TO THE DELEGATES TO THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1938:

Governor Herbert H. Lehman appointed the New York State Constitutional Convention Committee to collate factual data for the use of the delegates to the Convention. In accordance with the duty so imposed, this volume is respectfully submitted.

Charles Poletti, *Chairman*

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PROBLEMS RELATING

TO

EXECUTIVE

ADMINISTRATION AND POWERS

NEW YORK STATE
CONSTITUTIONAL CONVENTION COMMITTEE
1938

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INTRODUCTORY NOTE

IN this volume are discussed the functions and powers of the Executive, the administration of state departments, the constitutional provisions relating to public officers and related problems.

In the treatment of controversial subjects, a genuine effort has been made to present the facts impartially and to set forth the pros and cons. No recommendations have been advanced. What changes, if any, should be made in the State Constitution rest in the discretion of the delegates to the Convention.

This report has been prepared by and under the direction of the Sub-committee on Executive Powers and Functions of the New York State Constitutional Convention Committee.

This Sub-committee is composed of:

Chairman

JOHN J. BENNETT, JR.

Members

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Some studies which deal with executive problems but which were prepared by and under the direction of other Sub-committees have been included in this volume. Those studies are indicated by footnotes. A few studies have also been prepared by the research staff under the direction of the Chairman of the Committee. The procedure by which all the studies and reports were prepared and are here published is fully described in the General Introduction in Volume I.

The Committee expresses its warm appreciation to John J. Hassett of its research staff for his fine services in doing some of the research and also in helping arrange the material for this volume. The Committee also wishes to thank the other members of its research staff who so ably devoted themselves to the preparation of this volume: Ruth R. Kessler, Saul Nelson, Milton Rosenberg, Leonard J. Saccio and Howard Weinberger.

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For their very helpful assistance in the preparation of data for this volume, the Committee acknowledges its appreciation to: Abraham Green; Edward F. Murphy; I. N. P. Stokes 2nd; George Sylvester; Grace Reavy, President of the State Civil Service Commission; Dorothy Straus, member of the State Planning Council; Wayne D. Heydecker, Director of the State Planning Council; and to the State Mortgage Commission and the members of its staff, particularly Solomon J. Heifitz, Reuben Mazel and Gerald Blumberg.

CHARLES POLETTI,

Chairman, New York State Constitutional Convention Committee

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CHAPTER I

POWERS AND FUNCTIONS OF THE EXECUTIVE

A. History of the Executive Provisions of the New York State Constitution

The first Constitution of New York State was adopted on April 20, 1777, by a convention of delegates vested with authority to establish a State government. This Constitution was not ratified by the people of the State but took effect immediately on adoption by the convention. It remained in effect until December 31, 1822.[1]

Some of the provisions in this Constitution which relate to the executive function have not been changed to this day, some remain with slight change, some have been the basis of similar provisions in the constitutions of other states. It might then be to our advantage to glance briefly at the formation of that convention.

The Fourth Provincial Congress of New York State, the First Constitutional Convention, met at the Court House in White Plains, on the ninth day of July, 1776.[2] The convention had a dual function, to administer the affairs of the State until a settled government could be organized and to prepare a suitable plan for that government.[3] Because of the unsettled times and the fear of the British troops the convention moved from White Plains to Harlem, and then successively, to King's Bridge, Odell's in Phillipp's Manor, Fishkill, Poughkeepsie, and finally to Kingston where the Constitution was adopted.[4] Three men, more than all others, were responsible for the Constitution as a whole[5]—John Jay, aged 30; Robert R. Livingston, aged 29; Gouverneur Morris, aged 24.[6]

Under these trying and difficult circumstances the convention completed its work.

We shall first review briefly the provisions relating to the Governor which are contained in the Constitution of 1777. These provisions will be listed under three headings. The first will contain provisions adopted in 1777 which are still in force in the amended Constitution of 1938; the second, provisions adopted in 1777 which are in force with slight

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[1] Lincoln, Charles Z., The Constitutional History of New York State, 5 volumes, Lawyers Cooperative Publishing Co., Rochester, 1906, I, 472 ff.

[2] *Ibid.*, I, 484.

[3] *Ibid.*, I, 487.

[4] *Ibid.*, I, 491–2.

[5] *Ibid.*, I, 496.

[6] *Ibid.*, I, 471.

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changes in 1938; the third, provisions adopted in 1777 which are no longer in force.

I. Provisions Still in Force

The Constitution of 1777 imposed these duties on the Governor: (a) To transact all necessary business with the officers of government, civil and military;[7] (b) To take care that the laws are faithfully executed;[8] (c) To expedite all such measures as may be resolved upon by the Legislature.[9] Since these provisions have remained unchanged from the time of the first Constitution in 1777, we shall have no more to say of them.

II. Provisions Still in Force With Slight Changes

(a) The Constitution of 1777 provided that the Governor should be Commander-in-Chief of all the militia and Admiral of the Navy of this State. This provision appears again in the Constitution of 1821. It was changed in the Constitution of 1846 to read, "The Governor shall be Commander-in-Chief of all the military and naval forces of this State." In this latter form it is still in force.[10]

(b) The Constitution of 1777 gave the Governor power to convene the Assembly and the Senate on extraordinary occasions. This provision was changed in 1821 to read, "The Governor shall have power to convene the Legislature, or the Senate only, on extraordinary occasions." Until 1874 this new provision remained unchanged. At that time a section was added as follows: "At extraordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration." In this form the provision has continued to date.[11]

(c) The first Constitution gave the Governor power, at his discretion, to grant reprieves and pardons to persons convicted of crimes other than murder or treason. In the two latter cases the Governor had power to suspend the execution of the sentence until the matter should be reported to the Legislature at its next session. The Legislature then had the power either to pardon or to direct the execution of the sentence or to grant a further reprieve. By the Constitution of 1821 the Governor was allowed to pardon those convicted of murder, but his power was restricted in cases of impeachment. Cases of treason were

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[7] Constitution 1777, Art. XIX.
[8] Constitution 1777, Art. XIX.
[9] Constitution 1777, Art. XIX.
[10] Constitution 1777, Art. XVIII; 1821, Art. III, Sec. 4; 1846, Art. IV, Sec. 4; 1894, Art. IV, Sec. 4.
[11] Constitution 1777, Art. XVIII; 1821, Art. III, Sec. 4; 1846, Art. IV, Sec. 4; Amended 1874, Art. IV, Sec. 4; 1894, Art. IV, Sec. 4.

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still to be treated as provided by the Constitution of 1777 with regard to the suspension of sentence. In 1846 the Governor was given the additional power to commute sentence and he was ordered to communicate annually to the Legislature each case of reprieve, pardon or commutation granted. This provision has remained unchanged in our Constitution since 1846.[12]

(d) The first Constitution imposed upon the Governor the duty to *inform*[13] the Legislature at every session of the condition of the State and to recommend such matters to its consideration as should appear to him to concern its good government, welfare and prosperity. In 1821 Peter R. Livingston, of Dutchess county, recommended that personal addresses by the Governor to the Legislature be discontinued and that, following the example of President Jefferson, the Governor communicate by *message* to the Legislature. He claimed that the additional expense caused by debate over a fitting reply to the Governor was unnecessary (members of the Legislature were at the time being paid by the day) and that valuable time was lost to legislation. Mr. Livingston's suggestion was incorporated into the Constitution and the provision has remained unchanged to date.[14]

III. Provisions No Longer in Force

(a) It was provided in 1777 that the Governor should continue in office for three years. When in 1821 extended powers of veto were given the Governor, his term was reduced to two years and this provision was continued by the Constitution of 1846. In 1874 by amendment the term was increased to three years, but in 1894 it was reduced again to two years.[15] A four-year term for the Governor and Lieutenant-Governor was adopted in 1937.

(b) In 1777 the Governor was given power to prorogue the Legislature from time to time provided such prorogation should not exceed sixty days in the space of any one year.[16] This provision was omitted from all future Constitutions of the State.

(c) Our first Constitution imposed on the Governor the duty to correspond with the Continental Congress and with other states.[17] No equivalent provision was contained in subsequent State Constitutions.

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[12] Constitution 1777, Art. XVIII; 1821, Art. III, Sec. 5; 1846, Art. IV, Sec. 5; 1894, Art. IV, Sec. 5.
[13] Constitution 1777, Art. XIX.
[14] Lincoln, *op. cit.*, I, 670.
[15] Constitution 1777, Art. XVIII; 1821, Art. III, Sec. 1; 1846, Art. IV, Sec. 1; amended 1874, Art. IV, Sec. 1; 1894, Art. IV, Sec. 1.
[16] Constitution 1777, Art. XVIII.
[17] Constitution 1777, Art. XIX.

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(d) Our first Constitution demanded as a qualification for the office of Governor that the candidate be "a wise and discreet freeholder."[18] In 1821 the provision still demanded that the Governor be a freeholder but omitted the words "wise and discreet." In addition it provided that he must be a *native* citizen of the United States, thirty years of age and five years, next preceding election, a resident within the State unless absent on State or Federal business.[19] In 1846 eligibility for the office of Governor was extended to *naturalized* citizens and to those not freeholders, and the clause "unless absent on State or Federal business" was omitted.[20] By amendment of 1874 the provision was changed to read "a resident *of* the state" in place of "a resident *within* the state."[21] The provision has remained unchanged from 1874 to date.

(e) By the Constitution of 1777 the appointing power of all State officials except the *Treasurer,* and of most county and city officials was vested in a council composed of the Governor and one senator from each of the four great districts (southern, eastern, middle, western) chosen annually by the assembly. The Governor had a casting vote but no other vote in this council.[22] The earlier Governors claimed exclusive right to *nominate* all officials to the council, but this right was denied them by the Constitutional Convention of 1801. The council at the time of its abolition wielded a patronage including nearly 15,000 offices with an aggregate salary list of one million dollars.[23] The Constitution of 1821 abolished this council; instead, the Legislature was to appoint the Secretary of State, the Comptroller, the Attorney-General, the Treasurer, the Surveyor-General and the Commissary-General.[24] The Constitution of 1846 made most of the chief State offices elective. The offices of Secretary of State, Attorney-General, Comptroller, State Surveyor, Treasurer, Canal Commissioners, and State prison inspectors, were all to be filled by election.[25] In the Constitution of 1894 the officers listed above, with two exceptions, were still to be elected. The offices of canal commissioners and prison inspectors were to be replaced by a Department of Public Works and a Department of State Prisons, whose heads were to be appointed by the Governor, by and with the

[18] Constitution 1777, Art. XVII.
[19] Constitution 1821, Art. III, Sec. 2.
[20] Constitution 1846, Art. IV, Sec. 2.
[21] Amendments 1874, Art. IV, Sec. 2.
[22] Constitution 1777, Art. XXIII.
[23] Lincoln, *op. cit.,* I, 611.
[24] Constitution 1821, Art. IV, Sec. 6.
[25] Constitution 1846, Art. V, Secs. 1, 2, 3, 4.

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consent of the Senate.[26] By an amendment of 1925 only the offices of Comptroller and Attorney-General were left in the hands of the electorate. The Constitution as in force today provides that all but three of the State department heads should be appointed by the Governor, by and with the consent of the Senate. The head of the Department of Education is to be selected by the Regents of the University of the State of New York; the Comptroller and the Attorney-General, as noted before, are to be elected.[27]

(f) The Constitution of 1777 provided for a Council of Revision of Laws. The Governor, the Chancellor, the judges of the Supreme Court, or any two of them, were to constitute a council with power to revise laws and to veto them. Bills which were not approved were to be returned to the house in which they originated and all objections were to be put in writing and sent with them. The council had the power to veto on both policy and constitutionality. Two-thirds of the Legislature might override a veto.[28] In 1821 the Governor was given power of veto and two-thirds of the members *present* might override this veto; however, the Governor might only veto in matters of policy, not of constitutionality.[29] In 1846 this provision remained unchanged.[30] By amendment in 1874 it was provided that two-thirds of the members *elected* to the Legislature would be necessary to override a veto. At the same time the power was given to the Governor to use an Item Veto on appropriation bills.[31] This power has remained unchanged to date.

IV. Provisions Not Included in the Constitution of 1777

As a fourth and final division of this historical sketch, we shall consider two provisions which were not included in any way in the Constitution of 1777, but which do find a place in the amended Constitution of 1938.

(a) The Constitution of 1777 was silent on the subject of compensation of the Governor. The Constitution did not declare that the Governor was to have a fixed salary, nor did it determine who was to fix that salary. As a matter of historical fact the Legislature did fix and determine the salary of the Governor. The Constitution of 1821 contained a general provision that the salary of the Governor was to be fixed by the Legislature, but prohibited an increase or decrease of the

[26] Constitution 1894, Art. V, Secs. 1, 2, 3, 4.
[27] Amendments 1925 and 1931, Art. V (*in toto*).
[28] Constitution 1777, Art. III.
[29] Constitution 1821, Art. I, Sec. 12.
[30] Constitution 1846, Art. IV, Sec. 9.
[31] Amendments 1874, Art. IV, Sec. 9.

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Governor's salary for the term for which he was elected.[32] This provision remained unchanged in the Constitution of 1846. By an amendment of 1874 it was provided that the Governor's salary should be fixed by and in the Constitution at $10,000 per annum.[33] The Constitution of 1894 did not disturb this provision, but it was amended in 1927 to fix the Governor's salary at $25,000 per annum.[34] There has been no change since 1927 in this regard.

(b) The last provision in the State Constitution which concerns the executive, and with which we have to deal has a very brief history. The provision concerns the executive budget, and its first appearance in our State constitutional history was in the Constitutional Convention of 1915. In a volume which was presented to the delegates of the 1915 Convention (*The Revision of the Constitution—Papers on Special Topics,* Part I) appear several papers read at a meeting of the Academy of Political Science, November 19, 1914. One of the contributors, Frederick A. Cleveland, of the Bureau of Municipal Research, was largely responsible for the inclusion of the budget provisions in the proposed Constitution of 1915. In the proposed Constitution of 1915, which was rejected by the people, we find that article V corresponds in almost every detail to article IV-A of the present Constitution adopted as an amendment in 1927. This amendment is in force to date.

Other States

This concludes the history of the executive provisions of our own State Constitution. To give even a brief history of the executive provisions of all of the other states would be a work of great magnitude, and for practical results hardly worth the labor. However, it might be possible to indicate present trends in the Constitution making of other state governments. In states which do not already have constitutional provisions for an executive budget, an effort is being made to secure some such provision. Then again, publications of research agencies, such as the National Municipal League, show that there is a trend toward more extensive and more centralized powers on the part of the chief executives of the various states. In a pamphlet of recent release, *A Model State Constitution,*[35] the authors propose that the Governor should have the power to appoint and remove all department heads,[36] and that the Governor

[32] Constitution 1821, Art. III, Sec. 4.
[33] Amendments 1874, Art. IV, Sec. 4.
[34] Amendments 1927, Art. IV, Sec. 4.
[35] Published by the National Municipal League, Revised 1933.
[36] *A Model State Constitution,* p. 10 and p. 28.

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shall also have the right to sit in the Legislature, to introduce bills, and to take part in discussions, but without the right to vote.[37] In addition, of course, the Governor shall draw up the executive budget.

It may indeed be that the recommendations of such research agencies are not indicative of the trends of the growth of state constitutions, but we may note that article IV-A of our own Constitution is the direct result of the efforts of the Bureau of Municipal Research.

B. Comparison of the Executive Functions of the Forty-Eight States

In this second part, we shall attempt a comparison of the executive provisions as found in the constitutions of the forty-eight states. Since some of the material was already available through the publications of the Council of State Governments of Chicago, this material is incorporated bodily into the text.

The first part of this report will consist of the material available through this agency, and the additional work of compilation will be treated later.

I. Governors' Terms[38]

(a) In exactly half of the states, the Governor's term is four years. In all but one of the other twenty-four states, two-year terms are the rule. The sole exception is New Jersey, which gives her Governors three-year terms.

A slight trend in the direction of the longer term for chief executives is evident in the constitutional revisions of the last four decades. Of the twenty-two states operating under constitutions modeled since 1888, fourteen provide four-year terms for the Governors, as contrasted to eight which provide two-year terms. The one-year term has not been included in any of the new constitutions.

Four-Year Term

Alabama	Maryland	Pennsylvania
California	Mississippi	South Carolina
Delaware	Missouri	Utah
Florida	Montana	Virginia
Illinois	Nevada	Washington
Indiana	North Carolina	West Virginia
Kentucky	Oklahoma	Wyoming
Louisiana	Oregon	New York

[37] *Ibid*, p. 10 and p. 26.

[38] *Governors—Terms and Service*, Governors' Bulletin No. 2, Council of State Government, Chicago, p. 1.

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Three-Year Term

New Jersey

Two-Year Term

Arizona	Maine	North Dakota
Arkansas	Massachusetts	Ohio
Colorado	Michigan	Rhode Island
Connecticut	Minnesota	South Dakota
Georgia	Nebraska	Tennessee
Idaho	New Hampshire	Texas
Iowa	New Mexico	Vermont
Kansas		Wisconsin

(b) *Restrictions on Consecutive Service.*[39] Constitutions and customs continue to restrict the number of consecutive terms which a Governor may serve. New Jersey permits its Governors to hold office for only one three-year term. In contrast is the political philosophy of the citizens of Arizona who set an all-time record when they elected Governor George Wylie Paul Hunt, to eight two-year terms, seven of which were consecutive.

The constitutional restrictions, by states, follow:

Three years (one three-year term)—1 state

New Jersey

Four years (two two-year terms)—1 state

New Mexico

Four years (one four-year term)—12 states

Alabama	Kentucky	North Carolina
Florida	Louisiana	Oklahoma
Georgia	Mississippi	Pennsylvania
Indiana	Missouri	Virginia

Six years (three two-year terms)—1 state

Tennessee

Eight years (two four-year terms)—2 states

Delaware Oregon

No limit in—31 states

These restrictions usually apply only to consecutive terms but rarely is a Governor re-elected after leaving office because of such restrictions. A recent exception is the case of Governor Bibb Graves, of Alabama, who having completed his first four-year term in 1931, was forced out

[39] Copied with slight change from the same pamphlet, pp. 1–2.

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of office by the constitutional restriction, only to be re-elected four years later. The following table gives the provisions for re-eligibility:

Re-eligibility after lapse of one term

Alabama	Mississippi	Oklahoma
Florida	Missouri	Oregon
Indiana	New Jersey	Pennsylvania
Kentucky	New Mexico	Tennessee
Louisiana	North Carolina	Virginia

Re-eligibility after lapse of two terms

Georgia (two terms in—two terms out)

Delaware is the only state on record which definitely restricts her Governors to a maximum of two terms.

Custom, as difficult a barrier as written constitutional provisions, restricts the re-election of Governors in several of the thirty-one states. Where traditional limitations prevail, Governors are restricted to two consecutive terms, although the limit is sometimes shorter. For example, until John G. Winant arrived at Concord, New Hampshire's "unwritten law" prevented any re-election of Governors. By the time he left his official position, however, after serving three consecutive terms, that custom was thoroughly laid away.

(c) *Gubernatorial Elections in Presidential Years.*[40] In view of the proposed amendment, submitted to and approved by the voters in the recent election, with regard to a four-year term for the Governor, with elections in non-presidential years, it might be to our advantage to glance briefly at the conduct of the various states in this regard.

In eleven of the twenty-four states which provide for a four-year term for the Governor, the gubernatorial election falls in the same year as the presidential election. However, in Louisiana, which is one of these states, the gubernatorial election is held in April.

Delaware	Missouri	Washington
Florida	Montana	West Virginia
Illinois	North Carolina	Louisiana
Indiana	Utah	

In all of the twenty-three states which give the Governor a two-year term, alternate elections fall in the presidential year. In Maine, however, election for Governor is held in September, and consequently does not exactly coincide with the presidential election.

[40] Compiled from data in same pamphlet, p. 7.

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In New Jersey where a three-year term is granted to the Governor, one out of every four gubernatorial elections falls in a presidential year.

(d) *Table.*[41]

State	Governor's length of term in years	Maximum *consecutive* terms allowed by Constitution	Election held in presidential years
Alabama	4	1	No
Arizona	2	No limit	Yes*
Arkansas	2	No limit	Yes*
California	4	No limit	No
Colorado	2	No limit	Yes*
Connecticut	2	No limit	Yes*
Delaware	4	2	Yes
Florida	4	1	Yes
Georgia	2	2	Yes*
Idaho	2	No limit	Yes*
Illinois	4	No limit	Yes
Indiana	4	1	Yes
Iowa	2	No limit	Yes*
Kansas	2	No limit	Yes*
Kentucky	4	1	No
Louisiana	4	1	Yes†
Maine	2	No limit	Yes‡
Maryland	4	No limit	No
Massachusetts	2	No limit	Yes*
Michigan	2	No limit	Yes*
Minnesota	2	No limit	Yes*
Mississippi	4	1	No
Missouri	4	1	Yes
Montana	4	No limit	Yes
Nebraska	2	No limit	Yes*
Nevada	4	No limit	No
New Hampshire	2	No limit	Yes*
New Jersey	3	1	Yes§
New Mexico	2	2	Yes*
New York	4	No limit	No
North Carolina	4	1	Yes
North Dakota	2	No limit	Yes*
Ohio	2	No limit	Yes*
Oklahoma	4	1	No
Oregon	4	2	No
Pennsylvania	4	1	No
Rhode Island	2	No limit	Yes*

[41] Compiled from data in same pamphlet, pp. 4–7.
* Alternate elections for Governor fall in presidential years.
† Election for Governor held in April of presidential year.
‡ Alternate elections for Governor held in September of presidential year.
§ Election for Governor held in presidential year once in every twelve years.

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State	Governor's length of term in years	Maximum *consecutive* terms allowed by Constitution	Election held in presidential years
South Carolina	4	No limit	No
South Dakota	2	No limit	Yes*
Tennessee	2	3	Yes*
Texas	2	No limit	Yes*
Utah	4	No limit	Yes
Vermont	2	No limit	Yes*
Virginia	4	1	No
Washington	4	No limit	Yes
West Virginia	4	No limit	Yes
Wisconsin	2	No limit	Yes*
Wyoming	4	No limit	No

II. Veto Powers of Governors[1]

During the first few months of every odd year, the executive veto is used on more than three thousand bills *and individual appropriation items.* Only some 120 of these 3,000 or about 4 per cent are passed over the vetoes.

Our democratic scheme of government came of age under the "check and balance" system. This accounts for the relationship between the Governor and the Legislature which is found, in varying forms, in all but one of the states. North Carolina persists in denying its Governor any power to veto legislative decisions, although three State Constitutions have been adopted since 1776.

In an effort to determine whether the veto powers of Governors may be interpreted as an enhancement of executive authority or as a curb on the Legislatures, the arrangement of State Constitutions was analyzed.

In twelve states the veto provision is placed in the legislative section. In thirty-four states it is included in the executive section. And Rhode Island wrote her veto provision into the Constitution as an amendment.

Because North Carolina's Constitution is silent concerning vetoes, that state will be henceforth ignored throughout this report.

(a) *Veto Restrictions During Sessions.* Every state prescribes the amount of time during which a Governor may ponder the legislative product. Failure to veto and return a bill to the house of origin within that time limit is equivalent to approval—when the Legislature is in session.

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[1] This section has been copied with slight change from the pamphlet entitled *Veto Powers of the Governors*, Governor's Bulletin No. 3, Council of State Governments, Chicago, 1935.

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Three days are allowed the Governors of nine states:

Indiana	Minnesota	South Carolina
Iowa	New Mexico	South Dakota
Kansas	North Dakota	Wyoming

In four states the Governors have six days in which to study bills:

Alabama	Rhode Island
Maryland	Wisconsin

The Governors in twelve states are allowed ten days:

California	Kentucky	New York
Colorado	Louisiana	Ohio
Delaware	Michigan	Pennsylvania
Illinois	Missouri	Texas

The remaining twenty-two states allow their Governors five days:

Arizona	Massachusetts	Oregon
Arkansas	Mississippi	Tennessee
Connecticut	Montana	Utah
Florida	Nebraska	Vermont
Georgia	Nevada	Virginia
Idaho	New Hampshire	Washington
Maine	New Jersey	West Virginia
	Oklahoma	

Sundays are excepted from the count in all states but Colorado, Louisiana, Massachusetts, Missouri, and Pennsylvania.

(b) *Veto Restrictions After Adjournment.* Adjournment of the Legislature complicates the veto procedure. Twenty-seven states require that if the Governor plans to use his veto he must do so within a specified period of time which varies from three to thirty days; otherwise a bill becomes law:

Arizona	Maryland	Oregon
Arkansas	Massachusetts	Pennsylvania
Colorado	Nebraska	Rhode Island
Connecticut	Nevada	South Dakota
Florida	New Jersey	Texas
Idaho	New Mexico	Utah
Illinois	North Dakota	Washington
Indiana	Ohio	West Virginia
Kentucky		Wyoming
Louisiana		

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Four states require their Governors to return bills after the convening of the next session of the Legislature if they wish to veto them:

Alabama	Mississippi (see below)
Maine	South Carolina

In five states the Governors are prohibited from approving any bills while the Legislature is not in session:

Kansas	New Hampshire	Georgia
Mississippi (see above)	Tennessee	

"Pocket vetoes" are allowed in the remaining twelve states. In four states legislative bills are granted a thirty-day reprieve, during which time the Governor must sign them or they fail to become law:

Thirty-day limit (5 states)

California	Iowa	New York
Delaware	Missouri	

In two states fifteen days may elapse before the death sentence via pocket veto, becomes effective:

Fifteen-day limit (2 states)

Montana	Oklahoma

Ten days is the limit in Virginia, six days are allowed in Wisconsin, five in Michigan and Vermont, and three in Minnesota.

(c) *Item Veto.* When Jefferson Davis accepted the presidency of the Southern Confederacy, his veto powers included the right to invalidate not only legislative bills as a whole, but also specific items of appropriation bills. The states were quick to see the advantage of such an arrangement, by which these composite and complex bills might be made acceptable to Governors. The provision was inserted in the Georgia Constitution in 1865 and in the Texas Constitution in the following year. The item veto is now included in the constitutions of thirty-nine states. The only "veto-states" which lack it are:

Indiana	New Hampshire	Vermont
Iowa	Rhode Island	Nevada
Maine	Tennessee	

(d) *Overriding the Veto.* In all forty-seven of the veto states, Legislatures have been given the power to override the executive veto.

Nearly half of the states require the stiffest test, two-thirds of the elected legislators, to pass a bill over the Governor's veto. In thirteen others the requirement is two-thirds of the members present. A complete summary of the constitutional provisions in the states follows:

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Veto may be overridden by:

Majority of members present (1 state)

Connecticut

Majority of members elected (7 states)

Alabama	Kentucky	West Virginia
Arkansas	New Jersey	
Indiana	Tennessee	

Three-fifths of members present (1 state)

Rhode Island

Three-fifths of members elected (4 states)

Delaware	Maryland	Nebraska
	Ohio	

Two-thirds of members present (11 states)

Florida	New Mexico	Vermont
Idaho	Oregon	Washington
Massachusetts	South Dakota	Wisconsin
Montana	Texas	

Two-thirds of members elected (22 states)

Arizona	New Hampshire	Pennsylvania
California	Illinois	Maine
Colorado	Iowa	Michigan
Georgia	Kansas	Minnesota
Mississippi	Louisiana	South Carolina
Missouri	New York	Utah
Nevada	North Dakota	Wyoming
	Oklahoma	

Two-thirds of members present, but including a majority of members elected (1 state)

Virginia

(e) *Limitations of the Veto Power.* The Governors, through their veto power, limit the power of Legislatures. But this power to limit is itself limited. Thus the Governors of the nineteen states which have the initiative provision in their Constitutions may not veto measures initiated by the electorate. The Governors of these same states, with the addition of Maryland, are also prohibited from vetoing measures which have been referred to the electorate.

In fourteen states the Governors are constitutionally prohibited from vetoing resolutions of adjournment. In Louisiana, Rhode Island, and Wyoming the Constitutions provide that the Governor shall not exercise veto power on any questions affecting the prerogatives and duties of the Legislature. And in Alabama, Louisiana, Missouri and Rhode Island he may not veto a proposed amendment to the Constitution.

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VETO POWERS OF THE GOVERNORS ‡

STATE	DAYS AFTER WHICH BILL BECOMES LAW UNLESS VETOED. (SUNDAYS EXCEPTED)		Days after adjournment after which bill is dead unless approved	Item veto on appropriation bills	Votes required in House and Senate to pass bills on items over veto [1]	CONSTITUTIONS PROHIBIT GOVERNORS FROM VETOING		
	Before adjournment	After adjournment				Initiated measures	Referred measures	Miscellaneous measures
Alabama	6	[2]	.....	X	Maj. elect	.....	.....	[3, 5]
Arizona	5	10	.....	X	⅔ elect	X	X	.....
Arkansas	5	*20	.....	X	Maj. elect	X	X	.....
California	10	.....	30	X	⅔ elect	X	X	.....
Colorado	*10	*30	.....	X	⅔ elect	X	X	.....
Connecticut	5	*15	.....	X	Maj. elect	.....	.....	.....
Delaware	10	.....	*30	X	⅗ elect	.....	.....	.....
Florida	5	*10	.....	X	⅔ pres	.....	.....	.....
Georgia	5	.....	**	X	⅔ elect	.....	.....	[3]
Idaho	5	10	.....	X	⅔ pres	X	X	.....
Illinois	10	*10	.....	X	⅔ elect	.....	.....	.....
Indiana	3	*5	.....	.....	Maj. elect	.....	.....	.....
Iowa	3	.....	*30	.....	⅔ elect	.....	.....	.....
Kansas	3	.....	†	X	⅔ elect	.....	.....	.....
Kentucky	10	*10	.....	X	Maj. elect	.....	.....	.....
Louisiana	*10	*10	.....	X	¾ elect	.....	.....	[4, 5]
Maine	5	[2]	.....	.....	⅔ elect	X	X	.....
Maryland	6	[6] *10	.....	X	¾ elect	.....	X	.....
Massachusetts	*5	*5	.....	X	⅔ pres	X	X	.....
Michigan	10	.....	5	X	⅔ elect	X	X	.....
Minnesota	3	.....	*3	X	⅗ elect	.....	.....	.....
Mississippi	5	[2]	†	X	⅔ elect	.....	.....	.....
Missouri	*10	.....	*30	X	⅔ elect	X	X	[5]
Montana	5	.....	*15	X	⅔ pres	X	X	.....
Nebraska	5	*5	.....	X	⅗ elect	X	X	.....
Nevada	5	10	.....	.....	¾ elect	X	X	.....
N. Hampshire	5	.....	†	.....	⅔ elect	.....	.....	.....
New Jersey	5	5	.....	X	Maj. elect	.....	.....	.....
New Mexico	3	*6	.....	X	⅔ pres	.....	.....	.....
New York	10	.....	*30	X	⅔ elect	.....	.....	.....
No. Carolina	.....	.....	.....	.....	.....	.....	.....	.....
North Dakota	3	*15	.....	X	⅔ elect	X	X	.....
Ohio	10	*10	.....	X	⅗ elect	X	X	.....
Oklahoma	5	.....	*15	X	¾ elect	X	X	.....
Oregon	5	5	.....	X	⅔ prea	X	X	.....
Pennsylvania	*10	*30	.....	X	⅔ elect	.....	.....	.....
Rhode Island	6	*10	.....	.....	⅗ pres	.....	.....	[4, 5]
So. Carolina	3	[2]	.....	X	⅔ elect	.....	.....	.....
South Dakota	3	*10	.....	X	⅔ prea	X	X	.....
Tennessee	5	.....	†	.....	Maj. elect	.....	.....	.....
Texas	10	*20	.....	X	⅔ pres	.....	.....	.....
Utah	5	10	.....	X	⅔ elect	X	X	.....
Vermont	5	.....	5	.....	⅔ pres	.....	.....	.....
Virginia	5	.....	*10	X	⅔ pres [7]	.....	.....	.....
Washington	5	10	.....	X	⅔ pres	X	X	.....
W. Virginia	5	*5	.....	X	Maj. elect	.....	.....	.....
Wisconsin	6	.....	6	X	⅔ pres	.....	.....	.....
Wyoming	3	*15	.....	X	⅔ elect	.....	.....	[4]

Notes to above chart:

[1] Bill returned to house of origin with objections, except in Georgia, where the Governor need not state his objections, and in Kansas, where all bills are returned to the House of Representatives.

[2] Bill passed in one session becomes law if not returned within two days (Maine and Mississippi 3 days) after reconvening of Legislature.

[3] No veto on questions of election within the Legislature.

[4] Questions affecting the prerogatives and duties of the Legislature.

[5] Proposed amendments to the State Constitution.

[6] Within 10 days after presentation to the Governor, regardless of how long after adjournment this may be.

[7] Including majority elected.

* Sundays not excepted.

† No bill may be approved when the Legislature is not in session.

‡ Copied from *The Book Of The States*, Council of State Governments, Chicago, 1937, p. 159.

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III. The Appointing Power of the Governor[1]

When we consider the appointing powers of the Governors in this section, we shall confine ourselves exclusively to appointments in the administrative and executive departments of State government. If we were to consider the various powers of the Governors to fill vacancies in the judiciary, and in county and city governments, the resulting information would be so complicated as to defy understanding.

We shall also have to set another limit to our treatment of the Governor's appointing powers. Our main task will be to determine whether or not the Governor may appoint certain officials, and not to investigate whether these officials are elected by the people or selected by the Legislature or in any other way.

(a) *Secretary of State.* In only seven states has the Governor the power to appoint the Secretary of State, and in six of these states the appointment must be confirmed by the Senate.

Delaware	New Jersey	Pennsylvania
Maryland	New York	Texas

In Virginia, the seventh state, the appointment must be confirmed by both houses of the Legislature.

(b) *Attorney-General.* The Governors of only five states have power to appoint the Attorney-General, and four Governors must have the appointment confirmed by the Senate.

New Hampshire	New Jersey	Wyoming
	Pennsylvania	

In Indiana, the Attorney-General is appointed by the Governor alone.

(c) *Comptroller.* In twenty-seven states the office of Comptroller does not exist and the work is carried on by the State Auditor.

Arizona	Michigan	Oregon
Colorado	Mississippi	Pennsylvania
Delaware	Missouri	South Dakota
Idaho	Montana	Utah
Illinois	Nebraska	Vermont
Indiana	North Carolina	Washington
Kansas	North Dakota	West Virginia
Kentucky	Ohio	Wisconsin
Maine	Oklahoma	Wyoming

[1] The contents of Pt. III are based on Governor's Bulletin No. 8, *The Appointing Powers of the Governor,* and on the charts in *The Book of the States,* Council of State Governments, Chicago, 1937, p. 160 and p. 163.

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In seven states the Comptroller is appointed by the Governor by and with the consent of the Senate.

Arkansas	Massachusetts	Minnesota
Iowa	Virginia	New Hampshire
Louisiana		

In two states the office of Comptroller is filled by appointment of the Governor alone.

New Mexico	Rhode Island

In the remaining twelve states the office of Comptroller is filled apart from the influence of the Governor.

(d) *State Auditor.* In six states the office of auditor does not exist.

California	New Hampshire	Rhode Island
Connecticut	New York	Tennessee

In three states the same office is filled by appointment of the Governor, by and with the consent of the Senate.

Georgia	South Carolina	Texas

In three states the auditor is appointed by the Governor alone.

Florida	Maryland	Nevada

In the remaining thirty-six states, the State Auditor is selected apart from the influence of the Governor.

(e) *Treasurer.* New York is the only state in the country where the Treasurer is appointed by the Governor, and our Constitution provides that he be appointed by and with the consent of the Senate. In the other forty-seven states the Treasurer is selected apart from the influence of the Governor. (We may note here when we say that the Treasurer in New York is appointed by the Governor that we are speaking of the head of the Department of Taxation and Finance, in which department the Division of the Treasury is found. The head of the Division of the Treasury is a deputy commissioner appointed by the Commissioner of Taxation and Finance.)

(f) *Tax Commission.* Florida is the only state in the Union which does not have an office of Tax Commission or its equivalent. In four states the office is filled apart from the influence of the Governor. In twenty-six states (and in this group New York belongs) the Tax Commission or Commissioner is appointed by the Governor, by and with the consent of the Senate. In the remaining seventeen states the office is filled by the Governor alone.

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(g) *Department of Education.* In only two states, Maryland and Tennessee, is the Superintendent of Public Instruction, or equivalent officer, appointed by the Governor alone. Twelve other states provide for appointment by the Governor with the consent of the Senate.

Connecticut	Minnesota	Pennsylvania
Delaware	New Hampshire	Vermont
Maine	New Jersey	Rhode Island
Massachusetts	Ohio	Virginia

The remaining thirty-four states (among them New York) select this official apart from any influence of the Governor.

(h) *Other offices.* In the executive department of state governments there are other administrative offices of less importance than those we have already considered. Rather than devote too much time to them or to neglect them entirely we shall include them on the chart which is to follow.

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Chart

STATE	Secretary of State	Attorney-General	Treasurer	Auditor	Comptroller	Supt. Public Instruction	Director of Budget	Tax Commission	Agriculture	Labor	Health	Welfare	Public Utilities	Securities	Banking	Insurance	Liquor	Highways	Conservation	Appointed by Governor with consent of Senate	Appointed by Governor	Appointed apart from Governor
Alabama	•	•	•	•	•	•	X	•	•	•	•	•	•	•	•	•	•	•	•	1	4	12
Arizona	•	•	•	•	X	•	G	•	•	G	G	G	X	•	G	G	•	G	G	3	5	9
Arkansas	•	•	•	•	•	•	G	G	G	G	G	G	G	G	G	G	G	G	G	8	10	5
California	•	•	•	X	•	•	G	G	G	G	G	G	G	G	G	G	G	G	G	1	7	7
Colorado	•	•	•	•	X	•	G	X	G	G	G	G	G	G	G	G	G	G	G	7	4	7
Connecticut	•	•	•	X	•	•	G	G	G	G	G	G	G	G	G	G	G	G	G	4	7	6
Delaware	G	•	•	•	X	•	G	X	G	G	G	G	G	G	G	G	G	G	G	7	4	10
Florida	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	5	6	4
Georgia	•	•	•	•	•	•	G	G	G	G	G	G	G	G	G	G	G	G	G	1	7	10
Idaho	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	7	6	4
Illinois	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	2	1	10
Indiana	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	1	8	8
Iowa	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	1	10	8
Kansas	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	9	11	6
Kentucky	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	1	1	8
Louisiana	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	3	3	7
Maine	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	5	5	8
Maryland	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	7	2	3
Massachusetts	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	2	0	4
Michigan	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	0	3	5
Minnesota	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	5	5	7
Mississippi	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	1	6	9
Missouri	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	2	6	11
Montana	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	6	9	5
Nebraska	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	2	6	10
Nevada	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	1	6	6
New Hampshire	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	0	8	8
New Jersey	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	14	3	3
New Mexico	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	13	5	5
New York	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	6	7	7
North Carolina	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	13	7	3
North Dakota	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	14	3	9
	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	0	2	11

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Chart (continued)

STATE	Secretary of State	Attorney General	Treasurer	Auditor	Comptroller	Supt. Public Instruction	Director of Budget	Tax Commission	Agriculture	Labor	Health	Welfare	Public Utilities	Securities	Banking	Insurance	Liquor	Highways	Conservation	Appointed by Governor with consent of Senate	Appointed by Governor	Appointed apart from Governor
Ohio	•	•	•	•	X	GS	G	GS	GS	GS	GS	G	GS	GS	GS	GS	GS	GS	GS	1	13	4
Oklahoma	•	•	•	•	X	•	X	G	•	•	G	G	•	•	•	G	X	G	G	4	3	10
Oregon	•	•	•	•	X	•	G	G	G	•	G	G	G	X	G	•	G	G	G	2	7	7
Pennsylvania	GS	GS	•	•	X	GS	G	GS	GS	GS	GS	G	G	GS	GS	G	GS	GS	GS	15	1	2
Rhode Island	•	•	•	X	G	•	X	G	G	•	G	G	G	G	G	G	G	G	G	13	2	3
South Carolina	•	•	•	GS	•	•	X	G	•	G	•	G	•	G	G	•	•	G	G	4	3	11
South Dakota	•	•	•	•	X	•	X	G	G	G	G	G	•	G	G	G	X	G	G	1	9	7
Tennessee	•	•	•	X	•	G	G	G	•	G	G	G	•	G	G	G	X	G	G	8	4	6
Texas	GS	•	•	GS	X	•	X	G	G	G	G	G	•	G	G	G	G	G	G	11	1	6
Utah	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	11	1	6
Vermont	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	13	0	4
Virginia	GS	•	•	•	GS	GS	G	G	G	G	G	G	G	G	G	G	G	G	G	12	4	3
Washington	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	9	2	7
West Virginia	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	G	G	G	10	0	8
Wisconsin	•	•	•	•	X	•	G	G	G	G	G	G	G	G	G	G	X	G	G	12	0	5
Wyoming	•	GS	•	•	X	•	X	G	G	G	G	G	G	G	G	G	•	G	G	7	3	7

G Appointed by Governor alone.
GS Appointed by Governor with consent of Senate.
• Selected apart from influence of the Governor.
X Office or equivalent does not exist.

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IV. Commander-in-Chief of the State Militia

In all of the forty-eight states the Governor is designated as the Commander-in-Chief of the State militia. There are, however, in the Constitutions of other states provisions which limit or define the powers of the Governor in this capacity, and none of these provisions is found in the Constitution of New York State.

(a) *Except when in Actual Service of U. S.* The Constitutions of thirty states limit the power of the Governor as Commander-in-Chief to this extent: "The Governor shall be Commander-in-Chief of all the military and naval forces of this State *except when they shall be in the actual service of the United States.*" Eighteen states—and among them New York—have omitted this limitation from their Constitution.

California	Louisiana	New Jersey
Colorado	Maryland	New York
Georgia	Massachusetts	Oregon
Indiana	Michigan	Vermont
Iowa	Minnesota	Virginia
Kansas	New Hampshire	Wisconsin

(b) *The Governor may call out the Militia.* Thirty-five states provide in their Constitutions that the Governor may call out the militia to repel invasion, execute the laws and supress rebellion. Thirteen states—and in this group New York is included—do not grant this power in the Constitution.

Arizona	Kentucky	Rhode Island
Connecticut	Maine	Vermont
Delaware	New Jersey	Wisconsin
Georgia	New York	
Iowa	Pennsylvania	

We may note, however, that though New York has no *constitutional* provision by which the Governor may call out the militia, this power is provided for him in the consolidated laws, chapter 36, article 1, section 8.

(c) *Other Limitations.* There are several limitations of minor importance imposed on the Governor by the Constitutions of a few states in regard to their powers as Commander-in-Chief. In three states—Kentucky, Maryland, Vermont—the Governors are not allowed to command the militia in the field unless so advised by a resolution of the Senate or of the Legislature. In New Hampshire and Maine, the Governor is forbidden to lead the militia out of the state without the consent of

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the people or the Legislature. Again in Alabama and Missouri, the Constitutions declare that the Governor *need not* command in the field unless so directed by the Legislature.

V. Pardoning Powers of the Governors

In all of the states, except Connecticut, the Governor is vested to some extent with power to pardon and commute sentences. The Constitution of Connecticut only gives power to the Governor to grant reprieves in cases other than treason, until the end of the next General Assembly and no longer.

(a) *Board of Pardons.* Fifteen states limit the pardoning power of the Governor by providing for a board of pardons. However, in two states—Alabama and South Carolina—this limitation means little since the decision of the board of pardons is purely advisory in nature. In the remaining thirteen states the Governor is bound to abide by the decision of the board.

Delaware	Nevada	Minnesota
Florida	Pennsylvania	Nebraska
Idaho	New Jersey	South Dakota
Louisiana	Texas	Utah
Montana		

MEMBERS OF THE BOARD OF PARDONS

(1) Delaware—Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer, Auditor. Majority decision required.

(2) Florida—Governor, Secretary of State, Comptroller, Attorney-General, Commissioner of Agriculture. Majority decision needed.

(3) Idaho—Governor, Secretary of State, Attorney-General. Majority decision needed.

(4) Louisiana—Lieutenant-Governor, Attorney-General, presiding judge of the court making the conviction. Majority decision needed.

(5) Montana—Secretary of State, Attorney-General, Auditor. Majority decision needed.

(6) Minnesota—Governor in conjunction with the Attorney-General and the chief justice of the Supreme Court.

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(7) Nebraska—Governor, Attorney-General, Secretary of State. Majority decision needed.

(8) Nevada—Governor, Attorney-General, three justices of the Supreme Court. Majority decision needed.

(9) New Jersey—Governor, Chancellor, six judges of the Court of Errors and Appeals. Majority decision required.

(10) Pennsylvania—Lieutenant-Governor, Secretary of Commonwealth, Attorney-General, Secretary of Internal Affairs. Three votes required.

(11) South Dakota—Presiding judge, Secretary of State, Attorney-General.

(12) Utah—Governor, Attorney-General, three justices of the Supreme Court. Majority decision required.

(b) *Pardoning and Commuting.* In two other states—Massachusetts and New Hampshire—the Constitutions provide that the Governor may exercise the power of pardoning with the consent of the council.

Of the remaining thirty states, two—Kansas and Rhode Island—merely declare that the pardoning power is to be vested in the Governor. Two other states—Maryland and New Mexico—give the Governors power to reprieve and pardon, but the power of commuting sentences is not specifically granted in the Constitution. All of the other states—and New York is in this group—grant the Governors the constitutional power to reprieve, pardon or commute sentence after conviction.

(c) *Reasons for Pardon.* Twenty-three states demand that the Governor report to the Legislature his reasons (or the reasons of the Board of Pardons) for granting each reprieve, pardon or commutation, and four other states request that the reasons be filed in the office of the Secretary of State.

Report to the Legislature

Alabama	Michigan	South Carolina
Arkansas	Missouri	Virginia
Colorado	Montana	Washington
Georgia	Nebraska	West Virginia
Idaho	North Carolina	Wisconsin
Iowa	North Dakota	Wyoming
Kentucky	Ohio	Delaware
Maryland	Oregon	

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Filed with Secretary of State

Pennsylvania	Texas	Utah
South Dakota		

(d) *Fines and Forfeitures.* In twenty-six states the additional power is vested in the Governor or in the Board of Pardons to remit fines and forfeitures.

Alabama	Maine	Texas
Arkansas	Maryland	Utah
Florida	Montana	New Jersey
Georgia	Nevada	Vermont
Idaho	North Dakota	Virginia
Indiana	Oregon	Washington
Iowa	Pennsylvania	West Virginia
Kentucky	South Carolina	Wyoming
Louisiana	South Dakota	

In Mississippi the Governor is granted power to remit fines, to stay forfeitures and with the consent of the Senate to remit forfeitures.

(e) *Treason and Impeachment.* In twenty-seven states—and New York is one of the number—the pardoning power of the Governor or the Board of Pardons does not extend to cases of treason and impeachment. In these states, however, the Governor may suspend the execution of the sentence for treason until the next session of the Legislature, and the Legislature has the power to pardon or direct the execution of the sentence.

Arizona	Iowa	New York
Arkansas	Kentucky	North Dakota
California	Louisiana	Ohio
Colorado	Michigan	South Dakota
Delaware	Minnesota	Texas
Florida	Missouri	Utah
Georgia	Nebraska	Vermont
Idaho	Nevada	Wisconsin
Indiana	New Mexico	Wyoming

In Mississippi and Montana a similar limitation is imposed by the Constitutions which restrict the pardoning power to *criminal* cases.

In eight states the pardoning power does not extend to cases of impeachment, but no restriction is placed on cases of treason.

Alabama	New Hampshire	Oklahoma
Delaware	New Jersey	Tennessee
Maine	North Carolina	

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Maryland and Oregon limit the powers of the Governor in cases of persons convicted for treason, but impose no implicit restrictions in cases of impeachment.

(f) *Additional Constitutional Restrictions on Pardoning Power.* Neither the Governor nor the Legislature of California can grant pardon or commutation to a person twice convicted of a felony without the written recommendation of a majority of the justices of the Supreme Court.

Idaho, Maryland, Mississippi and Montana demand newspaper publication of the application for pardon before pardon can be granted.

Delaware, Nebraska, Idaho, and Pennsylvania provide that no pardon be granted by the Board of Pardons before a full hearing in open session of the application for pardon. Nebraska further provides that notice of the application be personally served on the judge of the court by which sentence was pronounced and on the attorney of the county where the offense was committed.

VI. Information in Writing from Heads of Executive Departments

Thirty-four states provide by Constitution that the Governor may require information in writing from heads of executive departments upon any subject relating to the duties of their respective offices.

Alabama	Iowa	Nevada
Arizona	Kansas	North Carolina
Arkansas	Kentucky	Ohio
California	Louisiana	Oregon
Colorado	Maine	Pennsylvania
Connecticut	Michigan	South Carolina
Delaware	Minnesota	Tennessee
Florida	Mississippi	Utah
Georgia	Missouri	Virginia
Idaho	Montana	Washington
Illinois	Nebraska	West Virginia
Indiana		

Eight of these states specify that such information shall be given under oath if the Governor so requires.

Alabama	Idaho	Nebraska
Colorado	Missouri	West Virginia
Delaware	Montana	

New York is not included in either of these groups.

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VII. Extraordinary Sessions of Legislature

All of the forty-eight states grant the power to the Governor to convene extraordinary sessions of the Legislature. Massachusetts, New Hampshire and North Carolina provide that the Governor shall exercise this power with the advice of the council. And Louisiana, in addition to giving the Governor the *power,* imposes on him the *duty* to convene the Legislature when so petitioned by two-thirds of the members elected of each house.

(a) *No Other Business.* The Constitutions of twenty-one states—one of which is New York—prescribe that during the extraordinary session which the Governor has called, no business may be considered by the Legislature except that which the Governor has recommended.

Arkansas	Kentucky	New Mexico
California	Louisiana	New York
Colorado	Mississippi	Ohio
Florida	Missouri	Oklahoma
Georgia	Montana	Tennessee
Idaho	Nebraska	Utah
Illinois	Nevada	West Virginia

(b) *Senate Alone.* Ten states—New York among them—grant the Governor the power of calling an extraordinary session of the Senate alone.

Colorado	Montana	New York
Delaware	New Jersey	Oklahoma
Idaho	Utah	Pennsylvania
Maryland		

(c) *In Different Place.* Fourteen states constitutionally provide that the Governor may call the extraordinary session of the Legislature in a place other than the ordinary seat of government, if said place is in danger from war, disease or plague. New York has no such provision.

Arkansas	Maine	Texas
Connecticut	Maryland	Wisconsin
Indiana	Massachusetts	Michigan
Kentucky	Mississippi	New Hampshire
Louisiana	Rhode Island	

VIII. Adjourn Legislature

A number of states grant power to the Governor to adjourn the Legislature—usually when there is a dispute between the houses as to the time of adjournment. Eighteen states permit the Governor under

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these circumstances to adjourn the Legislature not beyond the time of the next regular session.

Arkansas	Illinois	Ohio
California	Iowa	Oklahoma
Colorado	Kansas	Rhode Island
Connecticut	Maine	South Carolina
Florida	Mississippi	Utah
Georgia	Nevada	Vermont

Massachusetts and New Hampshire limit the time of adjournment to ninety days and demand that the adjournment be made with advice of council. Delaware specifies that the adjournment by the Governor shall not exceed three months, and Kentucky and Pennsylvania that it shall not exceed four months.

It is worthy of note that until 1934 Nebraska gave the Governor power to adjourn the Legislature until the time of the next regular session, in case of dispute beween the two houses. By amendment, in that year, this provision was removed from the Constitution.

New York does not give the Governor any constitutional power to adjourn the Legislature.

IX. Governor's Report to Legislature

(a) *At Every Session.* The Constitution of New York imposes on the Governor the duty of reporting to the Legislature at every session on the condition of the State and of recommending to the consideration of the Legislature such matters as he deems expedient.

Twenty-seven other State Constitutions contain similar provisions:

Alabama	Iowa	Ohio
Arizona	Kansas	Oklahoma
California	Missouri	South Dakota
Colorado	Montana	Utah
Delaware	Nebraska	Virginia
Florida	Nevada	Washington
Idaho	New Jersey	West Virginia
Illinois	North Carolina	Wisconsin
Indiana	North Dakota	Wyoming

(b) *From Time to Time.* Twenty-two states provide that the Governor shall make his reports and recommendations *from time to time.* In this group are eight states whose Governors are also required to

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give such information at every session. An asterisk will indicate the states which were found in the former group.

*Alabama	Louisiana	*New Jersey
Arkansas	Maine	*Oklahoma
Connecticut	Maryland	Oregon
*Delaware	Michigan	Pennsylvania
Georgia	Mississippi	South Carolina
*Idaho	*Missouri	Tennessee
*Indiana	*Montana	Texas
Kentucky		

(c) *At the Close of His Term.* Five states demand that their Governors shall also report to the Legislature at the close of their terms of office.

Alabama	Michigan	Nebraska
Arkansas	Missouri	

(d) *Additional Provisions.* The Constitution of Minnesota, althougn it requires the Governor to make a report to the Legislature on the condition of the state, is silent on the question of recommending expedient measures. Vermont's Constitution reads that the Governor must prepare business to lay before the General Assembly.

X. Budget Provisions

In making a comparison of the budget provisions of the various State Constitutions, it is noticeable that very few states provide for the executive budget in their Constitutions with such detail as our own State. Our method then will be to analyze the budget provisions in the New York State Constitution and then to note differences and similarities in other State Constitutions.

New York's Budget Provisions. We shall first separate the budgets of the Legislature and the judiciary from the executive budget. Itemized estimates of the financial needs of these two branches of government are submitted to the Governor for inclusion in the annual budget. The Governor may make such recommendations as he thinks proper with regard to various items, but he may not revise such estimates before action has been taken on the bills by the Legislature. However, after these bills have passed both houses, they must be submitted to the Governor for approval, and the Governor exercises the same power of veto over these bills as he does over all other appropriation bills.

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On or before October 15 of each year the heads of all other departments of the State government must submit to the Governor itemized estimates of appropriations to meet the financial needs of such departments. At the same time copies of these estimates must be furnished to the designated representatives of the appropriate committees of the Legislature for their information. Then the Governor holds hearings to help him in revising these estimates, and the members of the Legislative committee are invited to attend and take part in the hearings, while heads of departments or their subordinates may be required to attend.

On or before the fifteenth of January next succeeding (for a newly elected Governor February 1), the Governor shall submit to the Legislature the complete budget. It shall contain all the estimates so revised or certified and clearly itemized, and be accompanied by a bill for all proposed appropriations; it shall show the estimated revenues for the ensuing fiscal year and the estimated surplus or deficit of revenues at the end of the current fiscal year, together with the measures of taxation, if any, which the Governor may propose for the increase of the revenues. It shall also contain a statement of revenues and expenditures of the two preceding years in form suitable for comparison.

The Governor may, before final action of the Legislature thereon, but not more than thirty days after submitting the bill, amend or supplement the budget. He may also, with the consent of the Legislature, submit such amendment or a supplemental bill at any time before the adjournment of the Legislature.

The Governor and the heads of departments shall have the right, and it shall be the duty of heads of departments when requested by either house of the Legislature, to appear and be heard in respect to the budget during consideration thereof and to answer questions relevant thereto.

The Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such items are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose.

The budget for the administrative departments of the government becomes law immediately on the passage in both houses, but separate items added by the Legislature are subject to the veto or approval of the Governor. Neither house shall consider further appropriation bills until that appropriation bill proposed by the Governor shall have been finally acted on by both houses.

West Virginia's Executive Budget. Most of the provisions regarding the executive budget which are contained in the Constitution of New

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York are found in West Virginia's Constitution. However, there are certain important differences which shall be here noted.

1. The budget is drawn up, not by the Governor, but by the Board of Public Works which consists of the Governor, the Secretary of State, Auditor, Treasurer, Attorney-General, Superintendent of Free Schools and Commissioner of Agriculture.

2. The Legislature may not amend the budget bill so as to create a deficit but may amend the bill by increasing or diminishing the items therein relating to the Legislature, and by increasing the items therein relating to the judiciary, but with these exceptions, the Legislature may not alter the said bill except to strike out or reduce items therein; provided, however, that the salary or compensation of any public officer shall not be increased or diminished during his term of office; such a bill when passed by both houses shall be a law immediately, without further action by the Governor. *We may note that the Governor does not have a power of veto over the appropriations for the Legislature and the judiciary.*

3. The Legislature *may require the presence of the Governor* as well as well as any other member of the Board of Public Works to appear and be heard during the consideration of the budget.

4. The Board of Public Works does not have the power to revise the estimates for the public schools.

5. The budget bill must contain a statement showing the revenues and expenditures of the two preceding years, but it is not added as in New York "in form suitable for comparison."

For the remaining provisions, there is only verbal difference between the Constitutions of New York and West Virginia. Both states provide for executive revision of the budget; both provide for public hearings by the governor of State agencies requesting appropriations, *but in West Virginia members of the appropriate legislative committees are not invited to these hearings;* both provide that the budget be submitted to the Legislature within the first few weeks of each session and both provide for further appropriations or amendments in the same way.

Maryland's Executive Budget. The budget provisions of Maryland repeat word for word the provisions of West Virginia with these minor exceptions, that the word "Governor" is substituted for "Board of Public Works" and the words "General Assembly" are substituted for "Legislature."

California. California has several budget provisions not found in other Constitutions which are of special interest. All its budget provisions will be here noted and unusual provisions will be emphasized.

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1. The Governor *and the Governor-elect* shall have power to require any public department or agency to furnish him with information relative to the budget.

2. Within the first thirty days of each regular session the Governor shall submit the itemized budget for all state departments to the Legislature, *with an explanatory message;* at the same time he shall submit all the estimated revenues for the ensuing biennium; together with a comparison *as to each item of revenue and expenditure* with the actual items of revenue and expenditure of the preceding biennium.

3. The budget bill is then referred to the appropriate committee in each house, and it is handled by the Legislature in the ordinary way. But *before or after its enactment,* the Governor may amend or supplement the bill.

4. *In any appropriation bill* passed by both houses the Governor may reduce or eliminate items.

5. Until the budget bill has been finally enacted, neither house shall place *upon final passage* any other appropriation bill, except emergency bills recommended by the Governor, or appropriation bills for the salaries, mileage and expense of the Legislature.

6. Appropriations from the General Fund for any biennium, exclusive of appropriations for the public school system, shall not exceed by more than 5 per cent the appropriations for the preceding biennium unless two-thirds of all the members elected to each house vote in favor thereof. And the part appropriated by such two-thirds vote shall not become a part of the base for determining the maximum appropriation for the succeeding biennium.

7. Not more than 25 per cent of the total appropriations from all funds of the State shall be raised by means of taxes on real and personal property according to the value thereof.

Massachusetts' Executive Budget. Massachusetts' budget provisions are included in the amendments to the Constitution, article LXIII. Since the section is quite short, we shall list the provisions in order.

1. For the purpose of preparing the budget, the Governor shall have power to require any officer or agency of the State to furnish him with any information he may deem necessary.

2. Within three weeks of the convening of the Legislature the Governor shall submit a statement of all proposed expenditures together with a statement of all the revenues by which the expenditures shall be defrayed.

3. All appropriations based on the budget shall be incorporated in a single bill. *The Legislature may increase, decrease, add or omit items in the budget.*

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4. The Legislature may provide for its salaries, mileage and expenses and for necessary expenditures in anticipation of appropriations, but before final action on the budget bill it shall not enact any other appropriation bill except on recommendation of the Governor.

5. The Governor may *at any time* recommend to the Legislature supplementary budgets which shall be subject to the same procedure as the original budget.

6. Any other appropriation bills shall specify the revenues for defraying the appropriations therein contained.

7. The Governor may disapprove or reduce items or parts of items *in any bill* appropriating money.

8. He shall send to the house in which the bill originated his reasons for disapproval or reduction of items, and if he fails to do so within five days (unless the Legislature by adjournment shall prevent such transmission), such items shall have the force of law.

Other States. Other states have budget provisions in their Constitutions of rather a general nature, and hence they may be treated in more summary fashion.

Eight states require the Governor at the beginning of each session to present to the Legislature estimates of the amount of money required to be raised by taxation for all purposes of the State.

Alabama	Idaho	Montana
Colorado	Illinois	Nebraska
Florida	Missouri	

Only two of these states specify in the Constitutions that the estimates shall be itemized.

Missouri	Nebraska

The Constitution of Louisiana provides that the general appropriation bill shall be itemized, but it does not tell us if the Governor or any executive officer has any part in drawing up this itemized account.

XI. Conclusions

At this point it may be advisable to cast a backward glance over the provisions already considered to determine in what direction future efforts may be exerted.

(a) *Governor's Term.* In view of the fact that the electorate has so recently adopted an amendment providing for a four-year term for Governor with elections in non-presidential years, no further considera-

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tion will be given this topic. However, attention might be directed to a consideration of a constitutional limitation of consecutive terms for Governor.

(b) *Veto Powers.* No suggestion has been made to follow the example of North Carolina and entirely take from the Governor the power of veto, or even to take from him the item veto on appropriation bills. However, questions may arise as to the votes required in the Legislature to override a veto. Again, it may be debated whether a bill should die if not approved before adjournment, or whether a bill should be approved if not vetoed after adjournment.

(c) *Appointing Powers.* Under this head the convention may perhaps find one of the most fruitful fields for consideration. The question is directly brought up as to the strength or weakness of the Governor's power of appointment in the administrative or judiciary departments. Indirectly we are brought to a consideration of a highly centralized government with almost unlimited power of appointment and removal in the hands of the Governor.

(d) *Commander-in-Chief.* Little fruitful consideration can be given to this particular section. The Constitution provides that the Governor shall be Commander-in-Chief of the State militia and the consolidated laws of the State provide that the Governor may call out the militia to suppress insurrection, etc.

(e) *Pardoning Powers.* A fruitful topic for discussion is the advisability of a Board of Pardons. Such discussions have come up in previous conventions, and doubtless will arise again.

(f) *Information from Heads of Departments.* New York's Constitution does not now provide and never has provided that the Governor may require information in writing from heads of executive departments as to the duties of their respective offices. Whether the Governor shall be invested with such power seems an important question.

(g) *Extraordinary Session of Legislature.* Our State Constitution already bestows on the Governor the power to call an extraordinary session of the Legislature or the Senate alone and provides that in the extraordinary session which shall be called no other business shall be considered except that which the Governor has recommended. Important as such provisions are, they would not seem to invite discussion.

(h) *Adjourn Legislature.* As we saw in our historical survey the power of proroguing the Legislature was granted to the Governor by the Constitution of 1777. It remained then mainly as a relic of colonial days. The power was not granted in the Constitution of 1821 and has not since been restored to the Governor. Further inquiry might reveal

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the advantages or disadvantages to the State of granting such powers to the Governor.

(i) *Report and Recommendations of the Governor to the Legislature.* The State Constitution provides that the Governor shall report to the Legislature at each session as to the condition of the State and recommend such matters as he shall deem expedient. It does not seem that much could be added to this provision to greatly enhance its usefulness.

(j) *Budget Provisions.* As has already been indicated, New York's constitutional provisions seem quite complete and detailed. However, the provisions of other State Constitutions give food for thought. Should the budget be drawn up by a board or by the Governor alone? Should the Governor have the power of veto or revision over the budgets of the Legislature or the judiciary? Should the Legislature be allowed to require the presence of the Governor to explain matters relevant to the budget? Should the Governor-elect be given opportunity to draw up his budget before assuming office? Should the 5 per cent increase limitation of California be adopted?

Other questions may arise but the questions listed above seem to cover the main problems in this field.

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CHAPTER II

EXECUTIVE POWERS—ARTICLE IV

SECTION 1

"The executive power shall be vested in the Governor, who shall hold his office for four years; the Lieutenant-Governor shall be chosen at the same time, and for the same term. The Governor and Lieutenant-Governor chosen at the general election in nineteen hundred and thirty-six shall hold office until and including the thirty-first day of December, nineteen hundred and thirty-eight. Their successors shall be chosen at the general election held in that year and each fourth year thereafter." (As adopted November, 1937.)

(a) *The Executive Power Shall be Vested in a Governor:*

The Constitution of 1777 provided that "the supreme executive power and authority" should be vested in the Governor. (Art. XVII.) In the original draft the word "supreme" had been omitted, but it was inserted on the motion of General Scott. (Lincoln, *Const. Hist., I, 525.*)

The Constitution as amended in 1821 stated that the executive power should be vested in a Governor. (Art. III, sec. 1.) No delegates in convention questioned the striking out of the word "supreme," and the amendment as reported by the committee was accepted without change and incorporated into the Constitution.

In the convention of 1846, Mr. Morris moved that the section should be amended to read: "The *supreme* (or the *chief*) executive power shall be vested in a governor." He gave as his reason that other State officials, elective or appointive, were vested with executive power. For the sake of precision he believed that the phrase "executive power" should be qualified by an appropriate adjective. Mr. Stow objected that everyone understood the language of the Constitution in this case and that to amend it without cause was unnecessary and perhaps dangerous. The motion of Mr. Morris was "manifestly lost." (*Debates 1846,* pp. 169-170.)

No changes have been suggested in this provision since 1846 and it remains now in the form adopted in 1821.

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(b) *Term of Governor and Lieutenant-Governor:*

The Constitution of 1777 provided that the Governor should be elected for a term of three years (Art. XVII), and that a Lieutenant-Governor should be elected at every election for Governor, and *"as often as the lieutenant-governor shall die, resign or be removed from office."* (Art. XX.)

Convention of 1821

When the section was amended in 1821, it provided that the Governor should hold office for two years and that the Lieutenant-Governor should be elected at the same time and for the same term as the Governor. (Art. III, sec. 1.)

Since the convention had already determined that the Governor should be given new powers of veto and appointment, there was considerable debate about the term that should be given to the Governor. Three proposals were made fixing the Governor's term respectively at one year, two years and three years. (*Debates 1821,* p. 137.) Early in the debate the delegates decisively voted against the three year term with only thirty in the affirmative and eighty-nine in the negative. (*Ibid.,* p. 139.)

Mr. Cramer advocated the one-year term because of the additional power given to the Governor to veto, pardon murderers, and appoint certain officers. He said that an officer with such powers should be made accountable to the people and *frequently* accountable. (*Ibid.,* p. 138.) General Root argued along the same lines that frequent elections would give the people security that the Governor would act in their interest; the longer the term of the Governor, the less would be his responsibility to the people. (*Ibid.,* p. 137.)

Mr. N. Williams said that in one year no Governor could propose or carry into execution any plan for the public benefit. (*Ibid.,* p. 140.) But General Root replied that if the plan of the Governor is good, the people will re-elect him. (*Ibid.,* p. 146.) Mr. Van Buren answered that annual elections would not give the people the chance to overcome "the feelings of temporary excitement" and obtain "the sober second thought, which is never wrong." (*Ibid.,* p. 147.) Mr. Van Buren added that in one year a Governor cannot make himself familiar with the interest, wants and conditions of the State. (*Ibid.,* p. 148.)

Mr. Peter Livingston rose to join the advocates of the annual election. He pointed out that in forty years, New York had had only five Governors, and he felt that if a Governor were doing a good job the people would express their trust in him by re-election. But he believed that the people should be given the opportunity each year to reject a Governor

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who was not doing a good job. (*Ibid.*, p. 149.) Mr. Buel answered that a one-year term would bring the office of Governor into disrepute by its failure to attract capable men; he added that even a brilliant Governor would be unable to obtain sufficient knowledge of his duties in that short time. (*Ibid.*, p. 154–5.) Mr. Edwards maintained the further position that an annual election would render the Executive Department unstable. (*Ibid.*, p. 155.)

When a final vote was taken on the two-year term in convention, sixty-seven votes were recorded in the affirmative and forty-seven in the negative. (*Ibid.*, p. 552.) It thus became a part of the Constitution.

The convention of 1821 also considered a constitutional restriction of the service of the Governors to eight out of every ten years. Mr. Spencer objected to the provision, because in an emergency we might need a man to carry on his work. (*Ibid.*, p. 174.) Mr. Briggs argued in opposition that frequent change of rulers is a fundamental principle of the republican form of government. (*Ibid.*, p. 174–5.) Mr. Young answered that a more fundamental principle of republican government is to allow the people to elect their own officers, and he saw no point in restricting the right of the people to re-elect a good Governor. (*Ibid.*, p. 175.) The motion was carried to strike out the limitation on the Governor's service. (*Ibid.*, p. 175.)

Convention of 1846

When this section was being considered in 1846, Mr. Dana made a motion to eliminate the office of Lieutenant-Governor. He said that the only reason for the existence of this office was to preside over the Senate and to fill a possible vacancy in the office of Governor. Both of these objects could be attained without paying $6 per day for a contingency. (*Debates 1846*, pp. 167–8.) Mr. Loomis contended that a man who was to be the President of the Senate and possibly was to be Governor, should be elected by the people and not by the senators. (*Ibid.*, p. 167.) Mr. Marvin brought out the point that if the people elect a Lieutenant-Governor, they have some notion as to who will be Governor should anything happen to the Governor. (*Ibid.*, p. 168.) The motion was defeated by a vote of the delegates with no vote recorded in the affirmative. (*Ibid.*, p. 168.)

Mr. Hunt moved to amend the section by giving a three-year term to the Governor. Such an amendment would take the gubernatorial election out of presidential years, and thus separate state and national issues. A longer term would also serve to give the Governor more experience in the performance of his duties. Lastly, if the people should recklessly elect

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an incompetent Governor for the extended term, he would sentence the people to three years of incompetent government for their carelessness. However, this motion was lost in convention. (*Ibid.*, pp. 170–1.)

Mr. Stow moved to amend the section by limiting the term of the Governor elected in 1846 to one year and providing for biennial election thereafter. In this way the elections for Governor would not fall in presidential years. Although many of the delegates agreed in the advisability of removing the elections for Governor from presidential years, the motion was defeated because of practical difficulties. The amended Constitution would not be submitted to the people until November 1846 and would not be in effect at the time of the election of the next Governor. (*Ibid.*, p. 170.)

Convention of 1867

When the committee on Governor and other State officers reported to the convention, it recommended no changes in the term of the Governor. The committee felt that experience in office was of the greatest importance, and if the people had asked for a change in this regard, the committee would have recommended an extension of term to three or four years. However, since the people were satisfied with a two-year term, in the opinion of the committee it was better not to make any changes. (*Debates 1867*, Vol. II, pp. 884–5.)

The proposition to abolish the office of Lieutenant-Governor was also considered by the committee, but reported unfavorably by it. The Governor, as an elected official, represents all the people of the State; so too should be the Lieutenant-Governor who is to succeed him in office. (*Ibid.*, Vol. II, pp. 884–5.) This topic received no further consideration in convention.

In convention Mr. Ketcham proposed a four-year term for the Governor with election in presidential years "when all the voters will come to the polls." Such a plan would obviate the necessity for re-election every two years. (*Ibid.*, Vol. II, p. 889.) Mr. A. J. Parker contended that the Governor should be returned to the people for approbation at least every two years. (*Ibid.*, Vol. II, p. 889.)

Mr. Greeley sponsored an amendment to render the Governor ineligible for re-election after one term in office. He said that the Governor by a discreet use of patronage and the veto power could build up a political machine which would ensure his re-election and he felt that temptation to follow such a course would degrade the office of Governor. (*Ibid.*, Vol. II, pp. 889–90.) Mr. Flagler stated that there was no evidence that the Governor had used patronage or the veto power to

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secure re-election. He further insisted that the people had shown no disposition to render the Governor ineligible after one term, and he therefore held that the people should not be denied the right to re-elect a man whom they wanted to re-elect. (*Ibid.,* Vol. II, p. 890.) Mr. Opdyke replied that if the people did not want the ineligibility provision, it was because they had not given serious consideration to the subject. He was ready to vote for any provision which would free the Governor from improper influences. (*Ibid.,* Vol. II, p. 890.) Mr. E. P. Brooks said that even if the records of former Governors showed no need of the ineligibility clause, we must consider the fact that future Governors might be corrupt. (*Ibid.,* Vol. II, pp. 890–1.) Mr. Van Cott replied that government must be built on faith and not on the consideration of possible corruption. (*Ibid.,* Vol. II, pp. 891–2.) Finally, Mr. M. Townsend opposed the ineligibility clause, because he felt that the best way to get a good record would be to give a Governor the chance to aim at re-election. (*Ibid.,* Vol. II, pp. 892–3.)

When the vote was taken, the provisions to extend the term of the Governor and to render him ineligible after one term were both declared lost. (*Ibid.,* Vol. II, pp. 893.)

The Commission of 1872

The Constitution which was submitted to the people in 1867 was rejected by a decisive vote. In 1872 Governor Hoffman appointed a non-partisan commission to revise the Constitution. The commission recommended an extension of the term of Governor to three years to obviate frequent changes in policy and in office. The amendment was accepted by the people in 1874. (Lincoln, *Const. Hist.,* Vol. II, pp. 511–2.)

The Convention of 1894

Mr. McMillan proposed to decrease the Governor's term to two years in order to secure the separation of State and municipal elections. (*Revised Record 1894,* Vol. IV, p. 208.) Mr. Lincoln declared that the people were satisfied with a three-year term for the Governor and Lieutenant-Governor, and that the cities were asking for too much when they demanded a change of this sort for their own convenience. He saw no difficulty in electing a Governor and a mayor in the same year. (*Ibid.,* Vol. IV, p. 209.) Mr. Osborn pointed out that by separating the State and municipal elections, the State and national elections would be thrown into the same year. (*Ibid.,* Vol. IV., p. 215.) Mr. Dickey suggested that a four-year term for the Governor with elections in non-

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presidential years would answer all difficulties. (*Ibid.,* Vol. IV, p. 211.) Mr. Moore supported this position. He claimed that any man fit to be Governor should hold office for four years. The four year term would make for efficiency by keeping an experienced man in office. (*Ibid.,* Vol. IV, p. 215.)

The two-year term was adopted in convention by a vote 107 to 24. (*Ibid.,* Vol. IV, p. 217.)

Amendments Proposed 1894–1915

In 1910 an amendment was introduced in the Legislature to increase the term of the Governor and Lieutenant-Governor to four years, but it failed to pass in the Legislature and was never submitted to the people. In 1914 a similar amendment was proposed and defeated in the Legislature. (Constitutional Convention Commission 1915: *Constitution Annotated,* Part II, p. 81; p. 319.)

The Convention of 1915

The committee on Governor and other State officers reported in favor of a four-year term for Governor with election in non-presidential years and with a provision making the Governor ineligible to succeed himself. Mr. Baldwin submitted a minority report for the same committee in which he advocated a two-year term without restriction on succession. He gave as his reason that if the Governor did a good job he ought to be re-elected, and if he did not, two years was long enough for him. (*Revised Record 1915,* Vol. I, p. 886; pp. 868–9.)

In supporting the position of the majority of the committee, Mr. Rhees gave the following arguments. Under present conditions, he said, it takes the Governor the first year of his term to become familiar with his work and in the second year he must start his campaign for re-election. With a four-year term and ineligibility to succeed himself, the Governor would give experienced and "single-minded service" for it would be unnecessary to think of re-election. With the election in non-presidential years, the effects of party landslides would not be allowed to interfere with successful state management. (*Ibid.,* Vol. IV, p. 3842.)

Mr. Barnes pointed out that if the convention were to give the Governor the power to draw up the budget and the power to appoint the heads of most of the State departments as was contemplated, the people ought to be given the chance to approve or disapprove of his record at least every two years. (*Ibid.,* Vol. IV, pp. 3853–4.) But Mr. Austin declared that the longer a Governor remained in office, the more valuable

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he became to the State as an experienced manager of state affairs; and if the Governor were really bad, he could be impeached. (*Ibid.*, Vol. IV, p. 3848.)

Early in the convention a letter from Senator Wadsworth was read in convention urging the extension of the Governor's term to four years. He assigned as reasons that no Governor could hope to present and test a policy and program within the limits of a two-year term; consequently, there was no continuity of policy in the management of State affairs since each policy was abandoned and a new one substituted every two years. (*Ibid.*, Vol. I, p. 966.)

The convention voted against a four year term 85 to 45. (*Ibid.*, Vol. IV, p. 3860.)

Amendments 1915–1937

Between 1915 and 1920 the Legislature gave no consideration to the subject of a four-year term for Governor. In 1919 when Governor Smith took office, he urged upon the Legislature three reforms to secure more efficient management of State affairs: the executive budget, the reorganization of State departments, and a four-year term for Governor with election in non-presidential years. In 1920 proposals for all these changes were introduced in both houses of the Legislature. While he was still in the executive mansion, Governor Smith saw two of these measures incorporated into the Constitution, but his effort to secure the four-year term, in which we are here interested, was for the time unsuccessful.

In every year between 1920 and 1926 at least one proposal was introduced in both houses of the Legislature. Until the latter year all of these proposals died in committee in the Legislature. But in 1926 and 1927 an amendment providing for a four-year term with the first election in 1928—a presidential year—passed both houses of the Legislature. This amendment was submitted to the people in the general election of 1927 and decisively defeated.

Between 1928 and 1935 we again find that not a year passed without the introduction of amendments relative to the four-year term. Again we find these proposed amendments dying in committee until 1935. In that year an amendment providing for a four-year term with the first election in 1938—a non-presidential year—passed both houses of the Legislature and was referred to the Legislature of 1937. In 1937 it again passed both houses of the Legislature and was submitted to the people in the election of that year. The people voted in favor of the amendment and the four year term was incorporated into the Constitution.

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SECTION 2

"No person shall be eligible to the office of Governor or Lieutenant-Governor, except a citizen of the United States, of the age of not less than thirty years, and who shall have been five years next preceding his election a resident of this state."

Constitution of 1777

The only qualification demanded for the office of Governor by the first Constitution was that he should be "a wise and discreet freeholder of this state." (Art. XVII.) It was believed that the property qualification would add dignity to incumbents and would insure the selection of persons who had a direct property interest in the State. (Lincoln, *Const. Hist.,* Vol. II, pp. 7–9.) The same policy had its expression in property qualifications for voters. (Art. VII.)

Constitution of 1821

In the convention of 1821 Mr. Childs advocated that the Governor should be a native citizen of the United States for he could "conceive of no advantage in permitting a foreigner to be governor of this state." His motion was carried "almost unanimously." (*Debates 1821,* p. 174.) The convention retained the property qualifications, and demanded in addition to native citizenship that the Governor should have attained the age of thirty and that he should have been a resident of the State for five years. The words "wise and discreet" were omitted from the section. (Lincoln, *op. cit.,* I, 668; *Const. 1821,* art. III, sec. 2.)

Constitution of 1846

The first two Constitutions of New York State required property qualifications of both voters and State officers. By amendment of 1826 voters were relieved of property qualifications, and in 1845 the property qualifications for State officers were abrogated. (Lincoln, *op. cit.,* Vol. I, p. 222; p. 225.) Thus, one year before the constitutional convention met, one of the qualifications demanded in 1821 had already been struck out.

