer was permitted, when voting publicly, to state his choice, but was required to deposit in a ballot-box, as it was called, which was provided for the purpose, a paper known as a ballot. On this ballot the name of the candidate voted for was written or printed.

The adoption of the secret ballot was followed in the United States by a long and elaborate series of laws intended to preserve the secrecy of the vote. Thus, all ballots had to be written or printed on plain white paper of a certain size and quality, and having on the outside no marks by means of which the way in which the voter voted could be ascertained. All ballots which did not conform to the provisions of these laws were to be thrown out as bad when the vote was counted.

In the mean time one of the colonies of Australia found that the open or public vote was accompanied by the same evils which had been noticed in England and solved the problem in a somewhat different way. The Australians adopted the principle of the secret ballot, but they took precautions to secure the secrecy desired which were much more successful in attaining the end sought than was the American legislation. The chief defect in that legislation was that, while it fixed with great particularity the kind of ballot which might be

used, it left the furnishing of the ballots to the political parties. From the point of view of the desired end—*viz.*, a secret vote—this was a mistake. For it was possible for the agents of the political parties, who distributed the ballots on election day, to give the voter his ballot and force him, if he was paid for his vote, or was voting under compulsion, to hold the ballot so given him in a conspicuous position until it was deposited in the ballot-box.

The Australian legislation to remedy this defect provided that the ballot should be what came to be called an official ballot. That is, it was printed by the state and contained the names of all the candidates put in nomination, and to whom the voter was confined in voting. It was also distributed by officers of the state. A voter desiring to vote secured from the ballot officer one ballot, which he took with him into a booth provided for the purpose. In this booth, secure from observation by any one, or as an American politician once irreverently remarked, "alone with God and a lead-pencil," he was required to place a mark opposite the name of the person for whom he wished to vote. After folding the ballot in such a way that no one could distinguish how he voted, he then was to deposit the ballot so marked in the ballot-box.

During the first three-quarters of the nineteenth century demands were made with greater and greater insistence in England that the secret ballot should replace the existing method of a public vote. After the passage of the Reform Bill of 1867, which enlarged the suffrage considerably, a commission was appointed by Parliament to study the subject of reform in the methods of voting. This commission reported in favor of the

Australian method, which was adopted and put into form by the Ballot Act of 1872.

One of the incidental advantages which the Australian method had over the American method was to be found in the fact that the state, as a result of it, bore much of the expense which in the United States had to be borne by the political organization. About 1890, partly with the idea of lessening the legitimate expenses which political parties had to assume in the United States, and partly to secure the secret ballot, which was the purpose of all American ballot legislation, the Australian example was followed in the United States.

The secret ballot has been generally adopted in European countries, many of which have also an official ballot similar to the Australian ballot. This is the case, for example, in the elections for the German Imperial lower house, and in Italy and Belgium. In France, while the ballot is secret, it is not official. In Prussia the vote is still a public vote.

This slight sketch of the history of ballot legislation, particularly among the English-speaking peoples, would seem to show that if we are to secure an approximately free and unbribed vote we must adopt some method of voting which will provide as near as may be a secret vote. Experience would seem to show that this is secured, so far as it is practicable to secure it, by the Australian system of an official ballot printed and distributed by the state, and that the function of the voter in voting should be confined to marking in secret on such a ballot a cross or other mark opposite the name of the person for whom he wishes to vote, and to depositing such ballot in the ballot-box in such a manner that no one can ascertain how he has voted.

Other matters of great practical importance in connection with the methods of voting are the way in which the votes cast are counted and the remedies open to individuals, who claim that the law has not been observed or that the election has been accompanied by fraud or intimidation.

Probably in no country does the law descend into greater detail with regard to the methods of casting and counting the votes cast than in the United States. This is due to the fact that the method of filling offices by popular election is more commonly adopted there than elsewhere. As the election law is a very technical subject, it is somewhat difficult to describe in the space available the method for counting the votes, which a rather bitter experience of fraud and oppression has made it seem necessary to adopt. It may, however, be said that the realization of the purpose of an election—*viz.*, the counting of the free and independent votes of all those and only those who under the law are entitled to vote, has involved:

First. The registration of voters. Two methods of registration have been provided. One is known as personal registration; the other is called official registration. By the one the voter who desires to vote is given the opportunity on several days before election to present himself to the officers provided for the purpose. He has to answer under oath or affirmation questions put to him by the registration officers, which are intended to show what are the facts upon which he bases his claim to vote. Thus he is asked whether he is a native born or naturalized citizen, his age, his residence, his length of residence, and so on. Sometimes he is required also to sign the registration list, so that when

he attempts to vote on election day he may be identified. On the registration days there are usually to be found at the places of registration representatives of the principal political parties who check off the names of persons presenting themselves for registration, and who may subsequently by personal inquiry ascertain whether the answers given to the questions asked are truthful. All attempts to register illegally are punishable under the criminal law.

Where official registration is the method followed, the registration list is made up by officers provided for the purpose, and opportunity is given to those whose names have been improperly omitted from the list to have them placed thereon.

In either case registration officers may be punished criminally for illegal actions, and are under oath to obey the law.

No one whose name is not on the registration list on the day of election may vote. The attempt to count the votes of persons not so registered is illegal.

In the second place, the law provides that elections which have been decided as a result of the bribery or the intimidation of voters are illegal and attempts also to insure that the vote will be cast under such conditions that bribery and intimidation are impossible.

It is therefore provided that persons not acting in an official capacity may not linger about the voting-places. Only officials and one representative of each candidate whose name is on the official ballot may thus be present. Places for the sale of intoxicating liquor are sometimes forbidden by law to keep open during the time that the vote is being cast. Policemen are stationed at all the voting-places to preserve order, while judges of the

competent courts hold themselves in readiness to entertain the applications of persons who claim that their rights are being violated by election officers.

In the third place, the method of the counting of the votes is often regulated in great detail. Officers sworn to obey the law and liable to criminal punishment in case they do not do so are provided. The counting of the votes takes place in the presence of a representative of each of the candidates. The election officers must, on the closing of the poles, first count all the ballots cast, in order to see how many persons have voted. They then proceed to count the ballots cast for each candidate, but may not count any ballots which have been marked contrary to law. They must enter on a tally-sheet, as it is called, the total number of ballots cast, the number of illegal ballots found, which may not be counted for any one of the candidates, and the number of legal votes cast for each of the candidates. The number of these two kinds of ballots should agree with the total number of votes cast, and should not exceed the number of persons registered as entitled to vote. The ballots not counted because illegal, as well as the ballots cast for each of the candidates, are put into packages which are sealed. These are preserved so that they may be examined by the courts, in order that it may be judicially determined in case of litigation between the candidates which one has been elected.

The returns of each election district are gathered together in one place for the entire district in which a representative is elected. They are there counted by another body, which determines the total number of votes cast in the entire district, and issues a certificate of election to the persons receiving the greatest number of votes.

Finally any individual who deems himself aggrieved by anything which has been done in the course of these election operations has the right to apply to the courts for redress. Thus, if he is refused the right to register or vote, he may ask a court for an order compelling the proper officer to put his name on the registration list or to receive his ballot. Thus again, if the officer counting the votes refuses to count a ballot for a candidate on the ground that it is illegal, such candidate may apply to the court for an order commanding such officer to count the ballot. On the other hand, a candidate who believes that a ballot has been illegally counted for a rival candidate may apply to the court for an order forbidding the counting of such vote. In other words, all election processes are carried on under the supervision and control of the courts, which may interfere on the application of an interested person in order to insure the execution of the law.

Furthermore, laws have been passed, called Corrupt Practices Acts, which are intended to prevent the illegitimate use of money by bribery and otherwise in elections. Sometimes these acts limit the amount of money which may be spent. Violation of these laws is punishable criminally, and may result in the declaration that an election is void.

Generally everywhere outside of Great Britain cases with regard to parliamentary elections are tried by committees of the Parliament. In England, however, the ordinary courts have jurisdiction. In the United States the courts have the power to decide all cases having to do with questions arising out of the manner of voting. But their decisions may be reversed by the competent legislative committee. This committee has also the

right to determine whether money has been unlawfully used at elections or whether intimidation has been practised. In case it does so determine, the person who has benefited by such practices is declared not elected, and the seat in the house to which he claims to have been elected is usually given to that one of his opponents who received the next greatest number of votes at the election.

Such are some of the methods which have been adopted in order to secure an honest count of the legal votes. A carefully drawn ballot and election law which so far as may be prevents illegal voting, dishonest counting, and the illegitimate use of money, as well as intimidation at elections, has been shown by the experience of all countries which rely on election as a method of selecting public officers to be an absolutely necessary prerequisite of constitutional government.

Experience would seem to show also that most of the election procedure provided by such a law must be carried on under the supervision of courts independent of the executive.

XVI

THE PRIVILEGES OF MEMBERS OF THE LEGISLATURE

THE original purpose of the formation of a legislative body was, as we have seen, to provide a representative body of the people which might both aid and control the Crown in the exercise of his powers of government. Formed, perhaps, primarily to aid the Crown, the Parliament soon developed into a body of control. The discharge of its functions of control made it an absolute necessity that the members of Parliament should possess certain privileges and a reasonable degree of independence. As Blackstone says:

> Privilege of Parliament was principally established in order to protect its members not only from molestation by their fellow-subjects, but also more especially from being oppressed by the power of the Crown.

The conception that Parliament was primarily a body which was to exercise a control over the Crown, and that its members should on that account enjoy certain privileges, was reached in Great Britain at a very early period in the history of the country. By the end of the eighteenth century certain privileges were quite clearly established. When about this time parliamentary government was adopted in continental Europe the conception of parliamentary privilege was transferred thither. The history of the English Parliament is, therefore,

the source to which we must go in order to ascertain the origins and the purposes of the particular privileges recognized as possessed by members of Parliament at the beginning of the nineteenth century, when English political influences began to make themselves felt in other parts of the world.

The privileges of members of the English Parliament, which thus lie at the foundation of the independent position of Parliament, were not in early days and are not even now set forth in any one document or in any number of documents. As Blackstone again says:

> If . . . all the privileges of Parliament were set down and ascertained and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case not within the line of privilege and under pretense thereof to harass any refractory member and violate the freedom of Parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite.

Like most other English institutions, the privileges of Parliament are based on custom, in this case the custom known as the Law and Custom of Parliament. This law and custom of Parliament was gradually evolved in connection with the development of the powers of Parliament, largely as the result of the assertion by Parliament of particular rights which it claimed, but which the Crown refused to recognize or was attempting to violate in order to exercise a more effective control over Parliament. One of the most notable instances of the assertion by Parliament of what it considered to be its rights or privileges is to be found in a document known as the "Apology of the Commons," of date June 20, 1604, at the beginning of the reign of the first Stuart king, James I.,

when the final struggle between Parliament and Crown was just beginning. In this document the Commons said to the King:

What cause we your poor Commons have to watch over our privileges, is manifest to all men. The prerogatives of princes may easily, and do daily, grow: the privileges of the subject are for the most part at an everlasting stand: They may be by good providence and care preserved, but being once lost are not recovered but by much disquiet. The rights and liberties of the Commons of England consisted chiefly in these three things: first, that the shires, cities and boroughs of England, by representation to be present, have free choice of such persons as they shall put in trust to represent them; secondly, that the persons chosen during the time of the Parliament, as also of their access and recess, be free from restraint, arrest and imprisonment; thirdly, that in Parliament they may speak freely their consciences without check and controlment, doing the same with due reverence to the sovereign court of Parliament; that is, to your Majesty and both Houses, who in all this case make but one politic body whereof your Highness is the head.

In 1610, six years later, in a petition of the Commons, the privilege of free speech is reasserted. An item in this petition reads:

We hold it an ancient, general, and undoubted right of Parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal foreclosed.

The Parliament in the reign of the succeeding King Charles I. deemed itself obliged by the attempts of the King to establish absolute monarchical government, to protest frequently against the actions of the Crown. During this reign the Parliament refused the grant of money to the Crown pending the redress of grievances which it set forth in various petitions and remonstrances. The arrest of one of its members by the King called forth a fresh protestation of its liberties.

The conflict arising in the seventeenth century between the theory of absolute monarchy maintained by the Crown, and the theory of parliamentary control advocated by Parliament, led to a civil war. This began in 1640, and ended in the defeat and capture of Charles I., who was subsequently executed. Although the Stuarts were restored to the throne in 1660, the conflict was not really settled until by the "Peaceful Revolution of 1688," as it is sometimes called, the Stuarts were driven out a second time and the crown was given to William and Mary. In 1698 the new sovereign accepted a Declaration of Rights which, under the name of the "Bill of Rights," was passed by Parliament. This bill guaranteed to Parliament certain rights, among which was freedom of speech.

When the Constitution of the United States was adopted the occurrences of the seventeenth century, which were a part of the historical traditions of all English-speaking men, were in the minds of its framers, and they put into that Constitution what they considered experience had shown to be the privileges necessary to insure the independence of the new Congress which was established.

The privileges thus given are:

First. Each house is to be the judge of the elections, returns, and qualifications of its own members.

This privilege had developed as a result of the conviction that only through its recognition could an independent Parliament be formed. Had such matters been within the jurisdiction of the courts at the time when the royal judges, who held those courts, could be arbitrarily dismissed by the King, as was the case in England prior to 1701, the Crown might easily, by supporting

the claims of a candidate whom it favored to a seat in Parliament, secure the recognition by the courts of those claims. When, however, the courts were really independent of the Crown, as they became in 1701, or independent of the President of the United States, as they were made by the American Constitution, this privilege lost much of its significance. In England, therefore, Parliament has passed a law authorizing the courts to determine parliamentary election cases. But outside of England, as a general rule, the Parliament still has the right to judge these cases. The fear of subjecting the courts to partisan political influences has been instrumental in the United States in preventing the grant to the courts of the right to determine controversies arising with regard to elections to legislative bodies.

Second. Each house of the United States Congress may determine the rules of its proceedings, punish a member for disorderly behavior, with the concurrence of two-thirds expel a member, and may compel the attendance of absent members as each house may provide.

The existence of these rights had been found necessary in order to secure orderly and expeditious action. Did they not exist members might be absenting themselves, or, by disorderly conduct when present, prevent the transaction of business. At a time when the struggle between the Crown and Parliament was going on it was a comparatively easy matter for the Crown, which always had some supporters in the house, to hinder or even prevent the house from doing those things of which the Crown did not approve. At present, of course, when the relations between executive and legislature are better defined than they once were, such privileges are not so important, but even now their existence

would seem to be necessary where party government has developed.

The first French constitution, while recognizing most of these powers as belonging to Parliament, lays down a number of rules for the conduct of legislative business. The same is true of the Belgian constitution of 1830. But generally speaking, most of the modern European constitutions recognize large powers in the houses of the legislature to regulate their own proceedings.

The most common exception to the rule that each house of the legislature may lay down the rules governing its proceedings is the determination in the constitution of the number of members of the legislature required to be present, called a quorum, in order that business may be legally transacted. As a rule this is fixed, as it is in the Constitution of the United States, at a majority of the members. In that instrument, however, it is provided that "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."

Third. Each house of Congress 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.

The only part of this provision which can be regarded as granting a privilege is that authorizing keeping the proceedings secret. This was in the old days during the conflict between the Crown and Parliament, regarded as a privilege of great importance, since it was believed to be necessary in order to secure that independence of the control of the Crown which was necessary

to freedom of action. At the present time, however, with the development of more harmonious relations between the executive and legislature, it has ceased to have great importance.

Fourth. The members of both houses of Congress 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.

What was the original extent of the privilege of freedom from arrest which was possessed by the members of the British Parliament it is somewhat difficult to say, inasmuch, as we have seen, the privileges of members were rather indefinite. Blackstone says of it that "it included formerly . . . privilege . . . from legal arrest and seizures by process from the courts of law." By the end of the eighteenth century exceptions to any such general privilege had been made, to use again the words of Blackstone, in the case of "treason, felony, and breach (or surety) of the peace." These are the words, it will be noticed, which are used in the United States Constitution.

In case of arrest in these cases Parliament had, however, the right to receive immediate information of the imprisonment or detention of any member, with the reason for which he was detained. This right was recognized in a number of statutes.

The continental constitutions laid considerable emphasis on the right of Parliament to be notified, and often extended it by making the legality of the arrest dependent upon obtaining the consent of the chamber of which the person arrested was a member, except in the case that the member arrested was taken in the

criminal act. This was particularly the rule in the first French constitution of 1791, and was subsequently adopted by the Belgian constitution of 1830, whence it has gone into most of the modern European constitutions.

The form in which this privilege is granted in the United States Constitution, or perhaps it would be better to say, the exceptions to the privilege are such as to render the privilege itself worthless. The worthlessness of the privilege from arrest in the United States is, however, of little moment. The system of parliamentary government is by this time so universally accepted, so embedded, as it were, in the political life of the people, the position of the legislature is so secure, and the courts which would be called upon to judge an offense which, it was alleged, had been committed by a member of the legislature are so independent of the Executive, that little fear need be entertained of any attempt on the part of the President to terrorize members of Congress by arrest or threats of arrest of such members for crimes attributed to them. Were such conditions not present it would undoubtedly be necessary to give to the privilege from arrest somewhat the same extent which it probably had in early English constitutional law, if it were desired to assure to the legislature the position of independence it must have if constitutional government is to exist.

Fifth. The members of both houses of Congress shall not be questioned in any other place for any speech or debate in either house.

This principle of free speech was, as we have seen, regarded in England from an early time as absolutely necessary to the independence of members of Parlia-

ment. Such a privilege was incorporated into an act of Parliament passed in the reign of William and Mary, soon after the Revolution of 1688. This law provided "that the freedom of speech and debates and proceeding in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

This privilege of free speech was somewhat extended by the French constitution of 1791, which provided that

> the representatives of the nation are inviolable; they cannot be questioned, accused, or judged at any time with regard to what they have said or done in the exercise of their functions as representatives.

The Belgian constitution of 1830 provides a very similar privilege. It says:

> No member of either chamber shall be prosecuted or questioned because of opinions expressed or votes given in the exercise of his functions.

In either this form or the narrower English form the privilege appears in most modern European constitutions. The English belief in the necessity of its existence is thus entertained by all European peoples who have endeavored to establish constitutional government.

Such are some of the most important privileges which the modern European world deems necessary to accord to members of the legislative body. It is to be noticed in the case of most of these privileges that they have shown a tendency to diminish in extent rather than to be enlarged. We must not, however, conclude from this tendency that such privileges are no longer regarded as necessary or desirable. The real reason for the diminution in their extent is to be found in the fact that the

independence of Parliament over against the executive has been so clearly recognized in modern constitutional government that the privileges which were once so necessary, in order to protect the legislature from encroachment upon the part of the executive, have ceased to be so important as they once were. Were the executive to attempt to exercise a control over the legislature by terrorizing its members, we should expect to see a demand made that those privileges should be enlarged to their former extent, or that the government would cease to be constitutional in character. But while the insertion of such privileges into a written constitution is undoubtedly a desirable thing, it is to be remembered that this action alone and of itself is really of little value. The Parliament to whose members such privileges are accorded must ever be on the alert to see that their privileges are really observed. Furthermore, the people, whose representatives the members of Parliament are, must, if these privileges are to have any real value, also see to it that the executive is not permitted to encroach upon or in any way diminish these privileges. In Great Britain, where such privileges originated, this was the way in which they came to be recognized. Both Parliament and people on critical occasions resisted any encroachment by Crown or courts upon the rights of Parliament. It was largely as a result of this jealous solicitude, of this willingness to offer resistance where resistance was necessary, that it was in England that constitutional government had its birth. For the English people clearly saw that constitutional government had its basis in an independent Parliament and that parliamentary independence was in its turn based on certain parliamentary privileges.

PRIVILEGES OF LEGISLATORS

Originally in England members of the House of Commons, as well as of the House of Lords, were unpaid, and for a long time it was regarded as improper to provide any compensation for members of the House of Commons, notwithstanding the fact that with the increase in the number of the voters a less wealthy class of members were being elected.

With the development of democratic government, however, it has been felt almost everywhere that it is absolutely necessary to pay at least the members of the lower house of the legislature, and Great Britain has been unable to escape from the influence of this general movement. Italy is at present one of the few European states where the members of the lower house are unpaid.

In those countries which are democratic in character and in which, on that account, the upper house has not been established in order to provide for class representation, there is also a marked tendency to give compensation to the members of the upper house as well.

Payment of members of the legislature may thus be regarded as one of the privileges or rights of members of Parliament in all states which are striving to attain a popular and democratic constitutional government.

XVII

PARLIAMENTARY PROCEDURE

METHODS of legislative procedure differ greatly. The causes of the differences are for the most part to be found in the character of the system of government, whether Cabinet or Presidential, and in the existence or non-existence of strongly organized political parties.

In Great Britain thus we find both Cabinet government and a strongly organized party system. The coexistence of these two factors would seem to have been influential in causing the development of the present methods of procedure of the House of Commons. The long-continued existence of the two-party system in close connection with which Cabinet government has developed has brought it about that the Cabinet is an organ of great strength. The legal power to dissolve the House of Commons which the Crown possesses, but which is exercised really by the Cabinet, gives to that body the right to destroy the house whose creation it is. As dissolution is followed by a new election which involves inconvenience and expense for members of Parliament, the Cabinet is protected in large measure from captious criticism and unjustified votes of lack of confidence upon the part of the house as a whole. Furthermore, the ties of allegiance to party

are ties which are not easily or unreasonably broken. A Cabinet which has come in with the support of a great party in majority in the house is reasonably certain of quite a long term of office unless something unforeseen looms up on the political horizon. It must be admitted that of late years sectional and social interests have developed which tend to destroy the two-party system. One of the recent English cabinets thus rested upon a coalition of three political groups, two of which had somewhat peculiar interests. These were the Liberal, the Irish-Nationalist, and the Labor parties. If this condition of things becomes permanent the Cabinet in the English system will probably not occupy the same position of strength that it has had in the past.

But however that may be, it is still true that present methods of procedure in England are based on Cabinet government and the supposition that two strongly organized political parties exist. From the point of view of parliamentary procedure the Cabinet is very much in the position of a standing or permanent committee, all of whose members belong to the party in control of the House of Commons. They thus control legislation, particularly legislation of a partisan character. This being the case, there is little, if any, need for an elaborate committee system such, as we shall see, has developed in the Congress of the United States. For there is little possibility of legislation of which the Cabinet does not approve, and the Cabinet is expected and by reason of its strength is able to prevent the passage of such legislation. The part which the house itself directly plays in legislation is thus in large degree perfunctory. All important bills are now drawn by the government, and, until recently, all were considered by the house in what

is known as the Committee of the Whole House. A session of this Committee of the Whole House differs from the ordinary session of the house by reason of the fact that it is not presided over by the Speaker, but by the chairman. The ordinary rules regulating debate are also not so strictly observed. Attendance at a session of a Committee of the Whole is not so great as when the house is sitting as the House of Commons. Usually only those who are interested in the subject under discussion attend.

When the subject in hand relates to the providing of revenue the Committee of the Whole is known as the Committee of Ways and Means; when appropriations are being considered it is called the Committee of Supply. Such a disposition of the estimates for expenditures and of the ways and means for providing for the expenditures voted has the great advantage of keeping in practically the same hands all the appropriations as well as all the revenues.

It is to be remembered, however, that the detailed control over expenditures which can thus be exercised by the house is not a great one. For any Cabinet would regard a serious reduction of its estimates as equivalent to a vote of lack of confidence, and would either dissolve the house or resign. The real control over expenditures is exercised by the Treasury before the estimates are sent to the house. Attention should also be directed to the fact that a standing order of the House of Commons declares out of order any proposal for the expenditure of money not made by the Cabinet. Members of the House of Commons not members of the ministry may not thus move appropriations. Much extravagance is thereby prevented.

This device has so approved itself to men of British origin that a provision incorporating the principle is often inserted into those acts of the British Parliament which serve as constitutions for the colonies. Such, for example, is the case in the British North America Act of 1867. Section 54 of that act reads as follows:

> It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address or Bill for the appropriation of any part of the Public Revenue or of any Tax or Impost to any purpose that has not been first recommended to that House by Message of the Governor-General in the Session in which such Vote, Resolution, Address or Bill is proposed.

The increase of parliamentary business made necessary modifications of this method by which most bills were considered in committee of the whole. For if every bill went to the Committee of the Whole House only one bill at a time could be considered. In 1882, therefore, certain great standing committees were established. There are at the present time four of these committees, and all bills except money bills, private bills, and bills for confirming provisional orders—that is to say, all public non-fiscal proposals—are required by a standing order of the house of date 1907 to be referred to one of these committees, the Speaker to determine which one, unless the house otherwise directs.

The way in which these committees are formed indicates the care which is taken to keep the responsibility for all legislation of importance in the control of the majority party. The members of each of these committees, from sixty to eighty in number, are named by the Committee of Selection in such a manner that they will represent the composition of the house as a whole. This Committee of Selection is made up after

conference between the leaders of the Government and of the Opposition, and appoints as well the members of what are called the Select and Sessional Committees of the House. These committees are chosen for the consideration of measures which have for the most part not come into the field of practical partisan politics. Their members are therefore chosen by the Committee of Selection without regard to party lines.[1]

The existence of a Cabinet, which by reason of having the support of the majority in the lower house, and because of the way in which the committees are organized, has pretty complete control of the processes of legislation, has made it seem necessary to provide a presiding officer who will occupy an impartial position and protect the rights of the minority. Such an officer is the Speaker, as he is called, who is elected theoretically by each house, but who, once elected, is re-elected until he dies or resigns.

A word or two should, perhaps, be said as to the method by which the opposition makes its influence felt. This is done by means of questions asked by individual members, which those representing the government must answer, by amendments made in committees, and in the house as well, and by proposing votes of censure or lack of confidence. The struggles between the Government and the Opposition always take up a great deal of time. In order to diminish the unreasonable waste of the time of the house two methods have been adopted to curtail debate. One permits any member to move that the "Question be now put." The chair is then to put it, without amendment and without debate, unless he deems an abuse is being made of this motion.

[1] See Ogg, *The Governments of Europe*, p. 120 *et seq.*

But at least one hundred members must vote for the motion in order that it be operative. The other method is for the house to assign, in advance of the consideration of a bill, the time to be devoted to the consideration of that bill, or to portions of it. When the period has expired the vote is taken whether the debate has closed or not.

In France we find Cabinet government but a weak party system. Furthermore, the Cabinet in France does not have the weapon of defense possessed by the English Cabinet in the power of dissolution. The French Cabinet is, therefore, compared with the English, a weak body. It cannot, as does the English Cabinet, control legislation. For the conduct of legislation it has been necessary to provide an elaborate committee organization.

This committee organization has been made on the theory that party government either does not exist or should not be encouraged. Each of the French chambers is each month divided by lot into equal sections called Bureaux, of which there are eleven in the Chamber of Deputies.

These bureaux make a preliminary examination of the credentials of members, consider bills before they are sent to committees, and elect the members of those committees. Each bureau chooses one or more of its members to serve on the committees.

The general principle is that each bill is referred to a special committee formed for the purpose of its consideration. But the tendency is for these committees to become permanent. Thus the committees on the budget, and for the audit of the accounts of the government, remain unchanged for a year, while the com-

mittees on the army, labor, and on railroads continue in existence without alteration during the entire session of the chamber.

These committees have assumed to themselves the practical control of legislation. Instead of being controlled by the Cabinet, as is the case in England, they virtually control the Cabinet. The person selected by the committee to report to the chamber the conclusions on a bill submitted to it, who is called the reporter, is apt to exercise a greater influence over the chamber than a member of the Cabinet can.

The most important of these permanent committees is the budget committee, which, it is said, "seems to take pride in criticising the estimates and making them over, as regards both income and expenditure, and each member exerts himself to add appropriations for the benefit of his constituents, so that when the report is finally made the government can hardly recognize its own work."[1]

The absence of any rule similar to the standing order of the English House of Commons is apt to promote extravagance and derange all financial plans.

But while in France party government does not exist, and the Cabinet has little, if any, strength, it must be admitted that the committees of the French Parliament have for the last twenty-five years been following a reasonably consistent policy in the direction of greater and greater democracy and the complete separation of church and state. While the executive side of the government has been distinctly unstable, the legislative policy has shown a remarkable degree of continuity.

While in England we find Cabinet government and

[1] Lowell, *Government and Parties in Continental Europe*, I, p. 116.

the two-party system, in Germany we find neither. The existence in the Empire of an extremely strong and influential upper house—*viz.*, the Bundesrath, or Federal Council, is also a factor which may not be ignored. As Professor Ogg says:[1]

> The right of initiating legislation is conferred upon the Reichstag [the Imperial lower house], but in practice it is exercised almost exclusively by the Bundesrath. Even finance bills all but invariably originate in the superior chamber. Under the normal procedure bills are prepared, discussed, and voted in the Bundesrath, submitted to the Reichstag for consideration and acceptance, and returned for further scrutiny by the Bundesrath before promulgation by the Emperor. In any case the final approval of a measure must take place in the Bundesrath by whose authority alone the character of law can be imparted. Strictly speaking, it is the Bundesrath that makes law with merely the assent of the Reichstag.

Finally, members of the Bundesrath, to whom is assigned a special bench in the lower house, possess the right to appear and speak at pleasure therein.

The Reichstag has under the constitution the power to elect its own officers and to determine its own procedure. The president of the Reichstag resembles the English Speaker in that he is an impartial moderator whom custom requires to recognize alternately the supporters and opponents of the measure being considered.

At the beginning of a session the Reichstag is divided by lot into seven bureaus as nearly equal in numbers as possible. These bureaus remain unchanged unless upon a motion made by thirty members. These bureaus pass preliminarily on the credentials of members and choose the members of the committees to which the bills are referred. None of these committees is permanent, except a committee on elections, which sits through the

[1] *The Governments of Europe*, p. 221 *et seq.*

session. All other committees are temporary, made up to consider special bills by an election by ballot of seven members of each bureau.

The temporary and fluctuating character of practically all the committees to which proposed legislation is referred prevents them from exercising any great positive influence over legislation. The fact that they are not called upon to initiate or formulate anything makes it unnecessary to establish a permanent committee organization. German party organization does not seem strong enough to justify the attempt on the part of the Reichstag so to organize itself as to be able to exercise the powers which it possesses under the constitution. The weak party organization combined with a strong executive has been the controlling influence over the legislative procedure of the popular house of the German Parliament.

The United States offers an example of a political system which is based on the theory of Presidential rather than Cabinet government, and which has been characterized by the existence during most of the history of the country of two and only two strong political parties.

The Presidential system of government is the result of the conscious attempt to apply rather strictly the political theory known as the theory of the separation of powers. The application of this theory involves the existence of a legislative authority whose actions are not subject to the control or influence of the executive except in the cases specifically set forth in the constitution. These are few in number.

But the attempt has been made by the people through the organization of strong political parties to bring the

two independent authorities in the government into accord, and, by the exercise of party control, to secure harmony of action. These attempts have been on the whole successful. The President is coming more and more to be recognized as the leader of the party which secured his election, and as the leader of his party is being accorded a tremendous extra-constitutional control over the actions of the Congress in which normally the party electing the President is in control.

The two facts—*viz.*, the existence of Presidential government and the two-party system—furnish the explanation of the legislative methods and processes of Congress.

In the first place, the facts that the President has no power under the Constitution to initiate legislation, and that there are no representatives of the President in the House of Representatives to manage and control the legislative program, have made it necessary to provide some persons who shall be responsible for that program. Such persons are the Speaker and the chairman of the Committee on Ways and Means. The Speaker is theoretically chosen by the house. Actually he is selected at a meeting of the members of the party in majority in the house, and their choice is merely ratified by the house. The Speaker thus does not occupy the position of an impartial presiding officer, but is recognized as a party man who is to make use of his powers to carry through the legislative program of his party, and for this reason he is given authority to refuse to entertain what are known as dilatory motions—that is, motions made by members of the minority with the purpose of obstructing the performance of business. He also has a large discretion in the recognition of

members who desire to speak. It is thus often practically impossible for a member to catch the eye of the Speaker unless that officer understands beforehand that it has been agreed upon by the leaders of the two parties that this particular member shall have the floor.

Until recently the rules of the house provided that the Speaker should appoint all the committees of the house. Nominally, the committeemen are now elected by ballot by the whole house. In practice, however, the members of the two parties, meeting separately in what are called caucuses, determine who shall be voted for. And in fact the present practice of the party in power has been to select the chairman of the Committee of Ways and Means as its leader upon the floor, and to permit him to designate who shall be voted for by his party as members of the various committees. The chairman of the Committee on Ways and Means has thus become a more powerful party leader in Congress than the Speaker. He is assisted in his government of the house by the Committee on Rules, which has the power to report resolutions. These resolutions may be adopted by a majority vote, and their effect is to determine what measures shall be considered, in what form, and for how long. It does not need to be said that the majority of the members of all important committees, including that on Rules, are from the party in the majority in the house. Through the concentration of power in the hands of the Speaker, the chairman of the Committee on Ways and Means, the chairmen of the other important committees, and the majority members of the Committee on Rules, there has thus developed a system of party leadership which somewhat resembles the Cabinet system of government. This is true, at

least, to the extent that these leaders are able to formulate the principal policies of their party, control their discussion in the house, and secure for them the support of the other members of the party.

The organization of a leadership in Congress was not, however, sufficient. It was necessary to exercise a control as well over the time which individuals might use in the debate of measures before Congress. A rule of the house therefore provides that no member may speak more than an hour nor more than once on any measure unless he introduced it or is the member reporting it from committee. Even when the house goes into committee of the whole, where measures are discussed and provisionally voted upon, the house fixes the time for debate, which may not be extended by the committee.

In the Senate, however, greater freedom of debate is allowed, but even there the tendency is to curtail it.

