PAPERS AND DISCUSSIONS.

THE WORK OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION.

PRESIDENTIAL ADDRESS BY FRANK J. GOODNOW.

It is perhaps well that at the first public meeting of the American Political Science Association a statement be made as to its objects and purposes. It is proper also that this statement should be made by him who has been honored as its first President. For while what will be said is not exactly an official program of the work of the Association, at the same time it is, I trust, something more than a mere personal expression of the views of its president.

The statement which will be made on this occasion as to the purposes of the Association involves necessarily a consideration of the extent of the subject to the study of which the Association is devoted. It also offers a temptation to answer the question: What is Political Science? To this temptation I have determined not to yield. For it seems to me that such an attempt at definition is dangerous, particularly if it shall result in the endeavor to formulate a definition of Political Science which is at the same time inclusive and exclusive. Such an attempt is not only dangerous, but, even if successfully made, it is not in my opinion sufficiently fruitful of practical results to justify the expenditure of thought and time necessary to secure the desired end.

What I shall endeavor to do in what will be said to-day is therefore not to define political science or to show its relation to other sciences, but rather to enumerate some of the subjects which, because they have not been systematically treated by the other societies already in existence, should be chosen as the field of the American Political Science Association.

The matters which it is hoped thus to subject to more effective treatment than they have yet received at the hands of any American scientific association are those which intimately concern that political organization of society which is termed " the State." The State has been, of course, treated incidentally, by the American Historical Association. But members of that body have naturally been interested rather with the states of the past than those of the present, where their interest has been directed towards political matters at all. The functions of the State in the execution of its financial powers have also, at times, attracted the attention of members of the American Economic Association, but their interest has been mainly confined to the consideration of the economic expediency of certain kinds of taxes and the methods which have been adopted for securing their collection and disbursement. Other associations also have interested themselves in the consideration of specific political problems, such as civil service reform and the non-partisan government of municipalities, while still others have called attention, at their meetings and in their publications, to the political questions which, at the time, were agitating the public mind. While most of the associations whose aims have been at all political in character have busied themselves mainly with agitation for some particular reform, it cannot be denied that much work of scientific value has been done by the associations which are now, and for quite a time have been in the field. But it may perhaps be safely said that there was not, until the formation of the American Political Science Association, any association in this country which endeavored to assemble on a common ground those persons whose main interests were connected with the scientific study of the organization and functions of the State. It would seem, therefore, that there was room for the new Association which has been formed and which has met together for the first time for the discussion of some of the subjects, in the study of which its members are interested.

What, now, are those subjects? The answer to this question, when made by any single individual, must, of necessity, be colored somewhat by the special character of the work to

which he, in the main, devotes his attention, however much he may try to free himself from its somewhat narrowing influences.

Recognizing that what will be said is subject to this limitation, I shall endeavor to answer the question which has just been put, and, as a necessary consequence, endeavor to state what is the scope of the Political Science to which the Political Science Association should devote itself. As has been intimated, Political Science is that science which treats of the organization known as the State. It is at the same time, so to speak, a science of statics and a science of dynamics. It has to do with the State at rest and with the State in action. Inasmuch, however, as it is the State in action which causes the phenomena of the greatest practical concern to the individual, what will hereafter be said will be said from the point of view of the dynamics of Political Science. The State, as an object of scientific study, will be considered from the point of view of the various operations necessary to the realization of the State will.

In order that the State will may be realized in any concrete instance, it is necessary, first, that there be organs for the formulation of the State will; second, that that will be expressed; and, third, that the will, once expressed, shall be executed. Our subject naturally divides itself, therefore, into three pretty distinct parts, viz.:

1st, The expression of the State will;

2nd, The content of the State will as expressed, and

3rd, The execution of the State will.

In the first place, the State will must be expressed. In order that it shall be expressed, it is necessary that organs shall be established which are capable of action. The problems involved in determining what these organs shall be and how they shall act are of two kinds. They are, in the first place, theoretical or speculative in character, and they are, in the second place, legal or expressive of existing conditions. The theoretical problems have been mentioned first. For, however contemptuous may be one's belief in the practical value of the study of political theory, it is none the less true that every gov-

ernmental system is based on some more or less well defined political theory whose influence is often felt in minute details of governmental organization. The problems connected with the organization of the authorities which are to express the State will have to do naturally with the special disciplines to which the names of political theory and constitutional law have been attached. The subjects of political theory and constitutional law are, therefore, peculiarly subjects of political science to which any association devoted to the scientific study of Political Science should address itself. They are further, problems whose study has not attracted the serious and continuous attention of any organization or association.

But the problems of political theory, so far as that confines itself to the organization of the State and constitutional law do not, by any means, embrace all the problems arising in connection with the first branch of our subject. For the expression of the will of the State is in some cases directly facilitated by methods of procedure and by organizations which are not commonly regarded as parts of the political system. There are in all governmental systems extra-legal customs and extra-legal organizations whose influence must be considered if we are to obtain an idea of the actual political system of a country. Thus the British system of government is only imperfectly comprehended by one who confines his study to act of parliament and judicial decision. Only he can know what the British government is who in addition to the study of the law, takes up the study of parliamentary precedent; and thus comes to a realization of the real functions of the Cabinet, a body whose name is unknown to the law and whose composition is not even officially proclaimed.

