ADVANCE SHEET– OCTOBER 30, 2020

President's Letter

On the eve of a Presidential election in which there has been much discussion of federalism and the electoral college, it seemed appropriate to re-publish two classic essays on federalism and decentralism in government.

The first of these is a famous essay by Professor Herbert Wechsler of Columbia on why judicial enforcement of commerce clause restrictions on the national government was not necessary, in his view, to preserve a viable federalism. H. Wechsler, "The Political Safeguards Of Federalism: The Role Of The States In The Composition And Selection Of The National Government," 54 Columbia Law Review 543 (1954).

The second is a less well-known text, almost literally written in the blood of its authors, the manifesto of the anti-Nazi Kreisau Group in Germany, composed in secrecy in 1943, designed to outline a postwar German government. The organizer of the group was Helmut von Moltke; the members of the group included dissident military, church leaders, some trade unionists, and prominent members of the Catholic aristocracy. Of the nearly one hundred individuals who participated at one time or another in the secret meetings, all but four were executed or otherwise lost their lives after the failure of the 20th of July plot in 1944. The draft was distinguished by its emphasis on localism, on bottom-up political development, and on indirect elections like those in the original U.S. Constitution. It had a not inconsiderable influence on the German Basic Law of 1953, generally deemed to be one of the more successful of the world's constitutions, and its provisions for dealing with war criminals are thought by some to be superior to those adopted at Nuremberg. Critical readers should not forget the circumstances in which it was written, described in H. von Moltke, Letters to Freya (New York: Random House, 1995). The version here is from the appendix to C. Fitzgibbon, *20 July* (New York: Berkeley Books, 1956), 253-78.

Our last issue contained the text of the most "Jacksonian" of Justice Jackson's opinions. This issue contains the most "Brandeisian" of Justice Brandeis' opinions, his dissenting opinion in *Liggett Co. v. Lee*, 288 U.S. 517 (1933), the Florida chain store tax case. Justices Cardozo and Stone dissented separately.

George W. Liebmann

1840

It was the best of times, it was the worst of times, it was 1840. While the lawyers of Baltimore were establishing the Library Company of the Baltimore Bar, the national electorate was giving us "Tippecanoe and Tyler Too." William Henry Harrison would be dead thirty days after he was inaugurated, leaving the country with John Tyler. Now, most historians that I have seen who have engaged in ranking the American Presidents have put James Buchanan at the bottom. For me, however, it is Tyler. At the time of his death in 1862, Tyler was an elected member of the Confederate House of Representatives. At his funeral, the coffin of the tenth President of the United States was draped with a Confederate flag. Enough said.

The budget for the Library in 1840 was $400. The first members of the Library paid an initiation fee of $20 toward its establishment and annual dues of $10. The first President of the Library was John Van Lear McMahon, who served from 1840–1861, and was succeeded by the Library's Founder, the Honorable George William Brown who served from 1861–1874. Brown's service was interrupted from September 12, 1861 to November 27, 1862, when he was imprisoned by Federal authorities. To find out more about this fascinating man I recommend that you take a look at the current President of the Board, George Liebmann's discussion of him in his book *Six Lost Leaders: Prophets of Civil Society*, which of course, is available at the Library.

In 1840, Baltimore was the third largest city in America, behind only New York and Philadelphia. There was somewhere around two hundred lawyers in the City, most with homes/offices located in the area surrounding the Court House. Over the past several years we have seen many of the office buildings that surrounded the Circuit Courthouses, including the Equitable and Munsey buildings, returned to residential usage, so, I suppose everything old is new again.

My best to all of you. Be well and take care.

Joe Bennett

THE POLITICAL SAFEGUARDS OF FEDERALISM: THE RÔLE OF THE STATES IN THE COMPOSITION AND SELECTION OF THE NATIONAL GOVERNMENT†

HERBERT WECHSLER*

Federalism was the means and price of the formation of the Union. It was inevitable, therefore, that its basic concepts should determine much of our history. The more important fact is that they shape government, law and politics today. Nor is this merely illustration of the insight that the lives of nations, like the lives of individuals, are permanently influenced by the experience of infancy. In a far flung, free society, the federalist values are enduring. They call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise. They call for government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.

No form of government can serve these values with complete efficiency, no set of mechanisms can perfectly discriminate between the polar claims so patently involved. No single form or mechanism will give equal service under different circumstances or function with the same results at different times. But in a time when federalism must appear to many peoples as the sole alternative to tyranny, there is a special value in examining American experience, the more so since we face important issues of direction ourselves.

I

Our constitution makers established a central government authorized to act directly upon individuals through its own agencies—and thus they formed a nation capable of function and of growth. To serve the ends of federalism they employed three main devices:

They preserved the states as separate sources of authority and organs of administration—a point on which they hardly had a choice.

They gave the states a rôle of great importance in the composition and selection of the central government.

They undertook to formulate a distribution of authority between

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† This article is a revision of a paper submitted to the Conference on Federalism held January 11-14, 1954, as part of the Bicentennial Celebration of Columbia University.

* Professor of Law, Columbia Law School.

the nation and the states, in terms which gave some scope at least to legal processes for its enforcement.

Scholarship—not only legal scholarship—has given most attention to the last of these enumerated mechanisms, perhaps because it has been fascinated by the Supreme Court and its interpretations of the power distribution clauses of the Constitution. The continuous existence of the states as governmental entities and their strategic rôle in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored. Of the Framers' mechanisms, however, they have had and have today the larger influence upon the working balance of our federalism. The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority.

The fact of the continuous existence of the states, with general governmental competence unless excluded by the Constitution or valid Act of Congress, set the mood of our federalism from the start. The first Congress did not face the problem of building a legal system from the ground up; it started with the premise that the standing *corpus juris* of the country was provided by the states. As with the law, so with the courts. One federal Supreme Court was essential and the Constitution gave a mandate that it be established. But even the establishment of lower courts was left an open question by the Framers, as was the jurisdiction to be vested in any such courts as Congress might establish—within the limits that the Constitution set. Congress was free to commit the administration of national law to national tribunals or to leave the task to the state courts, sworn to support the national supremacy within its proper sphere.[1] Even the appellate jurisdiction of the Supreme Court was subject to congressional control.

National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case. This point of view cuts even deeper than the concept of the central government as one of granted, limited authority, articulated in the

1. For Justice Story's view that Congress was obliged to vest full jurisdiction over federal matters in a federal court either originally or on appeal, see Martin v. Hunter's Lessee, 1 Wheat. 304, 328 (U.S. 1816); 3 STORY, COMMENTARIES ON THE CONSTITUTION 449 (1833). The position was recently supported by Professor Crosskey. See 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 612 *et seq.* (1953). It seems, however, to be plainly contrary to the purport of one of the major compromises of the Constitutional Convention. See HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17-18 (1953). It was, of course, rejected by the Congress in the framing of the Judiciary Act of 1789 and the rejection has prevailed. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65 (1923); Hart, *The Relations Between State and Federal Law*, p. 489, *supra*, at 501-02.

Tenth Amendment. National power may be quite unquestioned in a given situation; those who would advocate its exercise must none the less answer the preliminary question why the matter should not be left to the states. Even when Congress acts, its tendency has been to frame enactments on an *ad hoc* basis to accomplish limited objectives, supplanting state-created norms only so far as may be necessary for the purpose. Indeed, with all the centralizing growth throughout the years, federal law is still a largely interstitial product, rarely occupying any field completely, building normally upon legal relationships established by the states. As Henry Hart and I have put it elsewhere: "Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."[2] As a state legislature views the common law as something to be left alone unless a need for change has been established, so Congress has traditionally viewed the governance of matters by the states.

The tradition plainly serves the values of our federalism in so far as it maintains a burden of persuasion on those favoring national intervention. New York, for example, faced the need for rent control after the need was deemed to have passed in most parts of the country. Should a national program have been continued when New York and every other state was competent to launch a program of its own, adapted to its special needs? Under such circumstances national action has consequences that are plainly undesirable. On the one hand, it is likely to impose control in areas where the politically dominant local judgment finds control unnecessary. On the other hand, it is likely to attenuate the rigor of control in areas where it is really needed. For if the need is not severe the country over, the terms of national legislation will be shaped by a Congress in which the hostile sentiment has a large influence, rather than by a legislature more generally sensitive to the need. This was, of course, the actual experience with federal control of rent throughout the later post-war years.[3]

The political logic of federalism thus supports placing the burden of persuasion on those urging national action. Though the explanation is the same, it is more difficult to find support for the commonly fragmentary quality of many national enactments, with their resultant ambiguity as to how far they supersede state law entirely and how far they call for integration with it. This is a point

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2. HART AND WECHSLER, *op. cit. supra* note 1, at 435.

3. On the dissatisfaction in New York with the progressive relaxation of federal rent control, culminating in the substitution of state control pursuant to the "local option" provision of the federal act of 1949, 63 STAT. 18, 26 (1949), 50 U.S.C. APP. § 1894(j) (Supp. 1952), see Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E. 2d 884 (1950); TEMPORARY CITY HOUSING RENT COMMISSION, CONTROL OF EVICTIONS AND OF RESIDENTIAL RENTS BY NEW YORK CITY (1950); REPORT OF N.Y. STATE TEMPORARY COMMISSION TO STUDY RENTS AND RENTAL CONDITIONS, N.Y. LEG. DOC. No. 49 (1950); Wechsler, *Next Steps in Rent Control,* 5 THE RECORD 126 (1950).

that has a special visibility to lawyers, for the federal-state adjustments called for by such ambiguities present problems of enormous difficulty to the courts.[4] The issue is perhaps most striking in the common case where federal law defines powers, rights or duties without attention to resulting liabilities or remedies, raising the question whether these are matters to be governed by state legal systems or determined by the independent judgment of federal courts.[5] To explore these matters is beyond my present purpose. I adduce them only to support my thesis that the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception.

II

If I have drawn too much significance from the mere fact of the existence of the states, the error surely will be rectified by pointing also to their crucial rôle in the selection and the composition of the national authority. More is involved here than that aspect of the compromise between the larger and the smaller states that yielded their equality of status in the Senate. Representatives no less than Senators are allotted by the Constitution to the states, although their number varies with state population as determined by the census. Though the House was meant to be the "grand depository of the democratic principle of the government,"[6] as distinguished from the Senate's function as the forum of the states, the people to be represented with due deference to their respective numbers were *the people of the states*. And with the President, as with Congress, the crucial instrument of the selection—whether through electors or, in the event of failure of majority, by the House voting as state units—is again the states. The consequence, of course, is that the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics.

Despite the rise of national parties, the shift to popular election of the Senate and the difficulty of appraising the precise impact of such provisions on the legislative process, Madison's analysis has never lost its thrust:

> The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former.[7]

4. Taft-Hartley is a good example. See, *e.g.*, Garner v. Teamsters Union, 346 U.S. 485 (1953); Hart, *supra* note 1, at 526-36. The problems of federalism in labor relations were fully considered at the Conference by Paul R. Hays in his paper, *Federalism and Labor Relations in the United States.*

5. See Hart, *supra* note 1, at 523-24, 529-30, 534-35; Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROB. 216, 241 (1948).

6. George Mason in the Convention, 5 ELLIOT'S DEBATES 136 (1876).

7. THE FEDERALIST, No. 45 at 288 (Lodge ed. 1888).

> A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States.[8]
>
> Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures.[9]

To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.[10] Indeed, the problem of the Congress is and always has been to attune itself to national opinion and produce majorities for action called for by the voice of the entire nation. It is remarkable that it should function thus as well as it does, given its intrinsic sensitivity to any insular opinion that is dominant in a substantial number of the states.

III

The point is so clear in the Senate that, as Madison observed of the equality accorded to the states, it "does not call for much discussion."[11] The forty-nine votes that will determine Senate action, even with full voting, could theoretically be drawn from twenty-five states, of which the combined population does not reach twenty-nine millions, a bare 19% of all state residents.[12] The one-third plus one that will defeat a treaty or a resolution of amendment could, equally theoretically, be drawn from seventeen states with a total population little over twelve millions, less than that of New York. I say theoretically since, short of a combination to resist an effort to impair state equality within the Senate (which the Constitution purports to place beyond amendment) or

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8. *Id.*, No. 46 at 294.
9. *Id.*, No. 45 at 288-89.
10. Many members of Congress have, of course, served previously in state government. For an analysis of the prior state service of the Senate in the Eightieth Congress, including twenty-eight former governors, see HOLCOMBE, OUR MORE PERFECT UNION 205-06 (1950).
11. THE FEDERALIST, No. 62 at 385 (Lodge ed. 1888).
12. The states referred to and their populations (according to the 1950 census) are:

Arizona	749,587	New Hampshire	533,242
Arkansas	1,909,511	New Mexico	681,187
Colorado	1,325,089	North Dakota	619,636
Connecticut	2,007,280	Oklahoma	2,233,351
Delaware	318,085	Oregon	1,521,341
Idaho	588,637	Rhode Island	791,896
Kansas	1,905,299	South Carolina	2,117,027
Maine	913,774	South Dakota	652,740
Mississippi	2,178,914	Utah	688,862
Montana	591,024	Vermont	377,747
Nebraska	1,325,510	Washington	2,378,963
Nevada	160,083	West Virginia	2,005,552
		Wyoming	290,529

The last apportionment allots these states 86 Representatives in a House of 435.

to diminish the political power of the smaller states in other ways, a coalition in these terms is quite unthinkable. The fact remains that in more subtle ways the Senate cannot fail to function as the guardian of state interests as such, when they are real enough to have political support or even to be instrumental in attaining other ends. And if account is taken of the operation of seniority within the Senate, of the opportunity of Senators to marshal individual authority, not to speak of the possibility of filibuster, this power of negation, vested in the states without regard to population, multiplies in many ways. Given a controversy that has any sectional dimension, it is not long before the impact of this power is perceived.[13]

Nor is it only power of negation. To be sure, on any direct show of strength in passing legislation, a Senate majority based on the states must be supported by a House majority based on population and must also avoid a veto by the President. But power to enact is rarely based on such a test—and when it seems to be, there sometimes is involved a merely token process. Legislation rests in practice on a balancing of interests, a give and take that calls for coalition and for compromise, a strategy that may involve a present sacrifice to hold or win future support.[14] In this dynamic interchange, a latent power of negation has much positive significance in garnering the votes for an enactment that might otherwise have failed. This is the point at which state equality may well present the largest difficulties, but the issue is beyond the range I have undertaken to explore. It is enough for present purposes to show how far the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control.

IV

Even the House is slanted somewhat in the same direction, though the incidence is less severe. This is not due appreciably to the one seat reserved for every state regardless of its population, nor to the mechanics or the mathematics of Congressional apportionment, though they present their problems.[15] It is due rather to the states' control of voters' qualifications, on the one hand, and of districting, on the other.

The position with respect to voters' qualifications derives from the con-

13. Any judicious estimate upon this point must take account of Lindsay Rogers' thesis that, sectional controversies apart, the Senate has traditionally taken a much broader and disinterested view of public questions than the House. See ROGERS, THE AMERICAN SENATE (1926), especially c. IV.

14. See, *e.g.*, Fischer, *Unwritten Rules of American Politics*, 197 HARPER'S 27 (Nov. 1948); HOLCOMBE, OUR MORE PERFECT UNION 208-10 (1950); GROSS, THE LEGISLATIVE STRUGGLE (1953), especially at 148-50.

15. See SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT (1941); Schmeckebier, *The Method of Equal Proportions*, 17 LAW & CONTEMP. PROB. 302 (1952); Willcox, *Last Words on the Apportionment Problem*, 17 *id.* at 290.

stitutional provision that fixes the electorate of Representatives (and of Senators as well since the Seventeenth Amendment) as those persons who "have the qualifications requisite for electors of the most numerous branch of the State Legislature."[16] Subject, then, to the prohibition of the denial of franchise because of color, race or sex, embodied in the Fifteenth and Nineteenth Amendments and the radiations of the equal protection clause of the Fourteenth, the states determine—indirectly it is true—the electorate that chooses Representatives.[17] The consequences of contracting the electorate by such devices as a poll-tax are, of course, incalculable, but they tend to buttress what traditionally dominant state interests conceive to be their special state position; that is the point of the contraction. This sentiment, reflected in the Representatives that these constituencies send to Congress, is not ordinarily conducive to support for an adventurous expansion of the national authority, though there have been exceptions, to be sure.

The Fourteenth Amendment purports to put in the hands of Congress a remedy for such diminution of the electorate. It directs that the census figure determinative of the number of a state's representatives be reduced on the apportionment to the extent that the right to vote "is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime." The remedy has proved unworkable in practice by reason of the difficulty of the quantitative investigation needed,[18] not to speak of the political problems that an effort to employ it would present. Federal abolition of the poll tax is periodically urged in Congress, with extensive hearings on the measure, but there are grave doubts with respect to its constitutionality and no real prospect of its passage.[19]

State control of congressional districting derives from the constitutional

16. U.S. CONST. Art. I, § 2.

17. See United States v. Classic, 313 U.S. 299, 314-15 (1941).

18. See SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 94-96 (1941). See also *id.* at 97 *et seq.* for the suggestion that the purpose of the unenforceable provision of the Fourteenth Amendment should be achieved by a further amendment basing the apportionment of representatives on the number of votes cast in a state rather than on population.

19. See the testimony of Charles Warren, expressing hostility to the poll tax but also opposing the constitutionality of federal abolition even in federal elections. *Hearings before Committee on House Administration on H.R. 29,* 80th Cong., 2d Sess. 145-162 (1948). Both Judiciary Committees have consistently reported in support of abolition. See, *e.g.,* SEN. REP. No. 1225, 80th Cong., 2d Sess. (1948); H.R. REP. No. 947, 80th Cong., 1st Sess. (1947). Though the measure has passed the House by overwhelming votes, see, *e.g.,* 89 CONG. REC. 4889 (1943), it has not been brought to a decision in the Senate. Compare the curiously different voting in the House on the war-time proposal to facilitate the vote of service personnel by distribution of a federal ballot, which, despite reliance on the war powers of Congress, was opposed on constitutional grounds. See 90 CONG. REC. 1229-30 (1944). Is it too cynical to suggest that voting on the poll tax abolition bills is partly influenced by knowledge that they are foredoomed to failure in the Senate?

provision that the "times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[20] The same clause provides, however, that "Congress may at any time by law make or alter such regulations. . . ." Though the matter has been disputed, it seems plain that state control thus rests entirely on the tolerance of Congress.[21] Until congressional action was taken in 1842, there was variation in state practice. Alabama, Georgia, Mississippi, Missouri, New Hampshire, New Jersey and Pennsylvania elected Representatives on a state-wide basis by general ticket, while Maryland, Massachusetts, New York, Virginia and South Carolina were committed early to the district basis. The Act of 1842 made districts "composed of contiguous territory" mandatory, though leaving districting to the respective states.[22] Even this mandate was initially defied in four of the general-ticket states, with the House seating their elected Representatives despite the state's recalcitrance as to the method of selection. Omitted in 1850, the mandate was repeated in later Acts and was extended in 1872 to require that the districts contain "as nearly as practicable an equal number of inhabitants."[23] The requirement of contiguity was further supplemented in 1901 to call for districts of "compact territory."[24] These provisions were repeated in 1911[25] but the Congress failed to reapportion after the census of 1920. The legislation of 1929, as amended,[26] establishing the present framework, provides for an automatic reapportionment upon the President's report (unless Congress directs otherwise). It directs the course that must be followed in the election of Representatives when a change from prior methods is required by an alteration of their number as a consequence of the apportionment and the state has failed to prescribe what the change shall be.[27] Beyond this, however, it lays down no requirements at all. The district system thus rests wholly upon state initiative at the present time. More important, the delineation of the districts rests entirely with the states.