In the Senate it is not normally necessary to make provision for a presiding officer, since under the Constitution the Vice-President is to preside over that body. In case of his death or absence for other reasons, the Senate, however, elects a chairman. When the Vice-President acts as the presiding officer of the Senate its presiding officer will usually be in sympathy with the party in general control of the government. Such will also be the case when the Senate elects its presiding officer, except when the Senate is out of harmony with the party which has elected the President, or which is in control of the House of Representatives when that is not politically of the same views as the President.

In the second place, the original theory of the independence of the legislature had for its result the right

of any member of either house to introduce bills. In the house this is done by handing them to the clerk if they are private bills, and to the Speaker if they are public. The result of the exercise of this right is the introduction of an enormous number of bills.[1]

The establishment of a committee system was absolutely necessary in order to dispose of such a vast amount of proposed legislation. The important committees in both houses are standing committees. In the house they are appointed, in theory, by the whole house; in the Senate they are in theory elected by the Senate, but are in reality appointed by a committee or committees selected at a meeting of the members of the party in majority in the Senate.

In either case the majority of the members of each committee belong to the party in majority in the house. The chairmen of the committees are named at the time of the formation of the committees.

These committees serve two ends:

In the first place being controlled by the party in control of the house, which will be normally as well the party to which the President belongs, they will see to it that no bills referred to them, as all bills must be, shall be reported favorably to the house which are opposed to the policies of that party.

In the second place they will kill many of the bills of a private character or introduced by a member without the backing of the party. In this way are "smothered" many bills which are introduced, not with any idea that they will receive serious consideration, but merely

[1] In the Fifty-ninth Congress there were introduced into the House 26,154 bills, 257 joint resolutions, 62 concurrent resolutions, and 898 simple resolutions.

with the purpose of pleasing a supporter or a body of supporters (many of them carry on their face the notice that they are introduced "by request") of the member introducing them. A further check upon the powers of the individual members in introducing and securing the discussion of bills is to be found in the fact that a regular order for the consideration of bills is provided by the rules, which may not be departed from except by unanimous consent. The Speaker, as a member, may refuse his consent to any attempt on the part of a member to bring up his measures for discussion, and it is said makes use of his power to obtain the support of such members for party measures.[1]

One of the results, however, of the freedom of the individual member in introducing bills and proposing amendments to bills which are being considered, is that the estimates proposed by the Executive are increased as to particular items, and cut down as to others either in the committees to which they are referred or in the houses after the determinations of the committees are reported. The attempt is made in the rules of both the house and the Senate to prevent increases in the appropriations as reported from the committees being made on the proposition of individual members. But these attempts have not been very successful.

Confusion has also resulted with regard to the finances of the government of the United States from the fact that several committees have jurisdiction. Thus in the house one committee, that of Ways and Means, has jurisdiction of tax measures, while appropriations are in the jurisdiction of several committees. No one committee ever gets an idea of the expenses of the govern-

[1] Beard, *American Government and Politics, passim.*

ment as a whole, while little, if any, attempt is made to relate expenditures to income. That national bankruptcy has not resulted from these practices is due to the fact that the income of the country has not, except in times of emergency, like periods of war, been based on the administrative needs of the government. The adoption of the idea of a protective tariff has had the effect of producing in ordinary years a surplus of income over expenditure, and the anxiety of the government has been rather to spend this surplus with reasonable wisdom than to curtail expenditure so as to reduce taxation. The natural result has been considerable extravagance. If the protective idea is abandoned it will undoubtedly be necessary to change the methods now followed, and to adopt others which will have the effect both of curtailing expenditure and reducing taxation.

Finally it is to be noticed that many important measures, such as appropriation bills and tariff bills, are really drawn up by some committee before they are submitted to the house. It is also true that occasionally bills are framed by joint committees of both houses of Congress appointed for the purpose, and somewhat nonpartisan in character, which are authorized to take testimony and report to Congress on some subject which is not regarded as political in character.

In this way the legislative procedure and the committee organization of Congress attempt on the basis of the independence of each other of the executive and the legislative, and through the medium of the party to secure harmony where otherwise there might be conflict, and to co-ordinate the actions of the separate political authorities of the government.

The reliance on party, which is characteristic of the

method adopted, gives to the President, the recognized leader of his party, a really tremendous influence over the work of the Congress.

It will thus be seen that a strong party organization is the most important factor in determining the real character of the government. The absence of such a party organization gives in the Presidential form of government adopted in the German Empire the control of the system to the executive; the presence of such a party organization produces somewhat the same result in Great Britain. The system of Cabinet government which has been adopted in Great Britain subjects the executive, however, to parliamentary control. The two countries differ thus because in the former the system of government is not subjected to popular control, while such control does exist in Great Britain.

On the other hand, the Cabinet government of France, where party organization does not exist, has resulted in the exercise of almost all important powers by the legislature. In the United States, finally, the system of Presidental government, which as originally established placed the Executive in the position of merely executing policies determined upon by a legislature not subject to his control, has, because of the organization of strong parties, developed into a form of government in which the Executive is exercising every day greater powers over legislation and legislative policy.

We must therefore conclude that the form of government as fixed in the constitution is not always or even generally expressive of the actual kind of government which a country enjoys. Extra-constitutional and extra-legal forces have the effect of greatly modifying the work of constitution-makers.

XVIII

THE POSITION AND POWERS OF THE COURTS IN THE CONSTITUTIONAL GOVERNMENT OF ENGLAND AND THE UNITED STATES

WE have seen that one of the principles of constitutional government which had been developed by England in the political struggles preceding the close of the eighteenth century was that the judicial power was to be exercised by judges who were independent of the Crown. That is, judges were not to be dismissed from office except with the consent of both houses of Parliament.

Originally, however, the position which the judges occupied in England was not a position of such independence. On the contrary, judges were, like other officers, appointed, and for the most part removable by the Crown at will. They acted for the Crown in the discharge of those functions which the Crown possessed as, to use the phraseology of the English law, "the fountain of justice." Owing to the peculiar political development of England the English judges occupied quite a different position from that occupied by the judges on the continent of Europe. This peculiar position of the English judges had an influence on the development of the English law. The English law became what was known as "the common law"—that is,

a law common to all Englishmen—and the English judicial system became a highly centralized system in which practically all the law was administered by one set of courts. The only exception to this statement, if exception it may be said to be, is to be found in the development of a special court held by the Lord Chancellor. This officer was called the "keeper of the King's conscience." In this capacity he endeavored in his Court of Chancery, as it was called, to mitigate some of the rigors of the law as administered by the common law courts. His efforts resulted in a supplementary system of law which came to be known as "equity." Apart, however, from this Court of Chancery, which had jurisdiction over the whole of England, with the result that the system of law known as equity was just as universal or common as the common law, practically all the law in the country with regard to all subjects and all persons was administered by the royal law-courts. In other words, in England, roughly speaking, there were but one law and one centralized system of courts.

On the Continent, however, conditions were quite different. Probably because of the fact that no country in continental Europe was from a political point of view so highly centralized as England, the law in the continental states was not uniform—that is, there was no common law—nor was there one judicial system exercising powers throughout the entire country. Thus in France, in 1789, there were two great systems of law struggling for supremacy—the Roman law in the south, and what were called the customary laws, mainly of Germanic origin, in the north. In France also there were thirteen supreme courts in the various provinces of the kingdom. In France, finally, the gradual cen-

tralization in the Crown of government apart from the administration of justice had resulted in the attempt, more or less successfully made, to deprive the ordinary courts of jurisdiction over actions to which the Crown or its agents were parties. Such an attempt was necessary in France if the fight waged by the Crown against feudal privilege was to be carried on successfully. For the judges of the ordinary courts could not be removed from office by the Crown. Judicial offices in France prior to the French Revolution were regarded as property, and as such were bought and sold. There therefore developed in France prior to the end of the eighteenth century special tribunals, not connected with the ordinary judicial system, but rather with the Crown, whose members, like the early English judges, were subject to its disciplinary power. These special tribunals for the most part decided cases arising between the individual citizens and the agents of the government. The law which they administered was also distinguishable in many respects from the law regulating the relations of private individuals one with another, which was administered by the ordinary courts.

We have thus, in France, as opposed to England, no common universal law governing all the actions of individuals, and no centralized judicial system. We find there, on the contrary, various systems of law governing private relations, another system of law governing public relations, thirteen different supreme ordinary courts, and a special set of tribunals to administer the law governing public relations.

What has been said of France may also be said of most other continental countries. Certainly none of them, with perhaps the exception of Spain, had at the

end of the eighteenth century anything like the universal common law and centralized judicial administration which were to be found in England. Even now in Italy the judicial system is quite decentralized, notwithstanding the country otherwise has been rather highly centralized. There are, it is true, civil and penal codes which are of force throughout the entire kingdom, but their provisions are applied by five separate and independent judicial systems at the head of each of which is a supreme court. These courts sit, respectively, at the old capitals of the principal states, whose union formed the present kingdom of Italy—*viz.*, Turin, Florence, Naples, Palermo, and Rome.

During the constitutional struggles in England, which took place in the seventeenth century, it was believed that the position of the judges was not sufficiently protected against royal influence. The famous case of "ship money," the decision of which forced John Hampden to pay a tax generally believed to have been illegally assessed against him, was one of a number of incidents which convinced the English people that royal influence should not be exerted over the judges in their decision of cases.

Therefore, after the Revolution was over and the people had won in their conflict with the Crown, Parliament, in 1701, passed an act which provided that the judges should not be removed by the Crown except upon the address or petition of both houses of Parliament. The English judges obtained as a result of this act a permanence of tenure similar to that which had for quite a time been possessed by most of the judges on the Continent. When this permanence of tenure was thus secured the position of the English judges was,

however, vastly more important than that of the continental judges. For the system of law to be administered by them was uniform and universal throughout England, and the English judicial system was highly centralized.

The position of English judges, so far as concerns their relations to the Crown and its officers, was particularly important. For, acting independently of the Crown as they did, and having jurisdiction of suits between private individuals and the agents of the Crown, they had ample power to protect the individual against any attempt on the part of those agents to demand of him what was not authorized by law.

Soon after this development had been accomplished the French philosopher Montesquieu made his study of the English law. In his *Esprit des Lois* he published the results of his study. His followers have claimed to find in the English judges something in the nature of a third authority in the government—*viz.*, the judiciary, which, on account of the independence of its action, exercised a third power of government—*viz.*, the judicial power. The existence of such an independent authority exercising such a power as was exercised by the English judges they considered to be necessary to constitutional government.

Whether this analysis of English institutions was correct or not is a matter of little moment. The important thing is that the experience of the English people, in their struggle for constitutional government, had led them to believe that it was absolutely necessary to the continued existence of that form of government, that the judges who were to determine the legality of the actions of the agents of the executive must be independent of that executive.

English-speaking people, therefore, accepted with eagerness the principle. They were proud of and had confidence in their courts. They believed that the English courts had developed the English common law. They further believed that through the courts had come to them "the gladsome light of jurisprudence," to use the words of Lord Coke, one of the greatest of English judges. They remembered the many instances in which the English judges, notwithstanding their dependence upon the Crown, had opposed the royal wish, and had endeavored to stand for the rule of law against autocracy. The historic remark of one English judge who, on being pressed by the King to decide in a particular way, had said, "Sire, you may perhaps find a judge who will reach that decision, but you will hardly find a lawyer," is indicative both of the belief of the English people in the necessity for the rule of law, and of their conviction that the rule of law could be secured only if the judges were independent of the executive.

This belief in the rule of law, and this conviction that the independence of judges was necessary to its existence, attained almost the dignity of a religious creed for those who framed the American constitutions at the end of the eighteenth century. The first constitution of the state of New York, adopted in 1777, provided absolutely that "the Chancellor, the judges of the Supreme Court and first judge of the County Court, hold their offices during good behavior." The method of removing judges in case of misbehavior was made even more difficult than was the case in England at that time. For the court of impeachment, which alone had such power of removal, was to consist of the members of the state Senate and the Chancellor and judges of the Supreme

Court. Thus the judges themselves were to pass upon the propriety of the removal from office of one of their number.

The Constitution of the United States, adopted twelve years later, provided similarly that "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 term of office."

While no mention is made in the United States Constitution of any method by which the judges may be removed from office, it has been the almost universal belief that they may be removed only as the result of impeachment proceedings. By the Constitution "all civil officers may be removed on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors." As the Constitution also, as has been shown, provides that judges "shall hold their offices during good behavior," it is at the present time considered that behavior on the part of a judge which is inconsistent with the accepted traditions of the judicial office is equivalent to "high crimes and misdemeanors," and therefore justifies conviction on impeachment.

The impeachment proceedings in connection with a judge are the same as those in the case of the President, except that when judges are tried the Chief Justice does not preside. That is, the proceedings are initiated by the House of Representatives, are tried before the Senate, which convicts by a two-thirds vote of those present, and the judgment of the Senate, the Court of Impeachment, "shall not extend further than to remove from office and disqualification to hold and enjoy any

office of 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."

The adoption in the United States of the idea of a written constitution which provided for the existence of the most important governmental authorities and determined their relations one with another, almost necessarily involved provision in the constitution for the general organization of the judicial authority. Thus the first constitution of New York specifically enumerates "the Chancellor, the judges of the Supreme Court and the first judge of the County Court." Thus again the Constitution of the United States provides for a "judicial power of the United States" which "shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

It is regarded as a rule of American constitutional law that if the written constitution mentions a governmental authority, that authority is to be regarded as created or its existence as recognized by the constitution. In either case it becomes a part of the constitutional government of the state, in such a way that it may not be destroyed by any distinctly governmental authority. The only way under these conditions in which such an authority may be abolished is by an amendment to the constitution.

The Supreme Court of the United States thus is so embedded in the governmental system of the United States, that its existence and the rules of the Constitution, with regard to its organization, are above and beyond the power not merely of the Executive, but of

the legislature as well. The Congress may not, therefore, even by law abolish the Supreme Court, nor may it give even by law to the judges thereof or to the judges of such inferior courts as may be provided any tenure of office other than good behavior, nor diminish their compensation during their continuance in office. In this particular the United States is peculiar among the sovereign states of the world, most of which provide for the judicial authority in legislation rather than in the constitution. In some of the great confederations of the British colonies, however, provision is made for a supreme court in the organic act of government.

But the Constitution of the United States apparently goes a step further than merely to provide for the Supreme Court in the Constitution. It provides also what shall be the jurisdiction which may be exercised by the courts. This is done by defining the judicial power of the United States, which by the Constitution is granted to the courts of the United States. The courts themselves, however, hold that the Constitution does not of itself vest all of the judicial power of the United States in the courts of the United States, but that as a general rule those courts may exercise actually only those powers which Congress has, within the limits of the Constitution, given to them. These provisions of the Constitution are thus regarded as limitations on the power of Congress, rather than as direct grants of power to the courts.

It may be added, finally, that the carefulness which is manifest in the definition in the United States Constitution of the judicial power of the United States was due to the necessity, believed by almost all at the time to be present, for the organization of a separate national

judicial system. This necessity arose out of the belief in states' rights, and out of the existence of local prejudices and jealousies which were so common at the time in America. The people generally thus desired to keep in the hands of the states the making of the law, except in so far as they had in the Constitution of the United States delegated the legislative power to the national government. The law in the United States, therefore, did not become, as the result of the adoption of the United States Constitution, uniform and common throughout the country. Even now in many respects it differs from state to state.

This belief in states' rights made it necessary to retain the state judicial systems in existence. Other considerations made it seem desirable to provide for the formation of a United States judicial system which was to be separate from the judicial systems of the states.

The Congress of the United States was accordingly given the right to "ordain and establish" courts inferior to the Supreme Court. This right to ordain and establish is regarded as including not merely the right to create, but as well the right to abolish, and also the right of inaction. Congress might thus, if it had seen fit, have refrained from establishing inferior courts, in which case the state courts would have had jurisdiction subject to appeal to the Supreme Court in cases within the judicial power of the United States. If this had been done conditions in the United States would have been somewhat similar to those existing, for example, in Canada and Australia. But Congress almost immediately after its organization established inferior United States courts. Its reasons for so doing may probably be explained by an examination of the most

important cases stated by the Constitution to be within the judicial power of the United States.

There are two general classes of these cases: In the first are cases arising under the Constitution and laws of the United States. In the second are cases arising between citizens of different states and between citizens and foreigners. It was evidently believed unsafe by the framers of the Constitution of the United States to intrust even the determination in first instance of cases arising in either class to the state courts. Local prejudice and state jealousy ran too high in those days to permit the entertainment of the hope that the state courts would decide, impartially and properly, cases in either of these classes. Furthermore, it was not absolutely clear in the early days of American national existence that the appellate jurisdiction given by the Constitution to the Supreme Court extended so far as to permit that court to entertain an appeal from the highest court of what was then regarded as a sovereign state. Even as late as 1813 the highest court of the State of Virginia refused to obey the order of the Supreme Court, commanding the Virginia court to carry the judgment of the Supreme Court into due execution. In the judgment of the Virginia court it was stated that that "court was unanimously of the opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States . . . and that obedience to its mandate must be declined by this court." Somewhat similar action was some years later again taken by the court of Virginia, and it was not until 1821 that it was settled, as a result of two decisions made by the Supreme Court of the United States itself that it might

entertain appeals from the decisions of the highest courts of the states.

Under the conditions which have been described, the establishment of inferior United States courts seemed unavoidable. With the dying out of local jealousies and states' rights ideas the continuance of these courts, however, would not seem absolutely necessary, and, as we have seen, Congress may at any time abolish them. But although Congress has lessened the extent of their jurisdiction, there seems no great feeling in favor of their abolition. There are also technical reasons into which we cannot go which would appear to make their abolition all but impossible.

This idea of two sets of courts, one for the states and one for the central government, with the incidental lack of uniformity in the law, has naturally been accompanied by serious disadvantages. These disadvantages are becoming every day more pronounced as the social and economic conditions of the country have been becoming more centralized, but as yet no method has been devised for remedying the evil.

The example set by the United States in the establishment of a national judicial system, separate and apart from the judicial systems of the states, has not generally been followed by the other great confederations which have been established. Thus in the German Empire, Canada, Australia, and South Africa, provision is made only for a supreme court of the central government. So far as concerns the lower courts, either use is made of the state courts, which are permitted to remain in existence, or the whole system of courts throughout the country has been centralized. The state or provincial courts have been retained in Canada,

Australia, and Germany. The judicial system has been centralized in South Africa.

In either case the law has been made much more nearly uniform or common. Where the law has been made uniform, as is the case in the German Empire and to a lesser degree in Canada, the powers of the supreme court are naturally much greater than is the case in Australia, where appeal may be taken from the decisions of the state courts to the national supreme court only in cases in which rights arising under the national constitution and laws are claimed.

Before closing what will be said about the United States judicial power it is necessary to call attention to one function which the courts of the United States have assumed. This is the power, in a case properly coming before them, to refuse to enforce an act of any other branch of the government, even of the legislature. Such a power may be exercised where the courts are of the belief that an act has been performed in excess of the power possessed under the Constitution by the authority doing the act. The most important instance of the discharge of this function is the declaration by the courts that an act of the legislature is unconstitutional. This power was clearly exercised as early as 1801, and has vastly increased the importance of the judiciary in the United States. The general principle lying at the bottom of the claim has been recognized, as we have seen in Canada and Australia, so far as concerns the relations of the central and local governments. But the power has become of much greater importance in the United States, because both the state constitutions and the United States Constitution contain what are known as bills of rights guaranteeing to private

individuals rights of which they may not be deprived even by legislation. The exercise of such a power by the courts is even now peculiar to the United States. Many believe that its recognition is desirable, others regard it as unfortunate. Whatever may be the truth in this respect, it cannot be denied that the possession of such a power by the American courts gives them a position which they may hardly be said to have in any other country.

In both Great Britain and the United States, then, the judiciary are independent of the executive, while in the United States they are as well in large measure independent of the legislative authority by reason of the insertion in a written constitution of provisions as to both the organization and the powers of the courts. In both Great Britain and the United States the courts possess the entire judicial power. Every case in which the interpretation of the law, with regard to individual private rights, is to be made, is made by the courts. As a result the courts decide what the law actually means in the specific concrete cases, and thus at the same time determine the extent of the powers which government officers may by law exercise and the content of the rights which individuals have by the law. In the United States, further, the courts may protect from encroachment, even on the part of the legislature, the rights guaranteed to the individual by the Constitution.

XIX

THE COURTS IN THE CONSTITUTIONAL GOVERNMENTS OF EUROPE

IN France, and on the Continent generally, the courts, as we have seen, did not at the end of the eighteenth century occupy the same position that they had in England.

In the first place, there was no common universal, uniform law.

In the second place, the judicial system was not centralized, inasmuch as there were, for example, in France, thirteen supreme courts of equal power.

In the third place the Crown had succeeded in taking out of the jurisdiction of the ordinary courts, which were independent of the royal influence, many cases involving the relations of the Crown and individuals. These cases were thus those in which the powers of government officers and the rights of individuals over against the government were concerned. The Crown had put the decision of these cases in the hands of special courts whose judges were dependent upon it, and might be dismissed from office at any time.

Such were the conditions in France when the French Revolution broke out in 1789. Those who were called upon to frame the new constitutions of France, of which there were so many between 1789 and 1814, regarded

Montesquieu's theory of the separation of powers with somewhat the same approval as did the constitution-makers of the United States. But they assigned quite a different meaning to it. It was not to be expected of them that they should lay the same emphasis upon the independence of the judiciary as had been laid by the English-speaking peoples. For the judges of the ordinary courts had for a long time been independent of the Crown, as a result of the fact that judicial office was property of which the holder of the office might not be deprived. Moreover, the conduct of certain of the French courts had been such as to cause the people of France to regard them as the protectors of privileges rather than as the defenders of private rights. For in the attack made on feudal privilege, which was attempted by the French king just before the French Revolution, some of the French courts whose judges were conservative in their feelings had attempted to oppose the Crown.

The French constitution-makers of the revolutionary period, therefore, adopted the view that the principle of the separation of powers was opposed to a judicial control over the Crown in the exercise of the powers of government; and that the function of the courts, that is the judicial power, was to decide merely questions involving the relations of private individuals one with another.

The constitution of 1791, thus, after stating that the judicial power was delegated to judges to be elected by the people, and that the judicial power should in no case be exercised by the legislative body nor by the King, provided that the courts might not interfere with the exercise of legislative power nor suspend the execution of

the laws, nor undertake the discharge of administrative functions, nor, finally, summon before them administrative officers because of their performance of their duties.

The immediate effect of the French Revolution was not, therefore, to cause any important change in the position of the courts as the protectors of individual rights against executive encroachment. But in the course of the century and more which has followed the adoption of the first written French constitution, the French have gradually developed a system for the judicial protection of individual rights through the organization of what have come to be known as administrative tribunals. At the head of this system is a body called the Council of State, which has gradually taken on most of the characteristics of a court, and is at the present time exercising a tremendous influence on the French law of private rights.

The members of the Council of State are appointed by the executive, and may theoretically be removed by him, but as a matter of fact their tenure of office is as permanent as is that of the ordinary judges, and may be said to be absolutely secure. The result is that the French have secured in a way quite different from that provided by the Anglo-American law an effective method for the protection against encroachment by the executive of the legal rights of individuals. But the fundamental principle is the same. This is the establishment of a judicial body whose members are independent of the executive, which shall have jurisdiction over all actions to which government officers and private individuals are parties, and in which the rights given by law to those individuals are involved.

Furthermore, it is to be noticed that the law has been made uniform for all of France. The constitution of 1791 contained a provision to the effect that "there should be made a code of civil law uniform for the entire kingdom." This injunction was subsequently obeyed through the drawing up of the famous civil code and other codes until at the present time there is a common law for all Frenchmen. The application of these codes is intrusted to a system of courts acting under one supreme court, the Court of Cassation. The tenure of the judges of the courts is permanent and independent of the executive, though not of the legislature.

The principles of the law regulating the relations of the government and private individuals—what has come to be known as the administrative law—have been made uniform throughout France, but they have not been codified. The application and development of this law in concrete cases are intrusted to a special set of courts acting under the control of one supreme court—*viz.*, the Council of State. This method of disposing of the subject has, it is believed by many, been followed by great advantage. The special character of the courts, their devotion of their entire time to similar classes of questions, have enabled them to elaborate in their decisions a legal system for the regulation of the relations between governmental officers and private individuals, which is surpassed by none in its success both in protecting individual rights and in promoting government efficiency.

The weak point in the Anglo-American method was that the application made by it of the principles of the separation of powers made it impossible logically to

subject the discretion of government officers to judicial control. The courts could properly decide that in attempting to exercise a specific power the officers of government were exceeding their powers. Once, however, the power was admitted, the courts could not logically attempt to substitute the court's idea of what was expedient for that of the officers. The disadvantages arising from such a conception at a time when, owing to the greater complexity of social conditions, the tendency has been in the direction of increasing the discretion of government officers, have, at any rate, in the United States, led to attempts to grant to the courts by the act of legislature the right to control administrative discretion; but these attempts may not be said to have been very successful. For the courts have been reluctant to exercise the powers granted. They have often felt that they did not have sufficient technical knowledge of the subject to justify them in changing the decisions of administrative officers. Suppose, for example, that a tax is imposed upon an individual by reason of his ownership or occupation of a house, and that the individual complains that the value of the house upon which the tax is based is too high, the court finds it difficult, with the knowledge which it has of house values, to revise the determination of administrative officers who do little else than determine those values, and as a result become expert in the matter. Suppose, again, that an officer whose approval of the plans of a building in a city must, under the law, be obtained before the building may lawfully be erected, refuses to give his approval to the plans of a specific building. An ordinary court has such slight knowledge of the technical details of building that it will hesitate

to substitute its idea of safe construction for those of an inspector of buildings. And so we might go on. There are a thousand and one similar instances under the conditions of modern life where discretion must, in the interest of efficient administration, be granted to government officers, and where courts having for the most part to apply the law governing the relations of individuals one with another cannot advantageously, because of lack of knowledge, control that discretion.

The result is that the attempts of the legislature to grant to the ordinary courts power to exercise a control over official discretion are often vain and futile. The rights of the individual under the Anglo-American law, while effectively protected against actual encroachment due to the attempt of officers to exceed their legal powers, are either not effectively protected against the exercise of official discretion or else, if so protected, are protected at the expense of efficient government.

In France, however, the special character of the courts, and their exclusive devotion to a particular class of subjects, have apparently made them less reluctant to exercise a control over administrative discretion. Knowing the conditions as they do in their capacity of administrative experts, they feel that they can safely extend their control beyond the point up to which Anglo-American judges are usually willing to go. They are thus much more apt, certainly, than are American judges, to scrutinize the motives of administrative officers, and quash their actions where those motives are improper, although their right is unquestioned to exercise the power in the exercise of which the act complained of has been done.

The French Council of State has, further, recognized

a wider liability of the government for the acts of its agents than has ever been recognized by the Anglo-American courts. Indeed, the Anglo-American courts have apparently been almost unable of themselves to recognize such a liability. Such liability as exists in Anglo-American law has been due for the most part to the direct action of the legislature, which has by statute imposed a liability in specific cases.

Thus by the English law no action based upon an alleged contract may be brought against the government without first obtaining the consent of the Attorney-General. In the United States special courts have been frequently established by statute for the decision of such suits. In both countries the law recognizes only in exceptional cases any liability upon the part of the government for the damages caused by the wrongful acts of its agents. The French Council of State, however, recognizes in both cases a much wider liability upon the part of the government, even going in its more recent decisions to the extent of holding the government liable for the damages caused an innocent person who was knocked down by an officer of the police force while pursuing a thief.

The French system has proved itself to be more effective in the protection of the individual, not only because of the law which the administrative courts have developed, but also because of the more simple and less expensive remedies which have been provided. Much of the procedure in the Anglo-American courts is extremely technical, and on that account expensive because the litigant must retain the services of a highly paid lawyer. Most of the remedies provided by the French law are simple and a lawyer's services are often not required.

The only serious disadvantage which is incident to the French system is one which is always found where there are different sets of courts, each of which has its own peculiar jurisdiction. This is the difficulty in determining whether a particular court has the power to act in a specific case.

Provision has had to be made for what is called a "Tribunal of Conflicts," which determines whether in a given case it is the ordinary courts or the administrative tribunals which have jurisdiction. The anxiety exhibited in the French law to prevent the ordinary courts from exercising a control over administrative officers has had the result of providing for the Tribunal of Conflicts, an organization of such a character as to give a majority of its members to those interested in the maintenance of administrative independence. For the court consists of members selected in equal numbers from the supreme ordinary court, the Court of Cassation, and the supreme administrative court, the Council of State. As it is presided over by an administrative officer, the Minister of Justice, the administrative members are in control.

The French method of providing a special law for the regulation of the relations of the government and the individual has had great influence on the Continent. In most continental countries there is what is known as an administrative law, which is distinguished from the ordinary law, regulating the relations of individuals one with another. Like the French law, its provisions are somewhat different from the provisions of the ordinary law in similar relationships. Thus contracts with the government must be made in particular ways, in order that they may be enforceable. Thus again the personal liability of officers for the damages they cause

by their illegal acts is somewhat different from that of ordinary individuals, where they have been guilty of illegal acts. In this respect the French law does not really differ in its character from the Anglo-American law. For in this law officers of the government are not treated as ordinary persons, nor are government contracts, so far as concerns the method in which they are made, treated in the same way as are ordinary contracts. The difference between the Anglo-American and the French law is a difference rather in degree than in kind. That is, the former endeavors perhaps more than does the latter to apply the private law to government relations. In the nature of the case government officers must occupy a position which is actually somewhat different from that occupied by private individuals. The rules of law governing their actions must, therefore, be somewhat different from the rules of law governing the relations of private individuals one with another. The officer is intrusted with the exercise of powers of compulsion, and has the authority of the state back of him. On the other hand, one cannot rely in public relationships on the self-interest which produces economy and efficiency in the affairs of private life. Contracts must be made with great formality, else extravagance or corruption is liable to follow. Usually this consideration makes necessary the provision that all public contracts must be made on the basis of detailed specifications, as they are called, and shall be awarded to the lowest bidder. There thus arises in all modern countries a peculiar law of public contracts which governs the making of those contracts. Unless such contracts are made in accordance with these provisions they are not regarded as legally binding.

These rules of law governing the actions of administrative officers are grouped together in the French legal classification, which is commonly adopted on the Continent under the name of administrative law, whether they are applied by special courts or not. In England and the United States, where perhaps they resemble more closely the ordinary rules of law governing private legal relationships, and where they are in all cases applied, certainly in last instance, by the highest of the ordinary courts, they have not thus been called by any special name.

But while many countries have followed the French example in the formal recognition of an administrative law, there are comparatively few which have adopted the French idea of administrative courts. Most have preferred to intrust the administration of the administrative law to the ordinary courts.

Of those countries outside of France which have established administrative courts, the German state, Prussia, is the most important. The judges of the Prussian administrative courts are, however, in law, as well as in fact, independent in tenure of the executive. Furthermore, in Prussia the judges of the lower administrative courts are for the most part not learned in the law, they are elected by the people of the localities over which they have jurisdiction, and in other capacities are engaged in the active work of administration.

We may say, then, that one of the fundamental principles of constitutional government, as seen in the law of modern European states, is:

First—the existence of judicial bodies independent in tenure of the executive; which shall,

Second—apply the law regulating the relations of in-

dividuals one with another—usually called the private law—by deciding the cases brought before them; and,

Third—shall apply in the same manner the law regulating the relations between officers of the government and private individuals—usually called the public or administrative law.

Whether a formal distinction is made between the private and the administrative law, and whether these two functions are discharged by the same courts, are matters of comparatively little importance. The important thing is that the courts which have these powers shall be independent of the executive. Without such independence it may be said that constitutional government is impossible.

The independence of the judges over against the executive which, we have seen, would appear to be so necessary to the existence of constitutional government, has been ordinarily secured by providing in the law that, while they may be appointed by the executive, they may not be removed except through the concurrent action of the executive and the legislature, or by something in the nature of a formal trial, like an impeachment proceeding, in which both houses of the legislature participate.

Some countries have gone even further in their desire to secure what they regarded as the necessary degree of independence. Thus in France no judge of the ordinary courts may be removed from office without the consent of the supreme ordinary court, the Court of Cassation. In Germany also the judges both of the ordinary courts and of the highest administrative court are appointed for life. The German judiciary act provides that "no judge shall against his will be perma-

nently or temporarily removed from office, transferred to another place, or retired, except by judicial decision and on grounds and according to forms prescribed by law."

Apart from the case of the lay judges of the lower administrative courts in Prussia, the principle of the popular election of judges adopted in the French constitution of 1791 has not been followed except in a number of the states of the United States. Opinions in that country differ as to the success of the elective principle as applied to judges. It must be admitted, however, that there is no immediate prospect of the abandonment in the United States of the principle in those cases in which it has been adopted.

XX

THE ENGLISH CONCEPTION OF PRIVATE RIGHTS

WE have already seen that modern constitutional government finds its origin in England. The principles upon which it rests were marked out as the result of a long and almost ceaseless struggle between the different political elements which developed as a result of the economic and social conditions to be found in the country.

With the formation of these principles there was evolved a form of government which has spread over western Europe, through America, the southern part of Africa, Australia, and the islands of the sea. That form of government has already had its influence in Asia since Japan has joined the ranks of the countries enjoying constitutional government, and is even now beginning to knock at the doors of China, whose civilization is the oldest known to the world.

We must be careful, however, not to reach the conclusion that this mere form of government was the end which the English, its originators, sought when they sacrificed their lives and their fortunes in their struggles to attain it. The English were always a practical people. It was an English poet who said:

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

Far from believing that there was any inherent virtue in any form of government, the English hardly knew that they had any peculiar form of government until a foreign observer, the French philosopher, Montesquieu, called their attention to it. What the Englishman had always had in mind was certain rights, which he often called the rights of an Englishman, and upon whose existence and recognition he insisted with all the strength of his character and with all the force that in him lay. The form of government which the French philosopher told him that he had was a matter of indifference to him, except in so far as it was a means through which he could secure the end for which he had always fought. That end was the recognition of what he believed to be his "rights."