The political system of the United States also offers abundant illustration of the necessity of considering extra-legal conditions. Thus, the real method of electing the President of the United States cannot be ascertained by a consideration of the provisions of the Constitution and the statutes of Congress relative to the matter. The habit, which has been developed, of regarding the presidential electors as mere instruments for the registration in legal form of decisions arrived at through

methods which are in large measure extra-legal, must be borne in mind if we would understand the real method of our presidential elections. Again, and in close connection with what has been said, we must endeavor to understand how the national parties are organized, how national conventions are formed and the methods of their action, if we are to understand the obligation which a presidential elector assumes when he accepts the nomination offered to him by the state convention of the party which he really represents.

In some instances organizations, which from most points of view are extra-legal, are given a standing within the law, as when the law provides, as it often does, that certain officers shall belong to the two leading political parties, or when the State puts on the official ballot the names of those persons which have been certified to its officers by the regular party conventions. In a few instances these parties are fully recognized by the law and their actions are regulated by statute and subjected to the control of the courts.

In all cases where the will of the State is actually influenced by such parties and naturally, particularly where such parties have secured legal recognition, the problems connected with their organization and the discharge by them of the functions for the discharge of which they were organized, are problems to which the attention of the Political Science Association should be directed.

Our political science has, therefore, to do, not only with the theoretical and legal problems of State organization, but also with the somewhat more practical and concrete problems of party organization, and nomination methods, whether these matters are regulated by law or not.

One of the peculiar developments of American political practice has been the attempt to separate both in organization and action the sovereign State from the government. The organization of the sovereign State we find provided for in constitutional conventions and plebiscites: its will is recorded in written constitutions and constitutional amendments. Important problems, both of a political and legal character, present themselves in connection with these subjects. Questions relating

to the legal standing of these conventions and the binding power of their enactments arise, the frequency increasing with the frequency of the actions of this character. Is a constitutional convention a representative of the sovereign people and are its enactments absolutely binding upon the courts, are questions which are not as yet answered, and to whose solution the Political Science Association may well be expected to contribute.

I have said that constitutional conventions and written constitutions are peculiar to American development. While this is true, it is also true that some European States have manifested a tendency somewhat akin to that to be noticed in the United States; while in America, not content with giving the sovereign people its opportunity to express its will on matters of fundamental importance, we have called upon it to act on many less important matters. We find here, as well as elsewhere, many instances of the referendum and initiative, both in state and in local affairs. These are subjects which should receive attention at our hands. For with the development of democracy they are becoming more and more important, and the questions connected with them are being solved in many cases, it seems to me, without sufficient intelligent consideration.

So far we have considered the questions of who shall express the State will and how shall that will be expressed. The second branch of the subject which demands attention is the content of the State will.

The content of the State will is usually regarded as the law.

Unless we conceive of all law as a part of Political Science, it becomes necessary then to differentiate Political Science from legal science. Strictly speaking, of course all law which does not affect the relations of the State and its officers is to be assigned to legal rather than to Political Science. For the science of the private law, *i. e.,* the law affecting the relations of private individuals one with another, is based upon social rather than political considerations. At the same time we must remember that the State, in either its central or local organization, is a subject of the private law, since it may enter

into almost all the relations into which a private individual may enter. Indeed, about the only relations into which a municipal corporation, *e. g.*, cannot, in the nature of things, enter, are the domestic relations. It is of course true, that the law affecting these so to speak private relations of the organs of the government, is somewhat modified because of the fact that the subject of these relations is possessed of the attributes of that elusive thing called sovereignty. But it is none the less true that a knowledge of the private law is necessary to one who would understand the methods and operations of what are known as political bodies. Furthermore, the points of contact between the private and the public law are so many and the contact is often so close that a knowledge of the private law is really necessary to one who would be a sound public lawyer. Thus, our constitution forbids a State to impair the obligation of a contract. To understand the meaning of this part of the constitution we must understand what is meant by the term "contract," which is usually regarded as a term of the private law. Again, the whole system of judicial remedies against illegal official action is in this country, because of the subjection of government officers to the law of the land, a part of the ordinary system of procedure open in the case of the violation of private rights to private individuals. A comprehension of this system of remedies is, therefore, impossible without a knowledge of what is usually spoken of as private law. Finally, many of the rules of private law are adopted largely because of their influence upon social and political conditions. Thus, the law of inheritance which prevails in a State, is adopted because some rather definite social purpose is sought to be subserved. Primogeniture is made the law of the State because of a desire to build up a class from whom political work is demanded. Thus, again, the law of contracts does not recognize as legal, certain agreements, such as those in restraint of trade, because they are not regarded as expedient from the political point of view. The law relating to labor cannot be understood without some knowledge of the private law.

For these reasons the American Political Science Associa-

tion has included among the subjects which are not foreign to it comparative legislation and historical and comparative jurisprudence, whether that legislation or jurisprudence is private or public. It will probably be true, however, that distinctly private legal subjects will not receive at our hands any very exhaustive treatment. For while the relations between public and private law are so intimate as to make it necessary that the public lawyer should have a knowledge of private law, it is none the less true that the public lawyer is interested only incidentally in distinctly private legal problems.