It is well known that there are great discrepancies in district size in many multi-district states, paralleling for Congress the discrepancies, to forego harsher terms, that prevail in districting for the state legislatures.[28] A recent study estimates that in the spring of 1952, 115 of the 435 congressional districts

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20. Art. I, § 4.
21. For an excellent account see Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?*, 17 LAW & CONTEMP. PROB. 276 (1952).
22. 5 STAT. 491 (1842).
23. 17 STAT. 28 (1872).
24. 31 STAT. 733-34 (1901).
25. 37 STAT. 13 (1911).
26. 46 STAT. 26 (1929), as amended, 55 STAT. 761 (1941), 2 U.S.C. § 2a (1946).
27. *Id.* § 2a(c).
28. See HURST, THE GROWTH OF AMERICAN LAW 41-43 (1950); Harvey, *Reapportionment of State Legislatures—Legal Requirements*, 17 LAW & CONTEMP. PROB. 364 (1952); Shell, *Political and Partisan Implications of State Legislative Apportionment*, 17 *id.* at 417.

showed variation as to size larger than 15% above or below the state average, the maximum above the average being 129.8% in Texas and, below the average, 51.3% in South Dakota (where there are only two districts).[29] Writing before recent redistricting in some fifteen states, Professor Holcombe's committee of the American Political Science Association said:

> The Committee has noted with concern the great disparities in the 1950 populations of existing Congressional districts. Take 350,000 as roughly the average in a district. In one state, there is a district under 175,000; six others under 250,000; three between 500,000 and 700,000, and one exceeding 900,000. In many states, the spread between 1950 population in the smallest and the largest existing district in the State is two or three hundred thousand.[30]

The committee proposed a remedy which was in turn proposed to Congress by President Truman in his message of January 9, 1951, reporting the reapportionment.[31] The main features were these: (1) that Congress restore the earlier requirement of single-member districts composed of contiguous and compact territory and containing as nearly as practicable the same number of inhabitants; (2) that it forbid deviations in excess of 50,000 above or below the norm of 350,000 persons to a district; (3) that Congress itself take measures to eliminate a larger variation, even to prescribing the redistricting in cases where the state persists in deviating from the standard thus laid down. Needless to say, no action has been taken on the message.

It may be said, and perhaps rightly, that the situation with respect to districting, while detracting from the equality of popular representation in the House, has little bearing on the rôle of Congress in preserving federalist values. I am not so sure. It is significant, for one thing, that it is the states that draw the districts; one can hardly think the district lines would be the same had they been drawn from the beginning by Congress. Beyond this, however, the general motive and tendency of district deviations has quite clearly been to reduce urban power, not in the meaning of the census classification[32] but in the sense of the substantial cities. The tendency is so appreciable that a recent article assures the readers of a small town magazine that while cities or towns of under 10,000 coupled with the farms account for only 51% of the entire population, residents of such areas are numerically dominant in 265 of the 435 congressional districts, accounting for the choice of 61% of the House (including

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29. See Todd, *The Apportionment Problem Faced by the States,* 17 *id.* at 314, 337 (1952).

30. *The Reapportionment of Congress,* 45 AM. POL. SCI. REV. 153, 154 (1951).

31. 97 CONG. REC. 114 (1951).

32. The 1950 census classifies the "urban" as opposed to "rural" population on a basis that includes as "urban" all persons living in places of 2,500 or more inhabitants, whether incorporated as cities, towns, boroughs or villages or unincorporated places outside any urban fringe. See 1 BUREAU OF CENSUS, CENSUS OF POPULATION: 1950 xv-xvii (1952).

18 of the 21 committee chairmen) in addition to their numerical dominance in the choice of 75% of the Senate.[33] Traditionally, at least, a more active localism and resistance to new federal intrusion centers in this 51% of Americans than in the other 49%. I should suppose that this is likely to continue; and that the figures, therefore, have some relevancy to an understanding of why presidential programs calling for the extension of national activity, and seemingly supported by the country in a presidential election, may come a cropper notwithstanding in the House. Such hostility to Washington may rest far less on pure devotion to the principle of local government than on opposition to specific measures which Washington proposes to put forth. This explanation does not make the sentiment the less centrifugal in its effects. Federalism would have few adherents were it not, like other elements of government, a means and not an end.[34]

V

If Congress, from its composition and the mode of its selection, tends to reflect the "local spirit" predicted by Madison, the prime organ of a compensating "national spirit" is, of course, the President—both as the Chief Executive and as the leader of his party. Without the unifying power of the highest office, derived from the fixed tenure gained by his election and the sense that the President speaks for and represents the full national constituency, it would be difficult to develop the centripetal momentum so essential to the total federal scheme. No modern President can doubt that one of his essential functions is to balance the localism and the separatism of the Congress by presenting programs that reflect the needs of the entire nation, building the best coalitions that he can for their enactment,[35] using the prerogatives and prestige of his office to that end.[36] That this has been accomplished, on the whole, despite the rôle allotted to the states in the selection of the President yields more support than Bagehot realized for his great dictum that "the men of Massachusetts could . . . work *any* Constitution."[37]

Familiar though they are, the constitutional provisions governing our

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33. Pathfinder, The Town Journal, June, 1953, pp. 26-27.

34. For an interesting comment on this aspect of the matter in relation to Australian federalism see Partridge, *The Politics of Federalism* in FEDERALISM: AN AUSTRALIAN JUBILEE STUDY 174 (Sawer ed. 1952).

35. On the weak hold of party ties on voting in the Congress, and especially the Senate, see, *e.g.*, HOLCOMBE, *op. cit. supra* note 10, at 152, 215.

36. *Cf.* HYMAN, THE AMERICAN PRESIDENT 52-53 (1954): "His problem would be simplified if the coalition he built for an election-day victory remained stable. But it does nothing of the sort. . . . To get any kind of measure enacted, the President has to build a special coalition for the immediate object in view." See also, *e.g.*, WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES, c. III (1908); HERRING, PRESIDENTIAL LEADERSHIP (1940); Rowe, *Cooperation or Conflict?—The President's Relationships with an Opposition Congress*, 36 GEO. L. J. 1 (1947).

37. BAGEHOT, THE ENGLISH CONSTITUTION 296 (1914).

presidential choices should be noted. The electors, in whom the initial choice is vested, are appointed by the states in the manner provided by each state's legislature.[38] Their number reflects the compromise concerning representation in Congress, being determined by the number of Representatives allotted to the state on the apportionment plus the two Senators that each state is assured. A majority of all the votes is necessary for election by electors. If it is not obtained by any candidate, the choice among the three who lead in electoral votes devolves upon the House of Representatives voting not as individuals but by states, with each state granted equal voice and a majority of all required for election.

Had these provisions worked out as the Framers contemplated, with the electors as an independent agency of choice, it is hard to think that there would often have been an electoral majority; the electors would have functioned merely as a nominating body, with selection falling mainly to the House voting under the rule of state equality. It is not comfortable to conjecture how far this result might have reduced the President to a mere agent of the states, exacerbating the intrinsic localism of the Congress, losing the unifying thrust for which the Presidency stands. It is uncomfortable also to reflect that only the rise and success of the two-party system, buttressed by the general ticket method of selecting the electors (under which a state's votes are cast as a unit), prevents that result today.

The drift to the general ticket was inevitable, given the demand for popular participation in the choice and the fact that the choice of electors by districts, which Madison averred the Framers mainly contemplated,[39] would normally divide the state's electoral votes. The states that used the district method early found themselves forsaking it, unwilling to accept such diminution in their influence on the election, unless the method that effected the division were decreed for all.[40] The most important consequence for present purposes is that the casting of the electoral votes in state units yields electoral majorities despite third party candidates, as in 1860 and 1912, while any system that reflects internal differences of opinion in the states might send the election to the House.

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38. Only the time when the electors shall be chosen and the day when they shall vote are explicitly subjected to control by Congress. But since the electoral votes are counted in joint session of both Houses, it became accepted that theirs is the agency to settle issues that arise upon the counting. The aftermath of the Hayes-Tilden controversy was the Act of February 3, 1887, 24 STAT. 373, 3 U.S.C. § 6 (1946), designed to refer disputes as to the validity of state electoral votes to the state's courts, so far as possible.

39. Letter to George Hay, August 23, 1823, quoted in 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 458-59 (1937).

40. *Cf.* Jefferson to Monroe, January 12, 1800: "All agree that an election by districts would be best if it could be general; but while 10 states chuse either by their legislature or by a general ticket, it is folly & worse than folly for the other 6 not to do it." 9 JEFFERSON, WORKS 90 (Ford ed. 1905).

Minority opinion is washed out within the states; it works no fragmentation of their electoral votes.

Fortunate though the result has been in keeping presidential choices from devolving on the House, the system still presents important difficulties.[41] The fact that electoral votes are allocated to the states means that the votes of individuals vary in influence depending on the size of the electorate within the states where they are cast.[42] Whatever merit there may be in the egalitarian objection, the state allocation must be taken as a datum of our federalism that is probably beyond the reach of an amendment. The other problems are, in any case, more serious. The system cannot meet third party threats with any confidence if the third party has sufficient sectional strength to win state pluralities and thus to make a substantial showing in the electoral vote. If this contingency befalls, there is great danger of the choice devolving on the House.[43] Moreover, disregard of the minorities within each state and of the size of the plurality by which a state is carried contracts the basis of our presidential politics by focusing prime attention on the large and doubtful states. In addition, since small margins of difference may determine large and possibly decisive groups of electoral votes, voting blocs that may appear to hold the balance of decision in pivotal states are granted disproportionate political importance. Finally, there is the risk that a candidate may be defeated on electoral votes, even though he has a solid popular plurality.[44]

It is much easier to state these difficulties than to find solutions to them, though more proposals of amendment have been offered on this subject than on any other aspect of the Constitution. Whatever may be said in principle for simple popular election, it would so diminish the political importance of the states of small electorates that it has no hope of adoption. Any method for dividing a state's electoral votes is clearly unacceptable so long as the House

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41. For a more extended analysis of these problems than is presented here, see Wechsler, *Presidential Elections and the Constitution: A Comment on Proposed Amendment,* 35 A.B.A.J. 181 (1949); Wechsler, *The Lodge-Gossett Plan,* Fortune, June, 1949, p. 138. Much of the following material is reproduced from these papers, with permission of the publishers.

42. Thus in the 1948 election the ratio of electoral to popular votes ranged between 1 to 161,000 in California and 1 to 18,000 in South Carolina.

43. With 39 electoral votes for Thurmond in 1948, small shifts of votes in Ohio and California, which Truman carried by 7,107 and 17,865 respectively, would have sent the election to the House—where incidentally, only twenty-one state delegations were controlled by non-dissenting Democrats, twenty were Republican controlled, and three were evenly divided. The four Thurmond states could thus have blocked any selection in the House or forced it on their terms. See Wechsler, *Presidential Elections and the Constitution, supra* note 41, at 181.

44. Hayes prevailed in the disputed election despite Tilden's plurality of over 250,000 —even on Republican claims. Cleveland's lead of almost 100,000 did not prevent the choice of Harrison in 1888. Wilson needed his advantage of 3,806 in California in the 1916 election though a reversal there would have left his national plurality at almost 600,000. The shift of only 29,000 votes in California, Illinois and Ohio would have elected Dewey in 1948, though Truman prevailed by 2,000,000 in the country.

chooses on a vote by states on failure of electoral majority; more elections would devolve upon the House. The real question is whether a division plan is workable upon a basis that either permits election by plurality, whatever its dimensions, or vests the election in the Congress as a whole, voting *per capita,* unless one candidate obtains a specified percentage of the electoral votes (40% in the proposal last brought to a vote). Such plans have been advanced throughout our history, calling either for determination of the electoral votes by districts or for a proportional division of each state's votes in accordance with the choices expressed by its voters.[45] A proportional division resolution has had the steady support of both Judiciary Committees in recent years;[46] it passed the Senate by the requisite two-thirds in early 1950 but failed by a substantial margin in the House.[47]

There is something to be said for the proportional division plan, even beyond the point that it would be a gain for the Republic to eliminate the present possibility of House selection on a plane of state equality. Division would deny to voting blocs within a state any disproportionate strategic importance. Moreover, absent intense sectional concentration of voting allegiance, proportional division should provide a better mirror of popular opinion than the present system. But intense sectional concentration of allegiance does exist and it exists, moreover, in the states where the voting population represents the smallest fraction of the total population that determines the number of electoral votes. The division plan would greatly increase the relative influence of these states and reduce that of the states with large electorates, accustomed to a close division in their voting. In the election of 1900, for example, where McKinley had a popular plurality of 861,459, the division system would have elected Bryan because of the relative unity of his southern vote.[48]

To make the point in more detail, I cite the 1944 election, but the evidence that it affords is typical of most. The twelve southern states polling a total vote of 5,609,320 gave Roosevelt a plurality of 2,263,270, which brought him 138 electoral votes and yielded none to his opponent. Division would have cut

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45. For a summary of the history of these proposals, see Wechsler, *Presidential Elections and the Constitution, supra* note 41, at 271.

46. See, *e.g.,* SEN. REP. No. 1230, 80th Cong., 2d Sess. (1948); SEN. REP. No. 602, 81st Cong., 1st Sess. (1949); SEN. REP. No. 594, 82d Cong., 1st Sess. (1951); H. R. REP. No. 1615, 80th Cong., 2d Sess. (1948); H. R. REP. No. 1011, 81st Cong., 1st Sess. (1949); H. R. REP. No. 1858, 81st Cong. 2d Sess. (1950); H. R. REP. No. 1199, 82d Cong., 1st Sess. (1951). Senator Ferguson and Representative Case both filed dissenting reports in 1949. See SEN. REP. No. 602, Part 2; H. R. REP. No. 1011 at 27. For the modification proposed by Mr. Case, see 96 CONG. REC. A890, 891 (1950).

47. The Senate vote was 64 to 27 in favor of the resolution, the House vote 210 to 134 against. 96 CONG. REC. 1278, 10427 (1950).

48. See the testimony of Basil Brewer, publisher of the New Bedford Standard-Times, *Hearings before Subcommittee of Senate Committee on the Judiciary on S.J. Res. 2,* 81st Cong., 1st Sess. 141-42 (1949).

his lead to 65+, giving him 99+ and Dewey 33+, with 4+ for minor candidates. California, Illinois, Michigan, New York and Pennsylvania—the five states with the largest voting population—all have active party competition. They cast a total vote of 20,621,569, returning a Roosevelt plurality of 1,026,256, giving him 135 electoral votes to 25 for Dewey, an advantage of 110. But proportional division would have brought this lead to less than 10, producing 83+ for Roosevelt to 73+ for Dewey. Thus a plurality within the single party states would have had an average worth of three times that given to a similar plurality in the states with the largest voting populations and the keenest party competition.[49]

The impact of the change is illustrated by considering its probable effect on party practice. Where the conventions now place emphasis upon the large and doubtful states, proportional division would inevitably turn it to the South —the Democrats to seek to hold their large advantage, the Republicans to reduce what would otherwise be a destructive lead. If the present emphasis on the pivotal states presents the evils that I have already noted, it has at least the virtue of its limitations: on the whole, it centers party thought upon the needs and claims of the most numerous among us, compensating for the diminution of the influence that the electoral system gives their individual votes and balancing somewhat their under-representation in Congress. To shift this emphasis to the states which now combine the smallest of electorates with an exceptional influence in the Congress would present comparable evils, in directing political appeals to a limited area, without the mitigation of comparable gain.

The answer given is that the proportional division would provide its own corrective of this danger by creating party competition where it now is lacking; that this in turn would create pressures for enlarging the electorate and thus would bring two-party politics to the affected states. If this prediction is correct it is a potent answer—but the trouble is that it may turn out to be wrong. The change might work *per contra* to solidify adherence to one party and intensify desire for restriction of the franchise in order to retain the larger influence that solidarity would yield. The other states would then have no defense but imitation, as the states that first chose electors on a district basis felt impelled by those that would not risk division to adopt the method that made

49. The point is made with greater emphasis by pointing to the situation in 1944 within individual states. California with 3,520,549 votes yielded Roosevelt a plurality of 475,599. Proportional division would have meant that this advantage was worth less than 4 electoral votes. New York gave Roosevelt a lead of 316,591 on a total vote of 6,316,790. Under division the electoral advantage would have been but slightly more than 2. Yet South Carolina with 103,375 votes and a plurality for Roosevelt of 86,054 would have produced an electoral lead of almost 7 votes. So Mississippi would have counted over 7 in return for a plurality of 155,773 among 180,080; and Texas, showing an advantage of 630,180 out of 1,150,330 would have contributed a lead of almost 13 votes.

unity the rule. But such an increase in the single party states would hardly leave us with the sense that we had made any advance. The people of the states of large electorates, confronted with this further diminution in the influence accorded to their members, may well prefer not to reflect their own internal difference of opinion, lest they imperil values larger than those involved in their differences, including their capacity to disagree.

What I have said about proportional division applies on the whole to the proposal to require choice within the states by one-vote districts rather than by the states at large.[50] Though it would be more difficult to show the consequences in detail, this method also would enhance the influence of single party states at the expense of those that show a close division, with the consequences that I have described.[51]

In net result, the present practice with respect to electoral votes seems likely to endure; and since the House vote by states on failure of an electoral majority is probably unchangeable alone, that feature of the system will probably remain as well, despite the weight and historicity of the objections to it.

Federalist considerations thus play an important part even in the selection of the President, although a lesser part than many of the Framers must have contemplated. A presidential candidacy must be pointed towards the states of largest population in so far as they are doubtful. It must balance this direction by attention to the other elements of the full coalition that is looked to for an electoral majority. Both major parties have a strong incentive to absorb protest movements of such sectional significance that their development in strength would throw elections to the House. Both must give some attention to the organized minorities that may approach balance of power status in important states, without, however, making promises that will outrun the tolerance of other necessary elements of their required strength. Both parties recognize that they must appeal to some total combination of allegiance, choice or interest that will yield sufficient nation-wide support to win elections and make possible effective government.

The most important element of party competition in this framework is the similarity of the appeal that each must make. This is a constant affront to those who seek purity of ideology in politics; it is the clue, however, to the success of our politics in the elimination of extremists—and to the tolerance and basic unity that is essential if our system is to work.[52]

The President must be, as I have said above, the main repository of

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50. For a contrary view, see, *e.g.*, Wilmerding, *Reform of the Electoral System*, 64 POL. SCI. Q. 1 (1949).

51. See the study by Professor Ruth C. Silva (App. A-J) in *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 8, 17, 19, 55, 84, 85, 95, 100*, 83d Cong., 1st Sess. 230, 237-46 (1953).

52. See Fischer, *supra* note 14.

"national spirit" in the central government. But both the mode of his selection and the future of his party require that he also be responsive to local values that have large support within the states. And since his programs must, in any case, achieve support in Congress—in so far as they involve new action—he must surmount the greater local sensitivity of Congress before anything is done.

VI

If this analysis is correct, the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states. Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states. Nor is this tendency effectively denied by pointing to the size or scope of the existing national establishment. However useful it may be to explore possible contractions in specific areas, such evidence points mainly to the magnitude of unavoidable responsibility under the circumstances of our time.

It is in light of this inherent tendency, reflected most importantly in Congress, that the governmental power distribution clauses of the Constitution gain their largest meaning as an instrument for the protection of the states. Those clauses, as is well known, have served far more to qualify or stop intrusive legislative measures in the Congress than to invalidate enacted legislation in the Supreme Court.