Furthermore, when it came to the determination of those rights, that is to the statement of what they were and of the methods by which he was to secure them, his attitude was just as practical, just as non-philosophical. He never consciously formulated a system of rights any more than he framed a system of government. He was perfectly willing to permit the continued and permanent existence of inconsistent institutions, provided he actually secured as a matter of fact what he wanted. Thus he is still willing to adhere to the principle that a member of Parliament may not resign, while preserving in existence a series of obsolete and useless offices, appointment to which will of itself cause a member of Parliament to lose his position. A member of Parliament, therefore, even now does not resign. He applies for the Chiltern Hundreds. English institutions are thus the despair of the student, at the same time that they arouse the admiration of the practical statesman.

Having this general attitude of mind which abhorred the statement of general theories and the formulation of complete and symmetrical systems, it is no wonder that the Englishman never stated in any one document or instrument what his rights were, any more than he ever put into any one written constitution or even any number of written documents the form of his government. The great English lawyer, Blackstone, probably expressed the English idea when in writing about the privileges of Parliament he said: "If . . . all the privileges of Parliament were set down and ascertained and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to derive some new case not within the line of privilege, and under pretense thereof to harass any refractory member and violate the freedom of Parliament. The dignity and independence of the two houses are, therefore, in great measure preserved by keeping their privileges indefinite."

What was true of the privileges of Parliament was also true of the rights of Englishmen. They were of extreme importance, but it was difficult to find out what they were. Indeed, in many cases, the only way to find out what they were was to fight for what it was believed they were. It is said that Parnell, the Irish leader in Parliament, was asked once by an Irish member, "How can I learn the rules of the House of Commons?" "By breaking them" was the characteristic reply. The rights of Englishmen have in large measure been ascertained through attempts that have been made to violate them.

The result is, then, that the rights of Englishmen, which have played such an important rôle in English

constitutional history, for the preservation of which the form of government now enjoyed by England has been evolved, are nowhere gathered together in any one legal instrument. Almost every one became known as the result of a successful struggle for its maintenance, and many of those which are recognized are rights to particular methods of procedure, rather than rights to particular substantive things. Thus the right to a special kind of trial for crime; that is, the trial by jury, is regarded as one of the most sacred rights of an Englishman. This insistence on particular methods of procedure is, of course, due to the fact that these methods have shown themselves, as the result of a long-continued experience, to be valuable in securing the end desired. This end was freedom from arbitrary autocratic action on the part of those to whom political power had been intrusted. It was the rule of law—that is, the rule of a principle of general application as opposed to the rule of a person arbitrary and capricious—which the Englishman sought. It was to secure his rights through this rule of law that he originated the form of government which has been called constitutional.

The Englishman has, therefore, never claimed that he has any natural rights; that is, rights to which he is entitled by reason of the fact that he is a man, a human being. He has been perfectly satisfied if it is recognized in his political and legal system that he has specified rights by the law of his country, and that no attempt may be made to take away what he may think are his rights, except in the manner by law provided. These claims being admitted, he has felt that in some way or other he will be able to have the law so formulated that he can secure the recognition of all substan-

tive rights which he ought at any particular time to possess. To secure the recognition in the law of those substantive rights he has insisted upon the grant to more and more of the people of the land of the power to control legislation. For through the control of legislation is obtained the power to determine what are his rights.

The rights of Englishmen are, therefore, so far as they are defined at all, to be found in acts of legislation and in judicial decisions. One of the earliest and most important of these acts of legislation is what is known as the Great Charter, which was originally forced from a reluctant king in 1215. As might be expected from what has been said, the most important clauses of the Great Charter deal not so much with what have been called substantive rights as with methods of procedure. Thus in Section 12 the Crown enacts that "no scutage or aid [*i. e.*, no tax] shall be imposed in our kingdom, unless by the General Council of our kingdom." This body was the forerunner of the modern Parliament. Section 14 provides how the General Council shall be composed and called together. Section 39, probably the most important section of all, provides that "no freeman shall be taken or imprisoned or disseized or outlawed or banished or anyways destroyed, nor will we pass upon him nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

There is, in fact, in this famous provision of the Great Charter hardly any recognition or mention of a substantive right. It is not said that a freeman has any right not to be "taken or imprisoned or disseized or outlawed or banished." Indeed, it is expressly stated

that such a right does not exist. What the section does say is that these things shall not be done to the freeman except in a specified way, which is, according to law. It is the rule of law which the Great Charter emphasizes. It was to the rule of law, then, that the Englishmen of the beginning of the thirteenth century were striving to attain.

It would be useless to attempt here to enumerate the different acts of legislation and judicial decisions in which, specifically and concretely, the rights of Englishmen have been set forth. It is, however, desirable to mention one, the Habeas Corpus Act, which received its final form in the reign of Charles the Second; that is, in the latter part of the seventeenth century. This act is one of the most important acts which have to do with the rights of Englishmen. But, like the Great Charter, it did not so much emphasize a substantive right as it did a method of procedure, a judicial remedy.

What is called the habeas corpus was a writ or order of a court. It takes its name from the most important words in it—habeas corpus—and it itself was a command or order from a court to a person, who was suspected of illegally holding some other person in confinement, to produce the body of that person in court, in order that the court might determine whether or not the person who was thus brought before it was being legally confined. The writ of habeas corpus was used long before the Habeas Corpus Act was passed. But before the English Revolution of the seventeenth century the courts, which, it will be remembered, were at that time under the control of the Crown, had laid down the principle that when a person was brought into court on a writ of habeas corpus, and the order of

the Crown for his arrest and imprisonment was at the same time produced, the courts could not examine into the legality of the arrest, but must order the return to prison of the prisoner. Immediately prior to the passage of the Habeas Corpus Act many persons were arbitrarily arrested and without trial kept in confinement by the Crown. It is true that by the law of the land such persons could not finally be adjudged guilty of the offenses of which they were charged, except in the method provided by law, which was usually a jury trial. But there was no way in which such persons might insist upon being tried. The result was that, if the Crown were so disposed, the imprisonment which was supposed to be preliminary to the trial could be used to serve the purpose of punishing one who was charged with the commission of an offense against the law, but who had not been convicted thereof, and who probably would not be convicted if he were given a trial in accordance with the law.

The purposes, therefore, of the Habeas Corpus Act were:

First. To permit the courts on a writ of habeas corpus to examine into the legality of an order of arrest and imprisonment, even if issued by the Crown, and to discharge the prisoner in case they found that the order was issued illegally;

Second. To grant to every one who was imprisoned the opportunity of having a speedy trial; and,

Third. To insure by means of a most detailed procedure with regard to the issue of and the return or answer to the writ of habeas corpus, that these primary purposes of the act were realized in actual practice.

Thus it was provided in the act that both the prisoner and any one on his behalf might apply to the courts

for the issue of the writ; that a judge to whom the application was made must issue the writ; and that in case of neglect or refusal to issue it he was liable to a fine, which might be recovered from him in an action brought by any one; that the person to whom the writ was issued must produce the body of the prisoner in a court within a specified number of days or must in his answer state under oath that he had not had the prisoner in his control, not at the time that he made the answer, but at the time he received the service of the writ. Various other provisions were contained in the act, all intended to secure the attainment of the primary purposes of the law as they have been described.

The law is a long one and attempts to deal with almost every contingency which had in the past arisen or which it was thought might arise, and as a result of which arbitrary imprisonment without trial might occur. It is, of course, impossible to treat them all here. Attention has been directed to some of the most important of them, in order to impress upon the reader the fact that it is not the recognition in a general way of the existence of a right which has counted in England. It is the detailed means and methods, indeed, the technical judicial remedies provided, which enabled the English gradually to build up that conception of individual liberty, the protection of which is the function—if not the most important function—of constitutional government.

By the end of the eighteenth century this conception of individual liberty had been evolved in England. A good statement of it will be found in Sheldon Amos's book on the English Constitution.[1] Mr. Amos says:

[1] Pages 131–135.

The expression, "Liberty of the Subject," does not, of course, mean that there is any member of the State who can do everything he likes or is exempt from the control of the Laws. It means that the Laws are (if the true principles of the Constitution be observed), or are intended to be, made and executed in such a way that no individual person's freedom is impaired to a greater extent than is absolutely needed in order to secure the largest possible amount of freedom and benefit for all. . . .

The chief safeguards of the "Liberty of the Subject" concern (I) the mode of making laws; (II) the judicial administration of laws, that is the trial of accused persons; (III) the general prevention of illegal imprisonment; and (IV) the definition and circumscription of the duties of the police, especially in respect of subjecting suspected persons to a preliminary judicial examination.

I. The first class of safeguards is found in the existence and mode of composition of the House of Commons, the popular and representative branch of the Legislature. . . .

II. The second class of safeguards includes the provision for Trial by Jury in the more important criminal cases. . . . To the same class of safeguards belongs the protection accorded to jurymen by which they cannot be made civilly or criminally responsible for their verdicts. . . . To this class of safeguards also belongs the independence of the judges of the Superior Courts. . . .

III. The third class of safeguards are those which provide against illegal imprisonment or confinement. These safeguards either take the form of securing that any one whose liberty is restrained shall have an opportunity (such as presented by the proceedings for obtaining the writ of Habeas Corpus) for having the ground of his restraint judicially investigated; of being speedily brought to trial if accused; and of the executive being restricted as to the place of his confinement; or they take the form of compensation in a civil action for illegal detention. The general principle that "excessive bail must not be required" is an acknowledged, if not a very valuable, safeguard for the same end.

IV. The fourth class of safeguards concerns the definition and circumscription of the duties of the police, especially in respect of subjecting suspected persons to a preliminary judicial examination. . . . The purpose of a *warrant* is to secure the responsible coöperation and assent of a judicial officer at the earliest stage of the proceedings. . . . It is a common maxim that an "Englishman's house is his castle"; this means, however, no more than that an Englishman's house or private room cannot be forcibly entered by the police except for a few clearly defined purposes and for important public ends.

The Englishman's conception of his rights at the end of the eighteenth century, by which time the conception had been quite fully developed, was thus not a conception of substantive natural rights which he possessed by reason of the fact that he was a man. It was not based on the claim that there were any such rights of which he might not in any possible circumstances, in any possible manner, be deprived. It was, on the contrary, based on the idea that the law of his country provided that neither his life nor his freedom to act within that law, nor what was by that law recognized as his property, could be taken from him except in the manner which was provided by that law.

The Englishman's conception of individual rights, the sum of which formed what was known as civil liberty, therefore emphasized the methods of procedure in accordance and only in accordance with which his life, his liberty, his property, might be taken from him. His conception was thus not a theoretical conception of substantive rights, but a practical one of procedure and remedies. Into the field of theoretical and speculative human rights he refused to wander. In the details of legislative and particularly of judicial methods of action he loved to revel.

What rights the English nation insisted, and, by reason of its form of government successfully insisted, upon having, it was able to protect with an effectiveness which has characterized similar attempts of no other nation. Whether those rights were from the point of view of a theoretical political philosophy, all the rights which he should have did not concern the Englishman, for deep down in his heart was a contempt for the theoretical and philosophical as unworthy of the attention of the practical man.

XXI

THE AMERICAN CONCEPTION OF PRIVATE RIGHTS

THE latter part of the eighteenth century, in Europe, was marked by a serious investigation by philosophical minds of the facts of government. The old theories upon which government had been supposed to be based were subjected to a searching examination, and the attempt was made to restate those theories in such a manner as to adjust them to the changed conditions which had resulted from the extension of commerce and from industrial invention. Indeed, some of the thinkers of the day were not content with the restatement of old theories, but, on the contrary, endeavored to formulate new theories to be made the basis of a new system of government, which it was hoped might in the near future be established.

A new political philosophy was formulated, out of which it was believed that a real political science would evolve. The characteristic of this new thought was the elaboration of theories to which the possibility of universal application was attributed. Rousseau gave a new and important phase to the theory that the state is based on what is called the social contract; Montesquieu emphasized the theory of the separation of powers on which, it was claimed, all free government was based; while a school of legal thought grew up which based all

law on what was called natural law. This idea of natural law in its turn was developed from the conception that all men, as human beings, have what came to be known as natural rights. Man was regarded as an individual rather than as a social being, a member of human society. As an individual he had certain rights with which he had been endowed by his Creator, and of which he might be deprived only with his own consent.

These theories of social compact and natural rights presupposed that society was static or stationary rather than dynamic or progressive in character. It was generally believed that there was a social state, which under all conditions and at all times was absolutely ideal. In this respect the originators of these theories differed in no way from those who had preceded them. From a very early time political theorists and philosophical dreamers had visions of what have been called utopias or ideal political states. These utopias were held before men's minds as a goal unto which man should strive to attain. They depicted an ideal state of society in which, if it were once reached, humanity would cease struggling and, finally at rest, would contemplate with complacency the hardships of the past and anticipate with satisfaction the joys of the future.

Under the influence of this static conception of society political philosophers and lawgivers sought with eagerness the key to the problem of the ideal state. In the belief that they had found it they accepted, at the end of the eighteenth century, the two theories of the social contract and natural rights, which were almost universally regarded as absolutely fundamental. These theories assumed that the state was based upon a com-

pact the time and manner of making which was not exactly stated, and the details of which were not precisely set forth. This compact was entered into between governors and governed.

The governed—that is, the mass of men—were considered to have given by this compact to the governors their powers to govern. It was believed, however, that a part of this compact consisted of a reservation by the governed of certain rights called natural rights which they had as men, and of which they might not be deprived by their governors.

That these ideas had a far-reaching influence, and that their application bettered the conditions of the western European world may not be denied. That they were true in fact is, however, not susceptible of proof. Indeed, prior to the eighteenth century no political system had been as a matter of fact based on such a compact. Political society was later believed to be, as it probably always was, a historical development. But the idea that society was a historical development was hardly conceived of at all prior to the formulation of the evolutionary theory of development in the world of science. But whether these ideas of a social contract and natural human rights were right or wrong, it was certainly true that they dominated the political and legal thought of the western European world until well into the nineteenth century. Indeed, it is probably the case that they still have influence. While the English law was probably much less influenced by them than was the law in any other European country, it is none the less the case that English political thought could not entirely escape from them. Sir William Blackstone, thus, hard-headed practical lawyer that he

was, seems to accept both the social contract and natural rights ideas in the theoretical and somewhat philosophical portions of his *Commentaries*.

Such, then, was the state of the politico-philosophical thought of western Europe when the Americans were by force of circumstances called upon to reorganize their governmental institutions. Small wonder was it that they made the social contract, natural rights, and the separation of governmental powers the basis of the constitutional system which they established. We have already seen what was the result of the attempt to apply the principle of the separation of powers. We have also already observed that the new American governments were founded upon popular sovereignty. This doctrine, it may be pointed out, was one of the necessary consequences or incidents of the social contract. For unless the people were sovereign they could not have made the compact. That they made the contract was considered to be proof that they were sovereign. We have now to ascertain in what respects the adoption of the theory of natural rights modified the conception of individual liberty which the Americans had received from their English forefathers.

The most important modifications which the Americans made in the English conception of the rights of Englishmen as they have been described were two in number:

In the first place the rights of man; that is, natural rights were regarded in a measure—and no small measure—as independent of the law. This characteristic of the American conception of natural rights is to be attributed to the fact that these rights were set forth in bills of rights that formed a part of the new written

constitutions, which were all but universally adopted. These written constitutions were, as has been shown, considered to be the acts of the sovereign peoples of the states. They therefore were superior to any mere laws which might be passed by the representatives of the people in the lawmaking bodies. These bodies, being simply delegates of the people, were not authorized to do anything not within the powers granted to them. If a written constitution provided that a man had a certain right it was evident that the legislature could not take it away from him. When the courts assumed in the United States the power to declare unconstitutional acts of the legislature, they did so because it was their duty to apply the law as they found it. They might not, therefore, apply as law an act of the legislature which in their opinion was in conflict with the constitution, since, being in conflict with the constitution, the highest law of all, such an act could not be law.

Now the bills of rights of the early American constitutions formulated the ideas then prevalent with regard to natural rights. In this way natural rights came to have an existence apart from the law or at any rate apart from the law as it had up to that time been understood. Furthermore, these rights obtained a judicial protection which prevented their violation by any other governmental authority.

The importance which was attributed by the Americans of those days to this idea of natural rights will be appreciated, when we recall that the Constitution of the United States, which in its original form contained few, if any, provisions relative to these natural rights, was ultimately adopted only on condition that they should be enumerated in a bill of rights to be appended

to the Constitution as adopted. This was subsequently done, and they appear as Amendments I to IX. The Ninth Amendment to the United States Constitution is an expression characteristic of the feeling of the time that these natural rights existed independently of all law. It reads:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

In the second place, the Americans attempted to enumerate the rights of individuals in their constitutions. The statement made in the Ninth Amendment to the United States Constitution, to which attention has just been called, is not inconsistent with this view. It is true that it is there stated that the enumeration in the Constitution of certain rights shall not be construed to deny others retained by the people. But it is just as true that an attempt at an enumeration of rights was made. The rights so enumerated are contained for the most part in the first eight amendments, but there are a few others to be found in the main body of the Constitution.

The rights so enumerated are recognized in the following way: They are assumed to exist—they never are expressly granted to the people, as such a grant would have been inconsistent with their character as natural rights—and the government is forbidden to violate them. Thus the government is forbidden to pass laws respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of the press, or the right of the people peaceably to assemble and to petition the government for the redress of grievances; or infringing upon the right of

the people to keep and bear arms; or quartering soldiers in time of peace in any house without the consent of the owner or in times of war in any manner but that prescribed by law; or violating the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures; or providing for the issue of warrants except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized; and finally to pass any bill of attainder or ex-post-facto law. All of these prohibitions were directed merely to the national government. The states also were prohibited from doing certain things. Some of these prohibitions were made in order to fix definitely the relations of the states to the central government; others, however, were intended to protect individual rights. Of this latter class were the prohibitions imposed upon the states to pass any bill of attainder, ex-post-facto law, or law impairing the obligation of contracts.

The rights thus assumed and protected against encroachment were, for the most part, substantive rights. That is, the individual might not be deprived of them by the government through the adoption of any method of procedure. The individual thus had an absolute right to the free exercise of religion, peaceably to assemble, and so on. It is true that these substantive rights were not in all cases clearly defined, and subsequently it had to be determined by judicial decision exactly what they meant. Thus it was later claimed by a Mormon that he could not be punished for having more than one wife, since polygamy was enjoined upon him by the precepts of the Mormon religion. The Supreme

Court held that freedom of religion is confined to the realm of purely spiritual worship; that is, to the relations between the individual and his God; but that as soon as religion attempts to regulate relations of individuals one with another, it ceases to be religion in the sense of the Constitution and becomes subject to the power of the government. The law punishing polygamy was therefore upheld.

Once, however, the exact meaning and extent of one of these individual rights is known, it becomes to that extent an absolute right of which the individual may not be deprived by the government in any manner whatsoever. In this respect the American conception of civil liberty differs considerably from the English conception. In England the exact meaning of a right which may be recognized is determined by the law; that is, by the legislature. In the United States these rights are recognized by the Constitution, and their precise meaning is to be fixed by the courts as the occasion arises.

But in addition to these rights, which have been called substantive rights, there are a number of rights included within the American conception of civil liberty which have to do not so much with a substantive thing as with methods of procedure. The experience of England as to those methods of procedure was perfectly well known to the Americans, and the appreciation of their value was too high to permit of their being abandoned. The United States Constitution provided for jury trial in both civil and criminal cases, and that neither excessive bail should be required nor cruel and unusual punishment inflicted. It also forbade the suspension of the privilege of the writ of habeas corpus unless when in cases of rebellion or invasion the public safety might

require it, and provided that no person should be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court. The crime of treason against the United States is itself defined in the Constitution as consisting "only in levying war against them or in adhering to their enemies, giving them aid and comfort," and the power of Congress to punish treason is limited by the provision that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted." In other words, the sins of the fathers shall not be visited upon the children.

Finally the Constitution of the United States provides that no person shall be tried twice for the same offense, be compelled to be a witness against himself in a criminal case, be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. In all criminal prosecutions the person charged with the crime shall be informed of the nature and cause of the accusation, shall be confronted with the witnesses against him, shall have compulsory process for obtaining witnesses in his favor, and shall have the assistance of counsel for his defense.

What has been said of the substantive rights is true as well of these procedural rights. Their exact meaning is to be determined not by legislation, but as a result of the decisions of the courts.

This power which the courts have of defining exactly the meaning of the rights given to the individual in the Constitution has made the American courts in a measure political bodies, in the same way in which the power they possess to define the meaning of the powers of the

central government and of the state governments and to determine their reciprocal relations has produced the same result.

In the case of the powers of the central government, and of the states, the courts are forced to take sides upon the question of centralization or decentralization. In the case of the definition of individual rights they are often obliged to play a part in the determination of the degree to which government interference with the individual is to be permitted, and in the defining of the relations which shall exist between the various social classes of the community. The broad and rather indefinite way in which many of the clauses of the United States Constitution are drawn adds greatly to the judicial power. Take, for example, the commerce clause of the Constitution which gives to Congress the power to regulate commerce among the several states. The Constitution does not define commerce, does not say whether it includes insurance or the relations between employer and employed, and a hundred or more things which may or may not be included within the term. The Constitution does not say of what action regulation consists, does not say whether regulation includes the power to organize companies or to construct public enterprises such as navigation improvement schemes. It does not even say what it means by "among the several states."

In the same way, in the case of individual rights for which provision is made, as we have seen in the Constitution, there are some very general clauses whose meaning is not precisely stated. Thus in the clauses which say that no person shall be deprived of his life, liberty, or property without due process of law, and

that private property shall not be taken for public use without compensation, property is not defined or its nature even hinted at, nor can we ascertain from a perusal of the Constitution what is liberty or what is due process of law. All of these matters have had to be marked out in decisions which are almost too numerous to be counted.

In the making of these decisions the following are some of the conclusions characteristic of American ideas of private rights which the courts have reached, together with some of the inconveniences which have been incident to the American method of determining and protecting individual rights.

The clause providing that private property shall not be taken for public use without just compensation has been interpreted as prohibiting inferentially the taking of property for private use. This interpretation is really due to the recognition in the individual of a natural, inherent, substantive right of property which may be limited by the government only in the case mentioned in the Constitution—*viz.*, by taking property for public use. It is therefore altogether probable that the American courts would have held unconstitutional in the United States an act of the legislature similar to the recent act of the British Parliament apportioning the property which had been held to belong to what was known as the "Scotch Wee Kirk" between that Church and the "Free Kirk."

Again the clause providing that no person shall "be deprived of his life, liberty, or property without due process of law" has been held by some of the state courts, under the influence of the idea of substantive inherent absolute individual rights, to prevent the legis-

lature from passing an act which changes the basis of the liability of employer to employed. The old basis of the liability was negligence. The act declared unconstitutional provided in the case of accident a liability on the part of the employer regardless of the question whether he was negligent or not. Other acts of legislation have been declared unconstitutional as violating this due process clause, because they imposed upon an employer the duty to pay his employees in money, or at stated periods, or because they forbade an employer to work his men more than a certain number of hours a week or a day. Such acts were held unconstitutional as depriving either the employer or the employed of his property or his liberty.

Such decisions have been reached as a result of the fact that the American courts have emphasized the idea of a substantive right, and have lost sight of the fact that the right granted in the constitution, if defined in the light of its history, was a right not under all conceivable circumstances to liberty or property, but merely a right not to be deprived of liberty or property except in a certain way, that is, by due process of law. The fact that in all these cases an act of the legislature—that is, a law in the historic English sense—provided that liberty or property should be taken away was not regarded by the courts as providing due process of law. In fact, the courts of the United States have really taken the position that there is no due process of law by which the individual may be deprived of these absolute, substantive, inherent natural rights.

Just as the determination of the relations of the states and the nation has drawn the courts into the vortex of partisan politics, whirling about the ideas of

states' rights and national supremacy, so the attempt on their part to fix the relations between employer and employed through their postulation of these substantive rights has precipitated them into the struggle between labor and capital. The courts in the United States have thus become important factors in the determination of questions elsewhere usually regarded as questions of legislative policy, and to the extent that they have taken sides in the bitter political struggles incident to the settlement of these questions have lost the position of impartial arbiters between man and man on the basis of the rule of law to be made by the legislative authority of the country.

If, then, we compare the American with the English conception of individual rights, we may say that the Americans, influenced by the doctrine of natural rights, have emphasized the substantive character of those rights, which are sought not, as in England, in the law, but in philosophical conclusions as to what rights ought to be. Basing themselves on a static and stationary conception of society, the American courts have been too inclined to assume that the rights of individuals should be the same at all times and under all conditions.

The American conception of civil liberty is, therefore, somewhat wider than is the case in England. For in addition to all the procedural rights recognized in England it recognizes as well a large number of substantive rights of which the individual may not be deprived in any way. The American conception has been extremely effective in protecting the sphere of individual liberty, for it makes almost the same provision as is made in England for remedies to which the individual may resort when his recognized rights are involved.

The American conception of civil liberty has not, however, made sufficient allowance for changes in ideas as to the extent of individual rights which may be recognized—changes due to changes in economic and social conditions. The American conception is in a way an obstacle to progressive development. It is, however, only fair to say that these disadvantages are due not so much to the American conception of rights as to the form given to them by the American courts. Those bodies are already beginning to see that they have made mistakes, and under the leadership of the Supreme Court of the United States, probably the most enlightened, broad-minded, and influential tribunal in the United States, are considerably modifying their views.

XXII

THE EUROPEAN CONCEPTION OF PRIVATE RIGHTS

THE first comprehensive statement in legal form made on the continent of Europe, of private individual rights, is probably to be found in the "Declaration of the Rights of Man and of the Citizen," put forth in France in 1789, and subsequently incorporated in the first written constitution of France adopted in 1791.

The National Assembly, which drafted and adopted this constitution, states in this declaration that it considers "that the ignorance, forgetfulness, or the disregard of the rights of man are the only causes of public misfortunes and of the corruption of government," and that it therefore has determined to set forth in a solemn declaration "the natural, inalienable and sacred rights of man, in order that this declaration, being constantly before all the members of the social body, may constantly remind them of their rights and duties."

The Declaration proper then follows.

It states that men are born and remain free and with equal rights; that the end of all government is to preserve the natural rights of man, which are liberty, property, safety, and resistance to oppression. After announcing that sovereignty resides in the nation, the declaration defines liberty as the right to be able to do anything which does not injure others. It concludes,

therefore, that the exercise of the natural rights of each man is limited only in such a way as to preserve the similar rights of others, and that the limits to be placed upon these rights can be determined only by the law. This law ought, however, to prohibit only those actions which are harmful to society, and no one may be forbidden to do what is not prohibited by the law nor be forced to do what that law does not commend. The law is regarded as the expression of the public will. All citizens, therefore, have the right to participate directly or indirectly through their representatives in its formation. It must be the same for all.

After this statement with regard to the rule of law the declaration mentions certain specific rights, such as the freedom of religious opinions, provided the expression of those opinions does not disturb the public order established by law; the right of free speech, the right of property of which no one may be deprived except in the case of public necessity, when compensation shall be paid, and the right not to be criminally punished for doing an act which was not punishable when it was committed. In other parts of the constitution other rights are recognized, such as the right of citizens peaceably to assemble, to decide their controversies by way of arbitration, and not to be tried by judges other than those provided by law.

For the most part it will be noticed that the declaration emphasizes substantive rights and lays little stress upon the methods by which, and by which only, limitations may be placed on these substantive rights. There are, however, provisions in the declaration which attempt to fix the procedure necessary in order to deprive a man of his natural rights. Besides those contained in

the declaration there are others to the same effect to be found in the body of the constitution, and particularly in that part of it devoted to the administration of justice. These have to do for the most part with procedure in criminal matters. They provide that in ordinary criminal matters no citizen shall be judged except upon a charge made by a jury. After the charge has been made it shall be tried as to matters of fact by a jury of not less than twelve. The accused shall have the absolute right to challenge twenty jurors without giving any reasons for his actions, and to have counsel, and if acquitted may not be tried again for the same offense. The judges shall decide questions of law and the proceedings shall be public. Arrest may be made only as a result of a police or judicial warrant. Every one so arrested shall be brought at once before a police officer, and shall be examined within twenty-four hours. If on such examination there appears to be no ground for his detention he shall be released; where bail under the law may be given he must be released on bail if he so desires. No keeper of a jail shall receive or detain any prisoner except upon a proper warrant, and no one shall be detained in any place not stated by law to be a place of detention. Any one who without authority of law attempts to arrest or detain a prisoner is declared to be guilty of the crime of arbitrary imprisonment.

There are also certain provisions regulating civil matters, the most important of which is that the courts are forbidden to entertain suits of a civil character unless the parties thereto have appeared, or unless the plaintiff has summoned the defendant before arbitrators in order to arrive at a compromise.

In the republican constitutions, which were adopted

immediately subsequent to the constitution of 1791, this Declaration of Rights is repeated in a substantially similar form. In some cases even new rights are added. Thus the republican constitution of the government known as the Directory, adopted in 1795, provides that the house of every person inhabiting French territory is inviolable. During the night no outsider may enter it except in case of fire, of flood, or on the request made by some one in the house. During the day it may be entered by an outsider only for a purpose authorized by law or as the result of an order which has been issued by a public authority. The constitution also provides that an order of arrest is not legal unless it states the reason of the arrest and the law in the execution of which it has been issued, that it has been issued by an authority who is competent, and unless the person arrested has been notified of it and a copy of it has been left with him.

The constitution adopted in 1795 would appear to be the last French constitution which contains a formal and comprehensive statement of private rights. But the omission did not have the effect in all cases of subjecting individuals to the arbitrary action of public officers. For specific provisions with regard to arrest and trial were often contained in either the constitution or the laws. Indeed, the various provisions in the bills of rights, which were inserted into the early French constitutions, were regarded as having in some measure the force of law even in the absence of legislation to that effect.

But the conception of the principle of the separation of powers and the position which was as a result assigned to the courts, which, it will be remembered, were

forbidden to cite before them administrative officers because of the performance of their duties, for a time, at any rate, left the French citizen almost helpless in so far as purely civil rights were concerned, where they were subject to encroachment on the part of the government. By the constitution of 1795 this immunity of administrative officers was somewhat lessened by the provision authorizing suits to be brought against them in the ordinary courts on the condition that the consent of the highest administrative authority, the Council of State, was obtained.

The inadequacy of the remedies, for a long time open for the protection of individual rights of a civil nature over against the government, and the conservative reaction which in 1795 followed the excesses of the French Revolution, thus would seem further to have made it somewhat of a vain and futile thing to re-enact a formal declaration of rights. In any case, whether because of this fact or because of the fact that the declarations of rights in the early constitutions were regarded as having the force of law, formal declarations of rights have not been repeated in the French constitutions since 1795.

The peculiar conditions to be found in France would seem thus to have had the effect of causing the abandonment of the formal declaration in the French law of the rights of man. But the liberal movement which had been responsible for these formal declarations of rights received a new impetus in 1830. This resulted in a revolution in France, which gave the throne to Louis Philippe. It also caused a revolution the same year which had for its effect the formation of the new kingdom of Belgium, at that time separated from the kingdom of the Netherlands.

The Belgian constitution, adopted in 1830, contains something in the nature of a declaration of rights. This differs from the former French declarations in two particulars. In the first place, it is not nearly so elaborate. At the same time it provides for individual liberty, which is defined as the right not to be prosecuted except in the cases and in the methods prescribed by law. Emphasis is laid upon the necessity of a special judicial warrant. Such a warrant is made obligatory except in the case the person arrested is caught in the act, and must be shown at the time of the arrest or at the most within twenty-four hours thereafter. The constitution provides that no one may be punished except by virtue of a law, and that no one may be punished by the confiscation of his property. A right of an inviolable domicile is recognized, and no domiciliary visit may be made except in the cases and in the manner prescribed by law.

In addition to this right of liberty the right of property is recognized, the statement being made in the constitution that no one can be deprived of his property except for public use, in the cases and in the manner prescribed by law and upon a just compensation to be paid in advance.

The constitution recognizes the freedom of religious belief, the liberty of speech and of the press, the right of association, and to peaceably assemble, the right of petition and the right of secrecy of correspondence. Only two of these rights are recognized as absolute. These are the right of association and the right of secrecy of correspondence. The others are subject, certainly so far as concerns their positive public exercise, to the limitations which may be imposed by law.

In the second place, taught by the experience of the

thirty or more preceding years, the makers of the Belgian constitution laid more emphasis upon the right to a remedy than to an absolute substantive right. As we have seen, almost every right which was enumerated in the constitution might receive limitations as a result of legislation, and in almost every case of a right mentioned, provision was made for methods by which it might be taken away. But above and beyond all this the Belgian constitution provided specifically that, except in the case of ministers, it should not be necessary to obtain the consent of their superiors in order to bring suit against public officers because of their acts. Furthermore, the judiciary article of the constitution provided the jury in criminal prosecutions, and the law subsequently passed which organized the judiciary made no provision for any special kind of courts for the trial of cases between the government and private individuals. Such cases, by the constitution, were within the jurisdiction of the ordinary courts, unless otherwise provided by law.

Just as the Belgian constitution was one of the results of the revolutionary movement of 1830, so the constitutions of Prussia and Italy were due to the revolutionary movements of about the middle of the last century, which affected most of the states of continental Europe. The influence of the Belgian constitution upon the treatment which was accorded the question of private rights in many of these later instruments is most noticeable. There is, in the first place, something in the nature of a declaration of rights, but much greater emphasis is laid on the limitations upon the rights and the methods of procedure by which these limitations are imposed than upon the rights themselves.