While this somewhat limited inclusion within the work of the association of private legal subjects demands an explanation, if not an apology, no such action on our part is necessary in the case of public legal subjects. Indeed, one of the most important objects of the association is just this study of the public law. The study of the public law is a particularly necessary part of Political Science. For, unless Political Science is to be regarded as a realm in which the political philosopher is to be permitted to roam at will, subject to no check on the exuberance of his fancy or caprice, the public law must be assigned a most important place in an association devoted to the study of Political Science. For it is only by a study of the law, sometimes a most detailed study, that we can arrive at an accurate idea of the form and methods of a governmental system. Indeed, it is very doubtful whether one can be a political scientist in any sense without a knowledge of the law governing the systems subject to study. There may be a class of political philosophers who are content to soar in the empyrean realms of speculation, but a political scientist who makes a study either of past or present governmental systems must of necessity know the law governing such systems. If it were not for the danger of offending some of those whose tastes lead them to philosophical speculation on things political, I should be inclined to say that the more public law a man knows, the more nearly does he approach the position of the political scientist, the more does he recede from that of the mere political philosopher.

In laying this emphasis upon the necessity of the study of

public law for the political scientist, I would not be regarded as depreciating the importance of the work of the theorist. Without him progress would be impossible; without him the public lawyer becomes a mere slave of precedent. Our study of the public law should therefore embrace a study of what it is, and what it should be.

It has been said that Political Science has to do with the execution of the State will, once it has been expressed. The subject of the execution of the State will, or the enforcement of law is one which, it seems to me, has never been accorded the importance which it deserves. Inasmuch as my work has been largely along the line of administrative law, which concerns itself particularly with the enforcement of law, it may well be that I approach this subject with somewhat of a bias. Nevertheless, I cannot let this opportunity pass without attempting to emphasize the importance of the ascertainment and application of correct principles of administration. I can not accept the truth of the saying,

> For forms of government let fools contest;
> That which is best administered is best,

for there is no one who has endeavored to secure some change in existing governmental organization who has not had this couplet thrown in his face so often that he has come to regard its use as an evidence of an absolutely hopeless condition of mind in the one who uses it A study of government which excludes the consideration of the administrative system and actual administrative methods is as liable to lead to error as the speculations of a political theorist which have no regard for the principles of public law.

What has been said requires, perhaps, the support of concrete example. The most famous of such examples that can be adduced is probably to be found in the condition of England just before the adoption of the Poor Law Amendment Act of 1834. The way in which the poor law had been administered was such that social conditions were deplorable. The cause of the trouble was found in the methods which had been provided for the administration of the law. For after the passage of the Poor Law Amendment Act although almost the

only changes introduced by that act were administrative in character, the conditions immediately improved. This improvement has, under the operation of the administrative principle at the basis of the Act, been almost steadily maintained up to the present day.

What was true of the Poor Law in England at the beginning of the nineteenth century is true of almost all branches of administration in this country at the present day. Where they are ineffective this ineffectiveness is in most cases due to the adoption of improper administrative methods. On this account the study of administration is of the greatest importance. But such a study cannot be made without a detailed study of administrative methods and their results. A detailed knowledge of fact and law is necessary to the proper understanding of even important administrative problems. The material to be examined, however, is so vast in extent and in large degree so inaccessible in character, that one hesitates to begin work, and shrinks in dismay at the magnitude of the task involved. While this is true in a measure of all countries, except those like Great Britain, where the material at any rate is in pretty good shape, it is particularly true of a country like the United States where over forty-five legislatures and supreme courts and thousands of administrative authorities are steadily at work increasing the amount of material to be examined; where, until a very recent time it could not be said, if even it can be said now, that the importance of the subject has been recognized, and where, as a consequence, the material to be examined has not been generally collected nor digested. When we approach the study of problems connected with municipal administration, we find conditions are even worse than those which have been described. For the fact that cities have been so long chartered by special legislative act and the almost complete absence of all city reports to State officers have made the collection of material on specific municipal problems a work before whose difficulty one simply stands in a state of almost mental paralysis.

The lack of a great deal of what might be called official material, it has been attempted to supply by the work of volun-

tary associations of persons engaged in the study of some particular class of administrative problems, which, like the Annual Conferences on Charities and Corrections and the State Charities Aid Associations, have already done valuable work. But the amount of the work done in this manner is but a drop in the bucket, while its character has, it is believed, suffered somewhat as a result of the narrowness of purpose of those engaged in it. A most important work for this association to take up would seem to be, therefore, the indexing and if possible the digesting of the material of the character described, already in existence, and the co-ordination of the activities of the various agencies now at work. Much might be done, it is believed, by suggestion to the State and Federal bureaus whose work is the gathering and circulation of information on topics of interest to those engaged in the study of Political Science. It is true that such work has no very dramatic character. It will not attract much attention nor excite extended comment. It will, nevertheless, be of the greatest value to the student, and will, even if tolerably done, have amply justified the addition of the American Political Science Association to the already long list of societies now in existence.