This does not differ from the expectation of the Framers quite as markedly as might be thought. For the containment of the national authority Madison did not emphasize the function of the Court; he pointed to the composition of the Congress and to the political processes. So in his letter to Everett, written in 1830, he summarized the views that he had often stated:

> as a security of the rights and powers of the states in their individual capacities ag[ainst] an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on 1. The responsibility of the Senators and Representatives in the Legislature of the U.S. to the Legislatures & peoples of the States. 2. The responsibility of the President to the people of the U. States; & 3. The liability of the Ex. and Judiciary functionaries of the U.S. to impeachment by the Representatives of the people of the States, in one branch of the legislature of the U.S. and trial by the Representatives of the States, in the other branch; the State functionaries, Legislative, Executive & judiciary, being at the same time in

> their appointment & responsibility, altogether independent of the agency or authority of the U. States.[53]

The prime function envisaged for judicial review—in relation to federalism—was the maintainance of national supremacy against nullification or usurpation by the individual states, the national government having no part in their composition or their councils.[54] This is made clear by the fact that reliance on the courts was substituted, apparently on Jefferson's suggestion,[55] for the earlier proposal to give Congress a veto of state enactments deemed to trespass on the national domain. And except for the brief interlude that ended with the crisis of the thirties, it is mainly in the realm of such policing of the states that the Supreme Court has in fact participated in determining the balances of federalism.[56] This is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation; the supremacy clause governs there as well. It is rather to say that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.[57]

Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands. So too, moreover, is the question whether state enactments shall be stricken down as an infringement on the national authority. For while the Court has an important function in this area, as I have noted, the crucial point is that its judgments here are subject to reversal by Congress, which can consent to action by the states that other-

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53. 9 WRITINGS OF JAMES MADISON 383, 395-96 (Hunt ed. 1910).

54. See, *e.g.*, THE FEDERALIST, No. 44 at 283 (Lodge ed. 1888); *id.*, No. 45 at 288; Madison: Letter to Everett, *supra* note 53; Letter to Thomas Ritchie, Dec. 18, 1825, *op. cit. supra note* 53 at 231; Letter to Jefferson, June 27, 1823, 9 *id.* at 137, 140-44; Letter to Spencer Roane, June 29, 1821, 9 *id.* at 65; Freund, *Umpiring the Federal System,* p. 561 *infra,* at 567.

55. See his letter to Madison, June 20, 1787, quoted in WARREN, THE MAKING OF THE CONSTITUTION 168-69 (1928).

56. Of the great controversies with respect to national power before the Civil War, only the Bank and slavery within the territories were carried to the Court and its participation with respect to slavery was probably its greatest failure. The question of internal improvements, for example, which raised the most acute problem of constitutional construction, was fought out politically and in Congress. After the War only the *Civil Rights Cases* and income tax decisions were important in setting limits on national power —until the *Child Labor Case* and the New Deal decisions. The recasting of constitutional positions since the crisis acknowledges much broader power in the Congress—as against the states—than it is likely soon or ever to employ.

57. Surprisingly, Chief Justice Arthur Vanderbilt ignores this point in his recent lectures urging judicial control of Congressional expenditures. See VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 135-40 (1953).

wise would be invalidated. The familiar illustrations in commerce and in state taxation of federal instrumentalities do not by any means exhaust the field.[58] The Court makes the decisive judgment only when—and to the extent that—Congress has not laid down the resolving rule.[59]

To perceive that it is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism is not, of course, to depreciate the rôle played by the Court, subordinate though it may be. It is no accident that Congress has been slow to exercise its managerial authority, remitting to the Court so much of what it could determine by a legislative rule. The difficulties of reaching agreement on such matters, not to speak of drafting problems of immense complexity, lend obvious attractiveness to the *ad hoc* judicial method of adjustment. Whether Congress could contribute more effectively to the solution of these problems is a challenging and open question. The legislative possibilities within this area of our polity have hardly been explored.

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58. See Freund, *supra* note 54, at 562; Wechsler, *Stone and the Constitution,* 46 COL. L. REV. 764, 785-93 (1946).

59. The judicial function in relation to federalism thus differs markedly from that performed in the application of those constitutional restraints on Congress or the states that are designed to safeguard individuals. In this latter area of the constitutional protection of the individual against the government, both federal and state, subordination of the Court to Congress would defeat the purpose of judicial mediation. For this is where the political processes cannot be relied upon to introduce their own correctives—except to the limited extent that individuals or small minorities may find a champion in some important faction. See Stone, J., in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4 (1938).

20 JULY

Constantine FitzGibbon

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Appendix 1 · The Kreisau Documents

DOCUMENT A—DRAFT OF 9 AUGUST, 1943

FIRST INSTRUCTIONS TO THE 'LAND' COMMISSIONERS

The internal and external misery of the German people can only be lessened, and a vigorous rejuvenation of its fortunes only be undertaken, on the basis of a clear and coherent vision of Germany's future. Such a closely reasoned design is all the more necessary since military and political developments may produce a state of affairs in which certain regions are under military occupation and separated from the rest, or even in which there is no government of the German Reich or at least no means by which such a government can communicate its orders.

It is a matter of urgent necessity that in such circumstances responsible leading persons in the individual *Länder* and districts will act on uniform lines and on identical principles, even though they may be unable to consult one another or exchange their views: this must be ensured in order to maintain and strengthen the cultural homogeneity of the German *Länder* as parts of one national body.

The principles, outlined below, are limited to basic matters in view of the great diversity of possible future developments; they are intended to ensure that should the military situation take an unfavourable turn, the German people will be able to present a homogeneous attitude to the other nations.

The German working class, which believes in freedom,

and the Christian Churches represent and lead those popular forces with which the reconstruction can be undertaken. At this time only they, on account of their enduring spiritual traditions, offer a guarantee that the cultural substance of the German people be preserved and that its national coherence be saved from the perils which now threaten it. Supported by those forces, we assign to you the high responsibility to assume the office of a *Land* Commissioner in the region delimited on the attached map, and to take possession of the necessary powers to perform your duties. The commanders of the Military Districts are being told to follow your instructions.

The *Land* Commissioner is responsible to the Reich for shaping the political, cultural and economic forces of the *Land:*

1. He will ensure Law and Order, liberty of the person, and a genuine co-responsibility on the part of the entire population of the *Land.* By so doing he will make prevail the natural course of political self-determination, and see to it that self-administration will develop according to the particular character of each district.

2. In close co-operation with the recognized representatives of the cultural activities, the Commissioner will take steps to re-create a Christian system of education and thus a genuine renewal of spiritual life. In this field it is essential that collaboration between *Land* and Church, based on mutual trust, be initiated forthwith.

For this purpose you are immediately to establish contact with the leaders of the Churches within your *Land.*

3. In particular, the *Land* Commissioner is to arrange for responsible co-operation by the workers in administrative and industrial matters. You will therefore establish immediate contact with the officials of the German Trade Union who are to be recognized as the only rightful representatives of the workers.

For further details see Annex I.

The following general lines will be pursued in carrying out these principles:

ANNEX I

1. In the matter of appointments, you have complete freedom to carry out all measures you may consider necessary to ensure an orderly administration and the preservation of law and order. On principle all leading National-Socialists are to be dismissed from important positions.

After selecting your closest colleagues, you will first appoint absolutely reliable persons to fill key positions. Your right of appointing personnel also extends to officials of Reich departments and regional authorities operating within your *Land*.

Final appointments carrying civil service status can only be made after your confirmation in office as *Land* Commissioner.

2. In the case of the proclamation of a State of Siege (Martial Law) the military plenipotentiary will remain subject to your general political directives.

3. As regards necessary arrests, the amount of personal guilt, particularly with regard to the provisions of Annex II concerning law-defilers, will be the criterion; offences are so far as is possible to be tried and judged according to the normal processes of law. In addition, all persons are to be arrested who may be suspected of attempting to hinder the State in carrying out the measures deemed necessary. Persons unjustly deprived of their freedom are to be liberated at once.

It is your responsibility to take all the necessary steps without awaiting instructions from higher authorities.

4. The adjustment of frontiers, necessitated by the redivision of the *Länder*, is to be carried out at once in cooperation with the Commissioners of the adjoining *Länder*. Means for a constant exchange of views with the *Land* Commissioners of all neighboring *Länder* are to be ensured as a matter of urgency. The spheres of the postal and railway administrations, as well as of the Armed Forces, will for the time being remain unaltered.

ANNEX II

1. All laws and decrees directed against individuals as members of a nation, race or creed will be suspended; all discriminatory measures based on such laws or decrees will be lifted immediately. Apart from those, the laws and administrative decrees at present in existence will, in principle, continue in force.

2a. All measures intended to serve the battle-worthiness of the German armed forces or, at a later date, their orderly demobilization, are matters of Reich responsibility and as such to be carried out with priority over all other tasks; the necessary actions will be taken regardless of any possible resistance.

2b. The orderly continuation of the existing economic system of production and distribution must in no circumstances be interfered with. Requisitioning of supplies in transit and a breakdown of the rationing scheme present the greatest danger.

3. In addition to maintaining the integrity of your *Land* and ensuring law and order with your *Land*, your primary task is to build up a system of self-administration in accordance with the principles laid down in Annex I above. In so doing the economic interests and the political forces existing within your *Land* are to be incorporated in the self-administrative edifice to the maximum extent, while the bureaucratic administration is to be reduced and your own personal authority is to be placed on a firm basis of support derived from below.

4. You will do what is needed to ensure that industry is capable of carrying out the necessary measures of re-organization, if possible without external help and while maintaining a proper level of employment. In order to stabilize conditions, the emigration of non-resident workers is to be encouraged. No regulations limiting the immigration or residence of Germans will be permitted.

5. To fulfil your necessary cash obligations you are en-

titled to claim the necessary disbursements on the basis of the Reich Appropriation Law.

DOCUMENT B—DRAFT OF 9 AUGUST, 1943

BASIC PRINCIPLES FOR THE NEW ORDER

The government of the German Reich regards Christianity as the basis for the moral and spiritual renewal of our people, for the overthrow of hatred and falsehood, and for the rebuilding of the European community of nations.

The point of departure is man's obligation to recognize the Divine Order which supports both his inner being and outward existence. Only when this Divine Order has been made the standard of relations between individuals and between states can the disorder of the age be overcome and a genuine condition of peace brought about. The internal reconstruction of the Reich is the basis on which a just and lasting peace is to be built.

With the collapse of forces that have become rootless and are founded exclusively on technical mastery, it is above all the Europeans who are confronted with this task. The way to its solution lies in a determined and energetic realization of the Christian way of life. The government of the Reich is therefore determined to fulfil the following indispensable demands, using all the means at its disposal:

1. The principle of legality, now trampled under foot, must be elevated once again to a position of supremacy over all conditions of human life. Beneath the protection of conscientious and independent judges, freed from the fear of men, this is the basis for every aspect of the peaceful state of affairs which is to come.

2. Freedom of belief and freedom of conscience will be guaranteed. All laws and decrees which contravene these principles will be repealed immediately.

3. Totalitarian moral compulsion will be broken: the inalienable dignity of the human individual will be recog-

nized as the basis for that legal and peaceful order which is the objective. Each man will work, in full responsibility, in his own field of social, political and international activities. The right to work and the right to property are under public protection regardless of race, nationality or creed.

4. The family is the basic unit of the peaceful life of the community. The family is under public protection which, in addition to education, will ensure that the family is provided with the material necessities: food, clothing, lodging, garden and health.

5. Work must be so organized that it encourages rather than restricts the will to personal responsibility. In addition to promoting the material conditions of work and a programme of vocational training, this requires an effective co-responsibility on the part of every worker not only towards his own industrial unit but also towards industry as a whole, to which his work contributes. He shall thereby co-operate in developing a healthy and enduring way of life in which the individual, his family and the community shall be capable of organic growth within a well-balanced economy. Industrial leadership must guarantee these fundamental requirements.

6. Everybody's personal political responsibility requires his right of co-determination in the administration, which is to be revived on the basis of small, easily comprehensible communities. Rooted and tested in such communities, his participation in the affairs of the state and of the community of nations will be ensured by his elected representatives: thus will he be given a living awareness of his personal co-responsibility for the general course of political events.

7. That especial responsibility and loyalty which each man owes to his national origin, his language and the spiritual and historic heritage of his people must be respected and protected. However, those emotions must not be perverted into the concentration of political power, nor must they be used to vilify, persecute or oppress foreign national groups. The free and peaceful expansion of a na-

tional civilization can no longer be combined with the maintenance of absolute sovereignty on the part of individual states. Peace requires the creation of an order embracing the individual states. As soon as the freely given approval of all the nations involved has been obtained, the representatives of this order must be given the right to demand of each individual obedience, respect, and, if necessary, the sacrifice of life and property, for the sake of the supreme political authority of the community of nations.

ORGANIZATION OF THE REICH

The Reich remains the supreme authority of the German nation. Its political constitution shall be based upon genuine authority and the co-operation and co-responsibility of the nation. It is founded on the natural organization of the people: the family, the parish and the *Land.* The structure of the Reich follows the principles of self-administration. Within it, freedom and personal responsibility combine with the requirements of order and leadership.

This structure shall ensure the unity and coherent leadership of the Reich and its incorporation in the living community of European nations.

The people's political will shall be realized within a framework that remains comprehensible to the individual. Parish and district form the natural bases of the *Länder* which consist of geographical, economic and cultural units. In order to ensure an effective self-administration, the *Länder* shall contain from three to five million inhabitants each.

Functions will be distributed according to the principle that each public body will be responsible for the independent performance of all duties which it can reasonably be expected to execute on its own.

It is the immediate duty of all public authorities to ensure that all measures and pronouncements lead towards the final objective of a constitutional system embodying

the rule of Law. Together with the elimination of the chaos and abuses caused by the National-Socialist war and the collapse, which now threaten the very existence of the German people, the constitutional organization of the Reich must be undertaken with all speed and with all the forces that shall become available for this purpose, according to the following principles:

1. *The Parish*

Parish councils will be chosen by the entire electorate by secret and direct ballot.

The right to vote belongs to everyone who has completed his twenty-first year or who has served in the armed forces in wartime; heads of families will have an extra vote for each child below the voting age; everyone is eligible who has completed his twenty-seventh year and whose candidature has been sponsored by a number of enfranchised citizens, the number to be determined according to the size of the parish; members of the armed forces are not eligible.

2. *The District*

District and borough councils will be elected according to the principles outlined for parish councils. This applies also to the ward councils within the boroughs. Constituencies which exceed the comprehensibility of the voter have to be sub-divided.

3. *The Land*

1. The *Land* Diet (*Landtag*) of the *Länder* and the Town Council of the boroughs will be elected by the district and borough (or ward) councils. Every male citizen of the *Land* or town who shall have completed his twenty-seventh year is eligible. Political officials and members of the armed forces are ineligible. The electoral Law will ensure that at least half of the men elected do not belong to the elective bodies.

The following are the functions of the *Land* Diet: decisions concerning budget, taxation and laws of the *Land;* the right of interpellating the *Land* governor (*Landeshauptmann*) and to pass resolutions concerning all matters of general *Land* policy and administration. The election of the Representative of the *Land* on the proposal of the *Land* Council *(Landrat).*

3. The *Land* government consists of the *Land* Governor and of the required number of State Councillors. The *Land* Governor is elected by the *Land* Diet on the nomination of the *Land* Commissioner. The State Councillors are appointed by the *Land* Governor on the nomination of the *Land* Commissioner. Members of the *Land* government must permanently reside within the *Land.*

In addition to governing its *Land,* the *Land* government performs the functions of the Reich government within the *Land.*

4. The *Land* Council proposes to the *Land* Diet the names of candidates for election to the post of *Land* Commissioner, makes recommendations to the *Land* Diet and exercises disciplinary jurisdiction over the members of the *Land* government.

5. The *Land* Commissioner will be elected by the *Land* Diet on the nomination of the *Land* Council for a twelve years' term of office. He will be confirmed in office by the Reich Commissioner.

The *Land* Commissioner is responsible for the supervision of the entire *Land* administration and for the appointment of the civil servants. He is responsible for the realization of Reich policy within the *Land.* He presides at meetings of the *Land* Council.

4. *The Reich*

1. The Reichstag will be elected by the *Land* Diets. Every male citizen of the Reich who has completed his twenty-seventh year is eligible. Political officials and members of the armed forces are ineligible. The electoral

law will provisionally ensure that at least half the deputies elected do not belong to an elective body.

The following are the functions of the Reichstag: decisions concerning the budget, taxation and laws of the Reich; the right of interpellating the Reich Chancellor and to pass resolutions concerning all matters of Reich policy; the election of the Reich Commissioner on the nomination of the Reich Council (*Reichsrat*).

2. The Reich government consists of the Reich Chancellor and the departmental ministers. The Reich Chancellor is appointed by the Reich Commissioner with the approval of the Reichstag. The ministers are appointed by the Reich Commissioner on the nomination of the Reich Chancellor.

The Reich Commissioner can dismiss the Reich Chancellor: such dismissal becomes effective on the appointment of a new Reich Chancellor. A qualified majority of the Reichstag has the right to demand the dismissal of the Reich Chancellor if it submits simultaneously to the Reich Commissioner the name of a new Chancellor.

3. The Reich Council consists of the *Land* Commissioners, the Presidents of the Reichstag and the Reich Chamber of Economics, together with a number of Reich councillors appointed by the Reich Commissioner with the approval of the Reich Government for terms of eight years. The Reich Council will propose to the Reichstag candidates for election to the post of Reich Commissioner: will establish the principles according to which officials are moved from one *Land* to another or transferred from the service of a *Land* to that of the Reich: will make recommendations to the Reichstag: and will exercise disciplinary jurisdiction over the Reich government and the *Land* Commissioners.

4. The Reich Commissioner will be elected by the Reichstag on the nomination of the Reich Council for a twelve years' term of office.

The Reich Commissioner is the supreme commander of the armed forces and presides at meetings of the Reich Council. With the counter-signature of the Reich Chan-

cellor he represents the Reich in external affairs. He executes the laws of the Reich, appoints and dismisses Reich ministers and Reich officials.

ECCLESIASTICAL, CULTURAL AND EDUCATIONAL MATTERS *

The Government of the Reich welcomes the determined co-operation of the two great Churches in the work of shaping public life. Public worship, the cure of souls and the educational activities of the two Christian Churches will not be impeded and are placed under the protection of the Reich government. The publication of religious writings is rendered possible once again. In education and literature, as well as in films and radio, the heritage of Christian thought is once more assigned its rightful role.

The legal relationship between the German Reich on the one hand and the German Evangelical and the Roman Catholic Churches on the other will be settled on a friendly understanding with these two Churches, in accordance with the principles outlined above. The Concordats will not be affected thereby.

The future legal position of other religious and philosophical communities will be regulated after previous discussion with these bodies.

Parents have the right to educate their children according to the principles of Christianity and the dictates of their own conscience. It is the duty of the state to help the family in overcoming internal and external dissension and strife. There will be no compulsory state activities on Sundays.

Family, church and school will together perform the work of educating the young. In so doing the school will safeguard the right of each child to receive an education suitable to that child. The work shall awaken and strengthen his moral powers and will equip him with such

* *See also the more detailed Document C.*

knowledge and ability as conform with the educational standards of his age.

Character training creates a decent human being who, on a religious basis, is capable of making his rules of conduct consist of honesty and justice, truth and uprightness, love of his neighbour and loyalty towards his own conscience. A man so brought up will possess the maturity needed to make decisions in the consciousness of responsibility. Learning serves the moral build-up of the personality and also acts as a preparation for practical life.

Vocational and high schools, based upon elementary and infant schools, will carry on the work of the elementary schools and give the scholar a well-knit body of knowledge and ability, and incidentally, impart a growing sense of responsibility.

The state school is a Christian school: religious instruction is a compulsory subject for the adherents of the two Churches. Such instruction will be carried out so far as possible by clergymen acting under instructions of their Churches.