The Japanese constitution, which, as has been said, has felt the influence of German ideas, did not escape the general European tendency. It recognizes the right of liberty, the sacredness of the dwelling, the secrecy of correspondence, the right of property, the freedom of religious belief, the liberty of speech and of expression, of association and of petition. But in most cases the recognition of the rights is coupled with the provision that the rights recognized must be exercised only in accordance with the law, and that the law may impose limitations on them. The source of the right is thus the positive law. In other words, it is the rule of law which it is sought to secure. The limited character of the rights recognized is particularly apparent in that article (Article XXXI), which says that the provision of the constitution as to private rights "shall not affect the powers of the Emperor in times of war or in cases of national emergency."

We may then say of the provisions in the later European constitutions, with regard to private rights, that they have in large measure abandoned the point of view of the eighteenth century as evidenced by the American constitutions, and to a lesser degree by the first French constitutions. At the present time the constitutional doctrine, with regard to private rights accepted in continental Europe, evidences somewhat of a return to the original English idea—*viz.*, that it is not the recognition of absolute substantive rights which is sought, but rather the provision of remedies and safeguards for the most part judicial in character, through which individuals can effectively protect against encroachment the rights which are accorded to them by the positive law of the land. As Mr. Errera, the com-

mentator on the Belgian constitution, says,[1] the provisions in that constitution relative to private rights "are not theoretical in character; they form practical barriers raised against governmental, even legislative action. They are constitutional rules which are imposed on public authorities, and which forbid all interference other than that of a judge with the sphere of individual liberty even in case of its abuse." Mr. Errera recognizes, as we all must, that the fundamental conceptions lying at the basis of the celebrated Declaration of Rights of 1789 have so entered into the spirit of our times that a formal statement of them appears to be unnecessary, and that what constitutional law is particularly concerned with is the way and method of procedure through which rights, that in a way are taken for granted, may be legally limited.

We may say, then, that at the present time we find two conceptions of private rights.

By the one which is held only in the United States these rights exist for most practical purposes apart from the positive law. They find their origin in an individualistic rather than a social conception of man. The rights of man as an individual human being are set forth in a written constitution which it is beyond the power of the legislature to change. If an attempt is made to make such a change it may be prevented by the courts, which may thus protect the individual in his rights recognized in the constitution. The exact definition and determination of private rights is by this system, made not by the legislature, but by the courts in the cases coming before them. It is, of course, true that these rights are only those set forth in the constitu-

[1] *Traité du Droit Public Belge*, p. 43.

tion. As the constitution may be changed by the sovereign people, the rights recognized are not in fact natural rights which have an existence apart from the law. But the law which recognizes them is the constitution, which is finally interpreted by courts independent of both executive and legislature. Judicial interpretation of the provisions affecting private rights in the United States has been much influenced by the philosophical ideas of the eighteenth century, and therefore, though these rights find their origin in constitutional law, their actual legal extent resembles that of the natural rights described by an extremely individualistic political philosophy, and is much the same as that held by the natural-rights philosophers of the eighteenth century. Owing to the power of interpretation possessed by the courts, and to the system of remedies which the Americans inherited with the English law, the provisions in their constitutions with regard to private rights are not, however, mere general theoretical statements as to what ought to be, but are rules of law interpreted and defined by the courts and protected by them in specific concrete judicial decisions. The conception of private rights, therefore, in the United States, is not merely a philosophical, but as well a legal one. In addition to substantive rights there are also rights of which the individual may be deprived only in a certain specified way. That is, he has a right to certain kinds of procedure.

The other conception of private rights is the English, now become the European conception. This is based upon the principle that the existence of the right is dependent upon the ordinary lawmaking body of the state. The rights recognized are not so much substantive rights as rights to a certain sort of procedure.

Thus an individual's property or liberty may be taken from him, but only in the way or by the methods specified in the law.

Intensive study of the law of a particular country is necessary to determine whether the methods provided by law in it are sufficient to protect the individual against arbitrary action by the government. The English writ of habeas corpus, it may be said, however, is more effective than any continental remedy, and the English right of suit against government officers for an injury caused by their exceeding their powers has been rendered less effective than it is in England by the limitations placed upon it on the continent of Europe.

It is clear, therefore, that whichever view be adopted, the American or European, it is an absolute prerequisite to the existence of constitutional government that there be established, for the protection of the rights recognized, an effective system of remedies administered by courts independent of the executive. For it is only as a result of the existence of such remedies that rights, however conceived, may be enforced, and, as the American Declaration of Independence says, it is a self-evident truth "that to secure these rights governments are instituted among men."

XXIII

THE LOCAL INSTITUTIONS OF ENGLAND

WE have seen that the relation between the central government of a state and the various local communities of which that state is composed presents problems of supreme importance only in countries of great extent. It is nevertheless true that in all states of any size the determination of the position of the local districts in the general scheme of government raises an important question. This question also, like the question of states' rights, is one which cannot be answered by the application of any general theory of centralization or local self-government, but must, to be solved satisfactorily, be solved in the light of the conditions which exist at the time the solution is reached.

The solution of this question made in countries whose civilization is Western European can be understood only by one who has some acquaintance with the history of European institutions. To obtain such an acquaintance we must begin our consideration of European local government with a glimpse at the government of the great Roman Empire. For Roman administrative institutions have had a tremendous influence on the subsequent history of Europe.

The original form of Roman political organization was what is called the "City-State." The Roman city-state

was a district consisting of open country and thickly populated areas, inhabited by people of the same blood and worshiping their own gods, who were believed to accord protection to the particular city in which their worship was carried on. The city-state of Rome gradually grew in power and by conquest and treaty extended its influence over the other city-states of Italy. But Rome made no attempt at first to govern these subject states, except in those respects in which Roman control was deemed necessary to the maintenance and extension of Roman power. The maintenance and extension of Roman power did, however, make it appear to be necessary to make provision for a centralized military administration, since it was to her military power that Rome owed her ability to maintain and extend her influence.

A centralized military administration, moreover, involved a centralized tax administration and a centralized administration of the means of communication. For it was only as money was forthcoming that the army could be supported, and it was only as a result of the existence of good and abundant means of communication that the army could be moved expeditiously to the points where it was needed.

The policy pursued by Rome in Italy was afterward followed throughout the entire Mediterranean basin, and, indeed, throughout all of western Europe, until finally all of this part of the world was subjected to the Roman power. The centralization of the military administration which, as we have seen, was deemed necessary to the maintenance of Roman power, involved somewhat of a departure from the city-state idea which originally lay at the basis of the Roman political organization. In the early days of Roman expansion the

Roman state was little but a collection of city-states under the leadership, and in certain respects under the control of the most powerful city-state of all—*viz.*, Rome. But as Roman influence expanded these subordinate city-states were grouped into provinces, each of which was placed under the control of a governor appointed by the Roman authorities. At first the Romans made no attempt to interfere with the law or customs of the districts which they conquered. They were satisfied if they obtained from those districts taxes sufficient in amount to maintain the army. But later the spread of Roman ideas and the great development of commerce incident to the conditions of peace which followed in the train of Roman conquest gradually brought about a unity in the law, as well as in most other matters of a political nature.

Ultimately, thus, the entire administration of the Roman Empire became highly centralized and substantially uniform. The entire country was, first under the Emperor Diocletian, later under the Emperor Constantine, divided into four great districts known as Prætorian Prefectures—*viz.*, those of the East, of Illyricum, of Italy, and of Gaul. At the head of each of these was an officer called a Prætorian Prefect. Each prefecture was divided into dioceses, each of which was governed by a Rector. Each diocese was divided into provinces, at the head of each of which was a President. Each province contained a number of municipalities, the original city-states, at the head of each of which was a council composed of members holding usually by hereditary right. Apart from the members of these municipal councils all the officers of this administrative system were appointed by the Emperor.

The administrative system which has been described, and which, it will be noticed, was highly centralized, had, however, to do only with civil matters. The military administration, according to the system of Constantine, was even more highly centralized, was under the immediate control of the Emperor, and had practically no connection with the civil administration.

The Roman administrative system which has thus been outlined had two noticeable characteristics:

In the first place, it made practically no provision for local self-government. All the officers were appointed from the center, all were subjected to the control of a superior, and no provision was made for the choice by the people of those by whom they were governed.

In the second place, the original idea which lay at the basis of the organization of the old city-state was retained—*viz.*, that no distinction should be made between the administration of the open country and the thickly populated areas. There was no such thing as city government, on the one hand, and rural local government on the other.

The first evidence of the decline of the great Roman Empire may perhaps be found in the abandonment of the islands now known as the British Isles. When the Romans abandoned these islands they were almost at once occupied by a number of piratical German peoples who gradually conquered them. These German peoples were, as compared with the inhabitants of the Roman Empire, barbarians. They had not been subjected to Roman influences, and they had, in the country in which they settled, probably a freer hand in the development of new institutions than they would have had in any other part of the Roman Empire. For Britain had not

been nearly so completely Romanized as had the other parts of Europe.

The institutions which were gradually established in Britain differed greatly from these which we have seen had been almost universally developed on the Continent. The difference was partly due to influences which affected all of Europe, and from which Britain did not escape, and partly to local conditions which existed in Britain only.

The most important of the general European influences is to be found in the development of what has come to be known as the feudal system. The chief characteristic of this system was the emphasis which was laid on local government as opposed to centralization. The whole Roman system of centralization was shattered with the gradual decay of Roman power. As the central authorities abdicated their authority this authority was assumed by those persons who were able to gather about them a local following. These were mainly persons of German origin who had invaded the less well-protected districts of the Roman Empire, and who gradually built up the present political organization of Europe.

One of the incidental results of this breaking up of the Roman Empire was the adoption of a distinction between city and rural government. The fall of the Roman system was accompanied by great disorder. The *pax Romana,* as it was called, which had for so many years been an incident to Roman control of Europe, ceased any longer to exist. The inhabitants of the thickly populated areas began to build walls and fortifications, behind which they might secure protection and safety against the bands of marauders that were wandering in search of plunder through the formerly peaceful Roman provinces.

A special form of administrative organization for the districts within walls was developed. Such an organization was particularly desirable, because of the fact that the people within the city walls had economic interests different from those outside of the walls. They were engaged in commerce and industry, while those outside were mainly agricultural in character. In this way a distinctly city government was established. That Britain, or England, as we may now call it, was not exempt from this general movement, is seen when we remember that the English word for city—that is, "borough"—is derived from an old German word, "burh" or "burg," which means a fortified or walled town.

The local conditions, which influenced the development of English institutions, are to be found in the predominantly German character of the people after the German conquest. Roman institutions never got the foothold in England that they had elsewhere. Now the Germans, probably because of the rather simple and comparatively speaking uncivilized life which they had led in the forests of Germany, had a great love for localized, and disliked centralized, government. The country to which the German conquerors of Britain came was much like the country which they had left. Situated in a corner, as it were, of Europe, it had not been subjected in any great degree to the commercial influences which had done so much to mold the life of Rome. Britain for a long time after the German conquest was a simple agricultural country, so to speak, a virgin soil for the cultivation of political institutions.

We find, therefore, in England all the conditions favorable to the development of local institutions of great

strength. These immediately grew up there. The disintegrating tendencies of English life were, however, somewhat checked by the Norman Conquest of England, which took place in 1066. The Norman kings were strong enough to give to the English people a consciousness of national existence. They were not strong enough, in the conditions which then existed in England, to destroy the local institutions which had developed during the Saxon period, nor to prevent the exercise of local influence over the central organization which they established.

The local institutions of England were centered about the district known as the shire or county in the open country, and the borough or walled city in the thickly populated areas. These districts were able to live a local life of their own, which developed in connection with the judicial administration. Originally this judicial administration was based on a system of popular courts. That is, the courts which decided the controversies arising between man and man consisted of assemblages of the freemen, who acted under the presidency of an appointee of the Crown. Those in the rural districts were to be found in the counties, were called county courts, and acted under the presidency of the sheriff. In the boroughs special judicial organizations of a similar character were evolved, which acted under an officer usually called the mayor, and were known as courts-leet.

These county and borough courts attended as well to other matters of local administration. They had the charge of such means of communication as existed, and often, particularly in the case of the boroughs, assessed and collected the taxes.

The royal authority gradually increased. Royal

courts held by judges appointed by the Crown encroached upon the popular courts, until finally royal judges assumed the entire administration of justice. In administrative matters also royal officers called justices of the peace assumed control in the counties. The result was that, apart from the boroughs, by the end of the fourteenth century the old popular courts had died out.

But the gradual extinction of the popular courts had been accompanied by the development of the English Parliament, which was composed in part, as we have seen, of the representatives of the counties and the boroughs. For the House of Commons finds its origin in the summons issued by the English Crown, in 1295, to each of the counties to send two knights, and to each of the most important boroughs to send two burgesses, to act with the Great Council, composed of the great landholders.

Furthermore, the justices of the peace who controlled the county administration, although appointed by the Crown, were always appointed from among the inhabitants of the county over which they were to have jurisdiction. Inasmuch as they were chosen from among the well-to-do classes they were, in large measure, independent of royal influence. For dismissal from office would not have meant to them loss of the means of livelihood.

Until comparatively recently in English history almost all functions of government discharged in the localities were placed under the control and supervision of these justices. Until within the last two hundred years they had charge even of the military administration. Since, however, England has had a vigorous foreign policy,

there have grown up under the control of Parliament branches of administration with which local affairs have little if anything to do. Such branches are particularly the army and the navy. To provide the necessary resources for these new centralized branches of administration new taxes have been established which are assessed and collected under the control of Parliament, by what are called Imperial officers having no connections with the localities. But apart from these centralized administrative services the local districts still exercise large powers over subjects which have more than local significance, as well as over what are regarded as purely local matters.

One of the results of the early development in England of a supreme national legislature—the Parliament—was the adoption of the idea that practically every government authority, whether central or local in character, must find its right to act in the law passed by that Parliament. No local district has any inherent power. With very few exceptions no officer, whether central or local, has any legal authority not derived from an act of Parliament. This is true even with regard to purely local business.

In order, therefore, to find out what are the powers of local districts and local officers, we must look through the acts of Parliament, some of which are special in character, that is, refer to a particular local district by name. This is peculiarly true of cities, although their general organization and powers are governed by a general Municipal Corporations Act, as it is called, passed originally in 1835 and codified with its subsequent amendments in the Consolidated Municipal Corporations Act of 1882.

The administrative organization which existed at the beginning of the nineteenth century, both in the counties and in the boroughs of England, while one of local self-government, was at the same time distinctly aristocratic in character. In the counties nearly all power was centered in the justices of the peace appointed by the Crown, practically for life, from among the nobility and gentry of the county. In the boroughs most authority was granted to a council which itself filled the vacancies in its membership as they occurred, or whose members were elected by a very narrow body of voters. In the counties it was the rich landholders, in the boroughs it was the rich merchants and manufacturers who controlled the administration. Finally, so long as local officers acted within the law as laid down in the acts of Parliament, they acted independently and practically free from any central control and supervision.

The English system of local government was, subject to the rule of law which, we have seen, is so characteristic of all English institutions, one of great decentralization, but at the same time highly aristocratic in character in that its control was in the hands of the well-to-do classes. These classes, it is well to remember, also controlled the Parliament. The local institutions of England were thus closely linked with her institutions of central government. The same classes which controlled the one controlled the other.

The year 1832 marks a great change in English political development. The widening of the suffrage, which was the object of the great Reform Bill then passed, gave the political power to people who were less well-to-do than those who had up to that time controlled the government of the country. It was only natural that

this class should strive to obtain control as well of the local institutions of the country. This is what they did and did successfully. The succeeding years were marked by the passage of legislation which has greatly modified English local institutions. The most important of the acts passed are the Poor Law Amendment Act of 1834, the Municipal Corporations Act of 1835, afterward codified with its amendments in the Consolidated Municipal Corporations Act of 1882, the Consolidated Public Health Act of 1875, and the Local Government Acts of 1888 and 1894.

The most important effects of this legislation on English local government are three in number:

In the first place, the whole system has been made much more democratic in character. At the present time almost all the important local authorities are councils, such as the county council, the parish council, and the borough council, having jurisdiction over particular local districts. These councils are elected by the taxpayers of the districts. But as taxes are paid by reason of occupation rather than the ownership of a house or land, practically all adult occupiers of houses and land have the right to vote.

In the second place, the sphere of local activity has, on the whole, been enlarged. This is due to the fact that local government legislation has become somewhat more general and liberal in character. The old idea of a special act conferring local powers has been in a measure abandoned, and the general acts give, particularly in the case of the boroughs, wider powers than were formerly possessed. Thus many boroughs at the present time have their own waterworks, their own tramways, their own electric-light plants, their own markets,

and so on, while the increasing density of the population has made it seem desirable to grant very wide powers to be exercised for the protection of the public health and safety.

Finally, the actions of local authorities, even within the limits of the law, have been subjected to a central administrative control to be exercised by the Local Government Board at London, established in 1871, to supervise the administration of the poor law, the public health, and the local finances of the various local districts.

The English system of local government remains, however, in its main features fundamentally the same as it has always been. That is, it is a system of local self-government in which the local people have within the limits of acts of Parliament a great influence over the detailed administration of local affairs.

The administrative centralization of the last century of development has consisted in the assumption by the central government, rather of the right of supervising the operations of the local authorities than of the actual management of local activities. For the most part the real power of decision is exercised by locally elected officers who may, however, be obliged by the central authority to maintain a certain fixed standard of efficiency.

It is, however, to be noticed that the system of local government is not so closely associated as formerly with the central governmental organization. Thus the boroughs as boroughs no longer send representatives to Parliament. The citizen of a borough does not merely, because of his local citizenship, have the Parliamentary suffrage. As a general thing, nevertheless, borough

voters and Parliamentary voters are from the same classes; and it never should be forgotten that Parliamentary or Constitutional Government in England developed in close connection with the local institutions. It is only as one understands these local institutions that one can comprehend the origin of constitutional government which, as we have seen, developed in the England of the centuries preceding the close of the eighteenth century.

XXIV

THE LOCAL INSTITUTIONS OF THE UNITED STATES

THE British settlers of North America brought with them the local institutions of the mother country, and upon these as a foundation they built their own system of local government.

In the first place they provided a decentralized administrative system; in the second place they laid even more emphasis than the English had laid, prior to the nineteenth century, upon the popular election of local officers; in the third place they accorded to the colonial, later the state, legislature the same power that had been possessed by the British Parliament to determine by law the organization and powers of the local districts and their officers; finally, they made a distinction between the government of cities and the open districts.

The declaration of the independence of the colonies and their organization as sovereign states brought about little, if any, change in their local institutions, while the adoption of the Constitution of the United States, in 1789, affected hardly at all the position and powers of the local districts and the local officers that existed in the separate states.

Among the powers not granted by the United States Constitution to the central government which it established—powers, therefore, reserved by the states—was the power to organize their own local institutions as they

saw fit. The original thirteen states have had added to their number as the result of American political development more than thirty new states. Each of these states has the same powers with regard to its local institutions, which are possessed by the original thirteen. As a result there are a number of different systems of local government, although the fundamental characteristics of these systems may be said to be substantially the same as those which were to be found a century and a quarter ago in both the original thirteen states and in England itself.

The various systems of local government in the United States differ one from the other mainly in the importance which is accorded to the county or the town, the two main local districts.

Throughout the South and the West it is the county to which has been intrusted the discharge of most of the functions of local government. It is the county which has charge of the preservation of the peace, of the administration of roads and bridges, of the support of the poor, often of the care of the schools and of the registration of documents affecting the title to land, and it is the county which must bear the expense of the judicial administration.

In the northeastern—that is, the New England—states these duties are for the most part imposed upon the town, which is smaller in area than the county.

In some of the Middle States, like New York, a compromise has been reached in which both the county and town are used in such a way that the functions of local government are divided between the two areas.

In all the states, however, without exception, a distinction is still made between the open country and the

thickly populated districts. For the latter a special organization is provided. The cities, if small, are excluded from the town organization, where that exists; if large they sometimes are excluded for most purposes from the county organization. In the one case the city performs the functions of the town, in the other it performs certain of the functions of the county.

The local districts provided in the United States are thus practically the same as in England. In the one country we find counties, towns, and cities; in the other counties, parishes, and boroughs. Furthermore, the principles of law which determine the powers and duties of these districts are the same in both countries. Just as the legislation of Parliament fixes in considerable detail the powers of the local districts in England, so in the United States those powers are in the same way determined by the legislature of the state in which the local districts are situated. There is also evident in the United States the same tendency to fix the powers of the local district in general rather than in special laws, which is noticeable in England. In some states even the attempt has been made in the constitution to forbid the state legislature to pass special acts of legislation relative to the local districts.

Finally, in the local government system of the United States we find the same administrative independence accorded to local officers which we noticed was accorded to them in England. Provided they act within the law, they are subject to little, if any, control. The United States has, however, had the same experience in this respect as England has had. That is, it has been found, as the means of communication have improved, that an increased efficiency results from doing certain things in

a uniform way throughout the state. In such cases the attempt has been made to depart from the historic English practice, and to subject the actions of the local officers to a central administrative control. This control is not, however, as yet so extensive in the United States as it is in England. It hardly as yet extends generally beyond educational matters and local finance. There are, however, in a number of states superintendents of schools or state boards of education that exercise quite an extended supervision over the management of the schools by the local school officers. In a few states also the chief state financial officer, such as the state treasurer or auditor, has by law the power to prescribe the methods of keeping local accounts and the duty to audit those accounts in such a way as to insure the honesty of local officers and their observance of the law with regard to local powers.

Apart from such a central administrative control, which in the United States is only just beginning to develop, the only control exercised over local administrative officers is, as in England, exercised by the courts. These bodies have the right to hold local officers liable for the damage they cause other persons by their non-observance of the law with regard to their powers; they may force them to perform their duties, they may prevent them from exceeding their powers, they may review their action and amend it where such action has been contrary to law. This judicial control is usually exercised only in order to protect private rights from encroachment on the part of officers.

The American system of local government is thus not only based on the English system, it even copies that system in almost all important particulars. At the same

time, in the general character of its organization, it departs in one most important respect from the English system.

It will be remembered that as a general thing the English system of local government is based upon the idea of concentrating all local powers exercised in a particular local district in a council or board elected by the local voters of that district. This feature of the English system is not reproduced in the American system. Instead of this administrative concentration which we find in England in the local government system, we find in the United States an extremely loose and unconcentrated local organization. Thus in the county we find at the head of almost every branch of county administration an officer elected by the people of the county who is not subject to the control of any administrative superior either in the county or in the state. There is a county superintendent of the poor, a county district attorney for the prosecution of crimes, a county register for the registration of documents such as deeds and mortgages, which affect the title of land, a county clerk who has charge of the records of the county, and so on. There is, it is true, what is called a county authority, a commission of three, or a board larger in number, one member of which comes from each town in the county. But this county authority, while having charge of the roads in the county, county buildings, and the county finances, has no power of direction, control, or supervision over the other county officers. It may not appoint them, since by law they are to be elected by the people of the county, and it has no power to dismiss them from office in case they fail to perform their duties. Punishment for official misbehavior is supposed to be

meted out to county officers either by the courts in case the misbehavior interferes with private rights, or is punishable by the criminal law, or by the people, who may refuse to re-elect officers guilty of negligence or inefficiency. That this popular control may be continuous, it is usually provided that official terms shall be short, not more than two or three years.

The more general application of popular election for filling local offices, and of the short terms of office provided, have the effect of causing the American system of local government to lay even greater emphasis than does the English on what has been called the self-government character of the system. The English system, as we have seen, applies the elective principle merely to the members of the councils which, within the law, control and direct the local administration. These councils in England appoint the officers who have the direct control and management of the local administrative services. They often appoint acknowledged experts who make the doing of their work their sole occupation. Such experts may thus be said to be professional officers. The American system lays greater emphasis upon the self-government characteristics of the system and less upon the expert professional. For, as has been shown, the places which in England are occupied by the expert professionals appointed by the councils are filled in the United States by an election by the people of the districts. These places are not, therefore, filled in the United States by professional experts, and are not so filled because it is seldom the case that one elected merely for a short term, with no prospect for a career, will be a professional, and because, as experience would seem to show, election is not a good method of choosing an expert.

While the English and American systems differ in the respect noted, they resemble each other, however, because of the fact that in neither is the professional expert accorded a position of authority. For even in England the councils which have the ultimate power of decision are composed, not of professional experts, but of ordinary members of society at large. The business man, the manufacturer, the lawyer, the physician, the artisan, the saloon-keeper even—all may be members of these councils if they are elected by their fellow-citizens. Acting together in council, they decide the affairs of their district. They may listen to and follow the advice of their experts, but it is they who actually decide. The English system, while assuring to the ordinary people of the districts the control of the affairs of those districts, still permits the employment of professional experts whose advice may be of the greatest value. The American system not only makes no provision for such professional experts, but even, because of the universal application of popular election as the method of filling local office, makes their employment extremely difficult. That in consequence the American loses greatly in administrative efficiency as compared with the English system there is no doubt.

What has been so far said has been said mainly with regard to the American system of rural local government. At the same time much is applicable as well to city government. The original system of American city government was like the English system based on the council idea. But in the course of time this concentrated council was split up. The mayor, who was originally elected by the council, and was merely its presiding member, was made elective by the people.

In a number of instances the officers at the head of the different branches of city administration sometimes organized as boards, also were made elective.

This unconcentrated organization proved to be unsuited to the rather complex problems of city government. Two remedies were applied. In the first place, in the belief that local self-government in cities had broken down, provision was made for the appointment by the State Governor of certain city officers. In the second place the power was given to the city mayor elected by the people to appoint city officers.

The organization of most American cities has been influenced by most of these methods of solving the problems connected with the organization of city government. We usually find a council which has merely deliberative or legislative powers, whose members are elected by the city voters. We find, as well, a mayor who is also elected by the city voters, but we usually find that a number of other city offices are filled in the same way. But the tendency almost everywhere is toward a return to the old concentrated form of organization in which most city powers are given to some one authority. This tendency is particularly characteristic of what has come to be known as the "commission form" of city government, which has recently attained great popularity as a form of government for the smaller cities and those of medium size. This form of city government provides for a commission, usually of five members, who are elected by the people of the city. Meeting together as a commission, they take formal action in carrying on the work of the city. Individually each member of the commission has under his immediate direction a branch of the city administration.

This greater concentration in the municipal organization permits of the employment of the professional expert, and as a matter of fact more and more expert professional officers are now being appointed in American cities.

There is, finally, one other respect in which American local government may be distinguished from the English system and, indeed, from every other European system of local government outside of Switzerland. In many states provision is made for the direct decision by the people of a local district of questions of local policy. The oldest instance of this direct participation of the people in the work of local government is to be found in the New England towns. Here all the voters of the town meet together several times a year in what is called the "town meeting." At this meeting, in addition to electing town officers, they decide what amounts of money shall be raised by taxation and spent the coming year for the various town services, such as roads, schools, the care of the poor, and so on.

In many of the states where there are no town meetings provision is made for submitting to the voters of the local districts, sometimes even to the voters of the cities, questions affecting the welfare of the districts, such as the question whether the district shall borrow money for some specific purpose. This practice has come to be known as the referendum.

The present tendency would seem to be in the direction of the extension of the use of the referendum, which is often at the present time to be found in connection with the commission form of city government.

The town meeting and the referendum have the effect of increasing the popular self-government character

which the American system of local government has taken on from the almost universal use of popular election as a means of filling local offices. In probably no other country in the world has the attempt been made to vest in the people of the local districts—that is, in the governed—so much power of determining by whom they shall be governed and of deciding important questions of local policy.

That the English, and particularly the American system of local government does, by its self-government popular character, do much, through the experience which the people gain in the management of local affairs, to train them for the wider sphere of state constitutional government cannot be denied. That the American system, by reason of its ultra-popular character, loses a great deal in administrative efficiency is, however, just as true.

XXV

THE LOCAL INSTITUTIONS OF CONTINENTAL EUROPE

THE existing local institutions of continental Europe may be said to find their origin in the administrative system established by Napoleon for the first French Republic in 1800. Of course German local institutions owe much to distinctly German tradition and custom, while Italian and Spanish local institutions in the same way find many of their roots in a local past. At the same time it is none the less true that Napoleon's administrative system of 1800 has had an enormous influence on continental Europe.

The system of Napoleon would almost seem to have been the result of a conscious attempt to follow the Roman administrative system, over whose main features we have already glanced. The leading idea in it was extreme centralization. The country was divided into districts called departments; these were in their turn composed of what were called wards (*arrondissements*). Each ward contained a certain number of municipalities (*communes*), which made no distinction between the open country or rural portions and the thickly populated or urban portions. At the head of the department was placed an officer with the old Roman name of prefect. At the head of the ward was an under-prefect, and at the head of the municipality was a mayor. By the

side of each of these officers was placed a council. These councils were called respectively the general council, the ward council (*conseil d'arrondissement*), and the municipal council. All the officers mentioned, together with the members of all the councils, were appointed by the central government and could be removed by it. Not one was elected by the people of the local districts.

The principal officers in this system, that is the prefects and under-prefects, were professional expert officers who made the performance of official duties their career. They devoted their entire time to their work, and received a compensation large enough to permit them to live without resorting to other means of livelihood.

Under this system, particularly during the time it was subject to the energetic direction of Napoleon, France developed great administrative efficiency. This was due, however, not merely to the general system. This system was, it is true, simple, and under it official responsibility was clearly defined. But the French made provision as well for certain technical services, such as the engineers of bridges and roads, which had charge of the public works of the country. The officers in these services received a splendid technical education at schools established by the government for their education, which have taken high rank among the technical schools of the European world.

While the officers in these services all had to possess technical qualifications in order to obtain their positions, there were no formal technical or even intellectual qualifications required of the prefects and the under-prefects. The excellence of the service which these officers ren-

dered was due entirely to the wisdom of the central government in making its appointments, and to the permanence of the positions. For, once appointed, a prefect or an under-prefect could look forward with reasonable certainty to a lifetime spent in official service, if he could prove that he was able to fill the position satisfactorily.

The distinguishing features of this system were, then, the professional expert, permanent service for which it made provision, and its distinctly centralized non-popular character. It was the professional centrally appointed expert officer who decided all important questions affecting the local districts. The people of those districts had no legal way of making their wishes known except through the local councils, whose functions were largely advisory. The system therefore was distinctly not a popular self-government system.

After the Revolution of 1830, however, the people of France began to demand participation in the work of local government. A series of laws was passed, beginning with 1830 and ending in 1884, which gradually introduced the self-government element into the system. At the present time the members of all the local councils are elected by the people of the districts concerned, while the popularly elected municipal council elects the mayor of the municipality. The prefect and the under-prefect are still, however, appointed by the central government, and as the powers, particularly of the prefect, are very large, the central government has still a very extensive control over local government.

The grant to the people of the districts of the power to elect the members of the local councils has been accompanied by the grant to those local councils of quite

large powers to regulate what are regarded as local affairs. The actual local initiative has been greatly increased, many matters which formerly were attended to by the central government now being attended to by the local councils. Indeed, the powers of the municipal councils are by the act of 1884 not enumerated. That is, those councils may, subject to the limitations on their powers contained in the law, take up any sphere of work which they deem proper. The result is that, at any rate so far as concerns the municipalities, the central control is rather supervision than actual administration by centrally appointed officers of local affairs.

The French system has, therefore, as the result of the development of the nineteenth century, come to resemble greatly the English system. It differs from that system, however, in at least two important respects. In the first place the central control and supervision over local affairs is more comprehensive, more systematic, and probably more effective in France than in England. The French system is, from an administrative point of view, therefore, considerably more centralized than is the English.

In the second place, there is in the English system no officer who resembles the French prefect. For the French prefect is not entirely a local officer. He is, it is true, the executive of the local government of the district called the department. But the department is not merely an organ of local government. It is as well an administrative district for the purposes of the central administration. The prefect is in the department the subordinate officer of every one of the central administrative services, for which no special provision has been

made. With these services the department as an organ of local government has nothing to do.

In both England and the United States the central services, with which the local districts such as the county have no concern, have each their own districts, made to suit the convenience of the particular service, and have each within such special districts their own officers. By the French system the attempt is made to give to each of these services the same district and to make one officer, the prefect, the officer in charge for each of those services. That the French system has many advantages may not be denied. Some of these advantages are the greater simplicity of the system and the greater consequent ease which the citizen has in dealing with the government.

Furthermore, the prefect, being the representative in the local district of almost all the administrative services, may co-ordinate the various services in such a way as to secure greater economy than is possible under a system not based on a common administrative district.

Finally, the French system encourages a reasonable decentralization of the central services of the government. For the prefect is an officer of such dignity that it is safe to intrust him with the final decision of many minor administrative matters which otherwise would be sent to the head of the service at the seat of the government.

The centralized administrative system which Napoleon established was carried into a number of European countries, largely as the result of the success of French arms. Its inherent excellence was undoubtedly also responsible for the fact that is has been so widely

copied. At the present time it thus may be said that the Italian, the Spanish, the Belgian, and the Dutch local government systems owe much to the administrative system of Napoleon. While subsequent local development has in most cases resulted in the grant to the people of the various local districts of the power to elect the members of the local councils which have an important influence over local government, all the countries mentioned make provision for an officer like the French prefect, who is appointed by the central government, and who exercises very important powers.

In Germany also French administrative institutions had a very important influence over the local government system in the early years of the nineteenth century. In Prussia, however, to which our consideration will be confined, there were other influences at work which have had the effect of introducing very serious modifications. These influences were twofold in character. In the first place they were of distinctly German, or perhaps it would be better to say, of Prussian, origin. These Prussian influences were in the direction of emphasizing the professional permanent expert character of official service. These influences were, in the second place, of just as distinctly English origin. When Prussia began to reorganize her administrative system after the Peace of Tilsit, which ended a disastrous war with France, the Prussian king called into his service Baron Stein. Stein was convinced that the weakness which Prussia had exhibited in her recent war with France had been in large measure due to the fact that she had not enough local self-government. He therefore attempted to organize an administrative system which should con-

tain many English features. Stein was, however, able to reorganize only the system of municipal government before the Prussian king was obliged by Napoleon to dismiss him from office.