In convention, Mr. Murphy moved to strike out the requirement for *native* citizenship. Mr. Patterson seconded the motion on the grounds that some very distinguished citizens who were not native-born had served ably in Congress and in the State Legislature. Mr. Perkins added that no foreign-born person would be elected Governor unless

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he had rendered outstanding service to the State. Mr. Cornell pointed out that althought the Federal Constitution required that the President should be a native citizen there was a reason there which did not exist in the case of the Governor. The President had to represent the country in international relations, and if he were not native-born, he might be inclined to show favoritism to one or another nation. The Governor need not be native-born, for he had no similar situation to deal with. (*Debates 1846,* pp. 172–4.)

The sole dissenting voice was that of Mr. Penniman. He was of the opinion that if the native-citizenship qualification were removed, the party leaders would get together and say: "Let's put up so and so, and then we shall carry the Dutch." (*Ibid.,* p. 180.) The proposition to strike out the qualification of native citizenship was carried in convention with only one vote in the negative. (*Ibid.,* p. 174.)

Mr. Patterson also moved to strike out the age qualification for the Governor. He would not ask whether a candidate were 25 or 30, but whether he was a good man and a capable man. If a person was important enough to be famous at the age of 21, he should be given a chance to serve the people as Governor. (*Ibid.,* p. 173.) Mr. Simmons replied that he would not like to see a "raw boy" acting as Governor. (*Ibid.,* p. 178.) Mr. Worden said that if we were to be consistent, we should eliminate not only "raw boys" but "superannuated old men." He saw no need of the age qualification in the Constitution, since political parties would not nominate candidates who were too old or too young. (*Ibid.,* p. 206.) Mr. Stow favored the retention of the age qualification, since he did not care to risk the pardoning power or the appointing power to a man under thirty—however competent. (*Ibid.* p. 197.) The convention finally decided to retain the age qualification by a vote of 69 to 41. (*Ibid.,* p. 338.)

A motion was made to strike out the qualification for five years residence in the State, but Mr. Nicholas objected to it on the grounds that a person without five years residence in the State would not be sufficiently familiar with the State government. (*Ibid.,* p. 179.) But Mr. O'Conor said that the required five years residence might be fulfilled between the ages of one and five and hence would be useless. (*Ibid.,* p. 202.) Mr. Strong pointed out that if the five-year residence provision were abolished, a famous personage might come into the State and be elected on the crest of his popularity. (*Ibid.,* p. 233.) The delegates finally voted not only to retain the five-year residence qualification, but to make it "next preceding election." The vote was recorded as 73 in the affirmative and 36 in the negative. (*Ibid.,* p. 338.)

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Changes since 1846

The only change that has been made in this section since 1846 was the application of the qualifications for Governor to the Lieutenant-Governor by amendment in 1874. The reason advanced for this change was that if the Lieutenant-Governor is to be the successor of the Governor, he ought to possess the same qualifications. No changes were made or suggested between 1874 and 1936.

SECTION 3

"The Governor and Lieutenant-Governor shall be elected at the times and places of choosing members of the Assembly. The persons respectively having the highest number of votes for Governor and Lieutenant-Governor shall be elected; but in case two or more shall have an equal and the highest number of votes for Governor, or for Lieutenant-Governor, the two houses of the Legislature at its next annual session shall forthwith, by joint ballot, choose one of the said persons so having an equal and the highest number of votes for Governor or Lieutenant-Governor."

The Constitution of 1777, article XVII, provided for the election of the Governor "by the freeholders of this state qualified, as before described, to elect senators" and "the person who hath the greatest number of votes within the said state shall be Governor thereof." Article XX of the same Constitution prescribed that the Lieutenant-Governor "be elected in the same manner with the Governor."

The Constitution of 1821, article III, section 3 provided for the settlement of tie elections by joint ballot of the Legislature. (*Debates 1821,* p. 522.)

The Constitution of 1846, article IV, section 3 did not touch the substance of this section, but determined that the election for Governor should take place at the time for electing members of the Assembly instead of at the time for electing members of the Legislature. It also added that contested elections should be settled by joint ballot of the Legislature *at its next annual session.* (Lincoln, *Constitutional History,* IV, p. 464.)

In the convention of 1867 Mr. Conger claimed that the section was ambiguous and that if there were a tie for both offices of Governor and Lieutenant-Governor, the Legislature might elect to the office of Governor the person receiving highest and equal vote for Lieutenant-

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Governor and vice versa. He proposed a slight verbal change to eliminate the ambiguity. The delegates approved this change, but since the Constitution of 1867 was rejected by the people, it never was incorporated into the Constitution. (*Debates 1867,* Vol.. V, pp. 3621–2.)

The provision has thus remained in the Constitution without change since 1846. The only amendment which has been suggested results from the efforts to establish biennial sessions of the Legislature. In such an event the provision would have to read that disputed elections shall be settled by the Legislature "at its next *biennial* session" instead of "at its next *annual* session."

SECTION 4

"The Governor shall be Commander-in-Chief of the military and naval forces of the State. He shall have power to convene the Legislature, or the Senate only, on extraordinary occasions. At extraordinary sessions no subject shall be acted upon, except such as the Governor may recommend for consideration. He shall communicate by message to the Legislature at every session the condition of the State, and recommend such matters to it as he shall judge expedient. He shall transact all necessary business with the officers of government, civil and military. He shall expedite all such measures as may be resolved upon by the Legislature, and shall take care that the laws are faithfully executed. He shall receive for his services an annual salary of twenty-five thousand dollars, and there shall be provided for his use a suitable and furnished executive residence."

Powers and Duties of the Governor

(a) *Military Authority:*

The Constitution of 1777 provided that the Governor should "by virtue of his office, be General and Commander-in-Chief of all the militia, and Admiral of the Navy, of this state." (Art. XVIII.) In the Constitution of 1846 the formal title of Admiral of the Navy was "Admiral of the Navy." The delegates gave no consideration to the topic and the motion was not carried. (*Debates 1821,* p. 552.) In the convention of 1821 a motion was made to strike out the phrase, omitted. No change in this provision has been effected or proposed since 1846. (Lincoln, *Const. Hist.,* Vol. IV, pp. 466–7.)

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(b) *Extraordinary Sessions of the Legislature:*

During the colonial period every session was to some extent an extraordinary session, since it practically began and ended under the direction of the Governor. The power granted in article XVIII of the Constitution of 1777 "to call extraordinary sessions of the Legislature, was an application in another form of the power possessed by the Governor before the Revolution. The necessity for this provision is apparent, and the power has been frequently exercised." The Constitution of 1821 granted the Governor the power to convene the Senate only on extraordinary occasions. In the convention of 1867 the delegates adopted a provision requiring the Governor to state in his proclamation calling the extraordinary session, the subjects he wished to be considered at that session, and prohibiting the passage of any law unrelated to the subjects included in the proclamation. The Constitution of 1867 was rejected by the people at the polls. However, the commission of 1872 proposed a similar amendment, limiting the action of the Legislature while in special session to subjects recommended for consideration by the Governor. This amendment was adopted in 1874. (Lincoln, *Const. Hist.* Vol. IV, pp. 467–8.) No change in this provision has been considered either in the Legislature or the constitutional conventions since that date.

(c) *Messages and Recommendations to the Legislature:*

During the colonial period it was the custom for the Governor to appear personally before the Legislature in joint session and to read to them a statement of public affairs, making such recommendations as he deemed proper. (Lincoln, *Const. Hist.,* Vol. IV, p. 469.) This custom was continued under the Constitution of 1777. (Art. XIX.) In the convention of 1821, Mr. P. R. Livingston made a motion that the Governor should communicate to the Legislature by *message* instead of by a *speech.* He said that the formal speech was a relict of monarchy and that it had been abandoned by Jefferson in the national government during his terms as President. Furthermore, he estimated that it cost the State government about $70,000 over a period of ten years for the legislative debates in answer to the Governors' speeches. Mr. Briggs retorted that it would cost just as much to answer a message. However, Mr. Livingston's motion was carried and the provision was incorporated into the Constitution. (*Debates 1821,* pp. 173–4.)

The commission of 1872 suggested an important change relative to the communications of the governor to the Legislature. Mr. Van Buren proposed that the Governor should be required to send his

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message to the Legislature at the close of each year instead of at each regular session. Mr. Silliman proposed that the Governor should report to the Legislature at every session and at the close of his official term. This would require two messages whenever a new Governor assumed office—one by the outgoing Governor and one by the incoming Governor. Both proposals were rejected by the commission. (Lincoln, *op. cit.*, Vol. II, pp. 514–7.)

No changes have been suggested in this provision from 1874 to date.

(d) *Transaction of Public Business; Expediting of Public Measures; Taking Care Laws Are Faithfully Executed:*

All of these functions were imposed upon the Governor by the Constitution of 1777. (Art. XIX.) They were continued in all subsequent Constitutions with only slight verbal change. (Lincoln, *op. cit.*, Vol. IV, pp. 470–1.)

(e) *Governor's Compensation:*

The Constitution of 1777 contained no provision relative to the Governor's compensation, and it was left to the Legislature to fix an appropriate salary. When the power of veto was given to the Governor in 1821, Mr. Spencer proposed that a constitutional provision prevent the increasing or diminishing of the Governor's salary during the term for which he was elected. Otherwise, he felt that by threats of decrease or promises of increase in salary the Legislature could effectively prevent the Governor from vetoing certain measures. (*Debates 1821,* p. 47.) Mr. Spencer's proposal was accepted by the convention and incorporated into the Constitution.

In the convention of 1846 the Committee on Governor and Other State Officers proposed to amend the Constitution by providing for the Governor a fixed salary of $4,000 per year with the rent for the executive mansion to be paid by the State. Mr. Morris urged the adoption of this provision, since thus the people themselves would determine the salary of the Governor when the Constitution was submitted to them. Mr. Loomis felt that the Legislature should determine the compensation to be paid to the Governor, since they could raise it or decrease it to meet the needs of the time. Mr. Taggart urged the retention of the 1821 provision by which the Legislature fixed the salary of the Governor although it was not allowed to increase or diminish such salary during the term for which the Governor was elected. Mr. Taggart's motion prevailed. (*Debates 1846,* pp. 284–5.)

The Committee on Governor and Other State Officers in the convention of 1867 reported that the salary of the Governor was so inadequate that only a wealthy man could afford to maintain the dignity of the

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office. The committee was opposed, however, to a fixed salary specified in the Constitution since the value of money was too fluctuating. (*Debates 1867,* Vol. II, pp. 885–6.) Mr. Robertson said that he saw no reason why the salary of the Governor could not be increased during the term for which he was elected, since the cost of living might increase during the term. But he did not wish to give the Legislature the chance to diminish the Governor's salary, for it would then possess an effective weapon to restrain the Governor's veto power. Mr. Robertson's amendment was declared lost. (*Ibid.,* Vol. II, p. 894.)

The commission of 1872 recommended that the Governor's salary be constitutionally fixed at $10,000 and that a suitable and furnished executive residence should be provided for him. This amendment was adopted by the people in 1874. (Lincoln, *op. cit.,* Vol. II, pp. 513–4.)

In the convention of 1915, Mr. Rhees speaking for the Committee on Governor and Other State Officers urged that the Governor's salary be increased to $20,000 per annum. He maintained that the Governor was forced to conduct his official life on a scale that was impossible within the limits of his salary and that, therefore, the people were compelled to choose for Governor only those persons who could supplement from private means the salary paid to them as chief officer of the State. (*Revised Record 1915,* Vol. IV, p. 3844.)

Governor Charles S. Whitman sent a letter to the convention, saying that it was right and in the public interest to increase the salary of Governor from $10,000 to $20,000, but he urged that the increase should go into effect on January 1, 1917, instead of on January 1, 1916. His reason for this recommendation was that he did not wish to see a violation of the constitutional provision that no State officer should have his salary increased during the term for which he was elected. Mr. Wickersham moved to amend the section to conform with the Governor's recommendation. (*Ibid.,* Vol. IV, pp. 4036–9.)

Mr. R. B. Smith offered an amendment placing the clause on the Governor's compensation in section 1 of article IV instead of in section 4 of the same article. (*Ibid.,* Vol. IV, p. 3863.) The motion was carried.

When a final vote was taken to increase the salary of Governor from $10,000 to $20,000, effective January 1, 1917, the record showed 135 in the affirmative and 5 in the negative. (*Ibid.,* Vol. IV, pp. 4131–2.) However, the proposed Constitution of 1915 was rejected by the people, and so the Governor's salary remained unchanged.

In 1916, 1917 and 1920 amendments were introduced in the Legislature to increase the Governor's salary to $20,000 but all of them died in committee. In 1925 an amendment was proposed increasing the salary to $25,000, but this measure also died in committee. In

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1926 four amendments were introduced in the Legislature providing for an increase in salary for Governor, and one of these which fixed the Governor's compensation at $25,000 passed both houses of the Legislature in that year and again in 1927. It was submitted to the people in the general election of 1927 and adopted by them at that time.

SECTION 5

"The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence, until the case shall be reported to the Legislature at its next meeting, when the Legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the Legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve."

The Constitution of 1777 gave the governor power "to grant reprieves and pardons to persons convicted of crimes other than treason or murder, in which he may suspend the execution of the sentence until it shall be reported to the Legislature, at their subsequent meeting, and they shall either pardon or direct the execution of the criminal, or grant a further reprieve." (Art. XVIII.)

Convention of 1821

In the convention of 1821, Mr. Tompkins moved to restrict the pardoning powers of the Governor in cases of impeachment. Mr. Spencer said that impeachment was not a criminal procedure and that, therefore, such restriction was unnecessary. Mr. King contended that the Constitution should be made clear and explicit, and consequently that the restriction of pardon in cases of impeachment should be included. Mr. Tompkins' motion was adopted. (*Debates 1821,* p. 124.)

The first Constitution had not given to the Governor the power to commute sentences, and the exercise of that power by the Governor

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previous to 1821 was challenged by the courts. Mr. Russell moved to give the power of commutation to the Governor, and his motion was adopted by the convention without debate. (*Ibid.*, p. 124.) However, in the final draft of the Constitution, the power of commutation was not granted. (Art. III, sec. 5.)

Mr. Van Buren moved to have the governor assign reasons for pardons granted. But Mr. Sharpe objected on the grounds that it is not always good policy to assign reasons for pardons: he quoted as an example cases where pardons were granted for turning State's witness. Mr. Buel felt that the Governor's good nature was often imposed upon in pardoning cases, and that the Governors would be more careful if they were forced to report to the Legislature their reasons for granting the pardon. The convention, however, rejected Mr. Van Buren's proposal. (*Ibid.*, pp. 124–7.)

We may recall that the first Constitution did not extend to the Governor the power to pardon in murder cases. Mr. Platt moved to grant this power to the governor. Mr. Spencer stated that the power to pardon in murder cases should exist somewhere and that the present system whereby the power was vested in the Legislature was cumbersome and ineffective, since a large group like the Legislature was more apt to act from motives of mere sympathy. Mr. P. Livingston added that the Legislature is a law-making body and that pardons related directly to the question of *executing* the laws, and hence should be left with the executive. But Mr. Sheldon did not wish to impose upon the Governor "the responsibility and invidiousness" of making decisions in murder cases. Mr. Sharpe agreed with Mr. Sheldon and added that he did not wish to see an aggravation of the condition whereby the prisons were being overcrowded because of the number of convicts whose death sentences had been commuted to life imprisonment. The convention finally decided to vest the Governor with power to pardon in murder cases. (*Ibid.*, pp. 128–31.)

Convention of 1846

Mr. Stephens urged in convention that pardons should be granted only after a public notice of the application for pardon, in order to give the injured parties a chance to present their side of the question. This would insure certainty of punishment, which, to his mind, was the best preventative of crime. But Mr. Bascom objected on the grounds that if the Governor were to be trusted with pardoning powers, restrictions should not be imposed upon him. (*Debates 1846*, pp. 290–1.)

Mr. Simmons suggested the establishment of an advisory board of pardons to give satisfaction to the public that every application for

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pardon would be considered. But Mr. Nicholas contended that to divide the responsibility of pardoning would be to fritter away the pardoning power. Mr. Morris opposed any plan which would create "red tape" or cause delay. If any errors were made under the present system, they were on the side of mercy and not to be deplored. (*Ibid.*, pp. 293–5.)

Mr. Shepherd moved to grant to the Governor the constitutional power to commute sentences. The commuting power was only had by virtue of statute, which was in danger of being declared unconstitutional. (*Ibid.*, p. 298.) This proposed amendment was the only important change in the pardoning power adopted in 1846. (Art. IV, sec. 5.)

The constitutional provision has remained unchanged to date, although numerous proposals for change have been considered.

Convention of 1867

Many proposals were entertained by the Committee on Governor and Other State Officers on the establishment of a board of pardons. The main reason advanced by the advocates of the pardons board was that the number of applications for pardon imposed too heavy a burden upon the Governor. However, after consulting several ex-Governors of the State, the committee decided that the pardoning power, however burdensome it might sometimes be to the Governor should not be entrusted to other hands. (*Debates 1867*, Vol. II, pp. 933–5.) Mr. Prindle argued against the establishment of a board of pardons. He felt that a board of pardons would become as formal as the courts and that appeals to mercy might thus be prevented. (*Ibid.*, Vol. II, p. 1188.)

Mr. Ketcham proposed that the Governor should assign reasons for pardons granted. Mr. Townsend objected that such an amendment would impose too great a burden on the Governor: in some cases he would have to write a book. Mr. Landon added that the pardoning power was based on mercy, not on justice: justice can always assign reasons, but mercy cannot. (*Ibid.*, Vol. II, pp. 1207–8.)

The convention finally voted to adopt the section as of 1846 in entirety. (*Ibid.*, Vol. II, p. 1210.)

The Convention of 1894

Several amendments relative to the pardoning power of the Governor were suggested, but none was adopted. Most of them had to do with the establishment of a board of pardons, but since the main arguments for and against such a board have been treated in the previous records of debates, it has not been thought necessary to review them here. A

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composite amendment was also introduced to abolish the death penalty and to deprive the Governor of the pardoning power in cases of persons sentenced to imprisonment for life, but this too was rejected. (Lincoln, *Const. Hist.,* Vol. III, pp. 310–1.)

The Convention of 1915

The Committee on State Prisons reported in favor of an amendment to vest the pardoning power in a board. (*Revised Record 1915,* Vol. I, p. 968.) Because of the pressure of more important business, late in the convention this report had not yet been reached for consideration. On September first it was made a special order with time limited for debate. (*Ibid.,* Vol. IV, p. 3777.) However, the convention did not attain consideration of the report before adjournment and the section remained unchanged.

Proposed Amendments 1915–38

Numerous amendments have been proposed in the Legislature since the last convention, but none was reported out of committee. In 1916, 1917, 1921, 1922 and 1937 proposals were made to vest the pardoning powers in a board. In 1924, 1925, 1926 and 1933, the amendment was proposed to limit the pardoning power in murder cases to a commutation of twenty full years, unless new evidence were introduced. In 1925 the amendment was offered to deny all pardons and commutations to persons sentenced to life imprisonment unless new evidence were presented. In 1928 it was proposed to vest the pardoning power in the Court of Appeals, and in the same year another proposed amendment denied the Governor the right to grant any pardons in cases where the Court of Appeals had unanimously sustained the sentence.

SECTION 6

"In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability shall cease. But when the Governor shall, with the consent of the Legislature, be out of the State, in time of war, at the head of a military force thereof, he shall continue Commander-in-Chief of all the military force of the State."

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The Constitution of 1777 contained a provision that the Lieutenant-Governor should succeed to the office of Governor should a vacancy occur in that office. (Art. XX.) It has been continued with only verbal changes in all subsequent constitutions. (*Const. 1821*, art. III, sec. 6; *Const. 1846*, art. IV, sec. 6; *Const. 1894*, art. III, sec. 6.)

Since the first election for Governor under the Constitution in July 1777, vacancy in the office of Governor has occurred on only six occasions. Four of these vacancies were caused by resignation. In 1817 Daniel T. Tompkins resigned as Governor to become Vice-President of the United States; in 1829 Martin Van Buren resigned to fill the office of Secretary of State under Andrew Jackson; in 1885 Grover Cleveland resigned the office of Governor to become President; and in 1910 Charles Evans Hughes resigned to assume the office of Justice of the United States Supreme Court. Only one Governor of New York died in office—De Witt Clinton in 1828. And in 1913 William Sulzer was removed from office by impeachment. On each of these six occasions, the Lieutenant-Governor assumed the office of Governor for the remainder of the term. (Lincoln, *Const. Hist.*, Vol. IV, pp. 477–9; *Legislative Manual* 1937; pp. 356–7.)

In the proposed Constitution of 1915 this section on the succession to the Governor was revised and clarified. The amendment explicity provided that *the Lieutenant-Governor should become Governor for the remainder of the term if the office of the Governor were vacant;* if the Governor were under impeachment, unable to serve as Governor, or absent from the State, *the Lieutenant-Governor should act as Governor during such inability, absence or the pendency of such impeachment.* (Art. IV, sec. 6.)

No changes have been proposed since 1915.

SECTION 7

"The Lieutenant-Governor shall possess the same qualifications of eligibility for office as the Governor. He shall be President of the Senate, but shall have only a casting vote therein. If during a vacancy of the office of Governor, the Lieutenant-Governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the State, the President of the Senate shall act as Governor until the vacancy be filled or the disability shall cease; and if the President of the Senate for any

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of the above causes shall become incapable of performing the duties pertaining to the office of Governor, the Speaker of the Assembly shall act as Governor until the vacancy be filled or the disability shall cease."

Qualifications for Lieutenant-Governor

The Constitution of 1777 provided no specific qualifications for the office of Lieutenant-Governor. Article XVII required that the Governor should be "a wise and discreet freeholder of the State," and article XX contained a general provision that the Lieutenant-Governor "be elected in the same manner with the Governor." Election "in the same manner with the Governor" might be presumed to imply the same qualifications in both Governor and Lieutenant-Governor.

The Constitution of 1821 was silent on the subject of the qualifications for the Lieutenant-Governor.

The Constitution of 1846 required that the Lieutenant-Governor should possess the same qualifications for office as the Governor. (Art. IV, sec. 7.) There appears to have been no objection to the insertion of this constitutional provision, since the person to succeed to the office of Governor in case of vacancy should undoubtedly possess the same qualifications for office.

No changes have been suggested in the eligibility requirements since 1846.

President of the Senate

In the first Constitution of the State and in every subsequent Constitution, the provision has been included that the Lieutenant-Governor should be President of the Senate with only a casting vote therein. The only changes that have been made or suggested were purely grammatical in nature. (*Const. 1777,* art. XX; *1821*, art. III, sec. 7; *1846,* art. IV, sec. 7; *1894,* art. IV, sec. 7.)

We may note here that the exercise of the casting vote which is here granted to the Lieutenant-Governor, must be read in connection with article III, section 5 of the Constitution. The latter section states: "Nor shall any bill be passed or become a law except by the assent of the majority elected to each branch of the Legislature." Since the Lieutenant-Governor is clearly not an elected member of the Legislature, he can have no vote in the passage of bills or laws. But the importance of the casting vote remains in matters of legislative procedure, Senate rules, appointment and removal of officers, etc. (Lincoln *Const. Hist.*, Vol. IV, p. 482.)

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Succession to Office of Governor

There is a colonial history behind the method of succession to the office of Governor. The commissions which were issued to most of the English Governors provided that the Lieutenant-Governor should succeed to a vacancy in the office of Governor, and that the council (a deliberative body which was in some sense the equivalent of the Senate) should exert the functions of Governor in the absence or inability to serve of both Governor and Lieutenant-Governor. Some of the later commissions of colonial history expressly named as next in succession the eldest councilor, a position similar to the office of Temporary President of the Senate. (Lincoln, *op. cit.*, Vol. IV, pp. 483–9.)

The Constitution of 1777 provided for the election of a Temporary President of the Senate who was to succeed to the office of Governor next after the Lieutenant-Governor. (Art. XXI.) The Constitutions of 1821 and 1846 omitted the provision for the election of the Temporary President, but continued the succession provision. (1821, art. III, sec. 7; 1846, art. IV, sec. 7.) Attempts were made in 1821 and 1849 to extend the privilege of succession to the Speaker of the Assembly, but both attempts were defeated. (Lincoln, *op. cit.*, Vol. IV, p. 491.)

In the convention of 1894 Mr. Vedder introduced an amendment by which the Speaker of the Assembly would succeed to the office of Governor in the inability to serve of the Governor, Lieutenant-Governor and Temporary President of the Senate. (*Revised Record* 1894, Vol. I, pp. 939–40.) When the amendment came before the convention for consideration, Mr. Cochran moved to amend so that the Secretary of State might succeed to the office of Governor before the Speaker of the Assembly. He pointed out that the Secretary of State was elected by the people of the State as a whole[1] and that he was more likely to be of the same political faith as the Governor. (*Ibid.*, I, 944; Vol. IV, p. 397.) Mr. Vedder replied that the Secretary of State was only a "high-class, high-priced clerk," and that the Temporary Presidents of the Senate and the Speakers of the Assembly were ordinarily men of great ability. The convention voted in favor of extending right of succession to the Speaker and it was incorporated into the Constitution. (*Ibid.*, Vol. IV, pp. 398–401.)

In the convention of 1915 a composite amendment was introduced which merely clarified the fact that eligible successors to the Governor should act as Governor when the Governor was under impeachment. (*Proposed Amendments* 1915, Pr. No. 392.) The amendment was

[1] The office of Secretary of State is now filled by appointment of the Governor with the consent of the Senate, as provided by art. V, sec. 4, of the Constitution adopted November 3, 1925.

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passed without debate and with 125 votes in the affirmative and none in the negative. (*Revised Record* 1915, Vol. IV, pp. 3737–8.) It thus became a part of the proposed Constitution of 1915 which was rejected by the people in the same year.

An amendment was introduced in the Senate in 1916 to accomplish the same effect as was contemplated in 1915, but this amendment died in committee. No changes have been proposed since 1916.

SECTION 8

> "The Lieutenant-Governor shall receive for his services an annual salary of ten thousand dollars, and shall not receive or be entitled to any other compensation, fee or perquisite, for any duty or service he may be required to perform by the Constitution or by law."

In colonial times the Lieutenant-Governor received no salary except at such times as he happened to be acting as Governor. Under the first Constitution no provision was made for the salary of the Lieutenant-Governor, but statutes were enacted giving that officer fees for specified services. The Constitution of 1821 was still silent on the question of the Lieutenant-Governor's salary, but in 1846 a new section was included in the Constitution which read as follows:

> "The Lieutenant-Governor shall, while acting as such, receive a compensation which shall be fixed by law, and which shall not be increased or diminished during his continuance in office." (Art. IV, sec. 8.)

In the convention of 1867 it was reported by the Committee on Governor and Other State Officers that the Lieutenant-Governor was receiving more than $10,000 a year in fees and perquisites of office, although his salary was fixed by law at $6 per diem. He was receiving payment at that rate for five or six positions which he performed as part of his duty. Thus, his *per diem* salary might amount to $30 or $36 plus mileage for traveling. The committee recommended that the Lieutenant-Governor receive a fair salary to be fixed by law, and no extra fees for the various duties performed as part of his office. No amendments or debate were offered by the delegates, but the report of the committee was accepted. (*Debates 1867,* Vol. II, pp. 886–94.)

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The proposed Constitution of 1867 was rejected by the people, but the question of the Lieutenant-Governor's salary was again taken up by the commission of 1872. The commission recommended that the Lieutenant-Governor's salary be constitutionally fixed at $4,000 and that all fees and perquisites of office should be eliminated. The Legislature raised the salary to $5,000 and in this form it was adopted by the people in 1874. (Lincoln, *op. cit.*, Vol. II, p. 517.)

No changes in this provision were suggested in the conventions of 1894 or 1915. However, an amendment was introduced in the Legislature in 1917 to raise the salary of the Lieutenant-Governor to $10,000; the amendment died in committee. In 1920 a composite amendment was proposed to increase the salary of both the Governor and Lieutenant-Governor, but this also died in committee. In 1926 another composite amendment to increase the salaries of the Governor and the Lieutenant-Governor passed in both houses of the Legislature. This amendment passed in both houses again in 1927; it was submitted to the people in the general election of that year and accepted by them. The salary of the Lieutenant-Governor was thus fixed at $10,000. No changes have been proposed since 1927.

SECTION 9

"Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the Governor. In all such cases the votes in both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively. If any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the Governor. No bill shall become a law after the final

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adjournment of the Legislature, unless approved by the Governor within thirty days after such adjournment. If any bill presented to the Governor contain several items of appropriation of money, he may object to one or more of such items while approving of the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects; and the appropriation so objected to shall not take effect. If the Legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered. If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law, nothwithstanding the objections of the Governor. All the provisions of this section, in relation to bills not approved by the Governor, shall apply in cases in which he shall withhold his approval from any item or items contained in a bill appropriating money."

Constitution of 1777

Under the first Constitution the veto power was not vested in the Governor, but in a Council of Revision composed of the Governor, the chancellor, and the judges of the Supreme Court, or any two of them. All bills had to be presented to the council for revisal and consideration. When the bill appeared improper to the council, or a majority thereof, it was returned to the house in which it originated together with the objections to the bill in writing. If, after reconsideration, the bill was passed again by the votes of two-thirds of the members of the house in which the bill originated and by the votes of two-thirds of the members present in the other house, it became a law. A bill also became a law if the council failed to return a bill within ten days after it had been received unless so prevented by adjournment of the Legislature; in which case the bill had to be returned on the first day of the meeting of the Legislature after the expiration of the said ten days. (Art. III.)

Convention of 1821

Early in 1820 a committee of the Assembly reported to that body in favor of a constitutional convention to consider various defects in the Constitution. Among the most prominent defects the committee listed the vesting of the veto power in the Council of Revision. The com-

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mittee feared that harm might be done to the interests of the State by a disagreement between the council (not responsible to the people in its four or five judicial members) and the elective branches of the government. Such a difference could not be dissolved by a vote of the people, and the situation might arise where important measures could be blocked by appointed officials. (Lincoln, *Const. Hist.,* Vol. I, p. 620.)

When a motion was made in the convention of 1821 to abolish the Council of Revision, the motion was unanimously carried. One hundred and twenty-one members were present. (*Debates 1821,* pp. 44–7.)

The committee which was considering the subject reported in favor of vesting the veto power in the Governor. In this respect the example of the Federal Constitution would merely be followed. (*Ibid.,* p. 44.) Mr. Spencer agreed to the proposal if the Legislature were not allowed to increase or diminish the salary of the Governor. Otherwise the Governor would be subservient to the Legislature and afraid to use his veto. (*Ibid.,* pp. 46–7.)

Mr. Peter Livingston insisted on some provision by which the Legislature might override a veto. He proposed that a majority of members elected should be permitted to pass a law over the veto of the Governor. He said that such a provision was sufficient to guard against bad or hasty legislation; if the Legislature were shown its error, it would not dare to vote for the measure again. But if more than a majority was required to override a veto, the governor and a "contemptible minority" in the Legislature could stop any bill from passage. (*Ibid.,* pp. 47–52.) Mr. Edwards said that the Governor was the sentinel of the people, that he was directly responsible to the people by election and that he should have more power than to ask the majority which had passed the bill to reconsider it. (*Ibid.,* p. 60.) Mr. Sharpe declared that after long experience in the Legislature he was more afraid that the Governor would veto too few bills than that he would veto too many. Consequently, he favored a provision requiring two-thirds of the members present of the Legislature to override the Governor's veto. (*Ibid.,* p. 112.)

The amendment, as it was proposed in final form by the committee vested the veto power in the Governor, required that vetoed bills be returned with the Governor's objections to the house in which they originated, and provided that such vetoed bills should become law if approved by two-thirds of the members present of each house upon reconsideration. Bills also became laws if approved by the Governor or if not returned to the Legislature by the Governor within ten days (Sundays excepted), unless the Legislature by adjournment prevented

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their return. (*Const. 1821,* art. I, sec. 12.) The convention adopted the amendment, as proposed, by a vote of 100 to 27. (*Debates 1821,* pp. 120–1.)

Convention of 1846

The subject which had been debated most heatedly in the 1821 convention arose again in the 1846 convention when Mr. Rhoades proposed that a majority of members elected of the Legislature should be sufficient to override the Governor's veto. Mr. W. Taylor objected that such a provision would effectively destroy the veto power and remove all checks against bad or hasty legislation. Mr. W. B. Wright replied that the Legislature needed no check, since it did not make bad laws. He was in favor of the majority requirement to override vetoes. The motion was defeated in convention. (*Debates 1846,* pp. 328–36.) The section as it was finally adopted by the delegates remained unchanged as of 1821. (*Const. 1846,* art. IV, sec. 9.)

Convention of 1867

The Committee on Governor and other State Officers recommended several important changes in the veto power: it proposed that two-thirds of the members *elected* to the Legislature should be required to override a veto instead of two-thirds of the members present; secondly, it voted to give the Governor power to veto *parts* of bills; lastly, the committee wished to deny the Governor power to approve any bills after adjournment. (*Debates 1867,* Vol. I, pp. 667–9.) Reasons for the proposed changes were as follows: the requirement of two-thirds *present* which then existed was insufficient to prevent hasty legislation and it sometimes happened that fewer votes were needed to override a veto than were originally needed to pass the bill. The veto of parts of bills was intended to present the attaching of "riders" to bills. Finally, he condition which then existed of allowing the Governor to approve a bill at any time after adjournment, created uncertainty as to whether or not certain bills would be passed long after the Legislature had adjourned. (*Ibid.,* Vol. II, pp. 886–8.)

Most of the debate in convention centered on the granting to the Governor power to veto parts of bills. Mr. Folger thought that by means of such a power the Governor could destroy the entire sense of a bill by leaving out parts at his discretion. But Mr. C. L. Allen pointed out that by the proposed amendment the Governor could veto only *"parts of it* (the bill), *containing separate and distinct provisions."*

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Mr. Alvord proposed a limitation of the part veto to items in appropriation bills. The general appropriation bill had to be passed annually, and the item veto would cut out a number of useless provisions. Mr. Prindle suggested an amendment whereby the Legislature would be allowed to reject the whole bill after the Governor had vetoed parts of it. Mr. Greeley contended that such a change would nullify the effect of the partial veto power. However, when the final vote was taken, the convention decided against granting to the governor either the partial veto or the item veto. (*Ibid.*, Vol. II, pp. 1110–31.)

Mr. C. L. Allen did not think that the Governor should have the power to approve bills after adjournment, but he also thought that no bills should be sent to the Governor within the last ten or twenty days of the legislative session. Mr. Rumsey agreed that the Governor should not be allowed to approve bills after the Legislature had adjourned, since all the lobbyists rushed from the legislative halls to the executive mansion after adjournment, and pestered the Governor until they obtained their requests. Mr. Alvord disagreed with the proposal to forbid the Legislature to send any bills to the Governor within the last ten days of the session, for during that period the legislators' only activity would be that of waiting for the action of the Governor. However, he did think that the Governor should have ten days after adjournment to consider the mass of legislation which was usual towards the end of a session. (*Ibid.*, Vol. II, pp. 1110–21.)

The only changes which were incorporated into the proposed Constitution of 1867 were those which required that two-thirds of the members elected to the Legislature be necessary to override a veto and that the Governor be limited to ten days after adjournment for approval of bills. (*Proposed Const. 1867*, art. IV, sec. 9: Quoted in Lincoln, *op. cit.*, Vol. II, p. 440.) The Constitution of 1867 was rejected by the people and the provisions of 1846 remained in force.

The Commission of 1872

The recommendations made by the commission with regard to the Governor's veto power were based on the changes suggested by the convention of 1867. The following is a list of the changes:

> "The existing section was modified in four particulars, by providing specifically that a bill could not be passed over the Governor's veto, except on the affirmative vote of two-thirds of all the members elected to each house; second, by adding to the ten day clause a provision that a bill should not become a law after adjournment

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of the Legislature 'without the approval of the Governor;' third, the addition of a clause establishing a thirty-day period after adjournment for executive consideration of bills; and fourth, adding a clause extending the veto power to separate items in appropriation bills." (Lincoln, *op. cit.,* Vol. II, p. 518.)

The Legislature approved the section without change, and the amendment was accepted by the people in the election of 1874.

Changes Since 1874

The convention of 1894 gave no consideration to the subject of the Governor's veto power, nor were any proposals for amendment made in the Legislature during the period before the convention of 1915. In that convention a recommendation was made to extend the time for executive consideration of bills after adjournment to forty-five days. (*Revised Record* 1915, Vol. I, pp. 789–90.) This amendment was never reached for consideration during the convention, and so the change was not effected. However, the committee on revision and engrossment recommended a grammatical correction of one clause in the section. The clause "Unless the Legislature shall by *their* adjournment" was changed to read: "Unless the Legislature shall by *its* adjournment." (*Ibid.,* Vol. IV, p. 4234.) However, the proposed Constitution was rejected by the people and the grammatical error still remains in the Constitution.

In 1916 an amendment was introduced in both houses of the Legislature to grant to the Governor the power to *reduce* items in appropriation bills as well as to *veto* them. The amendment died in committee in both houses of the Legislature.

No changes have been proposed in this section since 1916.

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CHAPTER III

THE PARDONING POWER

NEW YORK

Article IV, section 5, provides that "the Governor shall have power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitation, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."

Historically, the pardoning power emanated from the king who was the source of law, justice and mercy. This power could be both delegated and granted away, thereby depriving the Crown of all jurisdiction. It was customarily delegated to the executive head of a colony, who was the representative of the Crown. Prior to 1535, it had frequently been granted. The counties palatinate, possessing civil and criminal jurisdiction, often had the power to pardon without interference by the Crown. In 1535, a law was enacted which made the king the sole pardoning power, abolishing all grants of the power by gift or otherwise.

The source of the power in England was the Crown. The pardoning power can also be exercised by Parliament. As a result of the Revolution, the people of our states became the source of the pardoning power and in fact of all power. The people then entrusted the power to the Governor with the approval of the Executive Council in such states as provided for a council.

The power is not necessarily inherent in the executive. The sovereign in England originally combined all powers and functions, legislative, judicial and executive.

In exercising the power, the king was giving relief from the king's laws or the king's justice. In 46 C. J., 1184, it is said:

> "The pardoning power is generally regarded as not being inherent in any officer of the state, or any department of the state, but the power is one of the government, in the people, who may confer it on any officer or department as they see fit. The pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times. While it has been said that there are many reasons why a power of this kind should be confined to the highest executive officer, it has also been asserted that it is neither naturally nor necessarily an executive function."

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Lieber in *Civil Liberty and Self-Government,* Volume 2, page 147 says:

> "The fact that the pardoning power necessarily originated with the sovereign power, and that the rulers were considered the sovereigns, is the reason why, when jurists came to treat of the subject, they invariably presented it as an attribute indelibly inhering in the crown. The monarch alone was considered the indisputable dispenser of pardon; and this again is the historical reason why we have always granted the pardoning privilege to the chief executive; because he stands, if any one visible does, in the place of the monarch of other nations; forgetting that the monarch has the pardoning power, not because he is the chief executive, but because he was considered the sovereign—the self-sufficient power from which all others flow, while with us the governor or president has but a delegated power, and limited sphere of action, which by no means implies that we must necessarily or naturally delegate, along with the executive power, also the pardoning authority."

The pardoning power in New York State is not limited in any way except that the Governor may not grant a pardon before conviction. The Legislature may make regulations relative to the manner of applying for pardons. The provisions with respect to commutation are, therefore, not mandatory upon the Governor but advisory. (*People ex rel. Mongno* v. *Lawes,* 225 App. Div. 193, 197.) In *People ex rel. Ross* v. *Wilson,* 250 App. Div. 143, 144, the court said:

> "The authority of the Governor to commute the sentence of a convict or to grant a pardon is not given him by the Legislature. It comes directly from the People through section 5 of article IV of the New York State Constitution which is as follows: 'The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.'
>
> "The Legislature is without power to limit or curtail the exercise of this executive prerogative, but may pass laws 'relative to the manner of applying for pardons.' Certain sections of the Prison Law and corresponding sections of the Correction Law purport to prescribe conditions, restrictions and limitations in connection with this prerogative which the Constitution says is to be exercised by the Governor under such conditions 'as he may think proper.' The

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attempted limitations are ineffective in this regard. (*People ex rel. Atkins* v. *Jennings,* 248 N. Y. 46; *People ex rel. Mongno* v. *Lawes,* 225 App. Div. 193; *People ex rel. Sabatino* v. *Jennings,* 221 *id.* 418; 246 N.Y. 258; *People ex rel. Presser* v. *Lawes,* 221 App. Div. 692; *People ex rel. Brackett* v. *Kaiser,* 209 *id.* 722.)"

A pardon may be full and unconditional, partial or conditional. It is full when it freely and unconditionally absolves the party from all the legal consequences of his crime and conviction. It is partial when it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. Commutation is a partial pardon in that it remits only a portion of the punishment. A pardon, either full or partial, may be conditional in that it becomes operative when the grantee has performed some precedent specified act or it becomes void when some subsequent specified event occurs.

Article 9 of the Correction Law provides for commutations. The provisions are, as has been said, advisory and not mandatory on the Governor. The procedure is for the head of a State institution to forward to the Governor through the Department of Correction a report of the prisoners who may be released by reason of a reduction in sentence as determined by law. In each prison there is a board composed of the warden, principal keeper, physician and officer in charge of industries. This board determines the amount of reduction in sentence that it will recommend for good behavior and duties willingly performed. It may also recommend the disallowance of a reduction.

The Board of Parole is entrusted with the duty, when requested by the Governor, of collecting records, making investigations and reporting to the governor upon all prisoners who are being considered for pardon, commutation, or restoration of citizenship.

Applications for executive clemency are addressed either to the Governor or to the Parole Board. Many applications are without merit or are premature. In the case of applications for commutations of sentence, if they are not premature and appear to have some merit, the sentencing judge, the district attorney and the prison warden are requested to send reports and recommendations. If these reports are favorable, the prisoner is interviewed at the prison, and the data obtained forms the basis of an extensive field investigation made by an official representative of the Division of Parole. Upon completion of the investigation, a synopsis of the case is prepared by the board and a recommendation is made, based upon all the reports and the investigation. As soon thereafter as opportunity offers, the case is presented to the Governor, at a consultation in which his counsel takes part.

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Recommendations are based on the individual's previous record in the community, his prison record, the personality of the prisoner, whether the time served has been adequate, and whether or not he is a good prospect for rehabilitation. In addition, elements of injustice in the sentence and doubt of guilt as created by knowledge gained after sentence are factors.

Absolute pardons to men in prison are rarely granted. Instead, the Governor grants a commutation which permits the prisoner's appearance before the Parole Board and does not in any way remove his parole obligation or shorten the maximum of his sentence. After a prisoner has served his term and has been released the Governor may, where the facts warrant it, restore citizenship or grant a pardon to remove the disability against holding public office or practicing a profession, or to prevent deportation or to permit naturalization. The restoration of citizenship restores only the voting franchise and is not a pardon.

The following table shows the number of applications reviewed by the Governor, the number granted and their classification:

	1932	1933	1934	1935	1936	1937
Applications reviewed by Governor.....	208	298	341	261	273	266
Applications granted	140	94	154	102	103	129
1. Commutations	62	38	29	20	12	36
a. From death to life imprisonment	13	9	5	9	0	11
b. To time already served.....	49	29	24	11	12	25
2. Restoration of citizenship.....	38	39	69	39	38	46
3. Pardons	40	17	56	43	53	47
a. Absolute pardons	0	1	1	0	2	0
b. Pardons to remove disability...	7	2	19	17	24	28
c. Pardons to prevent deportation..	13	3	7	12	10	15
d. Pardons to permit naturalization	20	11	29	14	17	4

THE PARDONING POWER IN THE VARIOUS STATES

There are twenty states where the Governor is not the sole pardoning authority:

1. Arizona (Statute, 1913)
2. Connecticut (Statute, 1902, 1935)
3. Delaware (Constitutional Amendment, 1897)
4. Florida (Constitutional Amendment, 1896)
5. Idaho (Constitution, 1889)
6. Louisiana (Constitutional Amendment, 1879)
7. Maine (Constitution, 1819, Governor and Council)
8. Massachusetts (Constitution, 1780, Governor and Council)
9. Minnesota (Constitutional Amendment, 1896)
10. Montana (Constitutional Amendment, 1889)

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11. Nebraska (Constitutional Amendment, 1920)
12. Nevada (Constitution, 1864)
13. New Hampshire (Constitution, 1792, Governor and Council)
14. New Jersey (Constitutional Amendment, 1884)
15. North Dakota (Constitutional Amendment, 1900)
16. Pennsylvania (Constitutional Amendment, 1873)
17. Rhode Island (Constitutional Amendment, 1854, Governor and Senate)
18. South Dakota (Constitution, 1889)
19. Texas (Constitutional Amendment, 1936)
20. Utah (Constitution, 1895)

Of the above states, Maine, Massachusetts and New Hampshire have a governor and council. The pardon must be approved by the council. In Rhode Island, the pardon must be approved by the Senate.

In the remaining sixteen states there are pardon boards. In the following nine of these states the governor is a member of the pardon board:

1. Connecticut
2. Florida
3. Idaho
4. Minnesota
5. Nebraska
6. New Jersey
7. Nevada
8. North Dakota
9. Utah

In the following seven states there is a separate board of which the Governor is not a member:

1. Arizona
2. Delaware
3. Louisiana
4. Montana
5. Pennsylvania
6. South Dakota
7. Texas

The approval of the Governor is necessary for a pardon. The Governor, however, may not pardon if the board has disapproved of the pardon.

Advisory Boards of Pardons

There are nineteen states which have an advisory board of pardons, whose duty is to investigate and recommend. These states are as follows:

Alabama
Arkansas
California
Georgia
Indiana
Illinois
Iowa
Kansas
Michigan
Missouri
New Mexico
New York
North Carolina
Ohio
Oklahoma
South Carolina
Tennessee
Washington
Wyoming

In the states of California, South Carolina, Tennessee, and Washington the advisory board has the duty of investigating and making recommendations on such applications as are referred to it by the Governor,

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In the other states it investigates all applications for pardons and makes recommendations thereon.

Reasons for Pardons

In all the states except Connecticut, Florida, Illinois, Indiana, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Utah and Vermont the law requires that the pardoning authority give reasons for the pardon. These reasons must be set forth in a report to the legislature or filed in a public office.

Specific Data on Pardons

In all the states except Connecticut, Louisiana, Mississippi, Nebraska, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Tennessee, Texas, Utah and Vermont the law requires that the pardoning authority set forth specific data concerning each pardon, such as the nature of the crime, the date when committed, the term of the prisoner, the length of time served, and the date of the pardon.

Prior Notification or Publication

All states except Connecticut, Delaware, Georgia, New York, Rhode Island, South Carolina, South Dakota, Virginia, Washington and West Virginia require by law one or all of the following measures to be taken prior to a hearing:

1. Notification to the prosecuting attorney.
2. Notification to the trial judge.
3. Publication of the application for pardon.

Treason and Impeachment

In the following states, the pardoning authority has jurisdiction over cases of treason:

Alabama	Minnesota	Rhode Island
Connecticut	Montana	Tennessee
Delaware	New Hampshire	Virginia
Illinois	New Jersey	Washington
Kansas	North Carolina	West Virginia
Maine	Oklahoma	
Maryland	Pennsylvania	

In the remaining states the pardoning authority has no jurisdiction over cases of treason. In those states the pardoning authority may suspend the execution of the sentence for treason until the next session of the Legislature.

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In Connecticut, Illinois, Kansas, Oregon, Virginia and West Virginia, the pardoning authority has jurisdiction over cases of impeachment. In the remaining states, power to pardon in cases of impeachment is in the Legislature.

The composition of the pardoning authorities is shown in the Appendix.

A letter was sent to the pardoning authorities of the various states containing the following questions, numbered respectively six, seven and eight in the original questionnaire:

> "In your opinion would a board with final power to pass upon pardons and commutations be preferable to an advisory board?
>
> "Would it be preferable that the Governor be relieved of all duty with respect to pardons and commutations?
>
> "Should officers of the State government be members of the State board, or should it be composed of persons who devote their time solely to investigation and determination for pardons or commutations?"

The following are the answers to these questions:

Alabama

"Answering your sixth question, it is the Governor's opinion that final power to pass upon pardons and commutations should be left to the approval of the Executive, but he thinks it would be very easy for the Governor to approve when he has such a report before him as shows that the Parole Board or Advisory Board has made a thorough and complete investigation of the background, the prison record, the former life record and the probability of re-employment of the person under investigation. This answers also your seventh question.

"Answering your eighth question, he thinks it is advisable to have a board composed of persons to be appointed with sufficient salary and sufficient office force to devote their time solely to the investigation of all applications for pardon or commutation, and also to go through all prison records and see if there are not many deserving cases without friends to call the case to the special attention of the board."

Florida

"Yes by all means the powers should be vested in a board of at least three to five men and not rest in the exclusive power of the Governor or any other one man.

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"The method of choice of members of the board in this state has been sound policy though we have reached the point where the many other ex-officio duties of these particular officers is becoming burdensome and it would perhaps be well to have the burden shifted to a commission or board not loaded so heavily."

"I think that the pardoning power should be in a board and not in the Governor. It subjects the Governor to criticism about things which he has not the time to give due consideration.

"I do not believe that any elective state official should be on the Board of Pardons. The Board of Pardons should consist of no more than three men and they should devote their entire time to the business of investigating the cases of those who apply for pardons and there should be a provision made that no pardon should be granted unless both sides of the case are represented."

Iowa

"Governor Kraschel has expressed the opinion that the power and responsibility of commuting sentences, at least in cases where the death penalty has been imposed, should be delegated to a board."

Maine

"I believe that the pardon board should be a separate and distinct board."

Minnesota

"Personally, I think the exercise of the pardoning power by a board has decided advantages over its exercise by the Governor, as it tends to relieve the Governor from a great deal of personal pressure based upon political influence and expediency.

"I think the method of choice of the members of the board by the position they occupy is as good as any."

"As you probably know, the Pardon Board in this state is composed of the Governor, Attorney-General and chief justice of the Supreme Court. From my brief experience as a member of the board I am satisfied that with the various other duties imposed upon each of the members we do not find sufficient time to give proper consideration to the many applications that come before us. It is my understanding that in the neighborhood of one thousand applications for pardon or commutation of sentence are filed each year. I presume that about a month's actual time is spent by the board in considering these cases. The situation would be materially improved if the board had available an investigator who could furnish us with all the necessary data. While the data we have

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is furnished by the secretary of the board he has so many other duties being a member of other boards that he cannot possibly find the time to personally investigate very many of the cases."

Missouri

"Our board consists of three members. Each of us have given practically all of our time to the work of the board since its organization. We think after the lapse of a few months we will be able to do the work of the board, giving to it about two-thirds of our time."

Montana

"This state's procedure seems to place too much on the Governor and other elective officers. My opinion is that the whole procedure should be in the hands of a non-partisan board composed of persons qualified and with the necessary time to investigate cases more thoroughly than is now possible.

"The writer's opinion is that a member of this board should not have any other position in the government, and particularly not an elective position. The board should be composed of members that could not be influenced by political expediency or the effect of their action on the 'next election.' "

Nevada

"The Governor believes that the exercise of the pardoning power of a board has a distinct merit over that of the Governor individually.

"The Constitution of Nevada adopted in 1864, placed the pardoning power in a State Board of Pardons created by the Constitution, consisting of the members of our State Supreme Court (three in number), the Attorney-General and the Governor; provided that clemency might be granted by a majority of such board, and specifically required that the Governor should be one of such majority, and the practical effect of this is to make any action by the board ineffective in the granting of clemency unless the Governor concurs, and he is relieved thereby, of the individual responsibility of passing upon applications for pardon, either conditional or full.

"I do not believe that the best results can be obtained by having a board of pardons consisting of elective state officers, especially in the more populous states where the amount of taxable property is sufficient to justify the payment of compensation, living and traveling expenses for members of the board while acting as members thereof. The small amount of taxable property in this state is the only possible justification for having elective officers compose the Board of Pardons and Paroles,

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as any other arrangement would be considerably more expensive and work greater burdens upon the taxpayers of this state."

New Mexico

"This department, however, is of the opinion that an advisory board is preferable to a board with final powers to pass upon pardon and commutations, since we believe that ultimate justice requires that the Governor alone should have final power to determine whether a pardon or commutation of sentence should be granted any prisoner.

"This department has not authority to speak for the Governor in answering this question; however, it is the opinion of this department that the officers of the State government, especially elective officers other than the Governor, should not be members of a State Board of Pardons and Paroles. It might be advisable, although New Mexico has no such officers, for the state to have a probation officer or officers, who should devote their full time to investigation of convicts applying for pardons or paroles."

Oklahoma

"It is my opinion that a proper board with final power to pass upon pardons and paroles, and other acts of clemency, would be preferable to an advisory board. The Governor is entirely too busy with other questions, and I believe that he should be relieved entirely of the duty.

"With reference to Question 8, I do not believe that officers of the State government should be members of the State board, and I do believe that a full time board would be more preferable and could handle the situation in a manner more satisfactory to all concerned."

Oregon

"I believe that a board with final power to pass upon pardons, paroles, and commutations would be preferable to an advisory board provided that such a pardon board were appointed by and directly responsible to the Governor.

"I believe that the board should be composed of persons who devote their time solely to investigation and determination of applications for pardons, commutations, and paroles. I furthermore believe that this same board should have full responsibility for the supervision of convicted persons on probation and bench parole from the courts."

Tennessee

"In my opinion a board with final power to pass upon pardons and commutations would be much preferable to an advisory board such as we

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are now operating in Tennessee. There is too much lost motion between the Advisory Board of Pardons and the final authority which is the Governor. In my opinion if the Advisory Board of Pardons knew that their decision was final and that on its decision the man would either be retained or released, it would have a very salutary effect upon the minds of the board. As it now is the board, of course, has knowledge of the fact that the file will be reviewed by the Governor, and the Advisory Board itself unconsciously must feel that any mistake it might make could, and probably would be rectified by the Chief Executive. If the Board of Pardons had plenary power to hear and determine it would greatly facilitate hearings and disposition, and would relieve a great uncertainty and disaffection among the convicts did they know that the decision of the board was final.

"The answer to six is almost an answer to number seven. I believe it would be salutary legislation for the Chief Executive to be relieved of the burden and responsibility of signing a pardon. It is a source of constant irritation and misunderstanding by the public and hampers the effective administration of the business affairs of State. If the Governor were to give a careful painstaking review of every pardon presented to him he would not have time to do anything else.

"I think that the board should be composed of persons who devote their time solely to investigations and determination for pardons or commutations with final authority to act."

Texas

"Governor Allred felt that pardoning power should be in the hands of a pardon board and the Governor relieved of such duty, and advocated the passage of the constitutional amendment which was adopted last year. Consequently in Texas he is now relieved of most of this work.

"We answer to questions six and seven emphatically, yes. The reasons for our answer to each of the last questions are the same. In our opinion, no Governor of this, or any other State, can devote as much time to the investigation and consideration of applications for clemency as a Board chosen for that purpose. Again, a Board selected as ours is, is free from political pressure and influence. This can be said of but few Governors. They are prone to listen to appeals from Members of the Legislature and other political nabobs, and being anxious to court them, frequently grant clemency when it should be denied. Our Constitutional provision on this subject is a good one, with two exceptions—the salary of Members of the Board should be fixed therein and the appointment of the Members should not be required to be confirmed by the Senate.

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This gives the Senate and Members of the House an opportunity to give Board Members hell when their clients are denied clemency by the Board. Again, there should be another provision in the Constitution inhibiting Members of the Legislature from urging clemency before the Board. The Board with full power to grant clemency should be like a Member of the United States Judiciary, and ought to be free, independent, untrammeled, and unafraid to do in each and every case what it thinks should be done, subject to impeachment, of course, for misfeasance or malfeasance.

"To the eighth question we answer no. If the work is properly and impartially done, no other busy state officer has the time to devote to the investigation and study of each case. The Board Members should do what this Board is required to do—devote all their time to the duties of the Board."

Utah

"I am assuming that by 'pardoning power' you include all the authority granted the board, and this is certainly more than should be allowed to, or placed on, any one man. Neither do I regret that, in so important a matter as overruling the courts by grant of commutation or pardon, the authority is vested in a group of men, rather than a single individual. Such steps should be taken only after judicious consideration. Otherwise emotional high-pressure methods might often lead into error.

"In a state of 500,000 population our problems, of course, are not those which a similar board would have in New York. Our Legislatures have considered several times the idea of creating a board that could be composed of or utilize the services of scientifically trained and experienced penologists. We have hopes of solving some of the Utah problems through our new adult probation and adult parole law, probably reducing the prison population thereby. The present system, of course, takes too much of the time of its members from their other and ever-increasing duties. But from the viewpoint of efficiency of the board, I see no great harm in retaining the present system, especially when we can secure the expert advice as now seems possible."

Wyoming

"I think this would depend upon the particular state involved. A number of the states, and Wyoming is one, have very small populations and the expense involved in setting up a board which would devote its time solely to investigation and determination of pardons and commutations would not be justified, and accordingly state officers should be used. In a state like New York perhaps a full-time board with its attendant expense could be justified."

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APPENDIX

The Pardoning Power in the Various States

Alabama

Constitution (1819), Governor.

Constitution (1901), Governor and Advisory Board of Parole composed of the Attorney-General, Secretary of State and State Auditor who investigate all applications and make recommendations thereon.

Arizona

Constitution (1910), Governor, but can be limited by statute.

Statute (1913, 1928), Board of Pardons and Paroles composed of State Superintendent of Public Instruction, the Attorney-General and a citizen which investigates all applications and makes recommendations thereon. No pardon can be granted by the Governor without the recommendation of the board.

Arkansas

Constitution (1849), Governor.

Statute (1937), Advisory board composed of the State Penal Board which investigates all applications and makes recommendations thereon.

California

Constitution (1849), Governor.

Statute (1915, 1937), Advisory Board composed of the Lieutenant-Governor, Attorney-General, Director of the Department of Penology and Wardens of the two State Prisons which investigates such applications as are referred to it by the Governor and makes recommendations thereon.

Colorado

Constitution (1876), Governor.

Connecticut

Constitution (1818), Governor and General Assembly.

Statute (1902, 1915), Board composed of the Governor, judge of Supreme Court of Error and four citizens. Trial judge cannot sit.

Delaware

Constitution (1792), Governor.

Constitution (1897), Governor and board composed of the Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer and Auditor of Accounts. No pardon can be granted without the recommendation of the board.

Florida

Constitution (1838), Governor.

Constitution (1868, 1896), Board composed of Governor, Secretary of State, Comptroller, Attorney-General and Commissioner of Agriculture; also in charge of paroles.

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Georgia

Constitution (1777), Governor and General Assembly.
Constitution (1789), Governor.
Statute (1896, 1908), Advisory Board composed of members of Prison Commission which investigates all applications and makes recommendations thereon. Has charge of paroles.

Idaho

Constitution (1869), Board of Pardons composed of Governor, Secretary of State and Attorney-General; has charge of paroles.

Illinois

Constitution (1818), Governor.
Statute (1897, 1917), Advisory Board of the Department of Public Welfare which investigates all applications and makes recommendations thereon.

Indiana

Constitution (1851), Governor; may be limited by statute.
Statute (1933), Advisory Commission of Clemency, composed of trustee of State prison, trustee of reformatory and secretary to Governor.

Iowa

Constitution (1846), Governor.
Statute (1913, 1919), Advisory Board composed of Parole Board which must investigate all applications in felony cases and make recommendations.

Kansas

Constitution (1859), Governor but can be limited by statute.
Statute (1903), Advisory Board composed of Prison Board which investigates all applications and makes recommendations.

Kentucky

Constitution (1792), Governor.

Louisiana

Constitution (1812), Governor.
Constitution (1879), Governor and board composed of Lieutenant-Governor, Attorney-General and presiding judge of trial court.

Maine

Constitution (1819), Governor and council.
Statute (1917), Advisory Board composed of prison commissioners which investigates such applications as are referred to it by the Governor and makes recommendations.

Maryland

Constitution (1776), Governor.
Statute (1914, 1922), Advisory Parole Commissioner who investigates such applications as are referred to him by the Governor and makes recommendations thereon.

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Massachusetts

Constitution (1780), Governor and council.
Statute (1913, 1917), Advisory Board composed of Board of Parole which investigates such applications as have been referred to the council by the Governor and makes recommendations.

Michigan

Constitution (1835), Governor.
Statute (1893, 1937), Advisory Board of Parole which investigates all applications and makes recommendations.

Minnesota

Constitution (1857, 1896), Board of Pardons, composed of Governor, Attorney-General, chief justice of Supreme Court.

Mississippi

Constitution (1817), Governor.

Missouri

Constitution (1820), Governor.
Statute (1917, 1937), Advisory Board of Probation and Parole composed of Lieutenant-Governor and two appointees of Governor which investigates applications and makes recommendations.

Montana

Constitution (1889), Governor and Board of Pardons composed of Secretary of State, Attorney-General and State Auditor.

Nebraska

Constitution (1866), Governor.
Constitution (1920), Board composed of Governor, Attorney-General and Secretary of State. Has jurisdiction over paroles.

Nevada

Constitution (1864), Board composed of Governor, justice of Supreme Court and Attorney-General. Has jurisdiction over paroles by statute.

New Hampshire

Constitution (1792), Governor and council.
Statute, Advisory Board of Parole consisting of the Board of Trustees of the State Prison.

New Jersey

Constitution (1776), Governor and council.
Constitution (1884), Court of Pardons, composed of Governor, chancellor and six judges of Court of Errors and Appeals. Has jurisdiction over paroles.

New Mexico

Constitution (1912), Governor.
Statute (1899), Advisory Board of Penitentiary Commissioners.

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New York

Constitution (1777), Governor.

North Carolina

Constitution (1776), Governor.

Statute (1935), Advisory Board of Parole composed of Attorney-General, Chairman of State Highway and Public Works Commission, Superintendent of Public Welfare, and three non-office holders.

North Dakota

Constitution (1889), Governor.

Constitution (1900), Board of Pardons composed of Governor, Attorney-General, chief justice of Supreme Court and two citizens. Has jurisdiction over paroles; vote of four required.

Ohio

Constitution (1802), Governor.

Statute (1912, 1931), Advisory Board, composed of Board of Parole which investigates all applications and makes recommendations.

Oklahoma

Constitution (1907), Governor.

Statute (1913), Advisory Board of Pardons composed of State Superintendent of Public Instruction, President of the Board of Agriculture and State Auditor which investigates all applications and makes recommendations. Has jurisdiction over parole.

Oregon

Constitution (1857), Governor.

Pennsylvania

Constitution (1776), Governor and council.

Constitution (1790), Governor.

Constitution (1873), Governor and Board composed of Lieutenant-Governor, Secretary of Commonwealth, Attorney-General and Secretary of Internal Affairs.

Rhode Island

Constitution (1854), Governor and Senate.

South Carolina

Constitution (1790), Governor.

Statute (1922), Advisory Board of Pardons composed of three citizens appointed by Governor which considers such applications as are referred to it by the Governor.

South Dakota

Constitution (1889), Governor in cases of sentences of less than two years; in all other cases, Governor and a board composed of the presiding judge of the Supreme Court, Secretary of State and Attorney-General.

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Tennessee

Constitution (1796), Governor.
Statute (1918, 1929 and 1937), Advisory Board composed of Commissioner of Institutions, and two others appointed by Commissioner with approval of Governor, which investigates all applications and makes recommendations thereon.

Texas

Constitution (1835), Governor and council.
Constitution (1845), Governor.
Constitution (1936), Governor and Board of Pardons and Parole composed of three citizens.

Utah

Constitution (1895), Board of Pardons composed of Governor, justices of the Supreme Court and Attorney-General. Has jurisdiction over paroles.

Vermont

Constitution (1777), Governor and council.
Constitution (1836), Governor.

Virginia

Constitution (1776), Governor and council.
Constitution (1850), Governor.

Washington

Constitution (1889), Governor.
Statute (1935), Advisory Board composed of Board of Prison Terms and Paroles consisting of three persons appointed by the Governor which investigates such applications as are referred to the board by the Governor, and makes recommendations thereon.

West Virginia

Constitution (1861), Governor.

Wisconsin

Constitution (1848), Governor.

Wyoming

Constitution (1889), Governor.
Statute (1910), Advisory Board of Pardons, composed of State Board of Charities, which investigates all applications and makes recommendations.

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CHAPTER IV

THE MILITIA

Article XI provides for the State militia. Provision for such a force has been in the Constitution since 1777. That first Constitution merely carried into the fundamental law what had been matter of statute since 1665.[1] The major constitutional provisions were made in 1777, but between 1777 and 1894 the several sections of the article underwent considerable change. Two of the six sections came in for the first time in 1894. Since 1894, the article has remained unaltered.

Sections 1 and 2 provide for the militia and state the qualifications of those who shall constitute it. Section 3 outlines the organization of the militia and imposes upon the Legislature the duty of making appropriation for its maintenance.

Sections 4, 5 and 6 specify the officers of the militia, how they are to be chosen and the manner of removing them from office:

Manner of Selecting Officers

Some officers are appointed by the Governor as he alone sees fit. In the case of others the appointment must be with the consent of the Senate. As to still others the manner of choice or appointment is left to be prescribed by the Legislature.

In the table which follows, the provisions for selecting the officers of the militia, which are found in these three sections of the Constitution, are brought together:

Officers	Provision for Selection	Article XI
Chiefs of the several staff departments	Appointed by Governor....	Section 4
Governor's aides-de-camp ..	Appointed by Governor....	Section 4
Governor's military secretary	Appointed by Governor....	Section 4
Major-generals	Appointed by Governor with consent of Senate..	Section 4
Other commissioned and noncommissioned officers..	As Legislature shall prescribe[2]	Section 5
Commissioned officers	Commissioned by the Governor as Commander-in-chief	Section 6

[1] Lincoln, *Constitutional History of New York*, Vol. III, pp. 583-93.

[2] Provisions in effect in 1894 as to the manner of appointment or election of commissioned and noncommissioned officers were not to be changed by the Legislature unless by a two-thirds vote of members of both houses present.

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Tenure

The tenure of office of the chiefs of the several staff departments, the Governor's aides-de-camp and the Governor's military secretary, is stated in section 4, to be the duration of the term for which the Governor shall have been elected, subject however to the pleasure of the Governor.

Removal of Commissioned Officers

The several methods of removal provided in section 6 are: (a) by the Senate on the recommendation of the Governor, stating the grounds on which removal is recommended; (b) by sentence of a court-martial; (c) upon the findings of an examining board organized according to law;[3] (d) by the Governor for absence without leave for a period of six months or more.[4]

There is a Military Law of more than two hundred and fifty sections in force in the State, which makes effective the skeleton principles of these constitutional provisions. It is a continuation of military codes which have kept in step with the constitutional provisions since 1778.[5]

SECTION 1

> "All able-bodied male citizens between the ages of eighteen and forty-five years, who are residents of the State, shall constitute the militia, subject however to such exemptions as are now, or may be hereafter created by the laws of the United States, or by the Legislature of this State." (Constitution of 1894, continued without change.)

This section provides for the State militia, and declares how it shall be constituted. By its terms, it is provided that all able-bodied

[3] Military Law, sec. 80 (as amended L. 1917, ch. 644, secs. 16, 37; L. 1921, ch. 588, sec. 19; L. 1924, ch. 114, sec. 11), provides for the creation of such an examining board by the Governor. If the findings of such board be unfavorable to the officer and be approved by the Governor, he is removed by the Governor.

Recently the commanding officer of a regiment of the National Guard was ordered removed by the Governor on the unanimous recommendation of a special examining board. The board was appointed, at the request of the commanding officer of the National Guard, to determine the capacity and general fitness of the officer. (*N. Y. Times*, February 24, 1938, p. 42.)

[4] Military Law, sec. 81 (as amended L. 1917, ch. 644, sec. 37; L. 1921, ch. 588, sec. 21), repeats this constitutional provision. Since the amendment of 1921, the statute provides that a commissioned officer absent without leave for *three* months shall be dropped from the rolls of the active militia. In the 1915 convention and in the Legislature in 1916 proposals were introduced which would have made three months' instead of six months' absence without leave ground for removal by constitutional amendment, but the proposals were not adopted.

[5] Lincoln, Vol. III, pp. 595-602, 604-5.

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male citizens, between the ages of 18 and 45 years, residents of the State, shall comprise the State Militia. This conscription is subject to exemptions then or thereafter created by State or Federal laws.

The first Constitution provided for the militia with great solemnity.

> Constitution of 1777, article XL: And Whereas, it is of the utmost importance to the safety of every state, that it should always be in a condition of defense; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention, therefore in the name, and by the authority of the good people of this state, doth Ordain, Determine, and Declare, that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined and in readiness for service. That all such of the inhabitants of this state (being of the people called Quakers) as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service as the same may, in the judgment of the legislature be worth. And that a proper magazine of warlike stores, proportioned to the number of inhabitants, be forever hereafter, at the expense of this state, and by the acts of the legislature, established, maintained, and continued, in every county in this state.

The 1821 Constitution, eliminating the "whereas" clause and the last sentence, carried forward the 1777 provision for a militia, substantially in the form and content of the earlier one.

> Constitution of 1821, article VII, section 5: The militia of this state shall, at all times hereafter, be armed, and disciplined, and in readiness for service; but all such inhabitants of this state, of any religious denomination whatever, as from scruples of conscience may be averse to bearing arms, shall be excused therefrom by paying to the state an equivalent in money; and the legislature shall provide, by law, for the collection of such equivalent, to be estimated according to the expense, in time and money, of an ordinary able-bodied militia-man.

The 1846 Constitution continued the 1821 provision, but with one difference. Instead of the mandatory provision for the payment of a money equivalent by those exempt from service, it was now left to the Legislature to prescribe the conditions upon which such exemption should be granted.

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Constitution of 1846, article XI, section 1: The militia of this state shall, at all times hereafter be armed and disciplined and in readiness for service; but all such inhabitants of this state, of any religious denomination whatever, as from scruples of conscience may be averse to bearing arms, shall be excused therefrom [by paying to the state an equivalent in money; and the legislature shall provide, by law, for the collection of such equivalent, to be estimated according to the expense, in time and money, of an ordinary able-bodied militia-man.] *upon such conditions as shall be prescribed by law.*

The 1894 revision cast the section into its present form.

1821 Convention

There was some intense hostility to exempting persons from military service because of their religious scruples. Not only had it been found that the Legislature could never fix on a money equivalent for the military service, but it was contended that a vast number of persons hypocritically professed religious scruples in order to escape military duty.[6] In spite of the opposition, however, the section was adopted.

1846 Convention

The Committee on Military Affairs, was, early in this convention, asked to "enquire into the propriety and expediency of exempting all persons from the performance of military duty, who shall certify in writing to the military commandant, that they have conscientious objections to engaging in war."[7]

The committee responded with an article prescribing the method of selecting and removing military officials (*infra* secs. 2, 3, 4, 5 and 6), but leaving out any general provision for a militia,[8] such as appeared in 1777 and 1821. The article, thus, made no mention of excuse from military duty because of religious scruples.

This convention was not inclined to waste much time on the militia. The delegate who had presented the resolution of inquiry as to exemption from military duty because of religious objections, now suggested that there was no time "to go through with this article" reported by the committee. His idea was that an article be drafted "vesting the

[6] Constitutional Convention of 1821, *Debates*, pp. 577-80.
[7] Constitutional Convention of 1846, *Debates*, p. 114.
[8] 1846 *Debates*, p. 443.

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whole arrangement of the matter in the Legislature."[9] But the committee on revision did go through the article. The convention itself debated it very perfunctorily (*infra* secs. 2–6). The section 1 which the revision committee reported was in the precise language of the same section in the 1821 Constitution. The substitution of the words "upon such conditions as shall be prescribed by law," for the prescription as to payment of an equivalent for exemption from military service, was made in convention. It was agreed to, without a word of dissent, when attention was called to the fact that the constitutional provision, as reported, called for payments rendered obsolete by a recent statute. The section thus amended was adopted.[10]

1867 Convention

The provision for the militia adopted by the 1867 convention was split up in two sections.[11]

> "Section 1. All able-bodied male citizens, between the ages of eighteen and forty-five years shall be annually enrolled, under such regulations as shall be established by law, as a militia force, to repel invasion, suppress insurrection, and aid in the enforcement of the laws.
>
> Sec. 2. The militia shall be divided into the active and reserve forces. The active militia shall be called the National Guard of the State of New York, and its number determined by law; but shall not, in time of peace, exceed thirty thousand. It shall be always armed, equipped and disciplined. All enrolled persons not belonging to the National Guard shall constitute the reserve force. All persons who after one year's service, shall have been honorably discharged from the army, navy or volunteer forces of the United States, shall be in time of peace exempt from service in the militia; and all citizens who from scruples of conscience may be averse to bearing arms, may be exempt therefrom upon conditions to be provided by law."

It was drawn by the Committee on the Militia and Military Affairs in substantially this form.[12]

The committee's explanation[13] of the provision it had made for a militia was that it had "so modified article XI in the Constitution as

[9] 1846 *Debates*, p. 1049.
[10] 1846 *Debates*, p. 1076.
[11] *Documents of 1867 Constitutional Convention*, No. 185, art. XII secs. 1 and 2.
[12] Constitutional Convention of 1867, *Debates*, p. 1215-6; 1867 *Documents*, No. 94.
[13] 1867 *Documents*, No. 94.

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to perpetuate the National Guard, or organized militia, and establish it in such a manner as to make it most useful in case of need. It has been found better to have an efficient force of moderate number than to depend upon a large force not disciplined. Your committee has therefore provided for dividing the militia of the State into the active and reserve militia; the first to consist of the National Guard, and the second, all citizens between the ages of 18 and 45 years, not belonging to the active forces, or exempt according to law." The reason for leaving the number of the National Guard to be fixed by the Legislature was that "the requirements of the state cannot be anticipated with certainty."[14]

The first section as reported by the committee differed from the section as adopted in that the positions of the clauses were transposed by the Committee on Revision. The provisions were precisely the same.[15] The only discussion upon section 1 was a brief one as to retaining the word "annually." A motion to strike the word out was made for the reason that the convention "should not put in the Constitution compulsory enrollment every year." But the motion was lost on the ground that "if it is necessary to keep an organized force, it is necessary to maintain an annual enrollment." The only other attempt to amend it was a proposal that the militia be restricted to "white" persons.[16]

The second section of the provision establishing the militia caused more discussion. As reported, it had exempted from service in the militia in time of peace all persons "honorably discharged from the army or navy." It was amended so that persons honorably discharged from the "volunteer forces" of the United States were likewise exempt. This was merely constitutionalizing the exemption contained in Laws of 1867, chapter 502. The limitation of the exemption to a period of one year for all classes was the result of an amendment.[17]

The committee's section had left the size of the militia to "be fixed by law."[18] The restriction of the maximum number to 30,000 was also accomplished by amendment. The actual size of the militia under 30,000 was still left to the Legislature in spite of arguments that this too be written into the Constitution. The two provisions constituted a compromise between those who desired to leave it up to the Legislature to meet necessities as they arose, and those who distrusted

[14] In 1866 the National Guard numbered 52,247; the reserve militia 361,505.
[15] *Cf.* 1867 *Debates,* p. 1215 with p. 3678.
[16] 1867 *Debates,* p. 3678.
[17] 1867 *Debates,* p. 1216; 1867 *Documents,* No. 94.
[18] See report of committee, *supra.*

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the discretion of the law-making body not to fix the number of the militia at such a size as to make it an excessive financial burden. By creating the restriction only for "time of peace" the Legislature was left free "to raise a larger number in time of war."[19] The "marked distinction" between the National Guard and the reserve forces was emphasized: "The National Guard is made up of those organizations already formed and equipped, and recognized by law." It is the "active force * * * organized, armed and disciplined,"[20] it was said.

It was the clause allowing exemption from military service for religious reasons which provoked most discussion. Both the principle and the language of the exemption encountered opposition. In so far as the principle was concerned, the duty of military service was held one to be borne by each male without exemption. But the doctrine of exemption on grounds of religion had been in the Constitution since 1777 and was more or less accepted. So that it was not so much its continuance in the Constitution as the way in which it should be applied that was an issue. For example, the following question was posed: Should membership in a religious denomination holding to doctrines averse to bearing arms determine the right to exemption, or should it be personal scruples regardless of membership in any sect? Historically, the exemption stemmed from a respect for the religious scruples of Quakers, Shakers and Moravians against military service.[21]

The section 2 finally adopted by this convention, made the "scruples of conscience" against bearing arms of the individual the basis of the right to exemption, without regard to his belonging to any religious sect holding such tenets. That provision of the 1846 Constitution which the Committee on the Militia had at first continued[22] was discarded.[23]

1894 Convention

The 1894 convention rewrote the article on the militia as it appeared in the 1846 Constitution. The Constitution adopted by the 1867 convention was not ratified by the people, and no changes had been made in this article, nor indeed proposed, by the Legislature between 1846 and 1894. The 1872 Constitutional Commission had not recommended any changes in the article.[24] Taking the 1846 article, then, the 1894 convention revamped it and wrote a new one which has not been

[19] 1867 *Debates*, pp. 1216 *et seq.*, p. 3689.
[20] 1867 *Debates*, pp. 1221, 3686.
[21] 1867 *Debates*, pp. 1218-21, 3686-7.
[22] 1846 *Debates*, p. 1076; 1867 *Debates*, p. 1215.
[23] 1867 *Debates*, pp. 3705-6.
[24] Lincoln, Vol. II, p. 563.

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altered in any detail since then. It made the change with surprisingly little discussion. The article which the Committee on Military Affairs reported was adopted by the convention with but three dissenting votes out of 104 cast.[25]

The chairman of the Military Affairs Committee reported that the committee had "had correspondence with all the leading officers of the National Guard * * * and had submitted this amendment in advance to them. It has received the approval of every National Guard officer. The National Guard today is unanimous in support of this article."[26] As to section one specifically, he pointed out that the requirement of the old Constitution that the militia be armed and equipped was stricken out as "obsolete." He explained that in place of the former exemption of persons with religious scruples averse to bearing arms, had been substituted exemptions to be created by Federal laws or the State Legislature. There was some spirited debate on this subject between those who favored retaining the former provision and those who regarded that provision as unnecessary. It was pointed out that without it the Legislature may not necessarily exempt persons with religious scruples against military service.[27] As a matter of fact the exemption is still accorded by statute. Section 6 of the Civil Rights Law provides:

> "All such inhabitants of this state of any religious denomination whatever, as from scruples of conscience may be averse to bearing arms, are to be excused therefrom by paying to the state an equivalent in money; and the legislature is required to provide by law for the collection of such equivalent, to be estimated according to the expense, in time and money, of an ordinary able-bodied militiaman."

As for the age limits set by this section, attention was drawn to the fact that the Federal statutes so provide and that the states are bound thereby.[28] The entire section was adopted as proposed by the committee.