ECONOMY

1. All persons engaged in industry have to perform the same minimum duties. These duties include honest and clean leadership as well as loyalty to, and faithful work within the framework of, contractual obligations.

The security of the living standard of the workers, on which depends their dignity as human beings, is the responsibility of the industrial leadership. At the same time every effort is to be made quickly and broadly to raise the minimum standard of living from the present low level engendered by severe war-damage to industry. The necessary steps to achieve this will be taken by the individual, the factory, the autonomous industrial organizations, the German Trade Union and the state: attention will be paid to ensure also the security of the worker's dependents.

2. The government of the Reich regards, as the basis for the reconstruction of industry, a system of orderly

competition, carried out within the framework of an industrial direction by the state and, so far as competitive methods go, under the constant supervision of the state.

In cases where existent agreements and organizations (monopolies, cartels, combines) prevent such competition, it is the duty of the industrial leadership to establish the principles of orderly competition and to safeguard the interests of the general public.

Since the big industrial concerns affect industry as a whole, it is desirable that these branches be subjected to a particularly close control by the state. Key enterprises, that is to say the mining, iron and steel industries, the basic chemical industry and the fuel and power industries, will become public property. Nationalized industries will be run and supervised according to the general principles laid down for industry as a whole.

By means of the influence that it can exercise on markets and on the big industries, industrial control by the Reich will be used to forward the industrial policy of the *Länder* and to ensure that economic life is carried on with minimum friction. The government of the Reich will promote the development of each industrial concern into an economic community of the persons engaged therein. In such communities, called 'working Unions' (*'Betriebsgewerkschaften'*), the owner and representatives of the workers will agree on a system according to which all employees will share in the control and the profits of the concern, particularly in its increment value. This agreement will be subject to the approval of the autonomous industrial corporation of the *Land*.

3. The 'German Trade Union' is a necessary means to the carrying out of the industrial programme outlined above and to the political structure implied. It will fulfil its purpose by completing this programme and then by handing over its responsibilities to the organs of the state and to the autonomous industrial corporation. Should the task entrusted to the 'German Trade Union' require its

continued existence, then its structure will be adapted to those of State and industry.

4. Industrial, commercial and trading firms will be members of the Chamber of Industry set up within the framework of industrial self-administration on a *Land* basis. Agricultural undertakings will be members of the Chambers of Agriculture. The Chambers of Industry and Agriculture will together form the *Land* Chamber of Economics. Chambers of Industry and Agriculture will consist of an equal number of elected managers and representatives of the workers. The *Land* Chamber of Economics will consist of delegates from the Chambers of Industry and Agriculture.

The Chambers will draw up their own statutes. These will be subject to approval by the *Land* Commissioner. The presidents and deputy presidents of the Chambers will be elected by the Chambers subject to confirmation by the *Land* Commissioner.

The Chambers are responsible for the self-administration of industry. Functions concerning matters of the Reich and the *Land* may be imposed upon them by the existent industrial *Land* authorities (the *Land* Industrial Office, etc.). Prominent among the functions of these autonomous bodies is the supervision of the vocational training to follow the nine years' schooling; it is to be adapted to the requirements of industry in general and will normally be organized on a two-year basis. Technical and material facilities for further vocational training are to be made available.

The Reich Chamber of Economics, which is the highest authority of the industrial self-administration, will consist of delegates from the *Land* Chambers of Economics. Economic administration forms part of the general political administration. The Reich Ministry of Economics will deal with the autonomous *Land* organizations of the firms and with the firms themselves, only through the *Land* economic authorities.

DOCUMENT C—CONCLUSIONS OF DISCUSSIONS HELD BETWEEN MAY 22ND AND 25TH, 1942

I. DECLARATION OF PRINCIPLE

1. *Church and State*

We see in Christianity the most valuable force for the religious and moral renewal of the people, for the overcoming of hatred and falsehood, for the rebuilding of the Western world, for the peaceful co-existence of the nations. We welcome and recognize the existing co-operation of leading men, i.e. two bishops each representing one of the two great Christian denominations, to ensure a uniform regulation of all matters concerning the shaping of public life according to Christian tenets.

Freedom of belief and freedom of conscience will be guaranteed, as will the public practice of the Christian religion. All clergy and laymen arrested for their faith, unjustly or on trumped-up charges, are to be released and freedom of movement is restored to all. The freedom of action of the Churches' organizations, such as Youth Clubs, Journeymen's Unions and Vocational Associations, will be restored. The publication of religious writings is rendered possible once again. In the world of education and literature, as well as in films and radio, the heritage of Christian thought is once more assigned its rightful role. Parents have the natural right to educate their children according to the principles of Chistianity and the dictates of their own conscience. The state will also help the family in overcoming internal and external dissension and strife. There will be no compulsory state activities on Sundays.

Autonomy and self-administration are assured to the German Evangelical Church and the Roman Catholic Church. Building on the basis of historical development and of the existing laws, state supervision both in factual

and personal matters, will be developed in accordance with the changed circumstances.

The future legal position of other religious and philosophical communities will be regulated after previous discussions with these bodies.

2. *Education*

Education, which the school has to perform, in co-operation with the family and the Church, determines the future attitude of the individual towards God and his active participation in the living, natural communities of the family, profession and nation, parish, state and Church. The school shall safeguard the right of each child to an education suitable for that child. It shall awaken and strengthen his moral powers. Creative study forms the child's character in preparation for later life. The child shall be equipped with such knowledge and ability as conform with the educational standards of his age.

Character training creates a decent human being who, on a religious basis, is capable of making his rules of conduct consist of honesty and justice, truth and uprightness, love of his neighbour and loyalty towards his own conscience. A man so brought up will possess the maturity needed to make decisions in the consciousness of responsibility. Learning serves the moral build-up of the personality and also acts as a preparation for practical life. Vocational and high schools, based upon the elementary and infant schools, will actively carry on the work of the elementary schools, and give the scholar a well-knit body of knowledge and ability, and, incidentally, impart a growing sense of responsibility.

The state school is a Christian school in which religious instruction according to the two denominations is a compulsory subject. Such teaching will be carried out so far as possible by clergymen, acting under instruction by the Churches.

The present universities will be classified as high schools or Reich universities. The high schools will cater

for technical training for such callings as require a complete secondary education and thorough scholarly training. The Reich universities are centres of research and tuition of a universal character. They are the highest repositories of scholarly education and they will give pride of place to intellectually outstanding personalities, as scholars and teachers, who have proved their capability as undergraduates. The educational task of the universities is the scholarly schooling and training of those who will perform public service, and for whom leadership and with it the highest sense of responsibility are therefore necessities.

II. GENERAL DIRECTIVES

Universities and High Schools

The Reich universities are centres of universally directed, scholarly work. They utilize the research work done at high schools and ensure its integration with knowledge as a whole. This task belongs to the teaching body of the university. The teaching body must consist of scholars who combine specialist ability with a universal point of view. Specialization decides the form that all scientific work must take; a general picture of the arts and sciences presupposes the co-operative work of the leading men of the arts faculties.

The arts faculties with their basic branches will form part of every Reich university. Exaggerated specialization would destroy internal unity; that belongs to the high schools. In addition to research work the Reich universities will strive for the highest educational standards.

Since the Reich university is the supreme centre of training and instruction in the arts and sciences, properly trained and tested students are essential and the number to be admitted is therefore limited. Before attending a Reich university the student must have obtained the matriculation certificate of a grammar school and must have completed his studies at a high school.

The way of life at a university, which is a community for research, teaching and study, requires, so far as possible, living conditions in which places of work and of residence adjoin. The medium-sized town offers the most favourable conditions for this. The university town should constitute the centre of a region with a living historic tradition of its own.

The constitution of the Reich university is based upon a large measure of autonomy and self-administration. The first vice-chancellor will be appointed by the State. The first university teachers will be appointed by the State on the recommendation of the vice-chancellor. The Reich university will bestow the degree of master as proof of successful attendance. The possession of a master's degree will as a rule be a pre-requisite to appointment to leading positions in the public service which carry the highest responsibility.

The high schools are responsible for scholarly education for those callings which require a complete secondary school training and a thorough scholarly education. The training of theological students is the responsibility of the Churches. The national high schools comprise the following faculties:

Law, economics, medicine, humanities, science, education, agriculture, veterinary science, forestry, technology, mining.

In order to avoid undue specialist narrowness in research and instruction and in order to ensure the integration of the high schools within the living framework of knowledge as a whole, every high school teacher will be required to possess a master's degree.

III. NOTES

1. The question of whether the training of teachers should be carried out in the high schools or in training colleges remains open. The list of faculties within the high schools may therefore require emendation.

2. Certain guiding principles have been agreed upon in

the matter of issuing new school books. A uniform new history book should be made possible. However, present school books must be banned even before the new ones are made available.

3. The representative of the State with whom the two bishops will deal will be the Reich Chancellor. Further administrative work in this field of relations between Church and State is the responsibility of the Minister of the Interior.

4. The creation of a 'German Christian Union' *(Deutsche Christenschaft)* is proposed. To this union all Christians, regardless of their denomination, would belong. It is to ensure that Christian tenets will be taken into consideration in all matters of public concern, even if of only local importance.

This document, literally corresponding with the corrected drafts, is the original copy. All previous drafts and corrections have been destoyed.

Signed: Moltke.

Kreisau, 27 May, 1942.

Document D—Punishment of Law-Defilers

A law-defiler, automatically liable for punishment, is any man who has broken the essential principles of divine or natural law or of international law or of positive laws generally accepted within the community of nations, and who has done so in a fashion which makes it clear that he has wantonly disregarded the binding force of such laws.

A law-defiler is also he who has issued an order which will result in the defilement of the law, he who from a position of responsibility has exhorted others to do so, or who has issued lessons or directives of a nature that will cause defilement of the law.

Accomplices, accessories, and inciters will be judged according to the general criminal code.

The fact that the law has been defiled in consequence of an order received will not be accepted as entitling the defiler to avoid punishment, save only in such cases

where the accused was threatened with loss of life or where some other pressure was brought to bear which, on close examination, did not make the carrying out of the order an immoral action at the time. In particular the plea of superior orders is no justification when the performer of the action has shown by his behaviour before, during or after the action that he approved of the order received.

In cases of defilement of the law committed before the publication of this law, the legal process will be terminated with a final judgment stating that the accused is convicted of defiling the law.

Any person against whom there are adequate grounds for suspecting defilement of the law may be declared an outlaw by a public decision of the court or the higher administrative authorities. The outlaw can be arrested by any person. He is to be handed over to the police and forthwith brought before a court. All other safeguards concerning provisional arrest and detention are inapplicable to outlaws. The outlawry ends with the conviction or acquittal of the outlaw or with the quashing of the legal process.

Motivation

1. Many offences have been committed under National-Socialist rule. They are by their nature, extent and intention both grave and abominable. Their punishment is an urgent necessity for the sake of re-establishing the rule of law and thus of internal and external peace. The rule of law can be re-established only through the law itself and not through measures undertaken for political purposes or inspired by passion.

The nature of the law itself and political expediency both require that a morally acceptable and dignified solution be found.

2. In order to condemn the crimes unmistakably and clearly, it is purposed to create a specially punishable offence which carries imprisonment and death penalty for

the law-breaker who will be tried, however, according to regular criminal procedure.

In order to facilitate the apprehension of the criminals, the possibility is considered of declaring defilers of the law to be outlaws.

In addition to the measures proposed above, material punishments will be considered applicable to persons who shelter the outlaws, help them evade the officers of the law or fail to denounce them.

3. The retroactive nature of the proposed new law applying to defilers of the law is contrary to the principle *nulla poena sine lege*. The purely procedural provision regarding outlawry will not be affected by this consideration. Since the eighteenth century the principle of *nulla poena* has been inherent in European criminal law. In historic origin it was a defence against the arbitrary power of the absolute state. It derives from no fundamental moral claim, no matter which system of criminal law be examined. The old penal codes without definite codification of punishment (such as the Bamberg criminal code or the C. C. Carolina) did not contain this principle, even as some of the Swiss cantons do not accept it today. It is also to be noted that the set to which the criminals in question belong, deny and have abolished the principle. A return to a firm application of the law and the re-creation of legal security and trust require, however, that the principle of *nulla poena* be observed even in regard to the defilers of the law: therefore the promulgation of retroactive laws becomes unacceptable. It follows that actions performed before the promulgation of the law cannot be punished on the basis of the new decrees. Punishment can thus only be inflicted in cases when the criminal has committed crimes which are punishable under the laws existing at the time of the offence. The principle of *nulla poena,* however, does not prevent a simple pronouncement on the part of the court that the accused has been found guilty of defilement of the law even though such pronouncement refers to events which took place before the promulgation of the new law. This application of the

new law as a *lex imperfecta* is a valuable contribution to the re-awakening of legal consciousness and may be considered a partial atonement. Most defilers of the law under the Third Reich have committed such dastardly crimes, in particular as accessories, that the proper punishment for their crimes can also be obtained in this way.

4. In addition to legal punishment, there is the separate question of restitution towards those who have suffered arbitrary and violent damage whether to life and limb, property, honour, and civic rights and also towards those who have been discriminated against (concentration camps, unjust sentences, deprivations of citizenship, confiscations of property, dismissal of officials). Regulations will be published which will facilitate the taking of legal action against defilers of the law in such cases and which in general will increase the financial responsibility of the law-defilers.

5. The question of the effect that a pronouncement of law defilement will have upon the civic and political rights of the defilers will be dealt with in a special regulation.

Document E—Directive for the Arrangements to Deal with Defilers of the Law through the Community of Nations

Many legal offences have been committed under National-Socialist rule. They are by their nature, extent and intention both grave and abominable. Their punishment is an urgent necessity for the sake of re-establishing the rule of law and thus of internal and external peace. The rule of law can be established only through the law itself and not through measures undertaken for political purposes or inspired by passion.

The German nation has the greatest interest in ensuring that suitable punishment be imposed for violation of the law. This is an absolutely direct interest of the Germans themselves. It cannot however be contested that the community of nations is justified in demanding that punishment be exacted.

The re-creation of peace based on mutual confidence between the nations was impaired after the 1914–18 war by an inadequate attitude towards, and treatment of, 'war criminals'. In Germany at that time serious dissensions were aroused by the subject, dissensions which contributed to the state of affairs that created the new war. However, it cannot be denied that the problem which existed after the World War of 1914–18 was of an entirely different nature from that which exists today. Nevertheless, in view of current demands for a supra-national punishment of 'war criminals' guilty of 'systematic atrocities' it is of interest to recall the relevant clauses of the Treaty of Versailles.

Article 227 accused the Kaiser of 'a supreme offence against international morality and the sanctity of treaties' for which he was to be tried before a court of law consisting of five judges belonging to the major victorious powers. Judgment was to be based on the 'loftiest principles of international politics' with the purpose of 'establishing respect for solemn obligations and international treaties as well as for international morality'. The punishment was left to the discretion of the court.

According to Article 228 the Allied governments might arraign persons—whom the German government was obliged to extradite—before their military courts on charges of 'offences against the laws and customs of war' and inflict upon them 'the punishments provided by law', regardless of any punishment imposed by a German court.

Article 229 established the competence of the military courts of a victorious power to try persons accused of punishable offences against citizens of that power: in the event of the offences being committed against persons belonging to different victorious powers, military courts would be set up consisting of judges drawn from those powers.

So there was no question of trial before courts representing the community of nations, but rather before organs of the victorious powers. In contradistinction to the wrong solution then advocated, which made the co-opera-

tion of the German authorities virtually impossible, a solution of moral value must now be attempted, which derives from the nature of justice. Only such a solution can become a corner-stone of, and not a hazard to, peace.

The demand for the surrender of defilers of the law for punishment by the courts of individual victorious powers or of those powers as a whole is a denial of the natural dignity of the statesmen personally responsible for such surrender and of the nation they represent. But the establishment of standards of personal dignity is the prime condition for any happy future concert of nations.

Punishment by a combined court representing the community of nations and the subjection of defilers of the law to the jurisdiction of such a court does not offend justice or dignity. On the contrary, such a procedure could contribute, as foundation and touchstone, to the future mutual co-operation of the comity of nations. Only such a court, drawn from all the nations which took part in the war regardless of the side on which they fought, or even from all the nations of the world, would possess the moral and legal authority necessary to pronounce the great weight of moral and legal condemnation which the defilers of the law have earned. A sham sentence, pronounced by courts whose creation does not correspond to true justice, will not have the effect of re-creating the law but rather a quite contrary one.

In historical and practical terms, the proper court for this purpose would be the Hague Court. Various legal and political considerations concerning the advisability of entrusting the task of criminal jurisdiction to the Court have been ventilated from time to time but no basic argument against this can be effective in present circumstances. Non-membership of the League of Nations does not, according to Article 35 of the Statute of the Court, affect the functions of the Court. For the composition of the Court, however, Article 4 would have to be modified. Benches of six judges (three to be drawn from the victorious powers, two from the neutrals and one from the vanquished) in which, according to Article 55, the pre-

siding judge would have the casting vote would seem to meet the case. According to Article 34 of the Statute prosecution would devolve upon the state whose interests have been damaged by the crime. The appointment of counsel for the defence would be the responsibility of the state to which the accused belongs: the appointment of official defending counsel might also be considered. Details of procedure would be laid down by Court regulations. The factual criteria on which the Court would pass sentence should be the same as are outlined above for use in the trial of defilers of the law in the German national courts. The principle of *nulla poena sine lege* must remain binding for the Court, as it has been found binding in international opinion during recent years with regard to actions of the German government. Thus, even as in cases tried before German national courts, the Hague Court could pronounce the criminal guilty of defilement of the law and could punish him in accordance with the applicable laws which were valid in the country to which he belongs at the time when the action was committed. It can be left to the Court to define the applicability of national criminal laws in cases when offences were committed in occupied territories.

As to the number of persons who should be arraigned before the Court, the experience of English justice before 1689 may be of interest. Macaulay, in his *History of England,* Vol. I, Ch. X., p. 312 (London, 1854), defines this as follows:

'The rule by which a prince ought after a rebellion to be guided in selecting rebels for punishment is perfectly obvious. The ringleaders, the men of rank, fortune and education whose power and whose artifices have led the multitude into error, are the proper objects of severity. The deluded population, when once the slaughter on the field of battle is over, can scarcely be treated too leniently.'

The custody of the accused who are to appear before the Court should, by special arrangement, be provided by the Government of the Netherlands.

Responsibility for the carrying out of sentences would be assigned, by the Court, to various states, excluding the State whose interests have been damaged: the Court would retain the rights of supervision and of control.

Should this attempt succeed in banishing legally the obstacles to peace which are a grievous burden to all the parties concerned, a great step will have been taken towards the realization of the rule of law in international relations, and good will have been born of evil. Should, for practical political reasons, a solution be preferred involving courts which are not recognized as legally constituted, then injustice will have been answered with injustice, and might, which must specifically be abolished as the fount of the law, will once again have resumed its position of final arbiter.

Syllabus.

LOUIS K. LIGGETT CO. ET AL. *v.* LEE, COMPTROLLER, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 301. Argued January 12, 13, 1933.—Decided March 13, 1933.