Stein's work was nevertheless continued by Chancellor von Hardenbergh, who succeeded him. Hardenbergh had, however, greater belief in the French centralized professional administrative system than in English local self-government, and at the same time was of the opinion that it was desirable to lay even greater emphasis than had Napoleon on the trained expert. Therefore, while he did not seriously modify Stein's plan of municipal government, he did not extend to the open country the idea of local self-government which underlay it. The result was that, apart from the cities, the local government of Prussia was for the most part intrusted to centrally appointed officials who had been trained for the work which they were to do.

Soon after the Franco-Prussian War the question of local administrative reform was again taken up and again English influences came to the front, this time largely owing to the work of Gneist, a professor in the University of Berlin and a student of English institutions. A series of laws was finally passed, beginning in 1872 and ending in 1883, which completely remodeled Prussian local government.

The system of local government which was established by this legislation is interesting and important, not merely because it is the latest and on the whole the most clearly thought-out system which the administrative law of European states can present for our examination, but also because it was later made the basis of the local institutions which Japan established when

that country recently attempted its administrative reorganization.

In the space at our command it will be, of course, impossible to attempt anything more than the statement of the salient features of this Prussian system of local government.

These features are:

First. The employment of trained professional experts, who are educated by the state, and for the most part are appointed by the central government of the state. These officers have a fixed tenure of office—that is they may not be removed except for misbehavior, and they receive a compensation large enough to permit them to live without resort to other means of livelihood, and a pension when they retire. They are educated at the universities, where they must, if belonging to the general administrative service, have received a thorough training in law and political science, and must, before they are permanently appointed, have had practical experience in official work. If they belong to the special technical administrative services, they must have received their education at some one of the state technical schools.

These professional expert officers are not, as in the English system, the employees of local boards or councils composed of popularly elected non-professional laymen, but themselves exercise a certain authority, the exact measure of which is dependent upon the nature of the position they hold.

There is one of these professional expert officers at the head of each of the local districts, outside of the cities, into which the country is divided. At the head of the Province, thus, is the governor *(Oberpräsident);* at

the head of the Government District, as it is called, is the Government President (*Regérungspräsident);* at the head of the Circle is a commissioner (*Landrath*). These districts are sometimes organs of local government. This is the case with the Province and the Circle. But whether they are or not they are also administrative districts, and practically the only such districts for the purposes of the central administration. The officers at the head of them are sometimes at the same time the executives of the local governments and the agents of the central government in the districts.

So far it will be noted that the Prussian system of local government resembles very closely the French system established by Napoleon, but that it differs from that system in that it lays much more emphasis upon expert professional training and intellectual qualifications.

A second feature of the Prussian system is the subjection of the professional centrally appointed expert official to the control, even in matters of purely executive administration, of a popular non-professional body elected directly or indirectly by the people of the district. Thus there is by the side of the governor of the province a provincial council elected by the local provincial legislative body, and by the side of both the government president and the circle commissioner a similar council. This attempt to combine professional expert service and the self-government popular element is characteristic of the entire Prussian local government system being made as well in municipal government. In the cities, which as in England are clearly distinguished from the government of the rural districts, is usually to be found at the head of each branch of mu-

nicipal administration a board or committee composed of a professional expert and a number of non-professional laymen representative of the people. As a rule, finally, the non-professional elements outnumber the professional experts, and therefore actually control the situation. The expert can therefore win in the case of any difference of opinion only as his superior knowledge of the conditions of the problem to be solved enables him to convince his non-professional colleagues.

This method of attempting to combine the work of the expert and the non-professional layman is the peculiar contribution which Germany has made to the development of local institutions.

In the third place the distinctly local matters affecting the various districts of local government are, in accordance with English ideas, put in the charge of locally elected councils, which, within the limits of the law, determine what branches of work shall be undertaken by their districts, and in conjunction with professional experts carry on the various branches of local administration. It is to be noted, however, that Prussia has not adopted the English idea of enumerating the powers of these councils. On the contrary, they may, subject to a central administrative control, do anything which is of local interest to the district. Thus they may borrow money if they see fit, subject to the approval of the central administrative officer who by the law may exercise supervision over them. They do not, as was originally the case in England, and is still largely the case in the United States, have in each case to get the permission of the legislature to be given by the passage of a special law. In Prussia, however, as in France, the central administrative control is, notwithstanding

the recent changes in the English law, much more extensive and much more effective than it is in England. The system of local government in Prussia is, therefore, notwithstanding the participation which has by the reforms subsequent to 1872 been granted to the local people, much more centralized from the administrative point of view than is the system in either England or the United States.

In all the countries which have adopted constitutional government it will be noticed then that large powers of participating in the local government have been given to the local people. We can therefore hardly refrain from reaching the conclusion that a pretty wide participation of the people in local government is necessary to the successful operation of constitutional government. The existence of a judicial system which is independent of the executive is also just as necessary. It is because of the existence of an independent judiciary that a government of laws rather than of men is secured. It is because of the training which the people secure in their management of their local affairs that they become able to deal intelligently with the more complex if not more important national affairs. Without an independent judiciary and without participation by the people in local government we have, whatever may be the formal relations of executive and legislature, merely the forms of constitutional government. This is not to say that at times in a nation's history the forms of constitutional government are not of supreme importance. But it is always to be remembered that the establishment of those forms is only half the problem. The substance of constitutional government may come

in time, but it will come only as the people of that country realize, on the one hand, the importance of the rule of law, and, on the other hand, the necessity that they themselves must be trained in the school of local government to solve the larger problems of their national life.

APPENDIX I[1]

THE CONSTITUTION OF THE UNITED STATES

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 a House of Representatives.

SEC. 2. 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.

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.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.[3]

When vacancies happen in the representation from any State, the

[1] The constitutions and notes which follow in these appendices are reprinted by permission from "Modern Constitutions," by Walter Fairleigh Dodd, published by the University of Chicago Press. The author and the publishers of this volume desire to make grateful acknowledgment of this courtesy.

[2] Amended by the second section of the fourteenth amendment.

[3] According to the apportionment act of January 16, 1901, there are now three hundred and ninety-one members of the House of Representatives, there being approximately one member to 193,000 people.

Executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. 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.

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.

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.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

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.

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.

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.

SEC. 4. 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 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.

SEC. 5. 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.

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.

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.

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.

SEC. 6. 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 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.

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.

SEC. 7. 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.

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.

Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of

the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

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;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

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;

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, dock-yards, and other needful buildings;—and

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.

SEC. 9. 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.

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.

No bill of attainder or ex post facto law shall be passed.

No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any State.

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.

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.

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.

SEC. 10. 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.

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.

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. 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:

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by ballot

for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.[1]

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.

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.

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.

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.

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."

SEC. 2. The President shall be commander-in-chief of the army and

[1] This clause has been superseded by the twelfth amendment.

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 offences against the United States, except in cases of impeachment.

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.

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.

SEC. 3. 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.

SEC. 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.

SEC. 2. 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, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction, In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

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.

SEC. 3. 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.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

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.

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.

SEC. 3. New States may be admitted by the Congress into this Union; but no new States 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.

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.

SEC. 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Execu-

tive (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

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.

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 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.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I

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.[1]

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 offence 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 defence.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

[1] The first ten amendments were proposed by the first Congress, on September 25, 1789, and were ratified by three-fourths of the states during the two succeeding years.

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

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.[1]

ARTICLE XII

The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted;—the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President

[1] The eleventh amendment was proposed to the states on March 12, 1794, and was declared adopted on January 8, 1798.

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.[1]

ARTICLE XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.[2]

ARTICLE XIV

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.

SEC. 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.

SEC. 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

[1] The twelfth amendment was proposed to the states on December 12, 1803, and was declared adopted September 25, 1804.

[2] The thirteenth amendment was proposed on February 1, 1865, and was declared adopted on December 18, 1865.

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.

SEC. 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.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[1]

ARTICLE XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States of by any State on account of race, color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.[2]

ARTICLE XVI[3]

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

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.

[1] The fourteenth amendment was proposed to the states on June 16, 1866, and was declared adopted on July 21, 1868.

[2] The fifteenth amendment was proposed on February 27, 1869, and was declared adopted on March 30, 1870.

[3] The sixteenth and seventeenth amendments are not included in Prof. Dodd's "Modern Constitutions," which was published in 1908.

APPENDIX II

FRANCE[1]

CONSTITUTIONAL LAW ON THE ORGANIZATION OF THE PUBLIC POWERS

(February 25, 1875)

ARTICLE 1. The legislative power shall be exercised by two assemblies: the Chamber of Deputies and the Senate.

The Chamber of Deputies shall be elected by universal suffrage, under the conditions determined by the electoral law.[2]

The composition, the method of election, and the powers of the Senate shall be regulated by a special law.[3]

ART. 2. The President of the Republic shall be chosen by an absolute majority of votes of the Senate and Chamber of Deputies united in National Assembly.

He shall be elected for seven years. He is re-eligible.

ART. 3. The President of the Republic shall have the initiative of laws, concurrently with the members of the two chambers. He shall promulgate the laws when they have been voted by the two chambers; he shall look after and secure their execution.

He shall have the right of pardon; amnesty may only be granted by law.

He shall dispose of the armed force.

He shall appoint to all civil and military positions.

He shall preside over state functions; envoys and ambassadors of foreign powers shall be accredited to him.

Every act of the President of the Republic shall be countersigned by a minister.

ART. 4. As vacancies occur on and after the promulgation of the present law, the President of the Republic shall appoint, in the Council of Ministers, the councilors of state in regular service.

The councilors of state thus chosen may be dismissed only by decree rendered in the Council of Ministers.

The councilors of state chosen by virtue of the law of May 24, 1872, shall not, before the expiration of their powers, be dismissed except in

[1] By permission from "Modern Constitutions" by Prof. Walter Fairleigh Dodd, published 1908 by the University of Chicago Press.

[2] See laws of November 30, 1875; June 16, 1885, and February 13, 1889, pp. 302, 316, 318.

[3] See constitutional law of February 24, 1875, and laws of August 2, 1875, and December 9, 1884, pp. 288, 295, 310.

the manner provided by that law. After the dissolution of the National Assembly, they may be dismissed only by resolution of the Senate.[1]

ART. 5. The President of the Republic may, with the advice of the Senate, dissolve the Chamber of Deputies before the legal expiration of its term.

In that case the electoral colleges shall be summoned for new elections within the space of two months, and the Chamber within the ten days following the close of the elections.[2]

ART. 6. The ministers shall be collectively responsible to the chambers for the general policy of the government, and individually for their personal acts.

The President of the Republic shall be responsible only in case of high treason.[3]

ART. 7. In case of vacancy by death or for any other reason, the two chambers assembled together shall proceed at once to the election of a new President.

In the mean time the Council of Ministers shall be vested with the executive power.[4]

ART. 8. The chambers shall have the right by separate resolutions, taken in each by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic, to declare a revision of the constitutional laws necessary.

After each of the two chambers shall have come to this decision, they shall meet together in National Assembly to proceed with the revision.

The acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly.

During the continuance, however, of the powers conferred by the law of November 20, 1873, upon Marshal de MacMahon, this revision shall take place only upon the initiative of the President of the Republic. [The republican form of government shall not be made the subject of a proposed revision. Members of families that have reigned in France are ineligible to the presidency of the Republic.[5]]

ART. 9. The seat of the executive power and of the two chambers is at Versailles.[6]

CONSTITUTIONAL LAW ON THE ORGANIZATION OF THE SENATE[7]

(February 24, 1875)

ARTICLE 1. The Senate shall consist of three hundred members: two hundred and twenty-five elected by the departments and colonies, and seventy-five elected by the National Assembly.

[1] By the law of May 24, 1872, councilors of state were elected by the National Assembly for a term of nine years. This clause therefore ceased to have any application after 1881.
[2] As amended by Art. 1 of the constitutional law of August 14, 1884.
[3] See Art. 12 of the constitutional law of July 16, 1875.
[4] See Art. 3 of the constitutional law of July 16, 1875.
[5] As amended by Art. 2 of the constitutional law of August 14, 1884.
[6] Repealed by constitutional law of June 21, 1879. See law of July 22, 1879.
[7] Arts. 1 to 7 of this law were deprived of their constitutional character by the constitutional law of August 14, 1884, and were repealed by law of December 9, 1884.

ART. 2. The departments of the Seine and of the Nord shall each elect five senators.

The following departments shall elect four senators each: Seine-Inférieure, Pas-de-Calais, Gironde, Rhône, Finistère, Côtes-du-Nord.

The following departments shall elect three senators each: Loire-Inférieure, Saône-et-Loire, Ille-et-Vilaine, Seine-et-Oise, Isère, Puy-de-Dôme, Somme, Bouches-du-Rhône, Aisne, Loire, Manche, Maine-et-Loire, Morbihan, Dordogne, Haute-Garonne, Charente-Inférieure, Calvados, Sarthe, Hérault, Basses-Pyrénées, Gard, Aveyron, Vendée, Orne, Oise, Vosges, Allier.

All the other departments shall elect two senators each.

The following shall elect one senator each: the territory of Belfort, the three departments of Algeria, the four colonies of Martinique, Guadeloupe, Réunion, and the French Indies.

ART. 3. No one shall be a senator unless he is a French citizen at least forty years of age, and in the enjoyment of civil and political rights.

ART. 4. The senators of the departments and of the colonies shall be elected by an absolute majority and by *scrutin de liste*, by a college meeting at the capital of the department or colony, and composed:

1) of the deputies;

2) of the general councilors;

3) of the arrondissement councilors;

4) of delegates elected, one by each municipal council, from among the voters of the commune.

In the French Indies the members of the colonial council or of the local councils are substituted for the general councilors, arrondissement councilors, and delegates from the municipal councils.

They shall vote at the seat of government of each district.

ART. 5. The senators chosen by the Assembly shall be elected by *scrutin de liste* and by an absolute majority of votes.

ART. 6. The senators of the departments and of the colonies shall be elected for nine years and renewable by thirds every three years.

At the beginning of the first session the departments shall be divided into three series containing each an equal number of senators. It shall be determined by lot which series shall be renewed at the expiration of the first and second triennial periods.

ART. 7. The senators elected by the Assembly are irremovable.

Vacancies by death, by resignation, or for any other cause, shall, within the space of two months, be filled by the Senate itself.

ART. 8. The Senate shall have, concurrently with the Chamber of Deputies, the power to initiate and to pass laws. Money bills, however, shall first be introduced in and passed by the Chamber of Deputies.

ART. 9. The Senate may be constituted a Court of Justice to try either the President of the Republic or the ministers, and to take cognizance of attacks made upon the safety of the state.

ART. 10. Elections to the Senate shall take place one month before the time fixed by the National Assembly for its own dissolution. The Senate shall organize and enter upon its duties the same day that the National Assembly is dissolved.

ART. 11. The present law shall be promulgated only after the passage of the law on the public powers.

CONSTITUTIONAL LAW ON THE RELATIONS OF THE PUBLIC POWERS

(July 16, 1875)

ARTICLE 1. The Senate and the Chamber of Deputies shall assemble each year on the second Tuesday of January, unless convened earlier by the President of the Republic.

The two chambers shall continue in session at least five months each year. The sessions of the two chambers shall begin and end at the same time.

On the Sunday following the opening of the session, public prayers shall be addressed to God in the churches and temples, to invoke His aid in the labors of the chambers.[1]

ART. 2. The President of the Republic pronounces the closing of the session. He may convene the chambers in extraordinary session. He shall convene them if, during the recess, an absolute majority of the members of each chamber request it.

The President may adjourn the chambers. The adjournment, however, shall not exceed one month, nor take place more than twice in the same session.

ART. 3. One month at least before the legal expiration of the powers of the President of the Republic, the chambers shall be called together in National Assembly to proceed to the election of a new President.

In default of a summons, this meeting shall take place, as of right, the fifteenth day before the expiration of the term of the President.

In case of the death or resignation of the President of the Republic, the two chambers shall assemble immediately, as of right.

In case the Chamber of Deputies, in consequence of Art. 5 of the law of February 25, 1875, is dissolved at the time when the presidency of the Republic becomes vacant, the electoral colleges shall be convened at once, and the Senate shall assemble as of right.

ART. 4. Every meeting of either of the two chambers which shall be held at a time when the other is not in session is illegal and void, except in the case provided for in the preceding article, and that when the Senate meets as a court of justice; in the latter case, judicial duties alone shall be performed.

ART. 5. The sittings of the Senate and of the Chamber of Deputies shall be public.

Nevertheless either chamber may meet in secret session, upon the request of a fixed number of its members, determined by the rules.

It shall then decide by absolute majority whether the sitting shall be resumed in public upon the same subject.

ART. 6. The President of the Republic communicates with the chambers by messages, which shall be read from the tribune by a minister.

[1] This clause was repealed by the constitutional law of August 14, 1884.

The ministers shall have entrance to both chambers, and shall be heard when they request it. They may be assisted, for the discussion of a specific bill, by commissioners named by decree of the President of the Republic.

ART. 7. The President of the Republic shall promulgate the laws within the month following the transmission to the government of the law finally passed. He shall promulgate, within three days, laws the promulgation of which shall have been declared urgent by an express vote of each chamber.

Within the time fixed for promulgation the President of the Republic may, by a message with reasons assigned, request of the two chambers a new discussion, which cannot be refused.

ART. 8. The President of the Republic shall negotiate and ratify treaties. He shall give information regarding them to the chambers as soon as the interests and safety of the state permit.

Treaties of peace and of commerce, treaties which involve the finances of the state, those relating to the person and property of French citizens in foreign countries, shall be ratified only after having been voted by the two chambers.

No cession, exchange, or annexation of territory shall take place except by virtue of a law.

ART. 9. The President of the Republic shall not declare war without the previous consent of the two chambers.

ART. 10. Each chamber shall be the judge of the eligibility of its members, and of the regularity of their election; it alone may receive their resignation.

ART. 11. The bureau [1] of each chamber shall be elected each year for the entire session, and for every extraordinary session which may be held before the regular session of the following year.

When the two chambers meet together as a National Assembly, their bureau shall be composed of the president, vice-presidents, and secretaries of the Senate.

ART. 12. The President of the Republic may be impeached by the Chamber of Deputies only, and may be tried only by the Senate.

The ministers may be impeached by the Chamber of Deputies for offenses committed in the performance of their duties. In this case they shall be tried by the Senate.

The Senate may be constituted into a court of justice, by a decree of the President of the Republic, issued in the Council of Ministers, to try all persons accused of attempts upon the safety of the state.

If proceedings should have been begun in the regular courts, the decree convening the Senate may be issued at any time before the granting of a discharge.

A law shall determine the method of procedure for the accusation, trial, and judgment.

ART. 13. No member of either chamber shall be prosecuted or held

[1] The bureau of the Senate consists of a president, four vice-presidents, eight secretaries, and three questors; the bureau of the Chamber of Deputies has the same composition.

responsible on account of any opinions expressed or votes cast by him in the performance of his duties.

ART. 14. No member of either chamber shall, during the session, be prosecuted or arrested for any offense or misdemeanor, except upon the authority of the chamber of which he is a member, unless he be taken in the very act.

The detention or prosecution of a member of either chamber shall be suspended for the session, and for the entire term of the chamber, if the chamber requires it.

CONSTITUTIONAL LAW REVISING ART. 9 OF THE CONSTITUTIONAL LAW OF FEBRUARY 25, 1875

(June 19, 1879)

Art. 9 of the constitutional law of February 25, 1875, is repealed.[1]

CONSTITUTIONAL LAW PARTIALLY REVISING THE CONSTITUTIONAL LAWS[2]

(August 13, 1884)

ARTICLE 1. Paragraph 2 of Art. 5 of the constitutional law of February 25, 1875, on the Organization of the Public Powers, is amended as follows:

"In that case the electoral colleges shall meet for new elections within two months and the Chamber within the ten days following the close of the elections."

ART. 2. To paragraph 3 of Art. 8 of the same law of February 25, 1875, is added the following:

"The republican form of government shall not be made the subject of a proposed revision.

"Members of families that have reigned in France are ineligible to the presidency of the Republic."

ART. 3. Arts. 1 to 7 of the constitutional law of February 24, 1875, on the Organization of the Senate, shall no longer have a constitutional character.[3]

ART. 4. Paragraph 3 of Art. 1 of the constitutional law of July 16, 1875, on the Relation of the Public Powers, is repealed.

ORGANIC LAW ON THE ELECTION OF SENATORS

(August 2, 1875)

ARTICLE 1. A decree of the President of the Republic, issued at least six weeks in advance, shall fix the day for the elections to the

[1] This article fixed the seat of government at Versailles. The seat of government was removed from Versailles to Paris by a law of July 22, 1879.

[2] The amendments to the constitutional laws have also been inserted in their proper places.

[3] These articles were repealed by way of ordinary legislation on December 9, 1884.

Senate, and at the same time that for the choice of delegates of the municipal councils. There shall be an interval of at least one month between the choice of delegates and the election of senators.

ART. 2. Each municipal council shall elect one delegate. The election shall be without debate, by secret ballot, and by an absolute majority of votes. After two ballots a plurality shall be sufficient, and in case of an equality of votes, the oldest is elected. If the mayor is not a member of the municipal council, he shall preside, but shall not vote.

On the same day and in the same manner an alternate shall be elected, who shall take the place of the delegate in case of refusal or inability to serve.[1]

The choice of the municipal councils shall not extend to a deputy, a general councilor, or an arrondissement councilor.

All communal electors, including the municipal councilors, shall be eligible without distinction.

ART. 3. In the communes where a municipal committee exists, the delegate and alternate shall be chosen by the former council.[2]

ART. 4. If the delegate were not present at the election, the mayor shall see to it that he is notified within twenty-four hours. He shall transmit to the prefect, within five days, notice of his acceptance. In case of refusal or silence, he shall be replaced by the alternate, who shall then be placed upon the lists as the delegate to the commune.[3]

ART. 5. The official report of the election of the delegate and alternate shall be transmitted at once to the prefect; it shall state the acceptance or refusal of the delegates and alternates, as well as the protests raised, by one or more members of the municipal council, against the legality of the election. A copy of this official report shall be posted on the door of the town hall.[4]

ART. 6. A statement of the results of the election of delegates and alternates shall be drawn up within a week by the prefect; this statement shall be given to all requesting it, and may be copied and published.

Every elector may, at the bureaus of the prefecture, obtain information and a copy of the list, by communes, of the municipal councilors of the department, and, at the bureaus of the subprefectures, a copy of the list, by communes, of the municipal councilors of the arrondissement.

ART. 7. Every communal elector may, within the next three days, address directly to the prefect a protest against the legality of the election.

If the prefect deems the proceedings illegal, he may request that they be set aside.

ART. 8. Protests concerning the election of the delegate or alternate shall be decided, subject to an appeal to the Council of State, by the council of the prefecture, and, in the colonies, by the privy council.

A delegate whose election is annulled because he does not fulfil the conditions demanded by law, or on account of informality, shall be replaced by the alternate.

[1] Amended by Art 8. of law of December 9, 1884. The amendments of Arts. 4 and 5 merely substitute "delegates" and "alternates" for "delegate" and "alternate."
[2] *Ibid.* [3] *Ibid.* [4] *Ibid.*

In case the election of the delegate and alternate is annulled or in the case of the refusal or death of both of them after their acceptance, new elections shall be held by the municipal council on a day fixed by an order of the prefect.[1]

ART. 9. One week, at the latest, before the election of senators, the prefect, and, in the colonies, the director of the interior, shall arrange the list of the electors of the department in alphabetical order. The list shall be communicated to all who request it, and may be copied and published. No elector shall have more than one vote.

ART. 10. The deputies, the members of the general council, or of the arrondissement councils, whose elections have been announced by the returning committees, but whose powers have not been verified, shall be enrolled upon the list of electors and shall be allowed to vote.

ART. 11. In each of the three departments of Algeria the electoral college shall be composed:

1) of the deputies;

2) of the members of the general councils, of French citizenship;

3) of delegates elected by the French members of each municipal council from among the communal electors of French citizenship.

ART. 12. The electoral college shall be presided over by the president of the civil tribunal of the seat of government of the department or colony. [In the department of Ardennes it shall be presided over by the president of the tribunal of Charleville.[2] The president shall be assisted by the oldest two and the youngest two electors present at the opening of the meeting. The bureau thus constituted shall choose a secretary from among the electors.

If the president is prevented from presiding his place shall be taken by the vice-president of the civil tribunal, and, in his absence, by the oldest judge.

ART. 13. The bureau shall divide the electors in alphabetical order into sections of at least one hundred voters each. It shall appoint the president and inspectors of each of these sections. It shall decide all questions and contests which may arise in the course of the election, without power, however, to depart from the decisions rendered by virtue of Art. 8 of the present law.

ART. 14. The first ballot shall begin at eight o'clock in the morning and close at noon. The second shall begin at two o'clock and close at four o'clock. The third, if it takes place, shall begin at six o'clock and close at eight o'clock. The results of the ballotings shall be canvassed by the bureau and announced on the same day by the president of the electoral college.[3]

ART. 15. No one shall be elected senator on either of the first two ballots unless he receives: (1) an absolute majority of the votes cast; and (2) a number of votes equal to one-fourth of the total number of electors registered. On the third ballot a plurality shall be sufficient, and, in case of an equality of votes, the oldest is elected.

[1] Amended by Art. 8, law of December 9, 1884. The amendment to this article merely substitutes "delegates" and "alternates" for "delegate" and "alternate."

[2] This clause was inserted by law of February 1, 1893.

[3] Amended by Art. 8, law of December 9, 1884.

ART. 16. Political meetings for the nomination of senators may take place conformably to the rules laid down by the law of June 6, 1868,[1] subject to the following conditions:

1) These meetings may be held from the date of the election of delegates up to the day of the election of senators inclusive;

2) They shall be preceded by a declaration made, at the latest, the evening before, by seven senatorial electors of the arrondissement, indicating the place, the day, and the hour of the meeting and the names, occupation, and residence of the candidates to be presented;

3) The municipal authorities shall see to it that no one is admitted to the meeting unless he is a deputy, general councilor, arrondissement councilor, delegate, or candidate.

The delegate shall present, as a means of identification, a certificate from the mayor of his commune, the candidate a certificate from the official who shall have received the declaration mentioned in the preceding paragraph.[2]

ART. 17. Delegates who take part in all the ballotings shall, if they demand it, receive from the state, upon the presentation of their letter of summons, countersigned by the president of the electoral college, a remuneration for traveling expenses, which shall be paid to them upon the same basis and in the same manner as that given to jurors by Arts. 35, 90, and following, of the decree of June 18, 1811.

A public administrative regulation shall determine the manner of fixing the amount and the method of payment of this remuneration.

ART. 18. Every delegate who, without lawful reason, shall not take part in all the ballotings, or, having been hindered, shall not have given notice to the alternate in sufficient time, shall, upon the demand of the public prosecutor, be fined fifty francs by the civil tribunal of the seat of government.

The same penalty may be imposed upon the alternate who, after having been notified by letter, telegram, or notice personally delivered in due time, shall not have taken part in the election.

ART. 19. Every attempt at corruption by the employment of means enumerated in Arts. 177 and following of the Penal Code, to influence the vote of an elector, or to keep him from voting, shall be punished by imprisonment of from three months to two years, and by a fine of from fifty to five hundred francs, or by either of these penalties.

Art. 463 of the Penal Code shall apply to the penalties imposed by the present article.[3]

ART. 20. A senator shall not at the same time be a councilor of state, maître des requêtes, prefect, or subprefect, unless prefect of the Seine or prefect of police; member of the courts of appeal [4] or of the tribunals of first instance, unless public prosecutor at the court of Paris; general

[1] The law of June 6, 1868, was superseded by a law of June 30, 1881.
[2] Amended by Art. 8, law of December 9, 1884.
[3] *Ibid.*
[4] France is divided into twenty-six judicial districts, in each of which there is a court of appeal. There are similar courts in Algeria and the colonies. The Court of Cassation is the supreme court of appeal for all France, Algeria, and the colonies.

paymaster, special receiver, official or employee of the central administration of the ministries.[1]

ART. 21. No one of the following officers shall be elected by the department or the colony included wholly or partially in his jurisdiction, during the exercise of his duties or during the six months following the cessation of his duties by resignation, dismissal, change of residence, or other cause:

1) The first-presidents, presidents, and members of the courts of appeal.

2) The presidents, vice-presidents, examining magistrates, and members of the tribunals of first instance.

3) The prefect of police; prefects and subprefects, and secretaries-general of prefectures; the governors, directors of the interior, and secretaries-general of the colonies.

4) The engineers in chief and of the arrondissement, and road-surveyors in chief and of the arrondissement.

5) The rectors and inspectors of academies.

6) The inspectors of primary schools.

7) The archbishops, bishops, and vicars-general.

8) The officers of all grades of the land and naval forces.

9) The division commissaries and the military deputy commissaries.

10) The general paymasters and special receivers of money.

11) The superintendents of direct and indirect taxes, of registration, of public property, and of posts.

12) The commissioners and inspectors of forests.

ART. 22. A senator elected in several departments shall make known his choice to the president of the Senate within ten days following the verification of the elections. If a choice is not made in this time, the question shall be settled by lot in open session.

The vacancy shall be filled within one month and by the same electoral body.

The same holds true in case of an invalidated election.

ART. 23. If by death or resignation the number of senators of a department is reduced by one-half, the vacancies shall be filled within the space of three months, unless the vacancies occur within twelve months preceding the triennial elections.

At the time fixed for the triennial elections, all vacancies which have occurred shall be filled, whatever their number or date.[2]

ART. 24. The election of senators chosen by the National Assembly shall take place in public sitting, by *scrutin de liste*, and by an absolute majority of votes, whatever the number of ballotings.[3]

ART. 25. When it is necessary to elect successors of senators chosen by virtue of Art. 7 of the law of February 24, 1875, the Senate shall proceed in the manner indicated in the preceding article.[4]

[1] See law of December 26, 1887. By Art. 3 of the law of November 16, 1897, the director and under-director of the Bank of France are ineligible as deputies or senators.
[2] Amended by Art. 8, law of December 8, 1884.
[3] Arts. 24 and 25 were repealed by Art. 9, law of December 9, 1884. [4] *Ibid.*

ART. 26. Members of the Senate shall receive the same salaries as members of the Chamber of Deputies.[1]

ART. 27. All provisions of the electoral law relating to the following matters are applicable to elections of senators:

1) to cases of unworthiness and incapacity;

2) to offenses, prosecutions, and penalties;

3) to election proceedings, in all matters not contrary to the provisions of the present law.[2]

ORGANIC LAW ON THE ELECTION OF DEPUTIES[3]

(November 30, 1875)

ARTICLE 1. The deputies shall be chosen by the voters registered:

1) upon the lists drawn up in accordance with the law of July 7, 1874;

2) upon the supplementary list including those who have lived in the commune six months.

Registration upon the supplementary list shall take place conformably to the laws and regulations now governing the political electoral lists, by the committees and according to the forms established by Arts. 1, 2, and 3 of the law of July 7, 1874.

Appeals relating to the formation and revision of either list shall be brought directly before the Civil Chamber of the Court of Cassation.

The electoral lists drawn up on March 31, 1875, shall serve until March 31, 1876.

ART. 2. The soldiers of all ranks and grades, of both land and naval forces, shall not vote when they are with their regiment, at their post, or on duty. Those who, on election day, are in private residence, in non-activity or in possession of a regular leave of absence, may vote in the commune on the lists of which they are duly registered. This last provision shall apply equally to officers on the unattached list or on the reserve list.

ART. 3. During the electoral period, circulars and platforms signed by the candidates, electoral placards and manifestoes signed by one or more voters, may, after being deposited with the public prosecutor, be posted and distributed without previous authorization.

The distribution of ballots shall not be subject to the formality of deposit.

Every public or municipal officer is forbidden to distribute ballots, platforms, or circulars of candidates.

The provisions of Art. 19 of the organic law of August 2, 1875, on the election of senators, shall apply to the election of deputies.

ART. 4. The balloting shall last one day only. The voting shall occur at the municipal building of the commune; each commune may nevertheless be divided, by order of the prefect, into as many sections as local circumstances and the number of voters may require. The second

[1] See Art. 17, law of November 30, 1875.

[2] Arts. 28 and 29 of this law were of a temporary character, and are therefore omitted.

[3] This law was amended by laws of June 16, 1885, and February 13, 1889.

ballot shall take place on the second Sunday following the announcement of the first ballot, in accordance with the provisions of Art. 65 of the law of March 15, 1849.

ART. 5. The method of voting shall be in accordance with the provisions of the organic and regulating decrees of February 2, 1852.

The ballot shall be secret.

The voting lists used at the elections in each section, signed by the president and secretary, shall remain deposited for one week at the secretary's office at the town hall, where they shall be communicated to every voter requesting them.

ART. 6. Every voter shall be eligible, without any property qualification, at the age of twenty-five years.[1]

ART. 7. No soldier or sailor in active service may, whatever his rank or position, be elected a member of the Chamber of Deputies.

This provision applies to soldiers and sailors on the unattached list or in non-activity, but does not extend to officers of the second section of the list of the general staff, nor to those who, kept in the first section for having been commander-in-chief in the field, have ceased to be actively employed, nor to officers who, having gained the right to retire, are sent to or maintained at their homes while waiting the settlement of their pension.

The decision by which the officer shall have been permitted to establish his rights on the retired list shall become, in this case, irrevocable.