But, finally, whatever may be the work of a tangible and measurable sort which has been so imperfectly outlined, that the association may do, its annual sessions will offer a common meeting ground in more ways than one for those whose work is mainly or largely political rather than economic or historical. It is particularly desirable that there shall be an opportunity for those whose work savors somewhat of the closet to meet those engaged in the active walks of political life. For whatever may be the advantages of the life of the closet philosopher in securing the attainment of and adherence to lofty ideals, it can hardly be denied that a too great separation from the world of action is apt to conduce to the adoption of impracticable and unworkable methods. On the other hand, the man of action, particularly in the field of politics, is apt to acquire distorted views as a result of seeing his problems from too close a view-point, and often loses his ideals in his desire to attain his immediate object. The wise politician should

strive to secure the best that is attainable. Now the knowledge of what is the best attainable is possible only to him who has both ideals and practical political experience. It would seem, therefore, that the meetings of the Association where it is hoped the ideal and the practical may meet ought to be of benefit to both those classes to whom our political progress must be due.

The meetings of this Association ought also to have the greatest value to those of us who are engaged in the work of teaching. For only by personal contact with colaborers in the broad field we are essaying to cultivate, can we learn what is being done at other institutions than the one in which we have the privilege of working. Only by comparison of notes with our colleagues can we learn whether we can improve our methods. Only in this way can we rub away the prejudices and lose the narrowness resulting from our environment. Only in this way can we secure the inspiration which is consequent upon the comradeship and good fellowship of those engaged along the same lines of work. There is hardly one of us who is engaged in the work of instruction who does not feel a sense of loneliness, thrown, as we are, in our different intellectual homes in the companionship of those, who, in their enthusiasm for their own line of work, are prone to imagine we are engaged in the study of a vain thing. There is none of us, I am sure, who did not feel that the establishment of the American Political Science Association offered us an advantage which we had long envied the historian and the economist.

For these reasons it is believed that our new Association has opened to it a field which ought to be cultivated and offers opportunities which ought to be availed of, both by those engaged in the work of instruction in political science and by those who are more immediately responsible for the solution of the many pressing political problems of the day.

PAPERS AND DISCUSSIONS

THE GROWTH OF EXECUTIVE DISCRETION.

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The most notable point of difference between the English and continental administrative systems at the end of the eighteenth century was probably the relation which they bore to the judiciary. The English administrative system was characterized by its subjection to the control of the courts. The continental administrative system, as seen particularly in that of France, was marked by its freedom from judicial control.

The retention by each system of its characteristic feature may have been due to the conscious desire to secure judicial control or administrative independence, as the case might be. And yet the origin of the difference between the two systems is hardly to be attributed to any well-defined theory of government, but rather to a course of political development of which the leaders of political thought were in all probability not fully conscious. Thus, in England, the jurisdiction of the courts, to whose exercise the judicial control was due, was developed at a time when no clear distinction was made between judicial and administrative authorities, when the royal courts occupied toward the chief of administration, the crown, a position similar to that of all other governmental authorities, when the judges were like other officers subject to the disciplinary power of the crown, which might remove them from office at any time and bring pressure to bear upon them to secure decisions favorable to the royal interests. The development of a wide jurisdiction in the courts, under such

circumstances, did not involve a subjection of administrative action to a control exercised by bodies independent of the administration. For the crown could prevent the rendering of decisions unfavorable to its interests. The crown did not, therefore, try to limit the jurisdiction of the royal courts, but permitted them to exercise such powers as ultimately made them the highest and last instance of control over almost all governmental action.

Conditions on the continent were, however, quite the reverse of those which have been described. In France, thus, during the seventeenth century, administration was separated from justice more fully than was the case in England, and the *parlements*, as the most important judicial bodies were called, were composed of judges who occupied their posts for life, and were irremovable by the crown, because of the fact that the position of judge was bought and sold in very much the same way as military offices were bought and sold at a later date in England. In Germany also the most important courts were independent of the administrative authority. For the judges of these courts were appointed by the estates, while the most important administrative powers were exercised by the princes of the various states into which the Empire ultimately was divided.

Under these conditions the chief of administration, *i. e.*, the crown in France, and the prince in Germany, could not with due regard to his interests permit the development of a wide judicial control over administrative action, and we find in both France and Germany attempt after attempt on the part of the crown and prince to exempt certain administrative matters from the control of the courts. The ultimate result was the development of special tribunals on the continent for the decision of administrative cases, which tribunals were largely subject to the chief executive.

These facts account for the wide jurisdiction of the courts of England and the development of a narrow jurisdiction in administrative matters on the continent. Different as the development is on its surface, and important as the difference is in its effects upon the legal system and the political institu-

tions, nevertheless the main reason why the English courts exercised a control over administrative matters is to be found in the fact that the English courts formed a part of the administrative system of England, and as such were subject to the disciplinary power of the chief of administration, while the main reason why the continental courts did not exercise a control over administrative matters is to be found in the fact that they were not parts of the administrative system and were independent of the chief of administration.

