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CONSTITUTIONAL GOVERNMENT AND DEMOCRACY

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Theory and Practice in Europe and America

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Contents

don, Frankfurt, and many other centers of urban progress. The citizenry of London and Paris, as well as the imperial cities of Germany, were, on the whole, willing supporters of the princely overlord against local feudal barons, regarding him as the likeliest guarantor of the public peace. But in Italy, where the development of trade was perhaps most marked, the cities did not support such a central head; these cities, in fact, offered the most violent opposition to imperial as well as papal pretensions. Here traders preferred to rely upon the growing power of their own city. This led to incessant warfare between the cities, which eventually, in the age of Machiavelli, brought foreign intervention and subjugation. It was the success of Northern monarchs in integrating and pacifying their kingdoms which in part inspired Machiavelli's ardent concern with Italian unification.[8] In the Europe north of the Alps, by increasing the security of commercial intercourse, these political developments provided a fertile field for the expansion of trade activities.

During the later phase of the evolution of modern government, when differentiated bureaucracies were being established all over Europe, the industrial revolution with its growing number of manufacturing establishments is said to have "caused" the expansion of governmental services. There can be no doubt that the growth of these industries provided an important concomitant condition of governmental expansion; still, it is more nearly true that the governments grew the industries. In fact, the term mercantilism, generally used for characterizing this age, suggests just that type of governmental participation and stimulation in the economic realm.

Another factor making for unification was the military. The military cause or determinant is most clearly seen when we consider the development of various weapons and techniques of warfare during these centuries.[9] If we compare the military establishments of early modern times with those prevalent in the Middle Ages, we discover three important technical differences: (1) they are very much larger, (2) their main force consists of infantry, (3) they are equipped with firearms and guns. Besides these three technical differences, there are three important administrative contrasts: (1) the military establishments are permanent (standing armies), (2) they are mercenary, or at least regularly paid, (3) they possess a central command, entrusted to a professional officer corps. The story of how all these changes came about differs considerably for the various countries. Even more important, in England the military establishment was predominantly naval, while on the Continent the army occupied the center of attention. Army and navy exercised a similar effect upon the growth of central administration; but a navy proved less dangerous to constitutionalism than an army (see below, ch. III, p. 61). In the first place, as irregular forces

become standing mercenary armies, expensively equipped, they require ever increasing sums for their sustenance and thereby oblige the prince to perfect his tax-gathering machinery. Officials must be hired and organized, not only to collect the taxes, but to break down local resistance, and to give assistance to those groups in the community which promise larger tax returns through the development of industry and manufacture. Again, the large size of the armies presupposes the organization of offices for collecting the food for men and horses as well as for distributing it. Finally, the development of a professional officer corps suggests a similar hierarchy for the administrative services. Obviously, if one starts from this military development as a fact, he could undertake to explain the entire evolution of modern government from that viewpoint. Actually this military development itself is as much caused by the evolution and growth of modern government; for in the struggle with local lords, as well as in the conflicts which arose between the several kingdoms, we recognize the most powerful stimulants to this military progress. Modern infantry first appeared in Switzerland, where peasants on foot defeated the Austrian duke's cavalry; it appeared again in the Hundred Years' War when the newly organized archers gave the victory to England, until Charles VII of France succeeded in establishing his regular infantry. In short, we find that military and governmental development stimulate each other as concomitant aspects of the same process.

Attempts have been made from time to time to explain the evolution of modern government largely in terms of geography.[10] The distinctive evolution of government in England has provided seemingly convincing proof of such arguments. England's island position obviously facilitated her subordination to one government and the accompanying centralization by making foreign assistance to the weaker party relatively difficult, if not impossible. On the other hand, England has always been an island. The difficulty under which any geographic explanation labors is the static character of all geographic conditions. Growth is change, and cannot be explained by what has always been. Consequently, we find that those who would make us believe that geography was the final cause always slip in an unexplained, but firmly asserted, "natural" tendency of the "state" to grow. This natural tendency toward growth once accepted, it is easy to show how the governments of England, France, and Switzerland, for example, grew the way they did, because mountains, rivers, plains, and other such "facts" conditioned the particular form of their growth. There is little in the geography of Burgundy, to pick an example at random, which would lead us to conclude affirmatively that it was to become part of France rather than of Germany. Nor can the general assertions about the

definition, a constitutional democracy is one which does not grant *all* power to the majority. This issue dramatically presented itself again in Europe after the Second World War, when in France, Italy, and Germany the Communists came to plead for unrestrained and absolute majority rule in the name of democracy.

The "state" concept in association with sovereignty is based upon the fallacious idea that you can comprehend under one concept the antithetical systems of absolutism and constitutionalism. This is sometimes done, allegedly from a sociological (that is, scientific) standpoint, by asserting that the state exercises a "monopoly of force." This emphasis on coercion does not fit the co-operative community. If persuasion, or, more broadly speaking, consent, is given the place which it in fact occupies from time to time in the management of political communities by providing a basis for power and authority, the antithesis between the sovereign state and the self-governing community becomes clear.[15]

A political community is governed in one of two ways. Either a constituent group (see below, ch. VIII) has organized a pattern providing for the expression of consent by a substantial body of *citizens* (the common man) or a conquering group has set up a system of controls providing for effective constraint of the *subjects*. The antithesis is an abstract and theoretical one and there are many communities which fall into intermediary patterns. But the basic difference is of great importance in assessing even these communities. It was to idealize a government based on constraint that the concepts of "state" and "sovereignty" were developed. Any close analysis reveals that the central bureaucracies, supported by growing military establishments, conquered the medieval constitutional systems from within, and established the monarch as the symbolical figurehead of a system in which they became the final arbiter of what should be done.

Sovereignty · A very important corollary politically of the idea of state and sovereignty, however, was the depersonalizing of governmental relationships. To put this another way, against feudalism the trend toward legislative unification and centralization found its most challenging expression in the doctrine of sovereignty. It was the theoretical culmination of a long secular trend in France and elsewhere. Sovereignty rendered impersonal the relation of the king to his subjects. Under feudalism, all such relationships were patterned upon the personal fealty of lord and vassal. That is to say, the principle of the relation between the lord (*dominus*) and the vassal was personal "mutuality." Such personal relationship must needs be limited in extent, and was therefore ill-adapted to wide territorial realms. The hierarchy of the mutual relationships which feudal society had

tried to evolve in the effort to bridge the gap had shown a dismal tendency toward disintegration and anarchy. This tendency had resulted from the growth of complex intermediary authorities which opposed the prince's rule. To escape from this confusion it was then asserted that no true government existed unless there was somewhere an authority for making laws binding upon all the inhabitants of a given territory. The true achievement which lay in this recognition of the need for a central government has been obscured by the struggle over the control of such a government. It was forgotten that it was necessary first to create a government before the question of its control could even arise. And it was furthermore forgotten that this question of control could arise earlier in England than in France, because Tudor absolutism had consolidated previous efforts to establish an effectively centralized bureaucracy at a time when France was in the grip of an extended civil war. From this civil war the crown emerged with a considerable army at its command, which made it possible to crush the *Fronde*, while Cromwell's Model Army triumphed over the weak royal forces in England. This military ascendancy of the French crown, stimulated as it was by the possibilities of foreign invasion, delayed the outbreak of the struggle over the control of the government for one hundred and forty years. But the usefulness of the concept of sovereignty in providing a symbol for national unification and for the monarchical governments which destroyed feudal localism did not outlast its time. It was in the preconstitutional period that "sovereignty" was destined to play its most significant role. The word itself served as a symbol for concentrated power, deriving from the word "sovereign," connoting the holder of such power. Since under constitutionalism there is not supposed to exist any such concentrated power, sovereignty as a conception is incompatible with constitutionalism,[16] and all constitutional regimes have shown a marked tendency to resist its use. Even under a constitutional democracy this is true. The notion of "popular sovereignty"—a confused expression at best—needs to be supplanted by that of the "constitutional group." For this group is not the holder of concentrated power, but exercises the revolutionary, residuary, constituent power of establishing a new constitution. Most of the time other groups exercise intermediary powers of decision, such as amending the constitution, legislating, and so forth.

Reason of state and the problem of responsibility · As long as rulers were effectively influenced in their conduct by the moral teachings of the church—a united church with universal claims of obedience—the problem of responsibility could remain obscure. Our modern secularized methods of securing responsibility through electoral controls and the like (see be-

low, chs. XIV, XV) has tended to make us forget that through long ages responsible conduct had to be brought about by other means, and that even today much remains of these ancient ways. Historically speaking, we find that responsible conduct of power-holders has been enforced not only through secular, political, administrative, or judicial sanctions, but through religious sanctions as well.[17] In fact, such religious responsibility has bulked larger than any of the others. Medieval constitutionalism (see ch. VII, p. 126) was largely built upon that sanction. When a religious ethic prevails in a community (and it does not inherently matter what particular religion it is), the possibilities of producing responsible conduct in terms of that religious spirit are on the whole more promising than any of the secular devices. Since responsibility presupposes logically a set of norms or standards in terms of which conduct can be evaluated, the actual prevalence of a believed-in set of such norms makes responsibility of conduct almost automatic, as long as the faith lasts. It would be instructive to show the workings of Chinese bureaucracy in these terms, but even our own civilization has relied upon religious sanctions for long periods. As might be expected, there exist two primary forms corresponding to the two primary patterns of Christian ethics, the Catholic and the Protestant. Yet they have much in common. Under both creeds, the person who is supposed to be made responsible for his acts is made responsible for his acts to God. In practice this means, of course, responsibility to the clergy who legitimately interpret the will of God. Luther's frank and often angry letters to the Elector of Saxony and other German princes are a striking case in point. The only thing a prince can do to escape clerical censure as long as he accepts the faith is to conform as nearly as possible to the religious ethic. Luther's notion that the prince himself could function as the head of the church, if spiritually guided by an ecclesiastically unencumbered clergy, made the clergy sufficiently subservient to the government to make it increasingly ineffective as an instrument for securing responsible conduct. The result was either civil war, as in England, or absolutism, as in the various German principalities. The career of Archbishop Laud stands as an example of the unmistakable tendency within the clergy to extol the princely position for the sake of ecclesiastical support.

Basically, the position and approach of the Catholic Church was not dissimilar. Throughout the Middle Ages, the increasingly independent and highly effective administrative organization of the Catholic Church had run into bitter conflicts with the secular authorities. In these conflicts the secular authorities gradually gained the upper hand. The appearance of the concepts of "state" and of "sovereignty" marked the ascendancy of the secular authorities. At the same time, the secular authorities now became

themselves "clericalized" in the sense that their offices were being surrounded with a quasi-religious halo and sanction. It proved impossible in the sequel for the ecclesiastical authorities to recapture the medieval position in the Counter Reformation. Like the Protestant clergy, the Catholic authorities were obliged to concentrate on maintaining the loyalty and support of individual princes by every available means.

But as soon as the compelling standards of a divinely ordained faith faltered, a prince and his administrative following were able to emancipate themselves from the restraints which a religious conviction had imposed on them. Just as responsible conduct had almost completely disappeared from the republics of Renaissance Italy, so it now tended to disappear from the Northern kingdoms. The doctrines of the agnostic pagans for whom Machiavelli had spoken spread throughout Europe. The clash of his doctrines with the earlier religious notions of responsible government produced the doctrine of "reason of state."

Since religious responsibility means responsibility to transcendent ethical norms, it involves peculiar pitfalls for the official who seeks to be guided by it. There are bound to occur situations in which the ethical norm conflicts with the exigencies of the conduct of government. The government which follows the norm may succumb to its rival who disregarded it. To have observed and described this fact with corrosive frankness is the achievement of Machiavelli. His attempt to escape from the dilemma by idealizing power (the state) has earned him the condemnation of all Christian people. It is no accident that a Catholic priest, Giovanni Botero, attempted to fit this view into the Christian pattern of thought by constructing the idea of a *ratio status*, a special governmental rationality which is at the bottom of the doctrine of the two moralities.[18] Reason of state has not been recognized in Anglo-American political thought. But the fundamental category of purposive rationality in political behavior, of efficiency in the strictly military and technical sense, has been playing an increasing role in American thought. There has been, however, a studied soft-pedaling of the underlying issue which Machiavelli faced, and which he answered in favor of standards of expediency pure and simple. Even though we reject his answer as wrong, we are hardly justified in not facing the issue of a conflict between vital needs and a prevailing ethical norm. "Responsible" conduct of government is a phrase without precise meaning, until a decision is made between the ultimately valid ethical norms on the one hand and practical exigencies on the other. Toleration is liable to carry with it a weakening of the absolute standards which a religious sanction presupposes. Modern constitutionalism is essentially an effort to produce responsible conduct of public affairs without religious sanctions.[19] In

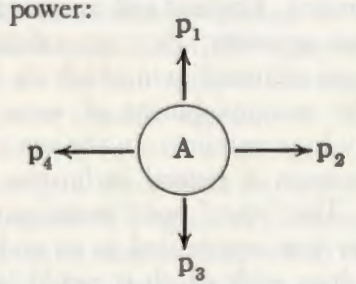
the place of religious standards mutually accepted interests (public interests, so-called) are taken as guideposts for official action. But until constitutional methods were discovered and perfected, the issue remained open. Reason of state then, indicates the attempt of human minds, the Christian mind, to grasp the meaning of deviations from an ethical standard, and concludes that the only way in which it could be done was to make government itself a divine institution. It was thus that government by divine law became the divine right of kings in the seventeenth century. Out of these efforts to deify government came the concept of "state," the Leviathan, the great one who could neither be seen nor heard nor communicated with, but who was all-powerful, all-wise, and in every other way a secular form of the deity. But seeing that governments were conducted by human beings with human weaknesses, the deification of the State failed to convince the more critical. Hence the problem of the relative importance of the ethical norm as contrasted with political necessity remained unresolved. Machiavelli and his followers tried to cope with the issue by glorifying power. If that approach is unacceptable, it must be possible to show that the Machiavellian approach to power is in error.

The nature of power · The national unification which successful kings accomplished at the beginning of the modern era was accompanied, then, by a sanctification of power politics which is symbolized by the words "state" and "sovereignty." They were invented by the apologists of absolute power, by men like Bodin, Hobbes, Grotius, and Spinoza, the object being to provide a universal value and appeal for the prince's efforts to extend and consolidate his realm.

This hallowing of political *power* makes it important to face the question of what *power* is. In recent years, this question has received a good deal of theoretical attention. In the age of Hobbes it was of all-absorbing interest. Hobbes, inspired by the passion of his time for geometry, described power as "the present means to secure some future apparent good." Such a definition is much too broad; for what is wealth but a "present means to secure some future apparent good"? Wealth and power are, of course, interrelated, but a definition which fails to bring out the difference between them is not much good. It is very revealing that the age which saw the creation of modern government should have favored such a concept. In order to get a fuller view, some elementary points need to be made. Power, though often spoken of as if it were a thing, is actually nothing of the kind. It is, as the Hobbesian definition suggests, oriented toward things, and anything can become the basis of power. A house, a love affair, an idea, can all become instruments in the hand of one seeking

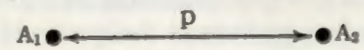
power. But in order to convert them into power, the power-seeker must find human beings who value one of these things sufficiently to follow his leadership in acquiring them. Power, therefore, always presupposes several human beings who are joined together in pursuing a common objective. Without common objectives there can be no power. Enduring common objectives engender organization. All more stable power is therefore based on organization and the control of organization.[20]

The nature of the human relationship which we call power must even today be considered controversial. That it is a human relationship has not always been accepted as axiomatic by political thinkers. Two aspects of the power relationship may be reasonably well distinguished: it may be either *substantive* or *relational*. That is to say, power may be considered a substance, or a relation. Hobbes and the entire school of thinkers following him, from Spinoza and the natural-law writers through the utilitarians and Hegelians down to our various totalitarians of the present day, have variously written of power as if it were a *thing had*, a substance possessed by some human beings and employed by them in an effort to control others. A diagram might indicate more clearly the structure of this "corporeal" or "substantive" view of power:



A = agent possessing power
p_1, p_2, p_3, p_4 = powers possessed by agent

Other thinkers have been inclined to stress the mutual interdependence of human beings in a political situation. They have emphasized primarily the fact that there must be people *over* whom to have power. Power, when taken in this sense, is a bond between people simultaneously embracing the leader and the led, the ruler and the ruled. Such a "relational" concept of power is found in John Locke's philosophical writings, though his political tracts follow the other terminology.[21] It has been more fully explored only in recent times, aided by our increasing knowledge of human psychology. This view of power also might be represented by a simple diagram:



A_1, A_2 = agents involved in power relationship
p = relationship containing power

Although stress is laid at various points upon this mutual aspect of the power situation in the analysis of constitutionalism which follows, each of the two interpretations covers *part* of the facts as we know them. Actual power situations, in other words, contain both the mutual relationship between leader and led, and the corporeal possession of an ability to exact obedience by the leader. It is to some extent a matter of long-run and short-run analysis, or, to put it more abstractly, it is a matter of neglecting or including the time factor.[22] The relational conception makes allowance for the time factor, and thus provides the basis for a long-run analysis.

The two approaches to power are reflected in two distinct views concerning the importance of consent and constraint. The corporeal concept of power inclines toward a neglect of the phenomena of *consent*, interpreting them as propaganda, symbols, myth, and so forth. Marxist and Fascist writers have a good deal in common with Hobbes in this respect. Thinkers who emphasize the relational concept of power tend to neglect the phenomena of conquest and government through force or constraint. Both consent and constraint are something real, they both *do* something, accomplish something. It is wrong to look upon consent merely as nonconstraint, or upon constraint as nonconsent. Consent and constraint are something more than the negation of their opposites; they are realities generating power.

Power, then, is a human relationship in which the leader and the led are banded together for the accomplishment of some common objectives, partly by consent, partly by constraint. In the age in which modern government came into existence, a general inclination prevailed to hallow power for its own sake. The "state" and "sovereignty" were the symbols in terms of which power was represented as an end itself, rather than a means toward accomplishing ends which it would be the task of government to ascertain through consultation with the governed. It may well be that such an exaggeration of the role of power was inevitable to bring into existence the unified national governments which were later constitutionalized.