1915 Convention

Two proposals were introduced to bring back into the Constitution the exemption from military duty of those having religious scruples against bearing arms. One proposal[29] was to amend section 1 of article XI by adding the following to it:

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[25] Constitutional Convention of 1894, *Revised Record,* Vol. IV, p. 1133.
[26] 1894 *Revised Record,* Vol. IV, p. 1089.
[27] 1894 *Revised Record,* Vol. IV, pp. 1090-1, 1095, 1097, 1098.
[28] 1894 *Revised Record,* Vol. IV, pp. 1090-1.
[29] *Constitutional Convention of* 1915, *Proposed Amendments,* Int. No. 529, Pr. No. 544.

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"but persons whose religious tenets or conscientious scruples forbid them to bear arms shall not be compelled to do so in time of peace, but shall pay an equivalent for personal service."

Another proposal[30] was to add a new section to article I of the Constitution providing:

"Friends or people called Quakers and members of any other religious denomination whatever which has tenets against participation in war or preparation therefor, who are opposed to war service for reasons of conscience, shall not be required to serve in war or preparation therefor, except as unarmed members of the ambulance or hospital service."

The Committee on Militia and Military Affairs was asked to choose between these two proposals and report one of them. But both this committee and the Committee on Bill of Rights, while recognizing and approving "the underlying principle of religious toleration for which these amendments stand," regarded them as unnecessary. The reason why they were so considered was that by a chain of enactments the constitutional exemption already existed. Attention was called to section 1 of article XI which recognizes exemptions created by State and Federal law; to the Military Law of New York which exempts all persons exempt under the Federal laws; to a Federal act (January 21, 1903) which makes an express exemption on religious grounds. Therefore, "the exemption there provided thus controls both the State Constitution and the State Military Law."[31]

The convention evidently accepted the committee report since the subject was not brought up on the floor of the convention. Indeed that committee report has been the last word upon it. No effort to reintroduce such a constitutional guarantee has been made since then.

SECTION 2

"The Legislature may provide for the enlistment into the active force of such other persons as may make application to be so enlisted." (Constitution of 1894, continued without change.)

This section was introduced in the 1894 Constitution to supplement section 1. Section 1 limits the militia to "citizens" who are residents

[30] *Id.*, Int. No. 440, Pr. No. 452.
[31] 1915 *Documents*, No. 49, p. 2.

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of the State. Section 2 gives the Legislature the power to permit others, who so desire, to enlist in the *active* force, the National Guard or Uniformed Militia. This section extends the right to aliens and nonresidents of the state, to *volunteer* for enrollment in such active force. The right to draft such persons does not exist.*

The section was adopted by the convention without any comment. No question has been raised as to it at any time since.

SECTION 3

"The militia shall be organized and divided into such land and naval, and active and reserve forces, as the Legislature may deem proper, provided however that there shall be maintained at all times a force of not less than ten thousand enlisted men, fully uniformed, armed, equipped, disciplined and ready for active service. And it shall be the duty of the Legislature at each session to make sufficient appropriations for the maintenance thereof." (Constitution of 1894, continued without change.)

This section sets for the militia a minimum of 10,000 fully equipped and trained enlisted men, ready for active service. It further makes it mandatory upon the Legislature to make sufficient appropriation for the maintenance of this force. For the rest, it is left to the Legislature to organize and divide this force into such land and naval, and active and reserve forces as it may deem proper.

This section, like section 2, was new with the Constitution drafted in 1894. But unlike section 2, it was an outgrowth, in so far as some of its provisions went, of statutes already in effect, of earlier Constitutions,[1] and of attempts in the 1867 convention to make similar constitutional provision. The chairman of the Committee on Militia and Military Affairs of the convention of 1894 considered this section "really the most important of the entire amendment."[2]

*Constitutional Convention of 1894, *Revised Record,* Vol. IV, pp. 1091-2.

[1] Constitution of 1777, art. XI; Constitution of 1821, art. VII, sec. 5; Constitution of 1846, art. XI, sec. 1.

[2] Constitutional Convention of 1894, *Revised Record,* Vol. IV, p. 1092.

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The Naval Militia

The chairman of the committee declared that there appeared to be a question as to the right of the State to maintain a naval militia. In order to avoid all such question in the future, the committee provided that the Legislature may divide the State into reserve forces, land and naval; the reserve forces to be all who are not active—the ununiformed militia. The propriety "in fastening upon the State of New York a naval force which should properly belong to the United States to pay," was questioned. The answer given was that the right had been recognized since the foundation of the State; that the Governor has always been by constitutional provision the Commander-in-Chief of the army and *navy*.[3]

Minimum of 10,000 in Militia

As the Constitution stood in 1894, there was nothing to prevent the Governor or Legislature from wiping the National Guard out of existence. It was urged that fixing a minimum force in the Constitution avoided any possibility of such action; that setting the number at 10,000 was stabilizing in the Constitution the number then fixed by statute: since 1820 that minimum had been 10,000; the maximum 15,000; the actual number maintained in 1894 about 11,000.[4]

Maintenance of Militia

The duty of making sufficient appropriation for the militia was imposed upon the Legislature to remedy an existent lack. There was no constitutional provision making it the duty of any branch of the State government "to either maintain or look to the maintenance of the National Guard."[5]

The entire section was adopted with no other question than the one already referred to as to the propriety of creating a naval militia.

In the 1915 convention it was proposed to substitute for the provision for a militia of 10,000, a requirement of one term of compulsory military service for all males attaining 18 years of age.

The 1915 convention met three-quarters of a year after the commencement of the World War. Even if the United States' embroilment in the conflict was not then anticipated, it was but natural that at the time the effort to strengthen the defensive forces should find sympathetic audience. A variety of suggestions for interesting the

[3] 1894 *Revised Record*, Vol. IV, pp. 1089, 1092, 1097-8.
[4] 1894 *Revised Record*, Vol. IV, pp. 1089, 1092.
[5] *Ibid.*

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youth in military affairs was offered to the Committee on Militia. But although the committee agreed without reservation with the design of such proposals, it deemed them within the scope of legislation and unwise as mandatory embodiments in the Constitution.[6]

The only attempt that has been made since then to alter section 3 was included in an elaborate bill proposed in the Legislature in 1917,[7] amending sections 3, 4, 5 and 6 of this article. The design of this bill was to transfer to the United States government the maintenance and training of the State militia whenever the Federal government should choose to avail itself of such transfer. Section 3 of that proposed bill would have amended this section 3 of article XI to read as follows:

> *"The organization, arming and discipline of the people of the United States for military purposes, and the military command and government thereof in case of war, invasion or insurrection, being national functions affecting the security and prosperity of the entire nation, this State yields to the government of the United States all its reserved authority to appoint officers and to train the militia of this state; and all laws, regulations and constitutional provisions of this state relating to the militia are hereby declared to be subordinate to the power of the federal government.*
>
> *Until the government of the United States shall otherwise provide,* [The militia shall be organized and divided] *the legislature may organize and divide the militia* into such land and naval, and active and reserve forces as *it* [the legislature] may deem proper, *and may provide for the arming, equipment and discipline thereof* [provided however that there shall be maintained at all times a force of not less than ten thousand enlisted men, fully uniformed, armed, equipped, disciplined and ready for active service. And it shall be the duty of the Legislature at each session to make sufficient appropriations for the maintenance thereof.]

The bill never emerged from committee.

Judicial Construction

Matter of Bryant 152 N. Y. 413, determined that article XI, section 3, does not make the State treasury solely responsible for the maintenance of the militia. General laws may be enacted impos-

[6] *Documents of 1915 Constitutional Convention*, No. 49, p. 2.
[7] 1917: A. Pr. No. 102, Int. No. 102.

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ing upon localities the expense of maintaining local armories. The Court held that it was "only reasonable that great centers of population that are subject to the dangers of riot and disorder" should have a large number of armories "for proper protection," and it is "but just" that certain counties should pay "as they do" a sum necessary to maintain the militia. "The command of the Constitution that the Legislature at each session, shall make a 'sufficient' appropriation was framed with the knowledge of the fact that the amounts contributed annually by certain counties left a deficit varying in amount each year in the aggregate sum necessary for maintenance, hence the provision that the annual appropriation should be sufficient. It is the duty of the Legislature to ascertain at each session the amount of this deficiency and appropriate from the State treasury a sum sufficient to cover it."

Generally as to section 3, the Court held that it was "the obvious purpose of the convention, as disclosed by the debates, to provide for a naval as well as a land force of militia that could not be reduced below a minimum number specified, and to impose upon the Legislature the duty at each session to make sufficient appropriations for its maintenance. In other words, the existence and maintenance of the National Guard were not to depend upon the legislative will, but were rendered permanent and certain by a provision of the fundamental law."

INTRODUCTORY NOTE TO SECTIONS 4, 5 AND 6

There have been provisions in the Constitution as to the selection of military officers since 1777. The first Constitution provided that "All military officers be appointed during pleasure," presumably of the Governor.[1] The Constitution of 1821, instead of this general provision, enumerated a great many officers of the militia, and prescribed the method to be followed in appointing or selecting them.

In every constitutional convention, commencing with the convention of 1821, the provisions for the manner of choosing the military officers were changed. Such changes were either in respect to the officers specifically enumerated in the Constitution; or they varied the manner prescribed for selecting officers; or the sections of the article on militia in which the provisions were embodied were rearranged. Sections were dropped and new ones inserted by each convention.

[1] Constitution of 1777, art. XXIV.

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For the most part these changes were made without much discussion. In the 1821 convention the Committee on Appointments recommended the manner of appointment adopted in the then article IV. The provisions were approved and adopted without any adverse comment.[2] In subsequent conventions there was somewhat more debate directed to the provisions made as to the selection of particular officers. The comments will be noted in considering separately the present sections 4, 5 and 6 of article XI, in which the manner of choosing the military officers is provided.

SECTION 4

"The Governor shall appoint the chiefs of the several staff departments, his aides-de-camp and military secretary, all of whom shall hold office during his pleasure, their commissions to expire with the term for which the Governor shall have been elected; he shall also nominate, and with the consent of the Senate appoint, all major-generals." (Constitution of 1894, continued without change.)

This section deals with:

Chiefs of the several staff departments;
Governor's aides-de-camp;
Governor's military secretary;
Major-generals.

The first three are appointed by the Governor and hold office at his pleasure. Their commissions expire at the conclusion of the Governor's term. The major-generals are also appointed by the Governor, but with the consent of the Senate.

That military officers appointed by the Governor hold office during his pleasure was declared in the Constitution in 1777. This provision was dropped from the Constitution in 1821. It reappeared in 1846 modified to the extent that the terms of such officials were limited to the term of office for which the Governor who appoints them has been elected.[3] This provision is retained in section 4.

[2] Constitutional Convention of 1821, *Debates*, pp. 38, 159, 356, 584.
[3] 1777 Constitution, art. XXIV; 1846 Constitution, art. XI, sec. 3.

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The provision describing methods for the selection of enumerated military officials was first inserted in the Constitution of 1821. While the Governor's aides-de-camp and military secretary, for whom provision is now made in section 4, were not mentioned in 1821, and his military secretary was not mentioned in 1846, provision was made in those Constitutions for a great many officers who are not now enumerated in the Constitution. The provisions in the Constitutions of 1821 and 1846 as to the selection of the four officers now included in section 4, were as follows:

Officer	Articles and sections of 1821 and 1846 Constitutions	Provisions for Selection in 1821 and 1846 Constitutions
Chiefs of the several staff departments	1821 Constitution, art. IV, sec. 2.....	Appointed by Governor with consent of Senate.
	1846 Constitution, art. XI, sec. 2.....	Appointed by Governor. Commissions to expire at end of Governor's term.
Governor's aides-de-camp...	1846 Constitution, art. XI, sec. 3.....	Appointed by Governor. Commissions to expire at end of Governor's term. (Provisions for only one aide-de-camp.)
Major-generals	1821 Constitution, art. IV, sec. 2; 1846 Constitution, art. XI, sec. 3	Appointed by Governor with consent of Senate.

The 1821 and 1846 Constitutions also defined the methods of selecting captains and subalterns, field officers of regiments and battalions, Brigadier-Generals and Brigadier-Inspectors, the Adjutant-General, the Commissary-General and staff officers of divisions, brigades, regiments, and battalions.[4]

As has already been said, these provisions were inserted in the 1821 Constitution, with no one questioning the recommendation of the Committee on Appointments. In the 1846 convention, several delegates were impatient about spending any time on the article on militia, and wanted to leave the details contained in these sections to the Legislature. But the absence of any provision—such as had been included in the 1821 Constitution—for the manner of appointing the Commissary-General, met with some disapproval, and one or two delegates managed to inject their views as to the relative

[4] Constitution of 1821, art. IV, secs. 1, 2 and 6; Constitution of 1846, art. XI, secs. 2 and 3.

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merits of electing this officer or of having his appointment rest with the Governor. An argument for the latter course was that there should be "entire confidence" between this officer and the Governor, his Commander-in-Chief. To the provision defining a two-year term of office for the Commissary-General was added the requirement that he give security for the faithful execution of his duties. With this addition the provisions were adopted as recommended by the committee.[5]

1867 Convention

The 1867 convention adopted a section (sec. 3) in the very language of the present section 4. The provision in the 1846 Constitution exacting security from the Commissary-General was extended to all officers responsible for military property and funds. There were further provisions in sections 4 and 5 of the Constitution adopted by this convention for the selection of lesser officers by their superiors. The Committee on Militia had concluded section 3 with a provision that "general officers" be appointed by the Governor with the consent of the Senate. But this last provision evoked criticism in convention and was dropped. The manner of choosing brigade commanders assumed important proportions. A member of the Militia Committee wrote a dissent to the committee's recommendation that these officers be appointed by the Governor, giving it as his opinion that they should continue to be elected.[6] The convention ultimately followed his view and made provision in section 5 for the election of such officers by the field officers of their brigades. Instead of the committee's provision that "all general officers" be appointed by the Governor with the consent of the Senate, it was provided that only Major-Generals be so appointed. A motion that Commissary-Generals also be chosen in this way was voted down. The argument for the election of brigade commanders was that it was more in accordance with democratic principles than appointment (which should be confined to the highest officers) and free of political entanglements. The argument against this procedure was that it would involve at the least undignified, and, possibly, unsavory, electioneering within the regiment. It was contended that Brigadier-Generals were of sufficiently important grade to be appointed by the Governor, as Major-Generals were.[7]

[5] Constitutional Convention of 1846, *Debates*, pp. 443, 1049, 1076.
[6] *Documents of 1867 Constitutional Convention*, No. 94.
[7] 1867 *Documents* No. 184, p. 4; *Constitutional Convention*, 1867, *Debates*, pp. 1221, 1224, 3691-3.

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1894 Convention

The convention of 1894 cut away all the minute provisions of earlier constitutions as to the selection of military officers of minor rank. Military Law, section 74 now defines the manner of selection of many such lesser officers for whom provision was made in the Constitution prior to 1894.

Section 4 of the Constitution of 1894 continued the provisions of the Constitution of 1846 as to the appointment of the chiefs of staff departments, the Major-Generals and the Governor's aides-de-camp. The provision as to the appointment of the Commissary-General, together with the requirement that he give security was omitted. It was declared that this officer should have the same status as other staff officers of the Governor. The earlier provision, it was explained, was put in the Constitution when the Commissary-General was the only officer who had charge of all the State property and it was thought best to give him a definite term. Now, it was declared, the provision was "obsolete" because the Commissary-General had no property to take care of and no responsibility and the provision, accordingly, had been nullified.[8] No one objected to the section and it was adopted.[9]

1915 Convention

The Constitution adopted by the 1915 convention, but rejected by the people, would have changed section 4 by omitting the chiefs of the staff departments from military officers to be appointed by the Governor, but would have made specific provision for the appointment of the Adjutant-General by the Governor. This was a return to the provisions of the 1821 and 1846 Constitutions.[10] The 1915 Constitution also would have checked the Governor's power of appointment of his aides-de-camp by giving to the Legislature the right to prescribe the number and qualifications of such officers as well as of Major-Generals.

The reason given for omitting the chiefs of the staff departments was that the provision as to them had been inserted in 1846, before the separation of the militia in 1894 into active and reserve divisions. Since 1894, the multiple active divisions of the militia had been united in one active force, the National Guard, with the Adjutant-General performing the duties of these former chiefs.

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[8] Constitutional Convention of 1894, *Revised Record,* Vol. IV, p. 1093.
[9] 1894 *Revised Record,* Vol. IV, p. 1093.
[10] 1821 Constitution, art. IV, sec. 2; 1846 Constitution, art. XI, sec. 3.

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No objection was raised to these changes and the section was unanimously adopted.[11]

After 1915

Since 1915, there have been two attempts to amend section 4. One was in 1916, when the amended section 4, adopted by the 1915 convention, but rejected by the people, was introduced in the Senate.[12]

The other was in the proposed amendment introduced in 1917,[13] to which reference has been made in the discussion of section 3. The amendment to section 4, included in that bill, was to leave with the Governor the appointment of his aides-de-camp and military secretary, and with the consent of the Senate, the appointment of major-generals. However, his power of appointing the chiefs of the staff departments was made subject to any provisions made by the Federal government.

Judicial Construction

People v. *Molyneux 40 N. Y. 113.* Since section 4 provides that the consent of the Senate is necessary in appointing major-generals, the Governor may not appoint such officers while the Senate is in recess. In times of war, however, the operation of the proviso for obtaining such consent is suspended.

The Attorney-General in 1917 *(13 St. Dept. Rep. 433)* noted that *People* v. *Molyneux* is the only judicial construction of this provision, which is a limitation upon the executive power. The Governor is not required by it to appoint major-generals, if the number of troops in New York make it unnecessary to have such an officer in command.

SECTION 5

"All other commissioned and non-commissioned officers shall be chosen or appointed in such manner as the Legislature may deem most conducive to the improvement of the militia, provided, however, that no law shall be passed changing the existing mode of election and appointment unless two-thirds of the members present in each house shall concur therein." (Constitution of 1894, continued without change.)

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[11] Constitutional Convention of 1915, *Revised Record,* pp. 1567–9, 2349–51.
[12] 1916: S. Pr. No. 40, Int. No. 40.
[13] 1917: A. Pr. No. 102, Int. No. 102.

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This section imposes upon the Legislature the duty of prescribing the methods of choosing or appointing all commissioned and non-commissioned officers, with the condition that no "existing mode of election and appointment" be changed without the concurrence of two-thirds of the members present in Senate and Assembly. The power of the Legislature to prescribe the mode of appointment of commissioned officers is further restricted by the provision, in section 6, that such officers be commissioned by the Governor.

In each Constitution, commencing with 1821, there has been such a general provision or provisions giving to the Legislature power over the selection of military officers.

The 1821 Constitution provided that the Legislature "shall, by law, direct the time and manner of electing militia officers, and of certifying their election to the governor." The election referred to was election of officers by brigades, regiments or separate battalions. This Constitution also provided that "in case the mode of election and appointment of militia officers hereby directed, shall not be found conducive to the improvement of the militia the legislature may abolish the same, and provide by law for their appointment and removal, if two-thirds of the members present in each house, shall concur therein."[1]

In the 1846 Constitution, these two sections were continued.[2]

The article adopted by the 1867 convention incorporated like provisions but united them as part of one section:[3]

> "All officers not specified in this Article shall be appointed as prescribed by law; and in case the selection and appointment of militia officers, in the manner directed by this Article, shall not be found conducive to the improvement of the militia, the Legislature may change the same by law, provided two-thirds of the members elected to each house shall concur therein."

The present provision of section 5 was adopted in 1894. In 1915 the convention tried to make the power given the Legislature more specific by adopting an amendment to this section bestowing upon it the right to prescribe the *qualifications* of all commissioned and non-commissioned officers other than those whose selection was provided for in section 4.

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[1] Constitution of 1821, art. IV, secs. 3 and 5.
[2] Constitution of 1846, art. XI, secs. 4 and 6.
[3] *Documents of 1867 Constitutional Convention*, No. 185. Art. XII, sec. 5.

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In no convention was there any objection to the giving of this residual power to the Legislature.[4] The change from the earlier provisions to the present one in 1894 was explained as resolving the inconsistency that was deemed to exist between section 2 of the 1846 Constitution (which provided the manner of electing certain officers) and section 6 (which gave to the Legislature the right to abolish the methods so provided, if it did not like them). It was pointed out that section 2 was "entirely obsolete" because for the last fifty years the Legislature had made many changes departing from the provisions of section 2. Therefore the Committee on Militia in 1894, to get away from this legislative practice, "and at the same time recognize some system by which the officers could be elected," had provided "that commissioned and non-commissioned officers shall be chosen or appointed in such manner as the Legislature may deem most conducive to the improvement of the militia, provided, however, that no law shall be passed changing the existing mode of election and appointment unless two-thirds of the members present in each house shall concur therein. This allows the same restriction that now exists in the Legislature for changing the existing mode of election or appointment, and codifies in one section what is now in two sections."[5]

The Military Law contains the provisions which the Legislature has passed pursuant to the present section 5 and its forerunners.

The proposal in the 1915 convention to change the section was received without comment and unanimously passed.[6]

After 1915

In 1916, the section 5 which the 1915 convention had adopted, but which the people had rejected, was introduced in the Senate.[7] It was referred to committee, but never reported out. As part of the proposed bill introduced in the Senate in 1917, to put the State militia at the service of the Federal government, section 5 was to be amended by making its provisions subject to contrary provisions of the Federal laws.[8]

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[4] Constitutional Convention of 1821, *Debates*, pp. 577-80; Constitutional Convention of 1846, *Debates*, pp. 443, 1049, 1076; Constitutional Convention of 1867, *Debates*, pp. 1221, 1225, 3693.

[5] Constitutional Convention of 1894, *Revised Record*, Vol. IV, pp. 1093, 1103.

[6] Constitutional Convention of 1915, *Revised Record*, pp. 1569, 2351.

[7] 1916: S. Pr. No. 41, Int. No. 41.

[8] 1917: A. Pr. No. 102, Int. No. 102.

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SECTION 6

"The commissioned officers shall be commissioned by the Governor as commander-in-chief. No commissioned officer shall be removed from office during the term for which he shall have been appointed or elected, unless by the Senate on the recommendation of the Governor, stating the grounds on which such removal is recommended, or by the sentence of a court-martial, or upon the findings of an examining board organized pursuant to law, or for absence without leave for a period of six months or more." (Constitution of 1894, continued without change.)

This section provides that commissioned officers shall be commissioned by the Governor and that the Governor is their Commander-in-Chief. It also provides the grounds of removal of commissioned officers.

The first sentence is the only one relating to the militia which has remained unchanged from 1777 to the present.[1] Since 1777, also, it has been provided that the Governor is Commander-in-Chief of the Militia, but in the Constitutions of 1821 and 1846, this declaration appeared only in the article dealing with the Executive, and was not repeated in the article on militia.[2] The provisions for removal have been changed somewhat, but only slightly, since 1821, when the first provisions were inserted.

> Constitution of 1821, article IV, section 4: * * * No commissioned officer shall be removed from office, unless by the senate, on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the decision of a court marshal, pursuant to law. The present officers of the militia shall hold their commissions subject to removal as before provided.

Constitution of 1846, article XI, section 5, continued the same provision.

Had the Constitution passed by the 1867 convention been adopted by the people, it would have changed considerably the provisions as

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[1] Constitution of 1777, art. XXIV; Constitution of 1821, art. IV, sec. 4; Constitution of 1846, art. XI, sec. 5.

[2] Constitution of 1777, arts. XVIII and XXIV; Constitution of 1821, art. III, sec. 4; Constitution of 1846, art. IV, sec. 4; present Constitution, art. IV, sec. 4.

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to the tenure of commissioned officers. Section 4 of that Constitution limited all commissions to periods of ten years, except those of the National Guard Reserves. Commissioned officers holding office during the pleasure of the Governor and general officers were declared to be not within the removal provisions. Removal was by the Senate on the recommendation of the Governor, stating the grounds on which removal was recommended, or by sentence of a general court martial.

The Committee on Militia in the 1867 convention[3] limited commissions to ten years in order to afford opportunity for promotion and "thus encourage efficiency and zeal in service," and obtain the retirement of officers who may become inefficient from age. It protected the officers whose commissions were terminated at the end of ten years by providing in section 6:

> "In the organization of the National Guard, the Legislature shall provide for reserve officers, to be composed of officers of the National Guard of not less than ten years' service in the same grade, and of officers honorably discharged from the volunteer service of the United States who are citizens of this State. They may, upon application, be commissioned by the Governor, with rank equal to the highest held by them by brevet or otherwise, in the National Guard or United States Volunteers, and they may be assigned to such service, and be entitled to such military privileges and exemptions, as the Legislature shall by law provide."

The committee pointed out that an officer of merit could be reappointed or re-elected. This it considered more desirable than continuing officers in the same grade for life. To make the services of such officers available to the State and in order that they might not feel aggrieved, the reserve list was created.

The provisions as to removal had been accepted without objection in the 1821 and 1846 conventions. These provisions as well as the innovation as to the time limit on officers' commissions, were also accepted in the 1867 convention without animated debate.[4]

The 1894 convention adopted the present section bringing into it certain grounds of removal that had theretofore been provided in the Military Law whose constitutionality was questioned. This doubt was removed by incorporating such provisions in the Constitution.

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[3] *Document of 1867 Constitutional Convention*, No. 94. Art. XII, sec. 4 and 6.

[4] Constitutional Convention of 1821, *Debates*, pp. 577-80; Constitutional Convention of 1846, *Debates*, pp. 443, 1049, 1076; Constitutional Convention of 1867, *Debates*, pp. 1224-9, 3692-8.

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These new grounds of removal were removal upon a finding by a board (a provision approved by the National Guard), and removal for absence of more than six months without leave.[5]

In 1915, with the World War going on in Europe, it was natural for the convention to deal more sternly with any carelessness in military discipline. Consequently, it changed section 6 by making absence without leave for three months, instead of six months, ground for removal. The purpose of this was to bring the New York Constitution into conformity with the Federal statutes.[6] The Constitution adopted by the 1915 convention not having been accepted by the people, a similar provision was introduced in the Senate in 1916.[7] But the committee to which it was referred never reported it. As in the case of sections 4 and 5, in the bill introduced in the Assembly in 1917,[8] making the State Militia subject to the call of the Federal government, the provisions of section 6 were made subordinate to contrary Federal enactments.

Judicial Construction

The power of removal has been construed in a few decisions. *In Peo. ex rel. Underwood* v. *Daniell* 50 N. Y. 274 (1872), a private in the National Guard was found guilty by a court-martial. He petitioned for *certiorari* claiming that this means of trial was unconstitutional on the ground that the judiciary article of the Constitution did not mention such courts. But the Court held that these tribunals had existed even before the adoption of the first Constitution and ever since then had never been abolished, and the provision of the 1846 Constitution (art. XI, sec. 1) requiring the militia to be armed and disciplined implied a tribunal to enforce this requirement.

Peo. ex rel. Smith v. *Hoffman* 166 N. Y. 462, determined that the findings of a military examining board were reviewable by the civil courts. The petitioner was tried by a military examining board as to his fitness, and claimed that he did not have a fair hearing. His petition for *certiorari* to the Supreme Court to review the decision of the board was opposed, upon the ground that the Court was without jurisdiction. It was held that the board was a judicial tribunal subject to review by the civil courts on a writ of *certiorari;* and that it was not simply an agency to advise the Governor.

[5] Constitutional Convention of 1894, *Revised Record,* Vol. IV, pp. 1093-4.
[6] Constitutional Convention of 1915, *Revised Record,* pp. 1569–70, 2352–3.
[7] 1916: S. Pr. No. 38, Int. No. 38.
[8] 1917: A. Pr. No. 102, Int. No. 102.

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The Governor's power of appointment and removal of military officers was examined in *Peo. ex rel. Gillett* v. *DeLamater* 247 App. Div. 246 (3d Dept.). The Court there declined to review the action of the Governor in relieving a brigadier-general of his command. It held that such procedure was completely discretionary with the Governor as Commander-in-Chief of the militia. Moreover, one brigadier-general could not question the appointment by the Governor of an additional officer of this grade. Though stripped of his command, he still had his office so long as his commission had not been taken from him. He had no grievance in the civil courts. In an earlier case, *Peo. ex rel. Leo* v. *Hill* 126 N. Y. 497, the Court of Appeals held that an officer who had no command because his organization had been disbanded, had not thereby been removed from office by means other than provided by the Constitution. The Governor's order disbanding the unit could not, therefore, be reviewed by the civil courts.

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CHAPTER V

EXECUTIVE BUDGET—ARTICLE IV-A

The budget provision is comparatively new in the constitutional history of New York State. We first find effort to establish an executive budget in this State in one of the volumes supplied to the delegates of the 1915 convention by the preparatory commission established to collect, compile and print information and data for the convention. (*Revision of the State Constitution: Papers on Special Topics,* pp. 141–192.) In convention the matter of preparing a budget provision to be included in the Constitution was turned over to the Committee on State Finance. Six documents, among which were included four addresses made to the committee by distinguished public officers and a majority and minority report, were printed in the volume: *Documents of the Constitutional Convention of the State of New York 1915,* Albany, 1915. (Nos. 11, 13, 14, 15, 32, 35.) In addition to all this initial spade work, about two hundred pages of debate were devoted to this budget provision in convention. (*Revised Record—1915 Convention,* II, 1607–1719, 1727–1788; III, 2370–2386.)

Since most of the important facts and recommendations were thoroughly discussed in debate, it is from this last-named source that our summary will be taken. A rearrangement of this material has been necessary to juxtapose difficulties and answers to difficulties.

Mr. D. Nicoll in debate said that there would be no need of budget reform unless there were serious defects in the present financial system. The defects as he saw them were mainly these: (1) There was a lack of publicity in the preparation of general appropriation bills and the people never knew what would be included in them until it was too late to remedy the situation. (2) There was a lack of deliberation in the consideration of the appropriation bills. They were rushed through the Legislature in the closing days of the session quickly and heedlessly. (3) In rushing through the appropriation bill, no time was left for criticizing it.

The proposed amendment remedied the defects in Mr. Nicoll's opinion: (1) It provided for public hearings on the estimates of the various departments. (2) It placed the burden of deliberation and revision and responsibility squarely on the shoulders of the Governor. (3) It imposed upon the Legislature the duty of publicly criticizing the budget and gave it the right to call upon the Governor and other State officers to answer its criticisms. (*Ibid.,* II, 1710–1.)

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Mr. Brackett objected to the budget provision as proposed to the convention. He said that no one disputed the fact that there should be a scientific budget for State appropriations, but he asked who should initiate such a budget. The power of framing appropriation bills should be, as it always has been under the American system, in the hands of the Legislature. However, he would be willing to support a suggestion of Mr. A. E. Smith that the chief fiscal officer of the State should frame the budget bill and that then the Legislature might criticize and revise it, and finally that the Governor should approve or veto it. But he did not believe in the confusion of functions whereby the Governor framed a bill and the Legislature passed it without the opportunity for a gubernatorial veto. (*Ibid.*, II, 1679–1685.)

Mr. Hinman replied that the Comptroller was not a man big enough to frame a budget, because he would not be in a position to withstand the pressure of various individuals and groups seeking appropriations. (*Ibid.*, II, 1693.)

Mr. Byrne suggested that the power of framing the budget should be placed in a board, because "there is safety in numbers." (*Ibid.*, II, 1708.) But Mr. Sheehan replied that the present extravagance was the result of unwieldy distribution of power and that this power should be concentrated in one man—the Governor. (*Ibid.*, II, 1705.) Mr. D. Nicoll added that a Board of Estimate had been tried in the State in 1913 and had proved ineffective. (*Ibid.*, II, 1711.)

Mr. R. B. Smith argued that the Legislature should frame the budget on the grounds that responsibility for initiation should be wholly with one authority and responsibility for veto wholly with another. (*Ibid.*, II, 1717.) Mr. Wagner argued for the same cause and said that the man to whom power was being given, in the interest of economy, to initiate a budget bill, was the man responsible for most of the increases in cost of government. He cited as an example of his contention the establishment of the Public Service Commissions on the recommendation of Governor Hughes at an annual cost of $3,000,000 to the State. (*Ibid.*, II, 1671.) In reply Mr. Sheehan said that after ten years experience in legislative councils, he was of the opinion that the Governor could do a better job in preparing a budget than the Legislature. (*Ibid.*, II, 1705.) And Mr. Stimson had already urged that the Governor, as being the executive officer in charge of all departments and in closest touch with them, should assume the duties of the executive officer in all business corporations—that of determining how much should be spent in conducting the business. The Legislature would take the place of the board of trustees to vote on the recommendations of the executive. (*Ibid.*, II, 1613–14.)

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Mr. A. E. Smith advocated that heads of departments should give their estimates under oath, for in this way he believed that they would be forced to read the estimates at least, instead of entrusting the entire matter to the chief financial clerk. (*Ibid.*, II, 1660.) But Mr. Smith never introduced this proposal in the form of an amendment, and so the matter was dropped. (*Ibid.*, II, 1788.)

Mr. A. E. Smith advocated more stringent regulations with regard to appropriations for local purposes. This would apply to article III, sec. 20 rather than to the article on the budget provision, but in his opinion it was pertinent to the question because more extravagance and waste were found in these appropriation bills than in the appropriations for the State departments and bureaus. (*Ibid.*, II, 1660.) But Mr. Hinman claimed that departmental appropriations were a great source of extravagance also. Heads of departments asked for twice as much as they expected and frequently got more than they needed. (*Ibid.*, II, 1698.)

Mr. Weed objected to the provision requiring the Governor to appear before the Legislature at the request of the legislators to answer questions relative to the various provisions of the budget. He felt that the Governor might be subjected to cross-examination and abuse inconsistent with the dignity of his office. (*Ibid.*, II, 1731.) Mr. Byrne asked why the Governor should not be examined if he were to initiate the budget. (*Ibid.*, II, 1733.) Mr. Wagner said that the arguments of Mr. Weed against the Governor's appearance before the Legislature presupposed that the legislators were rowdies. (*Ibid.*, II, 1734.) And he urged that a vote of one-third of the members elected should be sufficient to call the Governor before the Legislature. In this way the minority party would receive the opportunity to be heard in objection and the steam-rolling measures of the majority party would be curtailed by the ensuing publicity. (*Ibid.*, II, 1736.)

Mr. Ostrander objected to the budget provisions *in toto*. He asked the delegates who pinned all their faith for economic reform to a budget to take a look at the city of New York. When Mayor McClellan went into office (in 1904) the city had a debt of about $300,000,000. Since that time the city has been operating under "a large, ample and fine-looking budget" and the debt of the city is now (1915) $1,200,000,000. (*Ibid.*, II, 1740.)

When a final vote was taken on the constitutional provisions for a budget, the vote in the convention was 137 in the affirmative and 4 in the negative. (*Ibid.*, III, 2385–6.) Thus the budget was included in the Constitution submitted to the people in 1915, but rejected by them in the November elections.

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Before relating the history of the budget provision between 1915 and the year it was finally accepted by the people (1927), it may be interesting to note a few changes made by the Legislature which departed from the amendment which passed in convention in 1915.

(1) (a) 1915 provision. Estimates of heads of departments should be submitted to the Governor by the 15th day of November. (b) 1927 provision. The date of submission is changed to October 15.

(2) In 1915 no provision was made for the attendance of representatives of the appropriate committees of the Legislature at the hearings on revision of estimates. Such provision is found in section 1, article IV-A, of the present Constitution.

(3) (a) 1915 provision. The date assigned for submission of the budget by the Governor was February first. (b) 1927 provision. The date of submission was changed to January 15, except in the case of a newly elected Governor to whom an extension of time was allowed until February 1.

(4) According to the 1915 provision it was the duty of the Governor to appear before either house if so requested by them to answer questions relative to the budget. Such provision was not included in the amendment of 1927.

(5) The 1915 amendment gave the Legislature no power to add items to the Governor's budget bill, except with regard to items for the Legislature and the judiciary. The 1927 amendment gave the Legislature the right to add such items each for a single work or object to be specified in the bill and each to be subject to the veto of the Governor.

The history of the budget provision is closely linked to the history of the reorganization of the State government in the ten-year period between 1915 and 1925. The plan advocated was to place all the various governmental agencies in appropriate departments and then to impose on the head of each department the duty of preparing and revising estimates of the total expenditures necessary to carry on his work. In this way it would appear early in the legislative session how much money would be required to carry on all government activities and taxes could be levied accordingly.

In 1916 an amendment was introduced in the Senate to provide for an executive budget and the reorganization of State departments. This amendment died in committee. For the next three years the records are silent on the budget provision, but in 1919 when Governor Smith took office a commission was appointed to investigate facts and conditions

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relative to the reorganization and budget plans. The recommendations with regard to the State departments will be considered under article V, but the matters referring to the budget will be quoted here.

Reconstruction Commission: Report to Governor Alfred E. Smith on Retrenchment and Reorganization in the State Government, Albany, 1919

Present Budget Defects, p. 10:

1. The department estimates are merely "compiled" and sent to the Legislature.

2. Each member of the Legislature may introduce as many appropriation bills as he pleases.

3. No responsible officer measures the merits of proposed appropriation bills against the total expenditures and revenues of the State.

4. The general appropriation bill of the State is brought out on the floor of the Legislature a few days before adjournment. Debate is limited, perfunctory and futile.

5. After the general appropriation bill has been passed, a number of petty appropriations are rushed through without scrutiny or debate.

6. When the Legislature adjourns, no one knows how much has been appropriated and without knowing total expenditures, the Legislature passes revenue bills to meet them.

Summary of Recommendations, pp. 317–9:

"An executive budget system will be embodied in proper form in the Constitution of the State. The following are the essential elements of such a system:

"1. The Governor will be made responsible for securing estimates of proposed expenditures from responsible officers of all State spending agencies; also estimates of all anticipated revenues of the State for the period to be financed. The incoming Governor of New York assumes the duties of his office on January 1 which is usually two or three days before the beginning of the legislative session. If the budget program has just been prepared by the outgoing Governor and submitted to the Legislature, the new Governor cannot be held responsible for it. Estimates may be gathered and compiled under the supervision of the old administration, but the new administration will have the power to make up the budget and present it to the Legislature. The new Governor will make up the budget after he has appointed his departmental heads and can call them into conference to determine their relative needs in the financial program for the coming year.

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"2. The Governor will be required to review all estimates of expenditures and with the aid and counsel of his administrative colleagues to prepare a complete plan of proposed expenditures in which the relative importance of all demands on the treasury are considered.

"3. The Governor will have a permanent staff agency to assist him in the collection of budget data and the preparation of the budget. Under the proposed plan of reorganization the Bureau of Administration in the Executive Department will be charged with the duty of gathering the estimates and other information relative to the budget and of making a complete compilation of all budget data for the use of the Governor.

"4. The Governor will be required to hold public hearings on a tentative budget before its presentation to the Legislature.

"5. The Governor will be required to present to the Legislature early in the session a complete plan or budget embracing all of the proposed expenditures shown in connection with the anticipated revenues of the State; also a statement of the condition of the treasury both at the beginning and at the end of the period covered by the budget and a program of revenue measures. If found necessary in financing expenditures for public works to raise part of the moneys required by the issuance of bonds, then the budget will contain an estimate of such proposed expenditures with a statement of the amount to be raised by bond issues. Full details will be given as to the requirements to be attached to the issuance of the bonds.

"6. The Legislature will be required to begin immediately and openly to consider the Governor's budget.

"7. The Governor will have the right and it shall be his duty to meet with the committees of the Legislature and with the Legislature as a whole to explain, discuss and define his financial proposals.

"8. The Legislature will not be permitted to pass any appropriation bill except upon recommendation by the Governor until the Governor's entire plan is acted upon.

"9. The Legislature will not be permitted to add to the Governor's proposed budget but only to reduce and strike out items therein.

"10. The Legislature will be allowed to provide for expenditures in addition to those contained in the Governor's budget only by special procedure and subject as at present to the Governor's veto.

"11. The Governor will be given authority to supervise the expenditure of all appropriations and will be required to report transfers and changes in the schedules or allotments of appropriations to the Legislature. In order that the Governor and his department heads may have

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reasonable latitude in making expenditures the appropriation or budget bill will not be rigidly itemized. One of the two plans will be adopted. The first plan contemplates that the appropriation for each main class of expenditures in an organization unit will be made in lump sum with a supporting schedule for each lump sum. This schedule will serve as a guide to expenditures rather than a rigid program, transfers being permitted within a schedule by application to and approval by the Governor. Under the second plan a lump sum appropriation will be made by the Legislature to each main class of expenditure in an organization unit and control over the expenditure will be secured by requiring each unit to allocate its lump sum appropriation with the approval of the Governor just prior to the beginning of the fiscal year for which the appropriation is made."

In 1920 bills were introduced in both houses to provide for reorganization and an executive budget, and all the bills were based on the recommendations of the Reconstruction Commission. Three bills to provide for reorganization passed in both houses and were filed with the Secretary of State. The budget bill suffered a more severe fate and died in committee in both houses despite an unsuccessful effort in each house to discharge the committees.

Governor Smith was swept out of office by the Republican landslide of 1920, and although bills to provide an executive budget were introduced in both houses in 1921 and 1922, all such bills died in committee. Governor Smith returned to office in January, 1923, and again he exerted all his efforts to pass the budget plan and the reorganization plan. The reorganization plan which had been killed in 1921, again passed both houses and was filed with the Secretary of State. But the budget provision, although it passed in the Senate under an emergency measure of the Governor, died in committee in the Assembly. In 1924 the measure again passed in the Senate, and again it died in committee in the Assembly, although this time a futile effort was made to discharge the committee. In 1925, when the reorganization provisions were passed for a second time by both houses and submitted to and accepted by the people, the budget amendment died in committee in both houses.

Governor Smith appointed a commission in 1925 to provide for the placing of the various governmental agencies in appropriate departments as provided by the constitutional amendment of that year. This commission in its report to the Legislature in 1926 advocated the establishment of a budget plan to fully accomplish the reforms of economy and

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efficiency in the State government. A budget provision was passed by both houses in that year and again in 1927 and it was approved by the people in the general election of the latter year.

Between 1927 and 1937 no suggestions for change in this provision were made. But on December 27, 1937, there appeared in the newspapers of the city certain recommendations by a finance committee of the Legislature relative to budget provisions. This material was incorporated into the Report of the Joint Legislative Committee on State Financial Policies. (Leg. Doc. [1938] No. 41, Albany, 1937.) Many of the proposals contained in the report can be accomplished by legislative amendment to the existing State Finance law; extensive reference is, therefore, omitted.

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CHAPTER VI

STATE DEPARTMENTS—ARTICLE V

SECTION 1—COMPTROLLER AND ATTORNEY-GENERAL

"[a] The Comptroller and Attorney-General shall be chosen at a general election, [b] at the times and places of electing the Governor and Lieutenant-Governor, and shall hold office for the same term as the Governor and the Lieutenant-Governor. [c] The Comptroller shall be required: (1) To audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. In such respect the Legislature shall define his powers and duties and may also assign to him supervision of the accounts of any political subdivision of the State, but shall assign to him no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this Constitution to the contrary notwithstanding. [d] Each of the officers in this article named shall, at stated times during his continuance in office, receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected; nor shall he receive to his use any fees or perquisites of office or other compensation."

(a) Comptroller and Attorney-General

(1) Comptroller

Both the Comptroller and Attorney-General are traditional officers of New York State. The office of Auditor-General (Comptroller) existed in this colony for nearly a century before the Revolution. In July 1776 the Provincial Convention of the State appointed an Auditor-General. The Constitution which was framed in 1777 did not make the Comptroller a constitutional officer, and hence made no provision for the selection of that officer except the general provision that all State officers whose selection was not otherwise provided for by the Constitution should be chosen by the Council of Appointment. (*Const. 1777,* article XXIII.) The Auditor-General who had been appointed by the Provincial Convention was continued in office until October 1781, when he resigned. In 1782 the Legislature established the office

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of Auditor-General to be appointed by the Governor, subject to confirmation by the Council of Appointments. In 1797 the office of Auditor-General was abolished and the office of Comptroller was established. The Comptroller was charged with the duties previously performed by the Auditor-General "to settle and adjust the public accounts of the State," and in addition, he was required to draw warrants on the Treasurer for all sums payable from the State treasury and to "examine and liquidate claims against the State" when authorized by law. The Convention of 1821 made the Comptroller a constitutional officer and provided for his appointment by the Legislature. (*Const. 1821,* art. IV, sec. 6.) Lincoln in his *Constitutional History of N. Y.* records no debate on the subject. In 1846 the Comptroller was made an officer elected by the people. (*Const. 1846,* V. sec. 1; Lincoln, II, 526–8.)

The convention of 1867 made no recommendations to change the status of the Comptroller as provided by the Constitution of 1846. (Lincoln, II, 343–4.) In 1872 Governor Hoffman in his annual message to the Legislature recommended that all State administrative officers be appointed by the Governor and removed by him at pleasure. The Constitutional Commission of 1872 disagreed with the Governor on the office of Comptroller and recommended that the office remain an elective office. (Lincoln, II, 522.) The Constitution of 1894 did not change the provision relating to the election of the Comptroller. (Lincoln, III, 313.)

In the convention of 1915 Mr. Courtlandt Nicoll in a minority report of the committee of State officers recommended the appointment by the Governor of the Comptroller because "any other method of selection is a serious impairment of the Governor's responsibility to see that the moneys of the State are expended legally." (*Documents 1915,* Document No. 40, pp. 9–10.) The report was not considered favorably either by the members of the committee on State officers or by the delegates of the convention. The Comptroller thus remained an elective officer and no attempt has been made from 1915 to date to change the provisions which provide for the election of the Comptroller.

(2) Attorney-General

As has been mentioned before, the office of Attorney-General is traditional in New York State. For a few years after the English occupation the Attorney-General was appointed by the Governor, but about 1700 the power of appointing that officer was vested in the Crown.

The first Attorney-General of the State of New York was appointed by the Constitutional Convention of 1777 as were the other State officers deemed necessary to establish the new State government. Afterwards, until 1821, this office was filled by the Council of Appointment.

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At the convention of 1821 when this council was abolished and the State officers were to be chosen largely by the Legislature, a plan was introduced by the committee on State officers to have the Attorney-General appointed by the Governor with the consent of the Senate. The convention, however, rejected this plan and provided that the Attorney-General should be chosen by the Legislature along with other important State officers. (Lincoln, II, 527.)

In 1846 the standing committee on State officers reported in favor of election by the people of the Attorney-General and their recommendation was accepted by the convention and incorporated into the Constitution. (Lincoln, II, 136.)

In 1867 one of the delegates of the Constitutional Convention, Mr. Duganne, offered an amendment providing for the appointment of the Attorney-General by the Governor and the Senate. The arguments for and against the measure are listed below.

A. Arguments for the Appointment of the Attorney-General

Mr. Kernan	1. The Governor should have a cabinet to advise with, and the person who is to advise him as to law should be nominated by him.
Mr. Daly	2. It is most injudicious to leave the chief adviser of the executive in matters relating to the administration of the law throughout the State entirely independent of the Governor, instead of making him a confidential and consulting officer which he would be if appointed by the Governor.
Mr. Andrews	3. The Attorney-General advises the Governor on the execution of the laws; if the Attorney-General is to be elected you confer on the Governor the functions of the executive while you divorce from his control the agencies by which he is to execute the laws.
Mr. Barker	4. The most cordial relations, both social and political, should exist between the Governor and the Attorney-General. Therefore, the Governor should have power of appointment.

B. Against the Appointment of the Attorney-General

Various speakers	1. The Attorney-General has duties to perform not connected with the executive; while he may be, and probably should be, the Governor's adviser on public affairs, he is also the adviser of other departments of the government.

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Mr. Townsend 2. It is not the Governor alone but the people who want an Attorney-General. He has to take care where the interest of the people are concerned, and take care of their money, so far as action in the courts is concerned. If the Attorney-General does his duty, it matters little to the people whether he is in accord with the Governor or not. Indeed, it may sometimes be to the interest of the people that the Attorney-General is not in accord with the Governor.

Mr. Pierrepont 3. The Attorney-General should be a man who could not be ordered about by anyone. His opinions should be above any fear of loss of his office. His duties are of the highest order,—as high as those of any judicial officer, and he should be as independent as a judge. The opinion of the Attorney-General are upon great questions affecting the interest of the state. Therefore, the Attorney-General should not be a mere creature of the Governor to supervise his vetoes and obey his dictation.

Mr. Folger 4. It was not claimed that the Governor could not get a constitutional opinion from the Attorney-General even if he belonged to a different political party. The Attorney-General is the officer of the people and of every State-officer and department, and he has answered all their inquiries. The Attorney-General should not be the officer of the Governor alone, and subject to his controlling influence. The Legislature has as much right as the Governor to call on the Attorney-General for a constitutional opinion, and the Attorney-General should not be subject to either. The speaker cited an instance where the Governor vetoed a bill which the Attorney-General, in answer to an inquiry by the Legislature, had pronounced constitutional.

The proposed amendment was defeated in the Committee of the Whole by the close vote of 58 to 54. It was afterwards reviewed in convention and rejected by a vote of 66 to 50. (Lincoln, II, 344–6.)

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The Commission of 1872

The Constitution of 1867, with the exception of the judiciary article, was rejected by the people at the polls in 1869. However, there still was demand for constitutional revision. The Legislature was unable to handle extensive constitutional revision in addition to its ordinary business, and so in 1872 a commission of "thirty-two eminent citizens" was created by the Legislature at the suggestion of the Governor to consider this subject and report its findings at the next legislative session. (Lincoln, II, 464–470.)

In his message to the Legislature recommending the appointment of a commission to revise the Constitution, Governor Hoffman urged that the office of Attorney-General be filled by appointment by the Governor and he also advised a reorganization of the Department of Law much in the manner of those who today sponsor a State Department of Justice. We shall quote his words directly.

> ". . . The Attorney-General is the legal adviser of the Governor. The chief executive officer should be allowed the privilege which all men exercise, of selecting for a legal adviser such a person as is, in his judgment, the most competent. *The Attorney-General ought to have supervision over and be responsible for the conduct of all that class of officers, throughout the State, which is charged with the duty of prosecuting for crime and other violations of State laws. Prosecuting officers for offenses against the laws of the State, now erroneously called district attorneys, should not be county officers, but should be the deputies of the Attorney-General, appointed by him or by the Governor on his recommendation. In this way responsibility for the due enforcement of the laws could be brought home, as it should be, directly to the Governor, upon whom the duty is devolved to see that the laws are faithfully executed.*" (Italics ours.)

Governor Hoffman concluded his discussion of this office with the following comment:

> "It seems to me proper that . . . the Attorney-General should be appointed by the Governor without the intervention of the Senate, and hold office during his pleasure."

The commission adopted the Governor's recommendation to this extent that it proposed to vest in the Governor the power of appointment of the Attorney-General. However, the amendments to the article on

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State officers (art. V) were not passed by the Legislature and thus were never submitted to the people. (Lincoln, II, 522–4.)

The Convention of 1894

In the convention of 1894 the amendment with regard to the appointment of the Attorney-General was again raised, but there was little discussion on the subject, and no amendment in this regard was adopted by the convention. Thus the office of Attorney-General was still to be filled by election. (Lincoln, III, 312–313.)

The Convention of 1915

The Committee on Governors and other State Officers of the 1915 convention had reported their amendments for the revision of the State executive departments. In the sections which they proposed to the convention, the offices of Comptroller and Attorney-General were left elective. Mr. Courtlandt Nicoll proposed to the Committee of the Whole that this section be amended so that the office of Attorney-General should become appointive, basing his stand on the claim that the Attorney-General is the legal arm of the Governor, and that the Governor must depend on him for the execution of the laws. A section of the debate on this topic here follows:

Mr. Barnes speaking:[1]

> . . . "to my mind, the Attorney-General represents the State as an entity and therefore he should be elected. I have felt that it would be most unwise if the Comptroller's office should be made appointive. It is traditional in the State."
>
> . . . "I have very great doubt whether the Secretary of State ought not be elected."

Mr. J. G. Saxe speaking:

> "I wonder if the delegate knows that, in enunciating the principles he has been enunciating for the last few moments, he has been practically quoting the exact plank of the Short Ballot Association itself?"

Mr. Barnes speaking:

> "I have not examined it. I have not read any short ballot literature if I could avoid it."

[1] *Revised Record of the Constitutional Convention 1915*, Vol. IV, pp. 3530 and 3531.

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Mr. Saxe speaking:

"The Short Ballot Association throughout the United States makes its first plank that only those officers should be elected who are important enough to attract and deserve public examination."

Mr. Barnes:

"That is as it seems to me."

Mr. Blauvelt:[2]

"On the question of whether or not the Attorney-General should be elective or appointive, I sincerely hope that the amendment of Mr. Nicoll will not prevail, for the reason that the Attorney-General is not merely an administrative officer. He exercises very proper judicial powers; he is the legal adviser of the people of the State, and, in a sense, also of the political subdivisions of the State. He advises the heads of the various departments of the State government, and, to that extent, his duties are administerial. But he also brings actions in the name of the people of the State. He advises the local boards in the various counties, towns and villages of the State, and his decisions and opinions in those matters are judicial in nature and have the force and effect of judgments until the courts otherwise provide. I think he is an officer of such importance to the State that he should be elected."

Mr. Sheehan:[3]

"I have no objection to the election of the Attorney-General. In fact, there is much more reason why the Attorney-General should be an elected officer than that the Comptroller should be chosen by the people. He is made by law the prosecuting officer in criminal matters in place of district attorneys in special cases. It is his duty to prevent violation of law and to expose wrong doing in the State government wherever found. Let us keep that officer entirely free of official control or interference. He is the legal officer and not a financial officer of the State, and the Governor can shift no responsibility upon his shoulders such as he can with the occupant of the Comptroller's office."

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[2] *Ibid.*, Vol. IV, p. 3535.
[3] *Ibid.*, Vol. IV, p. 3537.

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The convention of 1915 finally decided that the Attorney-General should be an elective officer. The Constitution was, as we know, rejected by the people, and by virtue of the 1894 Constitution, the Attorney-General remained an elective officer.

The commission appointed by Governor Smith in 1919—and we shall consider its work in more detail in the following section—recommended that the Attorney-General should be appointed by the Governor. It was not until 1925 that the revised article V which was the fruit of the work of the commission was submitted to and accepted by the people, and we find that the Legislature did not accept the recommendation of the commission in regard to the appointment of the Attorney-General, although it adhered quite strictly to the suggestions made by the commission in most other respects. The reasons for this attitude of the Legislature are not available, since the debates of the Legislature are not published. However, since the revised article was also based on the recommendations of the 1915 convention, one may hazard the guess that the legislators were more impressed by the arguments advanced in favor of the election of the Attorney-General than they were by the arguments in favor of his appointment.

Between the time of the adoption of this article in 1925 and the year 1936 there was no effort made to change the provision for the election of the Attorney-General. In the latter year two sets of amendments were introduced in each house to have a department of justice created with the Attorney-General appointed by the Governor. Both sets of amendments died in committee in their respective houses. In 1937 a similar amendment was introduced in both houses and suffered a similar fate.

(b) Comptroller and Attorney-General to be Elected at the Same Time and to Hold Office for the Same Term as the Governor

Under the first Constitution the Comptroller and the Attorney-General were subject at any time to removal by the Council of Appointment. (Lincoln, I, 672–3.) The Constitution of 1821 (art. IV, sec. 6) provided that both these officers should hold office for a term of three years from the time they were appointed by the Legislature. The Constitution of 1846 (art. V, sec. 1) reduced the terms of these officers to two years but did not provide that the election of these officers should take place at the same time as the election for Governor. As a matter of fact in 1867 when the next convention met, both the Comptroller and Attorney-General were chosen at elections in non-gubernatorial years. To remedy this situation the convention of 1867 proposed that these officers be chosen at the same time and for the same term as the

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Governor. (Lincoln, II, 344.) This same recommendation was repeated by the commission of 1872 with regard to the office of Comptroller—the Attorney-General was to be appointed by the Governor with the consent of the Senate. (Lincoln, II, 520.) However, the recommendations of these bodies in this regard were rejected either by the people or the Legislature. In the convention of 1894 the question arose again and this time the provision was incorporated into the Constitution that elective State administrative officers should be chosen at the same time and for the same term as the Governor. (Lincoln, III, 312–3.) Although the entire article has been greatly revised since 1894, no proposal has ever been made to change this provision.

(c) Powers and Duties of the Comptroller

Previous to 1915 no attempt was made to fix constitutionally the duties and powers of the Comptroller. These matters had been cared for by statute. In the passage of the years, a variety of functions had been given to the Comptroller. But in the convention of 1915 one of the reasons advanced for the retention of the Comptroller as an elective officer was the need for an independent auditing official. However, when the amendment was submitted to the convention, the Legislature was given the power to increase, diminish or modify the duties and powers of the Comptroller. Mr. Wagner of New York urged the convention that the amendment be changed so as to preserve the Comptroller's power to audit all claims against the State. If the Legislature could deprive the Comptroller of the power of audit, not only was there no need to have the Comptroller elected, but there was the danger that there would be no independent auditing official. (*Revised Record, 1915 Convention,* IV, 3551–2.) Mr. A. E. Smith objected to the provision of the amendment which continued the office of Comptroller with the same duties as he then had. Many administrative tasks which had no connection with the duties of an auditing official had been given to the Comptroller, and for the sake of efficiency and economy, Mr. Smith felt that the Constitution should not leave them to this officer despite the power of the Legislature to diminish or modify the same. Mr. Smith claimed that the tasks were left to the Comptroller only to keep intact the patronage attached to this office. (*Ibid.,* IV, 3554–5.) Mr. Austin denied the implication that the amendment was so worded to retain patronage, and claimed high efficiency for the Comptroller's office as at that time established. (*Ibid.,* IV, 3555–7.) At all events, the measure to fix by constitution the duties and powers of the Comptroller was defeated in the 1915 convention.

In 1919 the report of the reconstruction commission (of which more in the next section) recommended that the fundamental duties of the

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Comptroller be outlined in the Constitution in order to prevent the assignment to this department by statute of purely administrative functions. (*Report to Governor Alfred E. Smith on Retrenchment and Reorganization of the State Government,* Albany, 1919, p. 57.) This recommendation was approved by the framers of the amendment which the people accepted in 1925. There has since been no attempt to change the provision.

(d) Compensation not to be Increased or Diminished; Nor are Fees or other Compensation to be Received

Until 1846 the Constitution of New York State contained no provisions relating to the compensation of administrative State officers. In the convention of that year the standing Committee on State Officers reported in favor of fixing the salaries of administrative officers and of eliminating fees and perquisites which attached to certain offices. While the convention was considering this article, one of the delegates (Mr. Marvin) suggested as a substitute for the provision fixing salaries, a clause requiring the Legislature to fix the salaries, and prohibiting their increase or diminution during the term for which an officer was elected. This proposition was adopted in substance. (Lincoln, II, 136–7.)

Since 1846 there has never been any thought of changing this provision, although considerable changes have been made in this article in other respects. During the convention of 1915 the Committee on the Governor and Other State Officers omitted this provision in the first draft of the new article V, but Mr. R. B. Smith urged its continuance and the convention voted for its retention. (*Revised Record 1915*, IV, 3620.)

SECTION 2—DEPARTMENTS AND STATE GOVERNMENT

"There shall be the following civil departments in the State Government: First, Executive; second, Audit and Control; third, Taxation and Finance; fourth, Law; fifth, State; sixth, Public Works; seventh, Architecture; eighth, Conservation; ninth, Agriculture and Markets; tenth, Labor; eleventh, Education; twelfth, Health; thirteenth, Mental Hygiene; fourteenth, Social Welfare; fifteenth, Correction; sixteenth, Public Service; seventeenth, Banking; eighteenth, Insurance; nineteenth, Civil Service; twentieth, Military and Naval Affairs."

The history of the civil departments of the State is the history of the growth of the State from small beginnings. The Constitution of 1777

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established no State departments as such, but it did provide for the election of a State Treasurer by the Legislature. Four other offices—those of Auditor-General, Attorney-General, Commissary-General and Surveyor-General, were established by statute. The office of Secretary of State was continued from colonial days without benefit of statute. (Lincoln, *Const. Hist.*, II, 520–32.) We have then from the beginning of our State's history, the nuclei of seven of the twenty departments listed in this article: Executive, Audit and Control, Taxation and Finance, Law, State, Public Works and Military and Naval Affairs. With the exception of the Governor and the Treasurer, the heads of all these embryo departments were appointed by the Council of Appointments. (*Const. 1777,* art. XXIII.)

The Constitution of 1821 made all of the officers above named, except the Commissary-General, constitutional officers and provided for their appointment by the Legislature. The terms of all the officers were to be for three years, except that the Treasurer was to be chosen annually. (*Const. 1821*, art. IV, sec. 6.)

The Constitution of 1846 continued these five officers—Secretary of State, Comptroller, Attorney-General, Treasurer, and State Engineer and Surveyor—as constitutional officers, and provided for their election by the people for a term of two years. It also required that the State Engineer and Surveyor should be a practical engineer. (*Const. 1846,* art. V, secs. 1, 2.) This Constitution also provided for three canal commissioners and three State prison inspectors to be elected by the people. (*Const. 1846,* art. V, secs. 5, 6.) Another section (sec. 7) grants the Governor the power to suspend the Treasurer from office during the recess of the Legislature, whenever he shall judge the Treasurer to have violated his duty. Lastly, section 8 of this article abolished offices for the weighing, etc., of merchandise, a provision which is still contained in the Constitution (art. V, sec. 5) and which will be treated later.

In summarzing the work of the convention of 1846 relative to State officers, we find provisions for six sections that are wholly new and one that is mainly new; the elective State prison inspectors who are made constitutional officers point to the creation of a Department of Correction; the elective canal commissioners who are also made constitutional officers were soon to become a part of the Department of Public Works.

The convention of 1867 made few recommendations to change existing provisions of article V. We have already noted the debate as to the appointment or election of the Attorney-General. Closely connected with this topic is a subject that was introduced by the Committee on Prisons relative to the establishment of a State police. Under one plan

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the Legislature was to provide for the establishment of a State police and no other police force was to be organized except under its provisions. Another plan required the Legislature to organize a State police force in lieu of all municipal police. The force was to be under the command of an officer appointed by the Governor and the Senate. There was to be a board of State police consisting of the Governor, the Attorney-General, the chief officer and chiefs of geographical divisions. This board had power to make rules for the governing of the police. Very little discussion was devoted to this subject, and when the report of the Committee on Prisons was submitted to the convention the sections on State police were stricken out without debate. (Lincoln, II, 346–8.)

We may recall that the Constitution of 1867 was rejected by the people at the polls and that a commission was appointed by Governor Hoffman in 1872 to study the question of revision of the Constitution and make recommendations to the Legislature. Following for the most part the suggestions made by Governor Hoffman in his message to the Legislature in that year, the commission recommended drastic revision of article V. The office of Comptroller was to be continued as elective, but all the other constitutional State officers—the Secretary of State, the Attorney-General and the State Engineer and Surveyor—were to be appointed by the Governor with the consent of the Senate. The main argument advanced for this change was that the Governor ought to be vested with the power of appointment of State officers, if he is to be charged with responsibility for the proper administration of public affairs. (Lincoln, II, 520–1.) These recommendations passed both houses of the Legislature in 1873 after they had been amended to leave the office of Secretary of State elective, but they were not approved by the Legislature in 1874 and so were never submitted to the people. (Lincoln, II, 523–4.)

The commission also recommended the abolition of the elective offices of State prison inspectors, and the creation of a Superintendent of State Prisons. The superintendent was to be appointed by the Governor with the consent of the Senate, and he was to serve for a term of five years unless sooner removed by the Governor on charges after an opportunity to be heard in defense had been given. The reason advanced for the change was that the present system of prison management was being gravely abused, and that reform could best be accomplished by the appointment of a single officer, directly responsible to the Governor and subject to removal by him. (Lincoln, II, 532–3.) The Legislature of 1873 approved the amendment without change, but it failed to pass the Legislature in 1874 and was not at this time submitted to the people. (Lincoln, II, 534.)

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The commission also recommended that the Treasurer should be removed from the class of elective officers and that he should be selected by joint ballot of the Legislature for a term of three years. The Legislature of 1873 approved this section without change, but it did not pass the Legislature in 1874 and was never submitted to the people. (Lincoln, II, 534–5.)

Another recommendation of the commission, which passed the Legislature in 1873 and failed to pass in 1874, was the section which abolished the office of commissioners of the Canal Fund and omitted the Comptroller as a member of the Canal Board. (Lincoln, II, 535.)

The commission further recommended the creation of the office of Superintendent of Public Works to take the place of the elective canal commissioners. The superintendent was to be appointed by the Governor with the consent of the Senate for the same term as the Governor, and he was subject to removal by the Governor for cause; the reasons for removal were to be filed with the Secretary of State and reported to the Legislature at the next session. Three assistant superintendents were to be appointed by the Superintendent of Public Works for terms of three years. The assistants were subject to removal by the superintendent for cause, and the Governor was to be notified of the cause for removal. This section was passed by the Legislature in 1873 but did not pass in 1874 and was not submitted to the people until a few years later. (Lincoln, II, 536–8.)

In 1875, article V as it was proposed by the commission was again introduced in the Legislature. Only the provisions for the abolition of State prison inspectors and canal commissioners and for the establishment of the offices of Superintendent of State Prisons and the Superintendent of Public Works passed the Legislature in that year and in 1876. Both these amendments were approved by the people in the election of 1876. (Lincoln, II, 583–5; 595–6.) In 1883 it was proposed to abolish the office of State Engineer and Surveyor as a constitutional officer, possibly in view of the overlapping duties of this officer and the newly created Superintendent of Public Works. The proposal never reached the point where it could be submitted to the people. (Lincoln, II, 585.) Amendments were offered in 1885 and 1891 extending the terms of State officers to four years, but these amendments were never submitted to the people. (Lincoln, II, 585.)

In the convention of 1894 an amendment was proposed authorizing the Governor and Senate to appoint the Secretary of State, Attorney-General, State Treasurer, Comptroller, State Engineer and Surveyor, Superintendent of Public Works, Superintendent of Prisons, Superin-

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tendent of Public Instruction, Superintendent of Banks and Superintendent of Insurance. Although this provision received little consideration from the convention, it is interesting in indicating the existence of the Departments of Education, Banks and Insurance in our State government. (Lincoln, III, 313.) Concerning the Department of Education: this department was established by statute in 1812, but no provisions regarding education, except those referring to the Education Fund, were incorporated into the Constitution until 1894, when they were included in article IX.

In the same convention another proposal was introduced to make the offices of Secretary of State, Comptroller, Treasurer, Attorney-General, Superintendent of State Prisons, Chief Factory Inspector, Commissioner of Labor, Commissioners of Mediation and Arbitration, and Superintendent of Public Buildings elective by the people for terms of four years. Another delegate proposed that the Superintendent of Public Works should be elected by the people. These amendments did not pass the convention, but again they indicate the existence of a Department of Labor in the State government. (Lincoln, III, 313.)

The only recommendations incorporated into the Constitution by a vote of the convention and of the people were the provisions which we have already considered for the election of State officers for the same term and at the same time as the Governor, and the omission of provisions for the abolition of the offices of State prison inspectors and canal commissioners. (Lincoln, III, 313.)

In the convention of 1915 a great amount of time and attention was devoted to the question of the reorganization of State departments. The matter was thrashed out both in convention and in the Committee on the Governor and Other State Officers. Hundreds of pages were given to the debate in the *Revised Record of the 1915 Convention*, but the main arguments which were used may be found in the majority and the two minority reports of the committee on State officers. We shall at first give some of the salient points of the latter document and later give extensive briefs of the debate in convention when we treat the Governor's powers of appointment under article V, section 4.

The Problem

"There were 152 departments, bureaus, boards and commissions which, on the first day of January, 1915, constituted the executive branch of the State government. In numerous instances these overlap in jurisdiction, and conflict in operation."

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"Except in some specific matters and to a partial extent, these agencies are independent of each other and not subject to the inspection, supervision and control of any superior officer, unless it be the Governor himself. It is manifestly impossible for the Governor personally to exercise direct supervision over such a multitude of agencies. They are, therefore, practically free from effective control." (*Documents of 1915 Convention,* Document No. 40, p. 2.)

The Solution

"The plan proposed by your committee divides itself naturally into three groups, according to the general functions of the officers or departments described.

"First, the Attorney-General, who is the law officer of the State and the adviser of the departments, and the Comptroller, who under the proposed system is a State-wide auditing officer, are continued as elective officers. Members of the committee who favor the appointment of these officers have yielded their views to others who prefer their election. The basis of this compromise is to be found in the peculiar relation which these two officers hold to the people of the State as a whole.

"Second, the agencies of government which, from the character of their jurisdiction and authority, cannot be considered as purely executive arms of the State government. These boards or commissions possess, to a large degree, judicial or legislative functions, and make rules and regulations under delegated authority from the Legislature. To this class belong the Department of Education and its Board of Regents, the Public Service, the Conservation, and the Civil Service Commissions. These sustain exceptional relations to the Governor. They serve for longer terms, and their removal has been made more difficult than that of the heads of purely executive departments.

"Third, the departments which are strictly executive in nature. These are the arms of the Governor by which he takes 'care that the laws are faithfully executed,' and for their acts he is held accountable. There was, accordingly, a strong sentiment in the committee in favor of the independent appointment and removal of these officers by the Governor. But a compromise was finally reached by providing that the appointments should be subject to the advice and consent of the Senate. The heads of departments thus appointed constitute the group of advisers on whom the Governor must depend for carrying out the policies of his administration. His authority over them should be unquestionable and direct." (*Ibid.,* Document No. 40, pp. 6–7.)

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The new article V as it was suggested by the Committee on State Officers, was approved by the convention, but the vote of the people rejected the Constitution in November, 1915. The article as submitted to the people provided for seventeen civil departments; there was no provision for Departments of Architecture and Military and Naval Affairs or for an Executive Department; the Departments of Mental Hygiene, Social Welfare and Correction were incorporated into one Department of Charities and Correction; finally, the work of the present Department of Taxation and Finance was carried on by three departments—those of Treasury, Taxation and Accounts.

After the defeat of the Constitution by the vote of the people, nothing was accomplished towards the reorganization of State government until 1919. Soon after his inauguration in that year, Gov. Alfred E. Smith appointed a Commission on Reorganization. Since this report and the recommendations of the convention of 1915 were the bases for future revision of article V, we shall quote in some detail from the report.

RECONSTRUCTION COMMISSION REPORT TO GOVERNOR ALFRED E. SMITH ON RETRENCHMENT AND REORGANIZATION IN THE STATE GOVERNMENT, ALBANY 1919

Introductory Statement by the Governor, p. iii:

With the idea of presenting this problem to the people, I asked the Reconstruction Commission, a non-partisan body which I appointed last January, to make a report on retrenchment and reorganization in the State government. This report, which follows, recommends the consolidation of numerous State departments and the introduction of an executive budget system and makes recommendations regarding State printing, salaries and pensions. I am entirely in accord with these suggestions.

(Signed) ALFRED E. SMITH

Present Administrative Organization, p. 6:

The administrative branch of our present State government is a miscellaneous collection of 187 offices, boards, commissions, and other agencies. They are nearly all independent of one another and most of them are subject to no direct and effective supervision by a superior authority.

Proposed Plan of Administrative Organization and Budget, p. 11:

1. A consolidation of all administrative departments, commissions, offices, boards and other agencies into a small number of departments, each headed by a single officer, except departments where quasi-legislative and quasi-judicial or inspectional and advisory functions require a board.

2. The adoption of the principle that the Governor is to be held responsible for good administration and is to have the power to choose the heads of departments who are to constitute his cabinet and who are to be held strictly accountable to him through his power to appoint and remove and through his leader-

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ship in budget preparation. This involves among other things the reduction in the number of elective administrative officers to two: The Governor and a Comptroller to act as independent financial auditor. Although there are objections to the confirmation by the Senate of nominations by the Governor, we are of the opinion that this check has on the whole worked well and should be retained.

3. The extension of the term of the Governor to four years and the careful adjustment of the terms of department heads with reference to the term of the Governor. Excepting members of boards with overlapping terms, department heads should have the same term as the Governor.

4. The grouping of related offices and work in each of the several departments into appropriate divisions and bureaus, responsibility for each branch of work to be centralized in an accountable chief.

5. A budget system vesting in the Governor the full responsibility for presenting to the Legislature each year a consolidated budget containing all expenditures which in his opinion should be undertaken by the State, and a proposed plan for obtaining the necessary revenues—such a budget to represent the work of the Governor and his cabinet. Incorporation of all appropriations based upon the budget in a single general appropriation bill. Restriction of the power of the Legislature to increase items in the budget. Provision that pending action on this bill the Legislature shall not enact any other appropriation bill except on recommendation of the Governor. Granting to the Governor the power to veto items or parts of items. Provision that special appropriation bills introduced after final action on the general appropriation bill shall secure the specific means for defraying appropriations carried therein.

Proposed Departments, p. 13:

The State government will be organized with the following departments:

Executive Department.
Department of Audit and Control.
Department of Taxation and Finance.
Department of Attorney-General.
Department of State.
Department of Public Works.
Department of Conservation.
Department of Agriculture and Markets.
Department of Labor.
Department of Education.
Department of Health.
Departments of Mental Hygiene, Charities and Correction.
Public Service Commissions.
Departments of Banking and Insurance.
Department of Civil Service.
Department of Military and Naval Affairs.

Important Proposed Changes in Departments

Audit and Control, p. 57:

1. Establish a Department of Audit and Control of which the Comptroller, elected for a term equal in length to that of the Governor, will be the head.

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This will require constitutional change, provided the Governor's term is made four years. The fundamental duties of the Comptroller will be outlined in the Constitution in order to prevent the assignment to his department by statute of purely administrative functions.

The department will be required to perform only those functions which come within the category of audit and control, and the numerous administrative duties now performed by the Comptroller's office will be transferred to the administrative departments. This department will not receive budget estimates or be responsible for their compilation.

Law, p. 79:

1. The Attorney-General will be appointed by the Governor with the consent of the Senate and will serve at his pleasure.

2. All of the legal work of the State will be conducted under the supervision and control of the Attorney-General although special attorneys may be assigned offices in the various departments. This will involve the transfer of all counsel and legal divisions in other departments to the Attorney-General.

3. The present Department of State Police will be retained and be attached to the Attorney-General's office as a Bureau of Police. Members of this bureau will be assigned as decided by the Attorney-General, to be in constant touch with the local district attorneys and to assist in preventing the breaking of laws and the apprehension of criminals.

Public Works, pp. 95–6:

Transfer to the proposed Department of Public Works the functions of the following existing agencies:

Department of State Engineer and Surveyor.
Department of Public Works.
Department of Highways.
Department of Architecture.
Commissioners of the Canal Fund.
Canal Board.
Trustees of Public Buildings.
New York Bridge and Tunnel Commission.
Interstate Bridge Commission.
Engineering and construction work of the Department of Conservation.
New York-New Jersey Port and Harbor Development Commission.
Long Island Waterway Improvement Board.

In all interstate public works projects the Commissioner of Public Works will represent and cast the vote of the State of New York.

Agriculture and Markets, pp. 111–2:

The Council of Agriculture and Markets will be continued for the present as the head of the Department and will be composed of one representative from each of the nine judicial districts of the State, one representative at large, and the Commissioner of Markets of New York City ex-officio; the ten members to be elected by the Legislature for terms of ten years as at present.

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Public Service Commission, pp. 206–7:

There will continue to be two Public Service Commissions to be known as the First and Second District Commissions each under a single commissioner appointed by the Governor with the consent of the Senate to serve at his pleasure.

The present Transit Construction Commission in the First District will be transferred to the city of New York and the commissioner will be appointed by the mayor.

The council and legal staff of both commissions will be transferred to the office of the Attorney-General if the Attorney-General is made an appointive officer.

In 1920 Governor Smith urged the Legislature to take appropriate action on this report. The Legislature was predominantly Republican, and was not too favorable to the proposals of the Democratic Governor. However, there was strong public pressure behind the proposed reform and Governor Smith utilized this pressure to secure results from the Legislature. Senator Sage introduced a series of bills providing for constitutional amendment of article V. Three of these bills were passed by both houses of the Legislature in 1920 and filed with the Secretary of State. But in the Republican landslide of 1920, Smith was defeated for Governor and the Legislature of 1921 failed to pass the amendments. (A. E. Buck—*Administrative Consolidation in State Departments,* New York, 1930, p. 36.)

In 1923 Smith again assumed office as Governor and he began a drive for administrative reorganization, an executive budget and a four-year term for Governor with election in non-presidential years. The last two measures failed to pass the Legislature at the time, but the amendment for the reorganization of State departments passed both houses in 1923 and again in 1925. It was thus submitted to the people in the general election of that year and approved by their vote. (*Ibid.,* p. 37.)

The section as it now stands in our Constitution is unchanged from this date with one single minor exception which we shall note later.

After the adoption of the amendment, Governor Smith appointed a non-partisan commission to help the Legislature to provide by law for the appropriate assignment of existing functions of the various boards, commissions and bureaus to the new departments. The commission also drafted bills to carry out their recommendations. The main guiding principle of the commission was to make the functions of the various departments, so far as was possible, kindred in nature. The recommendations of the commission were published in *The Report of the State Reorganization Commission,* Legislative Document (1926) No. 72,

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and submitted to the Legislature on February 26, 1926. The report takes us out of the field of constitutional history and into the field of the legislative power with regard to the State departments which had best be considered in the next section. The only matter that concerns us here is that the commission recommended the consolidation of the Department of Architecture into the Department of Public Works, and the absorption of the Department of Military and Naval Affairs into the Executive Department. Both these changes were accomplished without constitutional amendment by virtue of the power granted to the Legislature in the next section.

The only constitutional amendment to this section since 1925 has been the changing of the name of the Department of Charities to the Department of Social Welfare—an amendment approved by the people in 1931. A similar change would be required if a Department of Justice were to be established in place of a Department of Law.

In connection with this section, we shall append a listing of the various State departments with an explanation of the structure and functions of each. But before this information is given, we shall list the amendments proposed relative to this section which were not submitted to the people.

(1) 1930—To create a Department of Commerce: introduced in both houses and died in committee in both.

(2) 1931—To create a Department of Commerce: introduced in the Assembly and died in committee.

(3) 1931—To create a State Trade Commission: new section 3-a: introduced in both houses and died in committee in both.

(4) 1935—To create a Department of Real Property: introduced in the Assembly and died in committee.

(5) 1935—To create a Department of Justice: introduced in both houses and died in committee in both.

(6) 1936—To create a Department of Justice: introduced in both houses and died in committee in both.

(7) 1937—To create a Department of Justice: introduced in both houses and died in committee in both.

(8) 1937—To create a Department of Law and Justice: introduced in the Assembly and died in committee.

(9) 1937—To create a Department of Industry and Commerce: introduced in both houses and died in committee in both.

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VARIOUS STATE DEPARTMENTS

A. Executive Department

Head: The Governor—elected.

(1) Division of the Budget

(a) Head: Budget Director—appointed by Governor.

(b) Function: This department assists the Governor in assembling, analyzing and revising the estimates of revenue and the requests for appropriation submitted by the various State departments and agencies. It likewise assists the Governor in making such investigations, studies and surveys as may be necessary in order to supervise properly the fiscal operations the State government.

(2) Division of Military and Naval Affairs.

(a) Head:[4] Adjutant General—appointed by Governor.