1. A state tax (Florida Laws 1931, c. 15624) on the privilege of opening and maintaining stores, fixed at so much per store without regard to value or volume of business, and increasing progressively with the number of stores maintained by the owners taxed, is not in violation of the equal protection clause of the Fourteenth Amendment because of the resulting discrimination against them and in favor of owners of single and department stores or the owners of distinct stores in voluntary coöperation. *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527. P. 532.
2. A state statutory provision laying a heavier privilege tax per store on the owner whose stores are in different counties than on the owner whose stores are all in the same county, is arbitrary and void. P. 533.
3. The county line furnishes no rational basis for such a classification. *Id.*
4. There is nothing in the Florida statute here in question indicating that the discrimination based on counties was directed against so-called "national chains" of stores in contrast with "local chains," or against corporate owners, distinguished from individuals, or large owners distinguished from small. P. 534.
5. Assuming the State had power to suppress by taxation a form of organization deemed inimical to the public interest, no such motive can be attributed to the present statute in the absence of legislative declaration or record proof. P. 535.
6. Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. P. 536.
7. Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, can not be justified by the assumption that a different classification for a wholly different purpose might be valid. P. 536.
8. The provision authorizing counties and municipalities to levy license taxes on stores, to be graduated only on the number of stores situated within their respective limits, is constitutional. P. 537.

9. A higher state tax on the goods held in storage by chain stores for retail sale in their own shops than on the goods stored by wholesalers, to be sold to retailers, is consistent with the equal protection clause. P. 537.
10. Taxing chain stores generally by graduated license taxes but excepting filling stations engaged exclusively in the sale of gasoline or other petroleum products, that business being otherwise taxed by license and by a tax per gallon of products sold—*held* consistent with the equal protection clause. P. 538.
11. The Fourteenth Amendment does not prevent a State from imposing differing taxes upon different trades and professions or varying the rates of excise upon various products. P. 538.
12. State taxes for the privilege of operating stores within the State and on the value of the goods warehoused in the State for sale in such stores, *held* consistent with the commerce clause. P. 538.
13. A person is not exempted by the equal protection clause from paying a state tax because the tax is not collected by the state officials from others who are equally liable. *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23; *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239, distinguished. P. 539.
14. The remedy in such cases for taxpayers in Florida is by writ of mandamus commanding the tax officers to collect the omitted taxes. P. 540.
15. When, in a case from a state court, this Court finds that a part of a state statute is unconstitutional, it has jurisdiction to decide the question of state law whether the remainder is preserved by a saving clause, but may leave that determination to the courts of the State. P. 541.

104 Fla. 609; 141 So. 153, reversed.

APPEAL from a decree affirming the dismissal of the bill in a suit to enjoin state taxing officers from enforcing an Act laying a discriminatory tax on chain stores.

any reason to be inoperative, and we are asked, therefore, to declare the entire statute void.

Section 15 provides:

"If any section, provision or clause of this Act shall be declared invalid or unconstitutional, or if this Act as applied to any circumstances shall be declared invalid or unconstitutional, such invalidity shall not be construed to affect the portions of this Act not so held to be invalid or the application of this Act to other circumstances not so held to be invalid."

The operation of this section consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court. See *King* v. *West Virginia,* 216 U. S. 92; *Schneider Granite Co.* v. *Gast Realty Co.,* 245 U. S. 288, 290; *Dorchy* v. *Kansas,* 264 U. S. 286, 291.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRANDEIS, dissenting in part.

In my opinion, the judgment of the Supreme Court of Florida should be affirmed.

Florida Laws, 1931, Chapter 15,624 is legislation of the type popularly called Anti-Chain Store Laws. The statute provides for the licensing of retail stores by the State, the counties and the municipalities—a system under which large revenues may be raised. But the raising of revenue is obviously not the main purpose of the legislation. Its chief aim is to protect the individual, independently-owned, retail stores from the competition of chain stores. The statute seeks to do this, by subjecting the latter to financial handicaps which may conceivably compel their withdrawal from the State. An injunction

against its enforcement is sought on the ground that the law violates rights guaranteed by the Federal Constitution.

The Florida law is general in its terms. It prohibits the operation, after September 30, 1931, of any retail store without securing annually a license; and provides, among other things, for annual fees which are in part graduated. If the owner operates only one store the state fee is $5; if more than one, the fee for the additional stores rises by step increases, dependent upon both the number operated and whether all operated are located in a single county. The highest fee is for a store in excess of 75. If all of the stores are located in a single county, the fee for each store in excess of 75 is $40; if all are not located in the same county the fee is $50. Under this law, the owner of 100 stores not located in a single county pays for each store operated, on the average, $33.65; and if they were located in a single county the owner would pay for each store, on the average, $25.20. If the 100 stores were independently owned (although operated coöperatively as a so-called " voluntary chain ") the annual fee for each would be only $5. The statute provides that the licenses shall issue to expire on September 30th of each calendar year. This suit was begun September 30th, 1931. The first license year had expired before the case was heard in this Court.

In its main features, this statute resembles the Indiana law discussed in *Tax Commissioners* v. *Jackson,* 283 U. S. 527. For the reasons there stated, the Court sustains like provisions in the Florida statute. But it declares arbitrary, and hence invalid, the novel provision imposing heavier license fees where the multiple stores of a single owner are located in more than one county, because it is " unable to discover any reasonable basis for this classification." There is nothing in the record to show affirmatively that the provision may not be a reasonable one in

view of conditions prevailing in Florida. Since the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute, its validity should, in my opinion, be sustained. *O'Gorman & Young* v. *Hartford Insurance Co.,* 282 U. S. 251, 257–8; *Railway Express Agency* v. *Virginia,* 282 U. S. 440, 444; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 158; *Boston & Maine R. Co.* v. *Armburg,* 285 U. S. 234, 240; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 283.

There is, however, another ground on which this provision should be, and the whole statute could be, sustained—a ground not considered in the *Jackson* case and not pertinent there. Jackson was an individual. The plaintiffs here are all corporations. Though the provisions of the statutes in the two States are similar, certain rules of law applicable to the parties to the litigation are different.

The plaintiffs are thirteen corporations which engage in Florida exclusively in intrastate commerce. Each (except one) owns and operates a chain of retail stores within the State and some operate stores in more than one county. Several of the plaintiffs are organized under the laws of Florida; the rest under the laws of other States. No claim of discrimination as between the foreign and domestic corporations is made, compare *Southern Ry. Co.* v. *Greene,* 216 U. S. 400; *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494; nor could it be, since the statute affects both classes of corporations alike. The suit is brought as a class suit, for the benefit of all merchants similarly situated who may desire to avail themselves thereof. From certain allegations in the bill it may be inferred that there are at least two natural persons within the State who own and operate more than one store. But as no such person has intervened in the cause, we have no occasion to enquire whether the discrimination com-

plained of would be fatal as applied to natural persons. The plaintiffs can succeed only if the discrimination is unconstitutional as applied to them; that is, as applied to corporations. One who would strike down a statute must show not only that he is affected by it, but that as applied to him it exceeds the power of the State. This rule, acted upon as early as *Austin* v. *The Aldermen,* 7 Wall. 694, and definitely stated in *Supervisors* v. *Stanley,* 105 U. S. 305, 314, has been consistently followed since that time. Compare *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550; *Darnell* v. *Indiana,* 226 U. S. 390, 398; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54–55; *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Assn.,* 276 U. S. 71, 88. For the reasons to be stated, the discrimination complained of, and held arbitrary by the court is, in my opinion, valid as applied to corporations.

First. The Federal Constitution does not confer upon either domestic or foreign corporations the right to engage in intrastate commerce in Florida. The privilege of engaging in such commerce in corporate form is one which the State may confer or may withhold as it sees fit. Compare *Railway Express Agency* v. *Virginia,* 282 U. S. 440. See *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181, 184–5, 186; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 314; *Hemphill* v. *Orloff,* 277 U. S. 537, 548. Florida might grant the privilege to one set of persons and deny it to others; might grant it for some kinds of business and deny it for others; might grant the privilege to corporations with a small capital while denying it for those whose capital or resources are large. Or, it might grant the privilege to private corporations whose shares are owned mainly by those who manage them and to corporations engaged in coöperative undertakings, while denying the privilege to other concerns called private, but whose shares are listed on a stock exchange—corpora-

tions financed by the public, largely through the aid of investment bankers. It may grant the privilege broadly, or restrict its exercise to a single county, city or town, and to a single place of business within any such subdivision of the State.

Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable. It may be granted as a means of raising revenue; or in order to procure for the community a public utility, a bank or a desired industry not otherwise obtainable; or the reason for granting it may be to promote more generally the public welfare by providing an instrumentality of business which will facilitate the establishment and conduct of new and large enterprises deemed of public benefit. Similarly, if the privilege is denied, it is denied because incidents of like corporate enterprise are deemed inimical to the public welfare and it is desired to protect the community from apprehended harm.

Here we are dealing only with intrastate commerce. Compare *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 71. Since a State may fix the price for the privilege of doing intrastate commerce in corporate form, and the corporation is free to accept or reject the offer, the State may make the price higher for the privilege of locating stores in two counties than in one. Can it be doubted that a State, being free to permit or to prohibit branch banking, would be at liberty to exact a higher license fee from banks with branches than from those with only a single place of business; that it might exact a higher fee from those banks which have branches in several counties than it does from those whose branches are all within a single county; and that it might do so without obligation to justify, before some court, the reasonableness of the dif-

ference in the license fees?[1] The difference made by Florida in exacting a higher license fee for those concerns which do business in more than one county is similar in character to that suggested.

If the Florida statute had stated in terms that the license fee was exacted as compensation for the privilege of conducting multiple stores in corporate form, it seems clear that no corporation could successfully challenge its validity. Compare *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *Kansas City, F. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227; *Nebraska ex rel. Beatrice Creamery Co.* v. *Marsh,* 282 U. S. 799. And since the State had the power so to do, the mere failure to state that such was the nature of the exaction does not render it invalid. Compare *Castillo v. McConnico,* 168 U. S. 674, 683. Nor does the fact that the plaintiffs had been admitted to the State prior to enactment of the statute. A State which freely granted the corporate privilege for intrastate commerce may change its policy. It may conclude, in the light of experience, that the grant of the privilege for intrastate commerce is harmful to the community and may decide not to grant the privilege in the future. It may go further in the process of exclusion. It may revoke privileges theretofore granted, compare *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 343; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129, since, in the absence of contract, there is no vested interest which requires the con-

[1] In only 9 states is state-wide branch banking permitted: Arizona, California, Delaware, Maryland, North Carolina, Rhode Island, South Carolina, Vermont, and Virginia. Of these, all except South Carolina and Maryland require the authorization of the appropriate state officer. See Federal Reserve Bulletin, April, 1930, pp. 258–266; *id.,* July, 1932, pp. 455–458. Congress prohibited the establishment of any branch national bank from 1863 to 1927; see *First National Bank* v. *Missouri,* 263 U. S. 640, 656–659. The law of that year authorized branches only within the same city; and only if the state laws so permitted. Act of February 25, 1927, 44 Stat. 1224, 1228, c. 191, § 7. Compare Act of February 25, 1933, 47 Stat. 907.

tinuance of a legislative policy however expressed—whether embodied in a charter or in a system of taxation. *Citizens' Savings Bank* v. *Owensboro,* 172 U. S. 636, 644; *Texas & N. O. R. Co.* v. *Miller,* 221 U. S. 408, 414–415; *Erie R. Co.* v. *Williams,* 233 U. S. 685, 701; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, 157. Compare *Louisville Bridge Co.* v. *United States,* 242 U. S. 409.

If a State believes that adequate protection against harm apprehended or experienced can be secured, without revoking the corporate privilege, by imposing thereafter upon corporations the handicap of higher, discriminatory license fees as compensation for the privilege, I know of nothing in the Fourteenth Amendment to prevent it from making the experiment. The case at bar is not like those where a restriction upon the liberty of the individual may be attacked by showing that no evil exists, or is apprehended, or that the remedy provided cannot be regarded as appropriate to its removal. Nor is the case like those where a state regulation or state taxes burden interstate commerce. Compare *Welton* v. *Missouri,* 91 U. S. 275; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Caldwell* v. *North Carolina,* 187 U. S. 622, 626; *Davis* v. *Farmers Co-operative Equity Co.,* 262 U. S. 312; *Buck* v. *Kuykendall,* 267 U. S. 307. Cases like *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Looney* v. *Crane Co.,* 245 U. S. 178; *Terral* v. *Burke Construction Co.,* 257 U. S. 529, have no application to the situation here discussed.

Whether the citizens of Florida are wise in seeking to discourage the operation of chain stores is, obviously, a matter with which this Court has no concern. Nor need it, in my opinion, consider whether the differences in license fees employed to effect such discouragement are inherently reasonable, since the plaintiffs are at liberty to refuse to pay the compensation demanded for the corporate privilege and withdraw from the State, if they consider the price more than the privilege is worth. But a review of the legislation of the several States by which

all restraints on corporate size and activity were removed, and a consideration of the economic and social effects of such removal, will help to an understanding of Anti-Chain Store Laws; and will show that the discriminatory license fees prescribed by Florida, even if treated merely as a form of taxation, were laid for a purpose which may be appropriately served by taxation, and that the specific means employed to favor the individual retailer are not constitutionally objectionable.

Second. The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes.[2] It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.[3]

[2] See Joseph S. Davis, Essays in the Earlier History of American Corporations, Vol. II, pp. 16–18, 308–309. New York permitted incorporation under a general law for some business purposes in 1811. By 1850 a general law permitting incorporation for a limited business purpose had become common; and after 1875 extension of the privilege to every lawful business became so.

[3] It was doubtless because of this, that the earlier statutes limited the life of corporations to fixed terms of 20, 30 or 50 years. See the statutes cited in subsequent notes.

There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So, at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable. The later enactment of general incorporation laws does not signify that the apprehension of corporate domination had been overcome. The desire for business expansion created an irresistible demand for more charters; and it was believed that under general laws embodying safeguards of universal application the scandals and favoritism incident to special incorporation could be avoided. The general laws, which long embodied severe restrictions upon size and upon the scope of corporate activity, were, in part, an expression of the desire for equality of opportunity.[4]

The power of legislatures to grant special charters was sometimes strictly limited, even before the adoption of constitutional amendments withdrawing that power entirely. Thus the New York Constitution adopted in convention in November, 1821, and by popular vote in January, 1822, required the assent of two-thirds of each house for any act "creating, continuing, altering or renewing any body politic or corporate"—Art. 7, § 9; L. 1822–24, p. x. Similar provisions were included in the Delaware Constitution of 1831, Art. 2, § 17; in the Florida Constitution of 1838, Art. 13, § 2 (with an additional requirement of three months' public notice); and in the Michigan Constitution of 1835, Art. 12, § 2. The Rhode Island Constitution of 1842, Art. 4, § 17, required a bill for a corporate charter to be continued to the next legislature. The Constitution of Illinois, adopted in 1848, provided that no act authorizing the formation of a corporation with banking powers should be effective unless ratified by popular vote—Art. X, § 5; and a similar provision was included in the Constitution of Wisconsin, 1848, Art. II, §§ 4, 5.

[4] That the desire for equality and the dread of special privilege were largely responsible for the general incorporation laws is indicated by the fact that many States included in their constitutions a prohibition of the grant of special charters. The first constitutional provision requiring incorporation under general laws seems to be that in the New

(a) Limitation upon the amount of the authorized capital of business corporations was long universal.[5] The maximum limit frequently varied with the kinds of business to be carried on, being dependent apparently upon the supposed requirements of the efficient unit. Although the statutory limits were changed from time to time this principle of limitation was long retained. Thus

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York constitution of 1846—Art. 8, § 1 (except where objects of incorporation were not thus attainable). Other States followed in later years. Ala. 1867, Art. 13; Ark. 1874, Art. 12; Calif. 1849, Art. 4, § 31; Colo. 1876, Art. 15. § 2; Del. 1897, Art. 9, § 1; Ga. 1868, Art. 3, § 6 (amended by Laws 1890–1891, p. 55); Idaho 1889, Art. 11, § 2; Ill. 1848, Art. 10, § 1; Ind. 1851, Art. 11, § 13; Iowa 1846, Art. 8, § 2; Kans. 1855, Art. 13, § 1; La. 1864, Art. 121; Me. 1875, Art. 4, § 14 (except where objects could not thus be attained); Md. 1851, Art. 3, § 47 (except where objects could not thus be attained); Mich. 1850, Art. 15, § 1; Minn. 1857, Art. 10, § 2; Miss. 1890, Art. 7, § 178; Mo. 1865, Art. 8, § 4; Mont. 1889, Art. 15, § 2; Neb. 1866, Tit. Corporations, § 1; Nev. 1864, Art. 8, § 1; N. J. 1875, Art. 4, § 7; N. Car. 1868, Art. 8, § 1 (except where objects could not thus be attained); N. Dak. 1889, Art. 7, § 131; Ohio 1851, Art. 13, § 1; Ore. 1857, Art. 11, § 2; Penna. 1874, Art. 3, § 7; S. Dak. 1889, Art. 17, § 1; Tenn. 1870. Art. 11, § 8; Texas 1876, Art. 12, § 1; Utah 1895, Art. 12, § 1; Va. 1902, Art. 12, § 154; Wash. 1889, Art. 12, § 1; W. Va. 1872, Art. 11, § 1; Wis. 1848, Art. 11, § 1 (except where objects could not thus be attained).

[5] *Alabama*—until 1876, the limit was $200,000. Rev. Code 1867 (Walker), part 2, c. 3, § 1759; Act No. 282, March 3, 1870, § 3, L. 1869–70, p. 320. Under the Code of 1876 (Wood & Roquemore), § 1811, p. 509 (Act of February 28, 1876, § 9, L. 1875–76, p. 244), the limit was $1,000,000. Under the Code of 1896 (Civil, c. 28, § 1259, p. 429), it was $10,000,000. *Arizona*—Comp. L. 1864–71, c. 51, § 19, p. 486—$5,000,000. *Illinois*—$300,000, Act of June 22, 1852, L. p. 135; $1,000,000, Act of February 17, 1857, L. p. 110; $500,000, Act of February 18, 1857, L. p. 161. *Maine*—$50,000, Act of March 19, 1862, c. 152, § 3; $200,000, Act of February 28, 1867, c. 125, § 7; February 26, 1870, c. 93, § 1; $500,000, Act of February 3, 1876, c. 65, § 2; $2,000,000, Act of February 14, 1883, c. 116, § 1; $10,000,000, Act of March 25, 1891, c. 99, § 1. The Act of March 21, 1901, c. 229, was the first to prescribe no limit. *Wisconsin*—Until 1879, $250,000, Rev. Stat. 1878, c. 86, § 1772, p. 516; Act of February 7, 1879, c. 7,

in New York the limit was at first $100,000 for some businesses and as little as $50,000 for others.[6] Until 1881 the maximum for business corporations in New York was $2,000,000; and until 1890, $5,000,000.[7] In Massachusetts the limit was at first $200,000 for some businesses and as little as $5,000 for others.[8] Until 1871 the maximum for mechanical and manufacturing corporations was

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L. 1879, p. 10. Limits were imposed in some cases even by *Delaware* (March 21, 1871, c. 152, 14 Del. L. 299) and *New Jersey* (March 30, 1865, c. 379, L. 1865, p. 707; March 31, 1869, c. 374. L. 1869, p. 1001). And see the notes following.

[6] The Act of March 22, 1811, c. 67, limited the capital stock to $100,000. The purposes for which corporations might be formed under this law were limited to the following: manufacturing woolen, cotton or linen goods; making glass; making, from ore, bar-iron, anchors, mill-irons, steel, nail rods, hoop iron, ironmongery, sheet lead, shot, white lead and red lead. The Act of April 14, 1817, c. 223, extended the purposes to include the manufacture of morocco and other leather; but for such objects the capital stock was not to exceed $60,000. Further limitations were added from time to time, with the general limitation of $100,000, or a lower limitation; as, for example, $50,000 for corporations manufacturing salt. L. 1821, c. 231, § 19. The Act of 1852, c. 228, provided for the incorporation of companies for ocean navigation, and limited the authorized capital to $2,000,000; this was increased to $4,000,000 by Act of 1853, c. 124; to $8,000,000 by Act of 1866, c. 322; to $20,000,000 by Act of 1867, c. 419; and this was decreased to $4,000,000 by Act of 1875, c. 445. The Act of 1853, c. 117, provided for the incorporation of building companies, and set a maximum of $500,000; this was increased to $1,000,000 by Act of 1870, c. 773. The Act of 1854, c. 232, provided for the incorporation of companies to navigate lakes and rivers, and set a maximum of $1,000,000; this was increased to $2,000,000 by Act of 1865, c. 691. The Act of 1874, c. 143, provided for the incorporation of hotel companies, and set a maximum of $1,000,000.