The core of the power system: bureaucracy · In the age of absolutism, we suggested, public policy was dominated by *mercantilism*—a body of thought which its ablest expositor has called a "system of power."[23] Mercantilism, though usually associated with the idea of protectionism, was committed to freedom of trade. Internally, it was an economic corollary of the monarchical policy of centralization and unification. "Domestic tolls, local privileges, and inequalities in the system of coinage, weights and measures, the absence of unity in legislation, administration and taxation, it was against these that the mercantilist statesmen struggled. They there-

concept be more fully stated. For even though a complete analysis cannot be given until later (chs. VII ff.), a sketch of constitutionalism's historical evolution presupposes a general grasp of what it is, or is taken to mean here. Constitutionalism by dividing power provides a system of effective restraints upon governmental action. In studying it, one has to explore the methods and techniques by which such restraints are established and maintained. Putting it in another, more familiar, but less exact way, it is a body of rules ensuring fair play, thus rendering the government "responsible." There exist a considerable number of such techniques or methods, and they will receive fuller treatment at the appropriate place.

In this general historical sketch, the question confronts us: how did the idea of restraints arise? And who provided the support which made the idea victorious in many countries?[25] There are two important roots to the idea of restraints. One is the medieval heritage of natural-law doctrine. For while the royal bureaucrats gained the upper hand in fact, the other classes in the community who had upheld the medieval constitutionalism, the barons and the free towns and above all the church, developed secularized versions of natural law. At the same time, they clung to residual institutions, such as the *parlements* in France. After the task of unification had been accomplished, and the despotic methods of absolutism could no longer be justified, these elements came forward with the idea of a separation of power. Both the English and the French revolutions served to dramatize these trends.

But why did the same not happen in Germany and Italy? Remembering that the centers of medieval universalism were Empire and Papacy, we can readily understand that they would stay intact much longer, both institutionally and ideologically, in the countries which constituted their core, that is to say, in Germany and Italy. Political organizations and systems of government disintegrate at the periphery first; hence Sweden and Britain were among the first to evolve national unification and emancipation from the medieval system. Indeed, both countries never fully belonged to the universal structure of medieval Europe. They developed their own *imperium in imperio*, and hence their transition from medieval to modern constitutionalism was interrupted by only a comparatively short period of absolutism. This English absolutism, moreover, never went so far as it did in the countries nearer the center of medieval universalism.

The other root of the idea of restraints is shared by medieval and modern constitutionalism, and is peculiar to some extent to Western culture. It is Christianity, and more specifically the Christian doctrine of personality. The insistence upon the individual personality as the final value, the emphasis upon the transcendental importance of each man's soul, creates an

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insoluble conflict with any sort of absolutism. Here lies the core of the objection to all political conceptions derived from Aristotelian and other Greek sources. Since there exists a vital need for government, just the same, this faith in the worth of each human being is bound to seek a balance of the two needs in some system of restraints which protects the individual, or at least minorities, against any despotic exercise of political authority. It is quite in keeping with this conflict that the apologists of unrestrained power have in all ages of Western civilization felt the necessity of *justifying* the exercise of such power, a necessity which was not felt elsewhere. Bacon and Hobbes, Bodin and Spinoza, and even Machiavelli insisted that some sort of inanimate force, reason, natural law, or enlightened self-interest would bring about what their constitutionalist opponents would embody in effective institutions: restraints upon the arbitrary exercise of governmental power.

Turning to the question of who provided the effective support which made the idea of restraints victorious in various countries, the answer must be that it was essentially the mercantile middle class who did. The bourgeoisie, as it has come to be called, furnished everywhere the mainstay of political support for constitutionalism. This fact is noteworthy, but should not be overemphasized. In recent times, organized labor has stepped into the role of the bourgeoisie in many countries, for the simple reason that it, above all other classes in the community, is an exposed minority. To be sure, the class-war doctrine of orthodox Marxism took exactly the opposite line, but two things should be kept in mind: First, in the countries most deeply permeated by constitutionalism the Marxist doctrine never gained a substantial following, except amongst intellectuals. Second, the terrible persecution of the labor class in countries which have lost constitutionalism in our generation has produced a "crisis" of Marxism[26] amongst its most ardent upholders. It is undeniable that the economic problems of our industrial society have generated strains which are taxing established constitutional systems to the breaking point. But the evils of despotism have so rapidly become manifest that the most diverse groups, classes, and nations throughout the world are seen banding together for the reconstruction of constitutionalism on a new social and international basis.

Since the Second World War, perhaps the most striking development is the growth of a European Union which in the course of 1948–49 made the first halting steps at achieving actual institutional form. The common base of the nations of Western and Middle Europe is their attachment to constitutional, as contrasted with Soviet, democracy. Prevailing opinion is socialist, but the gradualist approach is prevalent.[27] (See below, ch. XI, for further analysis.) The idea of uniting Europe in defense of her tradi-

and professional middle class which carried forward not only the industrial revolution, but the demand for constitutional government as well. The bourgeoisie, to repeat, unquestionably furnished the minds and the men for this politico-economic revolution. But it is quite another matter whether the leadership stayed with them. Even the term middle class, quite appropriate at an early stage in the evolution of modern society, gradually loses its distinctness in the course of the nineteenth century. This broadening at the base will be dealt with presently.

Industrialization brought with it one feature peculiarly favorable to constitutionalism, and that is the progressive cheapening of the printed word. For the modern press, the channel of mass communication, was everywhere in the vanguard of advancing constitutionalism (see ch. XXIV below).

Democratization of constitutionalism · Constitutionalism, both in England and abroad, was at the outset not at all democratic, but rather aristocratic. In spite of the fact that the *Declaration of Independence*, and the *Rights of Man* of the French revolution, had proclaimed the equality of all men, dominant political practice remained sceptical. The *Federalist* has not much love for the mass of the common people; it has much to say about the "gusts of popular passion" and the like. Throughout the nineteenth century, intellectuals in England and elsewhere remained highly critical of democracy.[30] What is more important, democracy, in the sense of universal suffrage of men and women, the equal participation of all classes, especially the labor class, in political life, and the elimination of racial and religious discrimination—democracy in this sense spread slowly throughout the nineteenth century, and has not yet reached its culmination.

The milestones in the process of democratizing constitutionalism in the nineteenth century were: Jackson's presidency; the Reform Act of 1832; the revolution of 1848 in France; and the Civil War. Although none of them, obviously, realized democracy, they each contributed a significant forward step. Jackson's presidency provided the first effective frontal attack upon government by the elite; through the Reform Act of 1832, and the other great measures of reform which accompanied it, a broad breach was made in the system of government by the privileged, as exemplified in rotten boroughs and vote restrictions. The revolution of 1848 in France challenged the power of financial and industrial capital, and while its premature, radical experiments with socialism led to the Bonapartist reaction, it nevertheless heralded the coming of labor into its own. Farther east beyond the Rhine, the revolution precipitated an unsuccessful attempt to unite Germany by popular movement, after having swept away the system of Metternich. In Italy a similar initiative failed. But in spite of the

A sense of these realities and the strength of the constitutional tradition combined to keep English and American labor largely hostile to Communism and its doctrine of violence. Even in those European countries where Marxism became powerful, Socialist parties found themselves in practice obliged to soften the rigor of the doctrine. Sharp conflicts raged which led to an increasing recognition of the desirability of working within a constitutional context. After the First World War, the Socialists entered a number of governments and proceeded to apply their general policies under constitutionalism. But owing to their failure to face the issues involved in a combination of socialism and constitutionalism, very serious strains developed. Germany, Italy, Sweden, Czechoslovakia, France, all these and many others, experienced dangerous crises which in a number of cases proved fatal. The advent of the Labour Party into power in Britain in the twenties was somewhat less disturbing, but provided no real test because of its lack of a majority. In the meantime, the Dominions of New Zealand and of Australia have been governed for some time by Socialists under a constitution.[32]

It is a curious fact that the two countries with the most distinctively democratic constitutional tradition, the United States and Switzerland, have not participated in this experimentation. Some would say, of course, that Franklin D. Roosevelt's presidency was socialist in outlook. There is no need here to go into these partisan arguments; the fact is that neither Roosevelt nor many of his followers ever acknowledged a theoretical attachment to socialism, let alone Marxism. To this extent he certainly differed from the Blums, Scheidemanns, and Benešes. But while there has been no participation of professed socialists in these two democracies, the socialization of the economy, that is to say, the extension of governmental participation in the economy, has gone forward apace in both these as in all other countries. The constitutional system of the United States and Switzerland has often creaked under the load, but it has not broken down. In both Switzerland and the United States, some grave warnings have been heard.[33] Basing their analysis upon the "state" concept, which we have rejected, these writers have urged that a continuous expansion of the state was bound to destroy the individual and hence the free society of "capitalism." As a result there are quite a few today who would hold that constitutional democracy requires "capitalism" or "free enterprise" for its operation. These slogans are not often very carefully defined. A realistic view reveals that words like "free enterprise" and "free competition" refer to conditions which have never actually existed.

Since the Second World War, the social democratic movements in the leading countries of Europe have increasingly stressed constitutionalist

views, and all major new constitutions, like those of France, Italy, and Germany, are more cognizant of the need for regularized restraint. To be sure, the first French constitution, rejected by the voters in 1946, was radically unrestrained in its concentration of most power in the hands of a parliamentary majority, as are indeed the German constitutions of the Soviet Zone of Occupation, as well as the draft constitution for all of Germany, published by the German Communists. But the Social Democrats of Germany, as well as the Socialists of France to some extent, are sharply opposed to such corruption of the constitutionalist position. More especially do all moderate elements now perceive the importance of a firm guarantee of fundamental human rights or civil liberties. At the same time, the British Labour government has proved at least premature those prophets of doom who freely predicted a collapse of English constitutionalism at the time the Labour Party would attempt to institute socialism.[34] The crucial point is unquestionably this: that socialism can be realized gradually enough, in the view of these Europeans, to become compatible with constitutional democracy in the process.

Without pretending to pronounce final judgment in the matter, it would seem, in the light of present evidence, to be quite probable that constitutionalism is combinable with a considerable variety of economic patterns. Constitutionalism rests upon a balance of classes in a society. But this balance is not a hard and fast one, it is not an equipoise of mechanical weights, but rather a moving equilibrium of a kaleidoscopic combination of interests. The government, through the parties, operates as the balancer of these combinations. In a wider and deeper sense, the introduction of the "state" concept distorts the outlook of constitutionalism. For, when socialism is interpreted as "state" socialism, "state" and "society" are confronted as if they were two mutually exclusive corporate entities. Constitutionalism embodies the simple proposition that the government is a set of activities organized by and operated on behalf of the people, but subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused by those who are called upon to do the governing. There is no apparent reason why a greater or lesser amount of such governmental activities should be incompatible with effective restraints, provided the concentration of power in one group or one man is guarded against. "Social democracy," one of its ablest historians has said, "is not a miracle which comes to life at a particular moment and then continues to function automatically, but it is rather a political task upon which it is necessary to work continuously."[35] Change, as we pointed out at the beginning, is not something to be feared and avoided, as Aristotle thought, but is of the very warp and woof of modern constitutionalism.

Conclusion · There are two issues which confront constitutionalism today: socialism and the international or world order. In spite of the fact that internationalism and socialism are linked in many minds, the two issues are intrinsically distinct and perhaps even liable to suggest conflicting solutions. For to the extent that socialism implies planning, it impedes the progress of internationalism, since planning is more complicated on an international plane. It is a striking fact of contemporary life that convinced adherents of constitutional democracy usually split on the issue of the relative urgency of these two tasks. Fortunately, from a more comprehensive viewpoint, the conflict resolves itself. The history of the past thirty years has shown beyond a shadow of a doubt that constitutional democracy cannot function effectively on a national plane. An international pattern of constitutionalism is clearly indicated for all that part of the world which is democratically governed. The League of Nations, no matter what its faults, and they were many, nevertheless represented a first decisive effort to extend constitutionalism to the world at large. It was a projection of the aspirations of the Declaration of Independence. Whether the United Nations will prove to be more viable remains to be seen. Its greatest advantage over the League is that the United Nations really encompasses the world.

The worldwide tasks of constitutionalism should not be allowed to obscure the many unfulfilled tasks of democracy at home. Even in the most democratic countries, the process of democratization has stopped short of some of the most obvious issues, racial, social, and others. The need for a responsible government service is widely felt; yet the methods best adapted to fit such services into a constitutional democracy are as yet untried. The fear of the bureaucracy, inherited from a monarchical past and enhanced by a totalitarian present, remains a powerful factor inhibiting bold solutions. The role of public opinion and propaganda is casting a shadow over the conventional formulas of "the will of the people" and "the belief in the common man," which have been axiomatic in democratic constitutionalism.

Even more disturbing are recent trends, engendered by the concern over security, which are weakening the tradition of basic civil rights, including academic freedom. Investigatory and intelligence functions, believed necessary to cope with the enemies of constitutionalism, are dangerous activities in themselves. They are firmly rooted in "reason of state," and in the traditions of government in the preconstitutionalist period. Yet, the collapse of constitutional systems has raised the issue of how to deny the protection of constitutionalism to its avowed enemies. Any analysis of constitutionalism today would be incomplete if it did not attempt to assess recent efforts made to cope with the dangers which the rise of totalitarian dictatorship has created.

many ways the church became the example of secular rulers. In no respect was this more true than in that of the techniques of administration. More amply provided with literate personnel, the church developed, during the Middle Ages, the rationalized techniques of administration which the princes were quick to follow, at the suggestion of clerical advisers. These central bodies of royal servants are the beginnings of our modern administrative systems.

The elementary or basic aspects of bureaucracy: England · Conventional English and American history-writing has so exaggerated the role of Magna Charta and Parliament that the administrative core of British institutions of government has been obscured. Out of a justifiable pride in later developments, constitutionalism and democracy, the myth has grown up that the origins of modern government in Britain and America were different from those in continental Europe, that constitutionalism came first and the administrative services afterwards. Such a view is not only contrary to the facts, but it obstructs a real understanding of the strength of constitutionalism itself. Constitutionalism comes as a restraining, civilizing improvement; there must, in other words, first be government before it can be constitutionalized. That is why we suggest the study of administrative government, of bureaucracy, as the necessary preliminary of a full grasp of constitutional government. A comparison between the English and Prussian development, one very early and the other very late, will be instructive, though other countries, such as France and Spain, could serve equally well, since the development in the early phases is very similar throughout Western civilization, notwithstanding the great divergencies in the coming of constitutionalism.

A number of English historians, outstanding among them T. F. Tout,[1] have in recent decades brought to light the main outlines of early administrative history. The great Stubbs already had shown that the administrative system was set up in the days of the later Norman kings and found its first full development in the reign of Henry II (1154–1189). But to him "the Angevin administrative system was important, not so much in itself, as because he regarded it as the source of the parliamentary organizations of later times." His main interest "was in the origins of our modern constitution." It is the more striking that he should have stressed the early administrative system. But of course the great administrative departments kept on developing, and it is not too much to say that without that continuous development the government could not have succeeded in uniting the nation, which enabled it to undertake the task of constitutionalizing the centralized system. In the Middle Ages, Tout has rightly observed, when

ized methods of modern business administration are merely elaborations of techniques which the governmental bureaucracy had first developed. Rightly did Carl Russell Fish observe that "as long as the controlling element in the country (namely, business) manage their private affairs in a careful systematic manner, we may expect the government to conduct its business on approximately the same principles."

Functional and behavior aspects · The six elements of a bureaucracy brought out by this analysis fall naturally into two groups. Three of them order the relations of the members of the organization to each other, namely, centralization of control and supervision, differentiation of functions, and qualification for office (entry and career aspects), while three embody rules defining desirable habit or behavior patterns of all the members of such an organization, namely, objectivity, precision and consistency, and discretion. All these elements are familiar enough to the modern science of administration. But it is sometimes forgotten that they were originated by men of extraordinary inventiveness who were laying the basis of a rationalized society by these inventions.[6]

Turning first to the relations of the members of an organization, we find that they are elaborated and defined with reference to the functions to be performed. We may therefore call this group of elementary aspects functional criteria. These simple functional criteria, while underlying elaborate modern rules and regulations, as far as governments are concerned, still are far from being fully carried out. Practically all modern governments have struggled time and again to revamp their administrative pattern in terms of these basic functional relationships, but whether it be the *Report of the Hoover Commission* (1949), the *Report on Administrative Management* (1937), or the *Machinery of Government Report* (1918), there are always many vested interests ready to resist such simplification and reform.

When we come to the second group of criteria, dealing with behavior, we find a similar situation. In fact, these criteria contain normative elements which are puzzling. They are really striking instances of the intimate connection between fact and norm which is characteristic of social-science concepts. As in other cases, the normative aspect is dominant when individual conduct is examined in the light of the concept. An official who is indiscreet is immoral. But these criteria are rules of expediency founded on experience when an organization is examined in relation to the concept; organizations which fail to maintain discretion among their staffs usually fail. A more detailed analysis of the functional aspects must next be undertaken.

regional differentiation, or, as it is usually called, local self-government (home rule). But as it proceeds downward, such differentiation raises problems of integration with regard to differentiated functions, and problems of centralization with regard to functions not yet technically differentiated, but regionally dispersed. These problems of integration and of centralization, of supervision and control, may be lumped together under the heading "hierarchy."

The hierarchy · Nowhere is the impact of ecclesiastical experience upon administration more apparent than in the term hierarchy. Indeed, the word has such definite associations with the Catholic church that it might be well if we had another term. But since none is readily available, we will say that hierarchy is the pattern of subordination by which the several levels of command and obedience are defined. The hierarchy is a concomitant of the rational distribution of functions. As soon as an organization grows to any size the large number of officials who exercise partly conflicting functions stand in constant need of integrating and co-ordinating leadership. This seems obvious enough, and yet the implications of administrative leadership have received rather inadequate attention, except in connection with private business management. The urgency of such administrative leadership springs from two related and recurrent problems. On the one hand, the detailed and specific functions of the lower-downs need constant reinterpretation in terms of the larger objectives which they presumably serve. On the other hand, the obstacles and difficulties encountered in the exercise of these detailed and specific functions require consideration with a view to the possible improvement or alteration of these larger objectives or purposes. Even so general a statement shows that the semimilitary, authoritarian nature of a government service is by no means a gratuitous invention of petty autocrats, but is inherent in the very nature of the processes which form the essence of all administrative services. This point hardly requires emphasizing in an age which exhibits examples of such authoritarian, hierarchical control on all sides, since large-scale business corporations, trade unions, and many other organizations are conducted on precisely this pattern.[8]

The need for administrative leadership explains to some extent why monarchies have been so successful in developing a high-class government service. If the powers of control and coercion connected with the various offices and functions are arranged in more or less concentric circles which become smaller as we ascend to the higher levels, a single individual or bureau acting as a unit would presumably have ultimate control and power. Moreover, such an individual or group must be himself a part of the hier-

archy, though not necessarily chosen from among it. This unitary central control characteristic of a fully developed hierarchy may, of course, be quite effectively exercised by elective officials, provided there is a sufficient amount of continuity and agreement between successive office holders as to the conduct of governmental activities. The English cabinet in the latter half of the nineteenth century succeeded in building up a remarkable public service corps; it may be well, however, to keep in mind that the English Prime Minister has often been called a practical dictator once he has entered No. 10 Downing Street with a safe majority in the House of Commons (see below, ch. XVIII, p. 363).