(b) Divisions: New York National Guard
The Naval Militia
Bureau for Relief of Sick and Disabled N. Y. Veterans
Soldiers' Bonus Bureau (Discontinued June 30, 1937).

(c) Functions: This division supervises the preparation of all reports required from the State by the Federal government; it maintains a register of all officers of the land and naval forces of the State and is general custodian of the ordnance, arms and accoutrements as well as all military and naval equipment of the State or issued to the State by the Federal government; it audits military accounts and administers relief to honorably discharged, sick and disabled veterans of this State.

(3) Division of Standards and Purchases

(a) Head: Superintendent—Appointed by Governor.

(b) Six bureaus:
(1) Purchase
(2) Standards
(3) Stores
(4) Printing
(5) Laboratory
(6) Inspection

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[4] Military and Naval Affairs
(Reorganization effective January 1, 1927).
Laws of 1926, chapter 546, Secs. 42–47, inclusive. "All the powers and duties as now prescribed by law, pertaining to such (military and naval) functions, whether in terms vested in such departments, commissions . . . or in any officer thereof, shall hereafter be exercised and performed in the division of military and naval affairs *by or through the appropriate officer . . . thereof in accordance with existing law and subject to the direction of the Governor.*"
Section 42. "The commanding general of the national guard and the commanding officer of the naval militia may each cause those under his command to perform any military duty he may require *and shall be responsible to the governor for the general efficiency of the national guard or naval militia.*" Consol. Law, ch. 36, art. VI, sec. 110.

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(c) Functions: The division supervises and directs the standardization, estimating and purchase of all materials, equipment and supplies required by the State, except for the legislative bodies and committees; and controls their storage, distribution and delivery. The superintendent establishes, with the approval of the Governor, rules prescribing the conditions and the manner under which supplies shall be purchased by or furnished to the various State departments. The superintendent also has charge of the sale, distribution and marketing of prison made goods. The purpose of the division is to bring about greater uniformity and economy in purchases.

Specific Provisions in Law Relating to Division of Standards and Purchases

Chapter 87, Laws of 1927—amended *chapter 608, Laws 1930;*

"The Superintendent of Standards and Purchase shall have jurisdiction and control of the standardization and purchase of materials, equipment and supplies required by or for the State or any State department, board, commission, office or institution, except those required by the Legislature, or either house thereof, or a legislative commission or committee."

(4) Division of State Police

(a) Head: Superintendent—appointed by Governor with the advice and consent of the Senate to hold office during his pleasure.

(b) Divisions:

(1) Headquarters Staff
(2) Bureau of Criminal Investigation
(3) Uniformed Force
(4) Police Training School
(5) Telegraph Bureau
(6) Pistol Permit Bureau

(c) Function: To prevent and detect crime and apprehend criminals and to enforce the State's motor vehicle laws, especially in rural areas.

(5) Division of Parole

(a) Head: Board of Parole, consisting of three members appointed by the Governor with the consent of the Senate.

(b) Function: The board shall meet at each of the institutions under its jurisdiction at such times as may be necessary for a full study of the cases of all prisoners eligible for parole. The board shall determine when and under what conditions and to whom parole shall be given. The question of delinquency of any prisoner while on parole shall be determined and acted upon by the board.

The Board, upon request of the Governor, shall investigate and report in respect to pardons and commutations, and the restoration to citizenship. In the division there is an employment bureau aiding persons coming under the supervision of the board in securing employment.

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On the first of February of each year the board shall transmit to the Governor a full report of all prisoners paroled during the year, a detailed statement relative to parole work and such other information as the board may desire to give. The Governor shall transmit the same to the Legislature.

(6) Alcoholic Beverage Control Division

(a) Head: State Liquor Authority consisting of five commissioners appointed by the Governor with the advice and consent of the Senate. Not more than three members shall be of the same political party.

(b) Divisions: County control board in each county of the State except the counties comprising the city of N. Y.
New York City control board.

(c) Functions: To issue, revoke or cancel licenses; to limit in its discretion the number of licenses of each class issued; to remove any member or employee of a local board upon charges; to fix by rule the standards of manufacture and fermentation of alcoholic beverages manufactured or sold in the State; to inspect premises where such beverages are manufactured or sold; to hold hearings, subpoena witnesses, and require the production of books relative to any inquiry; to make an annual report to the Governor and the Legislature of its activities for the past year.

(7) Division of State Planning

(a) Head: State Planning Council, consisting of five members appointed by the Governor who also designates the chairman.

(b) Function: To co-operate with State departments and agencies in the preparation and co-ordination of plans and policies for the development of the State; to advise and co-operate with municipal, county, regional and other local planning commissions; to adopt measures calculated to promote public interest in state planning.

B. Department of Audit and Control

(a) Head: Comptroller—elected by the people.

(b) Functions: To superintend the fiscal affairs of the State; to audit all accounts of the State; to draw warrants on the treasury for payment of moneys directed by law to be paid out of the treasury; to countersign all checks drawn by the treasurer and all receipts for money paid to the treasurer; to designate, with the Commissioner of Taxation and Finance, the banks in which funds of the State officials and institutions shall be deposited; to examine the fiscal affairs of all municipalities in the State with the exception of the first class cities; to examine the accounts of county and town officers disbursing State, town and county funds in connection with the maintenance and construction of county and town highways; to publish and transmit to the Legislature a report

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known as the Report of the Bureau of Municipal Accounts which contains exhaustive financial data regarding the fiscal affairs of all the municipalities within the State; to make a report to the Legislature at its annual session, containing a complete statement of the funds of the State and its expenditures during the preceding year, and to recommend such matters as he deems expedient; to supervise the administration of all funds paid into any court of record, or ordered to be so paid by a judgment, order or decree of any court of record, and designate depositories for such funds that shall pay a fair rate of interest; to take charge of the sale of State bonds; to prescribe methods of accounting for State departments, institutions, boards or commissions; to audit expenditures in the new Social Welfare organization; to head the Employees' Retirement System.

C. The Department of Taxation and Finance

(a) Head: Commissioner of Taxation and Finance, appointed by Governor with consent of Senate.

(b) Divisions:
  (1) Division of Taxation
  (2) Division of the Treasury
  (3) The Bureau of Motor Vehicles

(c) Functions:
  (1) This department administers the personal income tax laws, the corporate franchise tax law, the estate tax law, the stock transfer tax law, the mortgage tax law, the gasoline tax law, the special franchise tax law, the alcoholic beverage law, the racing tax law, the milk publicity tax law and the unincorporated business tax law, and has supervision over the methods of assessing property and of advising assessors throughout the State. This division administers functions transferred from the Comptroller in 1927 relative to State owned lands in forest preserve counties. The State Tax Commission exercises jurisdiction over this division.
  (2) This division performs the duties of the old State treasury and has custody of State moneys including State Teachers' Retirement Fund and pension funds. It also has joint custody with the Comptroller of all securities held for the sinking funds.
  (3) This division has charge of registration of motor vehicles and issuance of driving licenses to operators and chauffeurs; revocation and suspension of driving licenses and certificates of registration are in the hands of the Commissioner and his deputies, the superintendent of the State Police, Magistrates, County Judges and certain other judicial officers. Restoration of licenses and certificates of registration is solely in the hands of the Commissioner of Motor Vehicles.

D. Department of Law

(a) Head: Attorney-General—elected by people.

(b) Functions: To prosecute and defend all actions and proceedings to which the State of New York is a party; to take charge and control

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of the legal business of the offices and various departments of the State; to act as general legal adviser to all departments and officers of the State government; to supersede, occasionally and upon direction of the Governor, district attorneys in prosecution of criminal cases. The Attorney-General is chairman of the Board of Canvassers in the Department of State, and is a Commissioner of the Land Office and likewise a member of the Water Power and Control Commission.

E. Department of State

(a) Head: Secretary of State, appointed by Governor with consent of Senate.

(b) Divisions:
- (1) Executive
- (2) Land Office
- (3) Corporations
- (4) Licenses
- (5) State Board of Canvassers
- (6) Athletic Commission
- (7) Racing Commission
- (8) Housing

(c) Functions:

(1) Executive Division: Superintends publication and distribution of session laws, legislative manual and election notices; has charge of the monthly publication and distribution of the *State Bulletin;* has custody of State Laws and miscellaneous records and documents.

(2) Division of the Land Office: Consists of three members; the Secretary of State (chairman), the Attorney-General, and the Superintendent of Public Works. It has charge of all State-owned lands not devoted to any specific purpose such as lands under water; abandoned canal lands, lands acquired for taxes and through the foreclosure of U. S. Loan Mortgages. All sales of these lands are made by this board. All original records of patents of lands by the Crown, Colony and State are in the custody of the board.

(3) Division of Corporations: Charters all domestic corporations other than banking, insurance and educational. Authorizes foreign corporations to do business within the State.

(4) Division of Licenses: Grants licenses to real estate brokers and salesmen, to private detectives, auctioneers, steamship ticket agents, theatre ticket brokers, billiard and pocket billiard rooms. It also records the appointment of notaries public made by the Secretary of State.

(5) Division of State Board of Canvassers: This board shall canvass the certified copies of the statements of the county board of canvassers of each county in matters relating to the offices of electors of President and Vice-President of the United States, United States senator, representatives in Congress and State offices, except members of the Assembly, and shall also canvass the votes cast on any proposed constitutional amendment. Upon the completion

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of the canvass the board shall make separate tabulated statements signed by the members of the board of the number of votes cast for and against each candidate in the various districts or counties, and the number of votes cast for or against proposed constitutional amendments. Such statements shall be filed and recorded in the office of the Department of State. A copy of this report shall be transmitted to the successful candidate, and if he shall have been elected to Congress, a copy shall be sent to the House of Representatives.

(6) Division of the State Athletic Commission has the sole direction, management and control of all boxing, sparring and wrestling matches in the State where admission is charged, and tickets of admission must be procured from a printer licensed by the Department of State.

(7) The State Racing Commission: Has power to generally supervise race meetings; to adopt, amend and promulgate rules and regulations governing the same; to fix maximum charge of admission. The commission issues licenses annually, to corporations or associations proposing to conduct race meetings or steeplechase meetings, the license contains a condition that such meetings shall be subject to the reasonable rules and regulations of the Jockey Club.

(8) Division of Housing studies housing needs and conditions throughout the State, co-operates with local housing and planning boards, promotes and supervises low rental housing projects under the terms of the State Housing Law.

F. Department of Public Works

(a) Head: Superintendent—appointed by Governor with consent of Senate.

(b) Divisions:
- (1) Architecture
- (2) Canals and Waterways
- (3) Engineering
- (4) Highways
- (5) Public Buildings

(c) Functions:

(1) Architecture: This division prepares plans and specifications for all work and materials used in the erection and alteration of State buildings.

(2) Canals and Waterways: This division has general care and superintendence of the State canals, the State grain elevators at Gowanus Bay and Oswego, and the power houses at Crescent and Vischer Ferry. It also takes care of the enforcement of the Canal Law, the making of rules and regulations governing navigation, the imposition of fines and penalties for any infraction of rules, the keeping of records of tonnage and traffic, and likewise the registration of all boats used in canal service.

(3) Engineering: This division performs such engineering service or supervision as the Superintendent of Public Works shall direct;

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keeps in the office all necessary maps, drawings, field notes, levels and surveys and engineering instruments belonging to the State. The work of the division includes grade-crossing elimination, surveys, construction of various public works, approving plans for docks and dams, water supply and sewerage disposal, and general supervision of all construction and repair on State-owned buildings.

(4) Highways: This division has general supervision of highways and bridges constructed, improved or maintained by State funds. It also installs, operates and maintains traffic lights on State highways. The commissioner performs the duties of the Interstate Bridge Commission.

(5) Public Buildings: This division has charge of all public buildings in Albany (exclusive of the Educational Building) and of State office buildings in New York City and Buffalo.

G. Conservation Department

(a) Head: Commissioner—appointed by Governor with consent of Senate.

(b) Divisions:

(1) Bureau of State Publicity
(2) Lands and Forests
(3) Fish and Game
(4) Parks
(5) Water Power and Control

(c) Functions:

(1) The Bureau of State Publicity collects, compiles and distributes information and literature as to the facilities, advantages and attractions of the State, historic and scenic places of interest, as well as transportation and highway facilities in the State; and directs campaigns of publicity, promotion and advertising.

(2) Lands and Forests Division has the following activities: Forest Preserve administration, including acquisition of additional lands, protection of lands already acquired, and the development of recreational facilities in the Forest Preserve; reforestation, including production of trees for distribution at cost to private landowners, the planting of trees on the State Forest Preserve and the reforestation of abandoned farm lands; forest fire control and forest pest control, and administration of the Conservation Law in relation to lands and forests. This division also has under its jurisdiction the work projects being done by Civilian Conservation Corps labor and the Olympic Bob Sled Run near Lake Placid.

(3) Fish and Game Division administers and enforces all laws relating to the wild life resources of the State. It issues hunting and fishing licenses; maintains a staff of game protectors; conducts game farms, game refuges, wild life management areas and fish hatcheries; supervises commercial fishing, including shellfishing; and carries on investigations into wild life and conditions.

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(4) Division of Parks: Has general supervision over all parks and parkways and all places of historic, scientific and scenic interest in New York State under the jurisdiction of the Conservation Department.

(5) Water Power and Control Division: Has power to issue licenses authorizing the diversion and use for power or other purposes of any water in which the State has a proprietary right or interest, but all licenses must be approved in writing by the Governor.
The division administers the Conservation Law in regard to river regulation by storage reservoirs, river improvement, drainage of agricultural lands and public water supplies. It forms river regulating districts and has general supervision over the same. It also passes on all projects dealing with new or additional sources of public water supply, including all large wells in Long Island, whether for public or private use.

(d) Memorandum to explain the difference in functions of the Director of State Parks and the Council of State Parks:
Chapter LXV of the Consolidated Laws, Art. XVI:

(a) *Director of State Parks*—Section 660. The director shall be appointed by the Commissioner of Conservation; he shall be in the competitive class of civil service, he shall perform such duties as may be assigned to him by the Commissioner of Conservation relative to parks, structures and buildings and relative to the enforcement of the rules of the Conservation Commissioner adopted pursuant to law.

(b) *Council of State Parks*—Section 67—The Director of State Parks is a member and the secretary of this council. The council acts as a central advisory agency for all parks, buildings, structures, etc., and formulates and recommends to the Conservation Commissioner plans for the management, construction, improvement, use and extension of parks, etc. All action of the council is in the form of recommendations made by the council to the Conservation Commissioner and shall be subject in all respects to revision and approval by him.

H. Department of Agriculture and Markets

(a) Head: Commissioner—appointed by Governor with consent of Senate.

(b) Divisions: In addition to the regular duties of the Department of Agriculture and Markets which are listed below, certain kindred duties are performed by bureaus within the department.
(1) Division of Milk Control
(2) Bureau of Milk Publicity
(3) Division of the State Fair.

(c) Functions: The department is charged with the administration of statutes relative to dairy products, frozen desserts, diseases of domestic animals (including bovine tuberculosis control). It has charge of the licensing of stallions and breeding of horses, licensing of dogs and the protection of domestic animals; of the sale and analysis of concentrated feeding stuff; of the grading of farm products; of the licensing of operators of milk gathering stations, manufactories and plants. The

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department is also charged with the inspection and sale of seeds, the sale and analysis of commercial fertilizers, prevention of fraud in the sale of soil and plant inoculants, the prevention of fraud in the sale of insecticides and fungicides, adulteration and sale of turpentine and linseed oil, of the grades and standards for eggs, grades and standards for grapes, prevention and control of diseases in trees and plants and insect pests, and sale of fruit-bearing trees, bee diseases, weights and measures, adulteration, packing and branding of food products, cold storage, sale of farm products, State institution farms, New York State Fair and the dissemination of statistics.

I. Department of Labor

(a) Head: Commissioner—appointed by Governor with consent of Senate.

(b) Divisions:

(1) Board of Standards and Appeals
(2) Industrial Board
(3) Labor Relations Board
(4) State Board of Mediation
(5) The Industrial Council
(6) State Insurance Fund (to furnish Workmen's Compensation)
(7) Division of Self-Insurance
(8) Division of Unemployment Insurance
(9) Prevailing Rate of Wages
(10) Division of Bedding (Inspects sale and manufacture and delivery of all mattresses, etc. that are made, remade or sterilized.)

(c) Functions: To gather, organize, analyze and disseminate statistics, facts and general information of industry, trade and labor in New York State and pertinent activities and developments outside the State; to foster peaceful relations between employer and employee, thus promoting industrial prosperity; to improve working conditions and employment in industry and trade; to insure economic security of workers and to protect the health and safety of employees and the public from hazards arising in industry and trade within the state.

The State Department of Labor is a unit of state government established under the State Constitution and the State Department's Law, primarily to administer the Labor Law and the Workmen's Compensation Law. Also, it operates under or invokes sections of other laws notably the General Business Law, the Education Law, the Domestic Relations Law, and the Penal Code. The Unemployment Insurance Law enacted in 1935, the Minimum Fair Wage Law, the State Labor Relations Act, Mediation Board Act, the legislation creating a Board of Standards and Appeals, the Wage Claims Act, the law regulating work hours in hotels and restaurants enacted in 1937 are all sections of the Labor Law.

While the Labor Department functions are mostly administrative, through promulgation of industrial code rules, orders and regulations amplifying, clarifying and applying specific statutory provisions, the Board of Standards and Appeals, and the Industrial Commissioner per-

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form a quasi-legislative function. In passing upon applications for variations of industrial code rules by the Board of Standards and Appeals, in reviews of compensation cases and in the findings of the Labor Relations and Mediation Boards, there are quasi-judicial operations within the department. The department also exercises something akin to a licensing authority.

J. Department of Education

(a) Head: Commisisoner—elected by the Board of Regents

(b) Divisions:
  (1) University of State of New York
  (2) State Museum
  (3) State Library
  (4) Motion Picture division
  (5) State Schools and Colleges

(c) Functions: The department exercises legislative functions concerning the educational system of the State. The Regents have exclusive power to incorporate educational institutions and organizations; they may confer degrees and regulate their issuance within the State; they have power to visit and inspect educational institutions of the State, conduct examinations therein and require reports therefrom; they register foreign and domestic educational institutions and fix the value of degrees, diplomas and certificates from all parts of the world, when presented for entrance to schools, colleges, universities and the professions. The department is also responsible for the examination and licensing of all motion picture films shown in New York State.

K. Health

(a) Head: Commissioner—appointed by Governor with consent of Senate.

(b) Divisions:
  (1) District health officers
  (2) Public Health Council
  (3) Bureau of Narcotic Control
  (4) State hospitals for tuberculosis and malignant diseases.

(c) Functions: The department has the administration of the Public Health Law and the State Sanitary Code and has general supervision of all local health authorities except New York City; has general supervision in the registration of births, marriages, deaths and prevalent diseases. The department supervises and stimulates the work of prevention and control of communicable diseases throughout the State. It conducts research studies of morbidity and mortality. It licenses and supervises midwives; holds clinics for child hygiene, venereal diseases and tuberculosis; it licenses embalmers and undertakers and manufacturers and wholesalers of narcotic drugs. Has general supervision of state hospitals for tuberculosis and malignant diseases. It produces, standardizes and distributes serums and vaccines and conducts diagnostic, bacteriological and pathological examinations.

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L. Mental Hygiene

(a) Head: Commissioner—appointed by Governor with consent of Senate.

(b) Functions: The department has the administration of laws relating to the custody, care and treatment of insane, mental defectives and epileptics. It has jurisdiction and control of all State hospitals for the insane, except Matteawan and Dannemora where its powers are limited to inspection and visitation. It also licenses and inspects privately owned hospitals for mental cases and mental defectives.

M. Department of Social Welfare

(a) Head: The Board of Social Welfare. The fifteen members of the board are appointed by the Governor with the consent of the Senate and appoint a commissioner.

(b) Functions: The department maintains supervision over public and private institutions, including institutions for delinquent boys and girls, hospitals, dispensaries, homes for children and homes for the aged. It also provides services for the blind which include both relief and non-relief activities in their behalf. The formulation, analysis and evaluation of all public assistance programs have been assigned to a single bureau (Bureau of Public Assistance) with the following divisions: Home, Veterans' and Blind Relief; Aid to Dependent Children; Old Age Assistance; State Charges and Indians. This bureau budgets the needs of families and individuals in the various categories of public assistance. The department is vested with functions, powers and duties to distribute, reimburse and grant funds appropriated by the Legislature for participation in public welfare work, and also such funds as may be received from the federal government for such purposes. It also has supervision of subsistence gardens and rural rehabilitation programs.

N. Correction

(a) Head: Commissioner—appointed by Governor with consent of Senate.

(b) Divisions:

(1) Administration
(2) Prison Industries
(3) Probation and Criminal Identification
(4) Records and Statistics

(c) Functions: The department has the management and control of six State prisons, two reformatories, three institutions for defective delinquents, a State vocational school, and two hospitals for the criminal insane. It exercises general supervision over the administration of probation throughout the State, including probation in childrens' courts. It also has charge of criminal investigation records and statistics.

(d) Memorandum explaining the difference between the functions of the Commission of Correction and the Commissioner of Correction:

Commission of Correction—Laws 1929, ch. 243, art. II, sec. 5. The Commissioner of Correction shall have sole charge of the administration of the department, but he may by order filed in the department delegate any of his powers to or direct any of his duties to be

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performed by the head of a division, except the power to appoint or remove officers or employees or to fix their compensation.

Sec. 16. Commission: Chairman is Commissioner of Correction, seven other members to be appointed by Governor by and with advice and consent of Senate.

Art. III, sec. 46. Commission shall visit and inspect all institutions for detention of sane adults charged with or convicted of crime and *subject to the direction and control of the commissioner* shall (1) aid in securing just, humane and economic administration of all institutions subject to its supervision, (2) advise officers of such institutions, (3) aid in securing erection of suitable buildings, (4) investigate management of buildings, (5) recommend ways of employing inmates, (6) close any county jail, city jail or police station which is unsafe, unsanitary or inadequate.

O. Department of Public Service

(a) The members of the Public Service Commission shall be the five commissioners appointed by the Governor with the consent of the Senate. The chairman is designated by the Governor with the consent of the Senate.

(b) Functions:

(1) Supervisory and regulatory powers over railroads, street railroads, common carriers, omnibus operators, safety inspection of vehicles operated for hire and for transportation of school children; gas and electrical corporations; steam corporations; telegraph and telephone corporations; water corporations, except municipal plants. The commission regulates rates and service, prescribes uniform accounting systems, approves franchises, plant construction and issuance of securities, investigates complaints and railroad accidents, tests and inspects gas and electric meters and railroad equipment and directs the elimination of highway-railroad grade crossings outside of New York City.

(2) (a) The members of the metropolitan division of the Public Service Commission shall be three transit commissioners appointed by the Governor by and with the consent of the Senate. The chairman is designated by the Governor.

(b) Transit Commission of New York City has the functions of the Public Service Commission with regard to transit problems in the City of New York.

P. Banking Department

(a) Head: Commissioner—appointed by Governor with the consent of the Senate.

(b) Functions: The department examines and supervises State banks, trust companies, savings banks, savings and loan associations, industrial banks, investment companies, safe deposit companies, licensed lenders, credit unions, Savings and Loan Bank of the State of New York, and private bankers. It is vested with the responsibility of liquidating closed banks.

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(c) Memorandum explaining the difference in functions of the Banking Board and the Commissioner of the Banking Department:

Banking Board—Laws 1932, ch. 118, Laws 1935, ch. 57, sec. 10-b. The Banking Board shall consist of nine members: The Superintendent of Banking; eight to be appointed by the Governor with the consent of the Senate; four of those eight members shall have had banking experience, and shall not be appointed by the Governor until the Superintendent of Banking shall have submitted to him for his consideration a list of the names of those who have been selected by the various banking groups as their candidates to represent such groups.

Sec. 10-c. By a two-thirds vote of all members, board has power to make, amend, alter rules and regulations not inconsistent with law.

Sec. 23. When a bank or trust company files an application for organization, the Superintendent of Banking shall investigate and determine whether or not it is expedient to permit the organization to engage or continue in business. If he deems it not expedient, he shall within sixty days endorse the certificate "refused" and return one of the duplicates to the proposed incorporators or banker from whom it was received. If he deems it expedient, he shall submit the facts to the board and if the board approves, the application is approved. If the board fails to approve, the application will be refused.

Q. Insurance Department

(a) Head: Superintendent—appointed by Governor by and with the consent of the Senate.

(b) Functions: The department has supervision over all insurance companies transacting business in the State; is custodian of securities required to be deposited by such companies under the law; licenses all insurance brokers and agents for corporations required to designate same through the department. No corporation or individual shall transact an insurance business in the State without permission of the department. Insurance companies organized under the laws of other states or countries are required to obtain renewals of their authority each year.

(c) Memorandum explaining the difference in functions of the Superintendent of Insurance and the Insurance Board.

Laws 1933, ch. 524, *Insurance Board,* sec. 450. The Insurance Board shall be composed of seven members; Superintendent of Insurance and six members to be appointed by the Governor with the consent of the Senate. Three of these six shall have had experience of such a nature as to make them familiar with the purposes and practices of corporations organized under the insurance law.

For the purpose of considering questions before it, the board shall have access to all the books and papers in the department including confidential papers which the members shall treat as confidential.

Sec. 451. The Insurance Board shall have power by an affirmative vote of four of its members *to consider and make recommendations to* the Superintendent of Insurance on any matter the superintendent may submit to the board.

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Sec. 9. Before authority is granted to an insurance company to become incorporated or transact business in the State or to amend a charter or declaration, the Attorney-General must examine said charter or declaration and certify it to be in accordance with requirements of law.

Sec. 10. If the Attorney-General shall approve, the Superintendent of Insurance shall then examine into the affairs of the corporation. If he is satisfied, he shall file a certificate in his department. Before the company can receive authority to transact business, such sums shall be deposited with superintendent as security as may be required by law.

R. Department of Civil Service

(a) *Civil Service*—ch. 440, Laws 1927: "The head of the department shall be the state Civil Service Commission, to consist of three commissioners who shall be appointed by the Governor by and with the consent of the Senate, not more than two of whom shall be adherents of the same political party."

(b) Functions: The commission makes rules, subject to the approval of the Governor, for carrying into effect article V, section 6, of the Constitution. It conducts examinations, establishes eligible lists for the use of appointing officers, and passes upon payrolls in the State service and in certain classified county and village services. The State commission has general supervision over the procedure of municipal civil service commissions, and holds hearings throughout the State.

SECTION 3—ASSIGNMENT OF FUNCTIONS

(a) "At the session immediately following the adoption of this article the Legislature shall provide by law for the appropriate assignment, to take effect not earlier than the first day of July, one thousand nine hundred and twenty-six, of all the civil, administrative and executive functions of the State Government, to the several departments in this article provided."

This provision is purely temporary in nature. The Legislature was aided in its work by the commission of 1925 whose recommendations have been considered in the previous section. After functions had been assigned to appropriate departments, the value and utility of the provision ceased.

(b) "Subject to the limitations contained in this Constitution, the Legislature may from time to time assign by law new powers

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and functions to departments, officers, boards or commissions continued or created under this Constitution, and increase, modify or diminish their powers and functions. No specific grant of power herein to a department shall prevent the Legislature from conferring additional powers upon such department."

The prime purpose behind the reorganization of State administrative agencies and departments as outlined in the convention of 1915, was to secure economy and efficiency in the administration of government. (*Documents 1915 Convention,* Document No. 40, p. 3.) For that reason it was thought necessary to limit the number of State departments and to prevent the creation of new departments without constitutional amendment. This effect was accomplished by constitutional provisions which we have already considered or shall consider later. However, the possibility of growth of State functions was realized, and this section was inserted to meet that possibility. If no new departments could be created and if no new functions could be assigned to the existing departments, it is likely that years of delay might be necessary to secure constitutional amendment necessary to carry out an important State function which might arise. Further, if the functions of a department could not be modified or diminished, dormant bureaus or boards would have to carry on until abolished by constitutional amendment. No debate is recorded on this topic in the 1915 convention except in regard to the functions of the Comptroller noted above in section 1. If the reorganization was to be accomplished, it was necessary to give the Legislature some freedom of action to meet emergencies. The provision as proposed by the convention of 1915 was inserted without change in the amendment adopted by the people in 1925.

(c) "No new departments shall be created hereafter, but this shall not prevent the Legislature from creating temporary commissions for special purposes."

We have already mentioned in passing the reasons why the Constitution forbade the creation of new departments. It was thought necessary and desirable to centralize activities and to control expenditures, and that this end was attainable only by the reduction of the number of departments and department heads responsible directly to

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the Governor. To prevent a recurrence of the conditions of 1919 when there existed 187 boards and agencies, this provision was placed in the Constitution, requiring a constitutional amendment to create a new department.

But when the Legislature is given constitutional power to create temporary commissions for special purposes, we have a departure from the recommendations of the convention of 1915. The Constitution submitted to and rejected by the people in 1915 contained this provision: *"Any bureau, board, commission or office hereafter created except assistants in the office of the Governor shall be placed in one of the departments enumerated in this article."* (Art. VI, sec. 3.) The recommendations of the commissions of 1919 and 1925 do not extend to this section of article V.

The reasons for this change do not appear, since legislative debates are not published in New York State.

Because of the provision allowing the Legislature to establish temporary commissions for special purposes, there are now in existence in the State thirty-four boards and commissions and sixteen authorities, none of them subject to administrative control or supervision of any State department.

A list of the various boards, commissions and authorities and general information about each will be appended at the end of this section.

(d) ". . . and nothing contained in this article shall prevent the Legislature from reducing the number of departments as provided for in this article, by consolidation or otherwise."

This provision or its equivalent was not included in the Constitution by the 1915 convention. Its value can be seen from the fact that by chapter 243, Laws of 1926 the number of departments was reduced to eighteen. The Department of Architecture became a division of the Department of Public Works and the Department of Military and Naval Affairs became a division in the Executive Department.

(e) "The elective State Officers in office at the time this article as amended takes effect shall continue in office until the end of the terms for which they were elected. Pending the assignment of the

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civil, administrative and executive functions by the Legislature pursuant to the directions of this section, the powers and duties of the several departments, boards, commissions and officers now existing are continued. Subject to the power of the Legislature to reduce the number of officers, when the powers and duties of any existing office are assigned to any department, the officers exercising such powers shall continue in office in such department, and their term of office shall not be shortened by such assignment."

This part of section 3 is purely temporary in nature, and its value has long ceased.

BOARDS AND COMMISSIONS

Legislative Committee on Enforcement of Criminal Law

(The Governor vetoed the appropriation, but an appropriation of $20,000 will be made from the Legislative Contingent Fund. See *Red Book*, p. 364.)

The committee will devote itself chiefly to the so-called sex crimes.

Salary Standardization Board

Laws 1937, chapter 859:

(a) Personnel: Five members appointed by the Governor to include a representative of the Civil Service Commission and one of the Division of the Budget, and to include a State employee in the competitive class and one in the non-competitive class.

(b) No compensation.

(c) Function: To allocate positions in the competitive and non-competitive classes of civil service in the appropriate salary grades in accordance with the declared policy of the State as provided by this chapter of the laws; "to provide equal pay for equal work, and regular increases in pay in proportion to increase of ability, increase of output and increase of quality of work demonstrated in service." Employees so allocated as to official title and salary grade will be notified before January 1, 1938 and promotion to higher grades will be only after examination.

Commission on the Ohio Valley Water Pollution

Treaty, Laws 1937, chapter 751:

(a) Five members appointed by the Governor.

(b) No salary other than expenses.

(c) Function: To negotiate a treaty with the representatives of the states of Pennsylvania, West Virginia, Kentucky, Illinois, Indiana, Tennessee, and Ohio or of any one of them, for the purpose of regulating, controlling or abating the pollution of rivers and streams within the drainage area of the Ohio valley. After approval of the draft of a treaty or a compact by all representatives, it will be submitted to the Legislature for enactment into law.

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Commission on the Hudson Valley Survey

Laws 1937, chapter 801:

(a) Personnel: Nine members; three appointed by the Governor, three senators appointed by the Temporary President, three assemblymen appointed by the Speaker.

(b) No salary other than expenses.

(c) Function: To make a comprehensive study of the scenic and historic sites and the commercial possibilities of the Hudson River valley; to recommend action to protect the sites of scenic and historic importance against destruction or defacement and to co-ordinate efforts to develop its commercial possibilities; to recommend as to possible acquisition by the State of privately owned sites of scenic or historic interest which may be found subject to defacement or destruction, and to submit a qualified appraisal of the value of such sites. The commission is to report to the Legislature not later than February 1, 1938 and any recommendations for purchase of sites are to be submitted to the Governor not later than October 1, 1937, together with an appraisal of the value of the sites.

Commission on the Settlement of Delaware by the Swedes

Laws 1937, chapter 734:

(a) Personnel: Nine members: three are appointed by the Governor; three by the Temporary President of the Senate; three by the Speaker of the Assembly.

(b) No salary other than expenses.

(c) Function: To co-operate with the Federal government in celebration of the 300th anniversary of the settlement of Delaware by the Swedes.

Commission on the Care of Hard of Hearing and Deaf Children

Laws 1937, chapter 743:

(a) Personnel: Thirteen members; two *ex-officio* members—The State Commissioner of Health or a member of his staff and the Commissioner of Education or a member of his staff; five are appointed by the Governor; three senators appointed by the Temporary President, three assemblymen appointed by the Speaker.

(b) No compensation other than expenses.

(c) Function: To study the adequacy and effectiveness of existing facilities for locating hard of hearing and deaf children, those suffering from conditions that may lead to deafness and to study facilities for provision of medical care to prevent or ameliorate deafness, and for providing education and training for those so afflicted. The commission is to report to the Legislature February 15, 1938.

Whiteface Mountain Highway Commission

Laws 1929, chapter 420:

(a) Personnel: Three members appointed by the Governor.

(b) Function: To construct a highway from Wilmington to the top of Whiteface Mountain in commemoration of World War veterans; to establish tolls on the highway and provide for their collection; to maintain and keep the highway in repair until its obligations are paid, after which it will be maintained in the same manner as other State highways.

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Commission on the 150th Anniversary U. S. Constitution

Laws 1937, chapter 824:

(a) Personnel: Six members; two are appointed by the Governor; two by the Temporary President of the Senate; two by the Speaker of the Assembly.

(b) No salary other than expenses.

(c) Function: To co-operate with the Federal government in the celebration of the 150th anniversary of the formation of the U. S. Constitution in 1939. The commission will report to the Legislature in the month of January, 1939.

Commission for the Study of the Urban Colored Population

Laws 1937, chapter 858:

(a) Personnel: Thirteen members; three are appointed by the Governor, two of these to be of the colored race; three assemblymen and two other members are to be appointed by the Speaker; three senators and two other persons are to be appointed by the Temporary President.

(b) No salary other than expenses.

(c) Function: To examine and report upon the economic, cultural, health and living conditions of the urban colored population of the State, and to recommend measures to secure for the race equal opportunity with the general population of the State. The commission is to report to the Legislature March 1, 1938.

Commission for the Study of the Treatment and Prevention of Cancer

Laws 1937, chapter 718:

(a) Personnel: Nine members; the Commissioner of Health, *ex officio;* two physicians appointed by the Governor; three assemblymen appointed by the Speaker; three senators appointed by the Temporary President.

(b) No salary other than expenses.

(c) Function: To make a comprehensive study of the prevalence of cancer within the State and a survey of existing facilities, public and private, for the treatment and prevention of this disease. The commission is to report to the Governor by February 15, 1938.

Merrimac and Monitor Celebration Commission

Laws 1935, chapter 910; Laws 1937, chapter 768:

(a) Personnel: Five members; two senators appointed by the Temporary President of the Senate; three assemblymen appointed by the Speaker.

(b) Function: To erect a monument in commemoration of the naval battle between the U. S. gunboat *Monitor* and the ironclad *Merrimac*. The commission will act with the Superintendent of Public Works and the Adjutant-General in the selection of a site for erection of the monument.

Lake Champlain Bridge Commission

Laws 1927, chapter 321; Laws 1933, chapter 201:

(a) Personnel: Three commissioners appointed by the Governor of New York and three by the Governor of Vermont.

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(b) Function: To control and construct and operate two toll bridges, one between Crown Point, New York and Chimney Point, Vermont, and another between Alburg, Vermont and Rouses Point, New York. For the first bridge, some funds were appropriated by each state and the remainder was supplied by the issue of bonds; the second was completed only by the issuance of bonds.

When sufficient money has been paid in tolls to pay all operating costs and to retire all obligations incurred in construction, the bridges will be turned over to both states as public highways.

Commission on Uniform Tax Laws

Laws 1909, chapter 56:

(a) Personnel: Three commissioners appointed by the Governor.

(b) No salary.

(c) Function: To meet annually with commissioners from other states for the purpose of drafting uniform legislation and attempting to secure the enactment of uniform laws in New York.

Commission for the Revision of Tax Laws

Laws 1930, chapter 726; Laws 1932, chapters 41 and 510; Laws 1933, chapter 18; Laws 1935, chapters 26 and 895; Laws 1936, chapter 837; Laws 1937, chapters 10 and 194:

(a) Personnel: Nine members appointed jointly by the Governor, the Temporary President of the Senate and the Speaker of the Assembly, all concurring.

(b) No salary,

(c) Functions: Originally to recommend a revision of tax laws, following a study of taxation in general; it has additional powers to make a survey of county, city, town, village, district and other units of local government, towards eliminating waste, duplication and inefficiency in such systems of government.

Commission on the Administration of Justice

Laws 1930, chapter 727; Laws 1932, chapter 508; Laws 1933, chapter 28; Laws 1934, chapters 29 and 179; Laws 1935, chapters 58 and 886; Laws 1936, chapter 551; Laws 1937, chapters 105 and 198:

(a) Personnel: Sixteen members: six are appointed by the Governor; four are nominated from the members of the State Bar Association by the president of the association and appointed by the Governor with the Speaker of the Assembly and the Temporary President of the Senate both concurring; three are members of the Senate appointed by the Temporary President, and three are members of the Assembly appointed by the Speaker.

(b) No salary.

(c) Function: To investigate and collect facts relating to the present administration of justice in the State. (Final reports and recommendations are to be submitted by March 15, 1938.)

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Saratoga Springs Commission and Authority

Laws 1930, chapter 866; Laws 1931, chapter 621; Laws 1933, chapter 208:

(a) Personnel: Seven members appointed by the Governor with the consent of the Senate.

(b) No salary.

(c) Function: To develop Saratoga Springs Reservation as a State health resort and spa for the use of the public.

(d) *Explanatory note:* The commission was created by chapter 866, Laws of 1930, for a seven-year period and during this time the control of the Conservation Department was suspended. To secure a loan from the Reconstruction Finance Corporation in 1933, the Saratoga Springs Authority was created and the commission leased the reservation to the authority for a period of ninety years. The members of the commission are the directors of the authority. By chapter 279 of the Laws of 1937, the commission received a permanent status as a division of the Conservation Department, and upon the expiration of the lease full control will revert to the Conservation Department.

The authority, meanwhile, has the function of insuring that the revenue derived from the operation of the resort be used to pay the loan of the Reconstruction Finance Corporation.

Interstate Sanitation Commission

Laws 1936, chapter 3:

(a) Personnel: Five commissioners of New York State, four appointed by the Governor by and with the consent of the Senate and the State Commissioner of Health, *ex officio*.

(b) No compensation other than actual expenses.

(c) Function: In co-operation with the New Jersey and the Connecticut commissions to make rules and regulations with regard to the tidal, esturial and coastal waters of the three states. It may investigate to determine if the orders of the commission are complied with and may resort to the proper courts to compel enforcement.

St. Lawrence Bridge Commission

A Federal Commission authorized by act of Congress to construct, maintain and operate a bridge across the St. Lawrence river at or near Ogdensburg. The New York State members were appointed by the Governor July 8, 1933.

Father Isaac Jogues Commission

Laws 1936, chapter 870:

(a) Personnel: Nine members: three are appointed by the Governor; three senators appointed by the Temporary President; three assemblymen appointed by the Speaker.

(b) No salary but necessary expenses.

(c) Function: To select a site and erect a monument to Father Isaac Jogues, discoverer of Lake George.

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State Traffic Commission

Laws 1936, chapter 910:

(a) Personnel: Three members named in the law: The Commissioner of Motor Vehicles; the Superintendent of State Police and the Commissioner of Highways.

(b) Function: To study the question of motor traffic rules and regulations in different parts of the State with a view to establish uniformity in these regulations so far as is practicable.

World's Fair Commission

Laws 1936, chapter 866:

(a) Personnel: 18 members. Six are appointed by the Governor; three senators are appointed by the Temporary President of the Senate; three assemblymen are appointed by the Speaker; other members are the Temporary President of the Senate, the Speaker of the Assembly, the minority leaders of the Senate and the Assembly, the chairman of the Senate Finance Committee and the chairman of the Assembly Ways and Means Committee.

(b) No salary, other than allowances for expenses.

(c) Function: To prepare plans for the participation of New York State in the World's Fair to be held in New York City in 1939.

State Mortgage Commission

Laws 1935, chapters 19, 56, 290, 586, 638:

(a) Personnel: Three members appointed by the Governor with the consent of the Senate. The chairman is designated by the Governor.

(b) Salary: Chairman, $15,000; members, $12,000.

(c) Function: To provide a method for the relief of distressed holders of mortgage investments during the period of emergency until January 1, 1940.

Erie County Survey Commission

Laws 1933, chapter 36:

(a) Personnel: Nine citizens of Erie county named in the law.

(b) Function: To collect facts as to the application and administration of State and local laws to the government of Erie county and its towns and villages. The commission submits reports of its analysis to the Legislature.

New York City Board of Statutory Consolidation

Laws 1936, chapter 483:

(a) Personnel: Mayor, comptroller, president of board of aldermen and corporation counsel of New York City.

(b) Function: To provide for the revision, simplification, codification of the statutes, local laws and ordinances of New York City in connection with the preparation of a new city code to harmonize with the new city charter adopted November 3, 1936.

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State Board of Law Examiners

Laws 1909, chapter 35:

(a) Personnel: Three members of the bar appointed from time to time by the Court of Appeals.

(b) Compensation is to be such sum as the court may direct besides necessary disbursements as authorized.

(c) Function: To hold examinations at least twice a year in each judicial department under rules of the Court of Appeals for the admission of attorneys and counselors-at-law. The board renders an annual account to the court each year in January.

State Flood Control Commission

Laws 1936, chapters 16, 862, 863:

(a) Personnel: Twelve members; four are appointed by the Governor; four are senators appointed by the Temporary President of the Senate; four are assemblymen appointed by the Speaker of the Assembly.

(b) No salary other than reimbursement for expenses.

(c) Function: To act as the agency for the State in assisting in the institution and consummation of a Federal long-range program of flood control and regulation of flood waters within the State.

Delaware River Water Resource Commission

Laws 1923, chapter 56:

(a) Three members appointed by the Governor.

(b) No salary.

(c) Function: To confer with similar commissions named by New Jersey and Pennsylvania and to formulate a treaty between the three states and the Federal government relative to all matters on the conservation, use and development of the water resources of the Delaware river drainage basin.

Law Revision Commission

Laws 1934, chapter 597:

(a) Personnel: Seven members; the chairmen of the Senate and Assembly Judiciary Committees *ex officio*; five members appointed by the Governor who shall be attorneys admitted to practice in the State, and at least two shall be of law faculties of universities or law schools within the State.

(b) Salary for members appointed by the Governor, $5,000.

(c) Functions: To examine the common law and statutes of the State and current judicial decisions for the purpose of discovering defects and recommending reforms; to receive and consider proposed changes in the law; to recommend such changes as are deemed necessary to modify or eliminate antiquated or inequitable rules of law, and to bring the law of the State into harmony with modern conditions; to report annually to the Legislature before February first.

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Commission on Pensions

Laws 1922, chapter 269:

(a) Personnel: Five members; the Superintendent of Insurance *ex officio,* and four persons appointed by the Governor.

(b) No salary.

(c) Function: To inquire into the subject of retirement pensions, allowances and annuities for State and municipal officers and employees, and to report to the Legislature.

Albany Port District Commission

Laws 1925, chapter 192:

(a) Personnel: Five members: four are residents of the city of Albany, appointed by the Governor on the nomination of the mayor of Albany; one is a resident of the city of Rensselaer, appointed by the Governor on the nomination of the mayor of Rensselaer.

(b) Salary, $5,000.

(c) Function: To confer with any official body in connection with port and harbor facilities within and without the district; to confer with railroad, steamship and warehouse officials in connection with the development of transportation facilities and to confer with State officials as to means for stimulating the use of the Barge canal; to formulate and adopt a financial building and operation program; to execute contracts and issue and sell obligations of the port district, to fix rates, charges and wharfage for the use of port facilities.

Niagara Frontier Bridge Commission

Laws 1929, chapter 594; Laws 1930, chapter 827; Laws 1931, chapter 380; Laws 1932, chapter 196; laws 1933, chapter 89; Laws 1934, chapter 300:

(a) Personnel: Seven members, formerly the commissioners of the State Reservation at Niagara, now also members of the Niagara Frontier State Park Commission.

(b) Function: To maintain bridges across the East branch of the Niagara to the State park on Grand Island.

Trustees of Cornell University

Laws 1909, chapter 21:

(a) Personnel: Forty members; *ex officio* are the Governor, Lieutenant-Governor, Speaker of the Assembly, the Commissioner of Education, the president of the State Agricultural Society, the Commissioner of Agriculture and Markets, the librarian and the president of Cornell University; the eldest lineal descendant of Ezra Cornell is also a trustee; in addition, five members are appointed by the Governor; twenty-six members are elected, fifteen by the board of trustees, ten by the alumni and one by the New York State Grange.

(b) Function: To make all reports and perform other such acts as may be necessary to conform to the act of Congress of July 2, 1862, donating public lands to the various states for the establishment of agricultural colleges. The board establishes the various schools in the university.

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New York State Roosevelt Memorial Board

Laws 1924, chapter 615; Laws 1927, chapter 549; Laws 1929, chapter 659; Laws 1930, chapter 265; Laws 1935, chapter 956; Laws 1936, chapter 224:

(a) Personnel: A temporary board of trustees of which the Governor is an *ex officio* member, and in addition not less than five nor more than seven residents of New York State appointed by the Governor.

(b) No compensation.

(c) Function: To assume jurisdiction over the erection and construction of the New York State Roosevelt Memorial on a site provided by the city of New York, adjacent to the American Museum of Natural History.

Constitutional Convention Committee (unofficial)

A bill passed the Senate in the 1937 Legislature to authorize the Governor to name a commission to collate facts and data for the use of the convention, but the bill died in the Rules Committee of the Assembly. Acting on his own responsibility the Governor named such a commission to undertake this work.

AUTHORITIES

The authorities of New York State have been created for financing and operating certain types of public works—buildings, bridges, tunnels, etc., which are expected to be self-sustaining. The various authorities issue bonds to finance the improvements which they have undertaken.

Bethpage Park Authority

Laws 1933, chapter 801:

(a) Personnel: Board consisting of three members of the Long Island State Park Commission.

(b) Function: To acquire land in the towns of Oyster Bay, Huntington and Babylon to be developed as a public park and recreational center; to issue bonds in payment of loans, and interest and principal shall be paid out of charges for use of facilities.

New York State Power Authority

Laws 1931, chapter 772:

(a) Personnel: Five members to be appointed by the Governor by and with the consent of the Senate.

(b) No salary, but the members are allowed $75 per day while traveling or rendering service as members, the individual amount not to exceed $7,500 per year.

(c) Function: To proceed in co-operation with the proper Canadian authorities and those of the United States with the improvement and development of the international rapids section of the St. Lawrence river for the aid and benefit of commerce and navigation and for the development of hydro-electric power. The authority is authorized to study the desirability and means of attracting industry to the State; the development of hydro-electric power is to be considered primarily for the benefit of the people of the State as a whole and particularly domestic and rural consumers to whom the power can economically be made available. The members are charged with the duty of

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supervising the construction, financing and operation of a hydro-electric plant on the St. Lawrence river as soon as marketing of the current has been assured on terms that will render it possible to finance the project. No State funds are to be used.

The Port of New York Authority

Laws 1921, chapter 154:

(a) Personnel: Twelve members, six from New York and six from New Jersey, appointed by the Governors of the respective states.
(b) No salary.
(c) Functions: To purchase, construct, lease and operate any terminal or transportation facility within the Port District (Holland and Lincoln tunnels, George Washington bridge, and three bridges connecting Staten Island and New Jersey); to finance its own projects with the issuance of its own bonds; all such projects must be self-liquidating. The authority is also charged with the duty of making recommendations from time to time to the two states or to Congress looking toward the expediting of commerce passing in and out of the Port of New York.

Jones Beach State Parkway Authority

Laws 1933, chapter 70:

(a) Personnel: The three members of the Long Island State Park Commission.
(b) Function: To issue bonds and to construct parkways and parking facilities in connection with the further development of Jones Beach State Park and to charge tolls for the use of such parkways.

Triborough Bridge Authority

Laws 1933, Chapter 145:

(a) Personnel: Three members appointed by the mayor of New York City.
(b) No compensation.
(c) Funtion: The authority has completed the construction of a bridge across the East river between Queens, Manhattan, the Bronx, Ward's Island and Randall's Island. The board is authorized to construct and maintain facilities for the public, not inconsistent with the use of the project; to maintain and operate the bridge and charge tolls; to issue bonds and provide for their payment.

Buffalo and Port Erie Public Bridge Authority

Laws 1933, chapter 824:

(a) Personnel: Nine members: Three are to be residents of Canada and appointed by that government; six are to be residents of New York State, appointed by the Governor.
(b) No compensation other than necessary expenses.
(c) Function: To manage the bridge, make the lowest possible rates to the public, and gradually pay off its bonded indebtedness. When the bonded indebtedness has been paid off, the authority must turn the title of the bridge over to the State of New York and the Dominion of Canada, or to such instrumentality as the two governments may decide at that time.

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Albany Regional Market District

Laws 1935, chapter 843:

(a) Personnel: Nine members, five are to be named by the board of supervisors of Albany county, and one member each to be named by the boards of supervisors of Rensselaer, Columbia, Schoharie and Greene counties.

(b) Function: To adopt a program for financing, building and operating a regional market and for local markets within the district. The projects are to be financed by the issuing of the securities of the authority which may borrow from any State or Federal agency, but not in excess of $750,000.

New York State World War Memorial Authority

Laws 1934, chapter 819; Laws 1935, chapter 822; Laws 1936, chapters 781, 782:

(a) Ten members appointed by the Governor with the consent of the Senate.

(b) No compensation other than necessary expenses.

(c) Function: To erect a memorial building in the city of Albany; to negotiate with the Federal Public Works Administration for funds to erect the memorial; to issue bonds for any corporate purpose not exceeding $12,500,000.

New York State Rural Rehabilitation Corporation

Laws 1935, chapter 526:

(a) Personnel: Seven persons named in the act.

(b) Functions: To serve as a social and financial agency of the State which shall "by financial aid, assistance or otherwise, rehabilitate individuals and families as self-sustaining persons by enabling them to secure subsistence and gainful employment from the soil and from co-ordinate and other affiliated enterprises in accordance with economic standards of good citizenship."

There shall be an advisory committee in each county appointed by the TERA. Such county committee must approve all plans for rehabilitation.

The life of the corporation is limited to February 1, 1939, unless the emergency is declared by the Legislature to continue in existence thereafter.

Thousand Islands Bridge Authority

Laws 1933, chapter 209; Laws 1936, chapter 272:

(a) Five members, appointed by the chairman of the board of supervisors of Jefferson county, subject to the approval of the board.

(b) No salary.

(c) Function: To construct vehicular traffic connection by bridges and incidental roads across the St. Lawrence river from the New York mainland to the Canadian mainland by way of Wellesley or Wells Island and Hill or La Rue Island in the Province of Ontario; to issue bonds to pay for such construction; after such construction the authority shall maintain and operate the traffic connection until all liabilities have been met and the bonds have been paid in full or otherwise discharged.

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New York State Bridge Authority

Laws 1932, chapter 548; Laws 1933, chapter 67; Laws 1936, chapter 686; Laws 1937, chapter 522:

(a) Personnel: Three members appointed by the Governor with the consent of the Senate.

(b) No salary.

(c) Function: The authority has issued and sold serial bonds to provide money to reimburse Dutchess and Ulster counties in connection with the construction of the Mid-Hudson Bridge and the Rip Van Winkle Bridge. (The responsibility for the design and construction of this bridge rested with the Superintendent of Public Works.)

Rockland-Westchester Hudson River Crossing Authority

Laws 1935, chapter 869; Laws 1936, chapter 845:

(a) Personnel: Three members: The Superintendent of Public Works *ex officio* and two members appointed by the Governor with the consent of the Senate.

(b) No salary.

(c) Function: To construct a causeway and tunnel or a bridge across, over or under the Hudson river in the vicinity of the villages of Nyack and Tarrytown; to maintain and operate the same, and to provide for the payment of its bonds.

New York City Tunnel Authority

Laws 1935, chapter 681; Laws 1936, chapter 1:

(a) Personnel: Three members appointed by the mayor of New York, who also designates the chairman.

(b) No salary.

(c) Function: The board is authorized to construct and operate a tunnel or tunnels under the East river from Manhattan to Queens, a tunnel or tunnels under the East river from Manhattan to Brooklyn, a tunnel or tunnels under Newtown Creek from Queens to Brooklyn, a tunnel or tunnels from Brooklyn to Staten Island under New York bay; a tunnel or tunnels across Manhattan connecting the Queens Midtown tunnel with the Lincoln tunnel.

Industrial Exhibit Authority

Laws 1933, chapter 246; Laws 1934, chapter 304:

(a) Personnel: Nine persons named in the law; successors to be appointed by the Governor with the advice and consent of the Senate.

(b) No salary.

(c) Function: To establish, develop and perpetuate a State or interstate and international industrial exhibit in connection and in co-operation with the annual State Fair.

Lower Hudson Regional Market Authority

Laws 1933, chapter 231:

(a) Personnel: Seventeen members; the Commissioner of Agriculture and Markets or his representative, *ex officio*; two members of each of

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the following counties: Delaware, Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester; the boards of supervisors of each of these counties shall appoint the two members representing their counties, and both shall be residents of the county from which appointed and one shall be actually engaged in farming and deriving the greater part of his income therefrom.

(b) No salary and no reimbursement for ordinary expenses.

(c) Function: To acquire, lease, erect, maintain and operate market facilities in the district after investigations and hearings; to issue bonds to cover the costs; to fix and collect rentals and license fees to meet the obligation of the bonds.

Central New York Regional Market Authority

Laws 1933, chapter 232:

(a) Personnel: Thirteen members; the Commissioner of Agriculture and Markets or his representative, *ex officio*; two members from each of the following counties: Cayuga, Cortland, Madison, Oneida, Onondaga and Oswego; the boards of supervisors of each of these counties shall appoint two members to represent their counties; both shall be residents of the county from which appointed and at least one shall be actually engaged in farming, and deriving the greater part of his income therefrom.

(b) No salary and no reimbursement for ordinary expenses.

(c) Function: To acquire, lease, erect, maintain and operate market facilities in the district after investigations and hearings; to issue bonds to cover all costs; to fix and collect rentals and license fees to meet the obligations of the bonds.

SECTION 4—DEPARTMENT HEADS

(a) "The head of the Executive Department shall be the Governor."

In the amendment which was submitted to and approved by the people in 1925 no provision was made for a head of the Executive Department. It was therefore necessary in 1927 to insert this provision which was approved by the people at the election in that year.

(b) "The head of the Department of Audit and Control shall be the Comptroller and of the Department of Law, the Attorney-General."

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We have already discussed in section 1 the two elective officers mentioned in this section.

(c) "The head of the Department of Education shall be the regents of the University of the State of New York, who shall appoint and at pleasure remove a Commissioner of Education to be the chief administrative officer of this department."

This section follows the recommendation of the 1915 convention in making the head of the Department of Education independent of the appointing power of the Governor. Previous to the adoption of this section the head of the Education Department was not a constitutional officer.

(d) "The head of the Department of Agriculture and Markets shall be appointed in a manner to be prescribed by law."

Although the convention of 1915 recommended that there should be a Department of Agriculture with the head to be appointed by the Governor, the 1919 commission advocated the continuation of the Department of Agriculture and Markets with the head of the Department the Council of Agriculture and Markets. This council was composed of ten members elected by the Legislature for terms of ten years. It is likely that in following out this recommendation the clause was inserted: "The head . . . shall be appointed in a manner to be prescribed by law." By chapter 646, Laws of 1926, the Council of Agriculture and Markets was the head of the department. However, a change was made by chapter 16, Laws of 1935, and the head of this department is now appointed by the Governor with the consent of the Senate for the same term as the Governor. In 1935 a constitutional amendment was introduced and passed in both houses to strike out the provision in regard to the appointment of the head of this department in a manner to be prescribed by law. The amendment was then filed with the Secretary of State and submitted to the Legislature of 1937. In that year it passed in the Senate but died in committee in the Assembly and thus was never submitted to the people.

(e) "Except as otherwise provided in this Constitution, the heads of all other departments and the members of all boards and com-

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missions mentioned in this article, excepting temporary commissions for special purposes, shall be appointed by the Governor by and with the advice and consent of the Senate and may be removed by the Governor, in a manner to be prescribed by law."

The history of the growth of State departments (see art. V, sec. 2) has been intimately related with the history of the appointing powers of the Governor relative to each of those departments. It has not been thought necessary to repeat here what has already been recounted under that section. Moreover, in the convention of 1915 all the arguments for and against granting extensive appointing powers to the Governor which had been advanced in previous conventions were repeated with renewed force and vigor, and new arguments were advanced which seemed to consider every aspect of this question. Extensive quotations from their debates are appended to this section.

We may note here that the rejected Constitution of 1915 gave the Governor the power *to appoint and remove in his discretion* the heads of all State departments whose appointment or election was not otherwise provided for in the Constitution (art. VI, sec. 4). It also provided that all appointed heads of departments should be subjected to impeachment or removal by a two-thirds vote of all the members elected to the Senate (art. VI, sec. 6). The article as it was finally drafted by the Legislature and approved by the people in 1925 demanded the consent of the Senate for all appointments by the Governor and provided for removal of such officers "in a manner to be prescribed by law."

No change has been suggested in this section since 1925.

*Reasons why the Governor should be given wide powers of appointing and removing State officials, as advanced by delegates of the 1915 convention:**

(1) If we give the Governor wide appointing powers, we give him great power to do good. (Tanner, Vol. III, p. 3330.)

(2) The Governor should have the power to remove officers at pleasure. If he removes them by charges, he can "fix" charges. (Tanner, Vol. III, p. 3330.)

(3) There should be no divided authority or responsibility in executing and administering the laws of the State. Therefore, the Governor should have the power to appoint or remove at pleasure. (Tanner, Vol. III, p. 3334.)

* The following quotations are cited from the *Revised Record: 1915 Convention.*

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(4) The people should know whom to hold responsible for maladministration of the government; they should not be distracted by a number of elective executive officials, but they should be able to concentrate and devote attention to the election and the defeat of a few officials. (Alfred E. Smith, Vol. III, p. 3353.)

(5) According to the proposed amendments "the Governor has the absolute power of removal. That is right, but when it comes to appointing, has he got the absolute power of appointment? Not at all, not at all. He can only do it by and with the advice and consent of the Senate.' Now that is not fixing responsibility." (Alfred E. Smith, Vol. III, p. 3353.)

(6) If the Governor were to have wide powers of appointment, efficiency would be increased. It is important in constitutional government to unite power with responsibility. A person should be responsible for what ought to be done, rewarded if he does it, punished if he doesn't, and he shall have power to do it. (Wickersham, Vol. IV, p. 3372.)

(7) Unless the Governor is given power to remove an official without question, that official can only be removed by slander and libel and expense. (Ostrander, Vol. IV, p. 3365.)

(8) It is an anomaly that the Attorney-General should be elected while heads of the other departments are appointed. (Quigg, Vol. IV, p. 3372.)

(9) The closer the State politics is run similar to large business institutions, the better it will be for the tax-payers. No large business has ever been a success without a head. (Letters to Mr. Green, Vol. IV, p. 3412.)

(10) If you can get better men by appointment than by election, why not also appoint the Attorney-General and the Comptroller. (Green, Vol. IV, p. 3413.)

(11) In an election the Governor is selected because of what the people want, other State officials, because of what the political bosses want. (Dykman, Vol. IV, p. 3417.)

(12) We should make the Governor the real boss—out in the open. Such a set-up will make for simplicity, economy and efficiency. (Dykman, Vol. IV, p. 3418.)

(13) In an election, you can concentrate on one official, but you cannot concentrate public attention on a great number of officials. (Low, Vol. IV, p. 3444.)

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(14) The amendment is designed to give us better men for the position of Governor. Political parties will hesitate before they will place these great powers in the hands of a freak or a knave. Such a candidate would not carry the State. (D. Nicoll, Vol. IV, p. 3457.)

(15) Unless we give the Governor the sole power of appointment, what are we doing but constituting a body of twenty-eight men (twenty-seven in the Senate, one in the executive chamber) to fill these offices? (D. Nicoll, Vol. IV, p. 3463.)

(16) "The plea for an independent Comptroller was never based on an honest desire for an independent audit, but wholly on the desire to keep a mass of patronage in the hands of an obscure elective official." (From an interview of H. S. Gilbertson of the New York Short Ballot Assn., *Morning Times,* quoted by Mr. Brackett, Vol. IV, p. 3467.)

(17) I fear far more the abuses which necessarily arise from irresponsible government than I do what I regard as the largely imaginary abuses which come from an increase of the effectiveness and power of government. (Stimson, Vol. IV, p. 3472.)

(18) The Attorney-General should be appointed by the Governor. The Governor must depend on that officer to the greatest extent for the enforcement of law. He is the legal arm of the Governor. (C. Nicoll, Vol. IV, p. 3525.)

(19) The average citizen is too busy to know about all the candidates who are running for office. Therefore, the Governor should be given wider appointing powers. (Eisner, Vol. IV, p. 3527.)

(20) The Attorney-General and the Comptroller are administrative officers, not representative. Hence they should be appointed and not elected. (Eisner, Vol. IV, p. 3528.)

*Reasons why the Governor should not have wide appointing powers, as advanced by the delegates of the 1915 convention:**

(1) If you give the Governor wide appointing powers he will find places for all his old college chums and for his sons-in-law. (Ostrander, Vol. III, p. 3356.)

(2) Competent men hardly ever come out of their holes to ask the Governor for these jobs.

"But the axle that is squeaking,
Is the one that gets the grease."

(Ostrander, Vol. III, p. 3357.)

* All of these quotations are cited from the *Revised Record, New York State Constitutional Convention 1915,* Vols. III and IV.

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(3) "There is no Governor, as I believe, that is fit to be trusted with autocratic power. We seldom get a large man for Governor. It is generally the available man." (Ostrander, Vol. III, pp. 3358–9.)

(4) No man is so safe in his job as the appointed man. You will find, generally, that more scandals occur in appointive offices than in elective offices, because the man who is elected always has a little fear of God in his heart, but the appointed boys are generally "pa's boys," and they know that he will protect them. (Ostrander, Vol. III, p. 3359.)

(5) What the people want is not more responsibility in the Governor, but more horse sense. (Ostrander, Vol. III, p. 3360.)

(6) The people ought to be able to fill by election those offices which have large patronage. (Quigg, Vol. IV, p. 3371.)

(7) "Are the people ready to confess that they cannot elect people to carry on their business? If so, let us have the emperor come along. They say people are too busy, they cannot find the man on the ballot." But on a ballot ten feet long you cannot hide a name. If the people want to "get a man, they will get him." (Ostrander, Vol. IV, p. 3361.)

(8) There is no comparison between the appointment of cabinet officers in the national government and the appointment of our State officials. The cabinet officers are not constitutional officers, the offices are created by Congress. Cabinet members are assistants to the President to enforce the law and they are responsible to Congress. (Quigg, Vol. IV, p. 3370.)

(9) The voters prefer to elect all State officers. (Letters to Mr. Green, Vol. IV, p. 3410.)

(10) I prefer a short ballot with power and responsibility centered in the Governor, if the Governor is a wise and conscientious man, but suppose a weak or sordid man happened to be elected Governor. This danger can only be avoided by the principle of recall. (Letters to Mr. Green, Vol. IV, p. 3410.)

(11) There is a great tendency in this country at present to exalt the executive and make him practically a dictator. (Letters to Mr. Green, Vol. IV, p. 3411.)

(12) There should be a department of accounts to investigate all the departments and the head should be elected by the people or by the Legislature. (Wagner, Vol. IV, pp. 3378–9.)

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(13) The head of the Department of Public Works has tremendous power and should therefore be elected. Rather let the Attorney-General be appointed than the head of this department. (Wagner, Vol. IV, p. 3381.)

(14) The letters to Mr. Green from his constituents were five to one in favor of having elective offices retained because "the people can pick as good a man as the Governor can." (Vol. IV, pp. 3402–03.)

(15) The Governor has enough patronage as it is now. (Letter to Mr. Green, Vol. IV, p. 3403.)

(16) When we deprive the people of the chance to elect executive officers, we are violating one of the essential and fundamental forms of popular government. (Letter to Mr. Green, Vol. IV, p. 3411.)

(17) The question is, whether we shall continue to be a democracy or not; whether we shall travel on the path of manhood suffrage or abandon it. (Brackett, Vol. IV, p. 3419.)

(18) If the Governor should appoint a worthless official, to get at the official you must get the Governor. (Brackett, Vol. IV, p. 3436.)

(19) Too much appointive power in one man is in the direction of turning over the management to some strong man who can run things efficiently. (Brackett, Vol. IV, p. 3437.)

(20) If you want efficiency get the Czar. (Brackett, Vol. IV, p. 3438.)

(21) Every appointive officer instead of looking to efficiency keeps his eye on the Governor. (Brackett, Vol. IV, p. 3437.)

(22) As for economy, each appointive office increases in expenditures. (Brackett, Vol. IV, p. 3437.)

(23) One fundamental rule for statute making is to consider not what a good man will do but what a bad man may do. (Brackett. Vol. IV, p. 3340.)

(24) It is a far cry from the efficiency of the Czar to this efficiency. Yes, but it is a step in the right direction. (Brackett, Vol. IV, p. 3441.)

(25) It is of first importance that the auditing officer should have his title from some other source than the chief executive. (D. Nicoll, Vol. IV, p. 3454.)

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(26) A Governor if he has all this power will not appoint to office bigger men than himself but small men whom he can control. A convention will select big men. (Betts, Vol. IV, p. 3508.)

(27) What is the Short Ballot League? Some men were disappointed in politics, they got together, hired a secretary and a press agent, and they started propaganda. Then the leaders thought there was a real honest public demand for the short ballot, and both parties put the plank in their platforms. (Burkan, Vol. IV, pp. 3468–9.)

(28) I have talked with the people in my district and they feel that the short ballot takes away their right to select their own officials. (Burkan, Vol. IV, p. 3469.)

(29) The appointment by the Governor does not do away with the boss system because the boss will tell the Governor whom to appoint. (Brackett, Vol. IV, p. 3533.)

SECTION 5—CERTAIN OFFICES ABOLISHED

"All offices for the weighing, gauging, measuring, culling or inspecting any merchandise, produce, manufacture or commodity whatever, are hereby abolished; and no such office shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health or the interest of the State in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purposes hereafter."

This provision was placed in the Constitution in 1846 after strong popular demand and agitation. In the early nineteenth century the people of the State conceived the idea that State products would sell better if they were stamped "Made in New York," and so the State set up a system of inspecting and stamping New York products. Laws were made requiring persons wishing to deal in certain products to secure such inspection and approval before they could trade in the particular product. By 1846, however, a small army of such officers had developed and had rendered themselves obnoxious by reason of the fees incidental to inspection. The people of the State felt that such offices should be

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abolished once and for all and approved the constitutional provision abolishing all such offices. (*Debates 1846,* pp. 510–7; *Revised Record 1915,* IV, pp. 3865–9.)

In 1867 no change of this provision was recommended, and in 1894 the provision was left in the Constitution without change. No debate is recorded in 1894 on this provision.

In 1915 an amendment was introduced (Int. No. 131) by Mr. Franchot to repeal this section (at that time, section 8 of article V). The amendment was referred to the Committee on Industrial Interests and Relations and was reported amended (Pr. No. 860) to the Committee of the Whole. In its final form the amendment read that no offices for weighing, gauging, etc., should be created by law, *but that nothing in the section should prevent the creation of an office for the non-compulsory grading or inspection of food products,* or for the purpose of protecting the public health, or the interest of the State, or the supplying the people with correct standards of weights and measures. (Part in italics new.)

Mr. Franchot in explaining his proposal to the delegates in convention stated that this section as it survived in the Constitution as a relic from 1846 might be classified as "junk" so far as its present applicability was concerned. No offices existed at the time for the weighing, measuring or inspection of food except for the protection of the public health or in the interests of the State or the people, and hence none could be abolished. So far as creating new non-compulsory offices for such purposes was concerned, there was positive advantage in such a procedure. Representatives from the office of the Attorney-General of the State who had conducted investigations into the condition of distribution of food in the cities of the State advocated the creation of non-compulsory offices for the inspection of food products. Such inspection would protect the producer from the middleman by certifying the grade and value of the produce and thus prevent the lowering of rates by the middleman in a distant city on the arbitrary claim that the food was imperfect; it would protect the consumer since purchase price would be based on stamped grade and value. (*Revised Record 1915,* IV, 3864–6.)

After hearing the explanation Mr. Blauvelt moved to repeal the entire section. Mr. Leggett then admonished the delegates not to become "lightminded" and remove without serious consideration a section of the Constitution which had survived since 1846. He argued that though trade conditions had changed since 1846, human nature had not, and if the way were opened to such offices, we would again have a small army of petty inspection officials. Mr. Stowell supported this argument of Mr. Leggett, and Mr. Wickersham urged hesitation before striking

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out thoughtlessly a provision that had been so long in the fundamental law. (*Ibid.*, 3867–8.)

Mr. Parsons then rose to the support of Mr. Franchot's amendment. He explained the advantage accruing from the Chicago Board of Trade. State officers of Illinois fixed standards for food. It was not necessary to come up to the standards, but if one wanted to sell on the Chicago Board of Trade, it was necessary to comply. The Attorney-General feared that such an arrangement would be impossible in New York because of the provisions of this section. Mr. Lindsay argued in opposition that in Chicago if one did not sell with the approval of the Board of Trade, he could not get a fair price for his product. And he asked whether the officers appointed for the non-compulsory inspection could not fix prices on anything shipped to the city market. Mr. Parsons replied that such was not the case since the officers would be authorized by legislation, and that the measure was in fact for the protection of the producer in the point of view of the Attorney-General, since the middle man could not then send back the food and say it was not up to grade. (*Ibid.*, IV, 3869–70.)

Mr. J. G. Saxe and Mr. Cullinan and Mr. Wiggins rose to oppose the repeal or amendment of this section, voicing their belief that the law was sufficient as it was and should not be changed. (*Ibid.*, IV, 3871.)

When a vote was taken on Mr. Blauvelt's amendment to repeal section 8 of article V, the motion "was manifestly lost." A vote was then taken on Mr. Wiggins' motion to strike out the enacting clause and leave the provision as it then existed in the Constitution and this motion was defeated by a vote of 44 to 30. Finally the vote was taken on the amendment of Mr. Franchot to permit the creation of non-compulsory offices for grading and inspecting food. The motion was carried and the proposed amendment went to the order of third reading. (*Ibid.*, IV, 3877–8.)

When the amendment of this section came to the order of third reading, there was considerable debate but no new arguments were offered either for or against the measure. (*Ibid.*, IV, 4088–97.)

The final vote upon Mr. Franchot's amendment was 83 for the proposal and 58 against it. Thus it failed to receive the affirmative vote of a majority of the delegates elected to the convention and it was not adopted. Whereupon Mr. Franchot moved that the vote should be reconsidered, and his motion was carried. (*Ibid.*, IV, 4096–7.) However, the convention never returned again to its reconsideration before final adjournment.

Between 1915 and the present time this bill has received no consideration either from the various commissions or from the Legislature.

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SECTION 6—CIVIL SERVICE APPOINTMENTS AND PROMOTIONS

"Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, any honorably discharged soldiers, sailors, marines or nurses of the army, navy or marine corps of the United States disabled in the actual performance of duty in any war, to an extent recognized by the United States Veterans' Bureau, who are citizens and residents of this State and were at the time of their entrance into the military or naval service of the United States, and whose disability exists at the time of his or her application for such appointment or promotion, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section."

Under the colonial government all major and minor civil officials were appointed either by the Crown or by the chief officers of the Colony. When the first Constitution was framed in 1777, the natural course was followed and the Council of Appointments was vested with the power to appoint and remove those State officers necessary for the performance of governmental activities whose appointment or election was not otherwise provided by the Constitution. (*Const. 1777,* art. XXIII.) We have before mentioned that the convention of 1801 decided that the power of nomination of officers was not vested solely in the Governor, but equally in the four other members appointed by the Assembly. The council soon rendered itself obnoxious by wholesale removals and appointments solely for political reasons. The council was hindered very little by constitutional or statutory provisions; if it was prescribed that a certain office was to be filled by a fit and proper person, the council was sole judge of fitness and competency. Only when qualifications were required such as those prescribed for district attorneys that they be counselors at law in the Supreme Court, was the council noticeably hampered in its freedom of action. Even judicial officers were appointed with little consideration of their knowledge of law. (Lincoln, *Const. Hist.* III, pp. 314–8.)

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The Constitution of 1821 abolished the Council of Appointment, made a large number of officials elective, transferred the selection of others to the Legislature and gave to the Governor the power of appointing others subject to the consent of the Senate. (Lincoln, *op. cit.,* III, p. 318.)

> "The convention of 1846 carried the policy of popular election almost to the extreme . . . . They (the people) constitute the tribunal—in a sense the Civil Service Commission—which must determine whether a candidate is qualified for the office he seeks. . . . If it should be found that an officer elected does not possess (the necessary) qualifications, he would be subject to removal, for this reason, by the proper authority. The people may not always be able to determine in advance whether a candidate possesses the required qualifications, but they are not, for that reason, compelled to accept the service of an unqualified officer." (Lincoln, *op. cit.,* pp. 318–9.)

It will be noted that the elective positions here discussed refer more to the offices filled outside of the authority of the Civil Service Commission —those which would either be in the exempt or the elective class today. Subordinate officers who "usually perform the largest part of the actual labor of a given department," are the persons whom civil service is especially destined to protect. The evils of removal of such subordinate officers for partisan reasons were particularly felt under the Council of Appointment, but the abolition of the council did not wholly relieve the situation from partisan influence. (Lincoln, *op. cit.,* III, pp. 320–1.)

In 1854 Governor Seymour called attention to the condition existing in State prisons where it appeared that the average length of time during which wardens and agents had held office between 1834 and 1851 did not exceed eighteen months. Under this system the Governor felt that it would be impossible to obtain candidates with the mental and moral qualities and the requisite experience necessary for the proper administration of prison affairs. Such offices he urged should be placed beyond the reach of political influence. An Assembly report of 1852 to which the Governor had referred, recommended that chief wardens should hold office for a long term, and that "in the selection of the chief and subordinate officers, it should be a cardinal point that they are fitted, both by nature and education, for the important stations they are to fill." Lincoln remarks that if such recommendations had been followed to their logical conclusion, the candidates could have been required to qualify by means of examinations. (Lincoln, *op. cit.,* III, p. 322.)

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We have already seen [5] that by constitutional amendment in 1876 the elective State prison inspectors were abolished and the office of superintendent of state prisons was created with power to appoint all the prison officers except the clerk. The prison law of 1889 provided that none of these appointments should be made on the grounds of political partisanship, but that "honesty, capacity and adaptation (should) constitute the rule for appointments." The act also provided that preference in appointment should be given to honorably discharged Union soldiers and sailors "in cases otherwise evenly balanced." (Lincoln, *op. cit.*, III, pp. 323–4.)

It was in the case of prison officers that the civil service reform was most urgently needed. But as far back as 1866 a type of civil service examination had been required of election inspectors. By chapter 812 of the laws of that year, the board of metropolitan police of New York City was designated to determine by examination, the qualifications of election inspectors appointed by the board of supervisors of New York County. The principal qualification of such officers was that they should "be able to read and write the English language understandingly." (Lincoln, III, pp. 324–5.)

The first State-wide civil service reform was accomplished by chapter 354 of the laws of 1883, enacted at the suggestion of Governor Cleveland. This act provided for the appointment by the Governor and the Senate of a State Civil Service Commission composed of three members, not more than two of whom should belong to the same political party. The act required the commission to provide for open competitive examinations to test the fitness of applicants for the public service and authorized the appointment of municipal Civil Service Commissions in cities containing a population of 50,000 or more. No recommendations or questions were to relate to the political opinions or affiliations of prospective candidates. By acts of the Legislature of 1884, 1885, 1886 and 1887, preference in the civil service of the State and of the cities, towns and villages thereof, was given to honorably discharged Union soldiers and sailors. (Lincoln, *op. cit.*, III, pp. 326–8.)

The first amendment offered by any delegate in the convention of 1894 related to the question of civil service reform. Although the laws outlined above provided for adequate protection of the civil service of the State, it was thought advisable for two reasons to include some provision in the Constitution. First of all, such a disposition would give the civil service provision more permanency by removing it from legislative control; secondly, constitutional provision for civil service was required to bring under its operation employees of State prisons and the

[5] *Vide supra*, p. 124.

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Department of Public Works. These departments were under the supervision of officers appointed by the Governor who themselves had constitutional power to appoint subordinate officers within the departments. (*Amendments 1876,* art. V, secs. 3, 4; Lincoln, *op. cit.,* III, pp. 328–30.)

This and other proposed amendments were referred to the Committee on Civil Service, and this committee reported an amendment to the convention. The reported amendment provided that appointments and promotions in the civil service should be based on merit to be ascertained by examinations *so far as was practicable.* The italicized clause was inserted because the committee did not believe that it was practicable in all cases to determine merit by examinations. It was the opinion of the committee that such examinations should be competitive, but again the clause "so far as practicable" was inserted and for the same reason as previously. (Lincoln, *op. cit.,* III, p. 330.)

The reported amendment of the Committee on Civil Service extended only to the public service of the State and cities thereof, but Mr. DeLancy Nicoll urged that the principle of the section be extended to counties, towns and villages. His amendment was incorporated into the final draft of this section. (Lincoln, *op. cit.,* III, p. 333.)

Mr. Tibbetts moved to amend the section by securing preference for honorably discharged Union soldiers and sailors. This group of citizens was protected by the existing civil service laws, but the amendment as reported by the committee would disfranchise this group. Mr. Countryman opposed the soldier amendment because he did not favor any preferred group in the civil service. By a vote of 65 to 5 the convention was in favor of granting some preference to Civil War veterans, but there was a great deal of dispute as to the extent of preference to be granted. The provision as it was placed in final form in the Constitution did not exempt veterans from examinations to ascertain merit and fitness, but it did grant them preference in appointment or promotion without regard to their standing on eligible lists. This motion was carried in convention by a vote of 69 to 24. (Lincoln, *op. cit.,* III, pp. 331–3.)