The rule laid down in the first paragraph of the present article shall not apply to the reserve of the active army or to the territorial army.

ART. 8. The exercise of public duties paid out of the treasury of the state is incompatible with the office of deputy.[2]

Consequently every official elected shall be superseded in his duties if, within one week following the verification of his powers, he has not signified that he does not accept the office of deputy.

There are excepted from the preceding provisions the duties of minister, under-secretary of state, ambassador, minister plenipotentiary, prefect of the Seine, prefect of police, first president of the Court of Cassation, first president of the Court of Accounts, first president of the Court of Appeal of Paris, attorney-general of the Court of Cassation, attorney-general of the Court of Accounts, attorney-general of the Court of Appeal of Paris, archbishop and bishop, consistorial presiding pastor in consistorial districts the seat of government of which has two or more pastors, chief rabbi of the central Consistory, chief rabbi of the Consistory of Paris.

ART. 9. There are also excepted from the provisions of Art. 8:

1) titular professors of chairs which are filled by competition or upon the nomination of the bodies where the vacancy occurs;

2) persons who have been charged with a temporary mission. All

[1] By law of July 20, 1895, no one may become a member of Parliament unless he has complied with the law regarding military service.

[2] By Art. 3 of the law of November 16, 1897, the director and under-director of the Bank of France are ineligible as deputies or senators.

missions continuing more than six months cease to be temporary and are governed by Art. 8.

ART. 10. The officer preserves the rights which he has acquired to a retiring pension, and may, after the expiration of his term of office, be restored to active service.

The civil officer who, having had twenty years of service at the date of the acceptance of the office of deputy, shall be fifty years of age at the time of the expiration of this term of office, may establish his rights to an exceptional retiring pension.

This pension shall be regulated according to the third paragraph of Art. 12 of the law of June 9, 1853.

If the officer is restored to active service after the expiration of his term of office, the provisions of Art. 3, paragraph 2, and Art. 28 of the law of June 9, 1853, shall apply to him.

In duties where the rank is distinct from the employment, the officer, by the acceptance of the office of deputy, loses the employment and preserves the rank only.

ART. 11. Every deputy appointed or promoted to a salaried public position shall cease to belong to the Chamber by the very fact of his acceptance; but he may be re-elected, if the office which he occupies is compatible with the office of deputy.

Deputies who become ministers or under-secretaries of state shall not be required to seek re-election.

ART. 12. The following officers shall not be elected by the arrondissement or the colony included wholly or partially in their jurisdiction, during the exercise of their duties or for six months following the cessation of their duties, because of resignation, dismissal, change of residence, or any other cause:

1) The first-presidents, presidents, and members of the Courts of Appeal.

2) The presidents, vice-presidents, titular judges, examining magistrates, members of the tribunals of first instance [and justices of the peace in active service [1]].

3) The prefect of police; the prefects and secretaries-general of the prefectures; the governors, directors of the interior, and secretaries-general of the colonies.

4) The engineers in chief and of the arrondissement, and road surveyors in chief and of the arrondissement.

5) The rectors and inspectors of academies.

6) The inspectors of primary schools.

7) The archbishops, bishops, and vicars-general.

8) The general paymasters and special receivers of money.

9) The superintendents of direct and indirect taxes, of registration, of public property, and of posts.

10) The commissioners and inspectors of forests.

The subprefects [and councilors of the prefecture [2]] shall not be elected in any of the arrondissements of the department in which they perform their duties.

[1] Justices of the peace and councilors of the prefecture were made ineligible by law of March 30, 1902. [2] *Ibid.*

ART. 13. Every attempt to bind deputies by instructions is null and void.

ART. 14. Members of the Chamber of Deputies shall be elected by single districts. Each administrative arrondissement shall elect one deputy. Arrondissements having more than 100,000 inhabitants shall elect one deputy in addition for every additional 100,000 inhabitants or fraction of 100,000. Arrondissements, in such cases, shall be divided into districts whose boundaries shall be established by law and may be changed only by law.[1]

ART. 15. Deputies shall be chosen for four years.

The Chamber shall be renewed integrally.

ART. 16. In case of vacancy by death, resignation, or otherwise, a new election shall be held within three months of the date when the vacancy occurred.

In case of option,[2] the vacancy shall be filled within one month.

ART. 17. The legislative indemnity is fixed at fifteen thousand (15,000) francs [3] per year, beginning with the first of January, 1907. It is regulated by the second paragraph of Art. 96 and by Art. 97 of the law of March 15, 1849, as well as by the provisions of the law of February 16, 1872.

ART. 18. No one shall be elected on the first ballot unless he receives:

1) an absolute majority of the votes cast;

2) a number of votes equal to one-fourth of the number of voters registered.

On the second ballot a plurality is sufficient. In case of an equality of votes, the oldest is elected.

ART. 19. Each department of Algeria shall elect one deputy.[4]

ART. 20. The voters living in Algeria in a place not yet made a commune shall be registered on the electoral list of the nearest commune.

When it is necessary to establish electoral districts, either for the purpose of grouping mixed communes in each of which the number of voters is insufficient, or to bring together voters living in places not formed into communes, the decrees for fixing the seat of these districts shall be issued by the governor-general, upon the report of the prefect or of the general commanding the division.

ART. 21. The four colonies to which senators have been assigned by the law of February 24, 1875, on the organization of the Senate, shall choose one deputy each.[5]

ART. 22. Every violation of the prohibitive provisions of Art. 3, paragraph 3, of the present law shall be punished by a fine of from sixteen francs to three hundred francs. Nevertheless the criminal courts may apply Art. 463 of the Penal Code.

The provisions of Art. 6 of the law of July 7, 1874, shall apply to the political electoral lists.

[1] By law of June 16, 1885, the *scrutin de liste* was introduced, but the law of February 13, 1889, re-established the system of single districts.

[2] I. e., when a deputy has been elected from two or more districts, and decides which one he will serve.

[3] As altered by law of November 23, 1906; before the passage of this law deputies and senators received nine thousand francs per year.

[4] Changed by law of February 13, 1889.

[5] *Ibid.*

The decree of January 29, 1871, and the laws of April 10, 1871, May 2, 1871, and of February 18, 1873, are repealed.

Paragraph 11 of Art. 15 of the organic decree of February 2, 1852, is also repealed, in so far as it refers to the law of May 21, 1836, on lotteries, reserving, however, to the courts the right to apply Art. 42 of the Penal Code to convicted persons.

The provisions of the laws and decrees now in force, not in conflict with the present law, shall continue to be applied.

ART. 23. The provision of Art. 12 of the present law by which an interval of six months must elapse between the cessation of duties and election shall not apply to officials other than prefects and subprefects, whose duties shall have ceased either before the promulgation of the present law or within twenty days thereafter.

LAW RELATING TO THE SEAT OF THE EXECUTIVE POWER AND OF THE TWO CHAMBERS AT PARIS

(July 22, 1879)

ARTICLE 1. The seat of the executive power and of the two chambers is at Paris.

ART. 2. The palace of the Luxemburg and the Palais-Bourbon are assigned, the first to the use of the Senate, and the second to that of the Chamber of Deputies.

Nevertheless each of the chambers is authorized to choose, in the city of Paris, the palace which it wishes to occupy.

ART. 3. The various parts of the palace of Versailles now occupied by the Senate and the Chamber of Deputies shall preserve their arrangements.

Whenever, according to Arts. 7 and 8 of the law of February 25, 1875, on the organization of the public powers, a meeting of the National Assembly takes place, it shall sit at Versailles, in the present hall of the Chamber of Deputies.

Whenever, according to Art. 9 of the law of February 24, 1875, on the organization of the Senate, and Art. 12 of the constitutional law of July 16, 1875, on the relations of the public powers, the Senate shall be called upon to constitute itself a court of justice, it shall indicate the town and place where it proposes to sit.

ART. 4. The Senate and Chamber of Deputies shall sit at Paris on and after November 3 next.

ART. 5. The presidents of the Senate and of the Chamber of Deputies are charged with the duty of securing the external and internal safety of the chambers over which they preside.

For this purpose they shall have the right to call upon the armed forces and upon authorities whose assistance they consider necessary.

Such requisitions may be addressed directly to all officers, commanders, or officials, who are bound to obey immediately, under the penalties established by the laws.

The presidents of the Senate and of the Chamber of Deputies may delegate to the questors or to one of them their right of demanding aid.

ART. 6. Petitions to either of the chambers shall be made and presented only in writing. It is forbidden to present them in person or at the bar.

ART. 7. Every violation of the preceding article, every provocation, by public speeches, by writings, or by printed matter, posted or distributed, to a crowd upon the public ways, having for its object the discussion, drawing up, or carrying to the chambers or to either of them, of petitions, declarations, or addresses, shall be punished by the penalties enumerated in paragraph 1 of Art. 5 of the law of June 7, 1848, whether or not any results follow from such actions.

ART. 8. The preceding provisions do not diminish the force of the law of June 7, 1848, on riotous assemblies.

ART. 9. Art. 463 of the Penal Code is applicable to the offenses mentioned in the present law.

LAW AMENDING THE ORGANIC LAWS ON THE ORGANIZATION OF THE SENATE AND THE ELECTION OF SENATORS

(December 9, 1884)

ARTICLE 1. The Senate shall be composed of three hundred members, elected by the departments and the colonies.

The present members, without any distinction between senators elected by the National Assembly or by the Senate and those elected by the departments and colonies, shall retain their offices during the time for which they have been chosen.

ART. 2. The department of the Seine shall elect ten senators.

The department of the Nord shall elect eight senators.

The following departments shall elect five senators each: Côtes-du-Nord, Finistère, Gironde, Ille-et-Vilaine, Loire, Loire-Inférieure, Pas-de-Calais, Rhône, Saône-et-Loire, Seine-Inférieure.

The following departments shall elect four senators each: Aisne, Bouches-de-Rhône, Charente-Inférieure, Dordogne, Haute-Garonne, Isère, Maine-et-Loire, Manche, Morbihan, Puy-de-Dôme, Seine-et-Oise, Somme.

The following departments shall elect three senators each: Ain, Allier, Ardèche, Ardennes, Aube, Aude, Aveyron, Calvados, Charente, Cher, Corrèze, Corse, Côte-d'Or, Creuse, Doubs, Drôme, Eure, Eure-et-Loir, Gard, Gers, Hérault, Indre, Indre-et-Loire, Jura, Landes, Loir-et-Cher, Haute-Loire, Loiret, Lot, Lot-et-Garonne, Marne, Haute-Marne, Mayenne, Meurthe-et-Moselle, Meuse, Nièvre, Oise, Orne, Basses-Pyrénées, Haute-Saône, Sarthe, Savoie, Haute-Savoie, Seine-et-Marne, Deux-Sèvres, Tern, Var, Vendée, Vienne, Haute-Vienne, Vosges, Yonne.

The following departments shall elect two senators each: Basses-Alpes, Hautes-Alpes, Alpes-Maritimes, Ariège, Cantal, Lozere, Hautes-Pyrénées, Pyrénées-Orientales, Tarn-et-Garonne, Vaucluse.

The following shall elect one senator each: The territory of Belfort,

the three departments of Algeria, the four colonies: Martinique, Guadeloupe, Réunion, and French Indies.

ART. 3. In the departments where the number of senators is increased by the present law, the increase shall take effect as vacancies occur among the life senators.

For this purpose, within a week after the vacancy occurs, it shall be determined by lot in public session what department shall be called upon to elect a senator.

This election shall take place within three months of the determination by lot. However, if the vacancy occurs within six months preceding the triennial election, the vacancy shall not be filled until that election.

The term of office in case of a special election shall expire at the same time as that of the other senators belonging to the same department.

ART. 4. No one shall be a senator unless he is a French citizen at least forty years of age and in the enjoyment of civil and political rights.[1]

Members of families that have reigned in France are ineligible to the Senate.

ART. 5. The soldiers of the land and naval forces shall not be elected senators.

There are excepted from this provision:

1) The marshals of France and admirals.

2) The general officers maintained without limit of age in the first section of the list of the general staff and not provided with a command.

3) The general officers placed in the second section of the list of the general staff.

4) Members of the land and naval forces who belong either to the reserve of the active army or to the territorial army.

ART. 6. Senators shall be elected by *scrutin de liste*, by a college meeting at the capital of the department or of the colony, and composed:

1) of the deputies;

2) of the general councilors;

3) of the councilors of the arrondissement;

4) of delegates elected from among the voters of the commune, by each municipal council.

Councils composed of ten members shall elect one delegate.

Councils composed of twelve members shall elect two delegates.

Councils composed of sixteen members shall elect three delegates.

Councils composed of twenty-one members shall elect six delegates.

Councils composed of twenty-three members shall elect nine delegates.

Councils composed of twenty-seven members shall elect twelve delegates.

Councils composed of thirty members shall elect fifteen delegates.

Councils composed of thirty-two members shall elect eighteen delegates.

Councils composed of thirty-four members shall elect twenty-one delegates.

[1] By law of July 20, 1895, no one may become a member of Parliament unless he has complied with the law regarding military service.

Councils composed of thirty-six members or more shall elect twenty-four delegates.

The municipal council of Paris shall elect thirty delegates.

In the French Indies the members of the local councils shall take the place of councilors of the arrondissement. The municipal council of Pondichéry shall elect five delegates. The municipal council of Karikal shall elect three delegates. All of the other communes shall elect two delegates each.

The balloting takes place at the seat of government of each district.

ART. 7. Members of the Senate shall be elected for nine years.

The Senate shall be renewed every three years according to the order of the present series of departments and colonies.

ART. 8. Arts. 2 (paragraphs 1 and 2), 3, 4, 5, 8, 14, 16, 19, and 23 of the organic law of August 2, 1875, on the elections of senators, are amended as follows:

"Art. 2 (paragraphs 1 and 2). In each municipal council the election of delegates shall take place without debate and by secret ballot, by *scrutin de liste*, and by an absolute majority of votes cast. After two ballots a plurality shall be sufficient, and in case of an equality of votes the oldest is elected.

"The procedure and method shall be the same for the election of alternates.

"Councils having one, two, or three delegates to choose shall elect one alternate.

"Those choosing six or nine delegates shall elect two alternates.

"Those choosing twelve or fifteen delegates shall elect three alternates.

"Those choosing eighteen or twenty-one delegates shall elect four alternates.

"Those choosing twenty-four delegates shall elect five alternates.

"The municipal council of Paris shall elect eight alternates.

"The alternates shall take the place of delegates in case of refusal or inability to serve, in the order determined by the number of votes received by each of them.

"Art. 3. In communes where the duties of the municipal council are performed by a special delegation organized by virtue of Art. 44 of the law of April 5, 1884, the senatorial delegates and alternates shall be chosen by the former council.

"Art. 4. If the delegates were not present at the election, notice shall be given them by the mayor within twenty-four hours. They shall within five days notify the prefect of their acceptance. In case of declination or silence they shall be replaced by the alternates, who shall then be placed upon the list as the delegates of the commune.

"Art. 5. The official report of the election of delegates and alternates shall be transmitted at once to the prefect. It shall indicate the acceptance or declination of the delegates and alternates, as well as the protests made by one or more members of the municipal council against the legality of the election. A copy of this official report shall be posted on the door of the town hall.

"Art. 8. Protests concerning the election of delegates or of alternates shall be decided, subject to an appeal to the Council of State, by the council of the prefecture, and, in the colonies, by the privy council.

"Delegates whose elections may be set aside because they do not satisfy the conditions demanded by law, or because of informality, shall be replaced by the alternates.

"In case the election of a delegate and of an alternate is annulled, or in the case of the refusal or death of both of them after their acceptance, new elections shall be held by the municipal council on a day fixed by an order of the prefect.

"Art. 14. The first ballot shall begin at eight o'clock in the morning and close at noon. The second shall begin at two o'clock and close at five o'clock. The third shall begin at seven o'clock and close at ten o'clock. The results of the balloting shall be canvassed by the bureau and announced immediately by the president of the electoral college.

"Art. 16. Political meetings for the nomination of senators may be held from the date of the promulgation of the decree summoning the electors up to the day of the election, inclusive.

"The declaration prescribed by Article 2 of the law of June 30, 1881, shall be made by two voters, at least.[1]

"The forms and regulations of this article, as well as those of article 3, shall be observed.

"The members of Parliament elected or electors in the department, the senatorial electors, delegates and alternates, and the candidates, or their representatives, may alone be present at these meetings.

"The municipal authorities shall see to it that no other person is admitted.

"Delegates and alternates shall present as a means of identification a certificate from the mayor of the commune; candidates or their representatives, a certificate from the official who shall have received the declaration mentioned in paragraph 2.

"Art. 19. Every attempt at corruption or constraint by the employment of means enumerated in Arts. 177 and following of the Penal Code, to influence the vote of an elector or to keep him from voting, shall be punished by imprisonment of from three months to two years, and by a fine of from fifty francs to five hundred francs, or by either of these penalties.

"Art. 463 of the Penal Code is applicable to the penalties provided by the present article.

"Art. 23. Vacancies caused by the death or resignation of senators shall be filled within three months; however, if the vacancy occurs within six months preceding the triennial elections, it shall not be filled until those elections."

ART. 9. There are repealed:

1) Arts. 1 to 7 of the law of February 24, 1875, on the organization of the Senate.

[1] The law of June 30, 1881, relates to notice which must be given to the authorities before any public meeting can be held.

2) Arts. 24 and 25 of the law of August 2, 1875, on the elections of senators.[1]

LAW AMENDING THE ELECTORAL LAW[2]

(June 16, 1885)

ARTICLE 1. The members of the Chamber of Deputies shall be elected by *scrutin de liste*.

ART. 2. Each department shall elect the number of deputies assigned to it in the table annexed to the present law, on the basis of one deputy for seventy thousand inhabitants, foreign residents not included. Account shall be taken, nevertheless, of every fraction smaller than seventy thousand.

Each department shall elect at least three deputies.

Two deputies are assigned to the territory of Belfort, six to Algeria, and ten to the colonies, as is indicated by the table. This table shall only be changed by law.

ART. 3. The department shall form a single electoral district.

ART. 4. Members of families that have reigned in France are ineligible to the Chamber of Deputies.[3]

ART. 5. No one shall be elected on the first ballot unless he receives:

1) an absolute majority of the votes cast;

2) a number of votes equal to one-fourth of the total number of voters registered.

On the second ballot a plurality shall be sufficient.

In case of an equality of votes, the oldest of the candidates is elected.

ART. 6. Subject to the case of a dissolution provided for and regulated by the constitution, the general elections shall take place within the sixty days preceding the expiration of the powers of the Chamber of Deputies.

ART. 7. Vacancies which occur in the six months preceding the renewal of the Chamber shall not be filled.

LAW ON PARLIAMENTARY INCOMPATIBILITIES

(December 26, 1887)

Until the passage of a special law on parliamentary incompatibilities, Arts. 8 and 9 of the law of November 30, 1875, shall apply to senatorial elections.[4]

Every officer affected by this provision who has had twenty years of service and is fifty years of age at the time of his acceptance of the office

[1] The temporary provisions of this law are omitted. They are practically repeated in the law of December 26, 1887, on parliamentary incompatibilities.

[2] Arts. 1, 2, and 3 of this law were repealed by law of February 13, 1889.

[3] For similar provisions regarding the presidency of the Republic and the Senate, see Art. 2 of the constitutional law of August 13, 1884, and Art. 4 of the law of December 9, 1884.

[4] See this law, p. 302. See also Art. 20 of the law of August 2, 1875.

of senator, may establish his rights to a proportional retiring pension, which shall be governed by the third paragraph of Art. 12 of the law of June 9, 1853.

LAW RE-ESTABLISHING SINGLE DISTRICTS FOR THE ELECTION OF DEPUTIES

(February 13, 1889)

ARTICLE 1. Arts. 1, 2, and 3 of the law of June 16, 1885, are repealed.

ART. 2. Members of the Chamber of Deputies shall be elected by single districts. Each administrative arrondissement in the departments, and each municipal arrondissement at Paris and at Lyons, shall elect one deputy. Arrondissements the population of which exceeds one hundred thousand inhabitants shall elect an additional deputy for every one hundred thousand or fraction of one hundred thousand inhabitants. Arrondissements in such cases shall be divided into districts, a table [1] of which is annexed to the present law and shall only be changed by law.

ART. 3. One deputy is assigned to the territory of Belfort, six to Algeria, and ten to the colonies, as is indicated by the table.

ART. 4. On and after the promulgation of the present law, until the renewal of the Chamber of Deputies, vacancies occurring in the Chamber of Deputies shall not be filled.

LAW ON MULTIPLE CANDIDATURES

(July 17, 1889)

ARTICLE 1. No one shall be a candidate in more than one district.

ART. 2. Every citizen who offers himself or is offered at the general or partial elections shall, by a declaration signed or countersigned by himself and duly legalized, make known in what district he intends to be a candidate. This declaration shall be deposited, and a provisional receipt obtained therefor, at the prefecture of the department concerned at least five days before the day of election. A definitive receipt shall be delivered within twenty-four hours.

ART. 3. Every declaration made in violation of Art. 1 of the present law is void and shall not be received.

If declarations are deposited by the same citizen in more than one district the earliest in date alone is valid. If they bear the same date, all are void.

ART. 4. It is forbidden to sign or post placards, to carry or distribute ballots, circulars, or platforms in the interest of a candidate who has not conformed to the requirements of the present law.

[1] This table is omitted. It may be found in the *Journal officiel* for February 14, 1889; it has been modified by laws of July 22, 1893, April 6, 1898, and March 30, 1902.

ART. 5. Ballots bearing the name of a citizen whose candidacy is put forward in violation of the present law shall not be included in the return of votes. Posters, placards, platforms, and ballots posted or distributed in support of a candidacy in a district where such candidacy is contrary to the law, shall be removed or seized.

ART. 6. A fine of ten thousand francs shall be imposed upon the candidate violating the provisions of the present law, and a fine of from one to five thousand francs on all persons acting in violation of Art. 4 of the present law.

APPENDIX III[1]

CONSTITUTION OF THE GERMAN EMPIRE[2]

(April 16, 1871)

His Majesty the King of Prussia, in the name of the North German Confederation, His Majesty the King of Bavaria, His Majesty the King of Würtemberg, His Royal Highness the Grand Duke of Hesse and Rhenish Hesse for those parts of the Grand Duchy of Baden, and His Royal Highness the Grand Duke of Hesse lying south of the Main conclude an eternal alliance for the protection of the territory of the Confederation, and of the rights of the same as well as for the promotion of the welfare of the German people. This Confederation shall bear the name of the German Empire, and shall have the following Constitution:

I. FEDERAL TERRITORY

ARTICLE 1. The territory of the Confederation shall consist of the states of Prussia with Lauenburg, Bavaria, Saxony, Würtemberg, Baden, Hesse, Mecklenburg-Schwerin, Saxe-Weimer, Mecklenburg-Strelitz, Oldenburg, Brunswick, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Anhalt, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck, Reuss elder line, Reuss younger line, Schaumburg-Lippe, Lippe, Lubeck, Bremen, and Hamburg.

II. LEGISLATION OF THE EMPIRE

ART. 2. Within this federal territory the Empire shall exercise the right of legislation in accordance with the provisions of this constitution; and the laws of the Empire shall take precedence of the laws of the states. The laws of the Empire shall receive their binding force by imperial promulgation, through the medium of an imperial gazette. If no other time is designated for the published law to take effect, it shall become effective on the fourteenth day after its publication in the *Imperial Gazette* at Berlin.

ART. 3. There shall be a common citizenship for all Germany, and

[1] Reprinted from "Modern Constitutions" by Walter Fairleigh Dodd, by the courtesy of the author and the University of Chicago Press.

[2] In the preparation of this text use has been made of the translation in Howard's "German Empire" [The MacMillan Company, Publishers] and of that issued by Professor E. J. James (2d ed., Philadelphia, 1899) [The University of Pennsylvania Press].

the members (subjects or citizens) of each state of the Confederation shall be treated in every other state as natives, and shall accordingly have the right of becoming permanent residents; of carrying on business; of filling public offices; of acquiring real estate; of obtaining citizenship, and of enjoying all other civil rights under the same conditions as those born in the state, and shall also have the same treatment as regards judicial remedies and the protection of the laws.

No German shall be limited in the exercise of these rights by the authorities of his native state, or by the authorities of any other state of the Confederation.

The regulations governing the care of paupers and their admission into the various local unions, shall not, however, be affected by the principle enunciated in the first paragraph.

In like manner, until further action, those treaties shall remain in force which have been concluded between the several states of the Confederation in relation to the taking over of persons liable to be deported, the care of sick, and the burial of deceased citizens.

With respect to the performance of military service in the several states, the necessary laws will be passed by the Empire.

As against foreign countries all Germans shall have an equal claim upon the protection of the Empire.

ART. 4. The following matters shall be under the supervision of the Empire and subject to imperial legislation:

1) Regulations with respect to the freedom of migration; matters of domicile and settlement; citizenship; passports; surveillance of foreigners; trade and industry, including insurance; so far as these matters are not already provided for by Art. 3 of this constitution, in Bavaria, however, exclusive of matters relating to domicile and settlement; and likewise matters relating to colonization and emigration to foreign countries.

2) Legislation concerning customs duties, commerce, and such taxes as are to be applied to the uses of the Empire.

3) Regulation of weights and measures; of the coinage; and the establishment of the principles for the issue of funded and unfunded paper money.

4) General banking regulations.

5) Patents for inventions.

6) The protection of intellectual property.

7) The organization of a general system of protection for German trade in foreign countries, of German navigation, and of the German flag on the high seas; and the establishment of a common consular representation, which shall be maintained by the Empire.

8) Railway matters, subject in Bavaria to the provisions of Art. 46; and the construction of land and water ways for the purposes of public defense and of general commerce.

9) Rafting and navigation upon waterways which are common to several states, the condition of such waterways, river and other water dues [and also the signals of maritime navigation (beacons, buoys, lights, and other signals)].[1]

[1] The last clause of this section was added by law of March 3, 1873.

10) Postal and telegraph affairs; in Bavaria and Würtemberg, however, only in accordance with the provisions of Art. 52.

11) Regulations concerning the reciprocal execution of judicial sentences in civil matters, and the fulfilment of requisitions in general.

12) The authentication of public documents.

13) General legislation as to the whole domain of civil and criminal law and judicial procedure.[1]

14) The imperial military and naval affairs.

15) Police regulation of medical and veterinary matters.

16) Laws relating to the press and to the right of association.

ART. 5. The legislative power of the Empire shall be exercised by the Bundesrat and the Reichstag. A majority of the votes of both bodies shall be necessary and sufficient for the passage of a law.

With respect to laws concerning the army, or navy, or the taxes specified in Art. 35, the vote of the præsidium [2] shall decide in case of a difference of opinion in the Bundesrat, if such vote be in favor of the maintenance of existing arrangements.

III. THE BUNDESRAT

ART. 6. The Bundesrat shall consist of representatives of the members of the Confederation, among which the votes shall be divided in such manner that Prussia with the former votes of Hanover, Electoral Hesse, Holstein, Nassau, and Frankfort shall have 17 votes; Bavaria, 6; Saxony, 4; Würtemberg, 4; Baden, 3; Hesse, 3; Mecklenburg-Schwerin, 2; Saxe-Weimar, 1; Mecklenburg-Strelitz, 1; Oldenburg, 1; Brunswick, 2; Saxe-Meiningen, 1; Saxe-Altenburg, 1; Saxe-Coburg-Gotha, 1; Anhalt, 1; Schwarzburg-Rudolstadt, 1; Schwarzburg-Sondershausen, 1; Waldeck, 1; Reuss, elder line, 1; Reuss, younger line, 1; Schaumburg-Lippe, 1; Lippe, 1; Lubeck, 1; Bremen, 1; Hamburg, 1—total 58 votes.

Each member of the Confederation may appoint as many delegates to the Bundesrat as it has votes, but the votes of each state shall be cast only as a unit.

ART. 7. The Bundesrat shall take action upon:

1) The measures to be proposed to the Reichstag, and the resolutions passed by the same.

2) The general administrative provisions and arrangements necessary for the execution of the imperial laws, so far as no other provision is made by law.

3) The defects which may be discovered in the execution of the imperial laws, or of the provisions and arrangements heretofore mentioned.

Each member of the Confederation shall have the right to make propositions and introduce motions, and it shall be the duty of the præsidium to submit them for deliberation.

[1] As amended December 20, 1873. The original text read: "General legislation concerning the law of obligations, criminal law, commercial law and commercial paper, and judicial procedure."

[2] I. e., Prussia.

Decision shall be reached by simple majority, with the exceptions provided for by Arts. 5, 37, and 78. Votes not represented or not instructed shall not be counted. In the case of a tie, the vote of the præsidium shall decide.

When legislative action is taken upon a subject which, according to the provisions of this constitution, does not concern the whole Empire, only the votes of those states of the Confederation interested in the matter in question shall be counted.

ART. 8. The Bundesrat shall appoint from its own members permanent committees:

1) On the army and the fortifications.
2) On marine affairs.
3) On customs duties and taxes.
4) On commerce and trade.
5) On railroads, posts, and telegraphs.
6) On judicial affairs.
7) On accounts.

In each of these committees there shall be representatives of at least four states of the Confederation, besides the præsidium, and each state shall be entitled to only one vote therein. In the committee on the army and fortifications Bavaria shall have a permanent seat; the remaining members of this committee, as well as the members of the committee on marine affairs, shall be appointed by the Emperor; the members of the other committees shall be elected by the Bundesrat. These committees shall be newly formed at each session of the Bundesrat, i. e., each year, and the retiring members shall be eligible for re-election.

A Committee on Foreign Affairs, over which Bavaria shall preside, shall also be appointed in the Bundesrat; it shall be composed of the plenipotentiaries of the kingdoms of Bavaria, Saxony, and Würtemberg, and of two plenipotentiaries of other states of the Empire, who shall be elected annually by the Bundesrat.

The employees necessary for the conduct of their work shall be placed at the disposal of the committees.

ART. 9. Each member of the Bundesrat shall have the right to appear in the Reichstag, and must be heard there at any time he shall so request, in order to represent the views of his government, even when such views shall not have been adopted by the majority of the Bundesrat. No one shall at the same time be a member of the Bundesrat and of the Reichstag.

ART. 10. The Emperor shall afford the customary diplomatic protection to the members of the Bundesrat.

IV. THE PRESIDENCY

ART. 11. To the King of Prussia shall belong the presidency of the Confederation, and he shall have the title of German Emperor. It shall be the duty of the Emperor to represent the Empire among nations, to declare war and to conclude peace in the name of the Empire, to enter

into alliances and other treaties with foreign countries, to accredit ambassadors and to receive them.

For a declaration of war in the name of the Empire, the consent of the Bundesrat is required, unless an attack is made upon the federal territory or its coasts.

So far as treaties with foreign countries relate to matters which, according to Art. 4, are to be regulated by imperial legislation, the consent of the Bundesrat shall be required for their conclusion, and the approval of the Reichstag shall be necessary to render them valid.

ART. 12. The Emperor shall have the right to convene the Bundesrat and the Reichstag, and to open, adjourn, and close them.

ART. 13. The Bundesrat and the Reichstag shall be convened annually, and the Bundesrat may be called together for the preparation of business without the Reichstag; the latter, however, shall not be convened without the Bundesrat.

ART. 14. The Bundesrat shall be convened whenever a meeting is demanded by one-third of the total number of votes.

ART. 15. The Imperial Chancellor, to be appointed by the Emperor, shall preside in the Bundesrat, and supervise the conduct of its business.

The Imperial Chancellor shall have the right to delegate the power to represent him to any other member of the Bundesrat; this delegation shall be made in writing.

ART. 16. The necessary bills shall be laid before the Reichstag in the name of the Emperor, in accordance with the resolutions of the Bundesrat, and shall be advocated in the Reichstag by members of the Bundesrat, or by special commissioners appointed by the latter.

ART. 17. It shall be the duty of the Emperor to prepare and publish the laws of the Empire, and to supervise their execution. The decrees and ordinances of the Emperor shall be issued in the name of the Empire, and shall require for their validity the countersignature of the Imperial Chancellor, who thereby assumes the responsibility for them.

ART. 18. The Emperor shall appoint imperial officials, cause them to take the oath to the Empire, and dismiss them when necessary.

Officials of any one of the states of the Confederation, who shall be appointed to any imperial office, shall enjoy, with reference to the Empire, the same rights as those to which they are entitled in their native state by virtue of their official position, provided that no other legislative provision shall have been made previous to their entrance into the service of the Empire.

ART. 19. If the states of the Confederation do not fulfil their constitutional duties, they may be compelled to do so by execution. This execution shall be decided upon by the Bundesrat, and carried out by the Emperor.

V. THE REICHSTAG

ART. 20. The members of the Reichstag shall be chosen in a general direct election and by secret ballot.

Until regulation by law, the power to make such regulation being reserved by sec. 5 of the Election Law of May 31, 1869, 48 deputies shall

be elected in Bavaria, 17 in Würtemberg, 14 in Baden, 6 in Hesse south of the River Main, and the total number shall consequently be 382.[1]

ART. 21. Government officials shall not require leave of absence in order to enter the Reichstag.

When a member of the Reichstag accepts a salaried office of the Empire, or a salaried office in one of the states of the Confederation, or accepts any office of the Empire or of a state involving higher rank or salary, he shall forfeit his seat and vote in the Reichstag, but may recover his place in the same by a new election.

ART. 22. The proceedings of the Reichstag shall be public.

No one shall be held responsible for truthful reports of the proceedings of the public sessions of the Reichstag.

ART. 23. The Reichstag shall have the right to propose laws within the competence of the Empire, and to refer petitions, addressed to it, to the Bundesrat or the Chancellor of the Empire.

ART. 24. The Reichstag shall be elected for five years.[2] It may be dissolved during that time by a resolution of the Bundesrat, with the consent of the Emperor.