Even though a trend toward unitary leadership be inherent in the hierarchical aspect of bureaucracy, or of effective government service, it seems undesirable to overemphasize this point. Hierarchy in our opinion should describe more generally any determinate system of distributing the powers of control and coercion. Hierarchy subordinates officials performing very specific and tangible functions to other superior officials, who supervise and direct a determinate number of these subordinates; the superior officials in turn may be supervised and directed by a still more limited number of "higher-ups." Nor need this scale of subordination and control be restricted to individual officials. A hierarchy may subordinate one group of officials to another group of officials acting together as a unit. Or individual officials lower down may be subordinated to a group superior higher up. The Swiss (Executive) Council, American administrative commissions, and practically all judicial systems are of this structure. In Anglo-Saxon countries, although the power of specific coercion of the higher courts to determine the decisions of lower ones is limited, the power of reversing decisions produces a similar effect crystallized in the rule of *stare decisis*. This rule limits narrowly the discretion of lower courts. An element of discretion remains, however, and this fact has led some writers to overemphasize the difference between courts and administrative bodies. In terms of actual conduct, the difference is quite small; for although the hierarchical principle seems to imply flawless subordination, the extent to which any given hierarchy conforms to that standard is limited by other competing principles which are essential for its life, such as the principle of differentiating and distributing functions. A higher official will hesitate to reverse the decision of a lower official when he feels, as is often the case, that the lower official has a better knowledge of the facts in detail. The question of whether judicial or administrative action should be provided for is only to be answered in respect of the purposes or objectives to be achieved. There is nothing inherently beautiful in either. Both are techniques for accomplishing certain purposes, as we shall show further on. And both are com-

The foregoing discussion shows, it is hoped, two things: (1) secrecy is an inherent feature of all governmental administration, and discretion a carefully cultivated trait of administrators, and (2) the sphere of applicability of both is dependent upon the nature of the tasks in hand, the conditions under which the task must be executed, and the governmental framework' whether democratic or authoritarian. We know too little about the probable limits of discretion and secrecy to formulate precise hypotheses concerning the sphere of applicability. But this fact should not mislead us into denying the great importance of secrecy and discretion as parts of bureaucratic behavior, regardless of whether we like what the particular bureaucracy is doing.

Conclusion · We have sketched the nature of a government service or bureaucracy in broad outline. All realistic study of government has to start with an understanding of bureaucracy (or whatever else one prefers to call it), because no government can function without it. The popular antithesis between bureaucracy and democracy is an oratorical slogan which endangers the future of democracy. For a constitutional system which cannot function effectively, which cannot act with dispatch and strength, cannot live. Fortunately, both the Swiss and the British have shown that an effective, responsible bureaucracy is quite compatible with vigorous constitutionalism (see below, ch. XIX). British constitutionalism, like all constitutionalism, developed as a system of controls imposed upon a vigorous bureaucracy. The early unification of England made her one of the pioneers in developing administrative techniques for modern government. But the trend is universal throughout the Western world. In the course of this analysis, six primary criteria of such bureaucracies have been identified: (1) the differentiation of functions, (2) qualification for office, (3) centralization and integration of control and supervision, (4) objectivity, (5) precision and consistency or continuity, and (6) discretion. They are found in a small administrative council at the beginning of Norman England, and they pervade a vast administrative machine such as the British Empire. As administrative organization unfolded, an increasing amount of publicity could and had to be given to governmental activity. Such publicity, though often bitterly resented and opposed by the bureaucracy, really contributed powerfully to its development by making it more determinate and institutionally stable. The effective working of such responsibility and publicity depends upon a viable constitutional system. Therefore constitutionalism, though historically opposed to monarchical "bureaucracies," actually reinforced and aided the full development of bureaucracy—a process which is still going forward.[16]

VI

Justice and the Judicial Function

Introduction: justice and government · Rival conceptions of law · "Artificial reason" of the law · The judicial process · The rule of precedent and the judicial process · Judicial organization in continental Europe · Bench and Bar and the Act of Settlement · The judiciary and the rule of law in Prussia: a contrast · Judicial restraint as the beginning of constitutional government · Administrative law · The *Conseil d'État* · French administrative justice and American problems · Conclusion.

Introduction: justice and government · "Justice is the end of government," *The Federalist* noted. "It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." Justice has often been expounded as the primary, or even the only "ideal" purpose of government. This is the view of Plato, especially as stated in *The Republic*. That marvellous dialogue, perhaps Plato's greatest, bears the subtitle: "or about the just." But do Plato and *The Federalist* mean the same "justice"? Plato himself makes it quite clear that he is not talking about "states as they actually are," but about an ideal commonwealth, perhaps realizable with great good luck, but certainly not then in existence. Careful reading soon shows that what Plato meant by "justice" includes a large part of morals. That government should be conceived and carried on with the objective of making its citizens "good men" is an idea which many may laugh at, but as an ideal it seems to modern man questionable primarily because of the totalitarian implications of employing the force of governmental power for such spiritual purposes. In any case, justice as an objective of modern government, in the sense in which objectives are treated here, is a more limited concept. It is neither identical with law, nor entirely transcending law; nor is it the subjective quality in the individual which makes him try to achieve justice. The ancient Aristotelian conception of justice as related to equality distinguished between corrective and distributive justice. Corrective justice is concerned with equal distribution of goods between persons, distributive justice with the relative equality of persons in accordance with their differences. Distributive justice is the more important of these. But justice as a primary objective of modern government is concerned with two things: to insure that all persons are put in a position to get what they are entitled to under the law, and to insure that no one is

Rival conceptions of law · Differentiation of the judicial function could not commence, of course, until the idea of "making" laws had become distinct. In the Middle Ages there existed, broadly speaking, no such idea. Law was assumed to be something already in existence, fixed and immutable. All that was thought necessary was to find out what this law was, to interpret and determine it (*jus dicere*). Custom was supposed to be the fountain of this law. But custom is local, and the inconveniences which resulted from the great variety of rules seriously troubled medieval governments. As we have already pointed out, one ideal weapon, the Roman law, was available against this multiplicity of local laws. It fitted in with the prevailing notion that law is something immutable, but had the advantage of stemming from a single source. What was more, the Roman law was patterned on the needs of a highly civilized society, built on commerce and industry. It was, to that extent, a welcome instrument to the commercial and industrial classes in their conflicts with the feudal landowning classes. Emperor, pope, and king alike sought refuge and relief in its provisions. However, the struggle between royal and papal authority, which was so significant an aspect of the later Middle Ages, made national kings turn away from the Roman law. More particularly in England, a common law, expounded by the king's judges, rapidly amalgamated the more useful ideas of the Roman law with the broader principles of Germanic customs. This development is most strikingly illustrated by the work of Bracton (1216–1272). As a result, England already possessed a substantial body of common national law at the time when elsewhere the Reformation, by eliminating most of the ecclesiastical jurisdictions, for the first time made possible the consolidation of national systems of law. On this law judges could base their decisions in opposing the royal claims to supremacy in the field of lawmaking, which Bodin's sovereignty had so ingeniously vindicated for the royal authority. Coke's famous claim that the king is *under* the law assumed a significance which it could not have had when no national law was extant.[3] In the course of the century from 1520 to 1620 (the Reformation), it became increasingly clear that in England parliamentary statutes were laws made by the king in Parliament. Legislation became an acknowledged fact; but it took quite some time until it was generally recognized. To be sure, Sir Thomas Smith in his *English Commonwealth*[4] distinctly speaks of a legislative function apart from the judicial function of Parliament. Francis Bacon's entire work on the common law is also permeated by this distinction, which is implied in his celebrated dictum that "the common law is more worthy than the statute law." Yet it is not easy to fix with any exactness the beginnings of the legislative activity which has become one of the main characteristics of

"Artificial reason" of the law · The doctrine of the "artificial reason," then, grew out of an argument as to whether the king was or was not above the law. Sir Edward Coke had been restricting the jurisdiction of the ecclesiastical Court of High Commission. He was asked to discuss the matter with the clergy in the presence of King James November 13, 1608, and he roundly asserted that he would not be able to accept the Romanist interpretation of the clergy. James, taking exception to this dogmatic view, declared that he was the supreme judge, and that under him were all the courts. To this Coke replied: "The common law protecteth the King." "That is a traitorous speech," King James shouted back at him in great anger; "the King protecteth the law, not the law the King. The King maketh judges and bishops." He then proceeded to denounce Coke so vehemently, shaking his fists at him, that Coke "fell flat on all fower" before the King, and humbly begged his pardon.[6] But the matter did not long rest there. In 1616, a similar quarrel ensued over whether the king could stay a court proceeding which he considered contrary to his prerogative. Under the leadership of Coke, then Lord Chief Justice of King's Bench, the judges had claimed such a proceeding to be contrary to law. To this claim James answered that although he never studied the common law of England, yet he was not ignorant of any points which belong to a king to know.[7] Thereupon his idea that "natural reason" unrelated to a knowledge of the law of the land could be employed in interpreting statutes was rejected by Coke in the most explicit form. "Reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood as an artificial perfection of reason, gotten by long study, observation and experience, and not as every man's natural reason . . . by many successions of ages [the law of England] has been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it, that no man out of his private reason ought to be wiser than the law, which is the perfection of reason." Thus reason is clearly not a standard, philosophical or otherwise, brought to the law from outside, but the essence of the law itself, acquired in the process of learning the law. This notion is not only historically significant, but has a certain general validity. For it is only when general rules, embodied in legislative enactments, are transformed into detailed statements applicable to everyday life that they become part of the living law.

The judicial process · To the judicial function corresponds a distinctive process. This process is typically that of deciding what is just in a controversy between two or more contending parties. The decision may be

stitution, on the other hand, are usually generalizations from the several such historical or legal constitutions with which the author happened to be acquainted. In the case of European philosophers their concepts of a constitution are usually derived by contrasting the meaning commonly attached to the word constitution (*constitution*, *Verfassung*) in their own country at the time of their writing with what the Roman law and Aristotle presumably suggested as being the meaning of constitution in classical antiquity.

Five concepts defined · Long lists of such "meanings," historical, legal, and philosophical, can easily be compiled. It seems more profitable to summarize such an inventory in terms of a few dominant concepts. Aristotle's concept of a constitution—or rather his concept of *politeia*, which is commonly translated as constitution—refers to the whole order of things in a city. Hegel, who so profoundly influenced the nineteenth century, entertained a very similar idea. Akin to this conception is the notion that the constitution describes the actual organization of the government in broad outline, so that we can speak of a monarchical constitution, a democratic constitution, and so forth. Finally there is found the idea, current among lawyers with a philosophical bent of mind, like Coke, that the constitution embodies the basic legal conceptions of the community, their outlook on life or *Weltanschauung*, in so far as it can be embodied in general legal rules. A similar conception is found in Jean Jacques Rousseau. It is obvious that these three descriptive, general concepts of what a constitution is apply to all political communities, to a Fascist and Communist dictatorship just as much as to the United States or England.

Besides these general descriptive concepts of a constitution we find two concepts which are based upon specific formal aspects. Of these, one maintains that a constitution must be *written*, in order to be a constitution, that it must be embodied in a document.[1] Superficial though this view may seem to us today, it was widely held during the age of constitution-makers in the past century and a half. This may be called the documentarian concept. It was bound to be challenged by students of the English political system like Lord Bryce; for English law makes considerable use of the concept of a constitution without having a written document to argue from. The other concept of a constitution stresses the need for a democratic or popular mode of amendment. In other words, it is the procedure of constitutional change which the procedural concept highlights. Such a concept is elusive because of the uncertainties surrounding the word democratic. What are we to think of the need of assent by the House of Lords, required in England until 1911? It does not appear very satisfactory to

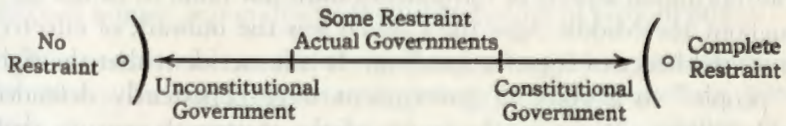
exclude such arrangements as out of keeping with constitutional principles. On the other hand, the Soviet constitution of 1936 has amending-power provisions.

The constitution as effective regularized restraint · For the sake of convenience, the five basic concepts which we have so far enumerated may be labeled philosophical, structural, legal, documentarian, and procedural. They are all valuable within their respective contexts, but none of these concepts is concerned with the *function* of a constitution and what it is supposed to accomplish. Function is intimately related to process; it is in terms of function that a process is molded. Hence the functional concept here used must be clearly understood. The definition given at the outset of this chapter said that to render a government constitutional required the establishment and maintenance of effective restraints upon political and more especially upon governmental action. Why should we insist that the restraints must be effective? What is this standard of effectiveness? It should be evident that the existence of formally legal restraints is in no wise an indication of the existence of a constitutional order in the political sense. All the cumbersome formalism of the Roman republican constitution cannot alter the fact that Rome in the first century before Christ had become an aristocratic absolutism, with power concentrated in the hands of the senate. Similarly, the legal separation of powers under the British constitution as expounded by Blackstone during the second half of the eighteenth century cannot blind us to the fact that power in England was largely concentrated in the hands of the aristocracy whose political will found expression in Parliament. On the other hand, a restraint might be very effective and thoroughly regularized, without necessarily being embodied in positive law unless law is very broadly defined as including all custom. Thus, what is perhaps the most important restraint of the English constitution, namely, the alternation of government between two or three parties, is quite effective. From what has been said it can be seen that the problem of effectiveness involves a factual situation and an evaluation and existential judgment of that situation. If no one has "absolute" power, if in actual fact there exists no sovereign who holds unrestrained power in a given community, then the restraints may be said to be effective.[2]

At this point it becomes necessary to introduce another important qualification. Unless such restraints are regularized, they cannot be said to have value as constitutionalizing factors. Madame Pompadour scolding the king at her bedside, or a Brown Shirt rebellion against Hitler, while possibly very effective checks upon the arbitrary whims of an unconstitutional ruler, cannot be classed as even rudimentary constitutional devices.

for supremacy: the land-owning squirearchy allied with the church, and the mercantile classes. In the course of the eighteenth century the latter gained increasing ascendancy as the formal constitution of divided powers was superseded by a new concentration in the hands of parliamentary leaders. This emergency of "parliamentary government" under Walpole eventually brought on the American revolution and the Reform Bill (1832). Both were fought by new classes in the community who sought to establish an effective and regularized restraint. From this sketch it can be seen that what appears to the legalist or the historian as an unbroken period of constitutionalism (simply because men in authority called it so), must appear from the standpoint of political science and its functional concept of a constitution as oscillating between constitutional and unconstitutional periods. It also makes it easier to recognize basic rights or civil liberties as patterns of restraint. This means that they are variable in correspondence with the shifting class structure of society, rather than God-given or nature-given absolutes. Thus the personal rights recognized in eighteenth-century England differ markedly from those adopted later in America. They were the rights which mattered most to the landed gentry and the mercantile aristocracy ruling the land. They represented an "area of agreement" beyond the class conflict upon which most people agreed. In short, such restraints depend for their maintenance upon a balance of classes in the society to which they apply.[4]

Restraint a question of degree · Upon further reflection, it will be apparent that no government, in the light of the preceding discussion, can be described as strictly constitutional. Nor will a completely unconstitutional order be discovered amongst the governments, known to us. Like all true functional concepts, the notion of constitutional government is essentially descriptive of two poles: very strong restraint and very weak restraint. Between these two poles, all actual governments can be ranged. The unreal limits are "complete restraint" and "no restraint," thus:



For rough descriptive purposes, governments near the no-restraint pole could be classed as unconstitutional; governments near the complete-restraint pole as constitutional. In the middle there would remain an area of uncertainty. Thus the Soviet Union today would be in the first class, the United States in the second; Prussia in 1860 (before Bismarck's usur-

decision genuine: the decision must be reached after the mature deliberation of those who participate in the decision. Confusing *opposition* with *rebellion* prevents the mature deliberation of those who participate in the decision. Thus no genuine decision results. Neither free speech nor free assembly are "natural rights," but they are necessary concomitants of constitutional decisions. For mature deliberation of an issue by any number of people who are to act collectively presupposes an exchange of views on the issues involved in the decision. If that opportunity is not available, nothing can be decided. This is the fundamental reason why plebiscites, so popular with dictators from Cromwell to the present day, fail to have the legitimizing effect which their initiators always hope for. Though they seem to offer an opportunity for collective approval of a government, their effectiveness in accomplishing that purpose is quite small. They carry little persuasive force in the community, because few of the participants feel any responsibility for the action taken.

The constituent power and the right of revolution · We are now ready to designate the group of human beings which we have broadly characterized in the last two paragraphs. No matter how large or small, it is a very decisive group which it is here proposed to call the constituent group wielding constituent power. Political thinkers during the seventeenth and eighteenth century were deeply concerned with this power, and we owe to them a great deal of our elementary insight. A thorough discussion of their views belongs to a history of political theory, where it is commonly discussed under the heading "the right of revolution." These early thinkers were preoccupied with the question of rights. A descriptive political science has no such concern; it does not ask whether people have a right to make a revolution, but rather what are the conditions under which they do make it. Those early writers, however, in their efforts to vindicate a right of revolution, brought out with much learning what the conditions of revolutions were. The traditional doctrine of the "right of revolution" contains at least this kernel of scientifically valid generalization. Thus Calvinist theorists, like Althusius and Rutherford, pointed to the many revolutions recorded in the Old Testament as proof of the fact that God permitted and even commanded revolutions, provided such revolutions were directed toward restraining the government in accordance with the command of God as interpreted by the priests. This argument the church had already used extensively in the Middle Ages. Still others, like Hotman and Buchanan, had likewise emphasized the historical fact of revolution as a valid part of their national history, whether French or Scotch. This earlier scientific interest in revolutions as manifestations of constituent power was

obscured by the moralist turn which this problem was given by Locke, and more emphatically by Rousseau. But the more realistic analysis back of it continues to be the mainstay of the argument.