In England, however, the Act of Settlement, enacted by Parliament in 1701, ushered in a new period in the history of judicial control over administrative action. This famous act, it will be remembered, provided that the judges of the royal courts should not be removed by the crown except upon the address of both houses of Parliament, thus giving to these officers a tenure not possessed by any other officers in the English system of government. The Act of Settlement had the further result of changing the character of the most important method of control over administrative action. This control, although theretofore exercised by bodies called courts, was really a control of an administrative character, because the bodies which exercised it were subject to the disciplinary power of the highest authority in the administration. It became, however, with the Act of Settlement, a judicial control, because it was exercised now by bodies which were hardly at all subject to an administrative disciplinary power.

Notwithstanding this change in the character of the control over administrative action, its extent was hardly lessened at all in the subsequent years. The jurisdiction of the courts was so well established that they continued to exercise it in the future as they had exercised it in the past. The reason why this was the case is probably to be found in the fact that the people had great confidence in the courts. As Professor Lowell says:

"'The gladsome light of jurisprudence,' as Coke called it, came with the king's courts, and hence it is not surprising that they supplanted the baronial courts, and in time drew before themselves all important lawsuits. . . . The same body of

judges, therefore, expounded the law in all parts of the realm, and hence England, alone among the countries of Europe, developed a uniform natural justice called the common law. The people naturally became attached to this law and boasted of the rights of Englishmen, while the courts that were the creators and guardians of the law became strong and respected."

In this way, then, England secured a judicial control over administrative action while the continent secured administrative independence. As a result of this independence the continent developed, particularly after the time of Napoleon, a much more efficient administrative system than England could develop under her régime of judicial control, and the study of administration and administrative methods assumed a place on the continent which it never reached in England, notwithstanding the subsequent development of administrative questions.

The English system of judicial control, *i. e.*, a control exercised by bodies independent of the executive, and from the point of view of its extent a wide one, became ours by inheritance along with other English institutions. For quite a time in our history it was developed rather than limited, being extended over legislative action through the power, which our courts soon began to exercise, of declaring acts of the legislature unconstitutional. At first no objections to its maintenance or extension over administrative action were made, for the reason that the period immediately subsequent to the formation of our constitutions was one which was characterized by great emphasis upon individual liberty. It was the age when the theory of the social compact and that of the natural rights of man had great influence on our law. Social conditions in this country at the time were comparatively simple. Much was expected from, and much was secured by, individual effort largely uncontrolled by law. Our growth was so rapid, industrial conditions became so complex, and social distinctions so marked, however, that by the latter part of the nineteenth century a change is to be noted in our attitude toward this question of judicial control.

It is to the change which has been introduced into our governmental system as a result of the attempt to substitute administrative independence for judicial control that I wish to call your attention this evening. My treatment of the subject will of necessity be somewhat legal in character. For here, as in so many other political problems, an investigation of the legal conditions is absolutely necessary to an adequate consideration and a successful solution of the question under treatment.

The most complex and difficult part of our governmental problem is that which is assigned to our national government. The management of our relations to other states, and of the national finances, the proper regulation of our commerce, the operation of such a vast commercial undertaking as our post-office, are all matters of such importance, magnitude and complexity as to call for the highest administrative skill and efficiency. In so far as those who are attending to these matters are subjected to the control of the courts, just in so far are they hampered in the discharge of their important duties, just so far is the administration of the departments under their charge made difficult and their action made slow.

For these reasons, perhaps, there has been a tendency on the part of Congress, from almost the beginning of our history, not to adopt in its complete form, as seen in England, the principle of judicial control over administrative action. This tendency is seen in the jurisdiction originally given to the federal courts. These bodies were not given as wide a jurisdiction as was given to the higher state courts. Thus it was provided that neither the Supreme Court of the United States nor the circuit or district courts should have original jurisdiction to issue such writs as *mandamus* and *certiorari* to compel or review action on the part of the officers of the United States government.[1] As jurisdiction in *mandamus* and *certiorari* is one of the most important means

[1] The United States Court of the District of Columbia has this jurisdiction, as the successor of the English Court of King's Bench through the Supreme Court of Maryland. But the territorial extent of its jurisdiction is confined to the District of Columbia.

by which the state courts exercise a control over state officers by forcing them to perform their duties and by reviewing their determinations, and as state courts may not issue these writs to federal officers, it will at once be seen what a position of administrative independence and freedom from judicial control has been accorded to federal officers as compared with the officers of the state government or with English officers.

Perhaps this omission from the judiciary act of 1789 of this jurisdiction was an accident. But whether that be the case or not, it is none the less true that Congress has never shown any disposition to remedy the omission, although the Supreme Court has several times called attention to the fact that neither it nor any of the circuit courts has this jurisdiction.

For quite a time Congress took no further action towards relieving the administration from judicial control. Its failure to act was probably due to the fact that no such further action was needed. No such action was needed because the functions of the national administration were not nearly so important as they are now. But, beginning with the Civil War, the national administration began to increase greatly in importance. This importance is seen particularly in the matter of the finances. The financial administration almost overshadowed the other administrative branches of the national government because of the enormous, both current and permanent, expenses which the war entailed.