During the period between 1895 and the convention of 1915 a number of amendments were introduced in the Legislature relative to the civil service provision, but none of them was ever submitted to the people. We shall list below the salient features of these amendments, but we shall be unable to give the legislative history of these provisions, since the source is deficient in that respect.

(1) 1899—Veterans preference to be granted to Spanish-American War veterans. Introduced in the Assembly.

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(2) 1900—Proposal to repeal the civil service provision introduced in the Assembly.

(3) 1901—(a) Veterans preference to be granted to Spanish-American War veterans. Introduced in both houses.
(b) Proposal to repeal the civil service provision introduced in the Assembly.

(4) 1902—Spanish War veterans to obtain preference in civil service. Introduced in both houses.

(5) 1906—Proposal to repeal the civil service provision of the Constitution introduced in both houses.

(6) 1907—Extension of veterans preference to Spanish-American War veterans. Introduced in the Assembly.

(7) 1908—(a) Additional 10 per cent in rating in examinations to all honorably discharged soldiers, sailors and marines of the United States forces who have been residents of the State for five years before making application and who have attained the grade for eligibility. Introduced in both houses.
(b) Veterans preference to Spanish-American War veterans, and to those who served in the army during the Philippine insurrection or the Boxer Rebellion in China before July 4, 1902. Introduced in the Assembly.

(8) 1909—(a) Additional 10 per cent in rating to Spanish-American War, Boxer Rebellion and Philippine Insurrection veterans. Introduced in both houses.
(b) Veterans preference to Spanish-American War, Boxer Rebellion and Philippine Insurrection veterans. Introduced in Assembly.

(9) 1912—Preference to veterans in any war according to the opening date of the war in which they served. Introduced in the Assembly.

(10) 1913—(a) The rights enjoyed by Civil War veterans with regard to protection against removal should be extended to veterans of the Spanish-American War, of the Boxer Rebellion and of the Philippine Insurrection and to exempt volunteer firemen. Introduced in the Assembly.
(b) Preference in appointment, retention and promotion extended to all who served in any war in which the United States was engaged and to those who served in the civil service of the State for ten years. Introduced in the Assembly.

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(11) 1914—Preference in appointment, retention and promotion extended to veterans of any war and to those who served ten years in the civil service of the State.
(Constitutional Convention Commission. *Annotated Constitution* Part II, pp. 91–101, Albany, 1915.)

A number of changes in the civil service provisions was recommended by the delegates in the 1915 convention. Some of the delegates wished to extend the preference granted to Civil War veterans to veterans of the Spanish-American War, to honorably discharged members of the National Guard or the Naval Militia of the State, to exempt volunteer firemen and to all honorably discharged soldiers, sailors and marines of the United States forces. The majority of the committee reported unfavorably against granting any such extension. They reported that there existed in the classified civil service of the State and the civil divisions thereof sixty-eight thousand positions. But the number of Spanish-American War veterans in the State was about twenty-five thousand; volunteer firemen numbered approximately two hundred thousand; honorably discharged members of the National Guard and Naval Militia of the State totaled about thirty thousand; no information was available as to the number of honorably discharged soldiers and sailors and marines of the United States Army and Navy. Thus the number of the proposed preferred groups far exceeded the number of places in the classified civil service. In addition the committee reported that strong protests had been received from heads of State and municipal agencies and from various mayors against the inclusion of such preference on the grounds that it would entirely destroy the merit system in civil service. (*Documents 1915,* Document No. 47, pp. 2–3.)

Three of the members of the committee submitted a minority report in which they urged that the privileges extended to Civil War veterans be granted to veterans of the Spanish-American War, since the same patriotic motives had inspired both groups to enlist. This minority group felt that the civil service would be strengthened in efficiency because of the military experience and training of the preferred group and that the recognition of patriotic service would provide an incentive for enlistment to the youth of the state, should a similar emergency arise. (*Ibid.,* Document No. 47, pp. 4–5.)

Another minority group wished to amend the constitutional provision for civil service by compelling the appointment of those who attained highest standing in competitive examinations. This group also wished to protect civil service employees from arbitrary removal and to prevent the change of positions from the competitive to the exempt class. (*Ibid.,* Document No. 47, pp. 5–6.)

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The report of the Committee on Civil Service together with the two minority reports were presented to the convention on August 31, 1915. These reports were ordered printed as documents and referred to the Committee of the Whole. (*Revised Record 1915,* IV, pp. 3634–5.) On September second Mr. Griffin made a motion to discharge the Committee on Civil Service from consideration of the bill (Pr. No. 29) providing for preference to honorably discharged soldiers and sailors and to veterans of the Spanish-American War. The president declared that such a motion was not in order since the Committee on Civil Service had already reported adversely to the convention on this particular bill. Mr. Whipple said that he was of the opinion that if a committee reported adversely on a bill and the House agreed with the report, such action killed the bill. Mr. Griffin then rose to state that though the bill had been reported adversely by committee, the house had not agreed to the report and had not even considered it. Therefore, he amended his motion and now moved that both the majority and minority reports be noted on the calendar of general orders for consideration by the convention. The president said that both of the reports should be on the printed calendar of general orders and he directed the secretary of the convention to take note of the fact. (*Ibid.,* IV., pp. 3878–80.)

On September the fourth Mr. Olcott made a motion that the Committee on Rules be directed to place the reports of the Committee on Civil Service on the calendar of general orders for prompt consideration, since the days of convention were fast decreasing. He felt that even if the delegates wished to defeat the measure, they ought at least to give it a vote on the floor in view of the thousands of interested veterans. The motion was seconded by Mr. Griffin and Mr. Byrne and referred to the Committee on Rules by the president. (*Ibid.,* IV, pp. 4124–9.)

After recess on the same day Mr. J. L. O'Brian reported that the members of the Committee on Rules felt that the consideration of the report of the Committee on Civil Service could not be reached on the calendar of general orders, and therefore no action was taken on it. Mr. Olcott then moved to disagree with the report of the Committee on Rules. A vote was taken and the convention went on record to disagree with the report of the Committee on Rules by a total of 72 for and 61 against. But the House then went on to consider the question of the Bill of Rights. (*Ibid.,* IV, pp. 4168–70.) The matter of veterans preference was not reached for consideration in the limited time at the disposal of the convention.

In the interval between 1916 and today, hardly a year has passed without the introduction of some amendment relative to the civil service

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provision in the Constitution. We shall here list in chronological order the various amendments introduced and the disposal of each.

(1) 1916—A bill was introduced in both houses to grant preference to veterans of all wars, first preference to be given to those who served in the earliest war. The bill passed the Senate but died in committee in the Assembly.

(2) 1917—A similar bill was introduced in both houses, passed both and was sent to the Secretary of State for consideration in 1919.

(3) 1919—The bill referred by the Legislature of 1917 was not considered by the Legislature of 1919, but a new bill specifically mentioning World War veterans as eligible for preference passed both houses and was sent to the Secretary of State for consideration in 1921.

(4) 1920—A bill was introduced in the Assembly to grant preference to veterans of all wars, but the bill died in committee. A bill was introduced in the Senate to grant preference to all disabled veterans and this too died in committee.

(5) 1921—The bill referred to the Legislature of this year by the Legislature of 1919 passed both houses. It was thus submitted to the people but defeated by them in the general election of that year.

(6) 1922—A bill was introduced in the Senate to grant preference in civil service to veterans of any war (including nurses) in a manner to be prescribed by the Legislature. The bill died in committee. Another bill was introduced in the Senate to grant additional credits in competitive examinations to veterans. This bill also died in committee.

(7) 1923—A bill providing preference to all disabled war veterans passed both houses and was filed with the Secretary of State for consideration in 1925.

(8) 1924—Two bills were introduced in the Assembly, one granting preference in civil service to veterans of all wars, the other granting such preference only to disabled veterans. Both bills died in committee.

(9) 1925—The bill referred to the Legislature of this year by the Legislature of 1923 was introduced in the Assembly and died in the Judiciary Committee of that body.

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(10) 1926—A bill was again introduced in the Assembly to grant preference in civil service to disabled war veterans. The bill died in committee.

(11) 1927—A bill was introduced in the Assembly to grant civil service preference to disabled war veterans, but the bill died in committee. Another bill was introduced in both houses to grant such preference to all war veterans, but it died in committee in both houses.

(12) 1928—A series of eight bills was introduced in both houses—six in the Assembly and two in the Senate to grant civil service preference to veterans. One of these bills which extended preference to disabled veterans of all wars passed both houses and was filed with the Secretary of State for consideration in 1929. The other bills died in committee.

(13) 1929—The bill referred to the Legislature of this year by the Legislature of the previous year passed both houses of the Legislature and was submitted to the people in the general election of this year. The amendment was accepted by the people and became a part of the Constitution.

(14) 1932—A bill passed both houses to extend preference to disabled veterans who were residents of the State at the time of enlistment and are now citizens. It was filed with the Secretary of State and referred to the Legislature of 1933.

(15) 1933—(a) The bill referred to the Legislature of this year by the Legislature of the previous year passed both houses and was submitted to the people in the general election of this year. It was defeated by a vote of the people.

(b) Another bill was introduced in both houses to grant civil service preference to veterans in appointment but not in promotion. The bill died in committee in the Senate and was stricken from the calendar in the Assembly after a third reading.

(c) A third bill was introduced in the Assembly to grant preference in the civil service to veterans who won the Congressional Medal or the Distinguished Service Cross. It died in committee.

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(16) 1934—A bill was introduced in the Assembly to provide for civil service preference in appointment but not in promotion for veterans. The bill passed the Assembly but died in committee in the Senate.

(17) 1935—A bill was introduced in the Assembly to provide for civil service preference to veterans in appointment but not in promotion. It died in committee. Another bill was introduced in the Assembly to provide that the persons holding the highest places on an eligible civil service list as ascertained by a competitive examination should be appointed before others. The bill died in committee.

(18) 1936—A series of four bills was introduced in both houses—three in the Assembly and one in the Senate—to provide earliest appointment and promotion in the civil service for those rating highest in competitive examinations. All these bills died in committee. Another bill was introduced in the Assembly granting preference to veterans in appointment but not in promotion in the civil service. This bill passed the Assembly but died in committee in the Senate. A third bill was introduced in the Senate providing for preference to veterans "as the Legislature shall prescribe." It died in committee in that house.

(19) 1937—A bill was introduced in the Assembly to provide that each appointment or promotion in the civil service should be of the one standing highest on the eligible list as determined by competitive examinations. The bill died in committee. Another bill was introduced in the Assembly to grant civil service preference to veterans in appointment but not in promotion. It died in committee.

Judicial Construction of Article V, Section 6

Purpose and Force

The purpose of the civil service provision as defined by the courts is to improve the standard of those holding subordinate positions in the public service and to terminate the vicious practice which had grown up of changing employees with every change in the appointing power. (*Seeley* v. *Stevens,* (1907) 190 N. Y. 158.) And the force of the constitutional provision is such that even "if the Legislature should repeal all the statutes and regulations on the subject of appointments in the

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civil service the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal." (Per O'Brien, J., in *People* v. *Roberts,* (1896) 148 N. Y. 360.)

Practicability of Competitive Examinations

The section provides in general that appointments and promotions in the public service shall be determined by competitive examinations, but there are certain classes of persons exempted from such competition. It was not believed practicable to hold competitive examinations for ordinary day laborers performing unskilled manual work. (*People* v. *Dalton,* (1900) 49 App. Div. 71.) The courts have also held that where a subordinate officer has personal custody of public funds and securities for which his superior officer has given bond, the superior officer should be entitled to a determining voice in the appointment of their custodian. (*Chittenden* v. *Wurster,* (1897) 152 N. Y. 345.) The courts have likewise held that competitive examinations are impracticable for filling confidential positions.

A position is confidential when its duties are not merely clerical, but are such as devolve upon the head of an office and which he is compelled to delegate to others; such positions require in the incumbent skill, judgment, trust and confidence and involve the responsibility of the officer whom the incumbent represents. (*Chittenden* v. *Wurster, supra.*) It was also held that in certain cases promotions might be made in the police force by reason of acts of heroism and without the necessity of competitive examinations. The quality of heroism was deemed a sign of merit and fitness for a police officer and the court recognized that such qualities could not be determined by competitive examination. (*People* v. *Knox,* (1901) 166 N. Y. 444.)

The constitutional provision on civil service does not attempt to determine when a competitive examination shall be practicable to determine merit and fitness, and hence that duty devolves upon the Legislature. But a declaration by the Legislature in any particular case that a competitive examination is not practicable, is not binding on the courts. (*People* v. *McWilliams,* (1906) 185 N. Y. 92.) However, the action of the Legislature or of a commission in exempting a position from competitive examination will not be set aside unless palpably wrong. If there is a fair and reasonable difference of opinion as to the practicability of a competitive examination in any case, such case will be left undisturbed. (*Simons* v. *McGuire,* (1912) 204 N. Y. 253.)

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Person Graded Highest

In positions which have been placed in the competitive class of civil service by the Legislature or by the State or municipal Civil Service Commission, the appointing authority is not required to give the position to the person graded highest on the eligible list. By article X, section 2, of the Constitution, municipal authorities are vested with the power of appointing certain officers. Some of these offices have been placed in the competitive class, but the municipal authorities are not denied discretion in making the appointments from those who are on the eligible list, except in the case of a qualified veteran. Otherwise they would be denied a constitutional power. But even in other offices where a constitutional power is not in question, discretion in appointment is still allowed to heads of departments or bureaus in which the vacancy is to be filled. Any law which required that a position should be filled by the person graded highest in a competitive examination would be unconstitutional. Furthermore, it would in effect make the Civil Service Commission the sole appointing power in filling thousands of offices. According to the constitutional provision the function of the Civil Service Commission is merely to determine the merit and fitness of an applicant to a position. The power of selecting subordinates from among those whose merit and fitness has been affirmed should be vested in the officer who is to be served by such subordinates. (*People* v. *Mosher,* (1900) 163 N. Y. 32.)

Periods of Probation

In addition, it is constitutionally valid to demand a probationary period for those who have successfully passed competitive examinations. The constitution reads that examinations shall be competitive "so far as practicable." In most cases a probationary period after success in competitive examinations, is a far more practicable way of determining merit and fitness in filling any one particular office. Even in cases of veterans who have been declared eligible after the examination, no appointment need be made if they fail to give satisfaction during the period of probation. (*People* v. *Lyman,* (1898) 157 N. Y. 368.)

Necessity of Competitive Examinations

We have seen above (*People* v. *Mosher, supra*) that a law would be unconstitutional if it required the appointment of the person graded highest in a competitive examination. However, a contention that favored classes may be created without limit if confined to those who pass cannot be sustained. The Constitution does not merely require

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examination, but it specifically requires competitive examination. (*Barthelmess* v. *Cukor,* (1921) 231 N. Y. 435.)

An examination is competitive when it conforms to measures and standards which are sufficiently objective to be capable of being challenged and reviewed by other examiners of equal ability and experience. Thus the use of an oral interview to determine whether an applicant for medical examiner had force and executive ability was held an abuse of discretion in the absence of a finding by the municipal Civil Service Commission that executive ability and force were necessary qualities for the office, in the absence of standards capable of objectively measuring such qualities, and in the absence of any announcement that these qualities would be measured. (*Fink* v. *Finegan,* (1936) 270 N. Y. 356.)

An oral test may be employed in a competitive civil service examination as a test of knowledge or it may be used to judge the merits of teachers who require in the performance of their duties qualities which cannot be judged without oral examinations. However, such oral examinations as are held, must be objective in the sense explained above. (*Fink* v. *Finegan, supra.*)

Although competitive examinations are necessary to fill certain positions in the civil service, it is not required that every position shall be thrown open to those not in civil service. Some vacancies can be filled solely by promotion from employees occupying lower positions in the service. (Per Cullen, Ch. J., concurring, and Haight, J., dissenting in *Hale* v. *Worstell,* (1906) 185 N. Y. 247.)

Promotions

Transfers may be made from one position to another within the civil service when the transfer does not constitute a promotion. If the transfer were to a higher position, it would in fact be a promotion. The court held that promotions under the name of transfers were illegal and contrary to the express terms of the Constitution. (Per Chase, J., in *Hale* v. *Worstell,* (1906) 185 N. Y. 247.) However, the Legislature may effect a change in the rank and pay of an office and may make that change applicable to incumbents of the office without subjecting such incumbents to a competitive examination. (*People* v. *Bingham,* 130 App. Div. 112.)

Any attempt to abolish a position in the competitive class and to place a newly created position "corresponding or similar" to the one abolished in the non-competitive class is a violation of the constitutional provision for civil service. (*Van Fleet* v. *Walsh,* (1924) 122 Misc. 316.)

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Veterans' Preference

We saw in the historical account of the civil service provision of the Constitution that previous to 1929 preference in appointment and promotion was given to all honorably discharged Civil War veterans, and that after 1929 preference was granted to honorably discharged and disabled veterans of all wars. Although the recipients of the veterans' preference were changed by the amendment, the preference given was not changed. Hence, decisions rendered prior to 1929 are still applicable in principle to the amended provision.

The Constitution does not exempt disabled veterans from examinations in the civil service. Until the veteran has passed the examination designed to test merit and fitness for a particular position, he is entitled to no preference. After passing the examination, however, he must receive priority in appointment and promotion regardless of his standing on the eligible list. (*In re Keymer,* (1896) 148 N. Y. 219.)

The courts have also held that the preference accorded to veterans extends to their retention in office so long as the position to which they have been appointed exists. Otherwise a veteran could be discharged immediately after his appointment and another assigned to his position; in such a case preference in appointment and promotion would be a "hollow sham." (*Seeley* v. *Stevens,* (1907) 190 N. Y. 158.)

The Legislature has no power to enact laws repugnant to the provisions giving preference to veterans, but it may adopt additional measures harmonious therewith. Thus, it may provide for their retention in office. (*Stultzbach* v. *Coler,* (1901) 168 N. Y. 416.)

The right of a veteran to preference is a constitutional right and does not depend on the knowledge of the appointing power that he is a veteran. Such was the opinion of the court in a case where a veteran was removed from office by an officer who was ignorant of the fact that the person removed was a veteran. The court held that the veteran was entitled to reinstatement upon calling to the attention of the officer his right of preference. (*Stultzbach* v. *Coler,* (1901) 168 N. Y. 416.) However, it has also been declared that since veterans' preference is a personal right, it may be waived by any person to whom it attaches; such waiver will be presumed from the failure to assert such right prior to appointment, dismissal or promotion where the veteran wishes to receive preference. (*People* v. *Simonson,* (1901) 64 App. Div. 312.)

In a case where a disabled veteran was not appointed to a position to which he was entitled by constitutional right, the court ordered not only that he be installed in the position, but that he be paid salary in arrears from the date of the original appointment to the position of his predecessor. (*Lipsky* v. *Rice,* (1934) 152 Misc. 218.)

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The preference extended to veterans cannot be said to protect them from reduction of salary. Neither the Constitution nor statutes require that other salaries must be reduced before a veteran's salary can be decreased. Hence, unless discrimination were to be shown against the veteran by the reduction of the salaries of some but not all the employees of a certain grade or class, or unless the reduction were below a proper living wage and amounted to a partial discharge, no preference would be shown to the veteran in this regard. (*People* v. *Prendergast,* (1916) 164 N. Y. S. 1042.)

Disability

The Veterans Bureau of the United States War Department is the authority designated by the Constitution to certify that the disability of the veteran is the result of war. As to whether that disability exists at the time of application for promotion or appointment in the civil service, the Civil Service Commission must abide by the decision of competent medical authority. (*Potts* v. *Kaplan,* (1934) 264 N. Y. 110.)

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CHAPTER VII

DISABLED VETERANS' PREFERENCE IN CIVIL SERVICE

On November 5, 1929, the Constitution was amended to provide that

> "any honorably discharged soldiers, sailors, marines or nurses of the army, navy or marine corps of the United States disabled in the actual performance of duty in any war, to an extent recognized by the United States Veterans' Bureau, who are citizens and residents of this state and were at the time of their entrance into the military or naval service of the United States, and whose disability exists at the time of his or her application for such appointment or promotion, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made." (Art. V, sec. 6.)

This amendment was adopted by a vote of 1,071,517 for, and 404,454 against.

Statutes have been enacted to implement this section. (See Civil Service Law, secs. 21, 21a, 21b, 22, 22a, 22b, 22c, 22d.) This report does not concern itself with any analysis of the judicial decisions construing these provisions. It is intended only to be a factual presentation of the results of the preference provisions contained in the Constitution and statutes.

The report describes the procedure followed in the administration of the civil service laws and rules, as affected by the conditions governing preference to disabled veterans, and presents certain tables and figures analyzing the effects of such preference, in the civil service of the State and counties.

The civil employees and officers of the State are divided into classified and unclassified services.

The unclassified service, which includes all elective officers, legislative employees, appointees of the Governor, election officers, teachers in the educational system, and a few small and unimportant groups, are clearly not subject to the conditions of veterans' preference.

The classified service is subdivided into the exempt, competitive, non-competitive and labor classes.

The exempt class embraces a comparatively few positions of a confidential or policy-forming nature, which are filled without examination and carry no security of tenure. This class is obviously not subject to rules of veterans' preference.

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The labor class is exactly what its name implies. It has no definite tenure, and is filled without examination. Like the exempt class it is not bound by the veterans' preference laws.

The non-competitive class comprises those positions which cannot be filled by competitive examinations. A candidate nominated by an appointing officer is subject only to a qualifying examination. Most positions in this class are those of artisans or skilled laborers, manual or mechanical. For some time after the adoption of the constitutional provision, the non-competitive class was included under it, and appointing officers were forced to nominate disabled veterans who applied for vacant positions in this class. However, it has since been determined that the preference to disabled veterans did not apply to the non-competitive class.

There remains the competitive class. This embraces the greatest number of types of work, the greatest range of salaries and opportunities for promotion, and the greatest number of employees. The competitive class is everything that the general public think of as "Civil Service," with entrance by open competition, and promotion from its own ranks, both based on merit and fitness. It is to this great class of the civil service that the rules of veterans' preference apply, and this report is, therefore, concerned only with the competitive class.

In order thoroughly to understand the application of the laws and rules relating to preferred veterans, the procedure of appointment in the competitive service is described in detail.

When a vacancy occurs, or is anticipated, for which no suitable eligible roster exists, and there is no field for promotion to it, the Civil Service Commission advertises an open competitive examination. First, a specification of the qualifications necessary to a candidate for the position is drawn by the commission in co-operation with the department or departments which may later fill vacancies from the eligible list resulting from the examination. Candidates for the vacancy must show that they possess such qualifications before admission to the written examination.

Such qualifications may include age limits, both minimum and maximum, particularly in the case of positions involving physically strenuous duties. At this point the preference to disabled veterans begins. Article 2, section 21,[1] provides that a preferred veteran shall not be disqualified because of age if such age does not render him incompetent to perform the duties required. While it is the present policy of the State commission to establish maximum age limits only in cases where physical vigor is obviously necessary (as with prison guards or game wardens), some of the municipal commissions establish arbitrary age limits, par-

[1] References, unless otherwise stated, are to ch. 7 of the Consolidated Laws, as amended, known as the "Civil Service Law."

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ticularly when attempting to establish a "career service" by recruiting personnel for the lower salary brackets from the lower age groups. In such cases, the preferred veterans are excepted from the age disqualifications.

The qualifications may also include certain degrees of formal education or experience, particularly in the more technical positions. The preference is again extended here by providing that time spent in a school for training disabled veterans shall be credited if the examination is for a position in the same vocation or trade as that for which the veteran has been trained, and further, that no such preferred veteran shall be rejected in such case on the ground of insufficient or unsatisfactory training or experience. (Art. 2, sec. 14-a.)

Candidates meeting the qualifications for a position (including veterans who may be exempted from such qualifications) are then summoned to a written examination, covering the duties of the position. On this examination, disabled veterans have no advantage over other candidates. The present rules of the State Civil Service Commission state that a candidate must receive a rating of at least 75 per cent in *each* part of an examination; that is, on the written examination, the oral examination or interview (if such is required), and on the subject of training and experience. Further, the commission may subdivide a written examination into several sections, and require a grade of at least 75 per cent in each section. At this stage of the competition, the disabled veteran competes on an equal and comparative basis with all other candidates, and not unless he passes all parts and sections of the examination does he receive any substantial preference.

Finally, a physical examination of applicants may be required. A veteran may not be disqualified for disability incurred in war service, unless such disability prevents performance of the duties required by the position. (Sec. 22-c. This supplements sec. 21, relating to age disqualification.)

When the results of the examination are finally compiled, the candidates are arranged in order of their ratings on all parts of the examination combined. This list is known as an eligible list, and when a vacancy is filled, the appointing officer must select one of the first three eligible candidates who is willing to accept the salary and location offered. It is at this point that the disabled veteran receives the full preference and discrimination provided by the Constitution. Any candidate on the eligible list who has qualified as a preferred veteran is raised to the top of the list and included among the three candidates chosen by the appointing officer. Of the three so chosen the veteran must be offered the

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appointment. If there is more than one disabled veteran they are placed at the top of the list in the order of their ratings, but the choice may be made from among them without regard to the order in which the one appointed appears on the eligible list certified. (1934 op. Atty.-Gen. 506.)

There is only one important exception to this phase of the preference. Certain appointments are made by counties, judicial districts, or other subdivisions, and only those who are residents of the subdivisions are certified in such cases, regardless of the presence of disabled veterans' names on the lists.

After appointment, a probationary period follows, usually three or six months. During this period an appointee may be dismissed if he is unable satisfactorily to perform the duties required. Such dismissal until the end of the period may be given without the necessity of preferring charges. After such time, the appointment becomes permanent, and removal from the service is only after hearing upon charges preferred. The disabled veteran is again given certain preference here, for he must be permitted to serve the full period of probation. However, like others, he may be dismissed at the expiration of this time, without hearing on preferred charges, before the appointment becomes permanent.

In the ordinary routine of the Civil Service Department, the disabled veterans among the candidates have their status determined by the time the eligible list is ready to be used. In making the original application for examination, the candidates are requested to indicate whether they are disabled veterans. This is again asked of the candidates at the time of the written examination. Those so stating are supplied with forms to be attested by the United States Veterans' Bureau, proving that they were citizens and residents of New York State at the time of enlistment, and that disability was incurred in the actual performance of duty in war. When such claims are satisfactorily established, the veterans are then examined by the Civil Service Commission's physicians, to ascertain if such disability still exists at the time of their applications for examination. Such conditions having been met, the Civil Service Commission is ready to extend the preference to those who pass the examination for the position.

In the case of examinations for promotion, the procedure is substantially the same as in open competitive examinations. In promotion examinations, the competitors are limited to those already employed in the department where the vacancy occurs. The veterans' preference is extended in the same manner as in open competitive examinations.

The Civil Service Law contains numerous provisions relating to suspensions, demotions, and removals from service, and the establishment

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of suspended lists for reappointment, when service has been curtailed. In these cases, additional security of tenure is provided for disabled veterans by granting them the right to a hearing upon charges preferred, with the further right of review by certiorari. If their removal is to occur through abolition of a position, they must be transferred to some other suitable position in the service, or, at least, have first preference in re-employment. However, it should be noted that this protection is extended also to all honorably discharged veterans, even though not disabled, and also to volunteer firemen, and this protection is not based on the constitutional veterans' preference.

To recapitulate, the laws which provide for the enforcement of the disabled veterans' preference, under article V, section 6, of the Constitution, apply only to the competitive class of the classified service. The preference is extended at several stages of the progression from private citizen to civil servant. It excepts him from certain requirements for admission to an examination; if he is successful in examination, he is favored for appointment; after entering the service, his tenure is more secure and his chance of promotion greater than the non-veteran's.

The exceptions to the entrance requirements are relatively unimportant, and preference in such cases is seldom claimed. Furthermore, such advantage is more apparent than real, since the written examination is based upon knowledge of the duties to be performed, upon which duties the entrance requirements are based. It follows that a candidate, lacking in certain qualifications, who is allowed to compete, will be at a disadvantage on the written examination.

Preference after entering the service is also relatively unimportant. Admission to promotion examinations comes only after the candidate has first been successful in open competition, and has served satisfactorily for some definite period in a position inferior only to that to which promotion is sought. Seniority, service record, training and experience, and a written test on knowledge of the duties of the position are the factors which govern promotion, so that the disabled veteran competes equally with other employees in proving his merit before any preference is given him.

The disabled veteran in the State's employ is given a more secure tenure than the non-veteran. But the tendency in the administration of personnel, in the government of this State, is toward greater security of tenure for all employees, and there will eventually be no difference between the rights of veterans and non-veterans in the procedure of dismissals and demotions.

There remains only the preference in appointment for disabled veterans who have succeeded in examinations, over all other candidates, regardless of rank on the eligible list, whereby the appointing officer has

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not the usual choice among three, but must appoint the veteran, as long as one remains on the list. This is the only real preference and discrimination in favor of the disabled veteran, but in many cases it is very great.

It is this preference that forces the appointment of the disabled veteran with a rating of 75 per cent over a non-veteran who may have a rating of 99 per cent; that allows a disabled veteran on a large eligible list to take precedence over hundreds or even thousands of better qualified candidates. It is this phase of disabled veterans' preference that is the foundation of the whole structure. In order to illustrate the effects of this preference the following figures have been prepared.

Since the adoption of the disabled veterans' preference there have been 3,513 competitive examinations, open or promotion, for positions in the State, county and village service. As a result, 79,282 persons have become eligible for appointments, and 14,888 appointments have been made. Two hundred ninety-five, or just about 2 per cent of these, are preferred veterans.

Of all those passing examinations, 543 are preferred veterans, which is 0.67 per cent. Of all those who pass, 18 per cent receive appointments. For preferred veterans, 54 per cent of those who pass are appointed. Thus, the actual disabled veterans' "preference" might be expressed by the figure 3; that is, a disabled veteran who passes an examination has three times as good a chance of receiving appointment as has the non-preferred candidate.

While the names of preferred veterans have occurred 543 times on eligible rosters, this represents only 425 different people, some having passed two or more examinations, and, while 295 appointments of preferred veterans have been made, duplications reduce this to 261 different people.

The 261 preferred veterans now in State service are divided as follows: 176 in State Departments, 82 in county and 3 in village service.

Of the 3,513 examinations held since 1929, in only 259 have any disabled veterans qualified. These are tabulated year by year:

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YEAR	Number of exams. held	Number of exams. where D. V.s passed	Total passing all exams.	Total passing exams. where D. V.s passed	D. V.s passed
1929.....	.....	11	.....	1,061	17
1930.....	649	52	8,749	2,569	105
1931.....	516	44	12,331	4,096	73
1932.....	462	38	11,012	6,303	104
1933.....	315	25	8,994	4,080	58
1934.....	277	20	5,048	2,086	65
1935.....	358	12	4,461	231	14
1936.....	462	22	10,721	4,334	43
1937.....	474	35	17,966	10,781	64
Total....	3,513	259	79,282	35,541	543

From these figures it is evident that disabled veterans competed successfully in less than one-tenth of all the examinations held, but that those examinations in which disabled veterans were successful accounted for nearly half of all successful candidates. The conclusion may be drawn that most of the disabled veterans are successful in the examinations which result in large eligible lists; that is, those requiring general experience, rather than those requiring highly specialized qualifications.

YEAR	Number of exams. where D. V.s passed	Total passed	D. V.s passed	Number appointed	D. V.s appointed
1929.....	11	1,061	17	142	5
1930.....	52	2,569	105	845	51
1931.....	44	4,096	73	405	45
1932.....	38	6,303	104	896	71
1933.....	25	4,080	58	539	23
1934.....	20	2,086	65	347	45
1935.....	12	231	14	87	8
1936.....	22	4,334	43	943	26
1937.....	35	10,781	64	274	21
Total....	259	35,541	543	4,478	295

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Comparing this with the first tabulation, we find that in 3,254 examinations no disabled veterans were successful, but 43,741 others were, and 10,410 appointments were made. In 259 examinations 35,541 were successful, including 543 disabled veterans, and 4,478 appointments made included 295 veterans.

Of the 261 disabled veterans actually in service, the positions held fall in the following salary ranges:

	Salary in Dollars per Year			
	Less than $1,500	$1,500–$2,500	$2,500–$3,500	Over $3,500
State	28	121	19	8
County and Village	4	71	9	1

Of course these figures relate to original appointment salaries, from open or promotion examinations. Promotions made without examination, or salary increases made in the ordinary course of service are not considered, since in such cases the constitutional disabled veterans' preference has no bearing.

The 261 disabled veterans in service can be classified by positions:

State:

Inspectors and investigators (Beverage, motor vehicle, factory, etc.)	54
Professional (Engineers, doctors, lawyers, etc.)	32
Prison guards, orderlies, keepers	26
Janitors, stationary engineers	16
Clerks	11
Accountants, examiners, appraisers	10
Stewards, storekeepers	7
Miscellaneous	20
	176

Counties and Villages:

Stewards, storekeepers, janitors	15
Alcoholic beverage officers and investigators	13
Clerks	10

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Court attendants	27
Police	8
Investigators and inspectors	7
Engineers	5
	85

The numbers employed in the various State and county departments are as follows:

State:		
Executive Department (Parole)		2
Law		2
Audit and Control		2
Agriculture and Markets		4
Alcoholic Beverage Control		17
Banking		2
Civil Service		1
Conservation		4
Correction		37
Education		2
Health		3
Insurance		5
Labor		17
Mental Hygiene		23
Public Service		5
Public Works		24
Social Welfare		2
State		2
Taxation and Finance		22
		176
County and Village:		
Court attendants:		
Supreme Court	14	
County Courts	13	27
Alcoholic beverage control		13
Clerks' and registers' offices		10
Public welfare employees		7
Institution and building service		17
Engineering		4
Police		5
Sealer of weights and measures		1
Sanitary and plumbing inspector		1
		85
Total		261

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It is of interest to note that these figures include three disabled nurses who passed examinations, two of whom were appointed. The two appointed were dictaphone machine operator (State) and probation officer (county). The other case was that of record clerk (county), where the disabled woman failed of appointment because only one appointment was made, and that to a disabled man who was higher on eligible list.

Of course, in the case of the 261 appointments actually made of disabled veterans, a certain number were eligible for appointment by virtue of their original position on the eligible list without any preference over non-disabled candidates. Of the 261 appointed, 105, or 40 per cent, competed successfully enough to permit appointment without preference. This calculation is based solely on a comparison of each disabled veteran's original standing with the total number of appointments made in any case. That is, a person standing within two more than the number of appointments made, would be eligible without preference. Also, in the ordinary course of any list, a number of those eligible will decline appointment for any of several reasons, salary, location, or other employment. Certification from State-wide lists by counties or judicial districts will in some cases raise the rank of a person otherwise too low in rank to be reached. These two factors (which cannot be broken down into figures) would increase to some extent the number of veterans originally eligible. In any event, the number of persons now employed in the competitive service who became eligible for appointment by preference over non-disabled candidates is not more than 156.

That this condition is fairly typical of each of the types of position and salary classifications detailed above is shown by the fact that of the nine disabled veterans holding positions paying $3,500 per year or more, three of them would have been eligible without preference; of those employed as prison guards in the State service, more than two-thirds were eligible without preference.

The average standing of disabled veterans on all lists, if no preference were given, would be 160. This figure has really little significance, since a list may contain from one to several thousand names, and from one to several hundreds of appointments may be made from a list (in the case of clerks, several thousand may be appointed). In other jurisdictions, such as the Federal government, the method of extending preference is by adding a definite percentage to the rating of the preferred veteran. The average of all disabled veterans on all examinations since the present amendment was adopted is 82.69 per cent. The average

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of the highest candidate in all examinations is 93.23. By adding 10 per cent to each disabled veteran's rating, the average would be very nearly that of the highest candidate. The average rank on all lists would be No. 8 instead of No. 160. This would mean that the disabled veterans would be No. 1 on most lists, and lower in rank only on the very large lists. (The United States government allows 5 per cent to all veterans, and 10 per cent to disabled veterans, but the addition is made regardless of the passing grade, and has the effect of turning failed examinations into passes.)

As stated above, these figures cover both open competitive examinations and promotions. The procedure of extending veterans preference is the same in each case, so the figures have not been broken down into these two types. Also, while 295 appointments of preferred veterans have been made, this only represents 261 different people. The difference is accounted for by those who have received two or more appointments under the preference. Nine persons have been appointed and subsequently promoted once or more, through veterans' preference. Fifteen who were in service before the adoption of the amendment have since been promoted as a result of promotion examination, benefiting through preference only on the promotion, their original appointments having been won in open competition. There are ten who have received two or more appointments through preference, in unrelated positions; that is, not by promotion, but by open competitive examination in each case. The net result of veterans preference in promotion examinations (as distinguished from open competitive) has been that 24 people have been appointed from promotion examination lists with veterans' preference (although, as in the case of the open examinations, some of these may have ranked high enough to make the preference superfluous.)

It would be interesting to analyze the disability from which each preferred veteran suffers, to compare with the charges that the preferred group are given an advantage for imaginary ailments, or that they are helpless cripples, unable to perform civil duties. However, both our policy and the law forbid the use of this data for any purpose beyond the establishment of the disability claim.

There remain to be mentioned the 164 candidates who were successful in examinations but who received no appointment. In 248 instances, the names of preferred veterans have appeared on lists without appointment being made. In some cases these instances represent disabled veterans already in service who have declined appointment from other lists on which their names appeared. The remainder are those who have received no appointment. In thirteen cases they have passed two or more

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(as many as five) different examinations. The reasons they have not been appointed are several. Fewer appointments may be made than the number of veterans at the top of the list. A list may be certified by counties or by judicial districts, and preferred veterans on such lists may not have been residents of such subdivisions. They may have declined appointment because of insufficient salary or location or better employment at the time in private service. And in some cases, after an eligible list has been established, a department head decides to leave a vacancy unfilled, or fill it by promotion or transfer from another department.

No attempt is made in this study to enumerate the arguments pro and con of the system of disabled veterans' preference. But these questions, among others, are raised by the foregoing report:

(1) Is the preference working so disadvantageously that it should be abolished?

(2) If the preference is to be retained, (a) should it be abolished in the cases of dismissals and promotions; (b) should age qualifications be extended to veterans, particularly in municipal positions; (c) should veterans be required to compete on an equal basis in all parts of examinations; (d) should the preference be extended to the probationary period; (e) should the preference be precluded in positions requiring special qualifications; (f) should the mechanics of the preference be changed by conforming it to the Federal practice?

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CHAPTER VIII

CONSTITUTIONAL PROBLEMS REGARDING REMOVAL OF OFFICERS

I. Introduction

An effort has been made to consider the principal methods of removal of all types of State officers as provided by the present New York Constitution, New York statutes, and constitutional provisions in other states. Most of the case law in New York has been examined, but no effort has been made to study the cases in other states, except some of those discussed in secondary sources. Consideration has also been given to some constitutional provisions which have been proposed from one source or another but are not as yet in force in any State. Citations of constitutional provisions of other states and of court decisions are merely illustrative and not intended to be exhaustive.[1]

The history of New York constitutional provisions has been considered only in certain cases where it seems especially relevant in determining their present meaning.

The general field of removal of civil service employees, as distinct from State officers, is not covered, although the line between these two categories is, of course, not always clear.

The removal of local officers has not been considered except in some instances where such removal is effected by State officers.

II

Summary of Methods of Removal of Officers and Principal Relevant Provisions of New York State Constitution

The following is a brief summary of the principal methods by which public officers may be removed from office and of the extent to which such methods are available under the present New York State Constitution. Each of these methods is discussed in more detail hereinafter.

[1] The most helpful collection of material found on the general subject is an article by Professor Burke Shartel, appearing in the December, 1936, 20 Jour. Am. Jud. Soc. (1936), hereafter cited as "Shartel." Although entitled "Retirement and Removal of Judges," it throws considerable light on removal of nearly all kinds of officers, and contains a wealth of citations to constitutional provisions and cases. Professor Shartel has informed the writer of this memorandum that the research on which the article was based was mostly done eight or ten years ago, but that a check was made in the summer of 1936 to discover any periodical material or treatises down to that date.

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Impeachment

This method normally involves presentation of articles of impeachment by the lower house of the Legislature and trial of the impeachment by the upper house. Impeachment is generally used only in cases of relatively serious offenses. The New York Constitution provides for impeachment, without express limitation as to the officers who may be impeached or the grounds of impeachment. Unlike the procedure in other states, the judges of the Court of Appeals sit with the Senate to constitute the Court for the Trial of Impeachments.

Action by Legislature other than Impeachment

Provisions for this method of removal vary greatly. In general, it is available in cases where there are not sufficient grounds for impeachment, although it may also be used in lieu of impeachment. It is sometimes effective only with the concurrence of the Governor either preceding or following the action of the Legislature. This method of removal is provided for judicial officers by the New York Constitution, and for various other officers by legislation.

Removal by Governor

This is the usual method of removal for appointed, as distinct from elected officers. In New York it is also available in the case of certain locally elected officers.

Removal by Judiciary

Judges and judicial officers of inferior courts are sometimes removable by higher courts. In New York, this power also extends to the removal of numerous non-judicial local officers.

Recall

Recall or removal by popular petition and vote, is not available in New York.

Other Methods

Various other methods of removing public officers include automatic forfeiture, removal at pleasure of the appointing authority, abolition of the office held, etc.

Statutory Provisions

In addition to making various express provisions for the removal of officers, the Constitution permits, and in some instances directs, the Legislature to make further provision in this respect. Moreover, in

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the case of offices not created by the Constitution, the legislation creating such offices often include provisions with regard to removal. In all, there are in the neighborhood of one hundred distinct statutory provisions now in force, each governing the removal of different officers or classes of officers. A table indicating the provisions with respect to the principal State officers is included as an appendix to this memorandum.

III

Impeachment

Present Provisions

The principal provision in the present New York Constitution with regard to impeachment is article VI, section 10, which provides:

> "The Assembly shall have the power of impeachment by a vote of a majority of all the members elected thereto. The court for the trial of impeachments shall be composed of the president of the Senate, the Senators, or the major part of them, and the judges of the Court of Appeals, or the major part of them. On the trial of an impeachment against the Governor or Lieutenant-Governor, neither the Lieutenant-Governor nor the temporary president of the Senate shall act as a member of the court. No judicial officer shall exercise his office after articles of impeachment against him shall have been preferred to the Senate, until he shall have been acquitted. Before the trial of an impeachment, the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this State; but the party impeached shall be liable to indictment and punishment according to law."

Various other provisions applicable to impeachment proceedings are referred to below.

Officers to Whom Applicable

It will be noticed that the above quoted section makes no general provision as to what officers may be removed by impeachment proceedings, although the provision for disability of a "judicial officer" pending trial of his impeachment indicates that some judicial officers, at least, are sub-

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ject to this method of removal. Other clues are furnished by article IV, section 6, providing for assumption of the Governor's duties by the Lieutenant-Governor "in case of the impeachment of the Governor" or his removal or disability for other specified reasons, and by the next section containing a similar provision in case of similar disability, while the governorship is vacant, on the part of the Lieutenant-Governor, President of the Senate, or Speaker of the Assembly.

Section 12 of the Code of Criminal Procedure provides that the Court for the Trial of Impeachment shall have power to try impeachments "of all civil officers of the State except justices of the peace, justices of justices' courts, police justices and their clerks." It may be doubted whether this provision is binding either as a limitation or as an extension of the constitutional power to impeach.[2]

The constitutions of other states with few exceptions, (including Oregon which has no provision for impeachment), specify the officers subject to impeachment. (See Index Digest of State Constitutions, N. Y. State Constitutional Commission (1915), p. 749.) In most states it is applicable to all State officers except certain inferior judicial officers. In some cases it is limited to a few specified State officers and members of the highest courts; in others it is applicable to all civil officers. But such provisions may be narrowly construed: the Massachusetts court has given an advisory opinion that a provision for impeachment of "any officer" refers only to "officers elected by the people of the whole state" and that a district attorney is, therefore, not subject to impeachment. (See Opinion of Justices, 167 Mass. 599.)

Grounds for Removal

The New York Constitution contains no provision with regard to grounds for impeachment. Section 12 of the Code of Criminal Procedure makes provision for impeachment only in case of "wilful and corrupt misconduct in office." As indicated above, however, any action

[2] The Constitution of 1777 provided for impeachment of "all officers of the State;" that of 1821 made it applicable to "civil" officers; and the Constitution of 1846 and subsequent Constitutions made no express provision in this respect. Amendment No. 312, introduced at the convention of 1915, but not adopted by the convention, proposed express restriction of impeachment to the Governor, Lieutenant-Governor and Comptroller. Art. X, sec. 7, in effect directs that provision be made by law for removal "of all officers, except judicial, whose powers and duties are not local or legislative, and who shall be elected at general elections." The Legislature has made such provision only for the Attorney-General and Comptroller. (Pub. Officers Law, sec. 32). This may indicate an assumption that the Constitution requires statutory provision only where constitutional provision is lacking and that, under the Constitution, impeachment is unavailable for the Attorney-General and Comptroller.

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of the Legislature limiting the power of impeachment is probably invalid.[3]

Some state Constitutions expressly provide the grounds of impeachment. These usually include malfeasance in office. In Washington the grounds are high crimes or misdemeanors or malfeasance in office (Washington V, 2). In Alabama and Oklahoma any offense involving moral turpitude is apparently sufficient. (Alabama VII, 173; Oklahoma VIII, 1). Oklahoma also includes habitual drunkenness and mere incompetency (Oklahoma II, 11; VIII, 1). Neglect of duties and maladministration are also sufficient grounds in a few states. Further discussion of grounds for removal is included under heading XII below.

Another question which is left open under the New York Constitution is whether an officer may be impeached after he has left office. This question is not necessarily academic, for impeachment may carry with it disqualification from further office holding. In 1853 the Assembly, pursuant to an opinion of its Judiciary Committee adopted a resolution that "a person whose term of office has expired is not liable to impeachment." (See 23 Yale Law Journal, 60, 75.) Of course, such action is not binding on subsequent legislators. Moreover, the resolution does not refer to the situation where the officer resigns prior to expiration of his term. The Constitutions of three states expressly permit impeachment after leaving office. (Vt. II, 54; N. J. V, 11; Ga. III, 6). In New Jersey an officer is subject to impeachment during continuance in office and for two years thereafter.

Institution of Proceedings

Under most state Constitutions, impeachment proper, *i.e.*, the presentation of articles of impeachment for trial, is effected by the Lower House of the Legislature, as in New York. In some cases a two-thirds vote is necessary. The question has several times arisen whether constitutional provisions limiting the functions of special sessions to the purposes enumerated by the Governor in calling the session preclude the impeachment of the Governor at such a session. (*Cf.* New York Constitution, art. IV, sec. 4.) Such a proposed limitation was rejected at the trial of Governor Sulzer, the argument being that the constitutional

[3] It was the opinion of a majority of the judges of the Court of Appeals sitting in the trial of the impeachment of Governor Sulzer that the above mentioned statutory provision was invalid in so far as it confined impeachment to misconduct "in office." See *People* v. *Berg*, 228 App. Div. 433, 440 (1930) aff'd 254 N. Y. 544. It would likewise appear to be beyond the power of the Legislature to define the nature of the offense, although the definition actually adopted, "wilful and corrupt misconduct," is so unspecific that the question of its validity is not likely to arise.

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limitation applies only to legislation as distinct from action in a judicial capacity. (See Trial of Sulzer, p. 194. Accord: *Ferguson* v. *Maddox* (1924) 114 Tex. 85; 263 S.W. 888.) This ruling received judicial confirmation in the denial of habeas corpus to a prisoner pardoned by Governor Sulzer after his impeachment. (*People ex rel. Robbins* v. *Hayes,* 82 Misc. 165, 169 (1913), aff'd 163 App. Div. 725, 212 N. Y. 603. Contra: *Matter of Executive Communications* (1868) 12 Fla. 651; *Simpson* v. *Hill* (1927) 128 Okla. 269; 263 Pac. 635.) Any such limitation is expressly precluded by the Constitution of Mississippi. (Art. V, sec. 121. See generally on this question 3 Wis. L. Rev. 155.)

An analogous question is whether the Legislature may convene of its own motion for purposes of impeachment. On the face of the Constitution, only the Governor can convene the Legislature. (Art. IV, sec. 4.) There is a dictum in *People* v. *Hayes, supra,* at p. 170, that the Assembly may convene itself in order to impeach the Governor. A contrary opinion was expressed by Presiding Judge Cullen at the trial of Governor Sulzer, p. 219. (See also *People* v. *Hatch* (1863) 33 Ill. 9; *Simpson* v. *Hill, supra.*) The Alabama Constitution provides that a majority of the Lower House may compel a special session for impeachment. (VII, 173.) A similar provision was included in the amendments submitted to the people following the New York State Constitutional Convention of 1915 (III, 10): "The assembly of its own motion, in the manner to be provided by rule which shall continue in force until abrogated or amended by the assembly, may convene for the purposes of impeachment."

Temporary Suspension Pending Trial

Article VI, section 10, of the present Constitution provides expressly that judicial officers shall not exercise their office after articles of impeachment have been preferred and before acquittal. In most states such provisions are applicable to all officers subject to impeachment. (See Index Digest, 753.) In many cases specific provision is made for appointment of a temporary substitute. (See Index Digest, 726, 754.) Amendment No. 141 introduced at the 1915 convention eliminated the word "judicial" from the above quoted provision, but it was apparently defeated on other grounds. Probably the effect of sections 6 and 7 of article IV providing for succession to the governorship in case of "impeachment" or other disability is to oust the incumbent as soon as articles of impeachment are preferred. (*Cf. People ex rel. Robbins* v. *Hayes, supra.*)

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Composition of Court

The New York Constitution is unique in providing for inclusion of judges of the highest court in the Court for Trial of Impeachments. In all other states, except Nebraska, the trial of impeachments is by the Senate, although a number of Constitutions provide that the chief justice of the highest court shall preside at the trial, and in some cases, he is given a casting vote on preliminary questions. (See Index Digest, 755.) In Nebraska impeachments are tried by the highest court of the state, except when a member of that court is impeached, in which case the trial is by all the judges of the District Courts. (Art. III, sec. 17.) The general theory on which the power of impeachment has been given to the Legislature seems to be that the legislative branch should have power to check grossly improper actions on the part of the judicial as well as the executive branch of the government, following the principle of checks and balances embodied in the Federal Constitution. (See 51 Harvard L. Rev. 330.) It is to be noted that the New York provision antedates the Federal Constitution, and that the original composite Court for the Trial of Impeachments was also the Court for Correction of Errors. (N. Y. Const. 1777, sec. 32). An awkward situation may arise where the judicial members of the court are over-ruled on a point of law by the legislators. It has not been decided whether justices of the Supreme Court who have been assigned to the Court of Appeals, pursuant to article VI, section 5, should sit as members of the court of impeachment. Three such members sat in the trial of Governor Sulzer, but no objection was raised by his counsel. Judge Cullen declared that inclusion of such members was proper. (*Trial of Sulzer*, p. 8.)

It was ruled in the *Sulzer* case that Senators who had served on a joint investigating committee which recommended the impeachment were not disqualified from taking part in the trial. (*Id.*, p. 45.)

Committees

Article III, section 6, provides for additional remuneration of "such members of the Assembly, not exceeding nine in number, as shall be appointed managers of an impeachment." Specific provisions for a prosecuting committee are included in some Constitutions. (Michigan IX, 2; Tenn. V, 3). The proposed Constitution of 1915 (Art. VIII, sec. 15) provided for the reference of the trial of an impeachment to a committee composed of members of the court of impeachment, subject to the provision that the impeached official must be allowed to testify before the full court if he so desired. The advantage of such a procedure was suggested in congressional debates following the impeachment of Judge Ritter. (80 Cong. Rec. 5938.)

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Review

In New York, judicial review of a removal by impeachment is precluded by the fact that the judges of the highest court are members of the court which tries the impeachment. In other states, the general rule is that conviction on a trial of impeachment is not reviewable, although some cases hold that the highest judicial court of the state may invalidate a conviction of impeachment where the court of impeachment exceeded its jurisdiction. The action of the Supreme Court of the United States in refusing to review the recent conviction of Judge Ritter has been taken as constituting adherence to the view that the action of the Legislature is final in all respects. (See 51 Harvard L. Rev. 330; *Ritter* v. *U. S.*, 300 U. S. 668 (1937.)

Effect of Removal

Article VI, section 10, provides that judgments in cases of impeachment "shall not extend further than" removal from office or removal from office and disqualification to hold further office. Section 128 of the Code of Criminal Procedure purports to remove from the court of impeachment any discretion as to the extent of disqualification where the judgment is for more than simple removal. In other words, if this statutory provision is valid, an officer who is removed by impeachment is either not disqualified as to any further office holding or he is disqualified to hold any public office of honor, trust, or profit in the State. The Governor's power of pardon is not applicable to impeachments. (Art. IV, sec. 5.) This is the usual constitutional provision. In Vermont, however, the Legislature has the power of remission or mitigation of punishment with respect to impeachment. (Art. II, sec. 20.) And in Tennessee the Legislature is expressly authorized to remove any such disqualification. (Art. V, sec. 4.)

Difficulties with Impeachment Procedure

Impeachment has been severely criticised as a method of removal, owing to the difficulty of getting such a large court to act efficiently, the pressure of political considerations, and interference with the legislative function. (See Shartel, *op. cit.*, note 1 at p. 145.) The trial of Governor Sulzer lasted a month and cost the State $230,000. The impeachment of Governor Ferguson cost the state of Texas $325,000. (See 31 Ill. L. Rev. 631.) In general, however, the conclusion of text writers has been that impeachment, supplemented by more expeditious methods of removal, should be retained as a final guarantee against gross abuse of office. (See, *e.g.*, Shartel, 146.)

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IV

Action by Legislature other than Impeachment

Present Provisions

Article VI, section 9, of the New York Constitution provides:

> "Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace, justices of the Municipal Court of the city of New York, and judges or justices of inferior courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal."

Officers Subject to Removal

In addition to the judicial officers specified in the provision quoted above, commissioned officers may be removed by the Senate on the recommendation of the Governor under article XI, section 6. Likewise under section 32 of the Public Officers Law, the Comptroller and Attorney-General [4] may be removed by two-thirds of the Senate on recommendation of the Governor, and all officers appointed by and with the advice and consent of the Senate, other than heads of departments [5] and the many officers subject to specific statutory provisions for removal, may be removed by the Senate, without a two-thirds vote, on recommendation of the Governor.

In most states express provisions for removal by the Legislature other than by impeachment are confined to judges, often to the judges of higher courts. (Index Digest, 1178.) In Delaware any officer except the Lieutenant-Governor or a member of the General Assembly may be thus removed. (III, 13).

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[4] As regards these officers, the statute discharges the mandate of art. X, sec. 7, which is discussed in note 2, *supra*.

[5] Most department heads are, as indicated below, removable by the Governor without concurrence of the Senate.

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It is not certain to what extent members of the Legislature may be removed under provisions such as those in article III, section 10, of the New York Constitution, declaring that each house shall be the judge of the qualifications of its own members. This clearly authorizes refusal to admit a member, but the question does not seem to have come up whether it permits expulsion of a member once seated. Some other Constitutions include express provision for expulsion of a member, usually by two-thirds vote of the house. (Arkansas, V, 14; Index Digest, 905.)

Grounds for Removal

It is clear from the history of article VI, section 9, that this permits removal of judicial officers on non-culpable grounds which would not be sufficient to justify impeachment.[6] This is the usual rule, although in some states the method is available *only* for non-impeachable crimes. (*E. g.* South Carolina, XV, 4.) In Missouri (VI, 41) and North Carolina (IV, 30) the method is confined to judges who are mentally or physically disabled. In the case of non-judicial officers, under section 32 of the Public Officers Law, the grounds are apparently similar to those of impeachment.[7]

Institution of Proceedings

In most states removal is by both houses of the Legislature (usually by two-thirds vote), and action by the Governor is either unnecessary, as in the case of members of the higher courts in New York, or follows as a matter of course; *i. e.* it is provided that he "shall remove" the officer.[8] In some states he "may" do so. In California and Florida removal is on recommendation of the Governor, as in the case of lower judicial officers in New York. (Index Digest, 448; Shartel, 146–7.) Under the Florida provision the Governor may temporarily suspend an officer while the Senate is not in session.

As regards judicial officers, the reasons are obvious for requiring action by the Legislature, and not the Governor alone, at least in the case of higher courts. To impose similar restrictions on removals by the Governor of his appointees in the executive branch of the government may produce awkward impasses. For instance in the case of the Re-

[6] Section 25 of the Judiciary Law provides for part pay after removal in the case of judges or justices removed pursuant to this section "for any cause not involving moral delinquency."

[7] As grounds for removing the Attorney-General or Comptroller, sec. 32 specifies "misconduct or malversation in office" following the language of Art. X, sec. 7. It is not clear whether these grounds are impliedly indicated for removal of other officers under sec. 32.

[8] Where action of the Legislature calls for removal by the Governor such action is sometimes called "address."

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moval of Kelsey (Pub. Papers Gov. Hughes (1908), p. 177), the Superintendent of Insurance was appointed by the Governor by and with the consent of the Senate, pursuant to a statute which also authorized his removal by the Senate upon the recommendation of the Governor. The Governor recommended such removal, taking the position that there was no requirement of formal charges and that the only question was whether the removal of the officer was in the interest of the service of the State, but the Senate refused to remove. Under present law, the superintendent is apparently removable by the Governor. (St. Depts. L. sec. 11; Ins. L. sec. 2.)

As in the case of impeachment, there is a question whether the Legislature may convene of its own motion for removal proceedings. The proposed Constitution of 1915 included an express provision permitting such action. (Art. III, sec. 10.)

Effect of Removal

As distinct from impeachment, other forms of removal by the Legislature do not generally involve disqualification from further office holding.

Withdrawal of Confirmation

It has occasionally been suggested that where an appointment must be ratified by the Senate, that body has the power, after once confirming a nomination, to withdraw its confirmation and thus to remove the appointee from office, either on the ground that facts regarding the appointee were withheld from the Senate at the time of confirmation or on the ground that his confirmation is conditioned upon good behavior in office. (See Sen. Logan, Debate on McAdoo Bill, 80 Cong. Rec. 5939.) This method of removal does not, however, seem to have been actually attempted.

V

Removal by Governor

Present Provisions

With respect to sheriffs, clerks of counties, district attorneys, and registers, in all counties outside New York City, it is provided in article X, section 1, that

> "The Governor may remove any [such] officer, . . . within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense."

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A more specific mandate with regard to district attorneys[9] is given by article XIII, section 6:

> "Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the Governor, after due notice and an opportunity of being heard in his defense."

Article V, section 4, provides that

> "Except as otherwise provided in this Constitution, the heads of all other departments [i.e. other than Audit and Control, Law, Education and Agriculture and Markets] and the members of all boards and commissions mentioned in this article, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the Senate and may be removed by the governor, in a manner to be prescribed by law."

Again, under article VIII, section 12, any member of the State Board of Social Welfare or of the State Commission of Correction

> "may be removed from office by the Governor for cause, an opportunity having been given him to be heard in his defense."

There are a large number of other officers removable by the Governor (or some other superior officer) under various statutory provisions, which are collected in an appendix to this memorandum. The most important of these provisions are section 33 of the Public Officers Law providing that:

> "An officer appointed by the governor for a full term or to fill a vacancy, whose appointment is not required by law to be made by and with the advice and consent of the senate, any county treasurer, any county superintendent of the poor, any register of a county or any coroner, except as otherwise provided by special provision of law, may be removed by the governor within the term for which such officer shall have been chosen, after giving to such officer a copy of the charges against him and an opportunity to be heard in his defense."

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[9] The cases in which proceedings have been brought for removal of a district attorney by the Governor are summarized with a helpful discussion in "The History of the Public Prosecutor in New York State—Part II: The History of the District Attorney in New York State" (pp. 91-3, 99-106, 111-28), by Josephine M. Pisani.

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and section 11 of the State Departments Law providing that

> "Except as otherwise provided in this chapter, the officer who is, or any or either of the officers who are, the head of a department, if appointed by the governor by and with the advice and consent of the senate, . . . may be removed from office by the governor whenever in his judgment the public interest shall so require. In case of such a removal the governor shall file with the department of state a statement of the cause of such removal and shall report such removal and the cause thereof to the legislature at its next session."

Although the last quoted section purports to except only cases for which other provision is made in the State Departments Law, it would seem that it must be inapplicable in many other instances expressly provided for elsewhere.[10]

As indicated above, under the heading "Action by Legislature other than Impeachment," section 32 of the Public Officers Law requires concurrence of the Senate in the removal of officers, other than department heads, appointed by and with its advice and consent, "except as otherwise provided by special provision of law." In fact, such special provision is made in the majority of cases, usually giving the power to the governor subject to varying provisions as to cause, opportunity for hearing, filing of report, etc. In many states, the Governor may remove all appointed officers, but this power does not generally extend to judicial officers (except in some inferior courts) or legislators. (Index Digest, 1177.)

The Legislature apparently cannot delegate to the Governor complete discretion in the removal of officers. In *People ex rel. Devery* v. *Coler,* 173 N. Y. 103 (1903) the opinion of Chief Judge Cullen purports to hold unconstitutional a provision giving the mayor of New York or the Governor power to remove a city police commissioner whenever in his judgment the public interest should so require. The reason given for invalidity is the provision in article X, section 2, that local officers shall be chosen locally. Two of the six judges sitting concurred in the opinion. The others pointed out that a holding of unconstitutionality was unnecessary to the decision. Judge Cullen indicated that his opinion would be otherwise if the removal was for cause, in view of article X, section 8, permitting the Legislature to provide when offices shall be deemed vacant.

[10] Some provisions regarding appointment of department heads provide that they shall be removable as provided in the State Department Law; some make specific provision for removal; and some contain no provision for removal. See Appendix.

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Grounds for Removal

The grounds for removal by the Governor specified in the various statutory provisions vary considerably in wording but probably less in substance. Typical grounds are "cause;" "just cause;" "misconduct, incapacity or neglect of duty;" "inefficiency, neglect of duty or misconduct in office;" and "whenever in his judgment the public interest may require."

In other states similar grounds are specified by constitutional provision. Extremely broad powers of removal were proposed to be given the Governor under the New York Constitution of 1915 which provided that "the heads of all the departments and the members of all commissions, unless otherwise provided in this Constitution, shall be appointed by the Governor and may be removed by him in his discretion." (art. VI, sec. 4.)

Where no grounds are specified the power to remove is not, in theory, unlimited, though absence of judicial review (see *infra*) may make it difficult to enforce implied limitations. Thus, in *Matter of Donnelly* v. *Roosevelt,* 144 Misc. 525, 531 (1932), the Court said that a provision for removal of the New York Mayor by the Governor, as in the case of a sheriff under article X, section 1, permitted such removal "only for a cause relating to some act or omission . . . which amounts to official misconduct or violation of public trust, or one that involves moral turpitude." But "the power and responsibility for the acceptance or rejection of the application of these precedents in the conduct of the proceeding pending before the Governor rest solely with him." (*Id.* at 532.)

The question which seems to have caused the most trouble in proceedings for removal by the Governor is whether an officer may be removed for causes arising prior to his present term of office. This problem is discussed under a separate heading below.

Procedure

Section 34 of the Public Officers Law permits the Governor to appoint a commissioner, a justice of the Supreme Court, or a county judge to hear testimony and report to him. As regards the performance of such functions by a justice of the Supreme Court, this provision was held unconstitutional in *Matter of Richardson,* 247 N. Y. 401 (1928) on the ground that it was in violation of the provision in article VI, section 19 of the Constitution that members of the Supreme Court and of the Court of Appeals "shall not hold any other public office or trust" (except as members of a constitutional convention). It was held that

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hearing testimony in such a case was not a judicial function since the justice was merely to report on the testimony to the Governor, who would make the decision.

Many, but not all, of the New York statutory provisions regarding removal by the Governor require him to give an opportunity for hearing. In some cases it is specified that this must be public, and also that the accused shall have the right to counsel. It will be noted that three of the four constitutional provisions for removal by the Governor provide for a hearing. There is apparently no constitutional right to a hearing, at least in the case of offices not created by the Constitution. Thus in *People ex rel. Gere* v. *Whitlock,* 92 N. Y. 191 (1883), the court upheld the constitutionality of a statute authorizing removal of a police commissioner by the mayor "for any cause deemed sufficient unto himself," although there was no provision for a hearing and none was given, and although the statute authorizing such removal was enacted after the incumbent had assumed office under a previous statute which required a statement of cause and opportunity for hearing.

Review

It has been settled by the decision of the Court of Appeals in *Matter of Guden,* 171 N. Y. 529 (1902), that the action of the Governor in removing an officer is not subject to judicial review, at least as long as he complies with the Constitution or statutory provisions for presentation of charges, etc. It is possible that if he failed to do so, the court might find that he acted entirely without jurisdiction. (See O'Brien, J., concurring, 171 N. Y. 529, at 536.)

A check sometimes provided against abuse of the Governor's power of removal is a requirement that he file a report of the removal with the State Department or the Legislature. It is sometimes provided that this shall include the record of the proceedings.

Effect of Removal

In *People* v. *Ahearn,* 196 N. Y. 221 (1909), it was held that a borough president having been removed by the Governor could not be reappointed by the board of aldermen to succeed himself for the balance of the term. The question whether the same rule would apply to an officer elected by the people was left open. In *People ex rel. Devery* v. *Coler, supra, at p. 118,* the opinion of the Chief Judge states that an officer removable without other cause than the Governor's estimation of the public interest cannot constitutionally be declared ineligible for reappointment.

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VI

Removal by Judiciary

Present Provisions

Article VI, section 17 of the Constitution provides:

> "Justices of the peace, justices of the Municipal Court of the city of New York, and judges or justices of inferior courts not of record, and their clerks, may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law."

Section 132 of the Code of Criminal Procedure provides that this power shall be exercised by the Appellate Division. The Appellate Division is also authorized by article X, section 1, to remove clerks of counties in New York City.

Officers Subject to Removal

The Appellate Division's power of removal has been extended by section 36 of the Public Officers Law to

> "any town, village, improvement district or fire district officer, except a justice of the peace."

In other states, removal by the judiciary is generally applicable to inferior court judges and judicial officers.

Removal by this method is to be distinguished from conviction in a regular criminal court for a crime involving misfeasance in office which normally involves a forfeiture of the office. (See *infra.*)

Reference is made to the provisions of the Nebraska Constitution discussed under heading III above giving the Supreme Court the power to try impeachments.

In Oregon impeachment has been abolished and all officers are, apparently, subject to removal by the courts under article VII, section 6, which provides:

> "Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law."

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Review

The Court of Appeals will not review the action of the Appellate Division as long as the latter has jurisdiction and exercises its power in the form prescribed by the Constitution and statutes. (*Matter of Droege,* 197 N. Y. 44 (1909).)

Quo Warranto

This procedure is usually employed to test the validity of the election or appointment of an officer rather than to remove for misconduct, and proceeds on the theory that the incumbent is only a *de facto* officer. In some cases, however, it has been used to remove for misconduct. (*Cf. State* v. *Darnell,* 123 Kan. 643 (1927); *State* v. *Redman,* 183 Ind. 332 (1915); *Com.* v. *McWilliams,* 11 Pa. St. 61 (1849); Shartel, 140 and cases cited.) Following the impeachment of Judge Ritter, Senator McAdoo introduced a bill providing for removal of Federal judges (other than Supreme Court justices) in *quo warranto* proceedings initiated by the Attorney-General before a specially constituted court of circuit judges. This proposal provoked an interesting debate on this means as a supplement to impeachment. (See 80 Cong. Rec. 5937; 51 Harv. L. Rev. 330.) A similar bill (H. R. 2271, 75th Cong.) was introduced by Mr. Sumners in the House.

VII

Recall

Recall is unknown in New York.

Officers Subject to Removal

In some states all public officers are subject to recall. (Index Digest, 1240.) In Idaho judicial officers are exempt. (Art. VI, sec. 6; *cf.* Washington, amend. VIII, sec. 33.) In California recall is confined to elective officers (Art. XXIII, sec. 1).

Length of Service

It is frequently provided that an officer shall not be subject to recall until he has been in office for a specified period varying from ten days to one year. (Index Digest, 1241.) There are also various limitations imposed on subjecting an officer to more than one attempt at recall during the same term.

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Grounds of Removal

Generally, it is merely provided that the petition must state reasons. In California it is expressly provided that such statement is solely for the information of the voters and is not open to review. (Art. XXIII, sec. 1.) In Washington an officer is apparently subject to recall only for malfeasance or misfeasance in office or violation of his oath of office. (amend. VIII, sec. 33.)

Institution of Proceedings

A recall election is instituted by a petition signed by a prescribed number or proportion of the voters. (Index Digest, 1242.) The successor, if any, is elected at the same election. Resignation after filing of a petition does not generally prevent the holding of a recall election unless made within a specified time.

VIII

Automatic Forfeiture

Present Provisions

Article X, section 8, of the Constitution authorizes the Legislature to

> "declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this Constitution."

Pursuant to this authority, section 30 of the Public Officers Law provides for automatic forfeiture of office in case any of the following events occurs:

(1) death;
(2) resignation;
(3) removal from office;
(4) ceasing to be inhabitant of state or to fulfill local residence requirement;
(5) conviction for a felony, or a crime involving violation of oath of office;
(6) judicial declaration of incompetency or insanity;
(7) judgment of a court, declaring void election or appointment, or that office is forfeited or vacant;
(8) failure to file required oath or undertaking.

Under section 510 of the Penal Law a sentence of imprisonment in a State prison involves forfeiture of all public offices. Other provisions

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for forfeiture of office are found in the Penal Law. The most important of these involve the giving or taking of bribes. (Secs. 768, 1331, 1823, 1832, 1833, 1837. See also secs. 1697, 1839, 1864.) One of the duties of the grand jury, under section 260 of the Code of Criminal Procedure, is to "inquire . . . into the wilful and corrupt misconduct in office, of public officers of every description, in the county."

In many other states constitutional provisions disqualify from holding office any persons who come under disabilities such as those mentioned in section 30 of the Public Officers Law. It is not always clear whether such disabilities will result in forfeiture of an office already held as well as disqualification for appointment or election. (Index Digest, 1162, *et seq.*)

Effect of Removal

Statutory provisions in New York vary as to disqualification from further office holding after forfeiture of office. For most offenses involving bribery, there is a permanent disqualification with respect to all public offices.

IX

Removal at Pleasure of Appointing Authority

Present Provision

Article X, section 3, of the Constitution provides as follows:

> "When the duration of any office is not provided by this Constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment."

Since this method of removal is only available where the officer has no specified term of office, it presents no particular problems. Such offices include most court clerks and other attendants, many unpaid commissioners, bureau heads, deputies and various other officers. Of course the Civil Service Law in effect prevents removal at pleasure of many persons whose term of office is not definitely specified. Section 22 prescribes definite limits on the power of removal. There are similar provisions in other laws.

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X

Abolition of Office

Offices which are created by the Constitution cannot, except as therein authorized, be abolished by legislation, but other offices can be abolished by statute before the incumbent's term has expired. *Morall* v. *County of Monroe,* 271 N. Y. 48 (1936).

Article VI, section 18, gives the Legislature power to establish and discontinue inferior local courts. It has been held that the provision in article IX, section 19, that the compensation of "all judges, justices and surrogates" shall not be diminished during their term of office does not protect the salary of judges of courts not created by the Constitution. (*Haggerty* v. *City of New York,* 267 N. Y. 252 (1935).) Likewise, non-constitutional courts can be abolished without providing any other judicial position for the incumbents. Possibilities of abuse of this power are indicated by *People ex rel. Swift* v. *Luce,* 204 N. Y. 478 (1912) where a minority of the court constituting a majority of those sitting upheld the validity of legislation abolishing the Court of Claims and creating a Board of Claims with the same functions but different members.

In the case of military officers it has been held that the Governor has the power to relieve them of their duties without formally removing them or abolishing their office. (*People ex rel. Gillett* v. *Delamater,* 247 App. Div. 246 (1936); *People ex rel. Leo* v. *Hill,* 126 N. Y. 497 (1891).)

XI

Problems Particularly Concerning Removal of the Judiciary

Many states have found it necessary to make special provision for the removal of judges. There are several factors which make the problem of removing judges especially important: (1) They come up for re-election only at rare intervals and the incumbent is frequently re-elected more or less as a matter of course; (2) they are expected to adhere to higher ethical standards in their official capacity; (3) in the case of trial judges much more depends upon the efficiency of a single individual than in the case of most other public officers. In general, such factors have led to the adoption of provisions permitting removal for non-culpable inefficiency. On the other hand there is always the danger of abuse of such provisions by the removal of judges who have refused to yield to

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political pressure. A very thorough discussion of this entire problem is contained in the article by Professor Shartel referred to above. (Note 1.)

One method of removal especially applicable to judges is the simple provision of a compulsory retirement age. Article VI, section 19, of the Constitution provides: "No person shall hold the office of judge or justice of any court or the office of surrogate longer than until and including the last day of December next after he shall be seventy years of age." This is apparently not applicable to judges of courts not created by the Constitution. (*Matter of Moore,* 115 Misc. 607 (1925), aff'd 215 App. Div. 655; *cf. Haggerty* v. *City of New York, supra.*) Various voluntary retirement plans are in effect or have been proposed in other states, but these would seem to involve no constitutional questions. (See study on "Age Limit of Judges" in Volume IX of this series.) In Massachusetts where judges are appointed for good behavior, the Governor may remove a judge with the consent of the council for non-culpable inefficiency. (Massachusetts Constitution, amend. LVIII. See Shartel, 143.)

As regards inferior courts, it has been urged that the best method of removal is by a superior court, since a court has a better idea of the qualifications involved. On the other hand it is difficult, if not impossible, to have members of the highest court removed by their colleagues.

In order to minimize the need for removal and to assure prompt removal when necessary, there has been a demand for some form of supervision of the lower courts, more searching than appellate procedure. Discontent with the then judiciary article following the convention of 1915 led to the creation of a convention by legislation in 1921 to consider amendments solely to this article. Just prior to that year a committee of nine published a "Model Judiciary Article" which, however, was not adopted by the Judiciary Constitutional Convention of 1921. This model article included provision for a separate committee on discipline elected by the justices and consisting of five of their number. This commiteee was to have power to discipline or remove judges as well as referees, clerks and members of the bar.

In 1934 the State established the Judicial Council. (Jud. L., secs. 40–48.) This body, composed of lawyers, judges, and legislators, is charged with the duty of making a continuous survey and study of virtually all matters affecting the efficiency of the courts. Its duties, however, are of a fact-finding, advisory, and policy forming nature rather than administrative or regulatory.

Some provision for supervision of lower courts is afforded by section 132 of the Code of Criminal Procedure, which authorizes the Appellate

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Division, on its own motion or on petition, to investigate the inferior courts. Such formal action is, however, apt to be taken only when it is already known that serious conditions exist. Thus in *Matter of Roosevelt,* 232 App. Div. 23 (1931), the court did not, on the evidence before it, feel warranted to initiate an investigation of the activities of eight magistrates, in spite of a public petition forwarded by the Governor. It did, however, censure one of the magistrates in question. (See also *Matter of Handler* v. *Berry,* 138 Misc. 584 (1931), holding that investigation by the Appellate Division does not involve performance of a non-judicial function in violation of article VI, section 19.)

The practice of appointing additional judges to perform the functions of those who have become incapacitated has been adopted in some cases in order to relieve aged trial judges of part of their responsibilities. In *Schiefflin* v. *Goldsmith,* 253 N. Y. 243 (1930) the court upheld the constitutionality of a provision in section 4-a of the Municipal Court Code permitting the mayor to appoint a temporary Municipal Court justice "if any justice is physically or mentally disabled so as to be unable to perform his duties." According to a study by the National Municipal League, the Legislature of Wisconsin has had to create thirty or more special courts outside of Milwaukee to perform the functions of aged incumbents. (See note on page 12 of "A Model State Constitution" (Rev. ed. 1933).)

Of course the need for various methods of removing judges varies largely with the methods by which they, and the judges who are to remove them, are selected, and the length of their terms of office.

Quasi-judicial Bodies

In view of the growing quasi-judicial powers of administrative bodies, such as the Public Service Commission, the Mortgage Commission, and the Labor Relations Board, consideration may also be given to the question whether the methods of removing such officers should be subject to the safeguards which are considered desirable in the case of the judiciary, or should, on the other hand, be designed with a view to administrative efficiency. Under existing statutes, members of the boards named above may be removed by the Governor (after hearing) for "inefficiency" as well as for graver offenses. In the cases of the Public Service Commission and the Mortgage Commission, the Governor must file with the Department of State a statement of charges, findings, and record. (Labor Law, sec. 702; Pub. Serv. Com. Law, sec. 4-c; Unconsol. Laws, sec. 1752.)

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The growing tendency to protect quasi-judicial officers from executive interference, as their duties become more judicial, is indicated by the reasoning of the United States Supreme Court in *Humphrey's Executor* v. *U. S.*, 295 U. S. 602 (1935) as compared with the opinion in the case of *Myers* v. *U. S.*, 272 U. S. 52 (1926).

XII

Some Criteria of Cause for Removal

Inefficiency

In the case of most officers it is clear that removal may not be without cause. Except where inefficiency is specifically stated in the statute, mere inefficiency has generally not been deemed sufficient. (See Removal of Crain 1931, of Geoghan 1936.)

Ignorance of Law as a Defense

Commission of a crime in office is generally sufficient ground for removal, but the cases are in conflict where local officers have violated the law in good faith. (*Matter of Moran*, 145 App. Div. 642 (1911); *Matter of Slack*, 234 App. Div. 7 (1931); *Matter of Application of Citizens*, 242 App. Div. 723 (1934); *Matter of Wolfe* v. *Trask*, 249 App. Div. 11 (1936).)

Offense Committed Prior to Present Term of Office

About the most controverted question with regard to the removal of officers in New York is the extent to which consideration may be given to offenses committed in a prior term of office or before holding office.

Many of the New York statutory provisions, as well as article X, section 7 of the Constitution (regarding removal of State elected officers) refer to misconduct "in office." The provision to this effect in section 12 of the Code of Criminal Procedure was deemed unconstitutional by a majority of the judges of the Court of Appeals sitting as part of the Court for the Trial of Impeachment in the trial of Governor Sulzer. (See *People* v. *Berg*, 228 App. Div. 433, 440 (1930), aff'd 254 N. Y. 544.) Governor Sulzer was removed for misconduct committed after his election but before taking office: filing a false statement under the Corrupt Practices Act. However, the offense was definitely connected with his then present term.

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Where the offense has been committed during a prior term of office, it has been urged that re-election imports vindication or at least forgiveness, and evidence of such offenses has often been ruled out, but frequently admitted. It is sufficient to say that the authorities are in complete confusion as regards impeachment, removal by the Governor, by other executive officers, and by the court, with the preponderance of recent precedents in favor of removal, especially where the misconduct was not fully known to the electorate at the time of re-election. Most of the cases are collected in the opinion in *Matter of Newman* v. *Strobel*, 236 App. Div. 371 (1932).