Locke's view restated scientifically · In his *Second Treatise of Civil Government* (¶ 149), the great English myth-maker remarks: "For no man, or society of men, having a power to deliver up their preservation, . . . to the absolute will and arbitrary dominion of another; whenever anyone shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with; . . . And thus the community may be said in this respect to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government is dissolved." On the basis of our previous discussion, we should rewrite this statement, as follows, in order to fit it into the hypothetical form of scientific thought: "For a considerable number of men (who constitute the more intelligent and vital part of the community at large) have a tendency to maintain their freedom (of decision) . . . against the unrestrained and arbitrary decision of others; whenever anyone shall go about to bring them into a constrained and dependent condition, the presumption is that they will try to escape from it even at considerable sacrifice; . . . and through this (more intelligent and vital) part of the community what may be called 'the constituent group' manifests itself, but not as considered *under* any government, because their power can never come into play except to dissolve the established government and set up a new constitution." This transcription shows that Locke's juridical statement contains the kernel of two important scientific generalizations: (1) there tends to exist a residuary and unorganized power of resistance in the community which seeks to restrain the government, and (2) this constituent power can only come into play when the government fails to function. This second proposition is important in differentiating the constituent power from the constitutional amending power, for which provision is made in most modern constitutions (see below, ch. VIII). To be sure, the amending power is set up in the hope of anticipating a revolution by legal change, and, therefore, as an additional restraint upon the existing government. But should the amending power fail to work, the constituent power may emerge at the critical point. It was part of the optimism of these rationalists to assume that the revolutionary group necessarily and always employed its power to *establish* a constitution. This is not the case. Events in our time, as well as Cromwell and the Napoleons, have shown that such revolutionary groups may set up an autocratic system. Such groups therefore are not a "constituent power."

each of these comprehensive "revolutions" was in a measure directed against the immediately preceding revolution, because it had been made by the class whose rule it was now proposed should be overthrown. This brilliant and engaging synthesis of Hegelian, Comtian, and Marxist elements in terms of an autonomous group life is admittedly not a political theory of revolution—revolution taken in the limited sense of a change of government. Neither Rosenstock-Hüssy's, Cromwell's, nor Trotsky's language is applicable to Bolivia, which has had sixty-eight revolutions in the sixty-five years of her existence. Aristotle drew a distinction between revolutions which aimed at a change of government, and others which merely substituted one person or group for another but left the form of government intact. A survey of modern history makes it seem more imperative to distinguish between revolutions affecting a change in a whole way of life, including religion, economics, and manners, as well as politics, and revolutions changing the form of government. Curiously enough, a revolution of this latter sort was going on right in the very lifetime of Aristotle without his ever noticing it as such.

In France, a keen feeling for the difference between the Revolution of 1789 and the many revolutions which followed during the nineteenth century has crystallized into the expression *la grande revolution* as an appropriate designation for the earlier event. The "great" revolution had a spiritual significance which the others lacked. Though Cromwell listed freedom of conscience along with strictly governmental restraints upon parliamentary absolutism as a fundamental aspect of the *Instrument of Government*, this freedom of conscience in matters of religion, while operating as a restraint on the government, also represented a new spiritual conception which grew out of the Reformation. Likewise the Bill of Rights of man which appears in the American and French revolutionary constitutions represents a new spiritual departure in that it secularized and expanded the freedom of conscience. It thus gave political form to ideas which had germinated in the period of Enlightenment. Finally, the socialist constitutions of postwar Europe, in setting forth the right to work, or even basing citizenship upon this quality of being a worker, as the constitution of the Soviet Union does, provided expression for the ideas which had taken root in the labor movement of the preceding generations. What these broad elements mean politically will be shown in the next chapter, when we take up the constitution as a political force. For the present, it is enough to conclude that revolutions may be limited to the political, governmental sphere, or they may be not so limited, and thus be unfathomable, incalculable, and incomprehensible to all but those who have been "seized by the spirit."

lasting importance. Perhaps the scepticism accompanying the new constitutions in Europe augurs well for their lasting value.

Aristotle's theory of revolution · The modern mind is and has been preoccupied with making suitable arrangements for change in a constitutional order. Change is viewed in an evolutionary sense, and is assumed to be moving in a definite direction which may be considered optimistically as progress or pessimistically as decline. In any event, change is taken for granted and revolution is deprecated, when it is deprecated, not because it is change, but because it is violent change. *Natura non facit saltum.* Revolution, but not change is unnatural. Very different was the view of Aristotle.[20] Motion in modern physics is the natural state. Modern political science also is kinetic. However, Aristotle's theory of revolutions is still the only fully developed theory. Aristotle described revolutions in terms of his fourfold method of stating a case (αἰτίου), namely, to use modern expressions, the material and energetic conditions, the conceptual framework, and the end or objective. Stated simply, the material conditions of revolutions are found by Aristotle to root in the economic class structure, and more particularly in the division of the community between the poor and the rich. The energetic conditions are provided by the restless scheming of potential leaders who are seeking ascendancy. Certain indications are offered concerning their psychology. The conceptual framework for revolutions persists in the form of ever-conflicting ideas concerning the just share of each individual and group in the community. The end or objective of all revolutions is the complete seizure of power by the revolutionaries. This remarkably lucid and comprehensive theory of revolutions may have been adequate for the Greek city-states, though no serious attempt has been made at verification. But the theory may not be adequate when we consider the great revolutionary upheavals of modern times, such as the French Revolution. For while the Aristotelian elements are present, spiritual elements have also loomed large. Modern theories of revolutions in their turn have been attempting to focus attention upon these elements. Accepting change not only as the "natural" state of affairs, but as intrinsically necessary and desirable, they have often viewed revolutions as approaches to a progressively realizable millennium. And if not that, they have taken periodic adaptations of the political order to underlying social change as a necessary "adjustment." Aristotle, on the other hand, while admitting the fatal persistence of revolutions, viewed them as substituting one kind of maladjustment for another. He therefore tried to find the least unbalanced political order (in which the conceptual framework of revolutions would have smallest scope) and then to maintain the *status quo.* But in many

has reminded us, Jefferson understood the ancient truth that where military power is highly centralized and separated from the masses of the people, the latter are in peril of losing their liberties. It is remarkable how small a role this once-prized right has played in the discussions over universal military service although one should have thought that the American people, like the Swiss, possessing this right would have wanted to exercise it in face of mortal peril. The right to bear arms has its value, though, for instance in strikes, for it gives organized labor a measure of protection against the abuse of military force by their opponents, self-appointed vigilantes, and the like. It is a right which has always been highly esteemed by the Swiss, whose deep-seated democratic instincts recognize in the armed citizenry the true safeguard of liberty. Not so in the more recent constitutions: no such right is stated in either the French or the Italian constitutions, and of course not in the German Basic Law. Instead, these constitutions are prepared to limit sovereignty in the interest of peace.

The third freedom is the right to worship as one chooses. This particular liberty was of great importance at the time of the English Revolution. Jellinek undertook to show that the freedom of religion constituted the first basic right to be recognized. Interest in this right has been revived in recent years by the religious persecutions of the totalitarian dictatorships. There is now a tendency for the constitutional protection to extend to every kind of conviction. Thus the German Basic Law (art. 4 (1)) prescribes that "freedom of faith and conscience and freedom of religious and ideological conviction shall be inviolable." The scope of religious freedom has posed very special problems in cases involving a refusal to obey the law, more especially laws connected with universal military service. While the treatment of the "conscientious objector" has been by no means ideal, there was a fairly general recognition of his position in England and the United States. In keeping with these trends, the German Basic Law now states it as part of religious freedom that "no one may be compelled against his conscience to perform war service as a combatant."

The fourth freedom, the one most frequently highlighted when people talk about civil liberties, is the freedom of speech. This freedom is, of course, vital in its most obvious manifestations to the operation of a free society, and is fundamentally related to the pattern of democracy. It is essential to keep in mind the fact that a menace to this freedom may arise from group pressure just as easily as it may from the government, especially in time of crisis. The development of radio broadcasting has also raised serious issues concerning freedom of speech through the use of radio; the charge of monopoly control is frequently heard and great difficulties have been encountered in apportioning time for presenting both sides of con-

troversial matters (see below, pp. 531, 533). Academic freedom, the freedom of the teacher to say what he wishes, is another facet of the same problem.

Closely related to the freedom of speech is (fifth) the freedom of the press. "Press" here means the printed word, books and magazines as well as the newspapers, now usually referred to as "the press"; but, as in the case of arms, the modern technology has produced factual limitations. This liberty no longer necessarily means the freedom to use the press to expound any particular view. Today the freedom of the press often means the protection of large business concerns in their use of the printed word for the purpose of making money, regardless of the moral, social, or other effects of that printed word, and regardless of who writes those printed words. The anxious question has been raised: "Is not the freedom of the press becoming an instrument for preventing views from being expressed, instead of making it possible for views to be expressed?" (See below, ch. XXIV, esp. pp. 520, 525 ff.).

The sixth freedom, that of assembly, the right to hold peaceful meetings, is nowadays often broadened to include the freedom of association, though the latter is not expressly guaranteed in the American Constitution. Like the other freedoms of expression, freedom of assembly cannot be exercised unless protection of peaceful group meetings against interference on the part of hostile groups of citizens is undertaken by the government (see next section). These freedoms can be taken together as primarily concerned with a citizen's right to political self-expression,—effective participation in political life, and hence constitutive of democracy itself. The new European constitutions all safeguard the right of association; it is of primary concern to the labor unions. Associated with this right is the right to strike. Thus the preamble of the French constitution of 1946 says that "the right to strike may be exercised within the framework of the laws"; the German Basic Law does not go as far, but explicitly recognizes the right of such associations "to safeguard and improve working and economic conditions" (art. 9 (3)). The Italian constitution, like the French, recognizes this right within the framework of the laws.

A seventh freedom has in recent decades been much discussed, a new freedom which is not included in the Bill of Rights of the American Constitution. This is the freedom to work, which is essential to the free citizen. It is impossible for a responsible person to maintain his self-respect and therefore to develop sanely, soundly, and completely, without the opportunity of putting his hands to something that is definitely worth-while in terms of appreciation by the community, expressed in pay. This is one of the most important freedoms at the present time, and needs to receive a

good deal of serious consideration if constitutional government is to continue. Totalitarian dictatorship, both in Russia and Germany, has perverted this emerging freedom to mean that every man is part of the chain gang working for the state. Their much-advertised abolition of unemployment is actually the re-introduction of serfdom. Such serfdom may be preferred by people if they are too long deprived of employment and the opportunity to participate usefully in communal life. For this, like all the freedoms, has a social as well as an individual value. All the rights, so-called, express points of significant mutual service between the individual and the community.

This right to work has two aspects, a positive and a negative one. The preamble of the French constitution of 1946 states that "everyone has the duty to work and the right to obtain employment." A similar provision was contained in the Weimar constitution, and is now embodied in the Italian constitution. The German Basic Law, on the other hand, is more concerned with "forced labor," also outlawed by the American constitution. Such labor is permitted only as part of a criminal penalty. In the same article (12) Germans are given "the right freely to choose their occupation, place of work, and training." It is doubtful, however, whether such a "right" can be vindicated in face of a general depression, except in the form of an unemployment insurance.

Such rights not natural but political · It is customary to look upon the bill of rights in any constitution as the instrumentality through which the arbitrary expansion of government is limited, and a sphere of "natural" rights of each individual is thus safeguarded against political interference. The idea that certain rights are natural rights has a long history. It produces the impression that certain things, like private property, or freedom of assembly, have an existence and meaning quite apart from any government. Yet, in fact, all of them presuppose a government. It would therefore be more appropriate to call these rights social, or political.[4] Although they are not necessarily limited to citizens, they require a government for their enforcement. They are rooted in deep conviction. Bills of rights express the dominant ideas concerning the relations between the individual citizen and the government. Take, as an example, the right of free peaceable assembly. The struggle against the authoritarian governments of the eighteenth century created the impression that interference with the free exercise of this right proceeded necessarily from the government. Closer scrutiny reveals that this impression is not tenable in the light of historical experience. If the community happens to be rent asunder by profound conflicts touching its customs and ways of life, such as are engendered by religious and social

tion owes its force.[7] The well-known American preamble is characteristic: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." It may be contrasted with the preamble of the French constitution of 1946 and of the German Basic Law, both of which stress peace and social progress; the French, in fact, goes so far as to proclaim that the French Republic "accepts the limitations of sovereignty necessary to the organization and defense of peace." The Germans provide similarly in their article 24. As previously noted, the French preamble contains the entire bill of rights; after solemnly reaffirming the traditional rights of man as stated in the epochal revolutionary Declaration of the Rights of Man, it recites the more recent rights: equality of women, health and old age protection, child care and education, as well as those rights noted in preceding paragraphs. Interestingly enough, it couples with these rights the community's right to control any "national public service or monopoly." In many ways, the French preamble is a legal anomaly; for such a preamble must needs have more than declaratory force. The stress laid upon peace and social progress is indicative of a new spirit, and one which would doubtless express itself forcefully in the preamble of any American Constitution written today. It is, therefore, often maintained that the *real* Constitution of the American people is no longer fully expressed in the written document. On the other hand, the preamble of the constitution of the Soviet Union sets forth ideas which are as yet quite generally rejected in the United States.

Parties and public opinion · The first change in insight concerning the power of public opinion since the time of Rousseau has turned upon the discovery of the political party (see below, chs. XX, XXI). More recently the role of interest groups has been added. The division of the people into more or less lasting groups which carry on the process of creating a public opinion has been found to be an essential feature of popular government. Rousseau obviously assumed popular opinion to be one and indivisible, but we incline to view it as divided. And yet, Rousseau remains in the right as far as the constitution is concerned. There must be some binding elements of unity in outlook which constitute the *real* constitution. If a people should be fundamentally at odds, it would be difficult for a constitution to exist. It was superficial, yet characteristic, of much nineteenth-century political thought to assume that constitutional government could be long maintained without regard to this sentiment. However,

yet do represent habitual preferences and patterns of behavior in certain communities? These questions are more easily raised than answered at this stage of our inquiry. (See below, ch. XXII.)

In the meantime, it may be worth while to cite one of Burke's most telling arguments in favor of English traditionalism. In his *Reflections on the Revolution in France*, he argues as follows:[14] ". . . from Magna Charta to the declaration of right, it has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity; as an estate especially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right. By this means our constitution preserves an unity in so great a diversity of its parts. We have an inheritable crown; an inheritable peerage; and a house of commons and a people inheriting privileges, franchises, and liberties, from a long line of ancestors." This view was expressed by a man who was by no means unaware of the power of propaganda. For in the same essay he speaks of the matter at length, particularly when discussing the alliance which in his opinion the commercial wealth and the masses in France had concluded for the overthrow of the landed aristocracy. "Writers, especially when they act in a body, and with one direction, have great influence on the public mind; the alliance therefore of these writers with the monied interest (their connection with Turgot and almost all the peoples of the finance), had no small effect in removing the popular odium and envy which attended that species of wealth. These writers, like the propagators of all novelties, pretended to a great zeal for the poor, and the lower orders, whilst in their satires they rendered hateful, by every exaggeration, the faults of courts, of nobility, and of priesthood. They became sort of demagogues. They served as a link to unite, in favor of one object, obnoxious wealth to restless and desperate poverty." There is clear realization here of willful influence upon public opinion, the clothing of interests by effective stereotypes, as far as the enemies of traditionalism are concerned. But Burke does not similarly note the propagandistic aspect of the symbols of traditionalism itself. What is the "entailed inheritance" but a skillful analogy to a species of private property and special privilege? Surely, the bitter comment of Thomas Paine that Burke proposed to enslave the living to the dead was not without justification. "The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies," Paine exclaimed in *Rights of Man*; what he failed to realize is that these rights of man themselves depend upon a working constitutionalism with its attendant symbols, myths, and make-beliefs. Rights are constitutional, not natural.

view of Bentham and his friends is: "If the power is being used for good, why divide it; if it is being used for evil, why have it?" The Constitutionalists' reply ought to be: "Who is the judge of what is 'power for good' and what 'power for evil'?"

The theory of mixed government · The Roman Republican constitution affords a particularly striking example of carefully divided powers. When Polybius came to analyze the Roman constitution in terms of the classification of forms of government evolved by Plato and Aristotle, he must have been baffled by the discovery that several forms were mixed together. He thereupon constructed his theory of mixed government, which exerted a considerable influence down to modern times.[1] Political theorists in the seventeenth century evolved from it the theory of the "separation of powers." Particularly, English theorists, during the civil wars, tended to generalize from the experience and the institutional pattern developed by medieval constitutionalism (see ch. VII, pp. 126 f.). It is too little realized that we owe to this approach the theory of the separation of powers which forms so vital a part of modern constitutionalism. Political thinkers undertook to analyze political processes from a functional point of view and thus they discovered the distinctive features of certain basic functions or "powers." This pattern of thought found its clearest theoretical expression in James Harrington's *Oceana* (1656). Reverting to thoughts on Roman constitutionalism, Harrington undertook to answer the question of how a commonwealth comes to be an empire of laws and not of men. Harrington candidly recognized that men are predominantly governed in their decisions by interest rather than reason, and he therefore felt that unless one can show how different men can be restrained—"constrained to shake off this or that inclination," Harrington says in the language of the seventeenth century—one will not achieve a government of laws. The crucial point, according to Harrington, is that of achieving a balance between various orders. There are two main orders, the "natural aristocracy" and the common people. These must concur in order to make a law, and together constitute the legislative power. Of necessity there must be a third "to be executive of the laws made, and this is the magistracy." Once this balance is achieved, you have a commonwealth, or government of laws: the commonwealth consists of "the senate proposing, the people resolving, and the magistracy executing."[2]

Importance of institutional background · In the definitive form which Locke gave the theory of the separation of powers,[3] it was an attempt to generalize the results of the struggle of the English Parliament for an equality of status with the Crown. As is usual in political theory, it was the

Nevertheless, in many of the state constitutions which contain an express statement of the doctrine, the older English emphasis upon the importance of general laws remains intact. The most famous and perhaps the most succinct statement of that doctrine is contained in the constitution of Massachusetts, which declares that the reason for the separation of powers into a legislative, executive, and judicial branch is to make sure that this will be "a government of laws and not of men." The federal Constitution, too, though abstaining from stating the doctrine, puts the legislative power first and therefore by implication foremost. In spite of the silence of the Constitution regarding the doctrine, the Supreme Court has repeatedly called it a "fundamental tenet." Many who in recent discussions have belittled the separation of powers seem unaware of the fact that their clamor for efficiency and expediency may easily lead to dictatorship (see below, ch. XXVI). Fortunately, the one-party dictatorships in many countries have gradually awakened a realization of where the fusion of power leads. "The flexible scope of the Constitution and the qualities of statesmanship demanded for its construction are illustrated by what is often alleged to be the greatest defect of the Constitution, namely, the doctrine of the separation of powers. That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia and in support of the adoption of the Constitution, unite in proof that the purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy. As a principle of statesmanship, the practical demands of government preclude its doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was insisted upon by those shrewd men of the world who framed the Constitution." The most important argument advanced against this point of view is derived from what is alleged to be the nature of parliamentary government in England. There an increasing fusion of executive and legislative powers does not seem to have destroyed the foundations of free government.