The carrying on of the great governmental undertakings then under way made it necessary that the receipts be secured with a promptness and certainty which were impossible under a régime of extended judicial control. The result was an attempt in some instances to cut off all judicial remedies whatever, in others to make resort to them by the taxpayer more difficult. In their place, or as a necessary prerequisite to a resort to them, was provided an administrative remedy.

While this movement was particularly characteristic of the Civil War period, it would not be correct to say that there are no evidences of it prior thereto. Thus, in 1839, the action of Congress, as interpreted by the Supreme Court,[2] cut off the

[2] *Cary* v. *Curtis*, 3 How., 236.

most important judicial remedy in customs cases and substituted therefor an appeal from the decision of the collector of the customs to the Secretary of the Treasury. Later, it is true, Congress expressly restored the old judicial remedy, but it made resort to the administrative remedy of appeal to the Secretary of the Treasury and an adverse decision on that appeal, necessary prerequisites to resort to the judicial remedy. During the war similar remedies were provided for the extensive system of internal revenue taxation which was then developed. Since the time when this limitation of the judicial control was provided there has never been a time that the old system has been restored. In customs cases the Administrative Act of 1890 further limited the judicial remedy, providing for customs cases special tribunals similar to the tribunals provided in France and Germany in the seventeenth and eighteenth centuries for the trial of administrative cases. These are the boards of general appraisers, whose members may be removed at any time by the President,[3] whose decisions are made without a jury, are final in matters of appraisement, but may be reviewed by the courts when they relate to classification.

While the Judiciary Act of 1789 did not give the federal courts jurisdiction in *mandamus* and *certiorari*, it still permitted them to issue the injunction, a most potent means of judicial control over administrative action.[4] But when Congress came to organize the new system of taxation made necessary by the war, it came to the conclusion that it was unsafe to subject the action of the revenue officers of the government to the control of the courts through the issue of the injunction, and therefore expressly forbade the courts to issue any injunction to restrain revenue officers from collecting the revenue.[5]

[3] *Shurtleff* v. *United States*, 189 U. S., 311.

[4] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94.

[5] The Supreme Court has interpreted this statute as preventing the courts from issuing the injunction in tax cases to government officers (*Snyder* v. *Marks*, 109 U. S., 189), but has, nevertheless, permitted the courts to issue it to private parties although the issue of the writ actually has the effect of preventing the collection of taxes. This was done, for example, in the in-

The result of this development has been to relieve officers of the national government, in the exercise of one of the powers most restrictive of private right, from the judicial control which, under the old English system, was exercised over them. For the remedies open to the individual are sometimes so difficult of application that he will pay the tax rather than go to the expense and trouble of contesting it. Thus, for example, in the case of certain stamp taxes, such as the tax imposed recently on deeds and mortgages, almost the only way one could secure an appeal to the courts was to refuse to affix the stamp required by law and run the risk of a criminal prosecution. Certainly the Supreme Court has held that the purchase of the stamp, its affixing to the document, even if accompanied by a protest to the collector, is a voluntary payment and that the judicial remedy is not available in the case of taxes voluntarily paid.[6]

The curtailment of the former judicial control over administrative officers is noticeable also in cases other than those already mentioned. The recent cases decided in the Supreme Court relative to the power of administrative officers of the national government to make conclusive determinations which are not susceptible of review by the courts are examples of this tendency to relieve administrative officers from judicial control.

Thus, it has recently been held that Congress may constitutionally vest—and as a matter of fact has actually vested—in administrative officers the conclusive determination of the existence of the facts which justify the deportation of an alien,[7] and that in the case of persons of Chinese parentage, the power of determining finally that such persons are not native-born American citizens may be constitutionally, and as a mat-

come tax cases. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429. Congress has also enacted legislation which takes from the individual the right to bring actions for tort or in replevin against the tax officers of the federal officers because of their performance of their duties. See the opinion in *De Lima* v. *Bidwell*, 182 U. S., 1.

[6] *Chesebrough* v. *United States*, 192 U. S., 253.

[7] *Ekiu* v. *United States*, 142 U. S., 651.

ter of law is actually, vested in the administrative officers of the government, although such persons of Chinese descent are, as a result of such determination, prevented from coming to this country, which they claim to be the land of their birth.[8]

Again, it has been held that the determination by an administrative officer that property shall be destroyed because imported into the United States contrary to the provisions of a statute and treasury regulations passed in pursuance thereof, need not by the constitution, and may not under the statute of Congress, be reviewed by the courts.[9]

The Supreme Court has even gone so far as to hold that, although the person owning such property has not been accorded a hearing before the determination was reached which held that the property was imported contrary to law, and although the order decreeing the destruction of the property has been made without the intervention of a judicial body, the person owning such property has not been deprived of his property without due process of law.

Finally, the Supreme Court has held that the determination that the facts exist which under the statute justify the exclusion of certain articles from the mails, cannot under the law be reviewed by the United States courts,[10] and has intimated that determinations of this character which involve mixed questions of law and fact are, when made by the administrative authority having jurisdiction by statute, conclusive and not subject to judicial review.[11]

Time does not permit of the attempt to set forth the reasoning by which the Supreme Court endeavors to justify these decisions. Nor indeed is the attempt to set forth this reasoning necessary. For what concerns us on this occasion is merely the fact that these decisions have been made. For this fact is indicative of the tendency to which it is the purpose of this paper to call attention.