In some states, as indicated under the heading "Impeachment" above, the Constitution expressly permits impeachment after leaving office.

XIII

Problems Suggested for Consideration

In the light of the facts disclosed by this survey consideration might be given to the following problems among others:

(1) May an officer be removed for an offense committed prior to his current term of office.
(2) Specifically, what officers may be removed by impeachment.
(3) Should specific grounds for impeachment be set forth.
(4) May an officer be impeached after leaving office.
(5) Should the Legislature be given the right to convene of its own motion for purposes of impeachment or removal of public officers.
(6) Whose decisions shall be final on law questions arising during the course of an impeachment proceeding, the Legislature's or the judges' of the Court of Appeals.
(7) Should an impeachment trial be referred to a committee.
(8) Should impeachment proceedings be subject to judicial review, and, if so, should judges of the Court of Appeals be excluded from membership in a court of impeachment of first instance in order to permit judicial review.
(9) Should complete disqualification follow all cases of impeachment subject to mitigation or remission.
(10) To what extent and under what conditions may members of the Legislature be removed.
(11) May an officer whose appointment must be confirmed by the Senate be removed by subsequent withdrawal of confirmation.

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(12) Should the Governor have complete discretion in the removal of public officers.
(13) Should a judge be permitted to be appointed by the Governor to hear and report in a removal proceeding.
(14) Should there be a hearing in all cases of removal.
(15) Should some mechanics, in addition to appellate procedure, be provided for supervising and correcting judges of inferior courts, in cases not warranting removal.
(16) Should removal of quasi-judicial officers be governed by the practise applicable to administrative officers or by that applicable to judicial officers.
(17) To what extent should mere inefficiency be a ground of removal of public officers.

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APPENDIX

Table Showing Method of Appointment and Removal of Principal State Officers (Otherwise than by Impeachment or Forfeiture) *

Office	By whom appointed	How removed
Accountants, Certified Public, Board of	Regents.....	By Regents, after notice and hearing, for misconduct, incompetency, or neglect of duty in office. (Education Law, sec. 1490).
Adjutant-General.....	Governor.....	By Senate on recommendation of Governor; by Court Martial with approval of Governor; (Military Law, secs. 85, 136; Const. art. XI, sec. 6.) Removal by examining board apparently unavailable because of lack of senior officers to form such a body. (Military Law, sec. 80).
Agriculture and Markets, Commissioner of	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Agriculture and Markets Law, sec. 5; Const., art. V, sec. 4).
Aide-de-Camp.....	Governor.....	At pleasure of Governor. (Const. art. XI; sec. 4).
Alcoholic Beverage Control Board	.....	See under "Liquor Authority."
Architects, Board of Examiners of	Regents on recommendation of Commissioner of Education	By Regents for misconduct, incompetency or neglect of duty. (Education Law, sec. 1477).
Assemblyman.....	Elected.....	Not clear. (*cf.* Const., art. III; sec. 10).
Athletic Commission.....	Secretary of State, with approval of Governor	At pleasure of Secretary of State, with approval of Governor. (State Departments Law, sec. 195; *cf.* Unconsol. Laws, sec. 191, Const., art. V; sec. 4).

NOTE—*The above table does not include provisions regarding local officers, except a few provisions of general application which are not to be found with the provisions covering selection, duties, etc. of the officer in question.

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Office	By whom appointed	How removed
Attorney-General.....	Elected.....	By two-thirds of Senate on recommendation of Governor for misconduct or malversation in office after giving copy of charges and opportunity to be heard. (Public Officers Law, sec. 32; *cf.* Const., art. X; sec. 7).
Banking Board.....	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest may require. Statement of cause of removal to be filed with Department of State. (Banking Law, sec. 10-b; *cf.* Const. art. V, sec. 4).
Banks, Superintendent of.	Governor, advice and consent of Senate.	Same as above. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Banking Law, sec. 10; Const., art. V, sec. 4).
Blind, Commissioner for..	Governor.....	By Governor, after giving copy of charges and opportunity to be heard. (Pub. Officers Law, sec. 33; *cf.* Unconsol. Laws, sec. 81; Const., art. V, sec. 4.)
Budget, Director of.....	Governor.....	At pleasure of Governor. (Executive Law, sec. 14.)
Civil Service Commission.	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Civ. Ser. Law, sec. 3, Const., art. V, sec. 4.)
Employees of same.....	Civil Service Commission	At pleasure of Civil Service Commission. (Civ. Ser. Law, sec. 4.)
Clerk of county outside of New York City	Elected locally.....	By Governor after giving copy of charges and opportunity to be heard. (Const., art. X, sec. 1.)
Clerk of county in New York City	Appellate Division.....	By Appellate Division. (Const., art. X, sec. 1.)
Clerks of court and other court officers	Court.....	Usually at pleasure of court. (Statutory provisions not included here.)

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Office	By whom appointed	How removed
Comptroller	Elected	By two-thirds of Senate on recommendation of Governor for misconduct or malversation in office after giving copy of charges and opportunity to heard. (Pub. Officers Law, sec. 32; *cf.* Const. art. X, sec. 7.)
Conservation Commissioner	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Conservation Law, sec. 3; Const., art. V, sec. 4.)
Coroner	Locally	By Governor, after giving copy of charges and opportunity to be heard. (Pub. Officers Law, sec. 33 — except as otherwise provided.)
Correction, Commissioner of	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (Not clear; *cf.* State Depts. Law, sec. 11. Correction Law, sec. 5, 16; Const., art. V, sec. 4.)
Commission of Correction, members other than commissioner	Governor, advice and consent of Senate	By Governor, for cause after opportunity to be heard. (Correction Law, sec. 16; *cf.* Const., art. V, sec. 4.)
Counsel to Governor	Governor	At pleasure of Governor. (Executive Law, sec. 4.)
Courts		
Court of Appeals	Elected	By concurrent resolution of two-thirds of both houses of Legislature, after service with statement of cause and opportunity to be heard. (Const., art. VI. sec. 9.)
Supreme	Elected	Same as above.
Justices of the peace, justices of Municipal Court of New York	Elected or appointed locally	By Appellate Division. (Code of Criminal Procedure, sec. 132.)

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Office	By whom appointed	How removed
City, Judges or justices of inferior courts not of record, and their clerks All other judicial officers.	Elected or appointed locally	By two-thirds of Senate on recommendation of Governor, after service with statement of cause and opportunity to be heard. (Const., art. VI, sec. 9.) Query as to non-constitutional courts.
Dental Examiners, Board of	Regents, on nomination of society	By Regents on proven charges of inefficiency, incompetency, immorality or unprofessional conduct. (Education Law, sec. 1305.)
District attorneys.....	Elected locally.....	By Governor, after giving copy of charges and opportunity to be heard. (Const., art. X, sec. 1.) By Governor, for failure to prosecute, after notice and opportunity for hearing. (Const., art. XIII, sec. 6.)
Education, Commissioner of	Regents.....	At pleasure of Regents. (Education Law, sec. 20; Const., art. V. sec. 4.)
Elections, Commissioner on County Board of	Locally.....	By Governor, after giving copy of charges and opportunity to be heard. (Election Law, sec. 30; Const., art. X, sec. 1.)
Engineers and Land Surveyors, Board of Examiners for	Regents on recommendation of Commissioner of Education	By Regents for misconduct, incompetency or neglect of duty. Education Law, sec. 1451.
Governor.....	Elected.....	No provision.
Health, Commissioner of.	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Public Health Law, sec. 2; Const., art. V, sec. 4.)
Housing, Board of.....	Secretary of State with approval of governor	No provision. (*Cf.* Unconsol. Laws, sec. 2260.)

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Office	By whom appointed	How removed
Industrial Board.....	Governor, advice and consent of Senate	By Governor, for inefficiency, neglect of duty, or misconduct in office, after giving copy of charges and opportunity for public hearing in person or by counsel. Record of proceedings and findings to be filed with Department of State. (Labor Law, sec. 16.)
Industrial Commissioner..	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Labor Law, sec. 10, 16; (Const. art. V, sec. 4.)
Industrial Council.....	Governor.....	By Governor whenever such member ceases to represent the interests in whose behalf he was appointed. (Labor Law, sec. 10-a.)
Insurance, Superintendent of	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11, *cf.* Insurance Law, sec. 2; Const., art. V, sec. 4.)
Judicial Council, other than *ex-officio* members	Governor, advice and consent of Senate	By Senate, upon recommendation of Governor. (Pub. Officers Law, sec. 32; *cf.* Judiciary Law, sec. 40.)
Judge (see " Courts ")		
Judicial officers (see " Courts ")		
Justice (see " Courts ")		
Labor Relations Board...	Governor, advice and consent of Senate	By Governor, for inefficiency, neglect of duty, misconduct or malfeasance in office, and for no other cause, after giving copy of charges and opportunity for hearing in public or by counsel. (Labor Law, sec. 702.)

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Office	By whom appointed	How removed
Law, Board of Examiners.	Court of Appeals.....	No provision. (*Cf.* Judiciary Law, sec. 56.)
Lieutenant Governor.....	Elected.....	No provision.
Liquor Authority, Commissioners of	Governor, advice and consent of Senate	By Governor, for cause after opportunity to be heard. Statement of cause shall be filed by Governor in office of Secretary of State. (Alcoholic Bev. Control Law, sec. 13.)
Local Alcoholic Beverage Control Board, member of	Liquor Authority or local official	By Liquor Authority, for cause after opportunity to be heard. (Id., sec. 41.)
Mediation, Board of.....	Governor, advice and consent of Senate	By Senate, upon recommendation of Governor. (Pub. Officers Law, sec. 32; *cf.* Labor Law, sec. 751.)
Medical Examiners, Board of	Regents.....	By Regents for misconduct, incapacity or neglect of duty. (Education Law, sec. 1252.)
Mental Hygiene, Commissioner of	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Mental Hygiene Law, sec. 3; Const., art. V, sec. 4.)
Mortgage Commission....	Governor, with consent of Senate	By Governor, for inefficiency, neglect of duty or misconduct in office, after giving copy of charges and opportunity for hearing in public and/or by counsel. Statement of charges, findings and record of proceedings to be filed in Department of State. (Unconsol. Laws, sec. 1752.)
Motion Picture Division, Director of	Regents on recommendation of Commissioner of Education	No provision. (*Cf.* Education Law, sec. 1080.)
Motor Vehicles, Commissioner of	Commissioner of Taxation and Finance	At pleasure of Commissioner of Taxation and Finance, (Vehicle and Traffic Law, sec. 5.)
Notary public.....	Secretary of State.....	By Secretary of State for misconduct after service of copy of charges and opportunity for hearing. (Executive Law, sec. 101.)

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Office	By whom appointed	How removed
Nurses, Board of Examiners of	Regents, on nomination of association (optional)	By Regents, for misconduct, incapacity or neglect of duty. (Education Law, sec. 1377.)
Optometry, Board of Examiners in	Regents.....	No provision. (*Cf.* Education Law, sec. 1426.)
Parole, Board of.....	Governor, advice and consent of Senate	By Governor, for cause after opportunity for hearing. (Executive Law, sec. 115.)
Pensions, Commission on.	Governor.....	By Governor, after giving copy of charges and opportunity for hearing. (Pub. Officers Law, sec. 33; *cf.* Unconsol. Laws sec. 1941; Const., art. V, sec. 4.)
Pharmacy, Board of.....	Regents, on nomination of association	No provision. (*Cf.* Education Law, sec. 1351.)
Planning Council.....	Governor.....	By Governor, stating cause in writing. (Executive Law, sec. 130.)
Police, State, Superintendent of	Governor, advice and consent of Senate	At pleasure of Governor. (Executive Law, sec. 17.)
Poor, County Superintendent of	Locally.....	By Governor, after giving copy of charges and opportunity to be heard. (Public Officers Law, sec. 33; except as otherwise specifically provided.)
Public Health Council, members other than Commissioner	Governor.....	By Governor, after giving copy of charges and opportunity to be heard. (Pub. Officers Law, sec. 33, *cf.* Public Health Law, sec. 2-a.)
Public Service Commission	Governor, advice and consent of Senate	By Governor, for inefficiency, neglect of duty or misconduct in office, after giving copy of charges and opportunity to be heard in person or by counsel. Statement of charges, findings and records of proceedings to be filed in Department of State. (Pub. Serv. Law, sec. 4-c.)
Public Works, Superintendent of	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, sec. 11; *cf.* Pub. Works Law, sec. 5.)

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Office	By whom appointed	How removed
Racing Commission.....	Secretary of State with approval of Governor	At pleasure of Secretary of State with approval of Governor. (State Depts. Law, sec. 196; *cf.* Unconsol. Laws, sec. 1126; Const., art. V, sec. 4.)
Regents of University of the State of New York	Legislature.....	No provision. (*Cf.* State Depts. Law, sec. 11; Education Law, sec. 41; Const., art V, sec. 4.)
Register.....	Elected locally.....	By Governor, after giving copy of charges and opportunity to be heard. (Const., art. X, sec. 1; Pub. Officers Law, sec. 33.)
School officer, any.....	Locally.....	By Commissioner of Education, for wilful violation or neglect of duty, or wilfully disobeying decision, order or regulation of Regents, or of commissioner, after hearing with right of representation of counsel. (Education Law, sec. 95.)
Senator.....	Elected.....	Not clear. (*Cf.* Const., art. III, sec. 10.)
Sheriff, outside New York City	Elected locally.....	By Governor, after giving copy of charges and opportunity to be heard. (Const., art. X, sec. 1.)
Shorthand Reporters, B'd of Examiners for Certified	Regents.....	No provision. (*Cf.* Education Law, sec. 1502.)
Social Welfare, Board of..	Governor, advice and consent of Senate	By Governor, for cause after opportunity for hearing. Forfeiture for repeated absence from meetings. (Pub. Welfare Law, sec. 3-a.)
Solicitor-General.....	Attorney-General.....	No provision. (*Cf.* Executive Law, sec. 60.)
Standards and Appeals, Board of	Governor, advice and consent of Senate	By Governor, for inefficiency, neglect of duty, or misconduct in office, after giving copy of charges and opportunity for public hearing in person or by counsel. Record of proceedings and findings to be filed with Department of State. (Labor Law, sec. 16.)
Standards and Purchase, Superintendent of	Governor.....	At pleasure of Governor. (Executive Law, sec. 16.)

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Office	By whom appointed	How removed
State, Secretary of.....	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, secs. 11, 190; *cf.* Const., art. V, sec. 4.)
Taxation and Finance, Commissioner of	Governor, advice and consent of Senate	By Governor, whenever in his judgment public interest shall require. Statement of cause to be filed with Department of State; removal and cause to be reported to Legislature. (State Depts. Law, secs. 11, 130; *cf.* Const., art. V, sec. 4.)
Taxation and Finance, Division of Finance, head of	Commissioner of Taxation and Finance	At pleasure of Commissioner of Taxation and Finance. (State Depts. Law, sec. 134.)
Tax Commissioner, member other than Commissioner of Taxation and Finance	Governor, advice and consent of Senate	By Governor, for neglect of duty or misfeasance in office, after notice and opportunity to be heard; or for other cause by Senate on recommendation of Governor. (Tax Law, sec. 170; *cf.* Const., art. V, sec. 4.)
Transit Commission.....	Governor, advice and consent of Senate	Same as Public Service Commission, *supra.*
Treasurer, county.....	Locally.....	By Governor, after giving copy of charges and opportunity to be heard. (Pub. Officers Law, sec. 33, except as otherwise specifically provided.)
Veterinary Medical Examiners, Board of	Regents, on nomination of society	By Regents for misconduct, incapacity or neglect of duty. (Education Law, sec. 1327.)
Wage boards.....	Industrial Commissioner	No provision. (*Cf.* Labor Law, sec. 556.)

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CHAPTER IX

BRIBERY AND CORRUPTION OF PUBLIC OFFICERS

ARTICLE XIII

Section 1. Oath of office.

Const. 1821, art. VI, sec. 1; continued without change in Const. 1846, art. XII, sec. 1; amended in 1874, art. XII, sec. 1; continued without change in Const. 1894, art. XIII, sec. 1.

Section 2. Acceptance of bribe by public officers a felony.

Amendment of 1874, art. XV, sec. 1; continued without change in Const. 1894, art. XIII, sec. 2.

Section 3. Offer of bribe to public officer a felony. Person offering bribe not privileged from testifying; immunity.

Amendment of 1874, art. XV, sec. 2; continued without change in Const. 1894, art. XIII, sec. 3.

Section 4. Defendant in bribery case may testify in his own behalf.

Amendment of 1874, art. XV, sec. 3; continued without change in Const. 1894, art. XIII, sec. 4.

Section 5. Discrimination in favor of public officers in transportation, telegraph and telephone rates, franking privileges, etc. prohibited; penalties. No privilege from testifying; immunity granted.

Const. 1894, art. XIII, sec. 5.

Section 6. Removal of district attorney for failure to prosecute. County expense in bribery prosecution charged against State.

Amendment of 1874, art. XV, sec. 4; continued without change in Const. 1894, art. XIII, sec. 6.

This article declares the policy of the State with respect to the offenses of bribery and corruption of public officers. The sections of which it consists were either originally introduced with this purpose in mind, or, were later amended in this respect.

Various practices and abuses of public life existing at the time of the Convention of 1867 led the delegates to consider seriously various measures intended to correct these conditions. While the Constitution pro-

Note—The Carter and Stone edition of the 1821 *Debates*, the Atlas edition of the 1846 *Debates* and the Revised Records of the Conventions of 1894 and 1915 have been used throughout this article. All references herein made are to the above designated editions.

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posed by this convention did not receive the necessary popular approval, the Commission of 1872 whose formation was recommended by Governor Hoffman in his message to the Legislature, substantially adopted the convention's proposed amendments. Thus, in 1874, four new sections were added to the Constitution which specifically dealt with bribery. These sections purport to be a fairly complete treatment of this subject. One section defines bribery and makes it a felony for any person holding office under the laws of the State to receive anything of value or of personal advantage with the understanding that his official actions will be influenced thereby. Another amendment makes both parties to a bribe guilty of a felony but offers complete immunity from punishment to the briber who testifies as to the giving of the bribe at the trial of the officer charged with receiving it. This was a departure from previous statutes which had held both the briber and the bribed equally guilty and equally punishable. By this change of theory which offers immunity to the briber for his testimony, it was thought that evidence needed for conviction would be made more readily available, and so would cure the weakness of the prior statutes. However, a bribe which is rejected is made a punishable felony since the above reason no longer obtains as the testimony of the officer refusing the bribe is available. Another section permits both parties to the bribe to testify in their own behalf in any civil or criminal prosecution of this crime.

In order to insure a proper enforcement of these provisions, at the same time as these above amendments were adopted, another section was enacted which provides for the removal of district attorneys from office who fail to prosecute faithfully violations of this article. To induce prompt and willing action by the counties, it is also provided that the State is to bear the burden of the cost and expense incurred by any county in investigating and prosecuting any charge of bribery.

The Commission of 1872, attempting to further eliminate this practice, also altered the oath of office so as to require all elected officers to swear to a denial of bribery in the course of their election. This amendment was adopted in 1874 at the same time as the above sections. Previous to this change, the only requirement was an oath of allegiance to the State and Federal Constitutions. Since 1821 all other oaths have been forbidden as qualifications for any office of public trust.

In the Convention of 1894, the distribution of free passes by railroads to members of the Legislature had reached a point where the delegates thought a constitutional prohibition to halt this abuse was proper. Accordingly, a new section was added to the article which provides that a public officer of the State is not to receive any free pass, free transportation or franking privilege nor be benefited by any discrimination

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in passenger, telegraph or telephone rates. Not only is the officer who violates the provisions of this section guilty of a misdemeanor but he also forfeits his office. Consistent with one of the principles of this article, while a person or corporation who contravenes the prohibition of this section is considered guilty of a misdemeanor, he is not liable to civil or criminal prosecution thereof upon his testifying as to the giving of the free pass or discriminatory rate.

SECTION 1

"Members of the Legislature, and all officers executive and judicial, except such inferior officers as shall be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ————————, according to the best of my ability;' and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof:

" 'And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote,' and no other oath, declaration or test shall be required as a qualification for any office of public trust." (Amendment of 1874, continued without change.)

This section states that all officers, executive and judicial except those inferior officers exempted by the Legislature, before taking office must subscribe to an oath of office exacting their support of the State and Federal Constitutions. It provides also that elected officers must further swear that in their election they abstained from bribery of voters either directly or indirectly by offering or promising money or any valuable

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consideration for votes. No other oath, declaration or test is to be required as a qualification for any office of public trust. The section was originally enacted in 1821 without the clause relating to elected officers which was added in 1874. Since 1874 it has remained unmodified, the few attempts made to amend this section having failed of adoption.

Members of the Legislature, and all officers executive and judicial, except such inferior officers as shall be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ———— according to the best of my ability:" [1]

As indicated by the debates of the Convention of 1821, little resistance was offered to the introduction of this section and this particular clause evoked no opposition. The oath must be taken before entering office by all officers, excepting those inferior officers exempted by law. It prescribes sworn allegiance to the Federal Constitution and to the Constitution of New York, and that a faithful performance of the obligations and duties of the office to be entered will be rendered.

Although 1821 seems to be a comparatively late date for the introduction of this general oath, it may be indicated that while other juris-

[1] *Constitution of 1821, art. VI, sec. 1:*

"Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be,) that I will support the constitution of the United States, and the constitution of the State of New York; and that I will faithfully discharge the duties of the office of ————, according to the best of my ability. And no other oath, declaration or test, shall be required as a qualification for any office or public trust."

Amendment of 1874, art. XII, sec. 1:

"Members of the Legislature, and all officers executive and judicial, except such inferior officers as shall be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ————, according to the best of my ability;' *and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof:*

'and I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote,' and no other oath, declaration or test shall be required as a qualification for any office of public trust."

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dictions may have had a provision relating to oaths in their Constitutions, the form of their oaths was different. Of the twelve states with Constitutions when the Federal Union was formed, all but Virginia and New York had prescribed a religious oath as a test for office.[1a] Later, these states substituted for religious oaths, not a general provision requiring allegiance and faithful performance of duties, but a specific oath which exacted a denial of bribery or corruption in the election of the officer taking the oath.[2]

And no other oath, declaration or test shall be required as a qualification for any office of public trust:

This clause also enacted in the Convention of 1821, limits oaths or tests for qualification for office to the one oath prescribed in this section. The purpose of this clause, originally, was to avoid any possible unfair discrimination that a Legislature might arbitrarily impose if it were allowed to require any religious or political tests or oaths from a candidate for office. Some comment was aroused on its introduction since it proposed to abrogate the duelling oath which required a State officer before entering office to swear that he had not participated in a duel. Duelling, although somewhat checked by the scandal of the Hamilton-Burr affair, had been considered in need of some legislative curbing which it was thought the duelling oath had supplied. While this custom was generally accepted, the public began to feel the shock of losing men active in public life. Then, too, the practice of challenging to a duel tended to interfere with candor of speech in legislative gatherings as speakers would hesitate to speak their minds for to do so might result in injury or death by provoking a challenge and duel. The duelling oath was to protect public officers from just such dangers. Therefore, the question before the convention was to weigh the unavoidable sacrifice of the duelling oath with the absolutism of this clause which prohibited any oath but the one prescribed to be administered to an officer. In support of the adoption of this clause, it was argued that to have the duelling oath continue in force by striking out this last sentence, would give the Legislature the "power to establish any test, religious or political, which party frenzy or religious bigotry might lead to."[3] One should not be "so anxious to preserve the duelling oath, that he would be willing to open the door to all sorts of tests rather than lose it."[4]

This would seem to indicate that the delegates to the convention of 1821 had in mind the use in England of a religious test oath whose

[1a] Luce, *Legislative Assemblies*, p. 244.
[2] Luce, *Legislative Principles*, p. 418.
[3] Convention of 1821, *Debates*, p. 207.
[4] *Id.*, p. 207.

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purpose was to prevent non-Protestants from holding office,[5] and similar test oaths then required by other states. In view of this, it would appear that the insertion of this provision, restricting as it does oaths and tests as prerequisites for office holding, undertook to safeguard the principles underlying democracy, and that it was inserted for this reason.

It has been judicially held that this clause, prohibiting the use of any other test or oath as a qualification for office, does not make unconstitutional a provision which seeks to insure an officer's suitability and fitness for the performance of his task. In *Rogers* v. *Buffalo*[6] a civil service enactment requiring a commission to consist of three men, not more than two being from the same party, did not violate this section, the Court saying:[7]

> "Looking at it as a matter of common sense we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of their people through their Legislature to enact laws which should have as their sole object the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means adopted to accomplish such end are appropriate therefor, they must be within the legislative power. The idea cannot be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the powers of their own representative as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people."

The imposition of a property qualification for office holding was held not to be in conflict with this section for the statute in question provided

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[5] From the time of Charles II until George IV, England had a law known as the "Test Act" which required office holders to deny transubstantiation and receive the sacrament according to the rites of the Church of England. Luce in *Legislative Assemblies*, pp. 237–47, presents a thorough historical treatment of religious tests as qualifications for office.

[6] (1890) 123 N. Y. 173.

[7] *Id.*, at p. 188.

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that property owners in the town "stand on equal footing with others of his class, all of whom are eligible."[8] But an oath to be taken as a prerequisite to hold the office of Excise Commissioner was held to be within the constitutional prohibition when it purported to disqualify from office-holding those who were unable to swear they had not previously been interested in the manufacture or sale of liquor.[9]

And all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, or part thereof: "And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote:"

The insertion of this clause in 1874 requiring as an additional oath of an elected officer, a denial of voters' bribery in his election, was due to the "alarming proportions" official corruption had then reached. It has been said of the period that, "the demoralizing influences of corruption are rapidly penetrating social life, and tampering with the press, the pulpit, and with the judge upon the bench, poisoning justice at the fountain-head, sapping morals, religion and education."[10] The activities of the Tweed Ring alone lent support to this statement, and it was said about the Tweed Ring, "Plunder of the city treasury, especially in the form of jobbing contracts, was no new thing in New York, but it had never before reached such colossal dimensions."[11]

While the Convention of 1867 had devoted serious consideration to the problem, it was not until 1874 that the clause relating to the additional oath for elected officers wherein they swore to the absence of bribery in the course of their election, was enacted, thus widening the terms of the section. Since the voter who had sold his vote could be challenged and be put on his oath to vindicate himself, it was considered no more than fitting that the officer elected should also undergo the same treatment. It was logical that bribery had to be eliminated, not only after an elec-

[8] *Becraft* v. *Strobel* (1936) 287 N. Y. S. 2.
[9] *People* v. *Palen* (1893) 74 Hun 289.
[10] Luce, *Legislative Assemblies*, at p. 427 quoting a memorial by the Citizens Association of New York, September, 1867, and signed by Peter Cooper.
[11] Bryce, *American Commonwealth*, Vol. II, ch. LXXXVIII, p. 389.

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tion, but before one. This amendment to this section was designed to prevent pre-election dishonesty; other sections in this article, *infra,* were designed to eliminate dishonesty during the tenure of office.

As originally proposed in the Convention of 1867 an officer taking a false oath would forfeit his office, but the clause amending the section as finally adopted did not contain the forfeiture clause. It was also decided that since another article of the Constitution[12] required an oath of an elector accused of bribery that "the new clause should not be applicable to officers who were chosen but only to those elected." [13] There are then two separate oaths for the two categories of officers.

Proposals were made in the Convention of 1894 to extend the oath to include bribery in primary elections, caucuses and conventions[14] and to have a promise to support a measure in return for a vote considered as a bribe.[15] These suggestions as well as a proposal to require this oath after the term of office had expired,[16] received very little attention. In the Convention of 1915 a proposal to strike out the provision relating to the denial of bribery in elections was killed,[17] and no action was taken on the suggestion that a false oath be made grounds for impeachment or removal from office.[18]

In 1920, a bill proposed in the Assembly sought to amend this section by requiring the denial of allegiance to "any other party or other body that advocates the overthrow of the government of the United States through violence or rebellion."[19]

It has been judicially held[20] that false swearing in the absence of a statute is not a disqualification for office holding under this section alone, on the ground that no provision for punishment is therein made. The court said:[21]

> "Where in the Constitution or the laws of this State, is it declared that false swearing in taking the oath of office disqualifies a person from holding the office to which he was elected? We are not cited to any such constitutional or statutory provision, nor are we aware of any * * * The law requires that a person elected to office shall take and subscribe the requisite oath of office, and that if he

[12] Art. II, sec. 2.
[13] Report of the commission of 1872.
[14] Proposed Amendments (1894) Int. No. 458 (Pr. No. 158).
[15] *Id.,* Int. No. 347 (Pr. No. 356).
[16] *Id.,* Int. No. 34 (Pr. No. 34).
[17] Proposed Amendments (1915) Int. No. 473, (Pr. No. 485).
[18] *Id.,* Int. No. 609 (Pr. No. 624).
[19] Pr. A. 506, A. 426.
[20] *People* v. *Thornton* (1881) 25 Hun 456.
[21] *Id.,* p. 468

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> shall omit so to do within the prescribed period the office shall become vacant. But it does not further declare that the office shall also be deemed vacant if the officers shall not swear to the truth in taking such oath, or that they shall in that case be disqualified from holding the office * * * Thus we are of the opinion that the Special Term was in error in holding the defendant was disqualified from holding the office because he was guilty of false swearing in taking the oath of office."

It has also been decided that a local officer such as the collector of a town must take and subscribe to the oath as he is an executive officer even though functioning locally.[22] In the absence of statute, if no oath is taken, the right to hold office has been held not to be lost.[23]

While the limitation on oaths as a qualification for office apparently contains a real, meritorious principle, capable of practical effect, the official oath, particularly in its requirement for a specific denial of bribery by elected officers, fails, it has been stated, to reveal corresponding advantages. It has been pointed out that while a general oath lends dignity to the entrance upon public service, solemnity to the responsibilities assumed, "it is however much to be doubted whether any good whatever has been accomplished by applying the principle to specific obligations."[24] The deterrence of the official oath denying bribery has not been favorably commented upon. "Such provisions are ineffectual. Men who bribe will falsify. There was a time when oaths embarrassed falsehood. They may still be of some use in courts, when the judge can caution witnesses and the perils of perjury can be emphasized. Taken on entering office, oaths now accomplish little else than to bring home to some men the seriousness of their responsibilities."[25]

While the real remedy will be a vigorous condemnation by the public of this corruptive practice, the oath is of some assistance to impress upon the public mind the heinous nature of this offense.

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[22] *People* v. *McKinney* (1873) 52 N. Y. 374.
[23] *Ibid.*
[24] Luce, *Legislative Assemblies*, p. 433.
[25] *Id.*, p. 419.

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SECTION 2

"Any person holding office under the laws of this State, who, except in payment of his legal salary, fees or perquisites, shall receive or consent to receive, directly or indirectly, anything of value or of personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action or omission to act is to be in any degree influenced thereby, shall be deemed guilty of a felony. This section shall not affect the validity of any existing statute in relation to the offense of bribery." (Amendment of 1874, continued without change.)

This section provides not only a definition of bribery but also gives this crime the status of a felony. Under its terms, for an official holding office under the laws of the State to receive anything of value or of personal advantage, or the promise thereof, besides his legally entitled compensation, to influence the performance of his official duties is to become guilty of a felony. It is here intended to define bribery, thus making clear the use of that term in successive sections of the article. It was enacted as a constitutional amendment in 1874 but its origin may be traced to the Constitution of 1867. It has remained unamended since 1874 and relatively few proposals have been made affecting the substance of the provision.

The first constitutional convention to consider this problem was that of 1867 which gave much serious thought to the open and extensive bribery of public officials complacently carried on in the face of the legislation then in effect. The hearing before the Committee on Official Corruption of that convention disclosed the fact that railroads had spent over a half million dollars to influence legislation: "that one railroad company during a term of the Legislature had expended twenty thousand dollars in the procurement of favorable legislation; that another during a single year had expended three hundred thousand dollars of its own stock at par, a large share of which the witness believed had ultimately gone into the hands of the members of the Legislature."[26] The frequency of these instances led to the adoption by the Convention of 1867 of the present section but which then went further by containing a provision

[26] Convention of 1867, *Debates*, Vol. V, p. 3297.

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for a penalty.[27] However, the Constitution proposed by the convention of 1867 with the exception of the judiciary article was rejected by the people. In 1872, Governor Hoffman in a message to the Legislature deemed the subject of bribery and corruption worthy of further attention. Additional scandals had developed since the time of the 1867 convention which made immediate action imperative. The notoriety of the Tweed Ring caused much public discussion and concern. The New York County Court House, when designed in 1868 was estimated to cost $250,000 to build. "Before the end of 1871 a sum variously estimated at from $8,000,000 to $13,000,000 had been expended upon it, and it was still unfinished."[28] It was claimed that contract frauds and land steals were perpetrated with impunity,[29] and that even the inviolability of the bench had been invaded.[30] The commission of 1872, the formation of which was recommended in Governor Hoffman's address, in addition to its concern with the scandals above mentioned, also studied disclosures made in the convention of 1867 relating to this practice, and recommended this provision which was enacted into the Constitution in 1874 with but a slight omission, that of a provision for a penalty, which is discussed *infra.*

Since the adoption of the amendment in 1874 there have been proposals made to alter this clause but it has remained unchanged. An attempt in the convention of 1894 to widen its scope to include persons holding office under a city or village charter met with no success.[31] It still remains restricted to those holding office under State law. The same proposal received no more favorable action when it further suggested enlarging the compass of the section by making a felony of the giving of support and assistance for nomination to office and election, and to include within it prohibitions against political contributions by corporations. An abortive proposal in the convention of 1915 suggested striking this section out completely,[32] but the debates do not disclose the reason for this proposal. However, it was never reported out of committee.

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[27] Convention of 1867, *Debates,* Vol. V, p. 3970. Art. XIII, sec. 1: "Any person holding office, under the laws of this State, who, except in payment of his legal salary, fees, or perquisites, receives, or consents to receive, directly or indirectly, anything of value or of personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official act or omission to act is to be in any degree influenced thereby, shall be deemed guilty of a felony, *and on conviction shall be punished by imprisonment in a State prison for a term not exceeding five years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the court.* This section shall not affect the validity of any existing statutes in relation to the offense of bribery."

[28] Bryce, *American Commonwealth,* 2nd Ed., Vol. II, p. 390.

[29] *Id.,* p. 389.

[30] Two judges were removed by impeachment and one resigned during impeachment proceedings.

[31] Proposed Amendments (1894) Int. No. 209 (Pr. No. 211).

[32] Proposed Amendments (1915) Int. No. 473 (Pr. No. 485).

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This section shall not affect the validity of any existing statute in relation to the offense of bribery:

This clause providing that the validity of any existing statute relating to the offense of bribery shall not be affected by the section, may be attributed to the fear of the 1867 delegates that the statute of 1853, chapter 539, relating to bribery would be repealed if the convention's Constitution were adopted by the people. The content of this statute differed radically from the article proposed, not in this section so much, as in others under this article.[33] It was felt that prosecutions of offenders under the 1853 statute, not yet completed by the time this article was adopted, would be unsuccessful on the ground that if an offense arose under the statute, which, if repealed by the amendment, the defendants might be permitted to go "unwhipt of justice." In other words, there would be a gap caused by the repeal of the statute of 1853 since prosecutions begun thereunder and not yet completed could not be continued under the amendment of 1867 which would have no retroactive effect. This "saving" clause was retained by the commission of 1872 and has continued in effect.

The statutory punishment in 1853 meted out for bribery was a ten-year sentence or a $5,000 fine or both but the Committee on Official Corruption of the convention of 1867 had recommended in its report a three-year prison term neither open to pardon nor commutation of sentence for good behavior. The convention of 1867 finally fixed upon a five-year term or $5,000 fine or both which penalty was adopted by the statute of 1869. The commission of 1872, however, in adopting the section, omitted this clause. This deletion may be explained by the feeling that such matters were not properly within the purview of a constitutional amendment but rather a subject of legislative judgment. Since the Legislature had enacted the statute of 1869, chapter 742, incorporating the drafted amendment of 1867, with its five-year term of imprisonment or a $5,000 fine or both, there appeared to be no need to prescribe a punishment in the 1874 amendment. Particularly since the last clause of the latter states that the validity of existing statutes relating to bribery is not to be affected by the section, it permits the 1869 statute, including its punitive measures, to continue to be applicable.

As a definitory section, there is nothing herein which appears unusual or impracticable as such, and the content apparently deals adequately with this phase of the subject. But the pertinency of its inclusion as a part of the Constitution depends on other factors of a general nature, the discussion of which will be found under section 3 of this article, *infra*. Specifically, while the section is sufficiently wide in scope to accomplish its

[33] See discussion under section 3 of this article, *infra*.

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ends, it may not be desirable to place a detailed enumeration in the organic law. Constitutional matters may be better drawn if they are expressed in form general enough to permit legislation, and still sufficiently precise to prevent legislative enactments which are not consistent with the intention of the section. To sum up in the words of the Debates of the 1867 Convention:[34]

> "* * * we have put in this section, a definition of the crime of bribery. We felt that it was necessary to do that lest subsequent legislation shall make that definition so loose that its evasion would be accomplished by those who desired to commit this wrong with impunity. This definition is much shorter than that contained in our statute (i. e., L. 1853, ch. 539). It may not be so comprehensive nor so good; but on a careful comparison of the two sections I am satisfied that, although it is much shorter, it is equally comprehensive, and will accomplish the purpose just as well. Our object was to avoid all unnecessary additions to the length of the Constitution by making the definition as short as possible."

SECTION 3

"Any person who shall offer or promise a bribe to an officer, if it shall be received, shall be deemed guilty of a felony and liable to punishment, except as herein provided. No person offering a bribe shall, upon any prosecution of the officer for receiving such bribe, be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving or offering of such bribe. Any person who shall offer or promise a bribe, if it be rejected by the officer to whom it was tendered, shall be guilty of an attempt to bribe, which is hereby declared to be a felony." (Amendment of 1874, continued without change.)

This section declares that those who offer or promise a bribe to a public officer shall be guilty of a felony except that if they testify upon the prosecution of that officer for receiving such bribe, they are not subject to civil or criminal prosecution. However, if the bribe be refused,

[34] Convention of 1867, *Debates*, Vol. V, p. 3300.

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such offer is an attempt to bribe which is declared to be a felony. While the section was adopted in 1874, its source can be traced to the convention of 1867 where the principle upon which the section is based was originally discussed and drafted.

By the time of the Constitutional Convention of 1867, bribery had become a matter of public concern. The practice was unchecked by the then existing legislation, the statute of 1853, chapter 539, which was intended to eradicate it. This legislative measure containing as it did a severe penalty for bribery of a ten-year term of imprisonment or $5,000 fine or both apparently had no deterrent effect. It was said, "that the law of 1853 is a dead letter, practically, upon our statute codes." [35] and in keeping with this statement, indictments under the 1853 statute were rare, but convictions were scarcer. The Special Committee on Official Corruption of the Constitutional Convention of 1867 was the outcome of these conditions and the testimony taken before this committee amply justified its existence, disclosing over a half million dollars distributed primarily by railroads to various legislators in order to assure success of bills. Governor Hoffman's address to the Legislature wherein he decried the unrestrained corruption and bribery of public officers prompted the commission of 1872 to fully consider steps towards eradicating these practices. Further impetus for the need of action on the commission's part was furnished by the Tweed Ring exposé which revealed that this group of men had increased the debt of New York City by $61,000,000 in two years with no visible improvements to show for it.[36]

Any person who shall offer or promise a bribe to an officer, if it shall be received, shall be deemed guilty of a felony and liable to punishment, except as herein provided. No person offering a bribe shall, upon any prosecution of the officer for receiving such bribe, be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving or offering of such bribe:

The Committee on Official Corruption considered it apparent that not only was new legislation needed, but that a radical departure from the theory underlying the statute of 1853, chapter 539, was also necessary, for to perpetuate the statutory principle in constitutional form would permit the practice to continue unabated. The present section in effect is the handiwork of this committee and the Constitutional Con-

[35] Convention of 1867, *Debates*, Vol. V, p. 3317.
[36] Bryce, *American Commonwealth*, Vol. II, p. 391.

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vention of 1867[37] and to be understood, it must be viewed in the light of its context, the statute of 1853, chapter 539.

The 1853 statute penalized the briber and the recipient alike, both being guilty of bribery. The draft of the convention of 1867, the basis of the present section in the Constitution, offers absolute immunity from civil or criminal prosecution to the briber whose bribe is accepted, thus inducing his testimony as to the offering or giving of the bribe on the prosecution of the officer receiving it. The present section now expressly states that the briber is guilty of a felony but is granted complete immunity from prosecution on offering his testimony which he is not privileged to refuse to give. The reason for the difference between the theory of the present section and that of the statute of 1853 is cogently stated in the debates of the Constitutional Convention of 1867:[38]

> "This section exempts the giver of a bribe from all legal penalties. Experience proves the absolute necessity of exempting from punishment one of the parties to an act of bribery, if we would convict either. Our present statutes hold both equally guilty and liable to the same penalties; and our Constitution declares that no person shall be compelled in any criminal case, to be a witness against himself. We have thus sealed the lips of the only witness cognizant of the fact that bribery has been committed, for no one of ordinary understanding will voluntarily testify in crimination of himself. This renders it difficult, if not impossible, to obtain proof sufficiently clear and reliable to convict of that crime and the consequence is that its perpetrators go 'unwhipt of justice.' It is notorious that neither the giver of bribes nor those who receive them are now punished. Our present laws afford perfect immunity to both. No one can doubt that it would be better to exempt a part than the whole, especially in view of the fact that it would be an effective means of suppressing the crime altogether."

This chief difficulty, the evidentiary question, however, was recognized in the 1853 statute which had attempted to surmount it by providing that an offender was to be a competent witness against any other person so offending and could appear to give evidence. However, the testimony so given was not to be used in the subsequent civil or criminal prosecu-

[37] Constitution of 1867, Art. XIII, sec. 2:
"Any person offering a bribe, if it shall be accepted, shall not be liable to civil and criminal prosecution therefor. But any person who offers or promises a bribe, if it shall be rejected by the officer to whom it is tendered, shall be deemed guilty of an attempt to bribe, which is hereby declared a felony, and on conviction shall be punished as provided in the first section of this article." (*Debates,* Vol. V., p. 3971).

[38] Convention of 1867, *Debates,* Vol. III, p. 2277.

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tion brought against this person. In *People* v. *Hackley*,[39] this provision was declared constitutional as such testimony did not violate article I, section 6, of the New York Constitution, which provides that in a criminal case one has a right not to be a witness against one's self. As the testimony given by the witness could not be used in the later trial, it could not be said he was made a witness against himself. Despite this provision, the statute remained ineffective for the inducement to testify afforded only a partial immunity because conviction was still possible in the later trial on other evidence. The testimony itself may not have been available but it could provide sources upon which to later prosecute the witness, and perhaps a conviction based on other grounds suggested in the original testimony covered by the immunity would follow. This fact was judicially recognized: "The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others."[40] The failure of this partial statutory immunity to furnish complete protection for the witness, and thus to produce evidence, provided the groundwork for the granting of complete exemption for the briber in the present section.

Since only one of the two parties to a bribe could be held, as one must go free to make available the production of his testimony on the strength of which a conviction of the other is made possible, the briber, and not the official bribed, received the immunity. The less guilty was allowed to escape to insure the punishment of the more guilty. The reasons advanced were that the official accepting a bribe violates his position of trust, thus breaching his duty to the people as well as forsaking his oath of office, so becoming guilty of perjury. The briber, not being under oath or in a fiduciary relation, was considered the less guilty.

Another theory suggested to be incorporated in this section was the English principle that the one who first reveals the transaction is entitled to the immunity, but this proposal received summary treatment.

Any person who shall offer or promise a bribe, if it be rejected by the officer to whom it was tendered, shall be guilty of an attempt to bribe, which is hereby declared to be a felony:

No freedom from punishment is permitted where a bribe is offered but refused as the officer to whom it is tendered is held to be a competent witness, not being a party to a crime. An attempt to bribe is therefore made a punishable felony although by the terms of the previous clause the completed act does not subject the briber to any penalty. The

[39] (1861) 24 N. Y. 74.
[40] *Matter of Doyle* (1931) 257 N. Y. 244, at p. 251.

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theory behind this clause was stated in the convention of 1867,—"the fear of making the offer lest it may be rejected, and the fear of accepting the offer lest the acceptance may result in the conviction of the acceptor will have a great effect in reducing this crime." [41]

In the debates of the Convention of 1867, while there were some who felt that vigorous prosecution under the statute of 1853 would eliminate the practice of bribery little opposition to this clause materialized. Disclosures of the ineffectuality of the statute apparently were enough to convince the delegates present of the wisdom of this revolutionary change incorporated in the entire section. While there was much discussion, chiefly concerned with the legal sacrifice of the briber in order to punish the bribed, the committee's report, which first introduced the theory underlying the section, was substantially adopted. One other suggestion bearing on this clause was treated summarily, namely, that a bounty be given to the official who refuses a bribe and also helps convict the briber, thus in effect, requiring the State to outbribe the wrongdoer by making honesty pay.

Mention also was made in the debates that the subject of bribery was not a matter for constitutional amendment so much as it was suited to legislative enactment. To this, it was replied that submission in constitutional form gave much needed publicity, weight and dignity whereas the statute of 1853 was almost unknown, and, further, it was likely that if the convention did not act, nothing would be done to remedy the situation. In addition, it was stated that the amendment also would be more difficult to repeal than a mere statute. As it was, a statute of 1869, chapter 742 incorporated the proposed amendment of the 1867 Constitutional Convention but still the Commission of 1872 thought it was expedient to have an amendment thereon, indicating that a statute alone, even with the proper provisions, was not sufficient.

Proposals to change this section have been infrequent and have received little attention. In the convention of 1894, this subject was discussed and the suggestion made to require all bribery investigations before any court, board, officer or body to be conducted under legal rules of evidence and to give the accused right to counsel.[42] It was killed by the Judiciary Committee, whose adverse report was affirmed by the convention of 1894. In the Convention of 1915, a proposal to strike this section out did not even reach a vote before the Committee of the Whole.[43]

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[41] Convention of 1867, *Debates*, Vol. V, p. 3314.
[42] Proposed Amendments (1894) Int. No. 196 (Pr. No. 197).
[43] Proposed Amendments (1915) Int. No. 473 (Pr. No. 485).

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The immunity provision of this section [44] which concerns the exemption from prosecution of the witness who testifies upon the prosecution of the officer receiving the bribe has been construed by the courts in conjunction with the related section 2 of this article. It has been judicially pointed out that there can be no legislative contravention of the constitutional grant of immunity from prosecution which extends only to those testifying as to offering or giving of a bribe which has been accepted. In *People* v. *Anhut*,[45] it was stated that, "* * * if possible, we should construe any legislative provision giving immunity in such a way as to make it in accordance with the express commands of the Constitution, or if it appears that the Legislature has gone beyond the power given it by the Constitution to legislate upon this subject of immunity, so far as it has attempted to go beyond the power granted, such legislation would be void as violating the constitutional prohibition." Thus, this phase of the constitutional immunity is narrow and will not be broadened by any legislative measure. Such interference is excluded.

The distinction and relation between this section and article I, section 6, which provides that no person shall be compelled in a criminal case to be a witness against himself, is discussed in *Matter of Doyle*.[46] In that case, the defendant had refused to answer questions relating to his alleged bribery put to him during an investigation by a joint legislative committee on the ground that the answers might tend to incriminate him. On being adjudged guilty of contempt for his refusal, the defendant maintained that the refusal was not contumacious but privileged under the constitutional right of a witness in a criminal case not to be compelled to testify against himself. Since section 381 of the Penal Law provides that "a person so testifying to the giving of a bribe which has been accepted, shall not thereafter be liable to indictment, prosecution or punishment for that bribery, and may plead or prove the testimony accordingly, in bar of such an indictment or prosecution," complete immunity was offered, obviating any need for reliance upon article I, section 6, by the defendant. It was held that his refusal to testify based on his right against self-incrimination was an insufficient defense since section 381 adequately protected him against any further prosecution. And thus it is consistent with article I, section 6, because the immunity from the use of the testimony in later actions is as comprehensive as the loss of the privilege suffered. The statute must meet the test that "to

[44] For a detailed history of this section, comparing it with other jurisdictions, see Wigmore (1923) Vol. IV, sec. 2281.

[45] (1914) 148 N. Y. 7, at p. 16.

[46] (1931) 257 N. Y. 244.

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force disclosure from unwilling lips the immunity must be so broad that the risk of prosecution is ended altogether."[47]

The fact that the above statute affords immunity to testimony procured at "any trial, hearing, proceeding or investigation" whereas the Constitution in this section refers only to "prosecution" has been held not in contravention of the Constitution even though the statutory immunity is broader,—"The expansion may be conceded, and the validity of the statute will suffer no impairment. The purpose of the Constitution was to establish one immunity permanently in the fundamental law, but not to foreclose the Legislature from establishing additional ones thereafter."[48] The above legislative power to enlarge this element of immunity[49] is not to be confused with the fact that "the witness is relieved of the risk of prosecution in one situation and one only: He must have testified to the offer or giving of a bribe which has been accepted."[50] Two distinct problems are involved. One deals with the *occasions* when the testimony is given, such as at trials, hearings, investigations and the like. The other question treats of the *contents* of the testimony itself which are necessary to entitle a witness to the privilege, namely, he must have testified to the offer or giving of a bribe which has been accepted. The taker of a bribe who testifies thereto, is accordingly not entitled to the immunity from prosecution.[51]

The courts have construed this section and the related ones in this article according to the spirit, as well as the letter, of the Constitution. It has been stated that it is still difficult to judge exactly the deterrent value of the article as a whole of which this section is the axis. On this point, James Bryce in his *American Commonwealth* says:[52]

> "It is always difficult to estimate the exact value of laws which propose to effect by mechanical methods reforms which in themselves are largely moral. This much, however, may be said, that while in all countries there is a proportion (varying from age to age and country to country) of good men who will act honorably whatever the law, and similarly a proportion of bad men who will try to break or evade the best laws, there is also a considerable number of men standing between these two classes, whose tendency to evil is not too strong to be repressed by law, and in whom a moral sense is sufficiently present to be capable of stimulation and education by

[47] *Id.*, p. 251. See also *People* v. *Sharp* (1887) 107 N. Y. 452.
[48] *Matter of Doyle, supra,* at p. 252.
[49] See Opinion, Attorney-General (1921), p. 424, for discussion thereof.
[50] *Matter of Doyle, supra,* p. 252.
[51] *People* v. *Grossman* (1932) 262 N. Y. S. 66.
[52] Vol. II, p. 452.

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> good law. Although it is true you cannot make men moral by a statute, you can arm good citizens with weapons which improve their chances in the unceasing conflict with the various forms in which political dishonesty appears. These improved Ballot Acts and Corrupt Practice Acts need to be vigorously enforced, for the disposition, of which there have been some signs, to waive the penalties they impose * * * would go far to nullify the effect to be expected from the statutes."

In drawing conclusions, it must be remembered that the United States passed through a relatively lawless era. The early and middle nineteenth century witnessed the development of the West, the rapid growth of industry and railroads in the East, a Civil War, frontier battles with Indians, immigration on a large scale. Bryce suggests[53] "that in a new and large country, where the temptations are enormous and the persons tempted have many of them no social position to forfeit, the conditions are not the most favorable to virtue." As the country developed, became more stable and fixed, the sense of responsibility of legislators may also have become more firmly rooted, particularly if an enlightened and awakened public were finally to insist upon it. Since bribery did not disappear immediately but rather gradually diminished over a period of time, it lends weight to the role played by general morality, also imperceptibly but steadily changing. Revolutionary in nature as the theory of this article through this section may have been, the conclusion appears to be that the decisive factor affecting bribery was not constitutional inhibitions, but custom.

SECTION 4

> "Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor." (Amendment of 1874, continued without change.)

Under the terms of this section, one charged with offering, promising or receiving a bribe is permitted to testify on his own behalf in any civil or criminal prosecution thereof. Only one attempt to change this has been made which was unsuccessful, so that since its enactment in 1874

[53] *Id.*, p. 167.

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on the recommendation of the Commission of 1872 which followed the draft of the 1867 convention,[54] it has remained unaltered. The purpose of this section is to permit a briber, or one who receives a bribe, to take the witness stand to testify in his own behalf in any civil or criminal prosecution thereof. This is in derogation of the common-law rule which did not permit a party to an action, particularly a defendant in a criminal case, to testify.[55] At common law, it was felt that one interested in the outcome of a law suit would inevitably commit perjury to insure a conclusion of the case which would be favorable to him. This common law principle up to 1867 was almost universal law, not being altered by State or Federal Constitutions.

The change, proposed by the Convention of 1867 in its Constitution but rejected by the people, was followed by the Legislature which enacted, Laws of 1869, chapter 678, a statute which applied to all criminal prosecutions, and chapter 742, a statute affecting bribery specifically, as does this section. The general legislative measure of 1869 provided that in all criminal proceedings, the defendant at his own request, but not otherwise, would be deemed a competent witness with no presumption against him to be created by his neglect or refusal to testify.

Since the common-law disqualification of a criminal defendant's right to be a witness in his own behalf had been removed by the general statute of 1869, the amendment adopted in 1874 would seem to add nothing, especially since the general statute was buttressed by the specific statute which removed the disability against testifying in both civil and criminal bribery proceedings.[56]

It is probable that this section was incorporated as an amendment in 1874 to complete the constitutional treatment of bribery in the article itself, especially since the subject of bribery was considered enough of a practice to warrant its removal from the vagaries and uncertainties of legislative action by being made part of the organic law.

A proposal in the Convention of 1915 to strike out this section received no attention.[57] No reasons for this proposal are to be found in the debates.

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[54] Constitution of 1867, Art. XIII, sec. 3:

"Any person charged with receiving a bribe, or with offering or promising a bribe that is rejected, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor." (*Debates*, Vol. V, p. 3971.)

[55] Wigmore on Evidence, (1923) Vol. I, Ch. XXIII.

[56] It is interesting to note that a statute on bribery, L. 1853, ch. 539, while containing no provisions as to the accused's right to testify in his own behalf did compel the testimony of one offender against the other, not subject to use in a later trial of the witness who so testified.

[57] Proposed Amendments (1915) Int. No. 473 (Pr. No. 485).

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The privilege of the defendant to testify in his own behalf in any criminal or civil prosecution for bribery no longer retains the uniqueness it had when first introduced into the Constitution. Even before its introduction in 1874 as part of the organic law, by the terms of the above statute of 1869, chapter 678, this common law disqualification had been removed for all criminal cases.[58] The Code of Criminal Procedure (1936), section 393, now states that "the defendant in all cases may be a witness in his own behalf, but his neglect or refusal does not create any presumption against him." This is derived from the above law of 1869. The statutory statement of the principle not only seems well established by now but is also general in its terms, including as it does "all criminal defendants." The corresponding civil provision[59] was enacted before the criminal one.[60] Thus both civil[61] and criminal statutes now exist which permit the party to the action to testify in his own behalf, and both are of general application including all cases.

When this section was adopted in 1874, it may have been considered expedient to have it incorporated into the Constitution to remove chances of its repeal by the Legislature, if left in statutory form. Since the above statutes have been in continuous existence for seventy years, this threat would no longer seem to hold true.

SECTION 5

"No public officer, or person elected or appointed to a public office, under the laws of this State, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another. A person who violates any provision of this section, shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the Attorney-General. Any corporation, or officer or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege or discrimination, shall also be deemed guilty of

[58] Wigmore, Vol. I, sec. 578. For comparative study of statutes affecting testimonial qualifications, see Vol. I, sec. 488.
[59] L. 1867, ch. 887, sec. 1.
[60] Wigmore, Vol. I, sec. 576.
[61] C.P.A. (1937) sec. 346.

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a misdemeanor and liable to punishment except as herein provided. No person or officer or agent of a corporation giving any such free pass, free transportation, franking privilege or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same." (Constitution of 1894, continued without change.)

Under the terms of this section, a public officer of the State may not receive any free pass, free transportation, or franking privilege nor may the officer be benefited by any discrimination in passenger, telegraph or telephone rates. An officer who violates the provisions of this section is considered guilty of a misdemeanor and may be subject to a forfeiture of his office. However, while a person or a corporation who contravenes the prohibitions of this section is deemed guilty of a misdemeanor, he is not liable to civil or criminal prosecution therefor upon his testifying as to the giving of the free pass or discriminatory rate.

The intention of this section was to stamp out the general practice indulged by railroads which consisted of offering passes to State officials instead of bribes. The source of the section is to be found in the recommendation of the Judiciary Commission of 1890 which had proposed that judges be prohibited from accepting railroad passes for their own or family use.[62] The Convention of 1894 extended this proposal to include all public officers and this was ratified in the same year. Despite a few proposals to change it, the section has not been modified.

No public officer, or person elected or appointed to a public office, under the laws of this State, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another:

The practice of distributing railroad passes to judges was considered by the Judiciary Committee of 1890 and was the subject of much discussion in the convention of 1894. It was said:

"We all know this is a great evil, petty and disgraceful as it is. What right has any man, the moment he gets into a public office, to

[62] Lincoln, *Constitutional History of New York*, Vol. II, p. 717.

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> accept a pass? Why should he ride free? Why should he not pay his fare out of his salary as every other man has to pay his out of his salary, or out of his private means?"[63]

It was also stated that "* * * this fact (distribution of railroad passes) is obnoxious to public morals, is an offense against public decency and ought to be suppressed."[64]

The distribution of passes to judges and legislators, while not in the actual form of money as to constitute open bribery, was considered the equivalent because these passes could be readily converted into cash by sale to another. If used by the person himself, it meant a considerable saving to which he was not properly entitled. A closer approach to bribery was found in certain parts of the State when the rate of assessments upon railroads was influenced by giving passes to the State assessors,[65] since the recipients were then placed under a tacit obligation to treat legislation affecting the railroad without the impartiality expected of those who held a public trust. This practice had become so widespread that as an offense to public decency and morality it was thought worthy of suppression by amendment.

The public was not the only sufferer of this pernicious system for the railroads were occasionally the victims of their own machinations. The "stand and deliver" policy of legislators who had been taught to accept gratuities for passing bills made them reluctant to act unless the railroads acceded to their request for passes. Such an abuse became a sword which cut both ways.[66]

In view of these facts, the convention of 1894 proposed this amendment which prohibits railroad passes being given to a State official for his own use or the benefit of another including within the scope of the section, discrimination in passenger, telegraph or telephone rates as well.

A person who violates any provision of this section, shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the Attorney-General:

The recipient of a pass or the one benefited by the discrimination in rates, under the circumstances prescribed, is made guilty of a misdemeanor, and his office is to be forfeited at the suit of the Attorney-General. It was felt that even though the previous sections of this

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[63] Convention of 1894, *Debates*, Vol. IV, p. 487.
[64] *Id.*, p. 126.
[65] Lincoln, Vol. III, p. 653.
[66] Convention of 1894, *Debates*, Vol. III, p. 118.

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article had made bribery a felony, the offense intended to be covered by this section was not of sufficient status to warrant such severe treatment. Therefore, it was made the lesser crime of a misdemeanor.

Any corporation, or officer or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege or discrimination, shall also be deemed guilty of a misdemeanor and liable to punishment except as herein provided. No person or officer or agent of a corporation giving any such free pass, free transportation, franking privilege or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same:

Once it was decided to treat this practice as a form of bribery, it was considered logical to follow the pattern of the other sections on bribery contained elsewhere in this article.[67] In was stated in the debates that "We should follow the bribery act, and we should put the offense where it properly belongs, on the public officer receiving the pass, and we should leave the corporations as our witnesses to be called against the public officer, in case he is found violating the provision."[68] Thus, the railroad corporation was left available as a witness whose testimony would be forthcoming under the immunity granted when the receiver of the bribe was tried. Without the inclusion of such an immunity for prosecution, it would otherwise be difficult to produce evidence because if both parties to a bribe are held punishable, neither would testify on the ground that the Constitution permitted neither to be compelled in any criminal case to be a witness against himself.[69] Consequently, since the transaction is normally only between the briber and the recipient of the bribe, no other witness would be available and neither party would be convicted. It was to circumvent this situation that the inducement of complete exemption from prosecution for the briber was offered in exchange for his testimony on the prosecution of the recipient as to the giving of the bribe.

Since only one offender was to be punished, the selection of the recipient of the bribe as that one was considered natural for it made this provision consistent with its predecessor, section 3.[70] The latter

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[67] See sec. 3 *supra.*
[68] Convention of 1894, *Debates,* Vol. IV, p. 487.
[69] Art. I, sec. 6 of New York Constitution.
[70] Discussed in detail *supra.*

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section punishes the receiver of the bribe on the theory that of the two parties involved, he is the more guilty as he violates his oath of office and breaches his fiduciary duty to the public.

In the debates following the proposal of this amendment in the convention of 1894 it was emphasized that no action by the Legislature on this subject could be expected. The remedy for this obnoxious offense against public morals had to come from the convention if it were to come at all. In view of this circumstance, it was thought proper to incorporate into the State Constitution a provision furnishing a standard of conduct for public officers which ordinarily would be a matter for legislative enactment. As it was put in the language of a member of the convention:[71]

> "As a general rule, Mr. Chairman, I am opposed to incorporating in the Constitution of this State legislative provisions furnishing a rule of conduct for public officers. My conception of the Constitution is that it should contain only succinct and elastic propositions under which the legislative discretion may be exercised for the guidance of public officers and for the welfare of the public. But, while that is true as a general proposition, there are some offenses against public morals, some abuses so notorious, so flagrant, so hopeless of correction by the Legislature of the State, that it becomes the duty of this sovereign Convention to provide a remedy for them and to put upon them the seal of its disapproval. Such an abuse, such an offense against public morals is the one we are now considering."

Those who voted against the new amendment in the 1894 convention did so on the varied grounds that this subject was "peanut politics," not suited to treatment in organic law but rather part of the Criminal Code; that the Legislature would feel a loss of public confidence by the passage of such a measure; that "public official" was too large a term, including as it did, such petty State officials as notaries; and that a proposal requiring the railroad to give free passes to certain enumerated State officials for expediting performance of State affairs would better eliminate the evil than this section.[72] Nevertheless, the section was adopted by the convention of 1894. In 1896, the Legislature sought to abrogate this section but failed,[73] and no further effort since that time has been made to alter it.

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[71] Convention of 1894, *Debates*, Vol. III, pp. 125–126.

[72] *Id.*, Vol. IV, pp. 502–12.

[73] 1896, A. No. 683 (Int. 632).

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This section forms a complementary part to the whole article. It deals with a specific phase of bribery. However, this section is of more legislative character than the other sections in the article as this resembles more closely a penal statute, being a specific and particular instance of bribery. But, since it was felt in the 1894 convention that the legislators themselves would not act to stop the offense, this constitutional amendment was enacted.

There has been some judicial consideration of this section. In *People* v. *Rathbone*[74] the court included a notary public within the section on the ground that he is a public officer, the plain and precise words of the Constitution preventing a different result. It has been held that a public officer who accepts a free pass entitling him to palace or sleeping car accommodations is accepting a free pass within the meaning of this section.[75] It has also been decided that local health officers are within the classification of public officers. This holding has been limited by the case where the local health officer is also in the employ of a railroad as a local railroad surgeon, and who may then receive a pass as compensation for services performed by him in the latter capacity.[76] This opinion is based on the court decisions concerned with public officers who occasionally find themselves in dual positions. *Dempsey* v. *N.Y.C. R.R.*[77] illustrates this. There, a railroad policeman who was partially paid for his services by being given a pass permitting use of the railroad, was included as a public officer under the Railroad Law.[78] This was held not to be a free pass "within the meaning of the Constitution but on the contrary, is a pass for which the plaintiff has paid full consideration"[79]

In view of these holdings, the courts have made clear that public officers of the State are not to be made the beneficiaries of corporate gifts which will disturb the exercise of the impartiality of judgment which is necessary for proper fulfillment of their duties.

SECTION 6

"Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the Governor, after due notice and an opportunity

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[74] (1895) 145 N.Y. 434.
[75] *People* v. *Wadham* (1903) 176 N.Y. 9.
[76] (1922) Op. Att. Gen. 56.
[77] (1895) 148 N. Y. 290.
[78] Railroad Law of 1891, sec. 58, ch. 565.
[79] See also, *Smith* v. *N.Y.C. R.R.*, (1861) 24 N. Y. 227.

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of being heard in his defense. The expenses which shall be incurred by any county, in investigating and prosecuting any charge of bribery or attempting to bribe any person holding office under the laws of this State, within such county, or of receiving bribes by any such person in said county, shall be a charge against the State, and their payment by the State shall be provided for by law." (Amendment of 1874, continued without change.)

This section purports to promote enforcement of the previous provisions relating to bribery by providing for the removal of district attorneys who fail to prosecute faithfully violations thereof. The culpable district attorney may be dismissed by the Governor after being given due notice and an opportunity of being heard in his defense. Enforcement is also encouraged by having the State bear the expense incurred by the county in the prosecution of bribery charges. No successful proposal to alter this section has been made since its enactment in 1874.

Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the Governor, after due notice and an opportunity of being heard in his defense:

Under the terms of this clause, district attorneys who are delinquent in the prosecution of bribery offenses may be removed by the Governor after due notice and an opportunity to be heard. The need for action to repress the practice of bribery originated with the Committee on Official Corruption appointed by the convention of 1867. Its report was prefaced by the remark that official corruption was "a crime of deep turpitude, growing prevalence, and dangerous tendency." The corroboration of this statement can be found in the testimony taken before it which revealed over a half million dollars distributed by railroads as bribes. One newspaper, referring to current conditions, said, "We speak what hundreds of men know from personal experience, that no bill whose passage will confer pecuniary advantage upon any man or any corporation can be passed in Albany except by bribery—except by paying members to pass upon it. No man can get his rights, or prevent serious damage to his private interests, or to avert ruin from himself and his family, except by bribery."[80]

As an outcome of this state of affairs the convention of 1867 drafted

[80] *New York Times*, April 8, 1867.

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this clause but did not favor the proposal of its committee to include within it judges as well as districts attorneys since provision for the removal of judges was made elsewhere in the Constitution. The Constitution proposed by the 1867 convention with the exception of the judiciary article was not accepted by the people. However, closely worded in accord with the section suggested by the 1867 convention was a provision contained in the statute of 1869, chapter 742. Despite the existence of the 1869 statute, the proposal drafted in 1867 [81] was nonetheless adopted as an amendment in 1874. The commission of 1872, while acknowledging the existence of this 1869 statute, must also have recognized its inadequacy in the light of the uncurbed activities of the Tweed Ring.[82] Thus, the necessity for a constitutional amendment was emphasized.

This clause, encouraging prompt prosecutions by the district attorney of bribery charges, makes this article an entity on the subject of bribery, and by reason of its constitutional form lends greater force than would a statute. It also has a further advantage over a statute by making repeal more difficult.

The expenses which shall be incurred by any county, in investigating and prosecuting any charge of bribery or attempting to bribe any person holding office under the laws of this State, within such county, or of receiving bribes by any such person in said county, shall be a charge against the State, and their payment by the State shall be provided for by law:

The history and background of this clause, introduced to encourage county prosecution of bribery, or attempts to bribe those who hold office under State law, and the above prior clause relating to the removal of the district attorney, are identical, arising from the same circumstances.

It is herein provided that expenses incurred by the county in those prosecutions are to be borne by the State, which, by law is required to provide therefor. This was inserted, so the debates in 1867 disclose, to meet the objection that a county would be loath to spend its money, time and services in order to confer a benefit upon the State; that if the State wished investigations and prosecutions of persons receiving bribes while holding office under State law it would have to assume the burden of bearing the expenses and not the county.

Matters dealing with a judge's duties to examine the accused and details for prosecution by the district attorney were originally suggested

[81] This section, as proposed by the convention of 1867, is exactly the same as the present section. See convention of 1867, *Debates*, Vol. V, p. 3971, art. XIII, sec. 6.

[82] Bryce, *American Commonwealth* (1933), Vol. II, ch. LXXXVIII.

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as separate sections of this article in the report of the Committee on Official Corruption of 1867. They were stricken out as being of too administrative and detailed a nature, suited to statutory legislation rather than amendments. Nor was more attention given to a proposal made at a later convention which suggested enlarging the scope of the section.[83] It has remained unchanged from the time of its enactment in 1874.

It has been judicially held that the State need not assume charges under this clause where the district attorney has not acted through the intervention of a grand jury in investigating and prosecuting bribery.[84] This shift of the expenses to the State "was intended only to be through the intervention of grand jurors, for the district attorney could act in no other way." [85]

In view of the fact that the district attorney is directed by this section, under penalty of removal from office, to prosecute violations in his county of the other constitutional provisions relating to bribery, the risk of prosecution of a witness is still substantial even though a joint resolution by both houses of the Legislature attempted to grant immunity.[86] It was held that the Legislature by a resolution cannot suspend the operation of the Criminal Law,[87] and where a statute on conspiracy to bribe did not provide complete protection from prosecution for the witness, the joint resolution of the two houses which sought to provide the immunity did not supply this gap in the statute. It was further stated: "A final argument is made that the risk of prosecution is unreal and unsubstantial, since it is not supposed that a district attorney would prosecute a witness in the face of a solemn declaration of the will of the two houses of the Legislature that the witness should go free. This argument ignores the provisions of article XIII, section 6 of the Constitution * * *."[88]

If it be assumed that the other sections on bribery deserve their place in the Constitution, this section completes the picture of the subject. Its purpose is to prevent the body of the article from becoming a dead letter by holding the whip of removal from office over the district attorney's head and by encouraging county prosecution of bribery when it forces the State to shoulder the onus of expenses thereby incurred.

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[83] Proposed Amendments (1894) Int. No. 209 (Pr. No. 211). The change suggested by this proposal was the addition of the following italicized matter in the first sentence of the section so that it would read: "Any district attorney who shall fail faithfully to prosecute a person charged with a violation in his county of any provision of this article, *or of any law against bribery and corruption* which may come to his knowledge, shall be removed from office by the governor, after due notice and an opportunity of being heard in his defense." The remainder of the section was left intact.

[84] *People* v. *Queens County* (1886) 39 Hun 442.

[85] *Id.*, at p. 444.

[86] *Matter of Doyle* (1931) 257 N.Y. 244.

[87] (1921) Op. Att. Gen., p. 424.

[88] *Matter of Doyle, supra*, at p. 265.

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CHAPTER X

THE ORGANIZATION OF THE STATE DEPARTMENTS IN RELATION TO EXECUTIVE CONTROL

Introduction

This study is directed to the organization of the State departments from the viewpoint of executive control. Attention is centered upon methods of appointment and removal of department heads, the purpose and history of the boards and commissions which direct or are affiliated with the various departments and the question of the distinction between administrative and non-administrative functions in relation to the work of these departments.

No attempt is made to evaluate the degree of administrative control which inheres in the Governor by reason of his power over departmental budgets. That this power is susceptible of such use is self-evident. However, it is usually agreed that the Governor was given such authority as a co-ordinate for executive leadership and not as a substitute for administrative control through proper departmental organization.

General Background

The convention of 1915 gave the first definitive impetus toward reorganization of the State's administrative services. The plan fell, however, with the rejection of the Constitution at the polls and it was not until a decade later that the necessary constitutional revision was accepted by the Legislature and the voters of the State. The amendments, passed in 1925, provided the frame within which the reorganization was to be consummated and instructed the Legislature to fill in the detail by statute.

The prime purpose motivating the reorganization was to eliminate poor and extravagant management and to achieve a sound system of State finance coincident with an integrated departmental system, headed and controlled by the Governor, as the responsible administrative head of the State.

Consolidation of the existing mass of boards, commissions, offices and other agencies into a limited number of orderly departments was the first requisite to reach the objective. The amendments of 1925 named the departments and forbade any increase in number.[1] The Legislature, pursuant to the accompanying constitutional direction[2]

[1] Art. V, secs. 2 and 3, as amended Nov. 3, 1925.
[2] Art. V, sec. 3, as amended Nov. 3, 1925.

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specified the functions of the departments so created. The second requisite was to provide for a practical application of the theory that the Governor was directing head of the administrative organization.

The desirability of centralizing authority over administration in the hands of the Governor had long been urged. Governor Hughes had repeatedly recommended such centralization of administrative services and the grant to the Governor of the power to appoint the heads of the administrative departments who should collectively serve as his administrative cabinet.[3] The Report of the Committee on the Governor and Other State Officers to the 1915 convention stressed that the Governor's authority over the strictly executive departments should be unquestionable and direct.[4] The Reconstruction Commission appointed by Governor Smith in 1919 had set forth as an underlying principle of its recommendations that an administrative department should be under the direction and supervision of one man appointed by and subject to removal by the Governor.[5]

Running parallel, however, with the desire to give the Governor such direct supervisory control over the administration of the State machinery has been the feeling that certain of the civil departments are of a nature somewhat apart from the others, and should therefore have a certain degree of independence from the chief executive's control, and also in some cases be headed by a commission rather than by a single individual. The line of cleavage has been set forth rather vaguely when general definition has been attempted, the most usual characterizations of this type of department being one whose functions are of a quasi-legislative or quasi-judicial nature. Other descriptions have included such phrases as advisory and inspectional functions, and political or control functions.[6]

It has been pointed out that it is easier to state such a distinction than to apply it, for the scope of no department is so limited that it does not encompass the performance of some or all of these functions as well as such as will fit the classification "purely administrative or executive."

Before examining those civil departments which presently have diffuse control as contrasted with direct control, it is of interest to note how the three major reports in this State on reorganization

[3] See Willoughby, *Principles of Public Administration* (1927) p. 73.

[4] *Documents of the New York State Constitutional Convention* (1915) No. 40, p. 7.

[5] Reconstruction Commission, *Report on Retrenchment and Reorganization in the State Government* (1919) p. 11.

[6] *Ibid.*; *cf.* Buck, *Administrative Consolidation in State Governments* (1930) pp. 5–6; Willoughby, *supra* note 3 at pp. 42, ff.; Graves, *American State Government* (1936) pp. 373–6.

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differed in making the division between "administrative" departments which should be wholly responsible and responsive to the Governor, and those of a "different" nature.

The three reports to be considered are the Majority Report on the Governor and Other State Officers to the convention of 1915, together with the proposed 1915 Constitution, the Report on Retrenchment and Reorganization by the Reconstruction Commission in 1919, and the Report of the State Reorganization Commission in 1926. With the last will be included the amendments of 1925 which directed and limited the work of that Commission.

Majority Committee Report—1915 Convention

The plan proposed by the 1915 convention committee[7] was divided into three groups "according to the general functions of the officers or departments described." In the first group the committee placed the Attorney-General and the Comptroller and recommended continuance of their offices as elective, stating that the members of the committee who favored the appointment of these officials had yielded their views and adding the brief note: "The basis of this compromise is to be found in the peculiar relation which these two officers hold to the people of the State as a whole."

In the second group were placed "the agencies of government which, from the character of their jurisdiction and authority, cannot be considered as purely executive arms of the State government. These boards or commissions possess, to a large degree, judicial or legislative functions and make rules and regulations under delegated authority from the Legislature." The specific bodies to which this description was applied were the Department of Education and its Board of Regents, the Public Service Commission, the Conservation Commission and the Civil Service Commission.

All other departments were placed in the third group and designated "strictly executive in nature." The only limitation on independent appointment and removal by the Governor was the compromise within committee, resulting in the recommendation that appointments be subject to the advice and consent of the Senate.

The amendments as finally incorporated in the proposed Constitution of 1915[8] went even a bit further than the committee's recommendations. The Department of Conservation was partially excluded from the "judicial and legislative function" class, for while a Con-

[7] *Documents, supra* note 4, at pp. 6–7.

[8] Art. VI, sec. 1, named the civil departments, sec. 2 designated the head of each department, sec. 4 provided for removal of department heads by the Governor.

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servation Commission was to head the department, the commissioners were to be appointed by the Governor, and were subject to removal by him in his discretion. In those cases where the Governor was to appoint the department heads, the "advice and consent of the Senate" clause was eliminated. The head of the Department of Taxation was made a Tax Commission, but the commissioners were each to be appointed and removed by the Governor in the same manner as individual department heads and were equally under his supervision.

Aside from the elective officers, the Department of Education, the Public Service Commission and the Civil Service Commission were the only departments falling wholly without the "purely executive" type. With the last two, control was limited by requiring the Senate's consent to appointment, making the commissioners' terms longer than that of the Governor, and overlapping them, and making removal more difficult through requiring the Governor to show cause for such action. The Board of Regents as the head of the Department of Education was continued, presumably as a body to be elected by the Legislature.

The heads of all other departments were designated as individual heads, a slight deviation existing in regard to the Department of Labor where the head was designated as either an Industrial Commission or Commissioner, and the advice and consent of the Senate was required in making an appointment.

Report of Reconstruction Commission

The Reconstruction Commission in 1919 submitted a detailed and comprehensive analysis of the existing organization of the State government together with a carefully defined plan for its reorganization.[9] Its work is particularly significant in that it laid the direct foundation for and presaged the constitutional and statutory reorganization of 1925–26.

Various underlying principles of reorganization were announced. It was deemed necessary that each department, as consolidated, should be headed by a single officer, an exception being stated, however, for departments where quasi-legislative and quasi-judicial or inspectional and advisory functions required a board. The commission further postulated that administrative responsibility must be placed on the Governor, who was to choose the department heads and hold them accountable through his power to appoint and remove and his leadership in budget preparation. The check on appointment by the requisite

[9] Reconstruction Commission, *Report on Retrenchment and Reorganization in the State Government* (1919).

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of Senate approval was however recommended as having worked well. The terms of department heads were to be made the same as the Governor's (proposed as four years), excepting members of boards with overlapping terms.[10]

The specific recommendations made by the commission placed eleven of the proposed nineteen departments under the direct control of the Governor. In each of these the head was to serve at the Governor's pleasure. The departments so treated were: Executive, State, Military and Naval Affairs and Public Works, in which the Governor had complete control, not even requiring the consent of the Senate for his appointments; Taxation and Finance, Conservation, Correction, Banking, Insurance and the Attorney-General, in which the Governor's control was limited only by the necessity of obtaining Senate approval; and Public Service, in which there were to continue to be two Public Service Commissions, one for New York City and one for the rest of the State, but each to be headed by a single commissioner appointed by the Governor with the consent of the Senate and to serve at his pleasure.[11]

Several divergencies from the 1915 recommendations will be noted. The Attorney-General was to be made an appointive officer, the only elective official besides the Governor being the Comptroller who was to act as independent financial auditor.[12] The head of the Department of Conservation was to be a single commissioner and not a commission. Similarly, an individual officer, instead of a commission, was to head the Department of Taxation and Finance. The Public Service Commissions were determined to be outside of the quasi-judicial, quasi-legislative or advisory class and placed under the Governor's direct control, a striking departure from previous functional analysis justified mainly on the ground that since appeal could be had to the courts from the decisions of the Public Service Commissions, and the Supreme Court of the State might review all the acts of these commissions, it did not seem necessary to provide a board to perform the quasi-legislative or quasi-judicial functions in connection with the regulation of public utilities.[13]

The Department of Health fell nearly within the category of direct control, the proposed head being a single officer appointed by

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[10] *Ibid.*, at p. 11.