Fusion of powers in England · Though the problems of parliamentary government will receive more careful treatment later on (see below, ch. XVIII), it is necessary to deal here in a general way with the fusion of the legislative and executive branches in England. The relative absolutism which this fusion appears to have created has been endurable because of a constitutional safeguard which no one clearly envisaged until after Montesquieu's time: the regular alternation of two large parties in controlling this broad power.[8] These parties represented a slow growth,

the background to be used in an emergency. When, in 1931, the weak Labor Cabinet fell apart the king stepped into the breach by authorizing Mr. Ramsay MacDonald to form a coalition cabinet, after his Labour cabinet had resigned. Harold Laski has expressly claimed a breach of the constitution by the king on this occasion, but the course of succeeding events seems to have vindicated the exercise of royal authority in this instance. In imperial affairs, likewise, the royal prerogative has emerged anew as the effective link between the parliaments at home and in the Dominions. It would, however, be contrary to fact to call the English king a guardian of the constitution. Whether he could, for example, effectively oppose an onslaught against the independence of judges may be doubted.

Under the Weimar constitution of Germany, it was hoped by some that the president might become such a neutral arbiter and guardian of the constitution. His powers were typically those of a constitutional monarch.[18] In the exercise of these powers, he was bound to the countersignature of a minister responsible to parliament. But owing to the confusion of parties, and to the state of emergency which arose, the German president inclined toward assuming wider and wider powers of actual government. From a representative head of the government, he became its executive center. Thereupon he lost the neutrality which would have been essential for a guardian of the constitution. Under their new constitution, the Germans have tried to take advantage of this experience by (*a*) stripping the president of the excessive emergency powers which he had under article 48 of the Weimar constitution, and (*b*) by establishing a constitutional court with broad powers to interpret the constitution and review legislation. In short, the new German constitution is turning toward the American system of a high court as the neutral power and umpire.[19]

The Supreme Court of the United States · More than a hundred years before the German Republic was established, the drafters of the American Constitution had clearly perceived that it is highly improbable, if not impossible, that a neutral guardian will be secured by election. Hamilton therefore urged that the courts appeared to be the most promising escape from this dilemma. In the *Federalist*, we are told: "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. . . . Limitations can be preserved in no other way than through the medium of the courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. . . ." John Marshall, in *Marbury v. Madison*, declared this doctrine to be part of the "manifest tenor" of the Constitution. The problems raised by this

been handicapped by an exceptional amount of formalistic, juristic argument. Having first posited that all "states" possess an indivisible "sovereign," jurists have strained human ingenuity to discover such a "sovereign" in a federal "state." But, as a critic remarked, even the incredible learning of a German scholar could not find something which was not there. The following discussion will not be concerned with these controversies about "sovereignty" and the "state." Instead, it will discuss federalism as the territorial form of dividing political powers under a constitution.

Federalism as a pattern of objectives · From a pragmatic viewpoint, an effectively centralized government, a decentralized government, a federal government, a federation, confederation or league of governments, an alliance, an alignment, a system of "independent" governments, and finally completely "independent" governments (such as those of Rome and China in the time of Caesar), all these could be represented as differences of degree in the relation of government to the territory affected by it, between two extremes, complete unity and complete separateness. An inordinate amount of interest has centered upon the point at which we pass from a federal government to a federation or league of governments, for it seems at this point that we pass from unity (no matter how organized) to multiplicity. But this is an illusion; for a federal government is as hard to distinguish clearly from a federation of governments as it is to distinguish it, at times, from a thoroughly decentralized government. Federal schemes, generally speaking, seek to combine a measure of unity with a measure of diversity; usually the diversity follows a territorial pattern, such as French spoken in Western Switzerland, German in Eastern Switzerland. Federalism is the form of political organization suited to communities where this territorially diversified pattern of objectives, interests, and traditions can be effectively implemented by joint efforts in the pursuit of common objectives and interests and the cultivation of common traditions. Whether the particular federal structure is best described as a single federal government, or as a federation of several governments, may sometimes be difficult to determine. The distinction should be drawn in accordance with the balance of these patterns of objectives.[1] The same observation holds true for all territorial divisions of government power. When the particularistic local objectives are sufficiently strong and compact to hold together the territorial subdivisions of the more comprehensive group, sustaining them as or molding them into autonomous groups, then the adequate political pattern is federational. On the other hand, the federal organization comes into existence when conflicting objectives (interests, traditions, purposes) are not as yet, or are no longer, sufficiently strong to sustain autonomous units. The

XII

Judicial Review of Legislative Acts; the Guardianship of the Constitution

Introduction · The supremacy of Parliament · The impact of federalism · Constitutional interpretation and due process · Judicial review politically restated · Judges and propertied interests · Disinterestedness and representative quality · Universality versus partisanship · European constitutional tribunals · Representative quality of judiciary uncertain · Conclusion.

Introduction · Hamilton's view that a high court of justice affords the best protection of a constitutional system[1] was a political restatement of the famous dictum of Sir Edward Coke that "Magna Charta is such a fellow that he will have no sovereign." In the days of Justice Coke, to be sure, it was the king in Parliament who seemed to threaten this "supremacy of the law." But in Hamilton's time the English Commons had pretty nearly achieved parliamentary supremacy. It therefore seemed apparent to him and to many other Americans that what was needed were limitations upon the legislative authority, irrespective of whether it was being exercised by a prince or by an elective body. A "tyranny of the majority" had loomed up in some of the states, and the makers of the Constitution sought to restrain it. The development of this power of the courts to interpret the Constitution is closely related to the doctrine of the separation of powers; yet the doctrine did not originally include it.

The origins of the idea of an independent judiciary interpreting *the* law are to be found in medieval England. As we saw (in ch. VI, pp. 104 f.), Coke and other seventeenth-century expounders of the supremacy of law claimed the right of the courts to interpret acts of Parliament according to the common law.[2] Coke's most signal conflict with King James originated in his belief that the high courts of England had the right to decide whether an act of Parliament was "legal" or not. However, this view did not triumph in England. Lip service was paid to it, though, until the end of the eighteenth century, just long enough to influence American juridical thought. By combining the Constitution as the fundamental law of the land with the common law, a great deal of common law has been worked into the American legal fabric in the course of a century and a half of judicial "interpretation" of the Constitution.

cerned with securing bills of rights, but to have cared little about securing sufficient legal guarantees for their enforcement. The idealists who continued to cherish the French revolutionary ideals (the *droits de l'homme*) lacked the practical judgment to appreciate the importance of institutional safeguards. European lawyers and jurists, accustomed to looking upon government and politics in terms of "the state" and of "sovereignty," began to evolve the vacuous theory of "state sovereignty." Later formalists and positivists alike denounced the natural-law tradition as incompatible with this "state sovereignty." How indeed could institutional safeguards against the "sovereign state" be conceived? Bismarck's Imperial Constitution (1871), as well as the Constitution of the Third French Republic (1875), did not even contain a "bill of rights." On the other hand, the Weimar Constitution did, and so do the new constitutions of France, Italy, and Germany (see above, ch. IX, p. 156). In spite of this development, the Continental tradition of settling questions of principle by express statutory enactment is still strong. It calls for extensive codification of such principles as freedom of speech, of assembly, and of the press; it does not favor judicial development of practice from broad constitutional rights.

The impact of federalism · In the discussion of federalism it has been shown that a constitutional judiciary is an integral part of any federal structure. If there is to be a division of powers between the central and local authorities, conflicts over the respective spheres of authority are bound to arise, and a procedure for their settlement is obviously needed. Generally speaking, this need is analogous to the need for an arbiter between authorities dividing powers functionally under some kind of separation of powers. Therefore, it is not surprising that federalism should reinforce the idea of judicial review, along with the idea of a constitution which embodies "higher" law than ordinary legislation. Though judicial review of legislative acts has disappeared completely in the English constitutional tradition, it has reappeared as part of the pattern of the Commonwealth of Nations; it has also become an integral part of federalism in several of the Dominions, even though these Dominions are governed by cabinets responsible directly to a parliament. In Australia, judicial interpretation has developed important constitutional principles and resembles the American tradition most closely. Significantly, Australia is the most markedly federal of these Dominions.

It is, of course, possible to keep such a constitutional judiciary over federal-state controversies entirely separate and distinct, as was attempted by setting up the Court of State under the Weimar Republic. Explicitly, that was the position of the United States Supreme Court. But since the

nition that the public at large believes the Court to be relatively non-partisan. This belief is part of the belief in the Constitution which makes the Constitution a political force (see ch. IX).

There are three levels of political insight into the constitutional and political function of a high court: (1) the court interprets the constitution, the norms of the constitution being as clear as a mathematical equation (popular view); (2) the court is an instrument of party politics, it decides according to the political views of the judges, it is anti-democratic (political view); (3) the court is the high priesthood of the faith in constitutionalism, it rationalizes the new norm in terms of the old and thereby maintains continuity, if not consistency; in short, it arbitrates between the fundamental and ever-present rival forces under a constitutional system. It is this third level of insight which recognizes fully the function of a high court as an interpreter and guardian of the sacred word symbols that hold many men and many minds together in one organized community. As Mr. Justice Jackson put it, when he was still Attorney-General, "the Court keeps the most fundamental equilibriums of our society, such as that between centralization and localism, between liberty and authority, and between stability and progress."[7] At any rate, the Court *should* keep such an equilibrium. There is ever present the danger that its members become ensnared in their own logic, and in the effort to maintain the sacred words attempt to throttle life and life's progress. The Court, at such times, shifts from a conservative to a reactionary position. When it does, the future of constitutionalism is in jeopardy. In the *Dred Scott* decision, the Supreme Court held that there could be no compromise between the old and the new, between the maintenance of slavery and its abolition; the Civil War followed as a natural consequence, since an amendment to the Constitution to override the decision was impossible on account of the distribution of voting strength.

In the decades prior to 1937, the Court had been inclined to find ways to narrow some of the powers conferred by the Constitution upon the federal government, and more particularly Congress, such as the taxing power, while at the same time it broadened the meaning of limitations such as "due process." Due process provides in many ways the most interesting illustration of the working of constitutional interpretation. When the Constitution was adopted, its meaning was strictly procedural: in compelling public officials to act in accordance with established rules of procedure, it served a clear constitutional purpose; it prevented arbitrary imprisonments, seizure of possessions, and the like. It was not until after the Civil War that due process began to assume the substantive meaning which it has been given since. First through obiter dicta and dissenting opinions,

John Dewey's approach · In 1927, John Dewey, after exploring the decline of democracy and the eclipse of the public, turned to the local community as the place where both might be reborn. For the troubled pessimism of Walter Lippmann's *Phantom Public* (as well as earlier studies), John Dewey sought to substitute a pragmatic ethic of neighbourly co-operation in *The Public and Its Problems*.[4] Dewey thought that the democratic public, still largely inchoate and unorganized, could not adequately resolve its most urgent problem: to find and identify itself. Perhaps it would be more in keeping with historical facts to say that this public is "increasingly" inchoate; it certainly was less so in earlier times than in mid-twentieth century America. If that is borne in mind, Dewey's entreaty that "democracy must begin at home, and its home is the neighbourly community," has a rather unpragmatic ring. For more than two thousand years, as we have just seen, philosophers have urged that the community should be small; yet for some centuries now, communities have been growing larger and more inclusive—having done the same in classical antiquity. At the very time of Aristotle's plea, the territorial dominion of Alexander the Great was superseding the small city-state, to be succeeded in turn by the Roman Empire.

But regardless of the homily, Dewey is undoubtedly right, if not very original, when he insists that only in the intimate contact of the neighborhood can the public, that is the mass of common men and women, become articulate. If this neighborly community is to be revived, it is important to understand the causes of its decline. The ideal which Dewey and other philosophers have portrayed is far from being a true description. In many American localities, hard-bitten machines are run by county sheriffs and town assessment boards. Fear and greed often play a greater role in the small community, with its weapons of social ostracism and personal discrimination, than in the more inclusive communities. Certainly Lord Bryce was rash in simply correlating the growth of machines to size. Genuine democratic constitutionalism calls for disagreement, open expression of conflicting views and responsiveness to divergent interests, as we have seen. The overemphasis on agreement which the philosophic partisans of the small community from Plato to Rousseau and Dewey have indulged in corresponds to boss rule rather than constitutional freedom. But whatever one's view concerning this aspect of the problem, the question as to the causes of the decline remains.

Unfortunately, several of these causes are so intimately linked with the development of modern industrialism that only very determined efforts to counteract them will have the desired result. If we agree with Dewey that "there is no substitute for the vitality and depth of close and direct

favoritism and other personal motives would play only a minor role. The long struggle for parliamentary reform in England was fought over this issue; rotten boroughs, patrons, and all the paraphernalia of aristocratic nepotism became unacceptable. In spite of Burke's eloquent defense of irrational traditionalism, Bentham and his insistence upon rational standards prevailed. In the modern world, direct general election has been generally accepted as the most rational method for choosing representatives. There are, however, important exceptions. Courts, for example, are manned by a different method, which may be more rational, and probably is more effective. Their selection is based upon a relatively objective standard: technical competence. It could be argued that legislatures should be similarly selected. Their representative quality would not necessarily disappear; it might in fact be heightened. Burke, in his discussion of parliamentary representation (see below, pp. 264 f.), insisted that even the elected representative must conceive of himself as a guardian of national interests. Parliament, he said, was not a congress of ambassadors from different and hostile interests, but a deliberative assembly from *one* nation, with *one* interest, that of the whole; these representatives ought to be guided not by local purpose, but by the general good. Such an idealistic conception of the function of a parliament evokes the ridicule of moralists and cynics alike; they would maintain whatever a parliament ought to be, it is in actual fact a congress of ambassadors from different and hostile interests. Actually, Burke's view is not wholly mistaken, but is true only of the best Congressmen and M. P.'s—the cynical popular view is also partly wrong in that it applies only to the worst representatives.

Representation in Rousseau · In Anglo-Saxon minds the idea of representative government is firmly linked to that of democracy. It is, therefore, worth noting that Jean Jacques Rousseau, the most ardent and influential expounder of democratic ideas, rejects representation in the broad sense as contrary to the very essence of modern government. In his *Social Contract* he asserts that as soon as public affairs cease to be the primary occupation of the citizen, the state is bound to perish.[1] If it is a question of going to battle, the citizens prefer to pay mercenaries and stay at home themselves. If it is a matter of going into the assembly, they appoint deputies and stay at home. From indolence they allow paid soldiers to tyrannize the fatherland and "representatives" to sell it for profit. Therefore sovereignty cannot be represented, and for the same reason for which it cannot be surrendered: it rests upon the general will. The deputies of the people are, therefore, not its representatives, but merely its commissaries; they cannot give a definite decision. Every law which the people have not

approved is null and void; it is no law at all. It is obvious from these remarks that Rousseau was misled by giving too much weight to the experience of the ancients. Where the active citizenry had been able to foregather in the market place, as in Athens or Rome, their failure to do so did indeed spell disaster to the commonwealth; what corresponds to it in modern communities is the tendency of the citizen to neglect his duty to vote and to participate in public affairs. If Rousseau were correct it would, in fact, make it impossible to organize responsible popular government in our modern countries with their millions of people. Rousseau, to be sure, does not bar the choice of professional magistrates to administer the law. But he does insist that legislation as an exercise of the "sovereign" power must be adopted by the people themselves. In truth, his arguments constitute the *reductio ad absurdum* of the idea of "sovereignty" in a democratic society. There is no good reason for singling out the making of general rules (laws) and saying: This only the people themselves can do. In legislation as in other concerns, where many people have the same right or interest, it is often absolutely necessary for them to agree upon one person to represent them lest their interest be neglected for want of unity in urging it. Nor is there any reason for drawing a hard and fast line between representatives and the agents, curators, and mandatories, as Burke did. They all are related types of human relationship recognized by every more highly developed legal system. Rousseau's violent hostility to any kind of representative scheme was no doubt stimulated by the fact that his great antagonist Hobbes gave it such a prominent place in his political system. Moreover, the small self-governing cantons of his native Switzerland provided a living model for active participation of the citizenry, which persists to this day.

Representation in Hobbes · It seems strange to us now that representation should at one time have been one of the most important ideas brought forth in the defense of absolutism. No writer offers a more striking illustration than Thomas Hobbes. Hobbes's entire conception of the state or even of a community rests upon the idea of representation. According to him: "A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented. . . . For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. . . . *Unity*, cannot otherwise be understood in Multitude."[2] Political writers in more recent times have often paid too little attention to the crucial significance of this notion when considering Hobbes's idea of the state. His notorious doctrine of the governmental compact, according to which every man covenants with every other man to make one man or assembly of men

their representative, is rooted in this conviction that the unity of the state can in no other way be understood. And why can it not be understood? Because each individual composing the multitude is a being utterly apart, like a particle of matter, moving through time and space in search of "power after power unto death." Therefore, only the superimposition of one such individual over all others can bring unity and order out of multitude and chaos. It is quite evident that such a point of view was eminently fitted to the age of monarchical absolutism. The modern idea of representation is different, indeed. Avoiding the mysticism of Rousseau's general will, the modern conception is built upon the idea that the many specific interests in the community—local, professional, commercial, and social, to mention only the more important divisions—can by argument and discussion be co-ordinated and compromised, by public scrutiny and criticism be scaled down to become compatible if not identical with the public interest, that is, the interest of the community as a whole. It is the task of the popular representatives thus to co-ordinate and criticize. The necessary unity does not logically follow from the unity of the representer, as Hobbes would have it, but must be created and constantly recreated through a political process of dynamic activity. This process consists mainly of parliamentary action and elections. Since both involve multitudes of persons, those with relatively similar interests form parties, that is, groups of people with common interests and ideals. Therefore parties are of great importance in any discussion of representation. (See chs. XX–XXI.)