[7] The General Business Corporation Act of 1875, c. 611, § 11, set a maximum of $2,000,000. This was increased to $5,000,000 by Act of 1881, c. 295.

[8] The first general act, May 15, 1851, c. 133, permitted incorporation for "any kind of manufacturing, mechanical, mining or quarrying business." It limited the maximum to $200,000. Act of March 19, 1855, c. 68, § 1, increased the maximum to $500,000. The act of

$500,000; and until 1899, $1,000,000.[9] The limit of $100,000 was retained for some businesses until 1903.[10]

In many other states, including the leading ones in some industries, the removal of the limitations upon size was more recent. Pennsylvania did not remove the limits

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May 9, 1870, c. 224 (Acts & Res. 1870, p. 154) repealed previous acts (§ 69) and made more comprehensive provisions; cutting, storing and selling ice, or carrying on any agricultural, horticultural, mechanical, mining, quarrying or manufacturing business, printing and publishing—a maximum of $500,000 (§ 2); coöperation in any of the above businesses and coöperative trade—$50,000 (§ 3); opening outlets, canals or ditches, propagation of herrings and alewives—$5,000 (§ 4); making and selling gas for light in cities or towns—$500,000 (§ 5); common carriage of goods—$1,000,000 (§ 6). Later acts provided for the manufacture and distribution of gas for steam, heat, power, and cooking; and for the furnishing of hydrostatic and pneumatic pressure. A maximum of $500,000 was prescribed. Acts of April 9, 1879, c. 202; May 15, 1885, c. 240; April 11, 1891, c. 189; May 27, 1893, c. 397. The same limit was prescribed for corporations to erect and maintain hotels, public halls, and buildings for manufacturing purposes. Acts of April 24, 1872, c. 244; March 9, 1888, c. 116.

[9] The maximum limit was raised to $1,000,000 for manufacturing and mechanical business by Act of March 22, 1871, c. 110, § 1; and for mining corporations by Act of May 3, 1875, c. 177, § 3; and to $100,000 for coöperative trade by Act of April 11, 1879, c. 210. By Act of April 14, 1873, c. 179, the general act was extended to the common carriage of persons—except by railroad—and the limit of $1,000,000 was retained. The Act of April 14, 1874, c. 165, authorized incorporation for " any lawful business," not specifically provided for, and limited the amount of stock to $1,000,000. The maximum limit for manufacturing and mechanical corporations was removed by Act of March 28, 1899, c. 199. For all the other corporate purposes, the limitations above-named remained until the passage of the Business Corporation Law, June 17, 1903, c. 437. By that time commissions with power to supervise the issues of public service corporations had long been established. Act of June 11, 1885, c. 314; Act of June 5, 1894, c. 450; Act of June 5, 1894, c. 452; Act of June 9, 1894, c. 462.

[10] For all except mechanical and manufacturing corporations, the limitations set out in notes 8 and 9, *supra*, remained until the passage of the Business Corporation Law, June 17, 1903, c. 437.

until 1905.[11] Its first general act not having contained a maximum limit, that of $500,000 was soon imposed.[12] Later, it was raised to $1,000,000; and, for iron and steel companies, to $5,000,000.[13] Vermont limited the maximum to $1,000,000 until 1911[14] when no amount over $10,000,000 was authorized if, in the opinion of a judge of the supreme court, such a capitalization would tend "to create a monopoly or result in restraining competition in trade."[15] Maryland limited until 1918 the capital of mining companies to $3,000,000; and prohibited them from holding more than 500 acres of land (except in Allegany County, where 1,000 acres was allowed).[16] New Hampshire did not remove the maximum limit until 1919.[17] It had been $1,000,000 until 1907,[18] when it was increased to $5,000,000.[19] Michigan did not remove the maximum limit until 1921.[20] The maximum, at first

[11] Act of April 22, 1905, No. 190, amending Act of February 9, 1901, No. 1; 5 Purdon's Digest, 1905–09 Supp. (13th ed.), p. 5340.

[12] The first Act passed in 1849, L. 1849, No. 368, p. 563, contained no limit. But a limit of $500,000 was imposed by Act of July 18, 1863, No. 949, L. 1864, p. 1102.

[13] The limit was raised to $1,000,000 for iron and steel corporations by Act of March 25, 1873, No. 4, L. 1873, p. 28, and it was extended to other corporations by Act of April 29, 1874, L. 1874, p. 73, which also increased the limit for the former to $5,000,000. The Act of April 18, 1873, No. 54, L. 1873, p. 76, had required that the Attorney General be satisfied of the reasonableness of so large a capitalization.

[14] Pub. Stat. (1906), Tit. 25, c. 187, § 4311, p. 830.

[15] Act of January 28, 1911, No. 143, L. 1910, pp. 140, 141–142. This provision was repealed by General Corporation Act, April 1, 1915, No. 141, L. 1915, p. 222.

[16] Bagby's Code (1911), Art. 23, § 245, p. 648; repealed by Act of April 10, 1918, c. 417, L. 1918, p. 884.

[17] Business Corporation Law, March 28, 1919, c. 92, L. 1919, p. 113.

[18] Pub. Stat. (1901), c. 147, § 6, p. 470.

[19] Act of April 5, 1907, c. 129, L. 1907, p. 131.

[20] General Corporation Act, No. 84, April 26, 1921, L. 1921, p. 125, contains no limit on the amount of stock. Corporate life is limited to 30 years, § 5(b).

$100,000,[21] had been gradually increased until in 1903 it became $10,000,000 for some corporations and $25,000,000 for others;[22] and in 1917 became $50,000,000.[23] Indiana did not remove until 1921 the maximum limit of $2,000,000 for petroleum and natural gas corporations.[24] Missouri did not remove its maximum limit until 1927.[25] Texas still has such a limit for certain corporations.[26]

(b) Limitations upon the scope of a business corporation's powers and activity were also long universal. At first, corporations could be formed under the general laws only for a limited number of purposes—usually those which required a relatively large fixed capital, like transportation, banking, and insurance, and mechanical, min-

[21] Act 148, May 18, 1846, § 6, L. 1846, pp. 265, 267—corporation for mining or manufacturing iron, copper, etc.

[22] Act 232, June 18, 1903, 3 Howell's Mich. Stat. (1914), § 9533, p. 3815. The $25,000,000 maximum was for mercantile and manufacturing corporations. It had previously been raised to $5,000,000 by Act 232, September 19, 1885, § 2, L. 1885, p. 343. For mining corporations, a different maximum was fixed: $500,000 by Act 41, February 5, 1853, L. 1853, p. 53; $2,500,000 by Act 113, May 11, 1877, § 4, L. 1877, p. 87; and $10,000,000 by Act 233, September 17, 1903, Howell's Mich. Stat. (1914), § 7783, p. 3158, § 7804, p. 3165.

[23] Act 254, May 10, 1917, § 2, L. 1917, pp. 529, 530. See *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 494; 170 N. W. 668.

[24] Until 1921, corporations for various objects were formed under various acts. For mining corporations, a limit of $2,000,000 was prescribed. 2 Burns' Ind. Stat. (1914), § 5137; 2 *id.* (1926), § 5547. In 1921, a general act, applicable to corporations for any lawful business, was passed, without limitation on the amount of stock. Act of February 28, 1921, c. 35, L. 1921, p. 93.

[25] By Act of March 30, 1907, L. 1907, p. 166, the maximum was increased to $50,000,000 from the $10,000,000 limit previously in force; Rev. Stat. 1899, c. 12, Art. 9, § 1320, p. 429; Rev. Stat. 1919, c. 90, Art. 7, § 10152. The act was repealed and no maximum provided in Act of April 8, 1927, L. 1927, p. 395; 1927 Supp. to Rev. Stat. § 10152.

[26] I Rev. Stat. (1925), Tit. 32, Art. 1302, ¶¶ 15, 16, 27. See Act of March 9, 1925, c. 51, L. 1925, p. 188.

ing, and manufacturing enterprises.[27] Permission to incorporate for "any lawful purpose"[28] was not common until 1875; and until that time the duration of corporate franchises was generally limited to a period of 20, 30, or 50 years.[29] All, or a majority, of the incorporators or directors, or both, were required to be residents of the incorporating state.[30] The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed. Severe limitations were imposed on the amount of indebtedness, bonded or other-

[27] See notes 6 and 8, *supra*. The first general act in New Jersey was that of February 25, 1846, L. 1846, p. 64. In Michigan—May 18, 1846, Act 148, L. 1846, p. 265. In Illinois—February 10, 1849, L. 1849, p. 87. In Pennsylvania—April 7, 1849, No. 368, L. 1849, p. 563. In Massachusetts—May 15, 1851, c. 133, Gen. Stat. 1860 (2 ed.), p. 341. In Maine—March 19, 1862, c. 152, L. 1862, p. 118. In Delaware—March 21, 1871, c. 152, 14 Del. L. 229. In general, the objects of incorporation under these acts were limited to mining, manufacturing, mechanical or chemical business; separate acts governed the formation of banking, insurance, and transportation companies. Authority to incorporate for mercantile business, where specifically provided, was given relatively late. *E. g.*, Md. Laws 1894, c. 599; Tenn. Acts 1887, c. 139; Vt. Laws 1884, No. 105; compare Ind. Laws 1889, c. 81, § 1. And see Cook on Corporations (1889), p. 91: "The general corporation laws [of Pennsylvania] do not provide for mercantile corporations, but these are practically incorporated by means of 'partnership associations.' . . ."

[28] New York—L. 1866, c. 838, p. 1896; L. 1875, c. 611, p. 755. Illinois—July 1, 1872, L. 1872, p. 296. Massachusetts—Act of April 14, 1874, c. 165, § 1. Maine—February 3, 1876, c. 65, L. 1876, p. 51. Other States followed shortly.

[29] In 1903, almost half the states limited the duration of corporate existence to periods of from 20 to 50 years. See Report of the Committee on Corporation Laws of Massachusetts (1903), pp. 162–164.

[30] *E. g.*, Calif. Civ. Code (1885), § 285; Conn. Gen. Stat. (1888), § 1944; Ill. Rev. Stat. (1891), c. 114, § 11; Me. Rev. Stat. (1883), pp. 412, 467; Md. Gen. L. (1888), p. 299; Ohio Rev. Stat. (1886), § 3236; Pa. Dig. (Purdon's 1905), Tit. Corporations, § 63. Compare Wis. Stat. (1908), c. 85, § 1750 (chief managing officer or superintendent must reside in state, except in case of interstate railroad).

wise.[31] The power to hold stock in other corporations was not conferred or implied.[32] The holding company was impossible.

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[31] See, *e. g.*, N. Y. Laws 1825, p. 448, § 3, 1 Rev. Stat. (1852), c. 18, Tit. 4, § 3, p. 1175; N. Y. Laws 1875, c. 611, § 22; Ill. Laws 1849, p. 87, § 22, p. 92; Ill. Laws 1872, p. 296, § 16, p. 300; Pa. Laws 1874, p. 73, § 13, p. 80; Maine Laws 1867, p. 72, § 24, p. 75; N. J. Laws 1846, p. 64, § 28, p. 69; N. J. Laws 1874, p. 124, § 16, p. 129. In 1903, almost half the states retained limitations on corporate indebtedness. See Report of the Committee on Corporation Laws of Massachusetts (1903), pp. 165–166.

[32] See Noyes, Intercorporate Relations (2d ed., 1909), pp. 473–498; Morawetz, Private Corporations (2d ed., 1886), § 431. New Jersey was the first state to confer the general power of intercorporate stockholding. N. J. Laws 1888, pp. 385, 445, cc. 269, 295; N. J. Laws 1893, c. 171, p. 301. See Gilbert H. Montague, Trusts of Today (1904), pp. 20–21; C. R. Van Hise, Concentration and Control (rev. ed., 1914), p. 70; W. Z. Ripley, Trusts, Pools and Corporations (rev. ed., 1916), pp. xix–xx; Eliot Jones, The Trust Problem in the United States (1921), p. 30; Maurice H. Robinson, The Holding Corporation, 18 Yale Review, pp 390, 406–407. Although unconditional power was not conferred until the Act of 1893, *supra*, it had been the practice of corporations formed in New Jersey to purchase the shares of other corporations. See Edward S. Keasbey, New Jersey and the Great Corporations, 13 Harvard Law Review, pp. 198, 207, 208. In no other state had there been a provision permitting the formation of holding companies, although by special act, notably in Pennsylvania, a few such companies had been formed. See James C. Bonbright and Gardiner C. Means, The Holding Company (1932), pp. 58–64. The scandal to which the series of Pennsylvania holding-company charters gave rise led to a constitutional amendment in that state forbidding the grant of special charters. Pa. Laws 1874, p. 8; Pa. Const., Art. III, § 7. See Bonbright and Means, *supra*, at p. 60. New York, like other states, had specifically prohibited intercorporate stockholding, except where the stock held was that of a corporation supplying necessary materials to the purchasing corporation, or where it was taken as security for, or in satisfaction of, an antecedent debt. N. Y. Laws 1848, c. 40, § 8; 1876, c. 358; 1890, c. 564, § 40; 1890, c. 567, § 12. See *De La Vergne Co.* v. *German Savings Institution*, 175 U. S. 40, 54–58.

(c) The removal by the leading industrial States of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser States, eager for the revenue [33] derived from the traffic in charters, had removed safeguards from their own incorporation laws.[34]

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[33] The filing fees and franchise taxes are commonly measured by the authorized or issued stock. See National Industrial Conference Board, State and Local Taxation of Business Corporations (1931), Appendix B, pp. 138–159. And for the earlier laws, utilizing the same basis, see Report of the Massachusetts Committee on Corporation Laws (1903), pp. 265–288; House Committee on the District of Columbia, Report of Hearings of January 16, 1905, on H. R. 11811 and 12303 (Gov't Ptg. Office 1905) pp. 24–28.

[34] The traffic in charters quickly became widespread. In 1894 Cook on Stock and Stockholders (3d ed.) Vol. II, pp. 1604–1605 thus described the situation: "New Jersey is a favorite state for incorporations. Her laws seem to be framed with a special view to attracting incorporation fees and business fees from her sister states and especially from New York, across the river. She has largely succeeded in doing so, and now runs the state government very largely on revenues derived from New York enterprises. . . .

"Maine formerly was a resort for incorporators, but a recent decision of its highest court holding stockholders liable on stock which has been issued for property, where the court thought the property was not worth the par value of the stock, makes Maine too dangerous a state to incorporate in, especially where millions of dollars of stock are to be issued for mines, patents and other choice assortments of property. . . .

"West Virginia for the past ten years has been the Snug Harbor for roaming and piratical corporations. . . . The manufacture of corporations for the purpose of enabling them to do all their business elsewhere seems to be the policy of this young but enterprising state. Its statutes seem to be expressly framed for that purpose. . . ."

Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive.[35] The states joined in advertising

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In 1906 John S. Parker thus described the practice, in his volume Where and How—A Corporation Handbook (2d ed.), p. 4: "Many years ago the corporation laws of New Jersey were so framed as to invite the incorporation of companies by persons residing in other states and countries. The liberality and facility with which corporations could there be formed were extensively advertised, and a great volume of incorporation swept into that state. . . .

"The policy of New Jersey proved profitable to the state, and soon legislatures of other states began active competition. . . .

"Delaware and Maine also revised their laws, taking the New Jersey act as a model, but with lower organization fees and annual taxes. Arizona and South Dakota also adopted liberal corporation laws, and contenting themselves with the incorporation fees, require no annual state taxes whatever.

"West Virginia for many years has been popular with incorporators, but in 1901, in the face of the growing competition of other states, the legislature increased the rate of annual taxes." And West Virginia thus lost her popularity. See Conyngton and Bennett, Corporation Procedure (rev. ed. 1927), p. 712. On the other hand, too drastic price cutting was also unprofitable. The bargain prices in Arizona and South Dakota attracted wildcat corporations. Investors became wary of corporations organized under the laws of Arizona or South Dakota and both states fell in disrepute among them and consequently among incorporators. See Conyngton on Corporate Organizations (1913), ch. 5.

[35] Thus, in its pamphlet, "Business Corporations Under the Laws of Maine" (1903), the Corporation Trust Co. enumerated among the advantages of the Maine laws: the comparatively low organization fees and annual taxes; the absence of restrictions upon capital stock or corporate indebtedness; the authority to issue stock for services as well as property, with the judgment of the directors as to their value conclusive; and, significantly enough, "the method of taxation, which bases the annual tax upon the stock issued, does not necessitate inquiry into or report upon the intimate affairs of the corporation." See also its pamphlet "Business Corporations Under the Laws of Delaware" (1907). See also the Red Book on Arizona Corporation Laws (1908), published by the Incorporating Company of Arizona, especially p. 5: "The remoteness of Arizona from the Eastern and

their wares.[36] The race was one not of diligence but of laxity.[37] Incorporation under such laws was possible; and the great industrial States yielded in order not to

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Southern States has in a measure delayed the promulgation of the generousness of its laws. New Jersey, Delaware and West Virginia have become widely known as incorporating states. More recently Arizona, Dakota, New Mexico and Nevada have come into more or less prominence by the passage of laws with liberal features."

[36] Thus, in an official pamphlet containing the corporation laws of Delaware (1901), the Secretary of State wrote in the preface: "It is believed that no state has on its statute books more complete and liberal laws than these;" and the outstanding advantages were then enumerated. See also a pamphlet "Organization of Corporations," issued by the Secretary of State of Maine in 1904. See also "The General Corporation Act of New Jersey" (1898), edited by J. B. Dill, issued by the Secretary of State: "Since 1875 it has been the announced and settled policy of New Jersey to attract incorporated capital to the State. . . ." P. xvii. And "The General Corporation Laws of West Virginia" (1905), published by the Secretary of State, containing, at pp. 209–210, a summary of the advantages of incorporating in West Virginia. For other examples, see Henry R. Seager and Charles A. Gulick, Jr., Trust and Corporation Problems (1929), c. 4.

[37] A change in the policy of New Jersey was urged by Woodrow Wilson in his inaugural address as Governor. "If I may speak very plainly, we are much too free with grants of charters to corporations in New Jersey. A corporation exists, not of natural right, but only by license of law, and the law, if we look at the matter in good conscience, is responsible for what it creates. . . . I would urge, therefore, the imperative obligation of public policy and of public honesty we are under to effect such changes in the law of the State as will henceforth effectually prevent the abuse of the privilege of incorporation which has in recent years brought so much discredit upon our State. . . . If law is at liberty to adjust the general conditions of society itself, it is at liberty to control these great instrumentalities which nowadays, in so large part, determine the character of society." Minutes of Assembly of New Jersey, January 17, 1911, pp. 65, 69; reprinted in Public Papers of Woodrow Wilson (ed. by Baker and Dodd), Vol. II, pp. 273, 274, 275. In 1913 the so-called "Seven-Sisters" Acts were passed by New Jersey, forbidding, among other things, intercorporate stockholding. Laws 1913, c. 18. These, in turn, were repealed in 1917. Laws 1917, c. 195. The report recom-

lose wholly the prospect of the revenue and the control incident to domestic incorporation.