[8] *United States* v. *Ju Toy*, 198 U. S., 253.

[9] *Buttfield* v. *Stranahan*, 192 U. S., 470.

[10] *Bates & Guild Co.* v. *Payne*, 99 U. S., 106.

[11] *Public Clearing House* v. *Coyne*, 194 U. S., 497.

Before leaving this point, perhaps mention should be made of the power which administrative officers have to enforce their determinations. Two methods are distinguishable. The one is by judicial process; the other is by summary administrative proceedings. So far as enforcement by judicial process is the rule, the method of enforcement in and of itself provides for a judicial control, since administrative officers have to apply to the courts to enforce their orders, and the courts may on such application refuse to act on the ground that the orders are illegal. So far as enforcement by summary administrative proceedings is the proper method, in order that there may be judicial control provision must be made for it in some other way, as by *certiorari*, injunction, or by an action for damages against the officer taking action.

At a very early time in our history it was decided that summary administrative proceedings for the enforcement of debts due the government from its officers were constitutional.[12] Later similar proceedings were upheld for the collection of taxes even where such collection resulted in the sale of the real property of the tax-payer,[13] and at the present time the statutes of Congress confer large powers on collectors of the revenue to collect the taxes due the United States by this method.

When we take these summary methods into consideration and remember that almost all the ordinary remedies by which the courts, on the application of the taxpayer, may exercise their control over actions of revenue officers, have been rendered less effective, if not taken away altogether, we see what an independent position has been accorded by the law to the officers of the United States government who are engaged in the collection of the revenue, and that the tendency is to put the other officers of the government into a similar position of independence.

[12] *Murray's Lessee* v. *Hoboken Land and Improvement Company*, 18 Howard, 272.

[13] *McMillen* v. *Anderson*, 95 U. S., 37; *Springer* v. *United States*, 102 U. S., 586.

What is true of the United States administrative officers is apparent in the case of the officers of the state governments. Attention has already been called to the fact that at the end of the eighteenth and the beginning of the nineteenth century great emphasis was laid on bills of rights, as they were called, which were expected to curtail the power of all branches of the government in their dealing with what were considered to be the natural rights of man. The effectiveness of these bills of rights was, however, in large measure, dependent upon the courts, which came to be regarded as having the power to declare unconstitutional all government acts, even those of the legislature, which they regarded as infringing the rights of the individual as guaranteed by the constitution. For quite a time in our history the courts were inclined to make large use of the powers with which they considered themselves to be endowed, but within the last generation they have developed the idea that there exists in the legislature a power not in any way limited by the constitutional provisions protecting private rights. This power is called the police power. It may be exercised by the legislature and by administrative officers in their attempts to enforce statutes of the legislature without making any compensation to the individual for the expense to which he may be put by their orders. The extent to which the sphere of individual rights has been subjected to government regulation and relieved from judicial protection is of course dependent upon the view taken by the courts as to the content of the police power. This is, however, a subject whose extent and intricacy make it impossible to attempt to go into it on such an occasion as this. It may, however, safely be said that its extent is recognized by the courts to be far greater than they at one time considered it to be. Thus the decisions of the New York Court of Appeals have upheld the right of the legislature to give to administrative officers the power to force owners of tenement property, which, at the time of the passage of the law giving the power, complied in all respects with the law, to make improvements in their property by the introduction of new kinds of plumbing, even where the introduction of such plumbing results in the expenditure of a substan-

tial sum of money.[14] The right to liberty is no more protected from the operation of the police power than is the right to property. Thus, the Supreme Court of the United States has just held that the right to liberty guaranteed by the Constitution is not violated by the provision of compulsory vaccination.[15]

The subject of the control of the state courts over the administrative officers of the state government, so far as it is affected by the question of remedies, is a very large one. Its history necessarily involves a history of judicial procedure. The conditions, furthermore, are so different in different states that it is doubtful if any general conclusions of value can be derived from a study of remedies. It may, however, be said that, in the most complex conditions which are to be found, such as those existing in the cities, a tendency is observable similar in character to the tendency in the legislation of the United States national government, already noticed, towards according greater freedom to administrative action, notwithstanding the greater extent of that action which is necessitated by the presence of the problems incident to municipal life.

In spite of the constitutional provisions protecting property, we find the courts upholding in their decisions more and more arbitrary action on the part of administrative officers having to do with the public health and safety of the community. Thus, the courts of New York have in recent years upheld, in almost all instances, the constitutionality of legislation conferring upon administrative officers powers relative to tenement-houses and the public health generally. Health officers in almost all the states are permitted to proceed to the making and enforcement of nuisance-removal ordinances, as they are called, without notice and an opportunity to be heard on the part of the persons affected by them. The old idea that a jury trial is necessary to the determination that a nuisance exists

[14] *Department of Health* v. *Trinity Church*, 145 N. Y., 32.