The dual nature of representation · Historically speaking, representative assemblies developed in most European countries in the course of the later Middle Ages as an important part of the medieval constitutional order. Very often the three "estates" were composed of nobility, clergy, and the merchants of the cities (the burgesses).[3] But the greatest variations existed in this respect. The most important of these assemblies is undoubtedly the English Parliament, where the higher nobility were joined with the higher clergy in the "Lords Spiritual and Temporal," while the knights together with the burgesses constituted the Commons. Thus the more important groups in the community—nowadays often referred to as "classes"—were represented and called together by the king through his "minister" for the purpose of securing their consent to extraordinary taxes or levies. This was necessary because the undeveloped state of central administrative systems and the absence of effective means of coercion (see above, Part I, and particularly ch. III) rendered the collection of such levies impossible without local co-operation. Quite naturally, these representatives when gathered together undertook to bargain for their consent to such grants of money;

they presented complaints and petitions, which the crown had to heed in order to secure what it wanted. These, then, were not national representatives but agents of local powers acting under special instructions or mandates. This was true, however, only as long as they acted separately. When the king and the two houses of Parliament acted together, after having settled their differences and reached a compromise, they were taken to *represent* the whole body politic. More particularly, they were supposed to represent the entire body politic of the realm of England when acting as a high court, which was taken to be their most solemn function down to the seventeenth century. Historically, then, one cannot draw a hard and fast line between agents with definite instructions or mandates and representatives empowered to attend to a general task. An elected body may and usually will be both a set of agents from different interests, and a representative group determining the common interest. Therefore, to return to our statement from Burke, a parliament is both: a deliberative assembly from *one* nation, with *one* interest, that of the whole, and a congress of ambassadors from different and hostile interests.

Older definitions of representation have tried to escape from this dualism, which lies deeply embedded in the political reality of representative schemes. But political thinkers, being philosophers or lawyers, sought some *logical* unity. Thus Hobbes, proceeding from his general theory of man as a machine propelled by irrational desires to make rational efforts toward their satisfaction, defined representative action as any action which actually served to realize the goals established by such human desires. To illustrate: the preservation of order by a monocrat, be he ever so tyrannical, is truly representative of the people simply because the desire for order is known to be a basic desire resulting from man's primordial fear of his fellows. It is evident that such a "definition" is much too broad. It neglects the conflict of interests and values, not only between groups, but within the individual himself. Hobbes's view has been revived in the contemporary Fascist and National Socialist doctrines of leadership; it also is implied in the Communist claim to represent the proletariat. Such self-appointed guardians of alleged proletarian or nationalist interests are in the last analysis basing their claim upon some kind of religious or inspirational sanction. Marx, Mussolini, Hitler, Stalin—all have been made to serve as inspired guides. The cult which grows up around such individuals places them into parallel with the demigods of old. In a sense, therefore, political representation has been transformed into religious representation once more.

Representation and responsibility · Whether the basis is religious or political, representation is closely linked to responsible conduct. If A repre-

sents B, he is presumed to be responsible *to* B, that is to say, he is answerable to B for what he says and does. In modern parlance, responsible government and representative government have therefore almost come to be synonymous. As our example shows, secularized political responsibility is conceived in terms of a relationship between human beings. There are two basic ways of securing such responsibility. One is the administrative and the other is the political or electoral form of responsibility. But in either case responsibility is measured in terms of service to interests determined by the preference of another. This means that responsibility always implies communication between human beings. Human beings will disagree as to what are their interests and, in the ensuing argument, the services are rationalized through which they are realized. But all rationalizations are bound to be more or less incomplete. Comprehensive notions, such as that of a "national interest," certainly lack definite content, and the conduct of officials in terms of them is therefore only vaguely rationalized, as Charles Beard has so learnedly shown with regard to the United States. Such notions possess rather the nature of a believed-in standard or value, and this is not at all surprising in view of the fact that nationalism has developed into a sort of substitute for religion. In fact, some writers have gone so far as to call nationalism a substitute form of religion. But even much more specific interests cannot be thoroughly rationalized by any means. How are we, then, to solve this problem of holding the several interests together and giving them a common direction, of integrating them into a more or less consistent whole? How, in other words, can the discordant private interests be converted into a common public interest? Authoritarians have always presumed to answer this question in an authoritative way. From Plato to Marx and Hitler they have been ready to say: I know! Leave it to me and all will be well. The classical doctrine of democracy answers: By the will of the people. But how is the will of this somewhat vague unity, the people, to be found? This question raises fundamental questions concerning electoral responsibility? With the development of modern means of communication and the vast scale of propaganda (see below, ch. XXIV), the "will of the people" concept has lost its magic. When smart public-relations men can substantiate the claim of changing the public's mind on basic questions, the belief in the common man, which was at one time such an obvious aspect of orthodox constitutionalism, must be restated to accord with the new reality. This is the second reason for seeking a new basis for responsible government. The problem, however, is not entirely new.

In a celebrated speech to his electors at Bristol, Burke enunciated the idealistic conception of political representation and responsibility thus: "My worthy colleague [his opponent for the seat] says, his will ought to be

subservient to yours. If that be all, the thing is innocent. If government were a matter of will upon any side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgment, and not of inclination; and what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide . . . ? To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But *authoritative* instructions; *mandates* issued, which the member is bound blindly and explicitly to obey, to vote and to argue for, though contrary to the clearest conviction of his judgment and conscience; these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution. Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where not local purposes, not local prejudices ought to guide, but the general good. . . ." And pushing the matter one step further and into the realm of religion once more, Burke pointed out: "Certainly, gentlemen, it ought to be the happiness and glory of a representative, to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion high respect; their business unremitted attention. . . . But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable."[4] This idealistic conception accords neither with the reality of politics, nor yet with the democratic conception of the "will of the people."

For the conflict of various interests and their possible relation to a more comprehensive public interest is the real issue. Ideally conceived, of course, a special mandate cannot be admitted, since it would make the members of representative assemblies into mandatories for special interests. But there is a vast difference between a special mandate and a broad indication as to the general line of policy to be pursued. The obvious question to be asked of Burke is: "Who decides whether you, Edmund Burke, have carried out this trust from Providence?" To which Burke could only answer: "The electors of Bristol!" "Very well," his cross-examiner would continue, "what about de Jouvenel's well-known squib about Parliament, that after having become a deputy, one need have but one essential preoccupation, to

remain a deputy? Will it not be true that unless a representative does obey the mandates and instructions of his electorate, or of groups of them, he will fail of re-election?" Such thoughts are now common among people who consider electoral responsibility; for the actual behavior of most elected representatives belies the lofty sentiments of Edmund Burke. Even in Burke's own day, many a listener to his speech must have chuckled inwardly as he reflected upon the complete subservience of most members of Parliament to the great aristocratic landowners, who did not even have to issue instructions, so assiduously did "their" members study their every wish before each vote in Parliament (see below, ch. XXII, p. 462). As realistic students of political behavior we must conclude, therefore, that Burke's doctrine of reason and conscience as applied to representation and electoral responsibility was an untenable idealization even in his own day. Burke's argument is most persuasive; but it is built upon the false assumption that the major decisions in politics are purely reasonable when often they are not even partially so. Only to this partial aspect would his argument apply.

Defining representation · If then we avoid these extremes, which are at best rationalizations after the event, we find that the scope of political representation can well be indicated by adopting Robert von Mohl's unpretentious definition.[5] Representation is the process through which the influence which the entire citizenry or a part of them have upon governmental action is, with their expressed approval, exercised on their behalf by a smaller number among them, with binding effect upon those represented. Some aspects of this definition deserve further comment. We speak advisedly of *influence* rather than participation or control, since the large number of citizens is not very likely to participate in or effectively to control governmental action. We use the general expression "governmental action" rather than legislation, because all kinds of governmental activities might be subjected to popular influence. By suggesting, further, that influence of a part of the citizenry, as well as the whole, may be represented, we recognize the representative quality of the American Senate. Group representation is more ancient than the representation of the whole people, in any case. Finally, the most essential part of this descriptive definition is contained in the phrase: "with their expressed approval." This approval is expressed presumably in the constitutional provisions regarding representative institutions—the particular institutions of that constitutional order, as well as the general principle. In short, it is in this phrase that we recognize the constitutional setting of all such representation. The authority of the representatives is not only created by the constituent power, but it is subject to change by the amending power under the constitution.

Election and representation · The modern tendency has been to identify representation with election. What this means is that genuine *authority*, or legitimacy, as it is sometimes called, rests upon popular acceptance and support alone. The will of the people is the magic source of all legitimate power. And to discover this "will of the people," elections must take place at regular intervals to give the people a chance to express their approval or disapproval of the stewardship of key officials. The large masses of individual wills that are merged in this collective concept of the popular will have been personalized and symbolized, at least in America, in the normative idea of the "common man." So familiar have these notions become, and so generally are they accepted in the United States, that it is sometimes forgotten that a process of elections is not the only process for creating representativeness and representation. Representation is a matter of existential fact; up to a certain point it just "happens," and is generally so accepted. Why should this be? *Repraesentare* means to make present something that is *not* in fact present. A piece of cloth may in that sense represent a vast power complex, or the Stars and Stripes the United States of America. But when human beings represent other human beings existentially, it is usually due to their *belonging* to the same community of values, beliefs, customs, behaviors, and so forth. Elections, when seen in this context, appear to be a method of finding persons who possess this representative quality. But usually the persons so found also have to perform specific and often difficult tasks; for these they may not be the best qualified. Apart from the electoral method of selection, representatives may be chosen on the basis of technical achievements. The representative quality of the Supreme Court and other judicial bodies rests in part upon this foundation. There is also the older method of having the officials of constituent corporate bodies be *ex officio* members of a larger representative body. This method was seemingly employed in the Fascist Council of Corporations, but this Council was no genuine representative body because of the control which the government possessed over the corporate constituents. In other words, since these corporations were dependent upon the government, they influenced it only indirectly and sporadically. This method is genuinely used by the United Nations, where the foreign ministers of the various nations or their deputies are usually members of the assembly or the council or both. The German Federal Council, *Reich* Council, and *Länderrat* (States' Council) also belong in this category. Various economic councils, such as the French and Czechoslovak Councils, also were composed of this type of representatives. The German Economic Council of the Weimar Republic was similarly organized.[6] Another method of considerable historical significance is inheritance of the office. Older representative bodies,

such as the House of Lords in England and some of the French upper chambers, rested upon this base. Inheritance as a basis of selection has become anachronistic for representative purposes. Election has superseded it almost completely.

If the election is envisaged as a method for securing people adequate for purposes of representation, it by no means follows that all those whose interests are to be represented should participate in the selection as such. The representatives may be dealing with the interests of children and imbeciles, yet most people nowadays readily admit that every voter should be able to read and write. Such a requirement is desirable, indeed, in a voter, who should certainly be capable not only of reading about what his representative is doing and saying in Congress, but also of writing to him concerning it (though some Congressmen might at times wish that there were fewer letter-writers in their constituencies). We may witness a considerable extension of such qualifications for the electorate. In the days when the American Constitution was made, property qualifications were often justified on the ground that they ensured a better education on the part of the voter. Democracy has found the answer to that argument by providing free public schools for all. The firm belief in the common man's judgment which democracy presupposes has thereby been given a firmer basis. Schemes of multiple representation have been advocated from time to time. It might conceivably provide a solution of the problems confronting democracies in foreign affairs. No such constitutional provisions would in and of themselves render a representative scheme less representative. But any proposal of this kind will have to make a hard stand against the ingrained equalitarian presumption that each citizen should have one vote.[7]

Law and the legislative function · How can we explain the fact that legislation came to be considered the peculiar province of representative, popularly elected bodies, when in fact medieval representatives had little or no concern with legislation? Because ever since the sixteenth century, legislation was believed to be the most striking manifestation of political and governmental power. Legislation entailed the making of rules binding upon the whole community. Bodin maintained that this power was the peculiar characteristic of a state.[8] As we have seen before, the medieval notion of law as eternal custom, as something already there and merely to be discovered by learned men, was giving way to a realization that laws are man-made, that they are essentially decisions as to what ought to be rather than as to what is. The shift, of course, was merely one in view and emphasis. The High Court of Parliament had changed the law in the process of finding it, and so had the other courts of the realm. But the

Once one grants their premise—and one has to when *their* factions grow to any considerable size—he cannot escape from their conclusion. But this is so not because there is a disagreement on fundamentals, for such we have had all the time. It is so because these particular groups have adopted organized violence as a method of party warfare. Constitutionalism and democracy, if they are true to themselves, will outlaw such methods of party strife as private uniforms, police, and the rest. This outlawing was done in the British *Public Order Act* of 1936 (see ch. IX, p. 161), and also in a number of American states. Federal legislation may be desirable. If this is done, there is no need for denying the rights of citizenship, such as our civil liberties, to people whose views are antidemocratic. The provisions exempting Germans with certain antidemocratic views from the protection of the basic human rights of the new German Basic Law (art. 18, see above, pp. 161 f.) appear much too broad from this standpoint; "abuse" of these rights "to attack the free, democratic basic order" seems much too vague a criterion for so dangerous a limitation on rights which the first article had declared to be "inviolable and inalienable." Compromise is, therefore, essential in making general rules; through argument and discussion the area of agreement is determined in the representative legislature.

The views of Hooker, Locke, and Rousseau on the importance of laws · To show the strong sentiment regarding the importance of laws and of legislation as the process of making such laws, it may be well to cite here three leading constitutional theorists, Hooker, Locke, and Rousseau. Rousseau describes the fundamental nature of a republic in terms of law: "I therefore give the name 'Republic' to every State that is governed by laws, no matter what the form of its administration may be: for only in such a case does the public interest govern, and the *res publica* rank as a *reality*."[9] Likewise, Locke's discussion of the forms of a commonwealth is based on the conception of law as the essence of a commonwealth: ". . . for the form of government depending upon the placing the supreme power, which is the legislative, it being impossible to conceive that an inferior power should prescribe to a superior, or any but the supreme make laws, according as the power of making laws is placed, such is the form of the commonwealth." And Hooker concludes his first book of *The Laws of Ecclesiastical Polity* thus: ". . . of Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power: both Angels and men and creatures of what condition soever, though each in different sort and manner, . . . admiring her as the mother of their peace and joy."

amount to dividing the people in a number of different ways, and then giving these several subdivisions a voice through different representatives who are kept from abusing their power by holding each other in check. Such a plan could not have any effect unless the community were *actually* divided into a number of groups or classes, one of which might have a majority in one constituency, while another has it in another. We thus speak of farm states, Catholic states, and Negro districts, of a governor who is the farmers' man, but who battles the Senate dominated by a utility, etc. Without representation, such balances could not establish themselves.

This fact has given rise in recent years to demands for some kind of new corporative body to represent the various class and interest groups in the industrial society (see below, ch. XXII). Such occupational representation was offered after the First World War as the panacea for the admitted shortcomings of territorial representation. Occupational representation, based as it is upon the idea that man's true community in an industrial society is his professional or occupational group, such as his trade union, has great difficulty in determining clearly the actual size and conformation of a constituency of this sort on account of the overlapping and the difficulty of assigning appropriate weight to each organization selected. How do housewives compare with musicians? It also has been found difficult to cope with multiple representation of individuals belonging to several such groups. The tedious history of the efforts to carry out the mandate contained in article 165 of the Weimar constitution shows clearly how extraordinarily complicated these issues are. It is too early to assess the experience with the Senate under the Bavarian Constitution, based as it is upon an occupational plan, or, more important perhaps, the Economic Council established by the new French Constitution in article 25.

Reasons for the late appearance of representative bodies · It has often been said that representative schemes are of rather recent origin; they certainly were not found, as Montesquieu asserted, in the forests of ancient Germanic tribes. They arose as part of the medieval constitutional order when that order assumed proportions which forbade any direct action.[12] In the first place, the unitary organization of Western Christendom within the Catholic Church necessitated representative assemblies, the great councils, in which all the Christian people were believed to be present. It was natural to apply the same idea to the representation of monasteries and cathedral chapters within a secular feudal order. And when the cities and towns reached a place in the sun in the course of the thirteenth century, and had to be reckoned with as centers of wealth and power, a further extension of corporate representation of these municipalities was clearly indicated.

adequately carry out the higher aspiration of a representative federal government of all nations. This may well eventually come to fruition. But what a real understanding of the problem of representation can contribute to this discussion is a better grasp of the basic rule that there can be no representation, federal or other, until there is a community to be represented.

Conclusion · It is difficult to draw conclusions beyond saying that representation and representative government are facing an uncertain future, since the communal bonds upon which their rationale rests are deeply disturbed, if not actually disrupted. It may even be considered doubtful whether governments which depend upon outlawing certain parties, the Fascists here, the Communists there, are truly representative, even though such outlawry is decreed by popular majorities. The argument that these parties are the agents of foreign powers undoubtedly carries some weight, but one must ask whether it would not be more in keeping with the spirit of constitutional government if specific acts of collusion with such foreign governments were outlawed rather than a party seeking representative support among the electorate.

In any case, neither in Europe nor elsewhere has the idea of representation been significantly advanced since the time when proportional representation was set against majority representation—unless one wishes to consider the declining support for proportional representation an advance. Occupational representation, which continues to claim some adherents, still founders upon the difficulty of finding the proper "constituency." It is generally agreed that the traditional method of basing representation upon territorial subdivisions is quite artificial since no genuine community corresponds to them any longer, especially in the great urban conglomerations. Yet no one has succeeded in discovering a really workable plan for a change that would take account of the transformation of communal bonds. While an old established democratic system might adapt itself through various devices, such as legalizing interest groups and the like, it is doubtful whether such devices do more than attenuate the decline in representativeness of the territorially based representatives. Yet the success or failure of efforts to re-establish and reform representative government will turn upon the finding of adequate techniques of representation through elections. Else the fragmentized mass feeling, lost and unrepresented in processes of would-be democratic government, will follow a "leader" of the inspired kind who sets forth a claim of representativeness on nonrational grounds of a transcendental community, whether of class or of nation.[13]

such as the Proportional Representation Society in England, to which men of great ability and standing have devoted much time and effort. And yet, it is a curious fact that in the English-speaking countries (except Eire, a special case), proportional representation has not made any substantial headway in spite of the fact that these countries are the home of representative government. Is this due to the greater resistance of established ways to any innovation? Or to some inherent defect in the plan which reveals itself to the good sense of peoples with a sound political tradition? Or to conditions such as greater homogeneity in the electorate which would make proportional representation less urgently needed? These and related questions will be answered very differently by different observers, depending upon their general convictions concerning proportional representation. This fact suggests that broader political and moral issues are involved in this apparently technical problem of political machinery.