[11] *Ibid.*, as follows: Executive at p. 51; State at p. 83; Military and Naval Affairs at p. 230; Public Works at p. 95; Taxation and Finance at p. 66; Conservation at p. 104; Correction at p. 199; Banking and Insurance both at p. 212; Attorney-General at p. 79; Public Service at p. 206.

[12] *Ibid.*, at p. 57.

[13] *Ibid.*, at pp. 204–5.

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the Governor with the advice and consent of the Senate, but the term being specified as six years. The proposal was a continuation of the then existing situation which had proved satisfactory. No mention was made of any change in the method of removal which the Reconstruction Commission designated in a chart as by the Governor alone.[14]

Of the seven remaining departments, the Comptroller as noted being elective, only two were paralleled in the 1915 recommendations, namely Civil Service and Education. As before, the Board of Regents was to head the Department of Education and be elected by the Legislature.[15] The Department of Civil Service was to be headed by a chairman designated by the Governor, who was to have entire responsibility for the administration of the department. For the quasi-legislative and judicial functions there was to continue to be a board of three commissioners, the two commissioners other than the chairman, however, to be limited to other than administrative questions. The method of appointment, by the Governor with the consent of the Senate, was to be continued, and also, presumably, the method of removal, by the Senate on the recommendation of the Governor, and the length of tenure.[16] The method of organization used in this instance was based on a recognition of the dual character of the department, and the desire to preserve administrative efficiency and direct control by the Governor over administration, without impairing the independence felt desirable for the quasi-legislative and quasi-judicial functions.

The Reconstruction Commission made a thorough survey of the various state departments and boards having supervision over mental hygiene, charities and correction, and formulated a plan for the consolidation of the numerous existing agencies into three departments: Charities (now Social Welfare), Mental Hygiene and Correction.[17] The Department of Correction as shown above fell into the direct control class, with a single head to be appointed and removed by the Governor and serving at his pleasure. For advisory and inspectional work in this department there was to be a Council of Correction of five appointed by the Governor for overlapping terms of five years each, with the consent of the Senate, and this council was to appoint a paid Board of Parole to administer parole, which the Council would supervise.

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[14] *Ibid.*, at p. 160, chart opposite title page.
[15] *Ibid.*, at p. 154.
[16] *Ibid.*, at p. 220.
[17] *Ibid.*, at p. 198.

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The Department of Mental Hygiene was to be placed under the direction of a commission of three, an experienced physician, a lawyer and a layman, all appointed by the Governor with the consent of the Senate, the respective terms to be during good behavior for the physician and six years for the others. The Department of Charities was to be directed by a Board of Charities composed of twelve members, one from each judicial district and three from New York City, to be appointed by the Governor with the consent of the Senate for six-year overlapping terms. These two departments, it should be noted, were given extensive inspectional duties under the Reconstruction Committee's plan of consolidation. No mention was made of the question of removal in either case.

The Council of Agriculture and Markets was the head of the Department of Agriculture and Markets when the Reconstruction Commission made its report. Under the law establishing the Council, the original appointments were to be made by the Governor and subsequent vacancies filled by election by the Legislature. The first election by the Legislature had taken place only shortly before the Reconstruction Commission reported, so that the new method was just being instituted. Further change at that time was opposed, and as a matter of expediency, therefore, the Reconstruction Commission recommended retention of the council, composed of ten men, as the head of the department, the council to appoint a Commissioner of Agriculture and Markets, to hold office at its pleasure. The Reconstruction Commission, however, strongly indicated its belief that the department was one where a single head responsible to the Governor was most desirable, and stated flatly that its recommendation for a council was not made on the basis of logic or principle and was contra to the principles of proper organization which it, itself, had laid down.[18]

With regard to the Labor Department, the Reconstruction Commission stressed its belief that the quasi-legislative and judicial functions of this department were "more extensive, more varied and less subject to appeal and affect the average citizen more closely than the similar functions of the Public Service Commission." It felt that a single head for the department was therefore inadvisable, and expressed the opinion that the solution of the organization problem was to have a single director, responsible for all administrative work, with a commission of several members who would be able to devote the greater part of their time to questions of quasi-judicial and quasi-legislative problems, and matters of policy.[19]

[18] *Ibid.*, at pp. 109–10.
[19] *Ibid.*, at pp. 116–18.

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Three possible relations between the commission and the director were considered.

> (1) To place the director under the Board of Commissioners as an appointee of the board responsible to it for all administration; (2) to have the director appointed by and responsible to the Governor for the administration of the department, and to associate with the director a Board of Commissioners appointed by and responsible to the Governor for determination of quasi-judicial and quasi-legislative matters; (3) the same as (2), excepting that the director would be an ex-officio member of the board, thus closely relating the administrative and other functions.

Of these possibilities the Reconstruction Commission favored the second or third as the ideal plan for centralizing administrative responsibility and dividing, while correlating, the dual functions of the department. It concluded, however, that the growing importance of the department, the great powers vested in it and new functions being added, the possibility of a single director's decisions seeming arbitrary, and the undesirability of side-tracking commissioners in whom the public had gained confidence, all made it advisable at that time to postpone the plan it preferred and to have the commission head the department and appoint a Director of Labor as the administrative head of the department. The number of commissioners was to be maintained at five, with an ultimate reduction to three recommended, and appointment was to be made by the Governor with the advice and consent of the Senate for terms of five years.

All of the above recommendations as to Mental Hygiene, Charities, Agriculture and Markets, and Labor, were, of course, different from the 1915 proposals. A Department of Mental Hygiene was not provided for at all in the proposed 1915 Constitution; the Department of Charities and Correction was to be headed by a single Secretary of Charities and Correction, and the Department of Agriculture had been placed under an individual commissioner. Further, although the direction of the Department of Labor was stated in the alternative as under a commission or commissioner, and Senate approval was required for appointment, removal was in the Governor's discretion and no provision was made for a stated term of office.

Constitutional Amendments of 1925

The amendments passed in 1925 left the question of supervision and control by the Governor an open one to a large extent, and passed that problem along to the Legislature. Article V, section 2, specified

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the civil departments which were to exist in the State government, naming twenty. Article V, section 4, dealt with the heads of departments. The head of the Department of Audit and Control was designated as the Comptroller, and the head of the Department of Law as the Attorney-General, both these officers remaining elective. The Department of Education was specifically placed under the Regents who were directed to appoint and at pleasure remove a Commissioner of Education as the chief administrative officer of the department. It was further stated that "the head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law," thus permitting the Legislature to deal with the method of appointment of the head of this department as it saw fit. As to all the other departments, article V, section 4, declared simply that their heads were to be appointed by the Governor with the advice and consent of the Senate and were to be removed by the Governor in a manner to be prescribed by law.

There has been no change in substance in these articles since their adoption, the only subsequent amendments being to change the name of the Department of Charities to "Social Welfare" and to add the statement "the head of the Executive Department shall be the Governor" to article V, section 4, in order to clarify the ambiguity existing in regard to that department.

This allocation to the Legislature of the task of determining the tenure of office, the designation of a single official or a commission as the head of each department, and the method of removal by the Governor, may be contrasted with the plan set out in the proposed Constitution of 1915, which specified these details. As noted above, the proposed Constitution of 1915 contained a blanket provision that the heads of all departments and the members of all commissions "unless otherwise provided in this constitution" were to be appointed by the Governor and could be removed by him in his discretion. The "unless otherwise provided" of course referred to the Attorney-General, the Comptroller, the Regents, the Civil Service Commission and the Public Service Commission concerning which details peculiar to each had been mentioned. The specific designation by the 1915 Constitution of the head of each department, as described heretofore, should also be observed as further marking the contrast.

Report of the State Reorganization Commission—1926

Following the passage of the 1925 amendments, Governor Smith asked the Legislature for a commission to do the preparatory work with regard to the legislation necessary to put the amendments into

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operation. The commission was finally constituted with ex-Governor Hughes as its chairman and proceeded "to study the structure of our State government and make recommendations to the Legislature" for "its information and guidance in framing suitable legislation to combine the functions and departments of the State" pursuant to the constitutional amendment.

The report was by no means as comprehensive or as detailed as that of the Reconstruction Commission in 1919. This may be attributed to the fact that the Reorganization Commission worked without funds or staff, did no field work and held no hearings. The committee chairmen had informal, personal conferences with various public officials, however, and the eminence and experience of the individual members of the group, which included four ex-governors, enabled it to do a task which was generally highly commended.[20]

In its section on General Considerations and Recommendations,[21] the Reorganization Commission pointed to four departments for special treatment with reference to their administration. Two of these, Education and Agriculture and Markets, had already been so segregated by the Constitution, which, as indicated above, specified the former's head as the Regents of the University of New York, and provided that the latter's should "be appointed in a manner to be provided by law." The other two departments included by the commission were Charities, where it was recommended that the head of the department be the State Board of Charities, and Civil Service, where the Civil Service Commission was advised. The heads of Audit and Control and Law had of course been fixed by the Constitution as the Comptroller and Attorney-General, respectively, the Constitution also confirming their status as elective State officers.

The Reorganization Commission next recommended that "except in these instances . . . the heads of the various departments shall be individuals and not boards or commissions." In regard to the term of office the recommendation was that "the tenure of heads of departments who are individuals shall be the same as that of the Governor who appoints them," and the suggestion was made that a suitable provision to be used was that formerly relating to the Superintendent of Public Works, to wit: "that he shall 'hold his office until the end of the term of the Governor by whom he was nominated and until his successor is appointed and qualified.'" The question of removal was dealt with by

[20] See Childs, "New York State Reorganizes" (1926) 15 *National Municipal Review* 265, for a description of how the committee was constituted and performed its work.

[21] State Reorganization Commission, *Report* (1926) Legislative Document No. 72, at pp. 5–6.

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suggesting as the "manner to be provided by law" the provision formerly relating to the Superintendent of Public Works, namely "he may be suspended or removed from office by the Governor, whenever, in his judgment, the public interest shall so require, but in case of such removal from office, the Governor shall file with the Secretary of State a statement of the cause of such removal, and shall report such removal and the cause thereof to the legislature at its next session."

In its detailed recommendations for each department, the Reorganization Commission carried out the form of its general recommendations regarding individual heads for all departments other than the four specified, but actually, as will be indicated, there was some divergence in regard to direct control and supervision in the Departments of Taxation and Finance and Public Service.

The departments placed under direct control of the Governor were therefore: Executive, in which Military and Naval Affairs was consolidated; Public Works, in which Architecture was consolidated; State, Conservation, Health, Mental Hygiene, Correction, Banking, Insurance, and Labor.[22]

Thus, Mental Hygiene, which the Reconstruction Commission had placed under a commission in its 1919 report, was removed from that category, and Health was brought more directly in line with the other direct control departments by eliminating the six-year term which had then been recommended. Labor, whose quasi-judicial and quasi-legislative functions had been stressed by the Reconstruction Commission in 1919, was likewise now placed under a single commissioner by the Reorganization Commission. The Industrial Board which existed in 1926, was, however, retained to continue its development of the Industrial Code and to make awards in workmen's compensation cases. It may also be noted in regard to Labor that when the Reconstruction Commission reported in 1919, an Industrial Commission of five headed the department, while in 1926 there was already a single Industrial Commissioner administering its work.

The Reorganization Commission repeated the thought of its predecessor, the Reconstruction Commission, that the administration of Agriculture and Markets might be improved by the application of the same principle of centralization of authority and responsibility which it advised for the other civil departments, but, taking into consideration the Constitution's recognition of an exception as to method of choice, it made no recommendation for change in the existing statutory method.

[22] *Ibid.*, as follows: Executive at p. 8; Public Works at p. 36; State at p. 29; Conservation at p. 42; Health at p. 50; Mental Hygiene at p. 54; Correction at p. 59; Banking and Insurance, both at p. 67; Labor at p. 48.

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A State Council of Farms and Markets was therefore included in its report as the head of the department, to be chosen as the Legislature might determine.[23]

For the head of the Department of Charities, the commission advised the State Board of Charities as theretofore constituted, stating that it recognized the success of that board in the visitation and inspection of the charitable institutions of the State receiving public moneys and the fact that its work had been satisfactory to the public at large. The commission noted, however, that the allocation of various institutions and the functions of various commissions to the department would require an administrative organization and suggested the creation of three divisions in the department, two of which, dealing mainly with administrative matters, to be under the direction of individuals chosen by the board, but with the approval of the Governor and to be subject to removal by him.[24] Here, again, a duality in departmental functions had suggested a device to bring administration closer to the Governor and yet permit a degree of independence for the special function; in this case, inspection and visitation.

With regard to the Department of Civil Service, the Reorganization Commission expressed satisfaction with the then existing Civil Service Commission, which consisted of three commissioners appointed by the Governor with the advice and consent of the Senate, holding office for overlapping terms of six years and electing their own president from time to time, usually in rotation. It was therefore proposed that the Civil Service Commission be made the head of the new Department of Civil Service, and its powers and duties be assigned to that department.[25]

In its segregation of Agriculture and Markets, Charities, and Civil Service, the Reorganization Commission followed the Reconstruction Commission, although it will be remembered that the latter commission in 1919 had attempted to centralize administrative responsibility for Civil Service in the chairman and to give to the commission, as such, only quasi-judicial and quasi-legislative functions. Of these three departments, only Civil Service had been so set apart in the 1915 convention committee's recommendations.

When it dealt with Taxation and Finance, the Reorganization Commission was presumably thinking in terms of direct administrative control. The head of the department was to be the President of the State Tax Commission, a single officer. However, the continuance of

[23] *Ibid.*, at p. 47.
[24] *Ibid.*, at p. 55.
[25] *Ibid.*, at pp. 67–8.

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the already existing Tax Commission to perform its statutory duties was also recommended and while the two additional commissioners were to continue to be appointed by the Governor, as was the president, their terms were to be six years while his was to be coterminous with the Governor's.[26]

To an even greater degree, Public Service was taken out of the class of complete control, even though an individual head was designated, namely the chairman of the Public Service Commission. For retention of a Public Service Commission with two divisions was recommended, with commissioners appointed for stated terms of considerable length and subject to removal by the Governor only on stated grounds after public hearing. Moreover there was no suggestion that the chairman of the Public Service Commission be treated differently as to tenure or removal than the other commissioners.[27]

The recommendations of the Reorganization Commission were transmitted to the Legislature in February, 1926. They were accepted in all substantial features and were enacted in statutory form shortly thereafter becoming law in April, 1926. The set of statutes so enacted was designated as the State Departments Law in the consolidated laws of New York. Thereafter a large number of the sections relating to specific departments was removed from the State Departments Law and placed with the laws of the particular department to which they referred, the sections concerning the Departments of Public Works, for example, being transferred to the Public Works Law and so on.

Present Day Administrative Organization from the Viewpoint of Executive Control

Since the enactment of the 1926 legislation there has been a number of modifications in the internal organization of the departments, bearing on the question of control, which will be mentioned in the discussions of the individual departments. The only legislation directly changing the character of a head of a department has been in Agriculture and Markets, where in 1935, the Council of Markets was abolished and a single head, the Commissioner of Agriculture, substituted in its stead.[28]

In the following discussion four departments will not be mentioned: Audit and Control and Law, because the Comptroller and Attorney-

[26] *Ibid.*, at p. 25.
[27] *Ibid.*, at p. 65.
[28] L. 1935, ch. 16, sec. 5.

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General are presently elective constitutional officers and they therefore present peculiar problems not within the scope of this study; and Education and Social Welfare, since special studies have been accorded these departments and their further treatment here would be repetitious. It should be borne in mind, however, that Education and Social Welfare are still headed by boards, the members of which have stated terms longer than the Governor's, and are not subject to removal in the Governor's discretion.

There remain, therefore, for consideration, Executive, State, Public Works, Conservation, Agriculture and Markets, Labor, Health, Mental Hygiene, Correction, Banking, Insurance, Taxation and Finance, Public Service and Civil Service. In all of these departments, with the exception of Civil Service, the head of the department is a single individual appointed by the Governor, by and with the advice and consent of the Senate; the Governor, himself, of course being the head of the Executive Department. For the heads of the departments, so appointed by the Governor, with the exception of the chairman of the Public Service Department, the tenure of office is uniformly stated to be until the end of the term of the Governor by whom he was appointed and until his successor is appointed and has qualified. And all these heads of departments, again with the exception of the chairman of the Public Service Commissions, are within the purview of section 11 of the State Departments Law, and according to its terms "may be removed from office by the Governor whenever in his judgment the public interest shall so require."

The sole check on such power of removal is the psychological one engendered by the provision of section 11 of the State Departments Law, that in case of such a removal the Governor shall file with the Department of State a statement of the cause of such removal and shall report such removal and the cause thereof to the Legislature at its next session.

A direct line of effective administrative responsibility between an individual head and the Governor, therefore, does exist in all the departments under consideration, except Public Service and Civil Service. But before accepting this fact as indicating the desideratum of centralized administration, and turning to an explanation of the two evident exceptions, it must be determined whether the internal structure of each department makes for a direct line of responsibility through the department itself to the head. For if there exists within a department itself an area of unaccountability, in the form of board or commission, not responsive to the head's control, then the authority of the Governor over the department through him is equally dissipated. On

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the other hand the existence of such intra-department boards or commissions may be significant as indicating the continuance of the theory of creating cleavage between administrative and "special" functions, such as quasi-legislative or judicial, and as exemplifying the particular fields in which such a distinction has been considered desirable.

Public Works — Agriculture and Markets

The Departments of Public Works and Agriculture and Markets are presently the most complete examples of centralized administration. In Public Works the superintendent appoints the heads of his divisions who are responsible to him, and he of course is directly accountable to the Governor.[29] A similar condition has existed with regard to Agriculture and Markets since 1935.[30] The conflict between expediency and conformity to desirable administrative principles shown in the reports of the Reconstruction Commission in 1919, and the Reorganization Commission in 1926, has apparently been finally resolved. The following recent expression of opinion from the Department of Agriculture and Markets indicates its attitude on the subject:

> "We are particularly of the unanimous and determined opinion that the present method of appointing the Commissioner of Agriculture and Markets should be continued, that is, by the Governor subject to approval by the Senate. Any attempt to restore the so-called council system should, in our opinion, be defeated as contrary to representative popular government.
>
> "As the administrative head of a department of state government, the commissioner is directly responsible to the Governor, who in turn, is responsible to the people. Under the council system, the selection of the commissioner was made by a group selected not by the people themselves but by the Legislature. Terms of the council members were of such length as to remove them entirely from contact with the popular will. Their selection of the commissioner, therefore, in no sense represented the wishes of the electorate who are entitled to such representation.
>
> "The council system, however excellent it may sound in theory, as practiced in this State proved it can be nothing more or less than a political device to perpetuate control of one department of state government by a party which the people repudiate at the polls. The council system as we knew it unrepresentative of the people's will, would be more unrepresentative if its members were

[29] Public Works Law, art. 2, secs. 5, 7, 10–15.
[30] Agriculture and Markets Law, art. 2, sec. 5.

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to be chosen by a Legislature not reapportioned to reflect the trend in population and give fair representation to the populous centers of the State.

"Under the present system of executive appointment, we have a direct responsibility between the commissioner and the Executive which can be terminated by the people if the policies of the administration do not meet with their approval. Any other system is a contradiction of representative government. There is no more reason why the Commissioner of Agriculture in this State should be chosen by a council to be a member of the popularly elected Governor's cabinet, than there is for the Secretary of Agriculture at Washington to be chosen a member of the President's cabinet by some group, irresponsive to the public will in whose selection the public has had no direct voice, and which is not responsible to the President who himself is responsible to the people.

"For these reasons and for many others which could be stated, we earnestly urge that your committee insist upon the retention of the present provisions governing the appointment of a Commissioner of Agriculture." [81]

Executive and State

The Executive Department and the Department of State were, throughout the reorganization movement and in its consummation, considered as "purely executive and administrative" in function.[82] Yet in each department are bureaus performing what might be termed isolated functions within the department and headed by boards which evidently have been deemed more suitable for performing such work than individual appointees of the department head. Where the members of such boards serve for stated terms longer than the Governor's and are not subject to removal in the discretion of the head of the department or of the Governor, a degree of independence from executive direction of course follows. Further, it has been suggested that the very creation of a board, even though its individual members hold office at the pleasure of the department head or the Governor, indicates an attempt to lessen affirmative control, and creates in the board itself a tendency to strain against direction from above.

[81] Letter dated January 26, 1938, from Department of Agriculture and Markets to Constitutional Convention Committee.

[82] Executive Law, art. 2-A, sec. 12 (Executive Department). State Departments Law, art. VI, sec. 190; Executive Law, art. 3, sec. 20 (Department of State).

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In the Executive Department the Division of Parole is headed by the Board of Parole, the Division of State Planning by the State Planning Council, and the Alcoholic Beverage Control Division by the State Liquor Authority.

The Board of Parole is constituted of three members, appointed by the Governor with the advice and consent of the Senate, for overlapping terms of six years each. The board now designates its chairman. The members of the board are subject to removal by the Governor for cause after an opportunity to be heard. The tendency to mitigate against a possible administrative inefficiency in multiheaded management is shown by the provision that the board shall, with the approval of the Governor, appoint an executive director who shall be the administrative officer for the board.[33]

The State Planning Council is an information gathering, co-ordinating and planning body rather than an administrative one, and has the broad function of preparing and advising on plans and policies for the development of the State and the use and conservation of its resources. It is composed of five members appointed by the Governor alone, and he designates the chairman. Two members have three-year terms and three members have two-year terms. The Governor may remove any member at will and need only state in the order of removal the cause therefor.[34]

The State Liquor Authority is composed of five commissioners, appointed by the Governor with the advice and consent of the Senate, the chairman being designated by the Governor. No more than three commissioners can belong to the same political party. The term of each commissioner is five years, and the governor may remove a member for cause. The authority has important quasi-legislative and judicial functions, which must be considered in evaluating its practical autonomy within the departmental structure.[35]

In the Department of State, four divisions differ in form from the standard for administrative units of a single division head appointed by the head of the department and responsible to him. Of these the Division of the Land Office represents an attempt to co-ordinate the functions of several departments over a single subject. The division has "the general care and superintendence of all state lands, the superintendence whereof is not vested in some officer or in

[33] Executive Law, art. 11, secs. 115–117.
[34] Executive Law, art. 12, sec. 130.
[35] Alcoholic Beverage Control Law, art. 2, secs. 10, 11, 13 and 17.

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a state department, division, bureau and agency thereof." This includes such State-owned lands as lands under water, abandoned canal lands and lands acquired for taxes. A Board of Commissioners is the head of the division, the commissioners being the Secretary of State, who is chairman, the Attorney-General and the Superintendent of Public Works. Here the need was apparently felt to be inter-departmental co-operation rather than an integrated administration.[36]

The State Athletic Commission and the State Racing Commission at the head of their respective divisions are primarily supervisory and licensing units. Both are commissions of three, the members of the Athletic Commission having terms of two years each while the members of the Racing Commission have terms of six years each. The members of both commissions are appointed by the Secretary of State with the approval of the Governor, and are removable at pleasure by the Secretary of State with the approval of the Governor.[37]

The Division of Housing is in charge of a Board of Housing consisting of five members, now appointed by the Secretary of State with the approval of the Governor for five-year terms. The board chooses its own chairman and vice-chairman and the Secretary of State may appoint such other officers and employees as the board may require for the performance of its duties, and is to fix and determine their qualifications, duties and salaries. No provision is made for removal of board members.[38] Municipal Housing Authorities although created and operating under the State Housing Law, are locally administered and not within the State departmental organization.[39]

Conservation, Mental Hygiene and Correction

The Departments of Conservation, Mental Hygiene and Correction have been grouped together since a general similarity may be observed in the type of function assigned to the boards and commissions within these departments. With some variations in the scope of affirmative power given these commissions, they are for the most part of the inspectional and supervisory type. They differ from the commissions described in connection with the Executive and State

[36] State Departments Law, art. VI, sec. 194. The State Board of Canvassers is also included in the State department (*ibid.*, sec. 199) but is not considered since it has electoral duties only.

[37] State Departments Law, art. VI, sec. 195 (Athletic Commission), sec. 196 (Racing Commission).

[38] Unconsolidated Laws, secs. 2260, 2261 (State Housing Law, art. 2, secs. 10, 11.)

[39] Unconsol. L., secs. 2310 *et seq.* (Municipal Housing Authorities Law being sections 61 *et seq.* of State Housing Law.)

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Departments in yet another manner than type of function, for while each of the latter deals with a single subject matter unrelated to that of the others in the same department and having little or no connection with the primary administrative function of the department in which they have been placed, those now under consideration have duties relating to a portion of the general work of their respective departments and do concern the major governmental function which the department itself is designed to perform. With most of them there exists an historical background antedating the reorganization of 1926, and in view of the valuable and devoted service which had usually been rendered, in most cases with no compensation or with nominal salaries, there was a disinclination to abolish them in the course of reorganization, although an application of the underlying principles of reorganization to a completely logical conclusion would, in large part, have required this result.

Thus in the Department of Conservation, there still exist ten park commissions each having jurisdiction over its own park or parks.[40] These commissions are composed of from three to ten members who uniformly serve without compensation. These members are appointed by the Governor with the advice and consent of the Senate,[40a] for terms of five to seven years but they are not subject to discretionary removal by the Governor.[40b] Each of the commissions is endowed by statute with extensive managerial authority over its own park or parks. However, it is also explicitly stated that all of their functions,

[40] The provisions relating to the park commissions are in the Conservation Law, art. XVI, as follows: Niagara Frontier State Park Commission, Part 3; Commissioners of Allegany State Park, Part 4; Genesee State Park Commission, Part 5; Finger Lakes State Parks Commission, Part 6; Central New York State Parks Commission, Part 7; Taconic State Park Commission, Part 8; Commissioners of the Palisades Interstate Park, Part 9; Westchester County Park Commission, Part 10; Long Island State Park Commission, Part 11; Thousand Islands State Park Commission, Part 12-A.

[40a] The Westchester County Park Commission is appointed by the board of supervisors of Westchester county and acts as agent for the state. L. 1927, ch. 482; L. 1928, ch. 242.

[40b] There is an express provision for removal only with regard to the members of the Allegany State Park Commission and the Long Island State Park Commission. In these instances the Governor may remove any member for inefficiency, neglect of duty or misconduct in office, giving him a copy of the charges against him and opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days' notice. In the event of such a removal the Governor must file with the Department of State a complete statement of all charges made against such member and his findings thereon, together with a complete record of the proceedings. The omission of any reference to removal in connection with the other seven commissions whose members are appointed by the Governor, with the advice and consent of the Senate, makes applicable section 32 of the Public Officers' Law which provides for removal in such instances by the Senate, upon the recommendation of the Governor. As noted, the members of the Westchester County Commission are not appointed by the Governor.

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powers and duties shall be exercised subject to the approval, supervision and control of the Conservation Commissioner.[41]

To co-ordinate the work of these commissions there exists the State Council of Parks,[42] composed of the heads of the various individual park commissions, the Director of the State Museum and the Superintendent of Lands and Forests in the Conservation Department, the last individual being a regular administrative officer of the department, appointed by the Commissioner of Conservation as one of his division heads. The executive officer of the Division of Parks, in which division the park commissions are comprehended, is the secretary of the council. He is, of course, an administrative officer, appointed by the Commissioner of Conservation.[43]

The Boards of Visitors in the Department of Mental Hygiene stem from the Boards of Managers which existed prior to the reorganization. The change in title is suggestive of the change in function. The Commissioner of Mental Hygiene is the administrative head of the department and his control over the institutions which are under the jurisdiction of his department is indicated by the fact that he alone appoints the respective superintendents.[44] Each institution, by statute, must have a Board of Visitors, consisting of seven members, having overlapping terms of seven years, and serving without compensation. Appointment is by the Governor, with the advice and consent of the Senate, and the members of the board are subject to removal by the Governor after having been given an opportunity to be heard. The work of each Board of Visitors is largely to visit and inspect the institutions under its jurisdiction, and report on conditions to the department and to the Governor and make such recommendations as it deems proper. It also has power to investigate charges made against the superintendent and has the power of subpoena for that purpose. There are twenty-four such Boards of Visitors within the department, covering the eighteen State hospitals for the insane, the five State institutions for mental defectives, and the colony for epileptics.[45]

Of the institutions in the Department of Correction, three have Boards of Visitors similar to those in the Department of Mental Hygiene. The institutions having such visitation and inspection bodies

[41] Conservation Law, art. XVI, sec. 661.
[42] *Ibid.*, sec. 665.
[43] *Ibid.*, sec. 660.
[44] Mental Hygiene Law, art. 3, sec. 33.
[45] The provisions relating to Boards of Visitors in the Department of Mental Hygiene are in the Mental Hygiene Law, art. 3, secs. 30–32.

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are the two reformatories, Elmira and the Westfield State Farm and the Albion State Training School which cares for mentally defective delinquent women.[46] The statute describing the powers and duties of the Boards of Visitors of the two reformatories states that they shall be directly responsible to the Commissioner of Correction.[47] In addition to visitation and inspection, making reports and recommendations, and investigating charges against the superintendent or other officers or employees, all three boards have "general supervision of the inmates with such powers as are delegated by the Commissioner of Correction."

There is, in addition, in the Department of Correction, the one constitutional commission which is not the head of a department, the State Commission of Correction. The Constitution provides for such a commission to "visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors," and designates the head of the Department of Correction as its chairman.[48] The Constitution further designates the method of appointment for commission members as by the Governor with the advice and consent of the Senate, and of removal as by the Governor for cause, an opportunity having been given to be heard in defense.[49] The existence of such a commission predates the reorganization and is another example of an exception having been made in the reorganization in the case of a public welfare group, which had given commendable service.

In carrying out the constitutional mandate, the Legislature set the number of commissioners at seven, in addition to the chairman, and the term at four years. Compensation is fixed at ten dollars for each day of attendance at meetings with an annual maximum of one thousand dollars plus actual expenses. The commission has been given somewhat more extensive duties than the Boards of Visitors, with the saving clause that it shall perform its duties, other than visitation and inspection, "subject to the direction and control of the commissioner of correction." Its powers and duties over the institutions within its supervision are, in summary form, defined as: to visit and inspect, aid in securing humane and economic management, advise the officers in charge, investigate management and conduct of institutional officers, secure the best sanitary conditions, collect statistical information, and

[46] Correction Law, art. 12, sec. 271 (reformatories); art. 17-a, sec. 450 (Albion).
[47] Correction Law, art. 12, sec. 272.
[48] Constitution, art. VIII, sec. 11.
[49] *Ibid.*, sec. 12.

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recommend a system of employing inmates of other than correctional institutions. In addition it is given the executive power to approve or reject plans for construction of suitable buildings and to close any county jail, city jail, or police station, town or village jail which is unsafe, unsanitary or inadequate to provide for the separation and classification of prisoners required by law.[50]

Department of Labor

The Reconstruction Commission in 1919 posed the question as to the desirable relationship between a single administrative head of the Department of Labor and the board which it felt necessary for quasi-legislative and judicial functions. As indicated, the dilemma has been determined in favor of the type of organization which the Reconstruction Commission considered most desirable but did not then feel free to recommend.

However, while a single Industrial Commissioner appointed by and responsible to the Governor heads the department[51] in recognition of the need for centralized administration, there are associated with him not the one board and one advisory council the Reconstruction Commission was thinking of, but four boards and an advisory council. In this department therefore we have the most marked extension of the theory of segregating what are deemed to be non-administrative functions and using a board to perform such functions.

The Industrial Board is the unit exercising primarily quasi-judicial functions. It has full power over questions relating to compensation claims under the Workmen's Compensation Act and is now confined to the performance of such duties only, its other activities having been transferred in 1937 to the Board of Standards and Appeals. The board is composed of five members appointed by the Governor, with the advice and consent of the Senate, for six year terms.[52]

The type of work taken over by the recently created Board of Standards and Appeals might be placed in the so-called quasi-legislative field. It consists largely of an exercise of the rule-making power in formulating the Industrial Code and making provision for testing and approving materials and apparatus used pursuant to the Labor Law. The Board of Standards and Appeals consists of three mem-

[50] Correction Law, art. 3.
[51] Labor Law, art. 2, sec. 10; State Departments Law, art. X, sec. 290.
[52] Labor Law, art. 2, secs. 12 and 27.

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bers appointed by the Governor, with the advice and consent of the Senate, for overlapping terms of six years.[53]

Members of both the Industrial Board and the Board of Standards and Appeals are subject to removal by the Governor for inefficiency, neglect of duty or misconduct in office, after being given a copy of the charges and an opportunity to be heard publicly in person or by counsel on not less than ten days' notice. In the event of such a removal, the Governor must file a record of the proceedings and his findings with the Department of State.[54]

The stated function of the Industrial Council is to advise the Industrial Commissioner. The council is composed of fifteen members appointed by the Governor, five to represent the interests of employers, five to represent the interests of employees, and five to be physicians to represent the schools of medical practice eligible to practice under the Workmen's Compensation Law. No term of office is mentioned in the statute and the question of removal is dealt with only in giving the Governor power to remove any member of the council when such member ceases to represent the interests in whose behalf he was appointed, or in the case of the physicians, when such member ceases to be licensed to practice. The council is to some extent a co-ordinating body, for the Industrial Commissioner is its chairman and the chairman of the Industrial Board and the chairman of the Board of Standards and Appeals are additional members. The council also has fairly wide duties with regard to matters connected with practice of medicine in relation to workmen's compensation.[55]

The State Labor Relations Board, created in 1937, is composed of three members appointed by the Governor, with the advice and consent of the Senate. The original members have terms of two, four and six years respectively, and their successors terms of six years which will necessarily overlap. The board's function, very broadly, is to encourage collective bargaining and protect the exercise by workers of freedom of association, self-organization and designation of representatives of their own choosing for negotiation of terms of employment or other mutual aid and protection. The independence of the board from either the Industrial Commissioner or the Governor is quite carefully guarded. The removal provision states that "any member of the board may be removed by the governor for inefficiency,

[53] Labor Law, art. 2, secs. 12-a, 27-a.
[54] Labor Law, art. 2, sec. 16.
[55] Labor Law, art. 2, sec. 10-a.

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neglect of duty, misconduct or malfeasance in office, and for no other cause, after being given a copy of the charges and opportunity to be publicly heard in person or by counsel." There is further a specific provision, peculiar to this board, prohibiting any supervision or control by the Industrial Commissioner over the work of the board, or any interference with its decisions or findings.[56]

The State Board of Mediation exists to carry on the work of mediation, conciliation and arbitration in labor disputes which the Legislature thought best to mandatorily exclude from the functions of the Labor Relations Board. The Board of Mediation is as much an arm of the Governor as an independent agency, for while it may act upon its own motion in an existing, imminent, or threatened labor dispute, it must so act upon the Governor's direction.[57]

The membership of the board consists of five persons appointed by the Governor, with the advice and consent of the Senate. The members first appointed have varying terms, one for one year, two for two years, and two for three years, the regular term thereafter being three years. No provision is made for removal in the article creating the board, but the members may be removed by the Senate upon the recommendation of the Governor, under section 32 of the Public Officers Law.[58]

Banking — Health

The form and function of the Banking Board in the Department of Banking and the Public Health Council in the Department of Health make the two departments comparable with regard to structural organization. Both boards are comparatively large bodies which the Legislature has seen fit to associate with the department heads in question to perform primarily quasi-legislative duties. The rule-making power so imposed in each of these boards is extremely wide and of great importance; the Banking Board has power to make rules and regulations not inconsistent with law to effectuate the statutory statement of the policy of the State with reference to banking, which is broad enough in its sweep to encompass the whole field of banking regulation and supervision;[59] and the Public Health Council has power to establish the sanitary regulations comprising the sanitary code which may deal with any matters affecting the

[56] New York State Labor Relations Act, Labor Law, art. 20, sec. 702.
[57] Labor Law, art. 21, sec. 753.
[58] *Ibid.*, sec. 751.
[59] Banking Law, art. 2, sec. 10-c.

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security of life or health or the preservation or improvement of public health in the State of New York (excluding the city of New York).[60] The regulations of each board are administered by the head of its department, and punitive provisions for violation are included for effectuating such administration.

The head of the department is made a member of the board in both instances, and the members of both boards are subject to removal by the Governor, without the limitations on his power to do so which are usually included with reference to removals of such officers. Thus, although both boards have the degree of independence which, it has been generalized, almost automatically follows from the form of multimembership itself, and is here emphasized by the large number of members, they are both subject to executive control to a greater extent than is usual with boards.

Turning to a separate and more detailed consideration of each department it is to be noted that the Banking Board was created in 1932.[61] The Banking Department had theretofore been the subject of little debate with regard to form of organization. Each body reporting on reorganization listed it as a purely executive department, to be directed by a single head who would be fully responsible to the Governor and would have complete control over all branches of his own department.

Agitation for a board grew up in 1931. The Superintendent of Banks took cognizance of this feeling in his annual report for the year ending December 31, 1931, and his following comment indicates his views on changing the then existing administrative structure.

> "Much has been said during the past few months with respect to providing a council or commission to assume all or part of the duties of the Superintendent of Banks. In considering legislation to provide for such a commission, it should be borne in mind that the duties of the superintendent are essentially executive in nature. To use the words of section 10 of the Banking Law 'There shall continue to be in the state government a banking department charged with the execution of the laws relating to the . . . corporations to which this chapter is applicable. The head of the department shall be the superintendent of banks.' Commissions vested with the power to formulate general rules to apply to particular lines of business, such as public service commissions, have a very proper place in our form of government. Such

[60] Public Health Law, art. 2, sec. 2-b.
[61] L. 1932, ch. 118, sec. 1.

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functions, however, are of a legislative nature and we believe that we should give very serious thought to the subject before vesting functions of an executive character in such a commission.

"On the other side of the question are many arguments in favor of the formation of some sort of council of bankers and business men with whom the superintendent may confer on general banking conditions or on specific matters as to which advice and official support may be helpful. It would seem that assistance of the sort mentioned could be furnished by a properly organized advisory council or commission, which would be in keeping with our present system of State government.

"In the future it may be found that certain powers relating to the issuance of general orders may very properly be vested in such a council. At the present time the problem of establishing uniform conservative interest rates is a matter of great importance to general banking conditions. If a council with advisory and certain other duties should be created, the Legislature might very well give serious thought to empowering the superintendent with the consent of two-thirds of such a council to establish maximum interest rates."[62]

The Banking Board was assigned considerably more than advisory powers. Its membership was set at nine. The Superintendent of Banking is specified as one of the members and as chairman. The remaining eight members are appointed by the Governor, with the advice and consent of the Senate, for overlapping terms of three years. Four members are required to have had banking experience, and each one of these four is to come from a particular grouping of banks, trust companies or savings banks, provision being made for the various groups designated to nominate their respective candidates for the Governor's approval. The members of the board are made subject to removal by the Governor, whenever in his judgment the public interest shall require; the Governor in case of such removal simply to file with the Department of State a statement of the cause of such removal. The members of the board serve without compensation.[63]

As originally drafted the provisions giving the board power to make rules and regulations were not implemented by proper punitive legislation in the event of non-compliance therewith. Thereafter, in

[62] Legislative Document (1932) No. 24, p. 13.
[63] Banking Law, art. 2, secs. 10-b and 10-c.

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1933, extremely wide temporary legislative powers were given to the board to cope with the banking emergency.[64] The board, under this grant, had power to pass rules and regulations superseding provisions of law and to suspend provisions of law. This extraordinary power terminated on March 1, 1935. In the same year, with the recommendation of the Superintendent of Banking, "on the basis of his experience during a trying period," the board's regular powers were broadened, and supplemented with a grant of authority to the board to remove from office, after a hearing, officers and directors who are responsible for violations of the Banking Law or regulations of the Banking Board.[65]

The board as it now exists, therefore, exercises extensive quasi-legislative powers, in practice serves in an advisory capacity, and has the power to approve or refuse, with the superintendent, certificates to engage in the various types of banking business supervised by the department. It has thus to some extent taken over functions formerly exercised by the superintendent alone, and, to the extent that a board of this character and type of personnel is less susceptible to control than an individual department head, even though its members may be as easily removed, there has been a diminution in executive authority over the department.

The Public Health Council has been in existence since 1913, and since that time has established the body of sanitary regulations known as the Sanitary Code. It must be noted, however, that under the original statutes describing the council's powers such regulations were not subject to anyone's approval before becoming effective, while presently the council's power to establish sanitary regulations is subject to approval by the Commissioner of Health.[66] This important change was recommended by the Reorganization Commission in 1926 and adopted in the same year. Thus, while the Superintendent of Banks can exert his influence on the rule-making body in his department only through his prestige as department head and chairman of the board and is in the last analysis confined to one vote, the Commissioner of Health has an express veto power over his rule-making affiliate.

There are eight appointive members in the Public Health Council, in addition to the Commissioner of Health. At least four must be physicians with experience in sanitary science and one a sanitary engineer. All are appointed by the Governor alone for overlapping terms of six years, and the Governor designates the chairman.[67] No provi-

[64] L. 1933, ch. 41.
[65] Banking Law, art. 2, sec. 10-d.
[66] Public Health Law, art. 2, sec. 2-b.
[67] *Ibid.*, sec. 2-a.

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sion is contained in the Public Health Law regarding removal, but the members would seem to be within the purview of section 33 of the Public Officers' Law providing that "an officer appointed by the governor for a full term or to fill a vacancy whose appointment is not required by law to be made by and with the advice and consent of the senate . . . may be removed by the governor within the term for which such officer shall have been chosen, after giving such officer a copy of the charges against him and an opportunity to be heard in his defense."

In addition to the Public Health Council there are several other bodies within the Department of Health which should be mentioned. There is first, the Advisory Board in the Bureau of Narcotic Control. The bureau itself is directed by a supervisor appointed by the Commissioner of Health. The function of the Advisory Board is to pass upon the rules and regulations necessary to achieve efficient narcotic control, which the Commissioner of Health is authorized to make and promulgate with the approval of the board. The board is composed of five members, one to be designated by the Medical Society of the State of New York, one by the New York State Pharmaceutical Society, one by the Dental Society of the State of New York, one by the New York State Veterinary Medical Society, and one by the New York Board of Trade, Drug and Chemical Section.[68]

This board is interesting from an organizational viewpoint since neither the Governor nor the department head have anything to do with appointment or removal of the members and it is completely free of formal control. Further it shows the use of a board to attempt to obtain co-operation and mutual assistance between a unit of administrative regulation and the various bodies which will be directly affected by such regulation.

The Department of Health also has various institutions within its jurisdictions and, as has been observed with the Departments of Mental Hygiene and Correction, the tradition of Boards of Visitors carries on. Two of the institutions have such boards, with powers and form similar to those in the Department of Mental Hygiene.[69] The three State tuberculosis hospitals authorized in 1931 have no such boards.[70] It must be remembered, however, that the State Board of Social Welfare as provided for in the State Constitution is directed to visit and inspect, among others, all State institutions which are of a charitable, eleemosynary, correctional or reformatory character.[71]

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[68] Uniform Narcotic Drug Act, Public Health Law, art. 22, sec. 421-a.
[69] Public Health Law, art. 19, secs. 362 and 363.
[70] *Ibid.*, art. 16-a.
[71] Constitution, art. VIII, sec. 11.

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The Board of Visitors of the State Institute of Malignant Diseases, like the other boards of visitors in the department, is to visit and inspect and report to the Commissioner of Health. Unlike the other boards, however, it has the power of approval over the appointment of a director of the institute by the Commissioner of Health. In case of disagreement, the Governor appoints the director.[72]

Insurance

The Department of Insurance is very close to the Departments of Public Works and Agriculture and Markets, treated at the beginning of this section, as an example of direct administrative control. It is dealt with here, however, to point the contrast between it and the Departments of Banking and Health, particularly the former, with which it was coupled in all the reorganization reports mentioned, as a purely executive department, and to give emphasis to the different turn taken in the use of a departmental board in this department.

As in Public Works and Agriculture and Markets, the head of the department has full control over it. The Superintendent of Insurance appoints his subordinates and the line of responsibility is direct up to him and from him to the Governor.[73] As with Banking, however, there was some feeling for an Insurance Board subsequent to the reorganization of 1925–26 and one was set up in the department in 1933. The membership was placed at seven, the Superintendent of Insurance being one of these and designated as chairman. The remaining six members are appointed by the Governor, with the advice and consent of the Senate, and may be removed by the Governor whenever in his judgment the public interest may require. In case of such removal the Governor is to file with the Department of State a statement of the cause of such removal. The members of the board have three-year terms which overlap, and serve without compensation.[74] The form of the Insurance Board is thus similar to that of the Banking Board and, in addition, although the provision is far less specific and detailed than its analogue in the Banking Law, an attempt is made to have a specialized personnel on the Insurance Board, for of the six members, three are required to have had experience of such a nature as to make them familiar with the purposes and practices of corporations organized under the Insurance Law.

Wholly different from those of the Banking Board, however, are the powers and function of the Insurance Board, which is only an advisory

[72] Public Health Law, art. 18, sec. 348.
[73] Insurance Law, art. 1, sec. 2.
[74] Insurance Law, art. 12, sec. 450.

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body having neither regulatory nor supervisory duties. Its power is stated simply as "by an affirmative vote of four of all its members to consider and make recommendations to the superintendent of insurance upon any matter the superintendent may submit to the board." [75] According to the letter of the law, then, the board is there if the superintendent wants to use it, and it can only act in that eventuality.

In all three of the boards just considered, the Public Health Council, the Banking Board and the Insurance Board, where the department head is a part of the affiliated department board, there exists the practical question of the effect of one on the other, regardless of the letter of the law. This relation of course will vary with the character and policy of the department heads, the calibre and temperament of the boards' personnel and, finally, the attitude of the Governor. While the importance of the human element in this connection is recognized, no attempt can be made in this study to evaluate its effect on the basic question of administrative control, either here or in other aspects of the problem, the discussion being confined to the structure of organization alone.

Department of Taxation and Finance

The continuance of the State Tax Commission in the Department of Taxation and Finance to administer nearly all the tax laws of the State, and its relation to the Commissioner of Taxation and Finance and to the Governor, are the most important variants in this department from direct administrative control. The historical background to the creation of the department as it now exists is of some importance, since it, perhaps, is a major reason for the continued existence of the Tax Commission.

The Tax Commission, and the department itself, may be traced back to the State Board of Assessors, consisting of three members, created by the State Legislature in 1859. The name of this body was changed in 1896 to the State Board of Tax Commissioners, but its duties remained the same, to equalize the State tax between counties and to fix the amount of assessment of real and personal property on which the State tax was levied.

Prior to 1880, this State, like the others, raised its revenues by a tax imposed on the assessed values of real and personal property in the State. Thereafter, the policy was begun of classifying personal property and subjecting it to a special tax. The first such tax was the capital stock franchise tax, followed in 1885 by the inheritance tax.

[75] *Ibid.*, sec. 451.

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The duty of administering and collecting under these and subsequent special taxes was given to the State Comptroller and not until 1911 was the State Board of Commissioners involved. In that year the board was given the task of assessing the value of special franchises. Later the board was detailed to supervise the collection of the mortgage recording tax and had the power to hear and determine appeals from local equalizations of assessments.

In 1915 various proposals for centralizing the taxation work of the State crystallized in the creation of a State Tax Department, the head of the department to be the State Tax Commission, consisting of three members, which succeeded the State Board of Tax Commissioners and took over its duties. In addition, there was transferred to the Tax Department all the powers and duties theretofore imposed upon the State Comptroller in relation to taxes on corporations. The Tax Department was also given power to order reassessment in any tax district in the State whenever it had reason to believe that the assessment rolls were erroneous.

In 1921 the duties of the Tax Department were again expanded at the expense of the Comptroller. In that year it took over the administration of the inheritance tax, personal income tax, stock transfer tax and the collection of corporation franchise taxes. In addition the duty of administering the law with respect to motor vehicles was taken from the Secretary of State and given to the State Tax Commission.[76]

In the reorganization of 1925–26 there was created the present Department of Taxation and Finance. To it were assigned all the functions of the old State Tax Department and the State Tax Commission and, in addition, those formerly performed by the State Board of Equalization and the State Treasurer. At the head of the new department, however, instead of the State Tax Commission, was placed a single head, the Commissioner of Taxation and Finance, responsible to the Governor and serving for a term coterminous with the Governor's. But the State Tax Commission was nevertheless continued and the department itself was divided by statute into two divisions, the Division of Taxation, and the Division of Finance. And while it was provided that the head of the Division of Finance, which was to carry on the work of the State Treasurer, should be an officer appointed by and to hold office during the pleasure of the commissioner, it was also specified that the head of the Division of Taxation,

[76] The historical material for the period 1859–1921 is summarized from *Annual Report of the State Tax Commission for the Year Ending December 31, 1926*, Legislative Document (1927) No. 7, pp. 7–9.

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which was to exercise the powers and duties of administering the tax laws, should be the State Tax Commission.[77]

It is in this form that the department now exists. The Division of Finance has been renamed the Division of the Treasury to indicate its continuance of the duties of the State Treasurer, but otherwise is unchanged, and its head remains wholly responsible to the Commissioner of Taxation and Finance. The Bureau of Motor Vehicles similarly is in charge of a single commissioner appointed by and to hold office during the pleasure of the Commissioner of Taxation and Finance.[78]

The State Tax Commission itself is unique, as a board, in its limited membership. Before the reorganization of 1925–26, the commission consisted of three members, appointed by the Governor, with the advice and consent of the Senate, one of whom was to be designated by the Governor as president of the commission. All three members were to have six-year terms, which overlapped. Any member was subject to removal by the Governor for neglect of duty or misfeasance in office, after notice and an opportunity to be heard and, in addition, a commissioner might be removed for other cause by the Senate on the recommendation of the Governor.[79] These provisions as to tenure and removal are still effective as to two of the three commissioners. The third member is now the Commissioner of Taxation and Finance, who is also the president of the commission.[80] Consequently, the deviation from direct administrative control extends only to the two six-year commissioners, and by reason of the position of the commissioner as head of the entire department and president of the commission and his relation to the Governor, the degree of unresponsiveness in the commission as a whole is necessarily lessened to some extent.

There is also in the Department of Taxation and Finance, the State Traffic Commission which, as evidenced by its personnel, is primarily a co-ordinating commission formed to attack the specific problem of safety programs and traffic control. The members are the Commissioner of Motor Vehicles, the Superintendent of State Police, and the Commissioner of Highways,[81] and all, of course, are responsible to the Governor either directly or through their department heads.

Civil Service

The Department of Civil Service is one of the three State departments of which a commission or board is the head, the other two being

[77] State Departments Law, art. IV.
[78] Vehicle and Traffic Law, art. 2, sec. 5.
[79] Tax Law, art. 8, sec. 170.
[80] State Departments Law, art. IV, sec. 130.
[81] Vehicle and Traffic Law, art. 7, sec. 95.

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Education and Social Welfare. Prior to the creation of a Department of Civil Service by the constitutional amendment of 1925, the administration of the civil service laws had been carried on by a Civil Service Commission. After the department was created the powers and duties of the Civil Service Commission were simply assigned by statute to the Department of Civil Service, and the Civil Service Commission, itself, in its then existing form, was named as the head of the department, and has continued as such.[82]

No steps had ever been taken to effectuate the plan proposed by the Reconstruction Commission in 1919 of having the Governor designate the chairman of the Civil Service Commission and of placing him at the head of a Department of Civil Service as the individual head solely responsible for its administrative work, and of associating with him two other commissioners, who, with him, would constitute a board limited to the performance of the quasi-legislative and judicial work.

The Reorganization Commission of 1926, therefore, found in existence the same general form of organization for civil service administration as had the Reconstruction Commission in 1919, but unlike its predecessor it offered no suggestion for change. It reported that various suggestions had been made to it dealing with proposed statutory or administrative changes, which did not seem to be of a character sufficiently serious to form part of a general reorganization, and noted that there seemed to be general agreement that the commission was functioning satisfactorily under the then existing statute.[83]

The Civil Service Commission, therefore, as it is presently constituted, continues to be a body of three members, appointed by the Governor with the advice and consent of the Senate, for overlapping six-year terms, no more than two of the commissioners to be adherents of the same political party, and none of them being permitted to hold any other political place under the State of New York. As before, the commission elects one of its members to be president, and uses the device of appointing an executive officer to serve at its pleasure, to achieve administrative efficiency.[84]

The Commissioners, however, are now subject to removal by the Governor in the same manner as any of the individual department heads discussed above, which differs from their status before the reorganization of 1925–26, when they were subject to removal by the State Senate, upon the recommendation of the Governor. No specific provision for

[82] State Departments Law, art. XIX, now repealed and replaced by Civil Service Law, art. 2, sec. 3 *et seq.*

[83] State Reorganization Commission, *supra* note 21, at p. 68.

[84] Civil Service Law, art. 2, secs. 3 and 4.

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removal is contained in the Civil Service Law itself, but since the commissioners are the head of a department, section 11 of the State Departments Law is applicable.

It is interesting to note that the present method of removal is similar to that provided for in the original Civil Service Law of 1899 which declared without any limiting clause, "the governor may remove any commissioner." [85] The section containing this provision was amended in 1913 and the reference to removal was omitted.[86] By so doing, section 32 of the Public Officers' Law became effective by its terms that "an officer appointed by the governor by and with the advice and consent of the senate may be removed by the senate upon the recommendation of the governor." This provision has since been amended to exclude from its operation an officer who is, or any or either of the officers who are, the head of a department. Moreover, as stated above, section 11 of the State Departments Law is directly in point giving the Governor power to remove any of the officers who are the head of a department whenever in his judgment the public interest shall so require. In case of such a removal, of course, the Governor must file with the Department of State a statement of the cause of such removal and report the removal and its cause to the Legislature at the next session.

Public Service

The Department of Public Service is, in its form of organization, more removed from executive control than any of the other departments analyzed in this study. That the head of the department is a single individual, appointed by the Governor, with the advice and consent of the Senate, is in formal accordance with the theory of centralized administration. But even here there is a divergence. For the head of the department is the chairman of the Public Service Commission, and while he is to be known in his capacity of department head as chairman of the Public Service Department, he retains the tenure of a public service commissioner and is not subject to the Governor's discretionary removal. Moreover, the work of the department is not to be performed by him, but by the Public Service Commission or the Transit Commission, the various provisions of the Public Service Law being usually in the form "the commission shall" rather than "the chairman of the department shall."

The relations of the Public Service Commission to the traffic and

[85] Civil Service Law (1899), sec. 3, as amended by L. 1900, ch. 66.
[86] L. 1913, ch. 352.

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other regulatory problems of New York City and its utilities will not be dealt with except for the following summary history of the divisional structure of the department.[87]

In 1907, the Legislature, pursuant to Governor Hughes' recommendation, established two public service commissions: One, the Public Service Commission for the First District was given jurisdiction over the operations of railroads, street railroads, common carriers, and gas and electric companies, in the counties of the Greater City of New York. In addition there was transferred to it all the powers of the Board of Rapid Transit Railroad Commissioners, under which it thereafter initiated and completed the expansion of rapid transit facilities under the Dual Subway Contract of 1913.

The other commission, the Public Service Commission for the Second District, was given all jurisdiction and powers not specifically granted to the Public Service Commission for the First District. Each of the two commissions consisted of five members, each commissioner to be a member of the district for which he was appointed.

In 1919 the Public Service Commission for the First District was split into two separate commissions, one to retain the name Public Service Commission of the First District, and to continue the regulatory powers of its predecessor, the other to be called the Transit Construction Commissioner, with the powers and duties of the Board of Rapid Transit Railroad Commissioners. Each of these new commissions had only a single commissioner appointed by the Governor.

In 1921, the two commissions were consolidated again into the Transit Commission of three members, with the powers of both transferred to the new unit, except that regulation of gas, electric and steam companies in New York City was transferred to the Public Service Commission, which dropped the descriptive tag "of the Second District."

In 1924 a further entity was created, the Board of Transportation, which was a local board of three members, appointed by the mayor. To this board were transferred the powers to lay out and build city subways under the Rapid Transit Act. The act creating the board applied to cities of over one million in population, which still means New York City.[88]

In the reorganization of 1925–26 a single Department of Public Service was established by the constitutional amendment. To this department the Legislature assigned the powers and duties of the Public

[87] Historical material in text *re* Public Service, derived from *Report of State Reorganization Commission*, at pp. 62–3.

[88] Public Service Law, art. 8, sec. 130.

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Service Commission and the Transit Commission. The form of these units was maintained, however, by creating in the department two divisions, a State Division and a Metropolitan Division, and requiring that the head of the former be a Public Service Commission, and of the latter, a Transit Commission.[89] This was in accordance with the recommendation of the Reorganization Committee to adhere to the consistent State policy of administering transit in New York City through separate boards or commissions with jurisdiction confined to the city, and whose members were appointed by a State authority exclusively from residents of the city. The Board of Transportation was not affected by the reorganization, and it was noted that this board was not vested with any of the regulatory powers which are a delegation of the power of the Legislature.

The structure of the department has not been changed. The Public Service Commission at the head of the State Division is composed of five members appointed by the Governor, with the advice and consent of the Senate. The chairman is designated by the Governor, and as has been mentioned, is the head of the department. The term of each commissioner, including the chairman, is ten years, and the terms overlap.[90] The Transit Commission at the head of the Metropolitan Division consists of three members appointed by the Governor, with the advice and consent of the Senate, and one of the commissioners is designated by the Governor to be chairman of the commission during his term of office. All three members have overlapping nine-year terms.[91]

With regard to removals it is provided that the Governor may remove any public service commissioner or transit commissioner for inefficiency, neglect of duty or misconduct in office, giving him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days' notice. If a commissioner is so removed, the Governor must file in the office of the Department of State a complete statement of the charges made against such commissioner and his findings thereon, together with a complete record of the proceedings.[92]

This removal provision follows that in force for the Transit Commission before the reorganization, but differs considerably from the proceeding described for the Public Service Commission which had been enacted in 1921. The latter required a concurrent resolution of

[89] State Departments Law, art. XVI, now largely repealed and replaced by Public Service Law, art. 2, secs. 3, 4 and 4-b.
[90] Public Service Law, art. 2, sec. 4.
[91] *Ibid.*, sec. 4-b.
[92] *Ibid.*, sec. 4-c.

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both houses of the Legislature if two-thirds of all the members elected to each house concurred, and further specified that a commission member could be so removed only for cause, and after service upon him of a statement of the cause alleged and an opportunity to be heard. The Reorganization Commission saw no good reason for the existence of this provision and recommended the change which was effected,[93] which of course, while more in line with a recognition of the relation between the Governor and his departments, is still most distinct from the treatment accorded individual department heads or the Civil Service Commission.

The Public Service Commission, and the Transit Commission, therefore, by reason of their long terms and the safeguards surrounding removal, have been placed in a position of independence felt to be justified by the type of function these bodies were performing. The work of a Public Service Commission or Department has frequently been cited as an example of the type of function "other than purely administrative," in making that distinction.[94] The Reconstruction Commission in 1919 differed from this view, it will be remembered, but it apparently did not voice a generally held opinion. However, a brief review of the conflict in viewpoint which occurred in 1930 between the Governor and the chairman of the Public Service Commission as to the function of that body, and its relation to the Governor, indicates both the flux in opinion as to what is and what is not an administrative department, and the pull between a board's desire for independence and the chief executive's desire to carry out his governmental policies.

Under the date line, Albany, February 4, 1930, the New York *Times* of the next day, carried the item: "A clear cut conflict between the views of Governor Roosevelt and his own on the subject of public utility regulation led to the resignation this afternoon of William A. Prendergast as chairman and member of the Public Service Commission. The Governor accepted Mr. Prendergast's resignation, which will take effect on February 28, the moment it was offered."

Mr. Prendergast issued a statement in connection with his resignation, and was quoted in the same article as saying, in part: "Gover-

[93] State Reorganization Commission, *supra* note 21, at pp. 65–6.

[94] Typical of such usage is the following comment in Willoughby, *supra* note 6: "There are certain officers usually deemed to belong to the administrative branch whose functions are political, quasi-judicial, quasi-legislative or of a control character rather than administrative strictly speaking. Reference is made to such officers as members of public utilities commissions, and the comptroller or auditor. Due to the nature of their duties, they should not be subject to the authority of the chief executive in the same way as the heads of the administrative services, strictly speaking."

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nor Roosevelt has certain ideas relative to the regulation of public utilities in this State, with which ideas I am not entirely in sympathy. Among other things, I do not feel that the Public Service Commission, which has quasi-judicial functions, should be influenced in the exercise of these functions by the executive or any other State agency."

On February 6, 1930, the New York *Times* reported that: "Governor Roosevelt in stressing the kind of a chairman he wants for the Public Service Commission left the impression that he does not feel satisfied that the commission has fulfilled its function as a defender of the public against utility corporations. As the Governor views it, the commission has been overdoing its quasi-judicial character at the expense of aggressiveness in the protection of the public."

In an editorial comment on the situation the New York *Times* declared, after noting Governor Roosevelt's dissatisfaction with the existing methods of public service regulation: "In all this it is the system that he finds at fault rather than the individuals charged with its administration. He might not have come into direct conflict with any of them had he not allowed his zeal for the protection of the public interest to lead him to write a letter which Chairman Prendergast deemed such an intrusion into the affairs of the Public Service Commission that he felt compelled to resign, declaring as he did so his objection to allowing a board with quasi-judicial functions to be 'influenced in the exercise of those functions by the executive or any other State agency.' "[95]

Mr. Prendergast further explained his reasons for resignation in an address shortly thereafter,[96] in the course of which he said:

> "What is the function of the Public Service Commission? The function of a regulatory commission is to see that the public and the utilities are treated with exact justice; that one is not favored to the disadvantage of the other and that discriminations of all kinds are eliminated. This was the purpose in making the commissions quasi-judicial tribunals. . . .
>
> "Being a quasi-judicial body I maintain that the Public Service Commission must arrive at its decisions on the facts, free from outside influence of any character; that it must not succumb to public clamor, nor be moved in its action or judgments by

[95] N. Y. *Times*, Feb. 6, 1930.

[96] Address at Legislative Conference of the Republican State and County Committeewomen, as reported in N. Y. *Times*, Feb. 26, 1930.

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the dictation of outside officials, no matter how politely or suavely or subtly that dictation may be offered. I am opposed to outside interference because it cannot fail to embroil the commission in politics and make it a political rather than a judicial forum."

Mr. Prendergast then referred to a request which had been made by Governor Smith to the Public Service Commission to permit certain individuals and organizations to be heard on a proposed merger of gas and electric companies, after the commission had decided that a certain "public committee on power" was not a proper party to the proceeding. In expressing his views on this incident Mr. Prendergast continued:

"Here we have the question of executive interference with the Public Service Commission squarely presented. Not to comply with the Governor's request meant a heavy blow to his political prestige. It is not the merit of the commission's problem which is at stake, it is the Governor's political prestige."

Governor Roosevelt's reaction to this theory of the place of the Public Service Commission may be judged by the following excerpts from an address he delivered shortly after Mr. Prendergast's resignation.

"In these latter days, and in the last few weeks, you have read a good deal about whether the Public Service Commission of this State is a quasi-judicial body. Well it is not quasi-judicial or any other kind of judicial. And my friend, my esteemed friend, who stepped out of the chairmanship of the Public Service Commission yesterday, in a speech in Albany the other day said that it was the function of the Public Service Commission to sit up on a bench and hand out justice on the one side to the people of the State and on the other side to the utilities; in other words a sort of arbiter between two contesting forces.

"Historically, practically, legally, and in every other way Mr. Prendergast was dead wrong. The Public Service Commission is not a quasi-judicial body. The Public Service Commission is the representative of the Legislature and back of the Legislature of the people. It is not dealing between two contestants. It is representing one side, the people of the state, definitely and clearly."[97]

[97] Address at National Democratic Club, as reported in N. Y. *Times*, March 2, 1930.

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Conclusion

The constitutional amendments of 1925 and the accompanying legislation of 1926 undoubtedly did a great deal to make the Governor of New York its chief executive in fact as well as in theory. Through reorganization of the administrative structure the Governor can now, to a greater degree, assume the responsibility for directing the administrative work of the State, because the units of government carrying on the actual work have been made more susceptible to his control and direction.

This result has been achieved most particularly in the sixteen departments in which the head of the department has been made a single officer appointed by the Governor, with a term of office coterminous with the Governor's, and subject to removal by the Governor, whenever in his judgment the public interest shall so require. These provisions are, of course, statutory and supplement the general constitutional direction for appointment of department heads by the Governor, with the advice and consent of the Senate.

In all but two of these departments, however, as has been shown by the breakdown of their internal structures, there exists, in varying degrees, the possibility of a block in the line of administrative responsibility, resulting from the presence of boards or commissions within a department, which are not subject to direct control by the head of the department or the Governor.

In nearly all of these boards or commissions, as indicated, the Governor appoints the members, but often their tenure is longer than the Governor's, and their removal is subject to restrictions. It has been urged that when the natural tendency of a board to seek a degree of independence is added to these factors, a situation results which can easily cause a diffusion of the control given the Governor over the department, through the department head, at least in the area in which the board operates.

In some cases, of course, such as the Labor Relations Board, the creation of an autonomous unit within the department is deliberate and the intent is clearly to guard its independence from the Governor as well as from the head of the department. In still other instances the members of important intra-departmental boards such as the Banking Board and the Public Health Council may be removed by the Governor as easily as the head of the department, and the possibility of even more limited independence is evidenced by isolated cases such as the Athletic Commission or the Racing Commission where the members are appointed by and removable by the head of the department.

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In any event, it has been noted that the use of a board within a department must, in each individual case, be studied on the basis of two considerations: first, whether the work to be performed calls for a multi-membered body or an individual, and second, if a board is desirable, whether the Governor's control should be extended over its members, particularly in so far as appointment, tenure and removal are concerned.

The questions relating to those departments which are headed by a commission are really only extensions of the above considerations. Only one such department was dealt with here, the Department of Civil Service. As pointed out, however, the Department of Public Service, although it has a single head, is even further beyond the scope of executive control in form of structure. The Public Service Commission with the Transit Commission may be contrasted with the Civil Service Commission, the former showing the direction of a department by commissioners who have long terms and are not easily removed, the latter indicating the possibility of commissioners at the head of a department with functions which likewise have been thought to preclude direction by a single individual, but nevertheless permit a grant of power to the Governor to remove the commissioners at discretion.

How to determine whether the entire work, or part of the work, of a department is of the type best handled by a board or commission rather than an individual is an elusive question, and it is probably even more difficult to decide the further problem as to the relation between such a board and the Governor. The use of such vague generalities as quasi-legislative and quasi-judicial is not too helpful. As shown, different opinions are held at different times as to where these designations may be fitted, and with a little straining a portion of every department's work could be rationalized into these classifications. It is the opinion of some that if the benefits derived from the reorganization of 1925-26 are to be retained, proposals to use boards instead of single officers to direct the work of a department in whole or in part must be carefully scrutinized, and accepted, if at all, only after considering what provision should be made for executive control.

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CHAPTER XI

THE DEPARTMENT OF EDUCATION AND THE BOARD OF REGENTS

The Constitution of New York State provides that the Board of Regents shall be the head of the Department of Education. (Art. V, sec. 4) It is provided by statute that there shall be twelve Regents, one to be elected each year for a twelve-year term by joint ballot of the Legislature; of the twelve members of the Board of Regents, there are three members at large, and one member representing each of the nine judicial districts of the State. (Education Law, art 3, sec. 41.) The Board of Regents appoints a Commissioner of Education who is the chief administrative officer of the department. (Education Law, art. 4, sec. 91.)

We find then, that in New York State the Department of Education, although it is considered one of the administrative departments of the executive branch of government, is almost entirely free from the control and influence of the chief executive of the State. Before entering at this point into the question of the desirability or undesirability of such independent administration of the educational system of the State, we shall first examine the historical origins of the present system of administration.

History of the Board of Regents and the Education Department

The Regents of the University of the State of New York were established by statute in 1784. The Regents were vested with the property, franchises and administrative powers of Kings (Columbia) College and were also authorized to confer academic degrees and found schools and colleges in any part of the State. There were eight *ex-officio* Regents, including the Governor and the Lieutenant-Governor, twenty-four Regents named in the act by the Legislature, and one Regent to represent each religious denomination, selected by the clergy of that denomination who resided within the State. (Lincoln, *Const. Hist.*, III, pp. 494–5.)

The number of Regents was reduced to twenty-one by statute in 1787. The Governor and Lieutenant-Governor were *ex-officio* members of the Board of Regents; the remaining nineteen members were named in the act and their successors were to be designated by the Legislature. The function of the board was "to visit and inspect all the colleges, academies and schools which are or may be established in this state." (*Ibid.*, III, p. 496.)

Under the first Constitution the Regents were not public officers. They were appointed by the Legislature, and the Legislature had con-

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stitutional power to appoint only the State Treasurer and delegates to Congress. By article XXIII of the Constitution of 1777, the Council of Appointment had power to appoint all officers whose election or appointment was not otherwise provided for by the Constitution. It was thus evidently intended that the Board of Regents should be a private corporation with certain public or semi-public functions. (*Ibid.*, III, pp. 534–5.)

It is to be noted that the Board of Regents was confined in its functions to the visitation and inspection of *private* colleges, academies and schools. This was necessarily so, since there existed at the time no *public* or *common* schools. In 1795 the Legislature passed a bill appropriating £20,000 annually for five years for the establishment of common schools in the cities and towns of the State. Each city and county was required to supply an amount equal to that apportioned to it by the State. The power of supervising these common schools was not vested in the Board of Regents, but in town commissioners. The appropriation for common schools expired in 1800 and was not renewed at the time. (*Ibid.*, III, pp. 503–4.)

In 1812 a system of common schools was again established by statute. The supervision of these schools was vested in a Superintendent of Common Schools who was chosen by the Council of Appointment. In 1821 the office of Superintendent of Common Schools was abolished and the duties and powers of the office were transferred to the Secretary of State. (*Ibid.*, III, pp. 507–8.)

Thus there existed in the State a dual system of educational supervision: the Board of Regents supervised universities, colleges and academies, while the Superintendent of Common Schools had general supervision of the public school system of the State. In 1842 an attempt was made to attain some unity in the State educational system by making the Secretary of State—at that time exercising the functions of Superintendent of Common Schools—an *ex-officio* member of the Board of Regents. (*Ibid.*, III, pp. 520–1.)

The Legislature of 1854 created the office of Superintendent of Public Instruction who was to assume the duties of supervision of the common schools. Although the Governor had recommended that this officer should be elected by the people, the act provided that he should be chosen by the Legislature for a term of three years. The Superintendent was also vested with the duty of visitation and inspection of academies—a function also exercised by the Board of Regents at that time and thereafter. Despite this evident duplication of functions, an effort was made to preserve some vestige of unity in the educational system by making the Superintendent of Public Instruction an *ex-officio* member of the Board of Regents. (*Ibid.*, III, p. 546.)

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Governor Hill in his message to the Legislature in 1886 recommended the abolition of the Board of Regents as a means of attaining a unified system of educational supervision in the State. He stated that the Board of Regents was "generally regarded as a purely ornamental body, and membership a sort of pleasant retreat for respectable gentlemen of literary tendencies." Governor Hill renewed his demand for abolition of the Regents in 1887, 1888, and 1889. However, the Governor's recommendation in this respect was not acted upon by the Legislature. (*Ibid.*, IV, pp. 711–2.)

The Constitutional Convention of 1894, instead of abolishing the Board of Regents, made the Regents constitutional officers by incorporating into the Constitution section 2 of article IX. The section reads as follows:

> "The corporation created in the year one thousand seven hundred and eighty-four, under the name of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the Legislature, shall be exercised by not less than nine regents."

The Committee on Education in its report to the convention made this statement: "The section simply crystallizes into a constitutional mandate the settled policy of the state for over one hundred years." (*Ibid.*, III, p. 557.) Thus, we notice that the only reason advanced for making the Regents constitutional officers was the historical argument that such had been the settled policy of the State for more than a century. The fact was that this provision was incorporated into the Constitution at the request of the Regents themselves, who regarded their position as precarious after the recent attempts which Governor Hill had made to abolish them. (*Ibid.*, IV, p. 712.)

The Convention of 1894 did not attack the more pressing problem of the unification of the State's educational system.

But in 1899 Governor Theodore Roosevelt appointed an honorary commission to consider the subject of educational unification. The report of this commission was transmitted to the Legislature by the Governor in 1900, but the Legislature gave little consideration to the subject during that session. However, a law based on the report of the commission was passed by the Legislature in 1904. (*Ibid.*, IV, pp. 713–7.)

The Education Law of 1904 abolished the office of Superintendent of Public Instruction and created a Department of Education to supervise and manage the entire educational system of the State. The chief administrative officer of this department was to be the Commissioner of Educa-

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tion—an officer chosen by the Regents to hold office during their pleasure and to administer the affairs of the department subject to the approval of the Regents. The act thus gave to the Board of Regents the control and management of the Department of Education. (*Ibid.*, IV, pp. 716–7.)

The Constitutional Convention of 1915 devoted a considerable amount of time and attention to the subject of the reorganization of the various State departments. The general attitude of the convention was in favor of granting to the Governor the power of independent appointment and removal of heads of departments. However, the Committee on Governor and Other State Officers did not wish to grant this power to the Governor in regard to the Department of Education. The committee felt that the Educational Department could not be considered as purely an executive arm of the State government, since it possessed judicial and legislative functions, and made rules and regulations under delegated authority from the Legislature. (*Documents* 1915 *Convention*, Document No. 40, pp. 6–7.) In accordance with the recommendations of the committee, the following section was included in the proposed Constitution of 1915:

> "The department of education shall be administered by the university of the state of New York. The chief administrative officer of the department shall be appointed by the regents of the university." (Art. VI, sec. 2.)

The Constitution proposed by the Convention of 1915 was rejected by the people at the polls. However, the agitation for reorganization of the State government did not die after this defeat, but was brought to prominence again in 1919 when Governor Smith appointed a commission to consider and report on the subject. (See Chapters V and VI, this volume.)

We shall quote here in some detail the recommendations of this commission with regard to the Department of Education.

> "The Board of Regents will continue at the head of the Department of Education and the University of the State of New York. There will be twelve Regents, as at present, one from each judicial district and three at large, elected by the Legislature one each year for a term of twelve years.
>
> "The Board of Regents will appoint a Commissioner of Education, who will be the chief executive of the University of the State of New York.
>
> "It will be noted that the recommendation for retaining a large Board of Regents elected by the Legislature as the head of the Edu-

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cation Department is an exception to the principles laid down at the beginning of this report. These principles would provide that the educational system of the State, in order to be responsible and responsive to the people, should be under the direction and supervision of one man appointed by and subject to removal by the Governor. This is the ultimate organization toward which the State should aim. However, we have had to take into consideration the fact that there is throughout the State a very strong conviction that the present administration of the department by the Board of Regents is successful and that a high type of citizen has been elected to membership in the board. There is also a strong feeling on the part of a large percentage of the people of the State that district representation in the administration of the Department of Education is absolutely necessary. Any attempt to change the Constitution or manner of election of the Board at this time, would jeopardize the program for reorganization of the Department and of local education."[1]

When the new article V was adopted by the people in 1925, the following provision on the Department of Education was included in the Constitution:

> "The head of the department of education shall be the regents of the university of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department." (Art. V, sec. 4.)

No changes of this provision have been proposed since 1925.

Summary of History: Observations and Conclusions

It would probably be no exaggeration to say that the present structure of the Department of Education is the result of haphazard growth over a long period of years. The Regents were originally trustees of Kings (Columbia) College with powers to confer academic degrees and found colleges, academies and schools in various parts of the State. Since the Board of Regents was considered a private corporation, the Regents were appointed by the Legislature instead of by the Council of Appointments. From the nature of its function, the University of the State of New York was soon recognized as a public institution, but the Legislature continued to appoint the Regents.

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[1] Reconstruction Commission: *Report to Governor Alfred E. Smith on Retrenchment and Reorganization in the State Government*, Albany, 1919, p. 133.

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Secondly, when a system of common schools was inaugurated in this State, the control and supervision of these schools was not vested in the Regents of the University, but in an officer called the Superintendent of Common Schools. There thus arose a duality of control in the educational system of the State, and a consequent overlapping of functions and duties on the part of the Regents of the University and the Superintendent of Public Instruction. For more than a century this conflict continued between the two educational agencies of the State, and there was some agitation to abolish the Board of Regents to secure the desired unity. But in 1894 the Regents were made constitutional officers and the people of the State approved of this change. When in 1904 educational unification was finally attained in the State, the Board of Regents was made the head of the new Education Department.

In the 1915 convention it was not believed wise to give the Governor power of appointment and removal of the head of the Department of Education, because of the legislative and judicial functions exercised by that department. The Commission of 1919 favored the proposal of placing the administration of the Education Department in the hands of one man who would be appointed by and subject to removal by the Governor. However, the commission recommended no change in the existing system for several reasons: the high caliber of the members of the Board of Regents had resulted in successful administration of the department and a large percentage of the people of the State favored district representation in the administration of the educational system.

The Present Problem

The administration of the Department of Education by the Board of Regents may be attributed to historical growth. The Convention of 1915 believed that the department could best be administered in this fashion, while the Commission of 1919 believed that the ideal organization for this department would be to place it under the control of one man appointed by the Governor and subject to removal by him.

We shall not here attempt to defend either of these views, but merely to list the various arguments which are advanced by the adherents of each view. And since the structure of the Education Department is largely dependent on the functions performed by that department, the reader is referred to the annotations to article V, section 2, which are included in Chapter VI, this volume. There the functions of the Education Department are related with some detail.

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Reasons for the Retention of a Board to Administer the Department of Education

(1) Rule-making and quasi-judicial functions can be exercised with more safety by a board than by one man. This is especially true where the control of the State's entire educational system is concerned.

(2) The present Board of Regents ensures the representation of all the districts of the State in the administration of the Education Department.

(3) The administration of the educational system has been satisfactory under the Board of Regents.

(4) The Regents serve for a longer term than the Governor. They may not be removed from office by the Governor. Because of their longer terms and the protection they enjoy against summary removal, the Regents may be presumed to be independent of the demands of political expediency.

(5) It has frequently been stated that a board is more capable of formulating an educational policy for the State than is one man. Where a board formulates a policy, we have the combined wisdom of many minds and the further advantage of open discussion and consideration of important problems of policy.

Reasons Against the Retention of a Board to Administer the Department of Education

(1) The rule-making powers and quasi-judicial functions of the Education Department can be performed by a department headed by a commissioner appointed by the Governor. That is the situation in other departments. As a matter of fact, these powers could be continued in the hands of the Board of Regents, district representation could be retained on the board, while the purely administrative work of the department could be entrusted to one man appointed by the Governor and subject to removal by him. A rather comparable relation now exists in the Department of Labor.

(2) During the fiscal year ending June 30, 1936, the State expended $129,214,333.55 on education. The sum represents 44.78 per cent of the total expenditures of the State for that year. While only a small fraction of that amount represents actual expenses of the department, the appropriations for both the department and other educational purposes have increased since that time. It is true that the Governor has the power to revise the estimates of the department (Constitution, art. IV-A) and that he also has

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the right to require reports from the department of education at any time. (State Departments Law, art. I, sec. 17.) However, if the administration of the department were in the hands of one man appointed by and removable by the Governor, such vital information would be more readily and more rapidly available to the Governor.