ART. 25. In case of a dissolution of the Reichstag, new elections shall take place within a period of sixty days, and the Reichstag shall be called together within a period of ninety days after its dissolution.

ART. 26. Without the consent of the Reichstag, an adjournment of that body shall not exceed the period of thirty days, and shall not be repeated during the same session.

ART. 27. The Reichstag shall examine into the legality of the election of its members and decide thereon. It shall regulate its own procedure, and its own discipline, through its order of business, and elect its president, vice-presidents, and secretaries.

ART. 28. The Reichstag shall take action by absolute majority. To render any action valid, the presence of a majority of the statutory number of members is required.[3]

ART. 29. The members of the Reichstag are the representatives of the people as a whole, and shall not be bound by orders or instructions.

ART. 30. No member of the Reichstag shall at any time suffer legal or disciplinary prosecution on account of his vote, or on account of utterances made while in the performance of his functions, or be held responsible in any other way outside of the Reichstag.

ART. 31. Without the consent of the Reichstag, no one of its members shall be tried or arrested during the session for any penal offense, unless he be taken in the commission of the offense, or during the course of the following day.

Like consent shall be required in the case of arrest for debt.

[1] Including, that is to say, those deputies returned by the states of the North German Confederation. By law of June 25, 1873, fifteen additional members are elected from Alsace-Lorraine. With certain minor exceptions every male German of the age of twenty-five years may vote for members of and may be elected to the Reichstag.

[2] Art. 24 amended, from three to five years, March 19, 1888.

[3] The second paragraph of this article was repealed by law of February 24, 1873. It read as follows: "For the decision of matters which, according to this constitution, do not concern the entire Empire, only such members shall vote as are elected from states whose interests are affected by the proposition."

At the request of the Reichstag all criminal proceedings instituted against one of its members, and any detentions for judicial inquiry or in civil cases, shall be suspended during its session.

ART. 32. The members of the Reichstag as such shall receive no salaries. They shall receive an indemnification in accordance with the provisions of law.[1]

VI. CUSTOMS AND COMMERCE

ART. 33. Germany shall form one custom and commercial territory, having a common frontier for the collection of duties. Such parts of the territory as cannot, by reason of their situation, be suitably embraced within the customs frontier shall be excluded.

All articles which are the subject of free traffic in one state of the Empire may be brought into any other state, and in the latter shall be subject only to such internal taxes as are imposed upon similar domestic productions.

ART. 34. The Hanse cities, Bremen and Hamburg, together with a part of their own or of the surrounding territory suitable for such purpose, shall remain free ports outside of the common customs frontier, until they request admission within such frontier.

ART. 35. The Empire shall have the exclusive power to legislate concerning everything relating to the customs; concerning the taxation of salt and tobacco produced in the federal territory, and of domestic brandy and beer, and of sugar and syrup prepared from beets or other domestic products; concerning the mutual protection against fraud with reference to all taxes upon articles of consumption levied in the several states of the Empire; as well as concerning the measures which may be required in the territory, outside the customs boundaries, for the security of the common customs frontier.

In Bavaria, Würtemberg, and Baden, the matter of taxing domestic brandy and beer is reserved to the legislation of the states. The states of the Confederation shall, however, endeavor to bring about uniform legislation regarding the taxation of these articles also.

ART. 36. The administration and collection of customs duties and of the taxes on articles of consumption (Art. 35) shall be left to each state of the Confederation within its own territory, so far as these functions have heretofore been exercised by each state.

The Emperor shall superintend the observance of legal methods by means of imperial officers whom he shall appoint, after consulting the committee of the Bundesrat on customs duties and taxes, to act in cooperation with the customs or tax officials and with the directive boards of the several states.

Reports made by these officers concerning defects in the administra-

[1] As altered May 21, 1906. Art. 32, as originally worded, forbade any compensation to members of the Reichstag. A law of May 21, 1906, provides that members of the Reichstag shall receive: (1) free transportation on the German railways during the sessions of the Reichstag and for eight days before the beginning of and eight days after the close of each session; and (2) a yearly remuneration of three thousand marks.

tion of the joint legislation (Art. 35) shall be submitted to the Bundesrat for action.

ART. 37. In taking action upon the rules and regulations for the execution of the joint legislation (Art. 35), the vote of the præsidium shall decide when it is cast in favor of maintaining the existing rule or regulation.

ART. 38. The revenues from customs and from the other taxes designated in Art. 35, so far as the latter are subject to imperial legislation, shall go to the treasury of the Empire.

Such revenues shall consist of the total receipts from the customs and excise taxes, after deducting therefrom:

1) Tax rebates and reductions in conformity with existing laws or general administrative regulations.

2) Reimbursements for taxes improperly collected.

3) The costs of collection and of administration, viz.:

a) In case of the customs, the costs which are required for the protection and collection of customs on the frontiers and in the frontier districts.

b) For the salt tax, the costs which are incurred for the salaries of the officers charged with the collection and control of this tax at the salt-works.

c) For the taxes on beet sugar and on tobacco, the compensation which is to be allowed, according to the existing rules of the Bundesrat, to the several state governments for the cost of administering these taxes.

d) Fifteen per cent. of the total receipts from other taxes.

The territories situated outside of the common customs frontier shall contribute to the expenses of the Empire by payment of a lump sum.

Bavaria, Würtemberg, and Baden shall not share in the revenues which go into the treasury of the Empire, from duties on brandy and beer, nor in the corresponding portion of the aforesaid payments in lump sum.

[The provision of Art. 38, paragraph 2, number 3 *d*) of the imperial constitution is repealed, in so far as it relates to the tax on breweries. The compensation to be allowed to the states for the expense of collecting and administering the tax on breweries shall be fixed by the Bundesrat.[1]]

ART. 39. The quarterly summaries made by the revenue officers of the federal states at the end of each quarter, and the final statement, made at the end of the year, after the closing of the accounts, of the receipts which have become due in the course of the quarter, or during the fiscal year, from customs and from taxes on consumption which, according to Art. 38, belong to the treasury of the Empire, shall be arranged by the administrative officers of the various states, after a preliminary audit, into general summaries, in which each tax shall be separately entered. These summaries shall be transmitted to the Committee of Accounts of the Bundesrat.

The latter, upon the basis of these summaries, shall fix provisionally every three months the amounts due to the imperial treasury from the

[1] Added by amendment of June 3, 1906.

treasury of each state, and it shall inform the Bundesrat and the states of the amounts so fixed; furthermore, it shall submit to the Bundesrat annually the final statement of these amounts with its remarks. The Bundesrat shall take action upon the determination of such amounts.

ART. 40. The terms of the Customs Union Treaty of July 8, 1867, shall remain in force, so far as they have not been altered by the provisions of this constitution, and so long as they are not altered in the manner designated in Art. 7 or 78.

VII. RAILWAYS

ART. 41. Railways which are considered necessary for the defense of Germany, or in the interest of general commerce, may, by force of imperial law, be constructed at the expense of the Empire, even against the opposition of the members of the Union through whose territory the railroads run, without prejudice, however, to the sovereign rights of the states; or private persons may be granted the right to construct railways, and receive the right of eminent domain.

Every existing railway is bound to permit new railroad lines to be connected with it, at the expense of the latter.

All laws which grant existing railway undertakings the right to prevent the building of parallel or competitive lines are hereby repealed throughout the Empire, without prejudice to rights already acquired. Such rights of prevention shall not be granted in future concessions.

ART. 42. The governments of the federal states bind themselves, in the interest of general commerce, to manage the German railways as one system, and for this purpose to have all new lines constructed and equipped according to a uniform plan.

ART. 43. Accordingly, as soon as possible, uniform arrangements as to operation shall be made, and especially shall uniform regulations be adopted for the policing of railways. The Empire shall take care that the various railway administrations keep the roads at all times in such condition as is necessary for public security and furnish them with such equipment as the needs of traffic may require.

ART. 44. Railway administrations are bound to run as many passenger trains of suitable speed as may be required for through traffic, and for the establishment of harmony between time tables; also to make provision for such freight trains as may be necessary for the transport of goods, and to organize a system of through forwarding both in passenger and freight traffic, permitting rolling stock to go from one road to another for the usual remuneration.

ART. 45. The Empire shall have control of the tariff of charges. It shall especially exert itself to the end:

1) That uniform regulations as to operation be introduced as soon as possible on all German railway lines.

2) That the tariff be reduced and made uniform as far as possible, and particularly that in the long-distance transportation of coal, coke, wood, ores, stone, salt, pig iron, manure, and similar articles, a tariff be introduced suitably modified in the interests of agriculture and in-

dustry; and that the one-pfennig tariff be introduced as soon as practicable.

ART. 46. In case of public distress, especially in case of an extraordinary rise in the price of provisions, it shall be the duty of the railroads to adopt temporarily a low special tariff suited to the circumstances, to be fixed by the Emperor on motion of the competent committee of the Bundesrat, for the transport of grain, flour, legumes, and potatoes. This tariff shall, however, not be lower than the lowest existing rate for raw produce on the said line.

The foregoing provisions, and those of Arts. 42 to 45, shall not apply to Bavaria.

The imperial government, however, shall have the power, with respect to Bavaria also, to establish by means of legislation uniform standards for the construction and equipment of railways which may be of importance for the defense of the country.

ART. 47. The managers of all railways shall be required to obey, without hesitation, requisitions made by the authorities of the Empire for the use of their roads for the defense of Germany. In particular shall troops and all materials of war be forwarded at uniformly reduced rates.

VIII. POST AND TELEGRAPH

ART. 48. The postal and telegraph systems shall be organized and managed on a uniform plan, as state institutions throughout the German Empire.

The legislation of the Empire in regard to postal and telegraph affairs, provided for in Art. 4, shall not extend to those matters the control of which is left to governmental ordinance or administrative regulation, according to the principles which have prevailed in the administration of post and telegraph by the North German Confederation.

ART. 49. The receipts from post and telegraph throughout the Empire shall belong to a common fund. The expense shall be paid from the general receipts. The surplus shall go into the imperial treasury (Section XII).

ART. 50. The Emperor shall have the supreme supervision of the administration of post and telegraph. The officers appointed by him shall have the duty and the right to see to it that uniformity be established and maintained in the organization of the administration and in the conduct of business, as well as in the qualifications of employees.

The Emperor shall have the power to issue governmental instructions and general administrative regulations, and also the exclusive right to regulate the relations with the postal and telegraph systems of other countries.

It shall be the duty of all officers of the postal and telegraph administration to obey the orders of the Emperor. This obligation shall be assumed in the oath of office.

The appointment of such superior officers as shall be required for the administration of the post and telegraph in the various districts (such as directors, counselors, and superintendents), furthermore, the appoint-

ment of officers of the post and telegraph acting in the capacity of organs of the aforesaid authorities as supervisors or for other services in the several districts (such as inspectors or controllers), shall be made throughout the Empire by the Emperor, to whom such officers shall take the oath of office. The governments of the several states shall receive timely notice of the aforementioned appointments, as far as they may relate to their territories, so that they may confirm and publish them.

Other officers required in the administration of the post and telegraph, as well as all those employed for local and technical work, including the officials in the local offices, and so forth, shall be appointed by the governments of the respective states.

Where there is no independent state administration of post or telegraph, the terms of special treaties shall control.

ART. 51. In consideration of the differences which have heretofore existed in the net receipts of the state postal administrations of the several districts, and for the purpose of securing a suitable equalization during the period of transition below named, the following procedure shall be observed in assigning the surplus of the postal administration for general imperial purposes (Art. 49):

From the postal surpluses which accumulated in the several postal districts during the five years from 1861 to 1865, a yearly average shall be computed, and the share which every separate postal district has had in the surplus resulting therefrom for the whole territory of the Empire shall be expressed in a percentage.

In accordance with the ratio thus ascertained, the several states shall be credited on the account of their other contributions to the expenses of the Empire with their quota accruing from the postal surplus in the Empire for a period of eight years following their entrance into the postal administration of the Empire.

At the end of the said eight years the distinction shall cease, and any surplus from the postal administration shall go, without division, into the imperial treasury, according to the principle contained in Art. 49.

Of the quota of the postal surplus which accrues during the aforementioned period of eight years in favor of the Hanse cities one-half shall each year be placed at the disposal of the Emperor, for the purpose of providing for the establishment of the proper postal organizations in the Hanse cities.

ART. 52. The provisions of the foregoing Arts. 48 to 51 do not apply to Bavaria and Würtemberg. In their place the following provisions shall be valid for these two states of the Empire:

The Empire alone shall have power to legislate upon the privileges of the post and telegraph, upon the legal relations of both institutions to the public, upon the franking privilege and the postal rates, excepting, however, the adoption of administrative regulations and of rates for the internal communication within Bavaria and Würtemberg respectively; and, under like limitations, upon the fixing of charges for telegraphic correspondence.

In the same manner, the Empire shall have the regulation of postal and telegraphic communication with foreign countries, excepting the

immediate intercourse of Bavaria and Würtemberg with neighboring states not belonging to the Empire, the regulation of which is subject to the provisions of Art. 49 of the postal treaty of November 23, 1867.

Bavaria and Würtemberg shall not share in the postal and telegraphic receipts coming into the treasury of the Empire.

IX. MARINE AND NAVIGATION

ART. 53. The navy of the Empire shall be a united one, under the supreme command of the Emperor. The Emperor is charged with its organization and construction; he shall appoint the officers and employees of the navy, and they and the seamen shall take an oath of obedience to him.

The harbor of Kiel and the harbor of the Jade are imperial naval ports.

The expense required for the establishment and maintenance of the navy and of the institutions connected therewith shall be defrayed from the treasury of the Empire.

All seafaring men of the Empire, including machinists and artisans employed in ship-building, are exempt from service in the army, but are liable to service in the imperial navy.[1]

ART. 54. The merchant vessels of all states of the Union shall form a united mercantile marine.

The Empire shall determine the process for ascertaining the tonnage of sea-going vessels, shall regulate the issuing of tonnage-certificates and shall fix the conditions upon which a license to command a sea-going vessel shall be granted.

The merchant vessels of all the federated states shall be admitted on equal footing to the harbors and all natural and artificial watercourses of the several states of the Union, and shall be accorded similar treatment therein. The fees which may be collected in harbors, from sea-going vessels or from their cargoes, for the use of marine institutions, shall not exceed the amount necessary for the maintenance and ordinary repair of these institutions.

On all natural watercourses taxes may only be levied for the use of special institutions which serve to facilitate commercial intercourse. These taxes as well as the charge for navigating such artificial channels as are the property of the state shall not exceed the amount required for the maintenance and ordinary repair of such institutions and establishments. These provisions shall apply to rafting, in so far as it is carried on along navigable watercourses.

The power to lay other or higher taxes upon foreign vessels or their cargoes than those which are paid by the vessels of the federal states

[1] Paragraph 5 of Art. 53 was repealed by law of May 26, 1893; it read as follows: "The apportionment of requisitions to supply the ranks of the navy shall be made according to the actual seafaring population, and the number furnished in accordance herewith by each state shall be deducted from the number otherwise required by the army."

or their cargoes shall belong only to the Empire and not to the separate states.

ART. 55. The flag of the naval and merchant marine is black, white, and red.

X. CONSULAR AFFAIRS

ART. 56. The Emperor shall have the supervision of all consular affairs of the German Empire, and he shall appoint consuls, after hearing the Committee of the Bundesrat on Trade and Commerce.

No new state consulates shall be established within the districts covered by German consuls. German consuls shall perform the functions of state consuls for the states of the Union not represented in their districts. All the state consulates now existing shall be abolished as soon as the organization of the German consulates shall be completed in such a manner that the representation of the separate interests of all the federal states shall be recognized by the Bundesrat as satisfactorily secured by the German consulates.

XI. MILITARY AFFAIRS OF THE EMPIRE

ART. 57. Every German is liable to military duty, and in the discharge of this duty no substitute shall be accepted.

ART. 58. The costs and the burden of the entire military system of the Empire shall be borne equally by all the federal states and their subjects, so that neither special privileges nor burdens upon particular states or classes are in principle permissible. Where an equal distribution of the burdens cannot be effected *in natura* without prejudice to the public welfare, the equalization shall be effected by legislation in accordance with the principles of justice.

ART. 59. Every German capable of bearing arms shall belong for seven years to the standing army, as a rule from the end of his twentieth to the beginning of his twenty-eighth year; during the next five years he shall belong to the national guard (*Landwehr*) of first summons, and then to the national guard of second summons until the thirty-first day of March of the year in which he reaches the age of thirty-nine years.

During the period of service in the standing army the members of the cavalry and of the mounted field artillery are required to serve the first three years in unbroken active service; all other forces are required to give the first two years in active service.

As regards the emigration of men belonging to the reserve, only those provisions shall be in force which apply to the emigration of members of the national guard (*Landwehr*).[1]

ART. 60. The number of men in the German army in time of peace shall be fixed until the thirty-first day of December, 1871, at 1 per cent. of the population of 1867, and shall be furnished by the several federal states in proportion to their population. After the above date the

[1] This article is given as amended by law of April 15, 1905. It was also altered by law of February 11, 1888.

effective strength of the army in time of peace shall be fixed by imperial legislation.

ART. 61. After the publication of this constitution the entire Prussian system of military legislation shall be introduced without delay throughout the Empire, both the statutes themselves and the regulations, instructions, and ordinances issued for their execution, explanation, or completion; especially, the military penal code of April 3, 1845; the law of military penal procedure of April 3, 1845; the ordinance concerning the courts of honor, of July 20, 1843; the regulations with respect to recruiting, time of service, matters relating to quarters and subsistence, to the quartering of troops, to compensation for injury done to fields, to mobilization of troops, etc., in times of peace and war. The military ordinance relating to religious observances is, however, excepted.

When a uniform organization of the German army for war purposes shall have been established, a comprehensive military code for the Empire shall be submitted to the Reichstag and the Bundesrat for their action, in accordance with the constitution.

ART. 62. For the purpose of defraying the expenses of the whole German army, and of the institutions connected therewith, the sum of two hundred and twenty-five thalers for each man in the army on the peace footing, according to Art. 60, shall be annually placed at the disposal of the Emperor until the thirty-first day of December, 1871 (see Section XII).

After the thirty-first day of December, 1871, the several states shall pay these contributions into the imperial treasury. Until it is altered by a law of the Empire, the strength of the army in time of peace, as temporarily fixed in Art. 60, shall be taken as a basis for calculating the amounts of such contributions.

The expenditure of these sums for the imperial army and its establishments shall be fixed by the budgetary law.

In determining the budget of military expenditure, the organization of the imperial army, legally established in accordance with this constitution, shall be taken as a basis.

ART. 63. The total land force of the Empire shall form one army, which shall be under the command of the Emperor, in war and in peace.

The regiments, etc., throughout the whole German army shall bear continuous numbers. As to the uniform, the primary colors and cut of the Prussian uniform shall be the standard. It is left to commanders of the several contingents to determine upon external marks of distinction (cockades, etc.).

It shall be the duty and the right of the Emperor to take care that throughout the German army all divisions be kept full and ready to take the field, and that uniformity be established and maintained in regard to organization and formation, equipment and command, in the training of the men, and in the qualifications of the officers. For this purpose the Emperor shall have authority to satisfy himself at any time, by inspection, of the condition of the several contingents, and to order the correction of defects disclosed by such inspection.

The Emperor shall determine the strength, composition, and division

of the contingents of the imperial army, and also the organization of the national guard (*Landwehr*), and he shall have the right to determine the garrisons within the territory of the Union, as also to mobilize any portion of the imperial army.

In order to maintain the indispensable unity in the administration, care, arming, and equipment of all divisions of the German army, all orders relating to these matters hereafter issued to the Prussian army shall be communicated, for their proper observance, to the commanders of the other contingents, through the Committee on the Army and Fortifications provided for by Art. 8, No. 1.

ART. 64. All German troops are bound to render unconditional obedience to the commands of the Emperor. This obligation shall be included in the military oath.

The commander-in-chief of a contingent, as well as all officers commanding troops of more than one contingent, and all commanders of fortresses, shall be appointed by the Emperor. The officers appointed by the Emperor shall take the military oath to him. The appointment of generals, and of officers performing the duties of generals within a contingent, shall in every case be subject to the approval of the Emperor.

In the transfer of officers, with or without promotion, to positions which are to be filled by him in the service of the Empire, be it in the Prussian army or in other contingents, the Emperor shall have the right to select from the officers of all the contingents of the imperial army.

ART. 65. The right to construct fortresses within the federal territory shall belong to the Emperor, who shall ask in accordance with Section XII for the grant of the means required for that purpose, unless it has already been included in the regular appropriation.

ART. 66. In the absence of special conventions, the princes of the Confederation and the Senates shall appoint the officers of their respective contingents, subject to the restriction of Art. 64. They shall be the heads of all of the divisions of troops belonging to their territories, and shall enjoy the honors connected therewith. They shall have particularly the right to hold inspections at any time, and shall receive, besides the regular reports and announcements of changes to be made, timely information of all promotions and appointments concerning their respective contingents, in order to provide for the necessary publication of such information by state authority.

They shall also have the right to employ, for police purposes, not only their own troops, but all other divisions of the imperial army which may be stationed in their respective territories.

ART. 67. Unexpended portions of the military appropriation shall under no circumstances fall to the share of a single government, but at all times to the imperial treasury.

ART. 68. The Emperor shall have the power, if public security within the federal territory is threatened, to declare martial law in any part of the Empire. Until the publication of a law regulating the occasions, the form of announcement, and the effects of such a declaration, the provisions of the Prussian law of June 4, 1851, shall be in force.

APPENDIX III

FINAL PROVISION OF SECTION XI

The provisions contained in this section shall be applied in Bavaria, in accordance with the more detailed provisions of the treaty of alliance of November 23, 1870, under III, sec. 5; in Würtemberg, in accordance with the more detailed provisions of the military convention of November 21–25, 1870.

XII. FINANCES OF THE EMPIRE

ART. 69. All receipts and expenditures of the Empire shall be estimated for each year, and included in the budget. The latter shall be fixed by law before the beginning of the fiscal year, in accordance with the following principles:

ART. 70. For the defrayal of all common expenses there shall serve first of all the joint revenues derived from customs duties, from common taxes, from the railway, postal, and telegraph systems, and from the other branches of the administration. In so far as the expenditures are not covered by such receipts, they shall be met by contributions from the several states of the Confederation in proportion to their population, such contributions to be fixed by the Imperial Chancellor, with reference to the total amount established by the budget. In so far as these contributions are not used, they shall be repaid to the states at the end of the year, in proportion as the other regular receipts of the Empire exceed its needs.

Any surpluses from preceding years shall be used, so far as the imperial budgetary law does not otherwise provide, for defraying the joint extraordinary expenses.[1]

ART. 71. The general appropriations shall, as a rule, be granted for one year; they may, however, in special cases, be granted for a longer period.

During the period of transition fixed by Art. 60, the properly classified, financial estimate of the expenditures of the army shall be laid before the Bundesrat and the Reichstag merely for their information.

ART. 72. For the purpose of discharge an annual report of the expenditure of all the revenues of the Empire shall be presented, through the Imperial Chancellor, to the Bundesrat and the Reichstag, for their approval.

ART. 73. In cases of extraordinary need, a loan may be contracted, or a guarantee assumed as a charge upon the Empire, by means of imperial legislation.

FINAL PROVISION OF SECTION XII

Arts. 69 and 71 shall apply to expenditures for the Bavarian army only according to the provisions of the treaty of November 23, 1870, mentioned in the final provision of Section XI; and Art. 72 applies only to the extent that the Bundesrat and the Reichstag shall be informed that the sum necessary for the Bavarian army has been assigned to Bavaria.

[1] As amended May 14, 1904.

XIII. SETTLEMENT OF DISPUTES AND PENAL PROVISIONS

ART. 74. Every attempt against the existence, the integrity, the security, or the constitution of the German Empire; finally, any offense committed against the Bundesrat, Reichstag, a member of the Bundesrat or of the Reichstag, an authority or a public officer of the Empire, while in the execution of their duty, or with reference to their official position, by word, writing, printing, drawing, pictorial or other representations, shall be judged and punished in the several states of the Empire in accordance with the laws therein existing or which may hereafter be enacted, by which provision is made for the trial of similar offenses against any one of the states of the Empire, its constitution, legislature, or estates, the members of its legislature or its estates, authorities, or officers.

ART. 75. For those offenses against the German Empire specified in Art. 74, which, if committed against one of the states of the Empire, would be considered high treason, the Superior Court of Appeals of the three free Hanse cities, at Lubeck, shall be the competent deciding tribunal in the first and last resort.

More definite provisions as to the competency and the procedure of the Superior Court of Appeals shall be made by imperial legislation. Until the passage of an imperial law, the existing jurisdiction of the courts in the respective states, and the provisions relative to the procedure of these courts, shall remain as at present.

ART. 76. Disputes between the several states of the Union, so far as they do not relate to matters of private law, and are therefore to be decided by the competent judicial authorities, shall be adjusted by the Bundesrat, at the request of one of the parties.

In disputes relating to constitutional matters in those states of the Union whose constitution does not designate an authority for the settlement of such differences, the Bundesrat shall, at the request of one of the parties, effect an amicable adjustment, and if this cannot be done, the matter shall be settled by imperial law.

ART. 77. If justice is denied in one of the states of the Union, and sufficient relief cannot be procured by legal measures, it shall be the duty of the Bundesrat to receive substantiated complaints concerning denial or restriction of justice, which shall be proven according to the constitution and the existing laws of the respective states of the Union, and thereupon to obtain judicial relief from the state government which shall have given occasion to the complaint.

XIV. AMENDMENTS

ART. 78. Amendments of the constitution shall be made by legislative enactment. They shall be considered as rejected when fourteen votes are cast against them in the Bundesrat.

The provisions of the constitution of the Empire, by which certain rights are secured to particular states of the Union in their relation to the whole, may be amended only with the consent of the states affected.

APPENDIX IV[1]

CONSTITUTION OF BELGIUM[2]

(February 7, 1831)

In the name of the Belgian people, the National Congress enacts:

TITLE I. THE TERRITORY AND ITS DIVISIONS

ARTICLE 1. Belgium is divided into provinces. These provinces are: Antwerp, Brabant, West Flanders, East Flanders, Hainaut, Liège, Limbourg, Luxembourg, Namur.

If there should be occasion for it, the territory may be divided by law into a greater number of provinces.

The colonies, possessions beyond the sea, or protectorates which Belgium may acquire shall be governed by special laws. The Belgian forces required for their defense shall be recruited only by voluntary enlistment.[3]

ART. 2. Subdivisions of the provinces shall not be made except by law.

ART. 3. The boundaries of the state, of the provinces, and of the communes shall not be changed or rectified except by law.

TITLE II. BELGIAN CITIZENS AND THEIR RIGHTS

ART. 4. Belgian nationality is acquired, retained, and lost according to regulations established by the civil law.

The present constitution and the other laws relating to political rights determine what other conditions are necessary for the exercise of these rights.

[1] Reprinted from "Modern Constitutions," by Walter Fairleigh Dodd, by the courtesy of the author and the University of Chicago Press.

[2] In the preparation of this text assistance has been received from the translation made by Professor J. M. Vincent and issued as a supplement to the *Annals of the American Academy of Political and Social Science*, May, 1896.

[3] As amended September 7, 1893. By treaty of April 19, 1839, Belgium secured a portion of the Grand Duchy of Luxembourg, freed from all connections with the German Confederation. The provision regarding colonies was introduced in 1893 to give the government power to administer the Congo Independent State when it should become a Belgian possession. By a treaty signed on November 28, 1907, Belgium took over the whole administration of the Congo Independent State.

ART. 5. Naturalization is granted by the legislative power.

Full naturalization alone admits foreigners to equality with Belgians in the exercise of political rights.

ART. 6. There shall be no distinction of classes in the state.

All Belgians are equal before the law; they alone are admissible to civil and military offices, with such exceptions as may be established by law for particular cases.

ART. 7. Individual liberty is guaranteed.

No one may be prosecuted except in cases provided for by law and in the form therein prescribed.

Except when one is taken in the commission of an offense no one may be arrested without a warrant issued by a magistrate, which ought to be shown at the time of arrest, or at the latest within twenty-four hours thereafter.

ART. 8. No person shall be removed against his will from the jurisdiction of the judge to whom the law assigns him.

ART. 9. No penalty shall be established or enforced except by virtue of a law.

Art. 10. The private domicile is inviolable; no search of premises shall take place except in the cases provided for by law and according to the form therein prescribed.

ART. 11. No one may be deprived of his property except for a public purpose and according to the forms established by law, and in consideration of a just compensation previously determined.

ART. 12. Punishment by confiscation of property shall not be established.

ART. 13. Total deprivation of civil rights (*mort civile*) is abolished and shall not be re-established.[1]

ART. 14. Religious liberty and the freedom of public worship, as well as free expression of opinion in all matters, are guaranteed, with the reservation of power to suppress offenses committed in the use of these liberties.

ART. 15. No one shall be compelled to join in any manner whatever in the forms or ceremonies of any religious denomination, nor to observe its days of rest.

ART. 16. The state shall not interfere either in the appointment or in the installation of the ministers of any religious denomination whatever, nor shall it forbid them to correspond with their superiors or to publish their proceedings, subject, in the latter case, to the ordinary responsibility of the press and of publication.

Civil marriage shall always precede the religious ceremony, except in cases to be established by law if found necessary.

ART. 17. Private instruction shall not be restricted; all measures interfering with it are forbidden; the repression of offenses shall be regulated only by law.

Public instruction given at the expense of the state shall likewise be regulated by law.

[1] *La mort civile* is abolished as a punishment by itself. The condition follows as a secondary consequence of condemnation to death, hard labor, or transportation for life.

ART. 18. The press is free; no censorship shall ever be established; no security shall be exacted of writers, publishers, or printers.[1]

In case the writer is known and is a resident of Belgium, the publisher, printer, or distributor shall not be prosecuted.

ART. 19. Belgians have the right, without previous authorization, to assemble peaceably and without arms, conforming themselves to the laws which regulate the exercise of this right.

This provision does not apply to assemblies in the open air, which remain entirely under the police laws.

ART. 20. Belgians have the right of association; this right shall not be restricted by any preventive measure.

ART. 21. Any one has the right to address petitions to the public authorities, signed by one or more persons.

Legally organized bodies alone have the right to petition under a collective name.

ART. 22. The privacy of correspondence is inviolable. The law shall determine who are the agents responsible for the violation of the secrecy of letters intrusted to the post.

ART. 23. The use of the languages spoken in Belgium is optional. This matter may be regulated only by law and only for acts of public authority and for judicial proceedings.

ART. 24. No previous authorization is necessary to bring action against public officials for the acts of their administration, except as provided for ministers.

TITLE III. CONCERNING POWERS

ART. 25. All powers emanate from the people.

They shall be exercised in the manner established by the constitution.

ART. 26. The legislative power shall be exercised collectively by the King, the House of Representatives, and the Senate.

ART. 27. Each of the three branches of the legislative power shall have the right of initiative.

Nevertheless, all laws relating to the revenues or expenditures of the state or to the army contingent must be voted first by the House of Representatives.

ART. 28. The authoritative interpretation of the laws shall belong only to the legislative power.

ART. 29. The executive power is vested in the King, subject to the regulations of the constitution.

ART. 30. The judicial power shall be exercised by the courts and the tribunals.

Decrees and judgments shall be executed in the name of the King.

ART. 31. Exclusively communal or provincial affairs shall be regulated by the communal or provincial councils, according to the principles established by the constitution.

[1] See also Arts. 96 and 98, which relate to trials of offenses of the press.

CHAPTER I. THE HOUSES

ART. 32. The members of the two Houses shall represent the nation, and not the province alone, nor the subdivision of the province which elected them.

ART. 33. The sessions of the Houses shall be public.

Nevertheless each House may resolve itself into a secret committee upon the demand of its president or of ten members.

It shall then decide by vote of an absolute majority whether the session shall be resumed in public upon the same subject.

ART. 34. Each House shall judge of the qualifications of its own members, and shall decide all contests which arise upon that subject.

ART. 35. No person shall at the same time be a member of both Houses.

ART. 36. Any member of either of the two Houses who shall be appointed by the government to any other salaried office except that of minister, and who accepts the same, shall vacate his seat immediately, and may resume his duties only by virtue of a new election.[1]

ART. 37. At each session, each of the Houses shall elect its president, its vice-president, and shall form its bureau.[2]

ART. 38. An absolute majority of the votes shall be necessary to pass any resolution except as otherwise established by the rules of the Houses in regard to elections and nominations.[3]

In case of an equal division of votes, the proposition under consideration is rejected.

Neither of the two Houses shall pass a resolution unless a majority of its members are present.

ART. 39. The votes shall be *viva voce* or by rising and sitting; the vote on a law as a whole shall always be by roll-call and *viva voce*. The election and nomination of candidates shall be by secret ballot.

ART. 40. Each house has the right to investigate the conduct of public affairs.

ART. 41. A proposed law shall not be passed by either of the Houses unless it has been voted upon article by article.

ART. 42. The Houses have the right to amend and to divide the articles and amendments proposed.

ART. 43. To present petitions in person to the Houses is forbidden.

Each House has the right to send to the ministers the petitions which are addressed to it. The ministers are obliged to give explanations upon the contents of such petitions whenever the House demands.

ART. 44. No member of either House shall be arrested or prosecuted on account of opinions expressed or votes cast by him in the performance of his duties.

ART. 45. No member of either House shall during the continuance of the session be prosecuted or imprisoned after trial, except by the

[1] As amended September 7, 1893. By the original article ministers were also required to seek re-election.

[2] The term "bureau" is used to refer to all other officers of the legislative body, e. g., secretaries, etc.

[3] For questions requiring a two-thirds vote, see Arts 61, 62, and 131.

authority of the House of which he is a member, unless he be apprehended in the commission of an offense.