Bagehot's view: the functional approach · When two men of the ability, insight, and experience of John Stuart Mill and Walter Bagehot disagree sharply, in spite of their belonging to the same party, the issue is likely to be a deep one. They were both liberals and they were both economists, but while Bagehot was a liberal of the right, Mill was a liberal of the left. In spite of his socialist leanings, Mill was an ardent individualist. His adherence to proportional representation clearly reveals this. The real core of the disagreement between Mill and Bagehot can be found in the former's distinctive emphasis upon the rationalist aspects of the problem, as against the latter's insistence upon the functionalist aspects. Bagehot asked: What will proportional representation do to the functioning of parliament as we know it? Bagehot's great achievement anyway was to spell out what everyone "knew in practice," namely that the function of parliament was two-fold: (1) for the majority to support the cabinet in its conduct of the government, and (2) for the minority to criticize the actions of the government. The combination of action and criticism enables parliament to represent the people as a whole both toward itself and toward the outside world. Of the two functions, Bagehot naturally considered the first more important than the second, and therefore he argued that no matter how great the gain on other accounts, proportional representation must be rejected if it seriously threatened the government's capacity for action.

Bagehot considers the basic difference between election by majority and proportional representation the fact that proportional representation makes the constituency voluntary; in other words, each voter individually is able to choose his own constituency in accordance with his personal preference. He votes as a voluntary member of a group which has no other

in the mastery of the art of large-scale organization. The answer to the question lies in the very nature of government and its function in society. One of its outstanding objectives is to regulate the relations between individuals and groups in a society, to keep them at peace and enforce their mutual obligations, to maintain the general as against particular interests, and to restrain the abuse of power by individuals or groups. These tasks, which have always been recognized, are bound to multiply as a society increases in size and complexity. Take as an example modern traffic. There was no need for many traffic policemen at a time, only a bare hundred years ago, when the streets were primarily occupied by a leisurely assortment of pedestrians and horsedrawn vehicles. But as cities became more and more populous and mechanical means of locomotion greatly increased the speed of vehicles, traffic police became ever more numerous. The regulatory or police function of government necessarily increased the number of government servants. Nor was it a matter only of the police. As motor vehicles became more numerous, the government found itself obliged to develop a licensing system which required quite a few officials for its administration; hospital services had to be increased to handle the numerous accidents; courts had to be stepped up to render judgment in controversial cases. The same picture can be seen over and over again. There is little value in emotional outbursts over this development. If we have a "wonderland of bureaucracy," it is the natural accompaniment of our wonderland of industrial progress.

Various attempts have been made to gauge the increase in the number of government officials and employees. Finer, in an interesting compilation, presented approximate figures for comparing England, France, and Germany. These figures reveal that there has been a markedly greater increase in officials than in population. In France the population increased about twenty per cent between 1841 and 1928, while the government services numbered about ten times greater at the end than at the beginning of the same period. In England the population grew to about two-and-a-half times its size in the same period, the service to about sixty times its size, while in Prussia the population grew about as rapidly as in England, but there was only a twenty-fold increase in officials.[2] Clearly, then, in the ratio of growth of population to growth of officialdom, we are facing a geometrical proportion which is roughly analogous in all these countries. The comparison of France, England, and Prussia suggests that the *complexity* of our industrial society, its machines and other modern features, is more likely to be responsible for the growth in administrative services than the increase in the size of the population. But is it not rather a result of socialistic theories, many ask? While such theorizing has played its part, a realistic view of society demands the counter-question: why did such theories arise? Are they not themselves expressions of the need of an industrial society? In Chapter XXIII, where we discuss at some length the relation between government and the economy, these problems are more fully explored.

Problems of recruitment and training · It has been said before, but must be said again, that all effective administrative work depends upon successful training and recruitment of personnel. European kings developed educational systems in large part for the purpose of providing themselves with trained personnel. In doing so, they followed the example of the churches, which had always been intensely interested in education for precisely that reason. Many of the great European universities owe their beginnings to this desire of church and government for trained personnel. In modern times the increasing specialization of the services has raised the issues of scientific training in a more pointed form. A thorough discussion of recruitment and training problems falls outside the scope of the present volume. There are, however, certain general aspects, vitally affecting the securing of responsible conduct, which we should consider here. In an earlier chapter (II) it was shown how the educational system and the recruitment of government officials depend on each other in a general way. The nations, however, have developed marked differences in the training for the public service; these differences are bound up with the entire pattern of folkways and national traditions. On the Continent a government-supported system of schools and universities forms part of the bureaucracy itself; democratic Switzerland does not differ in this respect from authoritarian Prussia. In England and the United States nonpublic schools and colleges and universities are found alongside the public institutions of learning which more nearly correspond to the concept of democracy. But even today the endowed schools play a vital role; their relative independence from communal restraints often allows them to take the lead and thereby to enrich and to hasten educational progress. In times of stress the private institutions of higher learning also seem to be better capable and more inclined to offer resistance to inroads made by public agitation and leading to interference with academic freedom.

A comparison of England, France, and Germany reveals an interesting contrast in educational objectives for the higher grades of governmental service. These contrasts are gradually being blurred as the impact of common economic and industrial conditions makes itself felt. But they are still important as persistent influences and deserve a brief sketch. In England social and cultural values have been given the central place. The idea that a

argued about this problem and while some, with Sir Erskine May, have dated party growth back to the Puritans under Elizabeth, others, like Lord Macaulay, have refused to admit anything worthy of the name prior to the Roundheads and the Cavaliers of the Long Parliament.[3] The truth lies in between. Some of these differences in opinion are traceable to different conceptions as to what constitutes a party. Obviously, the more one stresses organizational features, the later one will have to put "party origin." When party is taken to mean something akin to faction, the partisans of the Red and the White Roses in the fourteenth and fifteenth centuries were members of a "party." But since these factions of nobles were baldly striving to seat their head on the throne, no question of principle entered in. On the other hand, the Puritans under Queen Elizabeth lacked all effective organization, and they hardly attempted to control Parliament (without parliamentary responsibility, such control was not particularly important). They had deep-seated convictions, to be sure; but many of these beliefs transcended the strictly political sphere. Under James I, however, the Puritans took on something of the quality of a party which developed into the Roundheads of the Long Parliament. While the Puritans did not explicitly claim it, they really sought the control of the government. Or, to put it another way, they sought to escape from the control which the king had hitherto exercised over the government. The Tudor kings had developed a system of patronage and corruption for the purpose of keeping Parliament in line. What matters to us is that the Puritan party developed as an opposition to the government as such, and more particularly to so-called royal prerogative. This remained so down to the Long Parliament period, when the Puritans themselves gained ascendancy. Then they in turn claimed an exclusive control, which eventually called forth the Cromwellian dictatorship. This Puritan party was not recognized as a legitimate undertaking; the government belabored them by calling them rebels, and they returned the compliment by denouncing the crown as tyrannical. It was only after these violent revolutionary experiments with one-party rule had proven abortive that the English people settled down to a mutual acceptance of each other's political viewpoint. Thus we find that a two-party system develops out of a one-party predominance. Only after the resulting civil war had shown a people the danger of party violence did the two-party system with its dependence upon a certain amount of tolerance become acceptable to the group at large.

The policy of the government as a factor in the development of parties · Why should the two-party system have taken hold in England and nowhere else? What conditions favoring its development in England

But in most countries and at most times there are enough such people to constitute a sizable group in the community. Hence the programmatic viewpoint, the ideal objectives of conservatives are variable in the extreme. By reversing the positions taken by the leading advocates of change, whether they be called Liberals, New Dealers, or Socialists, it is always possible to derive the position and the interests back of the respective conservative parties or groups.

The first comprehensive challenge to things as they were, by an orderly constitutional party, comes in the form of the Liberal party in England. This challenge presents phases which constitute the evolution of Liberal parties. In its first phase, the Liberal party forms an aggressive opposition to the traditional monarchical government; in England this occurred from 1680 down into the nineteenth century, and on the Continent since the French Revolution, or more explicitly, since the Napoleonic Wars. In its second phase, the Liberal party attempts to cope with the social problems raised by industrialization, but inasmuch as the more radical Socialist elements are becoming the effective opposition, the Liberal party begins to adopt a defensive attitude, and in so far as it does, it becomes conservative. In its third phase, the Liberal party gets embroiled in the conflicts engendered by the rising nationalism everywhere without being able to offer a clear-cut answer in terms of its own tenets, and therefore it breaks up into nationalist and internationalist factions. The acute crisis of the second phase is reached when socialism triumphs or at least supersedes liberalism as the main opposition, while the acute crisis of the third phase culminates in the Fascist dictatorship exterminating the Liberal along with all other parties.

Liberal parties: their relation to conservatism · There was *one* party in the English Parliament between 1600 and 1641, the party of opposition to the royal prerogative. A similar party developed toward the end of Charles II's reign, when Shaftesbury organized the "Green Ribbon Club," the nucleus of the Whig party organization. This "Country" party, as it was called in contrast to the "Court" party, was animated by hostility to the crown's subservience to France and its tendency to favor the Catholics. Foreign policy and religion, both rooted in strong national sentiments, provided its main arguments; the economic interests of the rising mercantile classes also were a powerful cement. That the rights of Parliament should have become another central tenet is only natural under the circumstances; the king being supposedly beyond reach, any effective opposition had to seek a strengthening of Parliament. If we remember that opposition to Catholicism was already to some extent opposition to orthodoxy,

that the banner of toleration had been raised, and that deism and atheism had made their appearance, we are justified in saying that all tenets of orthodox liberalism except the doctrine of free competition were already implied in Whig doctrine, and the transition to the nineteenth century Liberal party was by no means such a break with the past as has occasionally been assumed in our time. The tenets of the Tory party were implied in the viewpoint of the Whigs; the Tories constituted essentially a reaffirmation of the traditional mode of life and thought. Thus, as against toleration, parliamentary rights, and mercantile interests, the Tories stood up for the Church of England, the royal prerogative, and landed interests. The Tory party was the party of squires and parsons. Essentially concerned with maintaining the existing order, English Toryism in the eighteenth century yet became a party of "Reform." The Whigs having put over the Hanoverian succession, and thereafter ruling England for decades under Walpole and Pelham, drifted so markedly into the position of the government, that the Tories lifted the banner of "reform." They did so, as we have seen, in the rather ineffectual manner of demanding that the "corruption" of the Whigs be remedied. Thus, even though the Tories insisted upon the rights of Parliament, they never adopted a position frankly demanding the change of existing institutions. As a result, the growing forces of public sentiment in favor of parliamentary reform tended to associate themselves with the Whig party, and by carrying their viewpoint to triumph in the great enactments of 1832, more fully treated in the next paragraph, they transformed the Whig into the Liberal party. All the way through, the mercantile interests had continued their association with the Whigs. For the great centers of industry and commerce were discriminated against by the then existing electoral districts (see above, ch. XV). A redistribution of parliamentary seats, so it seemed, would greatly increase the representation of these mercantile interests. The Tories could hardly be expected to foster such a scheme. But as a matter of fact, another problem was steadily coming to the fore, and by the time the Parliamentary Reform Act had become law, the Liberal party was beginning to face a dilemma touching the very foundations upon which its ideology was built. That was the social problem. Before entering upon this second phase of the evolution of Liberal parties, it may be mentioned in passing that nowhere except in Sweden had a party in the eighteenth century made its appearance which as closely resembled the later Liberals as the English Whigs. In France, Prussia, and the Hapsburg Dominions absolutist monarchy reigned supreme, and whatever enlightenment found expression in governmental policy did so through the benevolent despots ruling these lands. Frederick the Great, Joseph II, and Louis XVI were all profoundly influenced by certain basic tenets of

and action, and unrestrained license of the press may, however, bring about conditions under which the less general interests become so hardened and so violently pitched against each other that no working compromise can result. Then the complex mechanism will stall and eventually break down. Such breakdown is not, however, the result of special interests dividing the community, or of the advocacy of such views by elected representatives (as the Fascists and Communists allege); it is rather the result of the particular maladjustments which prevented compromise between these interests.

American lobbies · Whatever the reasons, it is a fact that the pressure of special-interest groups manifested itself in an organized form quite early in the United States. The large size of the country, the legislative initiative assumed by Congress, the comprehensive vagueness of party programs, all contributed to a development which brought interested citizens together in support of or in opposition to legislation which was of special interest to them. The farmers' organizations, seeking governmental control or at least supervision of the railroads, are one striking illustration. The number of such organizations and the interests they represent have more recently become so impressive that they are nationally recognized. Broad surveys of the whole range of activities, as well as searching and detailed studies of particular activities, have appeared in the course of the last decade, analyzing the rise of this "assistant government," as it has aptly been called. Since the administrative departments have been taking a greater part in legislation, and since they have been vested with ever more discretion in administering them, they also have become the target of the pressure of these interest groups. The following are of outstanding importance: the Chamber of Commerce of the United States, the National Association of Manufacturers, the American Farm Bureau Federation, the National Grange, the National Education Association, the American Federation of Labor, the railway brotherhoods, the Congress of Industrial Organization, the American Legion, the American Railway Association, the Committee of Utility Executives, the Federal Council of Churches, the American Medical Association, and a dozen strong trade associations, such as those of the woolgrowers, and coal, oil, lumber, meat packing, and sugar interests. It is a far cry from the activities of these large, publicly conducted organizations to the scheming and usually corrupt methods of the early lobbyist, looking for land grants and similar concessions. Every one of the modern organizations more or less persuasively identifies itself with the public or the national interest. "The American Federation of Labor talks of working for 'labor and the people.' 'Its accomplishments have benefited all the people, for the trade union movement is as deep and wide as human life.'

authority. For the Supreme Court to substitute its judgment for that of Congress on the ground of the Roman-law dictum that delegated power cannot be redelegated* was to drag a dubious formalistic red herring across the path of a democratically arrived-at policy. It was a usurpation of emergency powers by the Court.

But the distinction between legislative and executive or administrative powers in an emergency is as such questionable. For these emergency powers are being exercised to accomplish a definite result; they involve decisions large and small which together constitute the policy to be pursued in the accomplishment of this end: to overcome the emergency and to maintain constitutional government intact. There must be a broad grant of powers, subject to equally strong limitations as to who shall exercise such powers, when, for how long, and to what end.

Modern constitutional limitations inadequate: (1) the appointment of a dictator · If we now ask ourselves to what extent the four criteria of a constitutional dictatorship outlined above are realized in the various provisions for martial rule, for the state of siege, and for constitutional emergency powers, we have a test by which to evaluate these arrangements. This test may afford us some clue as to the relative value of these several arrangements. At the same time, such testing will reveal a considerable amount of similarity between the three forms of constitutional dictatorship. As to the first criterion, it must be admitted that only constitutional emergency powers regularly fulfill the condition laid down by it, to wit, that the appointment of the dictator take place according to precise constitutional forms. In England, where the application of martial rule occurs at the discretion of a cabinet supported by a legally and constitutionally unlimited majority in the House of Commons, the appointment of the dictator may be said to be thus defined, but it is a pretty vague definition at that. In France, where the state of siege was defined by the laws of August 9, 1848, and of April 3, 1878, it was provided that it shall be declared by legislative enactment, and when the legislature is not in session, by executive decree, later to be confirmed by the legislature. Presumably these arrangements continue in force. Here again an aggressive majority in the legislature, by changing the existing laws, could alter the provisions for the appointment of a dictator *ad hoc*. Although it is traditional under parliamentary government that the cabinet assume dictatorial functions, as happened in the case of Poincaré's dictatorship of 1926 for the stabiliza-

*Nowhere in the Constitution is there any mention of *potestas delegata non delegari potest*, nor even any statement to the effect that the legislative power is a "delegated" power. The power is said to be *granted* to Congress, presumably by the Constitution.

rarily concentrated powers cannot be separated and distributed again unless residuary power is left somewhere for that purpose. Recurrent measures crystallize into rules, and under crisis conditions a continuous state of emergency arises. It is curious that the later nineteenth century should have failed to revise its notions on this score in spite of the spectacle of the actions of Napoleon III and of Bismarck right before their eyes. The general optimism prevented a searching consideration of deeper springs of action in such situations. Rigid constitutional limitations such as the one suggested by the present analysis will not save a constitutional regime which prevents the realization of what is considered right by the community. But they will add a most powerful brake which in the day of crisis may be decisive in bringing the skidding constitutional order back into its groove, while the necessary adjustments are made in the distribution of power according to the believed-in standard of justice.

The pattern of transition from constitutional to unconstitutional dictatorship · The details of the transition from a constitutional government to an unconstitutional one are not yet known. But the broad outlines of the process are distinctly discernible.[11] The following sketch may give an idea of the kind of situation that is typical. The constitutional government is weak. It lacks the support of tradition. The division of power under the constitution is faulty, resulting in too much friction or in too much power for small groups in the community. The constitution provides channels for the manifestation of mass emotions, however. Typical tools of radical democracy, such as general elections or referendum machinery (plebiscitary apparatus), are available under it. The dissatisfied groups throw their strength in this direction. They thrust forward one or more leaders who are able under the constitution to secure positions of power, and thus legitimate authority. They buttress intransigeant demands for broader channels of mass emotionalism by appeals to the tenets of radical democracy. In the meantime their mass supporters carry on guerilla warfare against all opponents, thus creating a civil-war situation. The attendant disorder and the eventual anarchy stir the indifferent elements in the community into action. The tension rises. More disorder, clashes between groups of citizens, murders, burnings, follow. Dictatorial methods for the maintenance of the constitutional order, indeed any order, appear inevitable. The resulting constitutional dictatorship lacks drive, because of the weakness of constitutional morale. It consequently tends to succumb to anti-constitutional elements, working either from within or from without. At the decisive point, these elements will seize the initiative, with the mass of the citizens unable to counteract such an initiative or to seize it in their turn.

This, roughly speaking, has been the pattern of "transition," regardless of whether the particular totalitarians were coming from the right or from the left. Italy, Spain, Germany, France, or Czechoslovakia, Hungary, Eastern Germany, it is a similar story again and again.