The history of the changes made by New York is illustrative. The New York revision of 1890, which eliminated the maximum limitation on authorized capital, and

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mending the repeal stated: "Those laws now sought to be repealed are harmful to the State because there is much uncertainty as to their meaning, with the result that those who would have otherwise incorporated here or remained here are going to other States. There is no gain to the people of the country, but this State loses a revenue which is perfectly legitimate. We doubt not that much of the adverse criticism outside of the State which was directed against New Jersey and its corporation laws prior to 1913 was due as much to the desire to divert the organization of corporations to other States as it was to prevent evils which might have arisen, and New Jersey fell for the criticism. To whatever cause may be attributed the loss of revenue to the State, it is plain that it is a condition and not a theory which confronts the State, as the following figures will show: . . . Such losses mean a serious depletion of the revenues of the State, and, unless a different policy is pursued, it will not be long before the corporation business of the State will have been reduced to a minimum. We believe such conditions justify the appointment of the Commission and will also justify the Legislature in adopting the result of our investigation and embodied in the proposed revision." Report of the Commission to Revise the Corporation Laws of New Jersey, 1917, pp. 7–8.

For more recent movements, see A. A. Berle and Gardiner C. Means, The Modern Corporation and Private Property (1932), p. 206, n. 18: "As significant of the trend towards that corporate mechanism with the broadest powers to the management, it is interesting to note the steady trend towards the states having a loose incorporation law. Of the 92 holding corporations mentioned above [those whose securities were listed on the New York Stock Exchange and were active in 1928] 44 were organized in Delaware, all of them being formed since 1910. Indeed, of the 44 holding corporations now chartered in that state, 25 were incorporated there between the years 1925 and 1928. In the less liberal New York State 13 of the above holding companies were formed, 6 of them having been chartered between 1910 and 1920, while only 4 were formed since 1920. Ten of the holding companies were chartered in Maryland, one in 1920 and the remaining 9 between 1923 and 1928, presumably in large measure as a result of the looseness of

permitted intercorporate stockholding in a limited class of cases,[38] was passed after a migration of incorporation from New York, attracted by the more liberal incorporation laws of New Jersey.[39] But the changes made by New York in 1890 were not sufficient to stem the tide.[40] In

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the Maryland corporation law of 1923. New Jersey, a relatively popular state at the turn of the century shows only two of the holding company charters granted there since 1910; while Virginia shows 7 such charters.

"Combined holding and operating corporations likewise show a steady trend towards Delaware. Of the whole list, 148 of the 573 corporations hold Delaware charters, most of them relatively recent; New York is second with 121, most of them relatively old; New Jersey third with 87, most of which grow out of the great merger period from 1898–1910."

Corporations formed in one state by citizens of another state, to do business in the state of their residence, were frequently subjected to collateral attack. Generally the courts felt bound to uphold the corporate status. See the cases in J. H. Sears, The New Place of the Stockholder (1929), Appendix G. Occasionally, however, states legislated against the practice. Thus California enacted that the statutory liability of stockholders should apply to those in foreign as well as in domestic corporations. In two cases where the foreign corporation was organized specifically to do business in California this provision was held applicable. *Pinney* v. *Nelson,* 183 U. S. 144; *Thomas* v. *Matthiessen,* 232 U. S. 221. And more recently this Court has sustained a constitutional provision of Virginia which prohibits foreign public service companies from doing an intrastate business in the state. *Railway Express Agency* v. *Virginia,* 282 U. S. 440. The provision was adopted in the light of widespread incorporation of such companies in West Virginia and New Jersey. See Debates of Constitutional Convention of Virginia, 1901–1902, Vol. II, p. 2811.

[38] One corporation was allowed to hold stock in others so long as the latter were engaged in manufacturing materials, etc., necessary for the former; and in others, which used products of the former. Business Corporation Law, 1890, c. 567, § 12.

[39] See note 34, *supra.*

[40] See Report of N. Y. Joint Committee on Trusts, March 9, 1897, 120th Sess., Sen. Doc. No. 30, pp. 3–4: "When in 1890 the Court of Appeals in this State pronounced its final judgment against the system of trust organization then in vogue [*New York* v. *North River*

1892, the Governor of New York approved a special charter for the General Electric Company, modelled upon the New Jersey Act, on the ground that otherwise the enterprise would secure a New Jersey charter.[41] Later in the same year the New York corporation law was again revised, allowing the holding of stock in other corporations.[42] But the New Jersey law still continued to be more attractive to incorporators.[43] By specifically providing that corpora-

Sugar Refining Co., 121 N. Y. 582; 24 N. E. 834], the 'trust' became a thing of the past, existing trust agreements were dissolved and under the permission of existing laws the constituent elements held together under such agreements, became incorporated in the State of New Jersey and in other jurisdictions, where, either by accident or by design, the law of incorporation was so adjusted that by the simplest formality a trust declared unlawful and a conspiracy against public welfare might continue its career. . . .

"The corporation laws of the State of New York at that time differed essentially from the laws of the State of New Jersey in that they did not, as did the latter, permit the acquisition by one corporation of the capital stock of another, and consequently there followed an immediate migration of trusts to the State of New Jersey to secure corporate charters there and thus avoid complications in which the decision of the Court of Appeals threatened to involve them."

[41] N. Y. Laws 1892, c. 323. "The measure is approved because it is claimed that its objects cannot well be secured under general laws, and because its approval will keep within the State a corporation which professes to be ready to invest a large amount of capital, and which, without the concessions allowed by its proposed charter, would be incorporated under the laws of New Jersey." Public Papers of Governor Flower, 1892, p. 104. Quoted in James B. Dill, "Some Aspects of New Jersey's Corporate Policy," Address before the Pennsylvania Bar Association, June 29, 1903, Rep. Pa. Bar Assn., 1903, pp. 265, 267.

[42] N. Y. Laws 1892, c. 688, § 40.

[43] The New York Evening Post, March 23, 1896, said: "The *Evening Post* has frequently pointed out that New York capital is driven to shelter in New Jersey by reason of the more liberal laws of that State governing the incorporation of companies as compared with the laws of New York. Nearly all large corporations doing business in this City and State are incorporated under the laws of New Jersey or some other State, where more liberal laws prevail and in

tions might be formed in New Jersey to do all their business elsewhere,[44] the state made its policy unmistakably clear. Of the seven largest trusts existing in 1904, with an aggregate capitalization of over two and a half billion dollars, all were organized under New Jersey law; and three of these were formed in 1899.[45] During the first seven months of that year, 1336 corporations were organized under the laws of New Jersey, with an aggregate authorized capital of over two billion dollars.[46] The Comptroller of New York, in his annual report for 1899, complained that "our tax list reflects little of the great wave of organization that has swept over the country during the past year and to which this state contributed more capital than any other state in the Union." "It is time," he declared, "that great corporations having their actual headquarters in this State and a nominal office elsewhere, doing nearly all of their business within our borders, should be brought within the jurisdiction of this State not only as to matters of taxation but in respect to other and equally important affairs."[47] In 1901 the New York corporation law was again revised.[48]

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which inducements are thereby held out to attract capital thither and make it their legal home."

[44] N. J. Laws 1892, p. 90. In 1894, New Jersey provided by statute that corporations of another state should be subjected to the same taxes, license and other requirements in New Jersey as are imposed on New Jersey corporations by such other state. Laws 1894, c. 228, § 3. The statute was "in retaliation for the hostile legislation of some of the other States regarding foreign corporations." J. B. Dill, The General Incorporation Act of New Jersey (1898), p. 100.

[45] See Moody, The Truth About the Trusts, p. 453. Of the 298 corporations listed as "lesser industrial trusts," 150 had New Jersey charters. *Id.*, pp. 454–467.

[46] Edward K. Keasbey, "New Jersey and the Great Corporations," Address before the American Bar Association, August 28, 1899, reprinted in 13 Harvard L. Rev., p. 198.

[47] Report of Comptroller of New York, 1890, p. xxvii.

[48] N. Y. Laws 1901, cc. 355, 520.

The history in other states was similar. Thus, the Massachusetts revision of 1903 was precipitated by the fact that "the possibilities of incorporation in other states have become well known, and have been availed of to the detriment of this Commonwealth." [49]

Third. Able, discerning scholars [50] have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations

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[49] Report of Committee on Corporation Laws, Massachusetts (1903), p. 19. The Governor of Michigan, in his Message to the Legislature in 1921, said of the corporation laws of that state: "Because of their inadequacy to meet modern needs and requirements, and the failure to accord domestic corporations the same rights granted to those organized outside of the state, most of our business corporations are being organized in other states, only to return here as foreign corporations." Journal of House of Representatives of Michigan, 1921, pp. 31, 37; reprinted in Messages of the Governors of Michigan (Michigan Historical Commission, 1927), Vol. 4, pp. 775, 784. In 1921 the corporation laws of Michigan were revised, eliminating, among other things, the maximum limitation on capital stock. See note 20, *supra.*

The effect of the policy of West Virginia was described by President Henry M. Russell in an address before the West Virginia Bar Association in 1891. In the six years ending January 1, 1889, he stated, 330 charters were issued by the state to corporations having their principal places of business elsewhere. Of these, 101 were to be in the District of Columbia, and 65 in New York. "The neighboring State of Pennsylvania has adopted very stringent laws for the government of its corporations. . . . So our Pennsylvania friends who have patent rights or gold mines, come to West Virginia. . . . Of our 330 corporations, 80 were to have their principal offices in Pennsylvania. Our other neighbor, the State of Ohio, carries upon its statute book a law imposing a double liability on the stockholders for the debts of the corporation . . . and 30 out of the 330 have their principal offices in Ohio. Thus 284 of the 330 are found in the cities of Washington and New York and the States of Pennsylvania and Ohio. . . . It is unjust to our sister States." 27 American L. Rev., p. 105.

[50] Adolf A. Berle, Jr. and Gardiner C. Means, The Modern Corporation and Private Property (1932). Compare William Z. Ripley, Main Street and Wall Street (1927).

and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert that this "master institution of civilised life" is committing it to the rule of a plutocracy.[51]

The data submitted in support of these conclusions indicate that in the United States the process of absorp-

[51] Thorstein Veblen, Absentee Ownership and Business Enterprise (1923), p. 86; Walther Rathenau, Die Neue Wirstchaft (1918), pp. 78–81.

tion has already advanced so far that perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations whose shares are dealt in on the stock exchange;[52] that 200 non-banking corporations, each with assets in excess of $90,000,000, control directly about one-fourth of all our national wealth, and that their influence extends far beyond the assets under their direct control; [53] that these 200 corporations, while nominally controlled by about 2,000 directors, are actually dominated by a few hundred persons[54]—the negation of industrial democracy. Other writers have shown that, coincident with the growth of these giant corporations, there has occurred a marked concentration of individual wealth;[55] and that the resulting disparity in

[52] Berle and Means, The Modern Corporation and Private Property, Preface, p. vii.

[53] *Id.*, pp. 31–32. Compare H. W. Laidler, Concentration of Control in American Industry (1931).

[54] Berle and Means, p. 46, n. 34. Compare James C. Bonbright and Gardiner C. Means, The Holding Company (1932); Regulation of Stock Ownership in Railroads, H. R. No. 2789, 71st Cong., 3d Sess. (Dr. W. M. W. Splawn); Hearings before Senate Judiciary Committee, 72d Cong., 2d Sess., on S. 5267, February 14, 1933 (John Frey); Stanley Edwin Howard, Business, Incorporated, in Facing the Facts (J. G. Smith, ed., 1932), p. 124 *et seq.;* Lewis Corey, The House of Morgan, pp. 354–356, 441–448; George W. Norris, The Spider Web of Wall Street, Cong. Rec., 72d Cong., 2d Sess., pp. 4917–4928 (February 23, 1933).

[55] Federal Trade Commission, National Wealth and Income (1926); S. Howard Patterson and Karl W. H. Scholz, Economic Problems of Modern Life (1927), c. 22; Lewis Corey, The New Capitalism, in American Labor Dynamics (J. B. S. Hardman, ed., 1928), c. 3; Stuart Chase, Prosperity—Fact or Myth (1929), c. 9; H. Gordon Hayes, Our Economic System (1929), Vol. II, c. 56; Willard E. Atkins et al., Economic Behavior (1931), Vol. II, c. 34; Harold Brayman, Wealth Rises to the Top, in Outlook and Independent, Vol. 158, No. 3 (May 20, 1931), p. 78; Buel W. Patch, Death Taxes and The Concentration of Wealth, in Editorial Research, Reports, Vol. II, 1931, No. 11 (September 18, 1931), pp. 635–637; Frederick C. Mills, Economic Tendencies in the United States (National Bureau of

incomes is a major cause of the existing depression.[56] Such is the Frankenstein monster which States have created by their corporation laws.[57]

Economic Research, in Co-operation with the Committee on Recent Economic Changes, 1932), pp. 476–528, 549–558; Paul H. Douglas, Dividends Soar, Wages Drop, in World Tomorrow, December 28, 1932, p. 610; reprinted in Congressional Record, 72nd Cong., 2d Sess., Vol. 76, p. 2291 (January 20, 1933). Compare Morris A. Copeland, The National Income and its Distribution, in Recent Economic Changes in the United States (Report of President's Conference on Unemployment, Committee on Recent Economic Changes, 1929), Vol. II, c. 12; Willford I. King, The National Income and Its Purchasing Power (1930). George L. Knapp pointed out that in 1929, 504 persons had $1,185,135,300 taxable net income, whereas the aggregate gross market value of all the cotton and all the wheat grown in the United States in 1930 by the 2,332,000 cotton and wheat farmers was only $1,191,451,000 (see Labor, March 31, 1931, p. 4; *id.*, May 19, 1931, p. 4; *id.*, November 29, 1932 p. 4); and that the estimate of the aggregate dividends and interest paid in the United States in 1932 was $1,642,000,000, whereas that of factory wages was $903,000,000. See Labor, February 14, 1933, p. 4. (Compare the final figures in Bureau of Internal Revenue, Statistics of Income for 1929, pp. 5, 61, showing that 513 persons had taxable net income of $1,212,098,784.)

[56] Compare J. A. Hobson, Poverty in Plenty (1931), chs. 2, 4; Arthur B. Adams, The Business Depression of 1930, in American Economic Review, Vol. 21 (March, 1931, supplement), p. 183; John A. Ryan, The Industrial Depression of 1929–1931, in Questions of The Day (1931), pp. 209–217; Philip F. LaFollette, Message to the Legislature of Wisconsin, November 24, 1931, pp. 6–8; Fred Henderson, Economic Consequences of Power Production (1931), c. 1; Paul Blanshard, Socialist and Capitalist Planning, in Annals of The American Academy of Political and Social Science, Vol. 162 (July, 1932), pp. 6–8; Arthur Dahlberg, Jobs, Machines, and Capitalism (1932), pp. 205–208; Scott Nearing, Must We Starve? (1932), p. 119; George Soule, The Maintenance of Wages, in Proceedings of The Academy of Political Science, Vol. 14, No. 4 (January, 1932), pp. 87, 91; Christ Christensen, Major Problems of Readjustment, in *id.*, Vol. 15, No. 2 (January, 1933), p. 235; Taylor Society Bulletin, Vol. 17, No. 5 (October, 1932), pp. 165–193.

[57] Compare I. Maurice Wormser, Frankenstein, Incorporated (1931).

Fourth. Among these 200 corporations, each with assets in excess of $90,000,000, are five of the plaintiffs. These five have in the aggregate, $820,000,000 of assets; [58] and they operate, in the several States, an aggregate of 19,718 stores.[59] A single one of these giants operates nearly 16,000.[60] Against these plaintiffs, and other owners of multiple stores, the individual retailers of Florida are engaged in a struggle to preserve their independence—perhaps a struggle for existence. The citizens of the State, considering themselves vitally interested in this seemingly unequal struggle, have undertaken to aid the individual retailers by subjecting the owners of multiple stores to the handicap of higher license fees. They may have done so merely in order to preserve competition. But their purpose may have been a broader and deeper one. They may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that

[58] See Berle and Means, The Modern Corporation and Private Property, p. 21. This figure includes the assets of Drug, Inc., which in 1928 acquired the stock of United Drug Co., which in turn controls through stock ownership the Louis K. Liggett Co. See Moody's Industrial Securities (1932), pp. 1215, 1217, 1219.

[59] The total is compiled from figures, as of December 31, 1930, in Report of Federal Trade Commission on Growth and Development of Chain Stores, Sen. Doc. No. 100, 72d Cong., 1st Sess. (1932), pp. 76–77. Compare English Co-operative Wholesale Society, Limited, [U. S.] Commerce Reports, February 18, 1933, p. 104.

[60] The Report of the Federal Trade Commission, *supra*, note 59, at p. 76, gives 15,738 as the number of stores operated by the Great Atlantic and Pacific Tea Co. The number operated by the other four plaintiffs is as follows: Louis K. Liggett Co., 549; Montgomery Ward & Co., 556; United Cigar Stores Co., 994; F. W. Woolworth Co., 1,881. *Ibid.*

it is sapping the resources, the vigor and the hope of the smaller cities and towns.[61]

The plaintiffs insist that no taxable difference exists between the owner of multiple stores and the owner of an individual store. A short answer to the contention has already been given, so far as required for the decision of this case. It is that the license fee is not merely taxation. The fee is the compensation exacted for the privilege of carrying on intrastate business in corporate form. As this privilege is one which a State may withhold or grant, it may charge such compensation as it pleases. Nothing in the Federal Constitution requires that the compensation demanded for the privilege should be reasonable. Moreover, since the authority to operate many stores, or to operate in two or more counties, is certainly a broader privilege than to operate only one store, or in only one county, there is in this record no basis for a finding that it is unreasonable to make the charge higher for the greater privilege.

A more comprehensive answer should, however, be given. The purpose of the Florida statute is not, like ordinary taxation, merely to raise revenue. Its main purpose is social and economic. The chain store is treated as a thing menacing the public welfare. The aim of the statute, at the lowest, is to preserve the competition of the

[61] Compare Montaville Flowers, America Chained (1931); H. E. Fryberger, The Abolition of Poverty (1931); W. H. Cameron, Our Juggernaut (1932); M. M. Zimmerman, The Challenge of Chain Store Distribution (1931), pp. 2–4; Godfrey M. Lebhar, The Chain Store—Boon or Bane? (1932), p. 59; James L. Palmer, Are These Twelve Charges Against the Chains True? in Retail Ledger, July, 1929, reprinted in E. C. Buehler, Debate Handbook on the Chain Store Question (1930), p. 102; Edward G. Ernst and Emil M. Hartl, The Chain Store and the Community, in Nation, November 19, 1930, p. 545; John P. Nichols, Chain Store Manual (1932), c. 5.

independent stores with the chain stores; at the highest, its aim is to eliminate altogether the corporate chain stores from retail distribution. The legislation reminds of that by which Florida and other States, in order to eliminate the "premium system" in merchandising, exacted high license fees of merchants who offered trading stamps with their goods. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369. Compare *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304.

The plaintiffs discuss the broad question whether the power to tax may be used for the purpose of curbing, or of exterminating, the chain stores by whomsoever owned. It is settled that a State "may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry." *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322, 329.[62] And since the Fourteenth Amendment "was not intended to compel the State to adopt an iron rule of equal taxation," *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, it may exempt from taxation kinds of business which it wishes to promote; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; and may burden more heavily kinds of business which it wishes to discourage. *Williams* v. *Fears*, 179 U. S. 271; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; compare *Alaska Fish Co.* v. *Smith*, 255 U. S. 44. To do that has been the practice also of the Federal Government. It protects, by customs duties, our manufacturers and producers from the competition of foreigners. Compare *Hampton & Co.*

[62] Indeed, it has been urged that the taxation of the States and the Nation should be framed not with a view solely to the raising of revenue, but always for the purpose of promoting that social policy which the people deem wise.

v. *United States,* 276 U. S. 394, 411–413; also, *Billings* v. *United States,* 232 U. S. 261. It protects, by the oleomargarine laws, our farmers and dairymen from the competition of other Americans. Compare *McCray* v. *United States,* 195 U. S. 27. It eliminated, by a prohibitive tax, the issue of state bank notes in competition with those of national banks. Compare *Veazie Bank* v. *Fenno,* 8 Wall. 533. Such is the constitutional power of Congress and of the state legislatures. The wisdom of its exercise is not the concern of this Court.