No member of either House shall be arrested during the session, except by the same authority.

The detention or the prosecution of a member of either House shall be suspended during the session and for the entire term, if the House so demands.

ART. 46. Each House shall determine by its own rules the manner in which it is to exercise its powers.

SECTION I. THE HOUSE OF REPRESENTATIVES

ART. 47. The members of the House of Representatives shall be chosen by direct election under the following regulations:

One vote is allotted to citizens who have reached the age of twenty-five years, resident for at least one year in the same commune and who are not otherwise excluded by law.

One additional vote is allotted in consideration of any one of the following conditions:

1) Having reached the age of thirty-five years, being married or a widower with legitimate offspring, and paying to the state a tax of not less than five francs as a householder, unless exempt on account of his profession.

2) Having reached the age of twenty-five years and being the owner either of real estate of the value of at least 2,000 francs, said value to be rated on the basis of the cadastral assessment, or possessing income from land corresponding to such valuation, or being inscribed in the great book of the public debt, or possessing obligations of the Belgian government savings-bank bearing at least 100 francs interest.

These inscriptions and bank-books must have belonged to the holder for at least two years.

The property of the wife is counted with that of the husband; that of minor children with that of the father.

Two additional votes are allotted to citizens who have reached the age of twenty-five years, and who fulfil the following conditions:

a) Holding a diploma from an institution of higher instruction, or an indorsed certificate showing the completion of a course of secondary education of the higher degree, without distinction between public or private institutions.

b) Filling or having filled a public office, holding or having held a position, practising or having practised a private profession which presupposes that the holder possesses at least the knowledge imparted in secondary instruction of the higher degree. These offices, positions, and professions, likewise the time during which they must have been held or practised, shall be determined by law.

No one shall have more than three votes.[1]

[1] As amended September 7, 1893. Elections of representatives are regulated by laws of April 12 and June 28, 1894, as modified by laws of June 11, 1896, March 31, 1898, December 29, 1899, and April 18, 1902. Proportional representation was introduced by the law of December 29, 1899.

ART. 48. The constitution of the electoral colleges shall be regulated by law for each province.

Voting is obligatory; it shall take place in the commune, when not otherwise determined by law.[1]

ART. 49. The number of representatives shall be determined by law, according to the population; this number shall not exceed the proportion of one representative for 40,000 inhabitants. The qualifications of an elector and the process of election shall also be determined by law.

ART. 50. To be eligible it is necessary:

1) To be a Belgian citizen by birth, or to have received full naturalization;

2) To enjoy civil and political rights;

3) To have reached the age of twenty-five years;

4) To be a resident of Belgium.

No other condition of eligibility shall be required.

ART. 51. The members of the House of Representatives shall be elected for a term of four years; one-half being elected every two years, in the order determined by the electoral law.

In case of dissolution the House shall be entirely renewed.

ART. 52. Each member of the House of Representatives shall receive an annual compensation of 4,000 francs.

He shall have, in addition, the right of free transportation upon all state and concessionary railways from the place of his residence to the city where the session is held.[2]

SECTION II. THE SENATE

ART. 53. The Senate shall be composed:

1) Of members elected according to the population of each province, conformably to Art. 47; though the law may require that the electors shall have reached the age of thirty years. The provisions of Art. 48 are applicable to the election of senators.

2) Of members elected by the provincial councils, to the number of two for each province having less than 500,000 inhabitants, of three for each province having from 500,000 to 1,000,000 inhabitants, and of four for each province having more than 1,000,000 inhabitants.[3]

ART. 54. The number of senators to be elected directly by the voters shall be equal to one-half the number of members of the House of Representatives.[2]

ART. 55. Senators shall be elected for a term of eight years; one-half being elected every four years in the order determined by the electoral law.

In case of dissolution, the Senate shall be entirely renewed.

ART. 56. In order to be elected and to remain a senator, it shall be necessary:

1) To be a Belgian citizen by birth, or to have received full naturalization;

2) To enjoy civil and political rights;

[1] As amended September 7, 1893. [2] *Ibid.* [3] *Ibid.*

3) To be a resident of Belgium;

4) To be at least forty years of age;

5) To pay into the treasury of the state at least 1,200 francs of direct taxes, including licenses:

Or to be either the proprietor or the usufructuary of real estate situated in Belgium, the assessed income of which amounts to at least 12,000 francs.

In the provinces where the number of those eligible does not reach the proportion of one for every 5,000 inhabitants, the list shall be completed by the addition of as many of the highest tax-payers of the province as may be necessary to make this proportion. The citizens on this supplementary list are eligible only in the province where they reside.[1]

The senators elected by the provincial councils shall be exempt from all property qualification; they shall not be members of the assembly which elects them, nor have been members of it during the year of the election nor during the two preceding years.[2]

ART. 57. Senators shall receive neither salary nor emolument.

ART. 58. The sons of the King, or, if there be none, the Belgian princes of the branch of the royal family designated to succeed to the throne, shall be by right senators at the age of eighteen years. They shall have no deliberate vote until the age of twenty-five.[3]

ART. 59. Every meeting of the Senate which may be held at any other time than during the session of the House of Representatives shall be null and void.

CHAPTER II. THE KING AND THE MINISTERS

SECTION I. THE KING

ART. 60. The constitutional powers of the King are hereditary in the direct descendants, natural and legitimate, of His Majesty Leopold-George-Christian-Frederick of Saxe-Coburg, from male to male in the order of primogeniture, and to the perpetual exclusion of females and of their descendants.

[The prince who shall marry without the consent of the King, or of those who in his absence exercise his authority as provided by the constitution, shall forfeit his rights to the crown.]

[Nevertheless, with the consent of the two Houses, he may be relieved of this forfeiture by the King or by those who in his absence exercise his authority according to the constitution.[4]]

ART. 61. In default of male descendants of His Majesty Leopold-George-Christian-Frederick of Saxe-Coburg, the King may name his successor, with the consent of the Houses expressed in the manner prescribed by the following article.

[If no nomination has been made after the manner described below, the throne shall be vacant.[5]]

ART. 62. The King shall not at the same time be the head of another state, without the consent of the two Houses.

[1] As amended September 7, 1893. [2] *Ibid.* [3] *Ibid.* [4] *Ibid.* [5] *Ibid.*

Neither of the Houses shall deliberate upon this matter unless two-thirds, at least, of the members who compose it are present, and the resolution must be adopted by at least two-thirds of the votes cast.

ART. 63. The person of the King is inviolable; his ministers are responsible.

ART. 64. No decree of the King shall take effect unless it is countersigned by a minister, who, by that act alone, renders himself responsible for it.

ART. 65. The King appoints and dismisses his ministers.

ART. 66. He confers the grades in the army.

He appoints the officers of the general administration and for foreign relations, except as otherwise established by law.

He appoints other governmental officials only by virtue of an express provision of law.

ART. 67. He shall issue all regulations and decrees necessary for the execution of the laws, without power to suspend the laws themselves, or to dispense with their execution.

ART. 68. The King commands the forces both by land and sea, declares war, makes treaties of peace, of alliance, and of commerce. He shall give information to the two Houses of these acts as soon as the interests and safety of the state permit, adding thereto suitable comments.

Treaties of commerce, and treaties which may burden the state, or bind Belgians individually, shall take effect only after having received the approval of the two Houses.

No cession, exchange, or addition of territory shall take place except by virtue of a law. In no case shall the secret articles of a treaty be destructive of those openly expressed.

ART. 69. The King approves and promulgates the laws.

ART. 70. The Houses shall assemble each year, the second Tuesday in November, unless they shall have been previously summoned by the King.

The Houses shall remain in session at least forty days each year.

The King pronounces the closing of the session.

The King shall have the right to convene the Houses in extraordinary session.

ART. 71. The King shall have the right to dissolve the Houses either simultaneously or separately. The act of dissolution shall order a new election within forty days, and summon the Houses within two months.

ART. 72. The King may adjourn the Houses. In no case shall the adjournment exceed the term of one month, nor shall it be renewed in the same session, without the consent of the Houses.

ART. 73. He shall have the right to remit or reduce the penalties pronounced by the judges of courts, except such as are fixed by law in the case of ministers.

ART. 74. He shall have the right to coin money, in accordance with the law.

ART. 75. He shall have the right to confer titles of nobility, but without the power of attaching to them any privilege.

ART. 76. He may confer military orders in accordance with the provisions of the law.

ART. 77. The civil list shall be fixed by law for the duration of each reign.[1]

ART. 78. The King shall have no other powers than those which the constitution and the special laws, enacted under the constitution, formally confer upon him.

ART. 79. At the death of the King, the Houses shall assemble without a summons, at the latest on the tenth day after his decease. If the Houses shall have been previously dissolved, and if in the act of dissolution the reassembling had been fixed for a day later than the tenth day, the former members shall resume their duties until the assembling of those who should replace them.

If only one House shall have been dissolved, the same rule shall be followed with regard to that House.

From the date of the death of the King and until the taking of the oath by his successor to the throne, or by the regent, the constitutional powers of the King shall be exercised, in the name of the Belgian people, by the ministers united in council, and upon their responsibility.

ART. 80. The King is of age when he shall have completed the age of eighteen years.

He shall not take possession of the throne until he shall have solemnly taken, before the united Houses, the following oath:

I swear to observe the constitution and the laws of the Belgian people, to maintain the national independence and the integrity of the territory.

ART. 81. If, at the death of the King, his successor is a minor, the two Houses shall unite in one assembly, for the purpose of providing for the regency and guardianship.

ART. 82. If the King becomes incapacitated to reign, the ministers, after having ascertained this incapacity, shall immediately convene the Houses. The Houses shall provide for the regency and guardianship.

ART. 83. The regency shall be conferred upon only one person.

The regent shall enter upon his duties only after having taken the oath prescribed by Art. 80.

ART. 84. No change in the constitution shall be made during a regency.

ART. 85. In case there is a vacancy of the throne, the Houses deliberating together shall arrange provisionally for the regency, until the first meeting of the Houses after they have been wholly renewed. That meeting shall take place at the latest within two months. The new Houses deliberating together shall provide definitely for the vacancy.

SECTION II. THE MINISTERS

ART. 86. No person shall be a minister unless he is a Belgian by birth, or has received full naturalization.

ART. 87. No member of the royal family shall be a minister.

[1] The civil list of the present king, Leopold II, was fixed by law of December 25, 1865, at 3,300,000 francs.

ART. 88. Ministers shall have no deliberative vote in either House unless they are members of it.

They shall have admission to either House, and are entitled to be heard when they so request.

The Houses shall have the right to demand the presence of ministers.

ART. 89. In no case shall the verbal or written order of the King relieve a minister of responsibility.

ART. 90. The House of Representatives shall have the right to accuse ministers and to arraign them before the Court of Cassation, which, sitting in full bench, alone shall have the right to judge them, except in such matters as shall be established by law respecting a civil suit by an aggrieved party and respecting crimes and misdemeanors committed by ministers when not in the performance of their official duties.

The law shall determine the responsibility of ministers, the penalties to be imposed upon them, and the method of proceeding against them, whether upon accusation made by the House of Representatives or upon prosecution by the aggrieved parties.

ART. 91. The King shall not have power to grant pardon to a minister sentenced by the Court of Cassation except upon request of one of the two Houses.

CHAPTER III. THE JUDICIAL POWER

ART. 92. Actions which involve questions of civil right belong exclusively to the jurisdiction of the courts.

ART. 93. Actions which involve questions of political rights belong to the jurisdiction of the courts, except as otherwise determined by law.

ART. 94. No tribunal nor contentious jurisdiction shall be established except by virtue of a law. No commissions or extraordinary tribunals under any title whatever shall be established.

ART. 95. There shall be a Court of Cassation for the whole of Belgium.

This court shall not consider questions of fact except in the trial of ministers.

ART. 96. The sessions of the courts shall be public, unless this publicity is declared by a judgment of the court to be dangerous to public order or morals.

In cases of political offenses and offenses of the press closed doors shall be enforced only by a unanimous vote of the court.

ART. 97. Every judgment shall be pronounced in open court, and the reasons therefor stated.

ART. 98. The right of trial by jury shall be established in all criminal cases and for all political offenses and offenses of the press.

ART. 99. The justices of the peace and the judges of courts shall be appointed directly by the King.

The members of the courts of appeal and the presidents and vice-presidents of the courts of original jurisdiction shall be appointed by the King from two double lists presented the one by these courts and the other by the provincial councils.

The members of the Court of Cassation shall be appointed by the King from two double lists presented one by the Senate and one by the Court of Cassation.

In both cases the candidates named upon one list may be named also upon the other.

All the names shall be published at least fifteen days before the appointment.

The courts shall choose their presidents and vice-presidents from among their own number.

ART. 100. Judges shall be appointed for life.

No judge shall be deprived of his office or suspended until after trial and judgment.

The removal of a judge from one place to another shall take place only by means of a new appointment and with his consent.

ART. 101. The King appoints and removes the state officials serving in the courts and tribunals.

ART. 102. The salaries of the members of the judiciary shall be fixed by law.

ART. 103. No judge shall accept from the government any salaried office, unless he perform the duties thereof gratuitously, and not then if it is contrary to the law of incompatibility.

ART. 104. There shall be three courts of appeal in Belgium.

Their jurisdiction and the places where they shall be held shall be determined by law.

ART. 105. Special laws shall govern the organization of military tribunals, their powers, the rights and obligations of the members of these tribunals, and the duration of their functions.

There shall be commercial courts in places which shall be designated by law. Their organization, powers, the method of appointment of their members, and the duration of their term of office shall also be determined by law.

ART. 106. The Court of Cassation shall decide conflicts of jurisdiction, according to the method prescribed by law.

ART. 107. The courts and tribunals shall enforce executive decrees and ordinances, whether general, provincial, or local, only so far as they shall conform to the laws.

CHAPTER IV. PROVINCIAL AND COMMUNAL INSTITUTIONS

ART. 108. Provincial and communal institutions shall be regulated by law.

The law shall establish the application of the following principles:

1) Direct election, except in the cases which may be established by law with regard to the chiefs of the communal administration and government commissioners acting in the provincial councils.

2) The relegation to provincial and communal councils of all provincial and communal affairs, without prejudice to the approval of their acts in the cases and according to the procedure determined by law.

3) The publicity of the sittings of the provincial and communal councils within the limits established by law.

4) The publicity of budgets and of accounts.

5) The intervention of the King or of the legislative power to prevent provincial and communal councils from exceeding their powers and from acting against the general welfare.

ART. 109. The keeping of the civil register is exclusively the duty of the communal authorities.

TITLE IV. FINANCES

ART. 110. No tax for the benefit of the state shall be imposed except by law.

No provincial charge or tax shall be imposed without the consent of the provincial council.

The law shall determine the exceptions which experience shall show to be necessary in regard to provincial and communal taxes.

ART. 111. Taxes for the benefit of the state shall be voted annually.

The laws which impose such taxes shall remain in force for one year only unless they are re-enacted.

ART. 112. No privilege shall be established with regard to taxes.

No exemption or abatement of taxes shall be established except by law.

ART. 113. Beyond the cases expressly excepted by law, no payment shall be exacted of any citizen other than taxes levied for the benefit of the state, of the province, or of the commune. No change shall be made in the existing system of *polders* [1] and *wateringen* [2] which remain subject to ordinary legislation.

ART. 114. No pension or gratuity shall be paid out of the public treasury without the authority of law.

ART. 115. Each year the Houses shall enact the law of accounts and vote the budget.

All the receipts and expenditures of the state shall be contained in the budget and in the accounts.

ART. 116. The members of the Court of Accounts shall be appointed by the House of Representatives, and for a term fixed by law.

This court shall be intrusted with the examination and settlement of the accounts of the general administration and of all persons accountable to the public treasury. It shall see that no item of the expenditures of the budget is overdrawn and that no transfer takes place. It shall audit the accounts of the different administrative organs of the state, and shall gather for this purpose all information and all necessary vouchers. The general accounts of the state shall be submitted to the House with the comments of the Court of Accounts.

[1] *Polders* are lands reclaimed from the sea by dikes. The owners of these lands are grouped into associations for the maintenance of the dikes and are required by law to bear the expense of such maintenance.

[2] *Wateringen* are associations formed for the purpose of irrigating and draining lands reclaimed from the sea. They have power to raise funds by taxing the lands affected by such improvements.

This court shall be organized by law.

ART. 117. The salaries and pensions of the ministers of religion shall be paid by the state; the sums necessary to meet this expenditure shall be entered annually in the budget.[1]

TITLE V. THE ARMY

ART. 118. The method of recruiting the army shall be determined by law. The laws shall also regulate the promotion, the rights, and the duties of soldiers.

ART. 119. The army contingent shall be voted annually. The law which fixes it shall remain in force for one year only, unless re-enacted.

ART. 120. The organization and the duties of the armed police shall be regulated by law.

ART. 121. No foreign troops shall be admitted into the service of the state, to occupy or to cross its territory except by virtue of law.

ART. 122. There shall be a citizen militia, the organization of which shall be regulated by law.

The officers of all grades, at least as high as that of captain, shall be chosen by the militia, with such exceptions as may be judged necessary for accounts.

ART. 123. The militia shall not be brought into active service, except by virtue of law.

ART. 124. Soldiers shall not be deprived of their grades, honors, or pensions except in the manner prescribed by law.

TITLE VI. GENERAL PROVISIONS

ART. 125. The Belgian nation adopts for its colors red, yellow, and black, and for the coat of arms of the kingdom the Belgian lion, with the motto, "Union Gives Strength."

ART. 126. The city of Brussels is the capital of Belgium and the seat of government.

ART. 127. No oath shall be imposed except by virtue of law. The form of the oath shall also be determined by law.

ART. 128. Every foreigner within the territory of Belgium shall enjoy protection of his person and property, except as otherwise established by law.

ART. 129. No law, ordinance, or regulation of the general, provincial, or communal government shall be obligatory until after having been published in the manner prescribed by law.

ART. 130. The constitution shall not be suspended, either in whole or in part.

[1] This clause is interpreted to apply only to the denominations recognized by law in Belgium in 1830; these are the Catholic, Protestant Evangelical, Anglican, and Jewish; almost the whole of the Belgian population is Catholic. No minister is entitled to a salary, (1) if he must receive license from a person practising a profession without legal authorization; (2) if, being a foreigner, he performs the ministerial functions without the permission of the government.

TITLE VII. THE REVISION OF THE CONSTITUTION

ART. 131. The legislative power has the right to declare that a revision of such constitutional provisions as it shall designate is in order.

After this declaration the two Houses are *ipso facto* dissolved.

Two new Houses shall then be summoned, in conformity with Art. 71.

These Houses, with the approval of the King, shall then act upon the points submitted for revision.

In this case the Houses shall not deliberate unless at least two-thirds of the members of each are present, and no amendment shall be adopted unless it is supported by at least two-thirds of the votes.

TITLE VIII. TEMPORARY PROVISIONS

ART. 132. For the first choice of a head of the state the first provision of Art. 80 may be neglected.

ART. 133. Foreigners established in Belgium before January 1, 1814, and who continue to reside therein, shall be considered Belgians by birth, upon condition that they declare their intention to take advantage of this provision.

Such declaration shall be made within six months after this constitution goes into effect, if the foreigners are of age, and, if they are minors, within the year after attaining their majority.

This declaration shall be made before the provisional authority of the province where they reside.

It shall be made in person or by an agent having a special and authentic authorization.

ART. 134. Until further provision by law, the House of Representatives shall have discretionary power to accuse a minister, and the Court of Cassation to try him, find the offense, and fix the penalty.

Nevertheless the penalty shall not extend further than removal from office, without prejudice to the cases expressly provided for by the penal laws.

ART. 135. The personnel of the courts shall be maintained as it now exists, until further provision has been made by law.

Such a law shall be enacted during the first legislative session.

ART. 136. A law, passed during the first legislative session, shall provide for the manner of the first nomination of members of the Court of Cassation.[1]

ART. 137. The fundamental law of August 24, 1815, and the provincial and local statutes are abolished. However, the provincial and local authorities shall retain their powers until a law shall make other provision.

ART. 138. As soon as this constitution goes into effect all laws, decrees, orders, regulations, and other instruments contrary thereto are abrogated.

[1] Art. 99 provides for subsequent appointments.

APPENDIX IV

SUPPLEMENTARY PROVISION

ART. 139. The National Congress declares that it is necessary to provide for the following objects, by separate laws and as soon as possible:

1) The press.
2) The organization of the jury.
3) The finances.
4) Provincial and communal organization.
5) The responsibility of ministers and of other officers.
6) The judicial organization.
7) The revision of the pension list.
8) Measures proper to prevent the abuse of cumulative office-holding.
9) The revision of the laws of bankruptcy and of suspension.
10) The organization of the army, the rights of advancement and of retirement, and the military penal code.
11) The revision of the codes.

APPENDIX V

CONSTITUTION OF JAPAN[1]

(February 11, 1889)

CHAPTER I. THE EMPEROR

ARTICLE 1. The Empire of Japan shall be reigned over and governed by a line of emperors unbroken for ages eternal.

ART. 2. The imperial throne shall be succeeded to by imperial male descendants, according to the provisions of the Imperial House Law.[2]

ART. 3. The Emperor is sacred and inviolable.

ART. 4. The Emperor is the head of the Empire, combining in himself the rights of sovereignty, and exercises them, according to the provisions of the present constitution.

ART. 5. The Emperor exercises the legislative power with the consent of the Imperial Diet.

ART. 6. The Emperor gives sanction to laws, and orders them to be promulgated and executed.

ART. 7. The Emperor convokes the Imperial Diet, opens, closes, and prorogues it, and dissolves the House of Representatives.

ART. 8. The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, imperial ordinances in the place of laws.

Such imperial ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said ordinances the government shall declare them to be invalid for the future.

ART. 9. The Emperor issues, or causes to be issued, the ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no ordinance shall in any way alter any of the existing laws.

ART. 10. The Emperor determines the organization of the different branches of the administration, and the salaries of all civil and military

[1] This text has been adopted almost without change from the official English translation issued from Tokyo in 1889; the difficulty of obtaining revision makes it necessary to give this constitution in the untechnical language in which it here appears.

[2] By the Imperial House Law the succession is in the male descendants of the Emperor, in accordance with the law of primogeniture; when the Emperor has no descendants the crown goes to the male relative of the nearest collateral male line. [From "Modern Constitutions," by Walter Fairleigh Dodd, University of Chicago Press.]

officers, and appoints and dismisses the same. Exceptions especially provided for in the present constitution or in other laws shall be in accordance with the respective provisions (bearing thereon).

ART. 11. The Emperor has the supreme command of the army and navy.

ART. 12. The Emperor determines the organization and peace standing of the army and navy.

ART. 13. The Emperor declares war, makes peace, and concludes treaties.

ART. 14. The Emperor proclaims a state of siege.

The conditions and effects of a state of siege shall be determined by law.

ART. 15. The Emperor confers titles of nobility, rank, orders, and other marks of honor.

ART. 16. The Emperor orders amnesty, pardon, commutation of punishment, and rehabilitation.

ART. 17. A regency shall be instituted in conformity with the provisions of the Imperial House Law.

The regent shall exercise the powers appertaining to the Emperor, in his name.

CHAPTER II. RIGHTS AND DUTIES OF SUBJECTS

ART. 18. The conditions necessary for being a Japanese subject shall be determined by law.

ART. 19. Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military offices equally, and may fill any other public offices.

ART. 20. Japanese subjects are amenable to service in the army or navy, according to the provisions of law.

ART. 21. Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

ART. 22. Japanese subjects shall have the liberty of abode and of changing the same within the limits of law.

ART. 23. No Japanese subject shall be arrested, detained, tried, or punished unless according to law.

ART. 24. No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

ART. 25. Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

ART. 26. Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolable.

ART. 27. The right of property of every Japanese subject shall remain inviolable.

Measures necessary to be taken for the public benefit shall be provided for by law.

ART. 28. Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

ART. 29. Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meeting, and association.

ART. 30. Japanese subjects may present petitions by observing the proper forms of respect and by complying with the rules specially provided for the same.

ART. 31. The provisions in the present chapter shall not affect the exercise of the powers appertaining to the Emperor in times of war or in cases of national emergency.

ART. 32. Each and every one of the provisions contained in the preceding articles of the present chapter, that are not in conflict with the laws or the rules and discipline of the army and navy, shall apply to the officers and men of the army and navy.

CHAPTER III. THE IMPERIAL DIET

ART. 33. The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives.[1]

ART. 34. The House of Peers shall, in accordance with the ordinance concerning the House of Peers, be composed of the members of the imperial family, of the orders of nobility, and of those persons who have been nominated thereto by the Emperor.[2]

ART. 35. The House of Representatives shall be composed of members elected by the people, according to the provisions of the election law.[3]

ART. 36. No one shall at one and the same time be a member of both Houses.

ART. 37. Every law requires the consent of the Imperial Diet.

ART. 38. Both Houses shall vote upon projects of law submitted to them by the government, and may respectively initiate projects of law.

ART. 39. A bill which has been rejected by either the one or the other of the two Houses shall not be again brought in during the same session.

ART. 40. Both Houses may make representations to the government as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.

ART. 41. The Imperial Diet shall be convoked every year.

ART. 42. A session of the Imperial Diet shall last during three

[1] The internal organization of the two Houses is regulated by the Law of the Houses, of February 11, 1889. By Art. 3 of this law it is provided that "the president and vice-president of the House of Representatives shall both of them be nominated by the Emperor from among three candidates respectively elected by the House for each of those offices."

[2] See imperial ordinance concerning House of Peers, p. 390.

[3] The election law of 1889 was amended in 1900. At present the right to vote is enjoyed by male subjects twenty-five years of age, who have resided in the election district for one year, and pay a tax of ten yen (about five dollars). Before 1900 the tax qualification was fifteen yen. On account of the relative poverty of the people the present tax qualification limits the suffrage to a small proportion of the adult male population. In general all male subjects thirty years of age are eligible as representatives; the representatives are chosen in single election districts. [From "Modern Constitutions," by Walter Fairleigh Dodd, University of Chicago Press.]

months. In case of necessity, the duration of a session may be prolonged by imperial order.

ART. 43. When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary one.

The duration of an extraordinary session shall be determined by imperial order.

ART. 44. The opening, closing, prolongation of session, or prorogation of the Imperial Diet, shall be effected simultaneously for both Houses.

In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

ART. 45. When the House of Representatives has been ordered to dissolve, members shall be caused by imperial order to be newly elected, and the new House shall be convoked within five months from the day of dissolution.

ART. 46. No debate shall be opened and no vote shall be taken in either House of the Imperial Diet, unless not less than one-third of the whole number of the members thereof is present.

ART. 47. Votes shall be taken in both Houses by absolute majority. In the case of a tie, the president shall have the casting vote.

ART. 48. The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the government or by resolution of the House, be held in secret sitting.

ART. 49. Both Houses of the Imperial Diet may respectively present addresses to the Emperor.

ART. 50. Both Houses may receive petitions presented by subjects.

ART. 51. Both Houses may enact, besides what is provided for in the present constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.

ART. 52. No member of either House shall be held responsible outside the respective Houses for any opinion uttered or for any vote given in the House. When, however, a member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

ART. 53. The members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases where taken *in flagrante delicto*, or of offenses connected with a state of internal commotion or with a foreign trouble.

ART. 54. The ministers of state and the delegates of the government may, at any time, take seats and speak in either House.

CHAPTER IV. THE MINISTERS OF STATE AND THE PRIVY COUNCIL

ART. 55. The respective ministers of state shall give their advice to the Emperor, and be responsible for it.

All laws, imperial ordinances, and imperial rescripts of whatever kind, that relate to the affairs of state, require the countersignature of a minister of state.

ART. 56. The Privy Council shall, in accordance with the provisions

for the organization of the Privy Council, deliberate upon important matters of state, when they have been consulted by the Emperor.

CHAPTER V. THE JUDICIAL POWER

ART. 57. The judicial power shall be exercised by the courts of law according to law, in the name of the Emperor.

The organization of the courts of law shall be determined by law.

ART. 58. The judges shall be appointed from among those who possess proper qualifications according to law.

No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

Rules for disciplinary punishment shall be determined by law.

ART. 59. Trials and judgments of a court shall be conducted publicly. When, however, there exists any fear that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provision of law or by the decision of the court.

ART. 60. All matters that fall within the competency of special tribunals shall be specially provided for by law.

ART. 61. No suit which relates to rights alleged to have been infringed by the illegal measures of the executive authorities, and which should come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a court of law.

CHAPTER VI. FINANCE

ART. 62. The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

The raising of national loans and the contracting of other liabilities to the charge of the national treasury, except those that are provided in the budget, shall require the consent of the Imperial Diet.

ART. 63. The taxes levied at present shall, in so far as they are not remodeled by a new law, be collected according to the old system.

ART. 64. The expenditure and revenue of the state require the consent of the Imperial Diet by means of an annual budget.

Any and all expenditures exceeding the appropriations set forth in the titles and paragraphs of the budget, or that are not provided for in the budget, shall subsequently require the approbation of the Imperial Diet.

ART. 65. The budget shall be first laid before the House of Representatives.

ART. 66. The expenditures of the Imperial House shall be defrayed every year out of the national treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

ART. 67. Those expenditures already fixed and based upon the powers belonging to the Emperor by the constitution, and such expenditures as may have arisen by the effect of law, or that relate to the legal obligations of the government, shall neither be rejected nor reduced by the Imperial Diet without the concurrence of the government.

ART. 68. In order to meet special requirements, the government may ask the consent of the Imperial Diet to a certain amount as a continuing expenditure fund, for a previously fixed number of years.

ART. 69. In order to supply deficiencies which are unavoidable in the budget, and to meet requirements unprovided for in the same, a reserve fund shall be provided in the budget.

ART. 70. When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety the government may enact all necessary financial measures by means of an imperial ordinance.

In the case mentioned in the preceding clause, the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.

ART. 71. When the Imperial Diet has not voted on the budget, or when the budget has not been brought into actual existence, the government shall carry out the budget of the preceding year.

ART. 72. The final account of the expenditures and revenue of the state shall be verified and confirmed by the Board of Audit, and it shall be submitted by the government to the Imperial Diet, together with the report of verification of the said board.

The organization and competency of the Board of Audit shall be determined by a special law.

CHAPTER VII. SUPPLEMENTARY RULES

ART. 73. When it may become necessary in future to amend the provisions of the present constitution, a project to that effect shall be submitted to the Imperial Diet by imperial order.

In the above case, neither House shall open the debate unless not less than two-thirds of the whole number of members are present, and no amendment shall be passed unless a majority of not less than two-thirds of the members present is obtained.

ART. 74. No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

No provision of the present constitution can be modified by the Imperial House Law.

ART. 75. No modification shall be introduced into the constitution, or into the Imperial House Law, during the time of a regency.

ART. 76. Existing legal enactments, such as laws, regulations, ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present constitution, continue in force.

All existing contracts or orders, that entail obligations upon the government, and that are connected with expenditure, shall come within the scope of Art. 67.

IMPERIAL ORDINANCE CONCERNING THE HOUSE OF PEERS

ARTICLE 1. The House of Peers shall be composed of the following members:

1) The members of the imperial family.

2) Princes and marquises.

3) Counts, viscounts, and barons who have been elected thereto by the members of their respective orders.

4) Persons who have been specially nominated by the Emperor, on account of meritorious services to the state or of erudition.

5) Persons who have been elected, one member for each Fu (city) and Ken (prefecture), by and from among the taxpayers of the highest amount of direct national taxes on land, industry, or trade therein, and who have afterward been appointed thereto by the Emperor.

ART. 2. The male members of the imperial family shall take seats in the House on reaching their majority.

ART. 3. The members of the orders of princes and of marquises shall become members on reaching the full age of twenty-five years.

ART. 4. The members of the orders of counts, viscounts, and barons who, after reaching the full age of twenty-five years, have been elected by the members of their respective orders, shall become members for a term of seven years. Rules for their election shall be specially determined by imperial ordinance.

The number of members mentioned in the preceding clause shall not exceed one-fifth of the entire number of the respective orders of counts, viscounts, and barons.

ART. 5. Any man of above the age of thirty years, who has been appointed a member by the Emperor for meritorious services to the state or for erudition, shall be a life member.

ART. 6. One member shall be elected in each Fu and Ken from among and by the fifteen male inhabitants thereof of above the full age of thirty years paying therein the highest amount of direct national taxes on land, industry, or trade. When the person thus elected receives his appointment from the Emperor, he shall become a member for the term of seven years. Rules for such elections shall be specially determined by imperial ordinance.

ART. 7. The number of members appointed by the Emperor for meritorious services to the state, or for erudition, or from among men paying the highest amount of direct national taxes on land, industry, or trade in each Fu or Ken, shall not exceed the number of the members having the title of nobility.

ART. 8. The House of Peers shall, when consulted by the Emperor, pass upon rules concerning the privileges of the nobility.

ART. 9. The House of Peers decides upon the qualification of its members and upon disputes concerning elections thereto. The rules for these decisions shall be resolved upon by the House of Peers and submitted to the Emperor for his sanction.

ART. 10. When a member has been sentenced to confinement, or

to any severer punishment, or has been declared bankrupt, he shall be expelled by imperial order.

With respect to the expulsion of a member, as a disciplinary punishment in the House of Peers, the president shall report the facts to the Emperor for his decision.

Any member who has been expelled shall be incapable of again becoming a member, unless permission so to do has been granted by the Emperor.

ART. 11. The president and vice-president shall be nominated by the Emperor, from among the members, for a term of seven years.

If an elected member is nominated president or vice-president, he shall serve in that capacity for the term of his membership.

ART. 12. Every matter other than those for which provision has been made in the present imperial ordinance shall be dealt with according to the provisions of the Law of the Houses.

ART. 13. When in the future any amendment or addition is to be made to the provisions of the present imperial ordinance the matter shall be submitted to the vote of the House of Peers.

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