If one asks what measures might be suitable means for preventing this development, the answer seems at first to be: more radical measures for dealing with the emergency. But such measures usually will violate the constitutional tradition, and hence must be justified. This problem of "justification" is politically of crucial importance, because as the latent civil war develops, the decisive question is which side the army will take. In Russia the army was revolutionized through the war; the decision of the Kerenski government to continue the war was its fatal error. In Italy the army remained neutral, which was enough to give Mussolini the upper hand. In Germany the army refused to march against Hitler, as it looked upon the nationalism of the masses as the most effective support for the rearmament and remilitarization it desired. In Poland the army always supported Pilsudski, their own general. Likewise in Yugoslavia, the army supported *their* supreme commander, the king. It appears, in other words, that the concentration of powers cannot be forestalled if the armed forces remain indifferent. They must be positively attached to the constitutional order. It is here that the problem of constitutional morale meets its crucial test; the failure to perceive this problem spells eventual disaster. The Communists have learned this lesson and have seen to it that their partisans either infiltrated the army (Czechoslovakia) or developed a revolutionary army of their own (China). Neither Locke nor Rousseau saw this problem clearly, and much constitutional doctrine was equivocal about this matter. But the Swiss people have always been keenly aware of it, and their views have had a measure of resonance in the United States. Curiously enough, the keenest exposition of the problem in theory is offered by none other than Machiavelli. In his *Discourses on Livy*, as well as in his other works, he always returns to the *militia* as the central theme. In doing so, he rationalizes the historical conceptions of Livy. By this token, the democratization policy of the Western allies has been crucially handicapped because it was prevented by its demilitarization objective from permitting the German democrats to organize a "militia" with which to maintain themselves. Continued occupation is, under these conditions, the only possible thing to do; but it means that constitutional government exists by grace of the allies. The full measure of the gap implied here may be seen when one recalls that the American revolutionaries proudly claimed the "right to bear arms" as one of the basic rights of all free men, while the German Basic Law contains the provision among its declaration of rights that "no one

the welfare of the governed." In other words, within the scope and limits of military necessity, military government was and is inspired by humanitarian considerations for the subject population. This intrinsic tendency of military government when carried out on behalf of a constitutional democracy is enhanced if it is the objective of the occupation to seek the establishment of a constitutional democracy in the occupied area. For in the latter case, military government becomes a "constitutional dictatorship" in the more specific sense in which such a dictatorship is directed toward the maintenance of constitutional government. In other words, a "democratizing" military government is in a particularly close sense committed to the constitutional traditions of the people for whom it acts and speaks. The failure to grasp this fundamental fact has caused some of the most embarrassing situations arising out of the Second World War.[12]

Experience prior to the Second World War · Experience with military government in modern times has been quite varied. Ranging from the merciless burning and pillage of the religious wars, as exemplified by the deeds of a Wallenstein, a Richelieu, or a Cromwell, to the highly civilized occupation of the Rhineland by American armies, military government has tended to reflect the spirit of the times and of the government responsible for its execution. Francis Lieber in 1863 formulated the latter conception when he wrote: "As civilization has advanced, during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will permit." This philosophy was codified in the Hague Convention of 1907 which provided in its article 32 that ". . . the occupant . . . shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." In view of what happened during and after the Second World War, this article sounds like an echo from another world. Perhaps even more idyllic is the sound of article 46: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practices, must be respected. Private property cannot be confiscated."[13] These ideas dominated the *Basic Field Manual on Military Government* of the United States War Department, published in June 1940. It is fair to say that they dominated American military government practice in most cases. They were part of that "civilized warfare" which had originated with Hugo Grotius' *Law of War and Peace* (1625), inspired as it had been by the

consideration of any idea, or the forbearing to consider it; or to prefer the motion of any part of the body to its rest, and vice versa, in any particular instance; is that which we call the will." This statement is preceded by the important sentence: "This at least I think evident, that we find in ourselves a power to begin or to forbear, continue or end several actions of our minds, and motions of our bodies, barely by a thought or preference of the mind ordering, or, as it were, commanding the doing or not doing such a particular action" (ibid. §5). And again: "All the actions that we have any idea of, reducing themselves, as has been said, to these two, viz. thinking and motion; so far as man has power to think or not to think, to move or not to move, according to the preference or direction of his own mind, so far is a man free" (ibid. §8). And further: "Liberty is not an idea belonging to volition, or preferring; but to the person having the power of doing, or forbearing to do, according as the mind shall choose or direct." And later, after his well-known argument on the so-called freedom of the will: "For *powers are relations*, not agents: and that (agent) which has the power, or not the power to operate, is that alone which is or is not free, and not the power itself. For freedom, or not freedom, can belong to nothing, but what has or has not the power to act" (ibid. §17). Note that this view, rather dogmatically expressed, is found in Bentley, op. cit. The contrast between consent and constraint is implied in Tönnies' fundamental distinction between *Gemeinschaft* and *Gesellschaft*.

22. The importance of the time factor for political analysis has not as yet been adequately developed,—certainly nowhere nearly so adequately as in economics. Yet it is undoubtedly true that certain generalizations are vitally affected by the segment of time to which they are supposed to apply. See, for some sample suggestions, Stuart Rice, *Quantitative Methods in Politics* (1928), and P. Sargant Florence, *The Statistical Method in Economics and Political Science* (1929).

23. See Eli F. Heckscher, *Mercantilism* (1935; 2 vols.). For a somewhat studied, but stimulating criticism, see the article by Viner, cited in note 6, above.

24. Cameralism received careful treatment at the hands of Albion Small, *The Cameralist* (1909). See also the author's "The Continental Tradition of Training Administrators in Law and Jurisprudence" in *The Journal of Modern History*, Vol. XI, No. 2 (June, 1939).

25. Insofar as constitutionalism is related to liberalism, Guido de Ruggiero's *The History of European Liberalism* (1927) is excellent. Catholic political philosophy, of course, has always stressed the idea of governmental restraints in connection with the Church's efforts to prevent secular absolutism. From St. Thomas to contemporary writers such as Jacques Maritain the idea has found ever new expressions. See John A. Ryan and F. J. Boland, *Catholic Principles of Politics* (1940), and Heinrich A. Rommen's magistral *The State in Catholic Thought* (1945). The stress, however, is upon natural law, and the role of institutional sanctions is minimized. The word "constitution" characteristically does not even figure in the index.

26. For the Marxist crisis see Eduard Heimann, *Communism, Fascism, or Democracy?* (1938).

27. See the author's "European Union in Theory and Practice" in *Memorial Volume for Charles Payne* (ed. by Stuart Brown [1949]); for the earlier movement, initiated by A. Briand, see William E. Rappard, *Uniting Europe* (1930).

28. See Charles A. Beard's two articles on the origin of representative institutions in the *APSR*, [Vol. XXVI], 1932, pp. 28 ff., as well as William Stubbs, *English Constitutional History*, and F. W. Maitland, *Constitutional History of England*; in addition, G. P. Gooch, *English Democratic Ideas in the Seventeenth Century* (2d ed. with notes by Harold Laski; 1927), is important.

29. The view here adopted of emphasizing the constitutional issues in the American War of Independence is that found in C. H. McIlwain, *The American Revolution* (1924). See below, Ch. XII, note 3. There is no good comparative constitutional history tracing the spread of English constitutional ideas on the continent. Some interesting special points are developed in *The Constitution Reconsidered* (1938): Robert Binkley, "The Holy Roman Empire versus the United States: Patterns for Constitution-Making in Central Europe"; Hajo Holborn, "The Influence of the American Constitution on the Weimar Constitution"; W. Menzies Whitelaw, "American Influence on British Federal Systems"; Geoffrey Bruun, "The Constitutional Cult in the Early Nineteenth Century."

30. An able analysis of these writers is given by Benjamin Lippincott, *Victorian Critics of Democracy* (1938). Macaulay's famous letter to a congressman, as printed in *Harper's Magazine*, Vol. LIV, pp. 460 ff. (Feb., 1877), should be consulted. The vast literature on democracy, of course, cannot be summarized here. Much is propagandistic rather than scientific in its tenor, but Vernon L. Parrington's volumes, *Main Currents in American Thought* (1927–1930), and R. H. Gabriel, *The Course of American Democratic Thought* (1940), offer a wealth of insight into the process of democratization in America. A comparable treatment for England is not available, but the two volumes by E. L. Woodward, *The Age of Reform, 1815–1870* (1938), and R. C. K. Ensor, *England, 1870–1914* (1936), provide an excellent general panorama.

31. Arthur Rosenberg, *Democracy and Socialism* (1939). See also Harold Laski, *Parliamentary Government in England* (1938), and H. R. G. Greaves, *The British Constitution* (1938).

32. See especially Leslie Lipson, *The Politics of Equality; New Zealand's Adventures in Democracy* (1948), skillfully weighing the impact of socialism upon the citizen's freedom.

33. W. E. Rappard, *L'Individu et l'État* (1938), the main thesis of which is that expanding governmental activities, by threatening individualism, also threaten constitutionalism. In the United States the view was presented in somewhat popular form by James Beck in *Our Wonderland of Bureaucracy* (1932). The point has since been made so frequently by columnists as to have become almost a commonplace. See Mark Sullivan and David Lawrence. The argument, in turn, has been picked up by American fascists such as Lawrence Dennis, who in his *The Coming American Fascism* (1936) makes much of this contention. It is likewise a weapon in the armory of Marxist critics such as Max Lerner, who in "Constitution and Court as Symbols," *Yale Law Journal*, Vol. XLVI, No. 8 (June, 1937), has taken a view analogous to that of Laski.

34. See Harold Laski, *Parliamentary Government in England* (1938), especially Ch. I. The argument that the Labour Party has not realized socialism (an argument expounded by Paul Sweezey in his *Socialism* (1949), pp. 40 ff.), even if true, does not mean that Laski's prediction may yet come true, since the gradual adaptation noted in the text is the crucial point. See also Francis Williams, *Socialist Britain* (1948), for a broad statement of the situation.

35. Rosenberg, op. cit. p. 216.

II · *The Core of Modern Government: Bureaucracy*

REMARKS

The literature on "bureaucracy" is very extensive, if that term be taken to comprehend "administration and administrative personnel." Current developments and theory have been given an admirable platform in *Public Administration Review* since 1940. It reflects the rapid growth of the science of public administration, as suggested in works like John M. Gaus' *Reflections on Public Administration* (1947). I wish to draw attention also to two articles which sharply focus some of the issues: Robert A. Dahl, "The Science of Public Administration: Three Problems," and Herbert A. Simon, "A Comment on the Science of Public Administration," *PAR*, Vol. VII, pp. 1 ff. and 200 ff. (1947). J. M. Juran's *Bureaucracy: A Challenge to Better Management* (1944), while focused on American problems, deserves mention, as does the excellent case study by Taylor Cole, *Canadian Bureaucracy* (1949). Outstanding contributions to the historical origins are: Thomas F. Tout, *Chapters in the Administrative History of Medieval England* (6 vols., 1920–1933); Jean Brissaud, *History of French Public Law* (tr. J. W. Garner, 1915); Gustav Schmoller, "Der Deutsche Beamtenstaat vom 16.–18. Jahrhundert," in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft*, Vol. XVIII (1894), and "Über Behördenorganisation, Amtswesen und Beamtentum," introduction to *Acta Borussica*, Vol. I (1894), particularly Chs. II and VII; Otto Hintze, "Die Entstehung der modernen Staatsministerien," in *Historische Zeitschrift*, Vol. C (1907), pp. 53–111. Also C. J. Friedrich and Taylor Cole, *Responsible Bureaucracy* (1932), particularly Chs. I and II (Vol. I of *Studies in Systematic Political Science*, etc.); Max Weber, *Wirtschaft und Gesellschaft* (*Grundriss der Sozialökonomik*, Vol. III) (1925), Ch. III, §§3, 4, 5, of the first part, and Ch. VI of the third part; Alfred Weber, *Der Beamte* (in *Ideen zur Staats- und Kultursoziologie*) (1927). These three attempts at systematic treatment are

9. Schattschneider's argument is found in *The Struggle for Party Government*, the University of Maryland (1948), which is based upon his earlier book noted above.

10. For this paragraph see the famous historical discussion by M. Ostrogorski, op. cit. Vol. I, pp. 117 ff.

11. A. Lawrence Lowell, *Public Opinion in War and Peace* (1923), Ch. VII. The volume by Friedrich Röhmer is entitled *Lehre von den Politischen Parteien* (1844).

12. André Siegfried's study is contained in the well-known monograph, *Tableau Politique de la France de l'Ouest* (1913). A. Holcombe, in the works previously cited, developed the interrelation between social class and party development. The entire school of economic and social historians have made numerous contributions. See particularly A. M. Schlesinger, *Political and Social History of the United States* (1925). See, for the German side, the comprehensive *Die Deutschen Parteien; Wesen und Wandel nach dem Kriege* (1932) by Sigmund Neumann. For France as a whole, compare likewise André Siegfried's *Tableau des Partis en France* (1930), translated as *France: A Study in Nationality* (1930), a volume rich in glittering generalities as well as in sound insight. Stuart Rice's findings are set forth in *Farmers and Workers in American Politics* (1924).

XXI · *Political Parties: A Panorama of Their Comparative Development in Europe*

REFERENCES

1. E. L. Woodward, *Age of Reform* (1938), and R. C. K. Ensor, *England, 1870–1914* (1936). For England, see again Trevelyan, op. cit., and M. H. Woods, *A History of the Tory Party in the Seventeenth and Eighteenth Centuries* (1924) (more particularly the chapter on the party in the nineteenth and twentieth centuries), as well as F. J. C. Hearnshaw, *Conservatism in England* (1933). See also Karl Mannheim, "Das Konservative Denken," *Archiv für Sozialwissenschaft und Sozialpolitik*, Vol. 57, pp. 90 ff. For the growth of liberalism, see Harold Laski, *The Rise of Liberalism* (1931); Hamilton Fyfe, *The British Liberal Party* (1928); J. M. Robertson, *The Meaning of Liberalism* (2d ed., 1925).

2. For this, see the life work of L. T. Hobhouse, especially his *Liberalism* (1911); he realized more clearly than anyone else the issue which socialism posited. In America, a similar importance attaches to the recent writings of Charles Merriam, especially his *The Role of Politics in Social Change* (1936). See Lorenz von Stein, *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage*, 3 vols. (new ed., 1921). The original of this remarkable book appeared in 1850. There has for a long time been a controversy as to whether Karl Marx took his class doctrine from Lorenz von Stein. Though, on the best evidence, this appears improbable, the resemblance is certainly a striking one. See also Charles Trevelyan, *From Liberalism to Labor* (1921), a revealing personal account. See also Arthur Rosenberg's historical analysis, *Democracy and Socialism* (1939), passim, and Guido de Ruggiero, *The History of European Liberalism* (1927), particularly Parts I, III–IV.

3. For Mirabeau and Siéyès, see G. G. van Deusen, *Siéyès: His Life and His Nationalism* (1932), pp. 74 ff.; and Siéyès, *Qu'est-ce-que le Tiers État?* (1788). Nowhere has the doctrine of integral nationalism of the bourgeois been stated with greater force. For Napoleon, see the study by Hans E. Friedrich, *Napoleon I, Idée und Staat* (1935). For the foreign policy of Louis XVIII, see Frederick B. Artz, *Reaction and Revolution, 1814–1832* (1934), pp. 126 ff., and the literature cited there. The present impact of the French past has been depicted with much skill by C. J. H. Hayes, *France—A Nation of Patriots* (1930), particularly Chs. I–V. For England, see Trevelyan, op. cit. See also Josef Redlich, *The Procedure of the House of Commons* (1908), Vol. I, pp. 127–129, and J. L. Garvin, *The Life of Joseph Chamberlain* (1932–34), Vol. II, Chs. XXX–XXXIII, XXXIX–XLI, XLIV–XLV. See further, R. B. Haldane, *Autobiography* (1929), Ch. VI, and Sir Edward Grey, *Twenty-five Years* (1925), Vol. I, pp. 60 ff. Another source of vital importance is G. E. Buckle and W. F. Monypenny, *The Life of*

XXVI · *Constitutional Dictatorship and Military Government*

REMARKS

The literature on the subject of this chapter is quite limited, but we have a significant general analysis, Frederick M. Watkins, "The Problem of Constitutional Dictatorship" in *Public Policy*, Vol. I (1940). See also the same author's case study, *The Failure of Constitutional Emergency Powers under the German Republic* (1939). To these has recently been added C. L. Rossiter, *Constitutional Dictatorship* (1948). A considerable amount of controversial writing on this subject appeared in the 'thirties and 'forties of the last century in France; and Karl Marx, who has done more than anyone else to spread the idea of dictatorship in recent times, undoubtedly was influenced by this literature. A number of treatments of contemporary unconstitutional dictatorships contain more or less extensive comments on constitutional dictatorship. Particularly, Alfred Cobban's *Dictatorship: Its History and Theory* (1939) is a valuable general treatment, beside which Carl Schmitt's *Die Diktatur von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (2d ed., 1928) appears like a partisan tract. See also Hans Kohn, *Revolutions and Dictatorships* (1939). Other works one may mention in this connection are O. Forst de Battaglia, *Prozess der Diktatur* (1930), translated by H. Paterson as *Dictatorship on Trial* (1931); F. Cambo, *Les Dictatures* (1930); and E. Ortega y Gasset, *La Verdad sobre la Dictadura* (1925), digested in H. R. Spencer's article "Dictatorship" in *ESS*. Besides these general treatments, the considerable literature on the several dictatorships should be consulted. On the process of constitutional deterioration through the extensive use of dictatorial powers, Arnold Brecht, *Prelude to Silence* (1944), is particularly illuminating.

Military government has recently been the subject of an increasing number of studies, legal, political, and other. There have not been, however, any comprehensive attempts to integrate the ideas on military government with general principles of government, and the sketch which follows below represents, so far as the author is aware, a first essay in this direction. Besides the special-country studies, cited below, the following general treatments might be mentioned here. Raymond Robin, *Des Occupations militaires en dehors des occupations de guerre* (1913), gives a historical survey. Hajo Holborn, *American Military Government—Its Organization and Policies* (1947), gives the official view and some key documents concerning development during the Second World War. Carl J. Friedrich and Associates, *American Experiences in Military Government in World War II* (1948), gives accounts of actual operations in the several theaters, as well as some general analysis. The January 1950 issue of *The Annals* follows the same pattern. An unpublished dissertation by Robert N. Ginsburgh, *Between War and Peace* (1948), available at Widener Library, gives a broad historical account, as do the two articles by R. H. Gabriel in *APSR*, Vol. XXXVII (1943), pp. 417 ff., and *American Historical Review*, Vol. XLIX (1944), pp. 630 ff.

There is a vast amount of governmental documentation, not only American, but British, French, and other. These documents usually relate to a particular country or zone, like the *Monthly Reports of the Military Governor*, though *The Axis in Defeat*, Dept. State publication (1946) and a few others are of more general scope. The Department of the Army is planning a comprehensive history of military government operations in many volumes. Basic for the U.S. are the two field manuals: *Field Manual 27–5*, "Military Government" (1940), and "Joint Army-Navy Manual of Military Government and Civil Affairs" (1943).

For current information and material see *Military Government Journal*, published since 1948 by the Military Government Association; it contains many valuable articles, for example, Robert H. Slover, "The Goals of Military Government," Vol. II (1949).

REFERENCES

1. The most significant general discussion of constitutional dictatorship is given by J. J. Rousseau, *Contrat Social*, Book IV, Ch. VI.

2. On the royal prerogative in Britain, see Wormuth, cited above, Ch. VI, note 6. The