[15] *Jacobson* v. *Massachusetts*, 197 U. S., 11. See also *In re Veemeister*, 179 N. Y., 239; *State* v. *Jacobson*, 183 Mass., 242; *State* v. *Hay*, 126 N. C., 999.

has been almost completely abandoned. Action of health officers in taking children believed to be affected with a contagious disease from their parents' arms, after the door of the house in which they lived had been broken in, and consigning them into a pest-house has been sustained as legal.[16] Health officers have been recognized as possessing the power to force, either certain classes of the population, or the entire population of certain districts, to submit to vaccination, where in their opinion there is danger from smallpox.[17]

There is a tendency, further, towards upholding as constitutional the finality of administrative determinations made after a hearing. Such a tendency is perfectly clear where the determination reached involves merely questions of fact, as *e. g.*, the assessment of property for taxation, and is noticeable even in cases where the questions involved are questions of mixed law and fact, as, for example, the determination as to whether given conditions constitute a nuisance. The only exception to such a tendency is either the provision of a new remedy or the remodeling of an old remedy so as to permit of a direct appeal to the courts against administrative determinations, while recognizing their finality in collateral judicial proceedings.[18]

Notwithstanding this exception to the general tendency, it is still true, however, that both in the national government and in the state governments, but particularly in the former and those portions of the latter having to do with municipal life, the powers of administrative officers are, on the whole, broader and much less subject in their exercise to judicial control than they formerly were.

[16] *Haverty* v. *Bass*, 66 Me., 71.

[17] *Morris* v. *Columbus*, 102 Ga., 792; *Abeel* v. *Clark*, 84 Cal., 226; *Duffield* v. *School District*, 162 Pa. St., 476.

[18] This exception is quite marked in the tax cases where a direct remedy against assessments is very commonly provided. Furthermore, in some cases the province of the writ of certiorari, the most important common law remedy for the review of administrative determinations, has been sometimes so extended by legislation as to offer to the individual affected by an administrative determination the right to a judicial review of it even as to questions of fact.

So great, indeed, has been the change in this respect that some people are inclined to believe that we of the present day are departing from the faith of our fathers, and deplore a change which, if continued, will be apt to place us on a par with the people of continental Europe, who, many of us are accustomed to believe, do not enjoy the same sphere of individual freedom with which we consider that we are blessed.

What now is the explanation of this change in one of the important principles of Anglo-American legal philosophy? Why do we tend towards greater administrative power and greater freedom of administrative officers from judicial control?

Is not the reason to be found in the fact that the original English idea of judicial control over administrative action was worked out at a time when industrial and other social conditions were comparatively simple? and that such a system of control was in reality suitable only to such conditions? The greater administrative freedom to be found on the continent during the same period may well have been due to the more complex industrial and social conditions which we are told existed there.[19] At the time the judicial control was developed in England that country was many years behind the continent in industrial development.

Our conditions were naturally less well developed than were even those of England at the time we adopted the idea of judicial control of administrative action, and the change in them, which is evident to any one who examines them, has brought it about that we have enlarged the sphere of administrative action and curtailed the judicial control of that action, although in so doing we have seriously curtailed the sphere of individual freedom. It may, perhaps, be the case that the curtailment has been greater than is either desirable or necessary. However that may be, it is certainly true that large judicial control over administrative action is incompatible with administrative efficiency, and the days in which we live, the days of

[19] Cunningham: Growth of English Industry and Commerce (1892), vol. ii, p. 347.

the factory and the mine, the railroad and the great industrial corporation, the tenement-house and the slum, make greater social control over individual action an absolute necessity. Effective social control is possible only where the administration is efficient. That being the case, it is inevitable that judicial control over the administration must be curtailed.

While, therefore, in some exceptional instances judicial control over administrative action may be restored, while in certain more exceptional instances it may be extended, it can hardly be doubted that the future will see that control on the whole diminish rather than increase, notwithstanding that the action of administration officers may be more extensive than ever before in the history of Anglo-American institutions. We have passed through an age of constitutional private rights and are approaching one of social control. What needs emphasis is no longer the inherent natural rights of the individual, but the importance, indeed the necessity, of administrative efficiency. For upon administrative efficiency depends the effectiveness of that social control without which healthy development in existing conditions is impossible.

But while one of the main means by which such efficiency may be secured is the grant to administrative officers of greater freedom of action, it is to be remembered that this is not the only or probably the most important means. We must recognize as well that an efficient administration must be kept out of politics. That we have as a matter of fact recognized the importance of this principle is seen in the success which the movement for reform in the civil service has had. It is seen also in the greater permanence accorded those positions in the government service involving the discharge of duties of a technical and professional character, such as the position of teacher, member of scientific bureau, policeman and fireman.

When we have fully recognized the importance of an efficient and upright administration and have also recognized that an administrative officer is following a profession rather than occupying a "place," the problem of the proper protection of private rights, and the according to the administration the necessary freedom of action will be much nearer solution.

For we shall then have secured an administrative service which will not need to be subjected to judicial control in order to be made regardful of private rights. This service will then have that freedom of action so necessary to its efficient exercise of those powers of social control with which it must be endowed, if we are to hope to secure the highest public welfare in the industrially and socially complex age in which we are living.