Whether chain stores owned by individuals may be subjected to the discrimination here challenged need not, however, be decided. This case requires decision only of the narrower question—whether the State may freely apply discrimination in license fees against corporate chain stores. The essential difference between corporations and natural persons has been recognized by the Federal Government in taxing the income of businesses when conducted by corporations, while exempting a similar business when carried on by an individual or partnership. *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 158. It has, at other times, imposed upon businesses conducted by corporations heavier taxes than upon those conducted by individuals.[63] The equality clause of the Fourteenth Amendment presents no obstacle to a State, likewise, taxing businesses engaged in intrastate commerce differently according to the instruments by which they are carried on; provided the purpose of the discrimination is a permissible one, the discrimination employed a means appropriate to achieving the end sought, and the difference in the instruments so employed vital. Compare *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532. *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373; *Singer Sewing Machine Co.* v.

[63] See the statutes cited in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 407–409, notes 5 and 6.

Brickell, 233 U. S. 304. The corporate mechanism is obviously a vital element in the conduct of business. The encouragement or discouragement of competition is an end for which the power of taxation may be exerted. And discrimination in the rate of taxation is an effective means to that end.

The requirement of the equality clause that classification " must rest upon some ground of difference having a fair and substantial relation to the object of the legislation," *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 37, is here satisfied. Mere difference in degree has been widely applied as a difference justifying different taxation or regulation.[64] The difference in power between corporations and natural persons is ample basis for placing them in different classes. Even as between natural persons, where the equality clause applies rigidly, differences in size furnish an adequate basis for discrimination in a tax rate. The size of estates, or of bequests, is the difference on which rest all the progressive inheritance taxes of the States and of the Nation. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293; *Knowlton* v. *Moore,* 178 U. S. 41, 109; *Keeney* v. *New York,* 222 U. S. 525, 536; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Salomon* v. *State Tax Commission,* 278 U. S. 484. Differences in the size of incomes is the basis on which rest all progressive income taxes. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 25. Differences in the size of businesses present, likewise, an adequate basis for different rates of taxation. Compare *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322, 331; *Pacific American Fisheries Co.* v. *Alaska,* 269 U. S. 269. And so do differences in the extent or field of operation.

The State might justify progressively higher license fees for corporations of larger size, or a more extended

[64] See *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 42–46, notes 1–6.

field of operation, on the oft-asserted ground that such concerns are more efficient than smaller units and, hence, that they can, and should, contribute more to the public revenues. But the State need not rest the difference in tax rates on a ground so debatable as the assertion that efficiency increases with size.[65] The Federal Constitution does not require that taxes (as distinguished from assessments for betterments) be proportionate to the differences in benefits received by the taxpayers, compare *Illinois Central R. Co.* v. *Decatur,* 147 U. S. 190, 197; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 203; *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 76; *St. Louis & Southwestern Ry.* v. *Nattin,* 277 U. S. 157, 159; or that taxes be proportionate to the taxpayer's ability to bear the burden.

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[65] Compare Hearings before Senate Committee on Interstate Commerce, pursuant to S. Res. 98, Sen. Doc. 62d Cong., 2d Sess., Vol. 1, p. 1147 *et seq.* (1912); Report of Federal Trade Commission on The Meat Packing Industry (1919), Pt. III, p. 118 *et seq.;* A. M. Kales, Contracts and Combinations in Restraint of Trade (1918), §§ 74–90; F. A. Fetter, Big Business and the Nation, in Facing the Facts (J. G. Smith, ed., 1932), pp. 186–213; F. A. Fetter, The Masquerade of Monopoly (1931), pp. 367–380; Myron W. Watkins, Large-Scale Production, in Encyclopaedia of The Social Sciences, vol. 9, p. 170; A. S. Dewing, A Statistical Test of the Success of Consolidations, Quarterly Journal of Economics, vol. 36, p. 84; Virgil Jordan, The Flight from the Centre, in Scribner's, Vol. 91, p. 262 (May, 1932); W. L. Thorp, The Changing Structure of Industry, in Recent Economic Changes (1929), pp. 167, 179–206; Glenn Frank, Big Men and Big Enterprise, Albany Evening News, December 7, 1931; December 18, 1931; Glenn Frank, Thunder and Dawn (1932), pp. 106–110; Julius Klein, Assistant Secretary of Commerce, United States Daily, April 11, 1932, p. 1; Frederick M. Feiker, Director, Bureau of Foreign and Domestic Commerce, U. S. Daily, February 27, 1932, p. 3; Carter D. Poland, Small Business Has Its Day, Nation's Business, March, 1933, p. 51; also, Camera dei Deputati, N. 1209–A, Relazione della Giunta Generale del Bilancio (April 29, 1932), pp. 45–47.

Since business must yield to the paramount interests of the community in times of peace as well as in times of war, a State may prohibit a business found to be noxious and, likewise, may prohibit incidents or excrescences of a business otherwise beneficent. *Mugler* v. *Kansas,* 123 U. S. 623; *Ozan Lumber Co.* v. *Union County Bank,* 207 U. S. 251; *Williams* v. *Arkansas,* 217 U. S. 79; *Engel* v. *O'Malley,* 219 U. S. 128; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157. Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city. Compare *Morris* v. *Duby,* 274 U. S. 135; *Welch* v. *Swasey,* 214 U. S. 91; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388. It was said in *United States* v. *U. S. Steel Corp.,* 251 U. S. 417, 451, that the Sherman Anti-Trust Act did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned.

The elimination of chain stores, deemed harmful or menacing because of their bigness, may be achieved by levelling the prohibition against the corporate mechanism—the instrument by means of which excessive size is commonly made possible. Or, instead of absolutely prohibiting the corporate chain store, the State might conclude that it should first try the more temperate remedy of curbing the chain by imposing the handicap of discriminatory license fees. Compare *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269, 274; *Hammond Packing Co.* v. *Montana,* 233 U. S. 331, 333–334; *Bradley* v. *Richmond,* 227 U. S. 477, 480. "Taxation is regulation just as prohibition is." *Compañia General de Ta-*

bacos v. *Collector,* 275 U. S. 87, 96. And the State's power to make social and economic experiments is a broad one.

Fifth. The mere fact that the taxpayer is a corporation does not, of course, exclude it from the protection afforded by the equality clause. Corporations and individuals, aliens and citizens, are for most purposes in the same class. Ordinarily, they have the same civil rights; are entitled to the same remedies; are subject to the same police regulations; and are also subject to the same tax laws. Where such is the case, the corporation taxpayer is entitled, like the individual, to the protection of the equality clause against discrimination, however effected. Compare *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239. But the chief aim of the Florida statute is apparently to handicap corporate chain stores—that is, to place them at a disadvantage, to make their success less probable. No other justification of the discrimination in license fees need be shown; since the very purpose of the legislation is to create inequality and thereby to discourage the establishment, or the maintenance, of corporate chain stores; since that purpose is one for which the power of taxation may be exerted; since higher license fees is an appropriate means of discouragement; and corporations have not the inherent right to engage in intrastate commerce. The clear distinction between the equality clause and the due process clause of the Fourteenth Amendment should not be overlooked in this connection. The mandate of the due process clause is absolute. That clause is of universal application. It knows not classes. It applies alike to corporations and to individuals, to citizens and to aliens, *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 411; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489. The equality clause, on the other hand, is limited in its operation to members of a class.

It is true that the Florida Anti-Chain Store Law, like others, is not drawn so as to apply only to giant corporate chains. In terms, it applies to the small corporations as well as to the large; and also to natural persons. But the history of such legislation indicates that these laws were aimed at the huge, publicly-financed corporations; and that the statutes were couched in comprehensive terms in the hope of thereby avoiding constitutional doubts raised by judicial statements that the equality clause applies alike to natural persons and corporations. It was said in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 402, that the equality clause precludes making the character of the owner the sole fact on which a discrimination in taxation shall depend. And in *Frost* v. *Corporation Commission,* 278 U. S. 515, 522, it was said (citing the *Quaker City Cab* case; *Kentucky Finance Corp.* v. *Paramount Exchange,* 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 154) "that a corporation is as much entitled to the equal protection of the laws as an individual." These statements require, in my opinion, this qualification. Whenever the discrimination is for a permitted purpose—as when a State, having concluded that activity by corporations should be curbed, seeks to favor businesses conducted by individuals—the corporate character of the owner presents a difference in ownership which may be made the sole basis of classification in taxation, as in regulation.[66] The discrimination cannot, in such a case,

[66] Compare Ernst Freund, Standards of American Legislation (1917), pp. 40–41: "So far as the businesses of banking and insurance have been carried on under corporate charters they have been the subject of thorough and detailed regulation, while private banking and the unincorporated forms of fraternal insurance remain to this day in the main unregulated and uncontrolled. Railroads have been built and operated from the beginning by corporate enterprise; thus legislation was called for and was made the instrument of exercising

be held arbitrary, since it is made in order to effect the permitted hostile purpose and is appropriate to that end. Compare *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 283–285; *New York ex rel. N. Y. & Albany Lighterage Co.* v. *Lynch, post,* p. 590.

Sixth. The plaintiffs contend, for a further reason, that there is no taxable difference justifying the discrimination in license fees. They assert that the struggle between them and the independently owned stores is, in fact, not an unequal one; and in support of this assertion, they call attention to those paragraphs in the bill which describe the coöperative chains of individual stores and their rapid growth. These paragraphs allege that by "affiliations and coöperative organizations single grocery [and other] store owners have adopted the best features of chain store merchandising and have secured substantially all the benefits derived therefrom, while at the same time they have avoided burdens of capital investment, insurance, etc., incident to the carrying of a large stock in a central warehouse." The bill sets forth how this has been achieved, describing in detail the recent advances in efficiency of such coöperative merchandising. It alleges, moreover, that the members of a coöperative chain have the superior advantage of the good will and personal interest of the individual owners, as compared with the hired managers of the regular chains; and that all these facts were known to the Legislature when it enacted the statute here challenged.

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public power over operation, service and in some cases over rates; the express business, on the other hand, which happened to be carried on chiefly by unincorporated concerns, or at least did not seek special charters, practically escaped regulation and was not placed under administrative jurisdiction until the Rate Act of 1906; this tends to show that it was not merely the fact of being a common carrier subject to special power, but more particularly the fact of being a corporation asking for powers, which subjected the railroad company to the extensive and intensive legislative régime which it has experienced."

These allegations are admitted by the motion to dismiss; and they are supported by recent experience of which we may take notice.[67] But it does not follow that because the independently owned stores are overcoming through coöperation the advantages once possessed by chain stores, there is no taxable difference between the corporate chain and the single store. The State's power to apply discriminatory taxation as a means of preventing domination of intrastate commerce by capitalistic corporations is not conditioned upon the existence of economic need. It flows from the broader right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable.

[67] Federal Trade Commission, Report on Coöperative Grocery Chains, Sen. Doc. No. 12, 72nd Cong., 1st Sess.; Report on Coöperative Drug and Hardware Chains, Sen. Doc. No. 82, 72nd Cong., 1st Sess. See, also, A. E. Haase and V. H. Pelz, The Voluntary Chain, in Printer's Ink Monthly, February 1929, p. 29, *id.*, March 1929, p. 31, *id.*, April 1929, p. 52, *id.*, May 1929, p. 52; Paul H. Nystrom, Chain Stores (U. S. Chamber of Commerce, 1930), pp. 17, 21; Nystrom, Economics of Retailing (3rd ed., 1932), c. 13; Craig Davidson, Voluntary Chain Stores (1930); Marvin M. Black, Jr., Troubled Waters of Distribution, Outlook and Independent, May 15, 1929, p. 90; The Voluntary Chains (American Institute of Food Distribution, Inc., 1930); M. E. Bridston, Voluntary Chain Flourishes in Difficult Field, in Chain Store Review, April 1929, p. 12; "The Challenge of the Chains" Accepted by 500 Pacific Coast Grocers, Magazine of Business, July, 1928, p. 28. Compare Federal Trade Commission, Report on Coöperation in Foreign Countries, Sen. Doc. No. 171, 68th Cong., 2d Sess.; Huston Thompson, The Coöperative Movement in Foreign Countries, Congressional Digest, October 1925, p. 256; C. R. Fay, Co-operation at Home and Abroad (rev. ed. 1925); A. H. Enfield, Co-operation (1927); J. P. Warbasse, Co-operative Democracy (1923); Cedric Long, Consumers Co-operation, in A New Economic Order (Kirby Page, ed., 1930), p. 213; Charles R. Tuttle, The New Co-operative Order (1918); Charles T. Sprading, Mutual Service and Co-operation (1930), pp. 44–127; Henry Clay, Co-operation and Private Enterprise (1928).

The State might, if conditions warranted, subject giant corporations to a control similar to that now exerted over public utility companies.[68] Or, the citizens of Florida might conceivably escape from the domination of giant corporations by having the State engage in business. Compare *Jones* v. *Portland,* 245 U. S. 217; *Green* v. *Frazier,* 253 U. S. 233; *Standard Oil Co.* v. *Lincoln,* 275 U. S. 504. But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of coöperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure.[69] That way is clearly open. For the fundamental difference between capitalistic enterprise and the coöperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation.[70] *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.,* 276 U. S. 71. Compare *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322.

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[68] The general apprehension of corporations with huge capital was not allayed until after the introduction of two governmental devices designed to protect the rights and opportunities of the individual. Commissions to regulate public utilities—to curb the exaction of sanctioned monopolies. Anti-trust laws—to prevent monopolies in industry and commerce. When the Act to Regulate Commerce was passed in 1887, there were commissions in 25 States. Vanderblue and Burgess, Railroads (1923), p. 15. See M. H. Hunter, The Early Regulation of Public Service Corporations, 7 American Economic Review, p. 569, reprinted in Dorau, Materials for the Study of Public Utility Economics (1930), pp. 283–294.

[69] Compare Harold J. Laski, The Recovery of Citizenship (1928); Horace M. Kallen, Individualism (1933), pp. 235–241.

[70] See *Frost* v. *Corporation Commission,* 278 U. S. 515, 539, notes 8–16, 23.

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty. If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the State from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each State are still masters of their destiny.

LEGAL SPECTATOR & MORE

Jacob A. Stein

THE INVESTMENT BUILDING

The northwest corner of 15th and K streets is where the grand old Investment Building was located. I say "was located" because all that now remains of this once proud building are its exterior walls preserved for historical interest. A big sign hangs from the builder's rigging announcing that when the restoration is complete in August, 2001, Sidley & Austin will be the headline tenant.

I wonder whether Mr. Sidley and Mr. Austin believe in ghosts. I do, because when I walk over to the Investment Building to watch the progress of the rebuilding I see the ghosts of those who were tenants in the late 1940's and early 1950's. I see busy lawyers gathered around a conference table to discuss the need to allege contributory negligence in every Answer and the need of every Complaint to allege an extortionate *ad damnum* clause.

I see Frank Stoutenburg's drugstore with its lunch counter and tables and Rothschild's Cafeteria. They served as the

building's club rooms. There, the boys (and in those days it was just boys) met and gave each other legal advice based on an in-depth knowledge of the relevant headnotes and what somebody told them. They spoke of their wins and losses and the big one that got away.

I see Harry LaPorte (not his real name) sitting at one of Stoutenburg's tables describing a supernatural event. LaPorte represented aggressive real estate speculators who believed in the divine right of caveat emptor. LaPorte, himself, was gentle and virtuous. As fate would have it, LaPorte often was in court defending the indefensible. Now the supernatural event. One of his clients was sued concerning a questionable business transaction. On cross-examination the client got caught by documents that contradicted his testimony on direct. His face reddened. He grabbed his chest, fell forward and died, right then and there, of a heart attack. Right there on the witness stand.

This restored LaPorte's faith in the human experiment. Who would have thought that a higher power would find its way to a courtroom where a witness was trying to lie his way around Exhibits 105 and 226 in Prince George's County Circuit Court. And who would have expected that the higher power would impose sentence within ten minutes of the crime. Life should be that way but rarely is.

LaPorte, when telling the story (and he told it many times), concluded the narration by saying "it happened once and maybe it will happen again." But the story does not end there. LaPorte was named the executor of the will of the deceased gentleman. In that role LaPorte cancelled the usurious notes that were part of the estate. This made many borrowers very happy. LaPorte's fees as executor freed him up from the trial work he detested.

I see Albert Beasley, a southern gentleman, patient, careful, and redundantly loquacious. Beasley represented casualty insurance carriers. His expertise was not in negotiating a good settlement for the carrier. No, he was the expert in drafting the release that closed the case. A big case or a small case, once concluded, must be honored with colorful language that gave protection against any contingency and "any and all persons, firms, and corporations, whether herein named or referred to or not, their respective heirs, legal representatives, successors, and assigns, of and from any and all causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, and all consequential damages on account of, or in any way growing out of, any and all known and unknown personal injuries, death, and property damage resulting or to result from anything that happened from the beginning of the world to the date of execution. ..."

The Investment Building lawyers did not take themselves seriously as lawyers do today. They had no expectations of obtaining great wealth by practicing law. They were happy if they made ends meet with enough left over to make small investments in real estate ventures. The practice was local. Controversies among local businessmen, landlord and tenant cases, automobile accidents, the exploitation of the complicated probate law and procedure, the buying and selling of a small business, a dispute over a broker's commission, a suit to rescind a lifelong contract for dancing lessons, and domestic relations cases. Few ever handled a criminal case. That was for the lawyers on Fifth Street, not 15th Street.

The Investment Building's leading trial lawyer was H. Mason Welch. He, his brother Harry, and their friends, Jack Daley and Joe Barse, completed the firm. I called Joe to get his recollections of Mason Welch. Joe recalled Welch's astonishing memory and his

speed in getting at the heart of the matter. These two qualities seem to be what a successful trial lawyer must have to excel.

Mason Welch, during a trial, took few notes. Nevertheless, he had instant recall of all the testimony. If you were to put Mason Welch's name in a Lexis search you would see that he appeared for the defendant doctor in just about every medical malpractice case tried during the time Welch practiced.

Occasionally a lawyer would make a big score. How did he spend the money? He would go to D'elia and Marks, custom tailors, on the second floor of the building, select the cloth and then watch as Marks made dozens of measurements and announced the measurements to D'elia—sleeve length, chest, low right shoulder, raised left hip.

If there was any money left after D'elia and Marks computed the bill, the lucky lawyer would treat himself to a shave in the Investment Building barbershop. A real shave by a real barber who knew how to apply hot towels and then the lather and then the quick ballet movements with the straight razor, a flick here and a flick there and then some stropping on the leather belt attached to the chair. The barber shop was on the 15th Street side with a big window facing the sidewalk. Passersby stopped to watch the show.

If Mr. Sidley and Mr. Austin see any ghosts I hope they give me a call so I can come right over. Perhaps Cam Burton will make an appearance. A good lawyer and a very good tap dancer practicing the "Puttin' on the Ritz" number, right there in his third-floor office.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times Literary Supplement*, the *Wilson Quarterly*, and the ABA Litigation Section's publication. I want to thank Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the *Advance Sheet*.