(3) The administration of a large department frequently requires quick decision. The best and most harmonious administration can be obtained through one commissioner, appointed by the Governor, who is ultimately responsible for the conduct of the executive branch of State government.

What Other States Do

Before indicating how educational systems are administered in other states of the Union, it will be of advantage to review briefly the administration of the Department of Education in our own State. In New York the Board of Regents is the head of the Education Department (Constitution, art. V, sec. 4); members of the board are elected by joint ballot of the Legislature (Education Law, art. 3, sec. 41); the Regents in turn appoint and may remove at pleasure a Commissioner of Education who is the chief administrative officer of the department (*Ibid.*, art. 4, sec. 91); in the performance of his duty the commissioner needs the approval of the Regents for some of his acts (*vide ibid.*, art. 4, sec. 90). In New York State, then, the Governor exerts no influence in or control over the Department of Education.

Other States: Head of the Educational System[2]

In fourteen states the Governor appoints the head of the educational system, but in twelve of these states the consent of the Senate is required for the appointments.

Governor Alone

Maryland	Tennessee

With Consent of Senate

Connecticut	Minnesota	Pennsylvania
Delaware	New Hampshire	Rhode Island
Maine	New Jersey	Vermont
Massachusetts	Ohio	Virginia

In the remaining states heads of the educational system are appointed apart from the influence of the Governor. The source does not indicate

[2] The contents of this section are based on information found in two publications of the Council of State Governments of Chicago: *The Book of the States: The Handbook*, Chicago, 1937, pp. 202-5 and *Governors' Bulletin Number* 8, 1936, pp. 7-10.

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whether these officers are elected by the people, or selected by the Legislature, or chosen in some other way.

Other States: Board of Education[3]

In eleven states the Governor has the power to appoint members of the Board of Education without requiring the consent of the Senate.

Connecticut	Kansas	South Carolina
Delaware	Kentucky	South Dakota
Idaho	Maryland	Tennessee
Indiana	New Mexico	

In fifteen states the Governor appoints members of the Board of Education, but the Senate is required to confirm such appointments.

Alabama	Minnesota	Pennsylvania
California	Montana	Texas
Georgia	New Hampshire	Vermont
Iowa	New Jersey	Virginia
Massachusetts	Oklahoma	West Virginia

Fourteen states in addition to New York select members of the Board of Education apart from the influence of the Governor. It is not indicated in the source whether these officers are selected by the people, or by the Legislature, or by some other authority.

Arizona	Louisiana	Nevada	Washington
Arkansas	Michigan	North Carolina	Wyoming
Colorado	Mississippi	Oregon	
Florida	Missouri	Utah	

In three states—Nebraska, North Dakota, Wisconsin—there exists no Board of Education or equivalent agency and in four states—Illinois, Maine, Ohio, Rhode Island — the information about the manner of selecting members of the Board of Education was not available at the time of the publication of the bulletin which provides our information.

Conclusions

The history of the educational system in New York State shows that the Governor of the State has never had control or direction of education in the State. The example of other states shows that some states have been willing to give such control to their Governors while other states have apparently been unwilling to do so. The only question at issue is the determination as to whether the educational system may be better administered if the Governor should possess some such control or whether the present system of administration by the Board of Regents is more satisfactory.

[3] The sources for the information found in this section are the same as the sources for the previous section.

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CHAPTER XII

ADMINISTRATIVE ORGANIZATION OF THE DEPARTMENT OF SOCIAL WELFARE *

The Board of Social Welfare is the head of the department. The board consists of fifteen members appointed by the Governor, with the advice and consent of the Senate, serving overlapping terms of five years, no one member being allowed to serve more than two successive terms or ten successive years. The chairman of the board is appointed by the Governor from among the members of the board, and serves in that capacity at the pleasure of the Governor. However, the members, and the chairman in his capacity as a member, can be removed only for cause.

Under the legislation of 1936 the board retained its powers of inspection as granted by the Constitution and statutes, but its function as administrative and executive head of the department was abolished. The board remains the head of the department, but its main function is that of defining the general policies and principles of the department and of making rules and regulations on matters of relief, welfare, and the supervision of both public and private institutions under its jurisdiction. The rules of the board have the force and effect of law.

The Commissioner of Social Welfare is the chief administrative and executive officer of the department and is responsible solely to the board which appoints him and which may remove him at pleasure. The commissioner appoints five deputy commissioners according to qualifications satisfactory to the board. The deputy commissioners may be removed by the commissioner but only on the approval of the board. The commissioner is charged with the enforcement of the laws in relation to relief and welfare and the rules and regulations of the board.[1]

The present organization of the department represents the Legislature's decision as to what type of administration the department should have. The conclusions of the Governor's Commission on Unemployment Relief, usually known as the Wardwell Commission, were in favor of the cabinet type of administration, whereas equally well-informed opinion was to be found in favor of the board type of administration. The question stated briefly is: Whether it is preferable to leave control of the policy and administration of the department in a board or to give direct control to the Governor by granting

* This study was prepared under the direction of the Sub-committee on Bills of Rights and General Welfare.

[1] Public Welfare Law, secs. 3 to 3-d, as added in 1936.

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him the power to appoint the commissioner and remove him if unsatisfactory.

The first type of organization places administrative and executive duties in a board, the members of which hold office over long overlapping periods. These periods are longer in time than the term of office of a Governor. And of course, a Governor cannot during one term appoint a majority of the members. Appointments are made with the advice of the Senate. The members can only be removed by the Governor for cause. This type of administration is not very much changed if these powers are placed in a commissioner who is directly responsible to, and may be removed at pleasure, by the board. This last variant characterizes the present organization of the department.

In the cabinet type of administration the administrative and executive powers are placed in one person who is responsible directly to the Governor and may be removed by him at pleasure.

The recommendations of the Wardwell Commission in favor of the cabinet type of administration were based upon purported findings that the then existing board had dealt with details of administration, had little or no responsibility for the work of the various bureaus, had met infrequently and neglected to assume the burden of setting the general policies of the department according to its legal powers of supervision over the welfare system of the State and its failure to urge sufficient appropriations to carry out these policies.[2]

In support of its recommendation that the administrative power be placed in one person responsible to the Governor, the Wardwell Commission stated:

> "One of the major defects in the present organizational structure of the State department is the lack of any centralized responsibility for the administration of its functions. Under the present State Charities Law, the Board of Social Welfare is the administrative head of the department. The Commissioner of Social Welfare, who is appointed by the board, is the chief executive officer of the department, but he is responsible to the board itself. The plan of giving administrative responsibility to a board necessarily means that no one individual can be held responsible for the operation of its activities."[3]

> "The trend of governmental progress during the past few decades has pointed inevitably toward the centralization of adminis-

[2] State and Local Welfare Organization in the State of New York, Governor's Commission on Unemployment Relief (1936) Leg. Doc. (1936) No. 56, p. 52, ff.
[3] *Ibid.*, p. 59.

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trative authority in the hands of single executives in order that these individuals may be held directly responsible for the execution of the duties which are placed upon them. Thus in the field of local government, there has been a growing trend toward the development of the city manager and strong mayor types of organization and more recently of the county manager form. These plans have been utilized to develop direct responsibility for the success or failure of governmental administration. In the field of State government, a general reorganization of State departments has been witnessed during recent years, both in New York State and elsewhere. The principal characteristics of those reorganizations have been the simplification of governmental structure and the creation, for the most part, of State departments which have a single executive officer who is directly responsible to the chief executive of the State.

"Under the plan of organization now existing in the State Department of Social Welfare, it is impossible to place responsibility upon any given official. The Commissioner is not responsible since he is the agent of the board, and the board itself may not be effectively held accountable since administrative authority is inevitably diffused when shared by a group rather than held by a single individual. Moreover, the Governor of the State, who is responsible for budgetary recommendations for the department, has no effective means of control over the present organization. The members of the board are appointed for overlapping terms of eight years. Therefore, no Governor, unless he serves several terms, is in a position to appoint the entire membership of the board."[4]

The opposition to the recommendations of the Wardwell Commission is based upon the claim that the cabinet type of administrator is subject to political contingencies. The specific defects of the cabinet form of administration are claimed as:[5]

(1) Usually the political appointee is not fitted for the position.
(2) If he is, the fact that his office depends upon the Governor who appoints him gives him little time to carry out a State-wide program.
(3) The appointee is usually new to the State service.

After citing the existence of the cabinet form of administration in eleven states including among them California, Massachusetts, Michigan, Ohio and Pennsylvania, Miss Grace Abbott states:

[4] *Ibid.*, p. 60.
[5] Grace Abbott, "Report of the New York Commission on Unemployment Relief," 10 *Social Service Review* (1936) 178, p. 179.

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> "New York does not, therefore, take a leap in the dark. It can, if it is willing to look outside its own boundaries, see what the experience with this form of organization has been. If it does, it will find, from California to Pennsylvania, political control of the departments. In Illinois and Pennsylvania the director of the department has changed with every Governor whether he followed one of his own party or not. The Ohio and California programs have a good many scars and few accomplishments for the New Yorkers to observe." [6]

Advocates of the board type of administration cite the example of the New Jersey board. The New Jersey board has less power than the New York board did have or now has. The commissioner makes appointments and initiates policies with the approval of the board which appoints him to office. A characteristic of the New Jersey administration is its continuity of policy. It is claimed that the board is of great assistance "in securing new legislation, in increasing appropriations, and in interpreting the work of the department to the general public."[7]

The Wardwell Committee in response to this opposition stated in its report:

> "In arriving at this decision (in favor of the cabinet administrator), we have carefully considered the arguments advanced by many sincere and well-informed persons in the field of social welfare administration who favor the retention of the plan of administrative control, on the theory that it safeguards the welfare department from political activity or domination. The present board, with its long overlapping terms for board membership, has undoubtedly been free from political control. However, we are impressed with the high quality of executive leadership which has been developed in many of the State departments whose heads are appointed directly by the Governor. Many of these departments are charged with human and social responsibilities. We further believe that the long tradition of far-reaching consequence of non-political control which exists with regard to the State's welfare program will continue in the future. We see no reason why the executive head of the government should not be given the same responsibility in relation to social welfare as is given to him in the case of other divisions of the State government."[8]

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[6] *Ibid.*, p. 179.
[7] *Ibid.*, p. 180.
[8] *Op. cit.* note 2 *supra*, p. 161.

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In relation to the administrative set-up of the department the constitutional problem is one directed to the question as to whether the board should be made the constitutional head of the department as in the case of the Board of Regents, or whether the matter should be left to the discretion of the Legislature or whether the Governor should be empowered and directed by the Constitution to appoint a commissioner as head of the department as is done in the case of other State administrative departments.

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CHAPTER XIII

STATE PLANNING AND RELATED PROBLEMS [1]

Public Interest and Individual Property Rights

Any consideration of planning must include the question of land use and the measure of control which the State may exercise over it. Even the use which the State itself and its civil and political divisions may make of land owned by it or them has to a certain extent been limited. There are, for instance, limitations implied, if not expressed, in section 7 of article I of the present Constitution, and section 13 of the same article expresses definite limitations. Since what are regarded as proper "public" functions of the State and its civil and political subdivisions are constantly being extended, consideration should be given not only to a wider definition of "public use" but to the extension of the power to acquire lands for such public use by purchase, gift or condemnation, and to the power to deal with such land after its acquisition. This would apply not only to the State as a whole but to all of its subdivisions exercising governmental functions. The question has been emphasized by the recent discussions of housing, soil erosion and flood control.

The two sections of the Constitution herein referred to really cover two concepts: (a) control by the State over land privately held and (b) acquisition of land by the State and its civil subdivisions for their own purposes. In the interests of brevity, mention will be made only of the State, but what is said concerning the State will in nearly all instances also apply to its civil subdivisions.

While the right of eminent domain has always been an inherent part of the concept of sovereignty, the framers of both the Federal Constitution and of the Constitution of the State of New York were careful to restrict its exercise. A man's land was his and he could do with it what he pleased. In most places at that time he could do very little that would interfere with his neighbors' enjoyment of their own property. Roads were necessary, streams and foreshores had

[1] In the preparation of this material we have had the assistance of the State Planning Council, particularly Miss Dorothy S. Straus and Mr. Wayne D. Heydecker, and in addition the advice and co-operation of Mr. Harold M. Lewis of the National Resources Committee, Mr. Philip H. Cornick of the Institute of Public Administration, Professor M. P. Catherwood of Cornell University and Mr. C. W. Matthews of the State Planning Division.

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to be kept free for certain common uses. But it was not until urban centers grew to substantial size that the discomfort of almost completely free use of land became noticeable. Then the community was compelled as a matter of self protection to restrict and regulate use of property. As more and more of the wilderness was appropriated to private ownership, the proportion of free land available for public purposes constantly decreased while at the same time the State was being called upon to care for its citizens in new and ever increasing ways. So public authority had to buy back more and more of the land granted to individuals. But the Constitution of our State has rigorously limited the purposes for which land may be acquired and what may be done with it after acquisition. (*Vide* last paragraph of art. I, sec. 7.) In the last twenty years and especially in the last nine the concept of "public purpose" has increased enormously. As private funds disappeared, governmental agencies were called upon more and more to take over functions, institutions, enterprises that had always been carried as personal ventures by individuals or groups acting on their own initiative. Today we find not only schools, hospitals, parks, roads, water supply, sewage plants, prisons, but beaches, camps, game preserves, agricultural experiment stations, tunnels, bridges, fairs as accepted objects of public subsidy. The vanguard does not stop here; it is pushing on to the maintenance of proper dwellings as an essential item of governmental concern, and to flood control and soil erosion. Beyond these visible next steps there will doubtless be others into which the complicated and interwoven needs of our modern existence will push us before 1958.

In the solution of the conflict between public purpose and private property two alternatives have been proposed: to attempt a general definition of public use which would cover all contingencies or to grant to the Legislature the power to specify public uses from time to time.

The control which the sovereignty exercises is not however confined to publicly used lands. It may and does regulate the use of private lands. The border line between proper and improper regulation is a fine, uncertain one, mainly traced by court decisions which have occasionally established a distinction without a difference visible to the average layman. Public authority may prevent the cutting of trees on privately owned land (Opinions of the Attorney-General 1921, p. 110), the catching of fish in a private lake (*People* v. *Doxtater,* 75 Hun 472 (1894), regulate the flow of natural gas (*Hathorn* v. *Carbonic Gas Co.,* 194 N. Y. 326 (1919)), pass rent laws and authorize zoning ordinances; but the earlier drainage laws were declared unconstitutional because their relation to public health or welfare was not then obvious, the

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River Regulating District Law having been sustained because it was a public benefit (*Black River Regulating District* v. *Ogsbury,* 203 App. Div. 43 (1922).) As late as 1936, however, the Court of Appeals said that condemnation of private property for what might be regarded as private benefit even when an incidental or colorable benefit to the public might accrue would be unconstitutional (*New York City Housing Authority* v. *Miller,* 270 N. Y. 333). And what the courts would do if condemnation were resorted to for flood control or soil erosion, or land use were regulated for these and other purposes, would depend on the extent to which "public benefit" could be made obvious.

In other states zoning powers have been applied in a manner and to areas very different from those which have thus far been involved in cases coming before the courts of New York. Whether the courts of New York will regard establishment of minimum area requirements per family in suburban areas, the clearance of flood plains, the protection of highway margins, as a proper exercise of the police power under the present form of our Constitution are questions which cannot be answered with certainty.

The tendency has certainly been in the direction of limitation, often drastic, in the public interest on the hitherto asserted right of the individual to do as he pleased. Such limitation has frequently been achieved by legal devices designed to avoid what were deemed constitutional prohibitions. If, however, this tendency has the endorsement of the public it has been suggested that its unhampered development should be provided for by direct constitutional expression.

State Administrative Districts

Since the Legislature has under the present Constitution the power to create counties and towns, it would doubtless have the power to classify and reclassify them in categories, such as metropolitan, rural and suburban, or possibly into forest preserve, game preserve, agricultural or industrial, according to their dominant uses and density of population. For such purposes it might even be empowered to change or eliminate present county and town boundaries. The question arises whether it would also have the power without some constitutional expression to create administrative districts which would disregard both the geographical boundaries and the governmental organization of existing municipal corporations, particularly counties and towns. It has been suggested that such administrative districts might be most beneficially set up in regions like the Adirondacks or in similar preserves and where the State owned a certain percentage of the total land area with a

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certain maximum density of population. Such districts might be administered either by special local units or by representatives of existing departments of the State government. On this subject there are two schools of thought. While such a procedure would be new to the State of New York, considerable experiment along these lines has been done elsewhere, for instance in the state of Maine where the administrative unit in the so-called administrative district has a definite relation to land use. Such administrative units would be in lieu of existing types of governmental agencies.

In its Third Report the New York State Commission for the Revision of the Tax Laws (Leg. Doc. (1933) No. 56—Depression Taxes and Economy Through Reform of Local Government) pointed out that in some areas of the State, notably some of the forest areas where 52,000 acres may sustain a population of sixty-nine, practically all the adult breadwinners in a town are on the public payrolls and their remuneration for these public services constitutes a large percentage of the total cash income of the inhabitants. "Here, then, we have a situation in which two procedures of government, each valid and salutary in its effects under other conditions, have combined to create a local government drawing the bulk of its revenues from the State, and rendering little or no service to any taxpayers other than those who are also public employees." (Pp. 80, 81.) Marginal farm areas offer a similar, if not identical, problem. The solution suggested by the commission was the abolition of local government in forest areas. (Pp. 88, 89.) It cited the situation in Maine.

The only published discussion of the Maine administrative procedure in its unorganized forest areas containing almost half the total area of the State is in a brief article by Philip H. Cornick in the *National Municipal Review,* Vol. 21, No. 8, August 1932. In this he points out that in six sparsely populated types of "infra-agricultural regions, . . . the forms of local government dictated by the normal patterns have become in some cases ineffective, in other cases superfluous, in all cases costly, instruments for meeting either state or local needs." In Maine the State Treasurer collects all state, county and district taxes against properties on an assessment roll prepared directly by it. The state highway department builds the highways for through traffic, the state department of education sees to the schooling of the children. The health and welfare departments also work directly in these areas policed by the state police, fire-wardens, fish and game wardens There is a special forestry district created by statute at the request of landowners affected to control forest fires and insect pests and supported by a special tax levied and collected by the state on properties within the district.

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The cost of the governmental services within these areas is startingly lower than that in the adjacent organized towns.

As indicated above there are two schools of thought: (1) that upon the abolition of existing forms of local governments their functions should become absorbed in and be carried on by the respective State departments generally responsible, (2) that a new type of local government be created which would disregard county lines and be maintained by the State as a State controlled administrative unit.

Land Courts

Any consideration of land use brings up not only ownership but methods of transferring ownership and assuring legal title thereto. And here adoption of the Torrens system of title registration designed to simplify the conveyancing of real property has been urged. In a pamphlet on "The Land Court of Massachusetts," privately printed, the Massachusetts Conveyancers Association announces "Massachusetts conveyancers are proud of the position title registration has achieved among us."

This position is largely due to the Land Court established by chapter 562 of the Acts of 1898 and opened on October 14 of that year. Registration is voluntary, not compulsory and is little resorted to "in cases of developed land of considerable value, because of the expense for contribution to an insurance fund" or "where record title is satisfactory and readily marketable." It is of advantage in cases "(a) where record title is unsatisfactory or non-marketable or requiring to be cleared by matters dehors the records, (b) large tracts intended for subdivision where separate examining for each parcel and repeated expense for each examination is eliminated by one registration, permitting separate certificates to issue for each separate lot at small expense, (c) to procure certainty of freedom from possibility of prescriptive easements, (d) to finally determine with accuracy boundaries, etc."

While the number of cases coming into the court for original registration is but a small fraction of Massachusetts real estate, the mere existence and availability of the court tends to facilitate other transactions because of the belief that registration can be readily obtained whenever the expense of it is warranted, say the conveyancers.

There are three judges, who sit separately. Jury trials may be demanded; issues are then framed and sent to the Superior Court for trial. Proceedings are commenced by a petition, which is sent to an examiner of title for report. If this is favorable, notice of hearing on a date from twenty to sixty days after issue is published in a newspaper

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of the district where any part of the land lies. Provision is made for answering objections. The judge may refer the case for report to an examiner of title as master, or try it himself. His decision results in a "decree of registration."

Upon original registration or upon the entry of a certificate of transfer by descent or devise (for which there is a special procedure) the payment of one-tenth of one per cent (.001) of the value of the land as last assessed for municipal taxation must be paid into court for the Assurance Fund.

The statute also covers conveyances, mortgages, leases, trust, attachments and other liens, partitions, bankruptcy and insolvency and other incidents of ownership.

In its report of 1936 the Judicial Council of Massachusetts stated:

> "The recent statute as to foreclosure of tax titles has materially increased the volume of entries in this court from 856 of such cases in 1934 to 2,067 in 1935, so that the court has become a very useful municipal tax collecting agency (to the extent of some millions of dollars of taxes to avoid foreclosures), in addition to its other business of settling land titles in registration, and other proceedings."

It is urged by the advocates of the Torrens system that a similar court established for the State of New York or the creation of a special division in the Supreme Court might lead to the same desirable results.

Subdivision of Land and Local Debt Limitation

Since land use is so closely linked with the whole problem of revenue and taxation, the establishment of a debt limit for towns such as now exists under section 10 of article VIII of the present Constitution for counties and cities might aid in avoiding some of the difficulties created by premature subdivisions of land revealed as the special dangers inherent in present town government and methods of financing. Whether a similar restriction on villages should also be embodied in the Constitution or left as it now is under section 1 of article XII within the province of the Legislature, might likewise be considered in connection with a study of this latter section. A further suggestion is the establishment of a so-called "over all debt limit" which would include the debts of all governmental units except cities within a county.

For an authoritative discussion of some of the reasons for these suggestions reference is made to the report on Premature Subdivision of

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Land and its Consequences, by Philip H. Cornick.[2] In this Mr. Cornick has shown that premature subdivision "has been attended by large increases in governmental expenditure" (ch. IV, pp. 120–56) chiefly by towns, for essentially "urban" improvements, sewers, lighting, pavements, that these expenditures were often so large and improvident that the towns could not meet all of them by tax collections, thus shifting the burden to the counties (ch. III, pp. 92–119 and ch. VIII, pp. 242–289). The result of this has been to place the heaviest tax burdens on owners of improved lands who conscientiously met all assessments. This financial casualness was in part due to the practically unlimited capacity of the towns to incur debts, especially between 1924 and 1932. Since 1932 the Legislature, which controls the situation, has been less lenient but it is apparent from Mr. Cornick's studies that the laws are most lax when the need for curbs is greatest, *i.e.* during periods of speculative enthusiasm. Had the limitations on town indebtedness been fixed in the Constitution the rash of undeveloped or partly developed but subdivided areas which has periodically afflicted the fringes of our urban centers might have been prevented.

The difficulties are not new. In its Tenth Report the New York State Commission for the Revision of the Tax Laws (Leg. Doc. (1937) No. 63) refers to them (ch. III, pp. 57–70) as well as to still earlier discussions of them. Another aspect of town indebtedness and the need for more rigorous limitation was shown in the Special Report No. 11 made by Daniel T. Selko in 1936 for the State Tax Commission (ch. I, pp. 9–12; ch. V, pp. 109, 111–13). Both these documents show the effects of the Legislature's variable policy regarding town debt limitation.

One plan suggested was the limitation not of town and of village and of county expenditures but of all of them lumped into one inclusive limitation that would exclude only the outlays of cities within the county.

> "The proposal recognizes that not the debt of a single unit but the total overlapping debt often is the true cause of financial distress. Hence the proposal provides, in addition to limitations upon the various units to prevent them from becoming over indebted, an overall limitation of 12 per cent of the full value of the taxable real estate as determined by State equalization rates." (Leg. Doc. (1937) No. 63 *supra,* p. 70.)

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[2] *Problems Created by Premature Subdivision of Urban Lands in Selected Metropolitan Districts,* a report to the State Planning Council of Philip H. Cornick of the Institute of Public Administration, February 1938.

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This might or might not result in overcentralization of control, abolition of corporate units, or "log rolling;" on the other hand it would tend to a tightening of fiscal policies.

If the existing system of specific provisions is to be maintained for the different civil subdivisions including towns, the reasons for regulating this aspect of village government by statute rather than by constitutional proviso might also be re-examined.

Compulsory Extension of City or Village Area

Section 8 of article XII prohibits the annexation of territory to any city without a referendum. It appears that the present practice of the towns of rendering what are essentially urban services in unincorporated areas of low density of population has resulted in heavy tax burdens, very often passed on because of delinquencies to the inhabitants of other areas in the county. The question then arises whether the area of a city or village should be extended compulsorily where the density of population in adjacent territory makes such urban services imperative. Under present conditions the arbitrary cessation of services at definite border lines within areas where the economic or social units are very much larger often means an expensive and unnecessary duplication of facilities.

This provision, of relatively recent origin, had its inception in the resentment of Westchester county to the repeated annexation of portions of that county by the city of New York, and the inclusion of such annexed areas in the borough of the Bronx, later the county of the Bronx.

Recent studies with respect to the premature subdivision of land adjacent to municipalities, hereinabove referred to, compel the re-examination of this policy. Within recent decades, towns, through the process of creating special districts with relatively uncontrolled borrowing powers, have sought to perform a variety of urban services in areas only partly urban or where urban possibilities were only contemplated. The results have been heavy tax delinquencies, which have in turn been passed on to those taxpayers who were still able to pay and did pay their taxes. Thus they bore their own taxes and the costs of providing unnecessary services for lands owned by the defaulters. It has been suggested that only areas truly urban should be vested with such powers, and that such powers be taken from the towns. Thus a town area, desiring such urban services, could obtain them by applying to the contiguous urban area to which it was appurtenant for annexation, so that the areas served by urban services from a given center might all be parts of the same urban government.

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Carrying the logic of such a proposal a step further, it would seem that if the semi-urban satellite areas are to be denied the power to render urban services, then there should be placed upon the urban area whose growth has disturbed the previous balance in adjacent areas, the obligation to annex and to render urban services to any adjacent area which has attained a certain degree of urbanization. What that degree should be is not clear, but it has been proposed that it be based upon the density of population. For example when the population reaches a density of one person per acre in any area having an aggregate of one hundred acres, such compulsory annexation might be made to apply.

Towns that wished to avoid any such annexation of territory would simply make certain, under appropriate zoning ordinances, that their population density would be less than one person per acre. Thus local autonomy would be protected and at the same time where urban conditions were allowed to develop on the periphery of existing municipalities, the territory properly contributory to such urban nuclei would thus automatically become parts thereof.

Compulsory Incorporation of Cities and Villages

The extent to which incorporation of cities and villages should be limited or made compulsory might also be considered. For instance whether areas should be permitted to incorporate as cities or villages where there is a density of population of less than three hundred persons to a square mile or whether if there be such density the area should not be compelled to become incorporated to receive the so-called urban services hereinbefore mentioned.

If it be logical to require that portions of a town adjacent to growing urban areas and desirous of securing the benefits of urban services should be compulsorily annexed to such areas, as an alternative to the disastrous practice of permitting such non-urban areas, without proper safeguards, to finance and construct extensive and expensive urban facilities which can never be paid for by the land so served, it would likewise seem logical to require that areas not adjacent or tributary to existing urban nuclei should upon attaining a given density incorporate as villages. By this corollary proposition there would be solved the problem arising in open town areas when a given part thereof attains a degree of density which may be termed urban, say one person per acre.

For a hundred years or more the statutes of the State permitted the incorporation of villages only where there was a minimum density of three hundred persons per square mile in an area of one square mile. The salutary restraint of this provision was lost some years ago, in con-

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sequence of which the State suffered from an epidemic of pocket villages that by no stretch of the imagination could be regarded as of urban character.

Serious students of this problem urge that the powers of urban government be limited to those areas that are reasonably urban in character, and that the town form of government which has functioned satisfactorily in rural areas for a century and a half be freed of the dangerous and practically uncontrolled urban powers which are not necessary and which have in many instances brought the towns employing such powers dangerously close to financial ruin. The fact that the towns thus suffering from the abuse of these powers alien to rural government have been in metropolitan areas for the most part and have had within their borders areas which should have become urban in law lends color to this argument. With almost no exceptions those areas should have become either parts of the urban nuclei to which they were tributary, or where isolated should have assumed the responsibility of urban life by becoming villages.

The measure of urbanism may or may not be density of population. A better measure may be found, but until it is, it has been suggested that population density be considered as an indication of urbanization, and that an effort be made to find a constructive solution of the present problem. Certain it is that towns in metropolitan areas which have shunned the responsibilities and the financial limitations that attach to the urban forms of government established by the Legislature, while at the same time seeking to enjoy the benefits of the physical facilities that go with urbanism, have been led into excesses which have not only injured their own citizens but likewise have laid a heavy tax burden upon their innocent neighbors, in the cities and villages within the same county.

Prohibition of State Aid to Private Corporations

Among other constitutional limitations which constantly impinge upon the consciousness of planning agencies are those, particularly as in section 1 of article VII and sections 9 and 10 of article VIII, prohibiting the giving or loaning of credit or money by the State to any county, city, town or village thereof in aid of any individual, association, corporation or private undertaking. With the increase in public agencies, often incorporated, and the decrease in the sharp differences between private and public functions, and the extension of the concept of "public" function, these provisions have been said to act as brakes upon progressive social enterprise. The question is of sufficient importance to the growth of our community to warrant consideration of the proposal to render less strict the prohibition.

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The prohibitions contained in these sections of the Constitution were inserted after the orgy of investment in railroad bonds had subsided in the middle decades of the last century and had left the towns practically bankrupt. They were intended not only to prevent a recurrence of such conditions but to put a restraint upon the generosity of legislators. But as is pointed out in the Report of the Joint Legislative Committee on State Fiscal Policies (Leg. Doc. (1938) No. 41) these provisions are said also to complicate extensions of governmental activities for which there is growing public demand (ch. X, Housing, particularly pp. 119 to 123).

To circumvent these difficulties various devices have been resorted to. Special governmental units have been organized to perform special functions and the citizens of the State may now, in lieu of paying direct taxes, invest their funds in bonds of a large variety of "districts" and "authorities." If this method of parceling out governmental activities has proven itself so convenient and effective that it will be continued, the financing of projects becomes increasingly important. At present there is no centralized control; on the contrary there is often competition in the securities market between "districts," "authorities" and other agencies. In addition to uncontrolled financing, these agencies have created a new type of government official . . .The danger said to be inherent in this practice is pointed out in the following language:

> "First, there is the fact that authorities are performing a governmental function and yet are not responsible to the people, nor are the members generally removable by the appointing officer except for cause. When authorities are few in number, this may not be important but, should the present trend continue, we may some day find our cities broken up into numerous governmental agencies, and all activities of such governments capable of being financed on a self supporting basis divorced from the responsible administration of the city and not responsive to the wishes of the people or the administration which they elect."

Public Authorities and Administrative Efficiency

Also important is the question whether (a) special districts and similar special units of government should be abolished altogether and their functions absorbed into existing main units or departments, or (b) provisions should be made in the Constitution, either specifically or by adequately safeguarded grant of general power to the Legislature, to permit the creation of new types of districts and governmental units, or (c) the present types of districts and governmental units should be continued but all others prohibited.

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For example, there are at present drainage districts, river regulating districts, bridge, tunnel and port authorities, fire districts and other similar special units. Soil erosion and flood control districts have been proposed. Even the creation of "special franchise" corporations has been seriously urged to develop certain definite areas of land usually in urban centers, including public lands, such as parks, roadways, etc., and within such territories to exercise many functions of municipalities, of which the financing would be by bonds sold to the public. On the other hand proliferation of minor governmental agencies is said to have reached a point where reform would seem almost imperative.

This question is closely related to those discussed above, though here is emphasized the problem of administrative efficiency. Legislative Document No. 41, *supra,* lists 33 "authorities" having "legal existence in New York State." Add to these the 2,471 special districts of one kind or another (1934 figure—Special Report of the State Tax Commission, No. 11, 1936, on Town Administered Special Districts and the Control of Local Finance in New York), the 932 towns, the 554 villages, the 62 counties and the 59 cities of first, second and third class and it becomes obvious at once that the people of the State are not only well but amply governed. This despite the fact that thirteen years ago a successful attack was made on the State departments, reducing them to a mere twenty in number.

On the other hand it has been earnestly proposed that this process go still further. Among other things Special Franchise Improvement Corporations have been asked for to redevelop neighborhoods by private compact. These corporations would be given "public powers" within the areas of their operation and would "enter into agreements with existing government agencies" to utilize "public powers such as that of eminent domain." The Federal government has not only devised but is pushing a Standard State Soil Conservation Districts Law, and is discussing flood control districts with various flood control committees created by recent statutes.

It is a matter of practical policy whether administration be further centralized or governmental functioning further parceled out.

The foregoing list is not inclusive but indicates some of the problems which have arisen in the experience of the State Planning Council.

Background and Purpose of State Planning

From even a brief survey of the history of New York State, it is apparent that planning has been a function of various units of the State government for a century and a half. It is therefore no new function

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but one well grounded in tradition. However, it has been independent departmental planning covering special subjects and not a co-ordinated integrated plan.

More co-ordinated planning was perhaps given its first impetus when the invasion of Fifth Avenue, New York City, by the needle trades focused attention upon the need for the regulation of land uses in urban centers. Before this as a result of the gradually changing character of the State and more especially of certain areas within it, recognition was compelled of the fact that men were not absolute masters of the lands they owned, but that they held them subject to the higher right of the State to exercise a reasonable control over such lands in the public interest. These conceptions have emerged during the last sixty years as a consequence of the maladjustments in our urban, and later, our rural society.

The community was therefore in some measure prepared when in August, 1916, the City of New York adopted a resolution for the establishment of building districts with certain restrictions. This was the beginning of zoning in America, although it was not called by that name at first. In the twenty-two years that have elapsed zoning has spread throughout the length and breadth of the land. It has been upheld time and time again by State and Federal courts.

In retrospect, over a period of twenty-two years it can be seen clearly that zoning is essentially an integral part of a larger planning process, that it is a social implement or tool, one of several which are required to secure effective control over the location, arrangement, bulk and construction of buildings and uses of land. It needs to be supplemented by the enactment of proper building codes and regulations with respect to platting of land. Originally it was designed to meet urban conditions, but, with the passage of the years, it has been applied more and more in suburban areas, and within the last few years modifications thereof designed to fit rural conditions have been applied with marked success in cut-over decadent forest areas in the State of Wisconsin.

The Division of State Planning was created to effect the co-ordination of objectives which the introduction of these new concepts rendered necessary. Though there is no requirement in the law that department heads shall give such co-operation, the Council is entitled to call upon them for it.

At the present time there is much confusion of thought among the various advocates of governmental control through planning and zoning processes as to what control shall be exercised by the various levels of government, Federal, State, county and local. The inter-relationships are complicated and a satisfactory solution can be worked out only with patience, tact and wisdom.

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Much discussion has also revolved about the question whether State planning is primarily physical planning or whether it should lean more in the direction of social and economic planning. The advocates of each point of view have produced volumes of material in support of their contention. Edward M. Bassett, one of the earliest authorities, has on numerous occasions put forward the statement that all activities which properly fall within the field of planning are capable of being recorded upon a map, in other words, partake of the nature of physical planning. State planning is not especially concerned with the organization of social security programs or remedial welfare activities. Such matters are primarily the sphere of the Legislature and the departments charged with their responsibilities, but State planning cannot function even in the sphere of physical programming if it is divorced from the social, economic and administrative problems that affect the State. In fact it must be closely integrated with them in order to obtain a clear objective. State planning is concerned with people. It must deal with the twin problems of land use and human welfare. Perhaps the State is less susceptible to the conventional types of planning control that have been applied in the cities, but the task of the State's planning agency, like that of any other planning agency, is to make a design for the area within its jurisdiction. In that design it must deal with form, character, scale and relationships, for these are the elements that influence every design. The future use of land is the basis of all planning in the physical sphere and this future use must be determined not only by consideration of what the land is suited for, but what the people who occupy it, or will occupy it, will require in order that they may have the most satisfaction. State planning therefore must deal with the geographic environment, with the physical resources of the State and with its climate on the one hand and with the social, economic and administrative systems on the other, and thus through the intelligent adaptation of environment to human needs, we can establish a social control of the growth and development of the State and its subordinate parts. State planning therefore deals with material with which the city planner in the past has had little experience. It must include the conservation and interrelation of mineral, forest and water resources, soils, climate, topography and ecology. In a word, it may be construed as economic geography moulded by a concept of a social purpose. This is the essential difference between city planning and State planning. The differences are in the subject material with which it deals but the principles of planning are the same. The primary function is the development of a basic pattern or master plan. In this it differs from the State planning which has been developed in the past by depart-

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mental acts unrelated to one another. State planning, if it is to be effective, must possess greater breadth and depth and there must be some central agency through which conflicts may be reconciled and a central philosophy of State planning be maintained. By this it is not implied that such central agencies shall at any time have to do with the carrying out of physical programs or necessarily have a veto over the programs of constituted departments long established. But plans of all such agencies which affect the growth of the State or its welfare should be submitted to a central agency for review and comment, for the pointing out of differences, for suggestions as to shifts in emphasis. Viewed in this light the function of the State planning agencies does not constitute an interference with the authority of established departments.

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CHAPTER XIV

FOREST PRESERVE AND RELATED CONSERVATION PROBLEMS *

"The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. Nothing contained in this section shall prevent the state from constructing a state highway from Saranac lake in Franklin county to Long lake in Hamilton county and thence to Old Forge in Herkimer county by way of Blue Mountain lake and Raquette lake, and nothing shall prevent the state from constructing a state highway in Essex county from Wilmington to the top of Whiteface mountain. The legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, for the canals of the state and to regulate the flow of streams. Such reservoirs shall be constructed, owned and controlled by the state, but such work shall not be undertaken until after the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination that such lands are required for such public use. The expense of any such improvements shall be apportioned on the public and private property and municipalities benefited to the extent of the benefits received. Any such reservoir shall always be operated by the state and the legislature shall provide for a charge upon the property and municipalities benefited for a reasonable return to the state upon the value of the rights and property of the state used and the services of the state rendered, which shall be fixed for terms of not exceeding ten years and be readjustable at the end of any term. Unsanitary conditions shall not be created or continued by any such public works. A violation of any of the provisions of this section may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen." (Art. VII, sec. 7.)

This provision became part of the Constitution in 1894. The reason for its original enactment was the commercial exploitation of forests by

*This study was prepared under the direction of the sub-committee on Bill of Rights and General Welfare.

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lumbering operations which had reached such proportions that the future water supply of the inhabitants of the State was seriously threatened. At that time conservation was in its infancy, and it was over the strenuous objection of powerful groups that the provision was finally enacted. A preponderant public opinion appreciates the wisdom of this section and its continuation.

The section has been amended on four occasions to provide for the construction of certain highways through the forest preserve and to provide for the use of not more than 3 per cent of such land for reservoirs for the municipal water supplies, for the canals of the State and for the regulation of the flow of streams. Detailed reasons for continuing the policy of keeping these lands inviolate forever is fully set forth in the report under section 16 of article VII.

The highways designated in section 7 have all been completed, and there is, therefore, no necessity for retaining the amendatory provisions with respect to them.

"Nothing contained in section seven of this article, shall prevent the state from constructing a state highway in Hamilton county from Indian Lake to the village of Speculator by way of the existing highway whenever practical." (Art. VII, sec. 7-a.)

This provision was approved by the people at the general election held on November 7, 1933.

The road is approximately twenty-six miles long; upon its completion it will save a detour of approximately thirty miles which is necessarily made today to get from Speculator to Indian Lake.

Seven miles of this highway have already been constructed at a cost of $300,000; nineteen miles are yet to be built at an approximate cost of one million dollars. The reason the highway has not been entirely constructed is that the aborted revenues of the State have required the curtailment of such expenditures. It is asserted by some that it is legally necessary to retain this provision until the highway is completed. Some believe it may be possible through a general provision to safeguard its construction, and also that of other highways heretofore explicitly authorized by the people through a constitutional amendment.

Section 16 of article VII provides:

"*Purchase and reforestation of lands.* Section 16. The legislature in each of the eleven calendar years immediately following the adoption of this amendment shall appropriate out of any funds in the treasury not otherwise appropriated moneys for the acquisition by the State of land, outside the Adirondack and Catskill parks,

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as now fixed by law, best suited for reforestation, for the reforesting of the same and the protection and management of forests thereon; for the acquisition of land for forest tree nurseries, and for the establishment and maintenance of such nurseries, such appropriations to begin in the first year with the sum of one million dollars ($1,000,000) and increasing annually by the sum of two hundred thousand dollars ($200,000) to and including the sixth year and in each of the five years immediately following, a sum equal to that appropriated for the sixth year. All such appropriations to be available until expended. A law enacted pursuant to this section shall take effect without submission to the people.

"The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. Nothing contained in this section nor in the prohibitions of section seven of this article shall prevent the state from cutting, selling or removing the trees, timber, forest products and other materials on any lands hereafter acquired with the moneys herein authorized within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed or hereafter extended by law."

This section was adopted by the people at the general election of 1931 by the following vote: affirmative, 788,192; negative 554,550.

The Governor and Legislature, confronted with these requirements at a time when the income of the State was decreasing and appropriations for emergency services were correspondingly increasing, have in the enactment of the budget been obliged, in the last five years, to disregard this provision of the State Constitution. The following table portrays the picture more clearly.

	Required appropriation by Constitution	Appropriation made
1932	$1,000,000	$1,000,000
1933	1,200,000	*640,000
1934	1,400,000	400,000
1935	1,600,000	400,000
1936	1,800,000	400,000
1937	2,000,000	400,000
Total	$9,000,000	$3,240,000

* Of this sum $240,000 was bond money.

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The question immediately presents itself and has been asked time and again, "Why keep this provision in the Constitution if the Governor and the Legislature are compelled continually to disregard it?" The answer requires an analysis of the conditions that existed prior to its enactment, the attempts made to remedy the situation and finally, the translation of such attempts into concrete form to effectuate its purpose.

From 1880 to 1920, New York State farms are reported to have been abandoned at the rate of about 40,000 acres annually. From 1920 to 1927, the rate of abandonment was estimated at approximately 272,000 acres annually. In 1927 the total area of idle or abandoned farm lands in the State was estimated to be from four to five million acres.

On January 27, 1927, Senator Hewitt, chairman of the Senate Finance Committee, motivated by the fact that the rapid abandonment of farm lands was becoming an increasing financial dead weight, not only on the localities but on the entire State, introduced in the Senate a proposed constitutional amendment which authorized the creation of a debt of $100,000,000 for reforestation purposes.

This proposal from the chairman of the Senate committee on appropriations calling for such a substantial amount had the immediate effect of directing the attention of the people to the ever-increasing acreage of farm lands abandoned each year. The future protection of the State from floods, erosion, climatic changes, and disturbance of the subterranean water tables; provisions for adequate pure water supplies for the different centers of population, for forest products and for the future requirements of the State, and the lightening of the economic load caused by the continued non-productivity of millions of acres of land all lent emphasis to the necessity for reforestation.

The economic feasibility of maintaining tree nurseries, and of purchasing, planting and caring for waste lands had been demonstrated by the State Conservation Department in its tree planting on forest preserve lands and on private and municipal property. While these plantings standing alone appeared to be substantial in amount, it was evident from figures published by the United States Census, showing an accumulation of some 4,000,000 acres of abandoned farm land in the State, with an annual increase of a quarter of a million acres more, that only a small portion of the land acreage actually abandoned each year was being reforested and that the problem must be met by a radical advance in the State's reforestation policy.

It was not contemplated when the constitutional amendment for $100,000,000 was introduced that it could be passed without a survey being made to ascertain the amount and price of the lands within the

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State which it was practical to reforest, and to obtain an accurate estimate of the cost of the work.

Following the introduction of the amendment Dean Moon of the New York State College of Forestry, and other officers and leaders of State organizations interested in conservation, actively urged that action be taken by the Legislature. The result was the enactment of the law creating the Reforestation Commission.

The commission was created by chapter 241 of the Laws of 1928. Bills for that purpose were introduced simultaneously by the chairman of the Finance Committee of the Senate and by the chairman of the Ways and Means Committee of the Assembly. The Senate bill was passed by both branches of the Legislature and was signed by Governor Alfred E. Smith.

The commission, as created, was authorized to investigate generally the subject of reforestation, with particular reference to the location, value and area of lands in the State unsuitable for agriculture but which might be utilized for reforestation, and to determine the best means of promoting and financing reforestation within the State.

The commission decided to determine, first, the location and extent of idle farm lands that could be obtained in areas of five hundred acres or more for reforestation purposes, and that could probably be purchased at a price that would justify their being reforested. This survey necessarily covered a considerable period of time and was conducted by the individual members of the commission in co-operation with county boards of supervisors, town assessors, and other agencies who could contribute information upon the subject. The results were compiled in the fall of 1928 and the area of such lands so purchasable in tracts of five hundred acres or more was found to be at least one million acres.

In addition to the survey of idle lands, the commission held public hearings from time to time attended by representatives from practically every State organization interested in forest conservation, and fish and game. Agricultural economists, lumbermen, chambers of commerce, and other business organizations likewise sent their deputies. The representatives of these different organizations gave their views, which were found by the commission to be exceedingly helpful.

Following the survey and after ascertaining the views of the representatives of these different organizations, the commission sponsored a bill known as the State Reforestation Law, which became chapter 195 of the Laws of 1929. This law authorized the Conservation Department to acquire for the State, by gift or purchase, reforestation areas consisting of not less than five hundred acres of contiguous land, to be

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forever devoted to the planting, growth and harvesting of trees. Provision was made therein for the planting and management of these forests. The application of the law was restricted to areas outside the sixteen Adirondack and Catskill forest preserve counties. Provision was also made for payment by the State of local but not State or county taxes. Assessments were not to exceed the price paid for the land. This law carried an appropriation of $120,000 for starting the work of land acquisition, forest nursery extension and reforestation.

At the same time the commission sponsored a bill known as the County Reforestation Law, which became chapter 194 of the Laws of 1929. This law amended section 12 of the County Law and provided for State aid to counties in reforestation projects. It authorized the board of supervisors in any county to establish and maintain forest plantations on lands already owned by the county, and to acquire lands for reforestation. Title to lands so acquired was to be vested in the county, the lands were to be forever devoted to the establishment and maintenance of forests for watershed protection, the production of timber and other forest products, and for recreation and kindred purposes.

The law also empowered the board of supervisors to appropriate funds for reforestation projects and authorized the State to contribute a sum not exceeding $5,000 in any one year for any one county to defray portions of the expense of such work, provided the county budget for the project and the county's previous expenditures for reforestation under the law were approved by the Conservation Commission. The chairman and the clerk of the board of supervisors were required to certify before January first of each year the appropriations made by the county during the previous year. This certificate was made the basis for the allotment of State funds to the county in the following years.

The same provision with regard to taxation of county reforestation areas was contained in this act as in the State Reforestation Act, namely, that such areas were exempt from State and county taxes, and for the purposes of all other taxes were to be assessed at an amount not to exceed the price paid for the lands.

Under the provisions of the Fisher Law, (Tax Law sec. 13) an attempt has been made in cases of private reforestation to limit assessments to the value of the land, exclusive of the forest products. Investigation by the commission showed that the then provisions of the law were not regarded by private owners as sufficient protection to warrant extended private plantings. The commission consequently sponsored amendments to the law which limited assessments to the value of the land exclusive of the value of trees planted or underplanted in compliance

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with the provisions of the section or the natural reproduction, and at a valuation not higher than lands similarly situated without any substantial forest growth, but in no event higher than the assessments existing at the time the application for classification was filed. A classification having once been obtained forest growth could not be cut except upon payment of a 6 per cent stumpage tax, and upon the removal of the forest growth the land was to be assessed without regard to the provisions of the law.

The so-called Forest Tax Law was further amended by chapter 346 of the Laws of 1931 to extend the benefits of taxation relief to areas of natural second growth as well as to planted forests.

Recognizing the need of a definite, fixed, continuing program of reforestation which could be planned for in advance by the Conservation department, the commission, with the assistance of the Conservation Department and others, worked out a plan which was for the most part embodied in a constitutional amendment. The plan contemplated a budget appropriation in 1930 of $400,000 and in 1931 of $600,000. The amendment, adopted in 1931 to take effect in 1932, supplemented these sums by mandating the Legislature to provide an additional fund of $19,000,000 to be expended over a period of eleven years.

The details of the plan were as follows:

Year	Acres to be acquired	Acres to be reforested	Appropriation necessary
1930	40,000	10,000	$400,000
1931	50,000	15,000	600,000
1932	50,000	22,000	1,000,000
1933	60,000	30,000	1,200,000
1934	100,000	40,000	1,400,000
1935	100,000	50,000	1,600,000
1936	100,000	60,000	1,800,000
1937	100,000	70,000	2,000,000
1938	100,000	80,000	2,000,000
1939	100,000	90,000	2,000,000
1940	100,000	100,000	2,000,000
1941	100,000	100,000	2,000,000
1942	....	100,000	2,000,000
1943	....	100,000	....
1944	....	133,000	....
	1,000,000	1,000,000	$20,000,000

This constitutional amendment (sec. 16 of art. VII) expressly preserves the Adirondack and Catskill Park and the Forest Preserve as it now exists, but permits the cutting of timber and forest products by the State on any reforestation area acquired with this money outside

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of the parks. Realizing that the Adirondack Park boundary as it existed in 1930 did not include all the lands which should be included in the park, the commission, prior to the submission of the constitutional amendment, prepared and introduced in the Legislature a bill to extend the park boundary and to increase the area within the park from 3,054,000 to 5,475,000 acres. This bill was passed and signed and became chapter 95 of the Laws of 1931.

A cursory examination of the appropriations required under the program and those actually made, might give the impression that the work was proceeding at approximately 35 per cent of the contemplated program. However, a number of factors not evident at the time the program was formulated soon made themselves felt and increased the work; with those factors in mind the disparity between the work called for and the work actually accomplished becomes more apparent than real.

One of the largest items in the program, as originally arranged, was the cost of planting trees in the areas to be reforested. In order to carry out this long-range program, it was necessary to raise trees in the nurseries three years prior to the time when they would be replanted in the reforested areas. In view of the fact that the appropriation for 1932 was that called for by the program, trees were being raised in the nurseries for transplanting in 1935.

In the spring of 1933, the Emergency Conservation Work Program was inaugurated in the State of New York, with eighteen camps under the direction of the Conservation Department. In the fall of 1933 additional camps were provided for under the direction of the Conservation Department. The Civilian Conservation Corps undertook the work which the State of New York, due to reduced appropriations for reforestation, was compelled to curtail. The reforestation work of the C.C.C. has included not only tree-planting but also control of tree diseases and insect pests, truck trail and fireline construction, forest stand improvement, fencing, fire hazard reduction and waterhole construction.

The increased efficiency of the Conservation Department has helped further to reduce the cost originally thought necessary. Acreage has been bought at a price much lower than was contemplated. The average cost per acre has been $3.89. Furthermore, the planting in the reforestation areas was planned on the premise that the lands were entirely denuded and required 100 per cent planting. Actually, approximately 40 per cent of the areas have a natural second growth, so that only 60 per cent have to be planted.

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Proof of the saving due to the work of the C. C. C. forces is disclosed by the fact that the average cost of tree planting by local labor, paid from Conservation Department funds since the beginning of the program, is $5.09 per thousand. On this basis the net saving to the reforestation program on the tree-planting item alone amounted in 1936 to $291,-379.33. Furthermore, since the C. C. C. enrollees have planted, from the fall of 1933 up to December 31, 1936, a total of 114,922,820 trees, a total saving of $584,957.15 has been effected.

In 1936 the forces of the C. C. C. were used in the surveying work looking to the acquisition of lands for the reforestation program. During 1936, 326 proposals including 41,393 acres were surveyed. This work necessitated the running of 627.86 miles of survey lines. Surveys made by C. C. C. labor aggregated 607.01 miles effecting a saving to the State of approximately $20,097.73.

The Legislature has made no appropriations in the last few years for State co-operation with the various counties for reforestation purposes.

The large amount of work, and resultant savings to the State, accomplished by the twenty-four C.C.C. camps assigned to the reforestation areas in 1936, made possible the purchase of approximately 25,000 additional acres of land which could not otherwise have been acquired during the year.

The Conservation Department had available for its use the services of the C.C.C. camps, and work not originally contemplated in the reforestation program has been undertaken. Early in 1936, retrenchments took place in the number of C.C.C. camps used in this reforestation program. This practise has been progressively increasing so that it is difficult to state with accuracy how many of these camps will be available for the tree-planting operations in the future. With a serious doubt as to any increased appropriation for this program, the activities will, of necessity, have to be curtailed. It would be unsound to maintain tree nurseries and raise trees for planting three years from now if the funds were not available at that time for the purpose. This has caused the Conservation Department to abandon two nurseries in 1936 and two are likely to be abandoned in 1938 and 1939 as no additional funds were provided for the project.

The number of acres purchased as of October 31, 1937 as compared with the program of that date, indicates that the purchases are approximately 70 per cent of the requirements. The following table indicates the purchases:

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Summary of Lands Purchased Under Reforestation Program for Years Ending December 31, as Indicated

YEAR	Program rate acres	Total program to date acres	Acres contracted for year	Total acres contracted for to date	Titles approved year	Titles approved to date
1930	40,000	40,000	44,976.48	44,976.48	9,582.98	9,582.98
1931	50,000	90,000	36,144.911	81,121.391	36,834.75	46,417.731
1932	50,000	140,000	124,545.70	204,520.765	52,791.684	99,209.425
1933	60,000	200,000	20,042.15	224,562.915	75,655.515	174,864.94
1934	100,000	300,000	37,258.27	262,234.08	36,117.01	210,981.95
1935	100,000	400,000	54,020.57	316,437.65	34,037.45	245,019.40
1936	100,000	500,000	31,510.90	347,948.55	43,596.76	288,616.16
1937 (to Oct. 31)	100,000	600,000	48,200.11	396,148.66	33,036.84	321,653.00
1938	100,000	700,000	.....	.....	.....	.....
1939	100,000	800,000	.....	.....	.....	.....
1940	100,000	900,000	.....	.....	.....	.....
1941	100,000	1,000,000	.....	.....	.....	.....
1942	.....	.....	.....	.....	.....	.....
1943	.....	.....	.....	.....	.....	.....
1944	.....	.....	.....	.....	.....	.....
	1,000,000	1,000,000	.....	.....	.....	.....

The Resettlement Administration has been engaged in a program of acquisition of marginal farm lands in the State of New York. The policy of the Federal government is to purchase from the owner farm lands which are uneconomical to operate. The intent of the Federal government is to turn over to the State for operation, under the recently enacted Fulmer Act, these marginal lands purchased by the Resettlement Administration.

However, it has been found that much of this is denuded land in need of reforestation. Doubt has been voiced as to whether lands so acquired would be subject to the benefits of the reforestation program contained in section 16 of article VII since section 7 of article VII might be interpreted to prevent any replanting. It has, therefore, been suggested that section 16 be amended to give lands acquired from the Resettlement Administration the same status as lands acquired by the State for reforestation purposes. After reforestation it is recommended by the conservationists that the lands then remain inviolate under the provisions of section 7.

The reforesting of the lands under the reforestation program has kept close pace with the schedule, despite curtailment of expenditures which this year amounted to 20 per cent of what should have been provided. The total number of acres completed to October 31, 1937, is 260,230.10; the schedule requirement as of December 31, 1937 is 297,000 acres. The following table sets forth the program rate to be reforested, total acres planted and total acres completed to date:

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Summary of Lands Reforested Under Reforestation Program for Years Ending December 31, as Indicated

YEAR	Program rate acres	Total program to date acres	Acres planted year	Total acres planted to date	Acres completed year	Total acres completed to date
1930	10,000	10,000	5,411.00	5,411.00	7,476.69	7,476.69
1931	15,000	25,000	15,884.72	21,295.72	25,963.09	33,439.78
1932	22,000	47,000	17,770.75	39,066.47	27,908.88	61,348.66
1933	30,000	77,000	8,377.74	47,444.21	13,943.92	75,292.58
1934	40,000	117,000	30,060.47	77,504.68	51,551.26	126,843.84
1935	50,000	167,000	32,546.95	110,051.63	50,647.71	177,491.55
1936	60,000	227,000	43,059.86	153,111.49	67,214.28	244,705.83
1937 (to Oct. 31)	70,000	297,000	9,791.90	162,803.39	15,524.27	260,230.10
1938	80,000	377,000	.....	.....	.....	.....
1939	90,000	467,000	.....	.....	.....	.....
1940	100,000	567,000	.....	.....	.....	.....
1941	100,000	667,000	.....	.....	.....	.....
1942...p	100,000	777,000	.....	.....	.....	.....
1943	100,000	877,000	.....	.....	.....	.....
1944	133,000	1,000,000	.....	.....	.....	.....
	1,000,000	1,000,000	.....	.....	.....	.....

The effect of reforestation and soil conservation on floods has recently been the subject of close study. This is the result of the disastrous floods in the Mississippi valley, Ohio valley and in central and southern New York.

In the case of large rivers, the sources of most of the streams tributary to the main river are in hilly, upland and mountainous sections. In many cases, not only is the fall of the streams rapid but there is also a distinct lack of natural reservoirs in the form of swamps, marshes and ponds. Under these conditions, any factors that tend to decrease the volume and to retard the velocity of the surface runoff of water on the slopes in periods of heavy precipitation and melting snow, have an important effect on the local streams.

A continuous cover of vegetation on slopes materially retards surface runoff, and is most effective in the case of well-conditioned forests. This fact has been demonstrated convincingly by scientific experiments under widely varying conditions of climate, topography, character of soil and types of vegetation.

The general manner in which vegetable cover operates to influence the disposal of precipitation has been determined by numerous investigations and experiments. It breaks the impact of runoff; it directly intercepts a part of the precipitation which disperses soil moisture by transpiration; it binds soil against erosion; it holds some moisture by the "blotter" effect of the bad plant debris or litter. These functions are of only minor importance in flood control even though a considerable

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amount of water is thereby restrained from running off the surface into the water channels. Of far greater importance is the part that plant cover, and more especially the organic material at or near the surface, plays in the absorption of water by the soil:

1. By building up and maintaining the organic content of the soil, it increases its porosity and favorably modifies its structure, greatly increasing both infiltration capacity and the water-holding capacity of the soil layer within the zone occupied by plant roots.
2. It establishes and maintains a partial or complete cover of undecomposed or partly decomposed organic matter (litter) at or near the surface of the soil. This acts as a very efficient filter, preventing surface water from picking up fine soil particles and depositing them in the pore spaces in the soil, thus clogging or closing them to the entrance of subsequent seepage. The net result of this filtering process is to keep the passageways through the soil open to the movement of water to lower levels.
3. It keeps the water spread out over the surface of the land and mechanically retards or hinders surface flows. The water thus runs off more slowly and is thereby afforded more time for absorption and infiltration.
4. By increasing infiltration and checking runoff in these ways, it prevents serious soil erosion. The remaining runoff is so retarded as greatly to reduce or to eliminate erosion of the soil and formation of drainage lines or gullies, which themselves tend to increase and accelerate runoff.
5. By reducing erosion, it prevents large quantities of silt and soil from accumulating in and decreasing the carrying capacity of normal stream channels, from increasing the extent of overflow of such streams, and from reducing or destroying the storage capacity of flood control reservoirs.

Forest soil has even a greater capacity for infiltration than cultivated soil. It has been demonstrated that the power of water absorption and infiltration in given soils varies with the character and condition of the forests and the degree of protection of the ground cover. There is a great difference in these qualities between the soils under well-managed forests and those which have been badly handled in lumbering, repeatedly burnt, overgrazed or otherwise abused. The effect of forests in retarding runoff is naturally greatly lessened when the volume of falling waters is so great that the soil and the litter are completely saturated. Notwithstanding, trees and brush continue to exercise a measure of influence on the rate of surface flow.

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The most ardent foresters and conservationists do not advocate reforestation and soil conservation as substitutes for flood control works but they do insist that flood control improvements downstream should be supplemented by conservation and forestry practices upstream. Downstream levees and flood walls should be reinforced by upstream forests and land restoration. Forestry and conservation properly reinforce actual engineering work to prevent floods.

The Federal Flood Control of 1936 enacted by the Congress in 1936 recognizes that conservation and reforestation play a large part in flood control. This has been further accentuated by the progress made by the State of New York in the work of the State Flood Control Commission. As eminent an authority as Dr. Frank B. Howe of Cornell University, testifying before the War Department of Engineers on the question of the southern New York flood control project stated:

> "I am of the opinion that the flood problem in central and southern New York has partially been created, and to a considerable extent, aggravated by improper land use."

It is well to take a leaf out of the book of other countries and see what effect reforestation and the lack of it has had. Japan would have been washed into the ocean centuries ago were it not for the protection given to her forests and vegetation. The runoff in Japan is tremendous. It often rains torrents in a few hours. The country is of volcanic formation and the slopes are steep. A policy of maintaining the thick verdure of the hillsides provided by nature was initiated; a sound policy of cutting forests has been adopted; forestry and conservation have saved Japan.

But, in China, with less rainfall, the situation is different. China is the victim of famine and recurring disastrous floods largely as a result of land abuse and mismanagement.

In addition to actual soil conservation and flood control the acquisition of these lands has effectively reduced State aid to schools and appropriations for highways. Upon the acquisition of the land, school districts have been consolidated with a consequent decrease in expenditures on the part of the State. Highways in areas where this land has been acquired have been abandoned so that no appropriations had to be made for that purpose. However, there are no figures available to indicate the saving from these two sources.

The administration of the reforestation areas, including fire hazard protection, silvicultural operations and the harvesting of timber crops, will provide at least part-time employment to a very considerable number of people in areas of the State which have been very seriously affected

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by the depression. That this benefit will be widespread is assured by the fact that the reforestation areas already acquired are located in thirty-two different counties.

Moreover, the production of timber and other forest products on reforestation areas will not only produce in years to come very considerable revenues for the State treasury, but will also provide a permanent source of raw materials for local wood-using industries.

Reports from recognized authorities on conservation and agriculture indicate that this program can be carried out at a profit to the State so that the maintenance of these reforested areas will be paid for in addition to a surplus sufficient to purchase additional lands in need of reforestation.

Rural electrification can be undertaken more efficiently and with consequent reduction in cost to the consumer, due to the scientific management of these reforested areas.

The people of the State of New York have, with rapid progress, taken advantage of the recreational facilities offered by the State. These facilities are being taxed almost to the extent of their usefulness. Additional sources will be necessary to accommodate our ever-increasing outdoor enthusiasts. Under this enlarged reforestation program recreational facilities have been undertaken in a small measure. Ski trails have been constructed in the reforested areas and facilities for hunting and fishing have been made more convenient and better adapted to those desiring to participate in them. As conditions warrant, these facilities will be undertaken on a larger scale.

The scenery of the State is more attractive where planting has been undertaken, as contrasted to the appearance of large areas of denuded and abandoned farm lands and the corresponding effect it has on people visiting the State of New York.

Opposition to this section of the Constitution has been made by some members of the Legislature who, while in sympathy with this program, nevertheless feel there are other governmental divisions which can use to better advantage the moneys appropriated for this purpose.

The Governor and the Legislature by continued appropriations have apparently indicated their opinion of the soundness of this program and the debates in the Legislature point to further appropriations for this purpose.

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CHAPTER XV

PROPOSED STATE DEPARTMENTS: JUSTICE

Introductory

Perhaps the most noteworthy development which has taken place in the administration of criminal justice in many years is the extent to which the Federal Department of Justice and its Bureau of Investigation have captured the imagination and interest of the public as a remarkably efficient crime fighting organization. This emergence of the Federal unified system of law enforcement as an important factor in crime control has aroused much agitation for the introduction of similarly unified and co-ordinated law enforcement agencies in the several states. Various types of legislation have been introduced in New York and in the legislative bodies of other states designed to accomplish this result.

The discussion of the State Department of Justice which is included herein will take up the various proposals which have been made by representative bodies, including the Wickersham Commission, the Institute of Public Affairs of the University of Georgia, the American Bar Associations, the Attorney-General's Crime Conference in Washington, Governor Lehman's Crime Conference in New York, the National Commissioners on Uniform State Laws and other important law reform organizations and assemblies. The substance of these various proposals and their respective variations will be analyzed and considered.

Following this presentation of the views of various law reform organizations, an inquiry will be made into the present statute and constitutional law of the states with respect to the district attorney and the Attorney-General, special reference being had to the New York practice. A historical survey of the growth and development of the offices of the Attorney-General and county district attorney in New York State is included.

In addition to the existing practices in the various jurisdictions of the United States, some effort has been devoted toward obtaining useful information and suggestions from the practice in England and in the various continental countries. This was deemed helpful in view of the extent to which the European nations have centralized and unified their systems of law enforcement.

The discussion concludes with a summary of the arguments for and against the proposal. It is believed that the delegates to the convention will therefore have available to them a complete historical and current analysis of the factors which must be taken into consideration in passing upon the practicability of a State Department of Justice for New York.

Although virtually all the discussion outside New York has been

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devoted to complete State-wide unification of the agencies of law enforcement, some interest has been expressed in New York in the possibility of centralizing the administration of the criminal law in New York City, without reference to the practice elsewhere in the State. This proposal has been deemed of sufficient importance to merit individual treatment.

A. RECOMMENDATIONS OF OTHER BODIES

(1) In 1927, the Journal of the American Judicature Society (Vol. XI, pp. 67–8), in a vigorous editorial, sharply criticized the system of criminal prosecution prevailing in the states. It employed the following language:

> "Considered theoretically can anything be more absurd than our traditional handling of this highly important matter of prosecuting? The laws are state laws; the work of enforcing them is a state function. But we have no state organization of prosecution. Instead we have a thorough decentralization of this function."

The editorial then went on to propose that every local prosecutor should serve as the appointed deputy of an Attorney-General who was to be appointed by the Governor.

(2) Professor W. F. Willoughby, in "Principles of Judicial Administration" (Brookings Institution, 1929), urged the adoption by the states of the Federal system of prosecution. He stated that it would be impossible to secure an effective mechanism for the enforcement of the criminal law in the United States until the states provided for an officer having the responsibility and the necessary administrative machinery to see that the laws are properly enforced. He also recommended that State Departments of Justice, when established, should have control of the other law enforcement agencies, such as the state constabulary.

(3) An article in 8 North Carolina Law Review, pp. 328–352 (1930) favors the creation of a State Department of Justice, at the head of which is to be the Attorney-General, who is to be appointed by the Governor. It is suggested that such a body could also serve the function of ascertaining defects in the law and making recommendations for their correction.

(4) In 1931, the National Commission on Law Observance and Enforcement, under the chairmanship of Mr. George W. Wickersham, submitted its "Report on Prosecution." The commission found that:

> "Under the conditions of transportation today and with the facilities for and the coming of highly organized crime, the state is as natural a unit as the county or town was a century ago." (P. 13).

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It recommended the adoption of:

> "A systematized control of prosecutions in each state under a director of public prosecutions or some equivalent official, with secure tenure and concentrated and defined responsibility." (P. 38.)

(5) A comprehensive plan for a State Department of Justice is that advocated by the Institute of Public Affairs of the University of Georgia, in 1932. This scheme, outlined by Professor Harmon Caldwell in the Journal of the American Judicature Society (October 1932), provides that the department consist of the Attorney-General and the local prosecuting attorneys, all of whom are to be appointed by the Governor with the consent of the Senate. It is made the exclusive duty of the department to handle all prosecutions for the violation of State criminal laws. Of this proposal, it has been said that it presents about the greatest possible centralization in the State government of the power to conduct criminal prosecutions. (Earl H. DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecution,* 25 Journal of Criminal Law and Criminology, pp. 358–400, at p. 381 (1934).)

(6) In his book entitled *Politics and Criminal Prosecution* (Minton, Balch and Co., 1929), Professor Raymond Moley made the following prophecy:

> "It is inevitable that the prosecuting function will come to be vested to a greater and greater degree in the state government, probably in the Attorney-General . . . There is no reason to suppose that this tendency toward the centralization of prosecution will end until there is established a central prosecuting office directly under the Governor or in the office of the Attorney-General, which will, to a great extent, conduct the prosecution of at least the more important felonies throughout the state." (Pp. 226–7.)

(7) A preliminary draft of a recommendation presented in August, 1933, to the American Bar Association urges the creation in each state of a Department of Justice headed by the Attorney-General or some other officer whose duty it is to supervise and actively to direct the work of every district attorney, sheriff and law enforcement agency. (See Earl Warren, *A State Department of Justice,* 60 Reports of American Bar Association, pp. 311–21 (1935).) In his discussion of the recommendation, Mr. DeLong says:

> "It does not specify the position of the agency in the structure of the government, nor does it define its powers or its relation to local law enforcement. All of these factors must be determined before any statute can be drafted."

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(8) Writing in 23 Journal of Criminal Law and Criminology, pp. 927–63 (1933), Mr. DeLong expresses the opinion that in almost every state in the Union more efficient prosecution would result from the increase of the official interest of the state government in local prosecution. The following year (25 *ibid.*, pp. 358–400 (1934)), his proposed took on a more concrete form. He advocated the creation in the states of a State Department of Justice to which was to be given all the powers and duties relating to prosecution. At the head of the department would be a director appointed by the Governor. The Attorney-General would be stripped of his criminal law functions. In this connection, the following statement (26 *ibid.*, 821–46, at p. 842 (1936)) is worthy of note:

> "If any particular lesson is to be drawn from American experience with the power of Attorney-Generals to supervise criminal prosecution, it is that this officer should not be given any of the Criminal Law functions which the state government decides to assume."

(9) The Attorney-General's Conference on Crime (1934), held in Washington, D. C., approved the report of the Committee on Resolutions which contained the following recommendations:

> "Especially in view of the deplorable condition of disorganization which exists in local law enforcement units, it is recommended that the various states give serious consideration to a better form of coordinated control by means of a State Department of Justice or otherwise. Modern conditions demand modern methods."

At the conference, a difference of opinion among several of the delegates was found to exist. Mr. Gilbert Bettman of Ohio was of the belief that adequate criminal prosecution could best be achieved by cooperation between locally elected prosecuting attorneys and the state's Attorney-General, with the power of supersession in the latter in case of emergency. (Proceedings, pp. 159–68.) On the other hand, George Z. Medalie was of the opinion that:

> "A State Department of Justice can work if every official in it from the Attorney-General down to the assistant district attorney is appointed and removable if he is incompetent or suspect, without waiting through the weary years for his riddance." (Proceedings, pp. 182–87, at p. 186.)

(10) At Governor Lehman's Conference on Crime, the Criminal and Society at Albany, New York (1935), the delegates discussed the question of whether a State Department of Justice should be established, and if so what powers it should have. (Proceedings, pp. 631–46.)

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George Z. Medalie again set forth his proposal that there be created a State Department of Justice, at the head of which was to be the Attorney-General. According to this proposal, the Attorney-General and the district attorneys are to be appointed and removable by the Governor. Considerable opposition to this suggestion was expressed by rural prosecutors.

(11) The Association of the Bar of the City of New York has supported the plan, saying, "During the past forty years the Attorney-General has been elected by a political party opposed to the Governor in five instances. This Committee believes that the advantage of vesting in the Governor the direction and administration of the law enforcement of the State out-weighs any other considerations."

(12) The New York Commission on the Reorganization of the State Government in 1919 recommended that the head of the Department be appointed by the Chief Executive, just as is done in the Federal Department of Justice. On the basis of this report, Governor Smith proposed that the Department of Law be treated like the other departments of the State Government. The Governor, he argued, is held responsible by the people for law enforcement and he should have commensurate authority. It is not by any means a new suggestion that the Attorney-General be appointed by the Governor. Five states are now operating under such a system.

(13) In 1935, the National Conference on Uniform State Laws considered the first tentative draft of a Uniform State Department of Justice Act. (Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, 1935, pp. 249–61.) This draft creates a State Department of Justice. At the head of the department it places a director who is to be either the Attorney-General or some other person to be appointed by the Governor with the consent of the Senate. The term of office of such person is to be coincidental with the term of office of the Governor and he is to be removable by the Governor at any time. The Attorney-General is empowered to appoint assistant Attorneys-General.

Section 4 of the draft creates the following six divisions within the department:

(1) Division of Criminal Prosecution
(2) Division of Medical Examiners
(3) Division of Police
(4) Division of Criminal Identification, Investigation and Statistics
(5) Division of Pardons and Parole, and
(6) Division of Prisons

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The following alternative provisions dealing with the Division of Criminal Prosecution are quoted in full:

> "Section 5. The Attorney-General as the Director of the Department of Justice may require written reports to be made to him by every district attorney, prosecutor, sheriff, or other law enforcement officer as may be designated by law, and upon the request of any such district attorney or prosecutor of any county or upon the request of the Governor may aid in the prosecution of any offense against the laws of the State which may be tried therein or if so requested by said district attorney, prosecutor, or Governor as aforesaid may assume entire direction of such prosecution."
>
> "Section 5A. The Attorney-General is hereby vested with the exclusive control and direction of the prosecution of all criminal proceedings in any and all of the courts and tribunals of this State and in any county or part of the State."
>
> "Section 5B. There shall be appointed by the Governor, by and with the advice and consent of the Senate, from among the practicing members of the bar of each county (judicial district) of this State, a lawyer resident in each of said counties (judicial districts) and designated a State prosecutor, whose duties, subject to the supervision and direction of the Attorney-General shall be to attend any and all courts or tribunals in his county (judicial district), and to prosecute all violations of the criminal and penal laws therein, and to discharge all other duties assigned him by law."

(14) The appointment rather than the election of local prosecuting officials has not been completely accepted. It has been suggested, however, that there be a constitutional amendment empowering the Governor to appoint the Attorney-General who would act as the head of a State Department of Justice. This would not necessarily interfere with the present system whereby local district attorneys are popularly elected. The appointive character of the office of Attorney-General has been emphasized on the ground that in the last analysis the duty of law enforcement is imposed by the Constitution on the Governor.

A State Department of Justice is thus conceived as a device to assist local criminal law enforcement agencies. To that end, the creation within such department of a Bureau of Investigation to bring to the aid of the local police and prosecutors the resources and techniques necessary to combat crime, a Bureau of Criminal Identification to make available fingerprints, photographs and other data, and a State Crime Prevention Bureau to stimulate and plan local and state effort for the purpose of

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reducing juvenile delinquency have been advocated. And the facilities of the department would be implemented by giving it jurisdiction over the State police force.

B. THE EXISTING PRACTICE

1. The Federal System

An Attorney-General was provided for by a statute passed in 1789. Under the terms of this statute, he was to prosecute and conduct all suits in the Supreme Court of the United States in which the United States might be concerned, and to give advice upon questions of law when requested by the President or the heads of the executive departments. Provision was made in the Judiciary Act of 1789 for district attorneys who were to be appointed

> "to prosecute in each district all delinquents for crimes and offenses cognizable under the authority of the United States."

Until 1861, the district attorneys were not subject to centralized control. In 1861, owing to the exigency of the Civil War, the Attorney-General of the United States was given "superintendence and direction" of United States attorneys and marshals in all districts of the United States. In 1867, the Attorney-General recommended that his office be made

> "the Law Department of the government, thereby securing uniformity of decision, of superintendence and of official responsibility."

This suggestion was adopted in 1870 with the creation by statute of a Department of Justice and the provisions for a Solicitor-General and three assistant Attorneys-General. In 1896, further centralization resulted by virtue of legislation empowering the Attorney-General to appoint Assistant United States Attorneys. (See National Commission on Law Observance and Enforcement, *Report on Prosecution,* 1931, p. 8.)

The work of the Federal Bureau of Investigation, consolidated in its present form by presidential proclamation in 1933 is too well known to require extended discussion here. Its significant feature is that both it and the United States Attorneys throughout the country are subdivisions of the Federal Department of Justice, with all that implies in the direction of complete co-ordination and co-operation of police and prosecution, beginning with the detection and apprehension of the culprit to its conclusion in the trial. The Federal government has a co-ordinated, integrated system of identification, detection, apprehension and prosecution which is not to be found in states where unrelated

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police and prosecuting units, independent not only of each other, but themselves subdivided into ancient county lines, function without relation to each other and without responsibility to a single co-ordinating head.

2. The System in the States

(a) The District Attorney

History. It was customary under the English common law which the colonists brought with them to America for criminal prosecutions to be conducted by a private prosecutor in the name of the king. Early in the eighteenth century, the colonies began to do away with private prosecutions and to set up public prosecutors. The first statute was enacted in Connecticut in 1704 and read as follows:

> "... Henceforth there shall be in every countie a sober, discreet and religious person appointed by the countie courts, to be atturney for the Queen to prosecute and implead in the lawe all criminals and to doe all other things necessary or convenient as an atturney to suppress vice and immoralities."

By the end of the century, official prosecutions by public prosecutors had become established as the American system. (See National Commission on Law Observance and Enforcement, *Report on Prosecution,* 1931, p. 38.)

In New York, the history of the Attorney-General and the county district attorney may be jointly considered. The origin of the Attorney-General may be found in the "schout-fiscal," who, in the early days of the colony of New Netherland (established 1623) was a member of the Council of Five, which governed the colonists under a Governor, sent over by the West India Company. The "schout-fiscal" was a kind of an Attorney-General, uniting with the powers of a presenting officer the executive duties of a sheriff. (Lincoln, *Constitutional History of the State of New York,* p. 454.)

The first Attorney-General of the type now familiar to us was appointed by the Constitutional Convention in 1777. Upon the adoption of the Constitution, the Attorney-General was appointed by the Council of Appointment.

In 1796, the office of assistant Attorney-General was created, providing for the appointment of seven assistants who were assigned to districts established by the act. They were charged with the duty of attending the criminal courts and conducting criminal prosecutions, except in the county of New York, where similar duties were to be performed by the Attorney-General.

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In 1801, the office of district attorney was created, and seven districts established, with provision for an assistant in each district, having the criminal duties formerly discharged by the Assistant Attorney-General. The Attorney-General, however, was still required to attend to criminal matters in New York county. Other districts were created by later statute and in 1815 the county of New York was made a separate district. In 1818, a law was passed providing for a district attorney in each county.

Parenthetically, it should be noted that the county system of government which the American Colonists brought with them from England, dates in New York from 1682, when King James, on the advice of William Penn, authorized the Governor to call an assembly in New York, one of the first acts of which was to divide the entire province into twelve counties.

In the Constitution of 1821, provision was made for the appointment of county district attorneys by the respective County Courts (art. IV, sec. 9.) The provision read:

> "§ 9. The clerks of courts, except those clerks whose appointment is provided for in the preceding section shall be appointed by the courts of which they respectively are clerks; and district attorneys, by the county courts.

In 1846, the world-wide tendency toward the democratization of government had its effect upon the Constitution then adopted. It provided (art. X, sec. 1):

> "Sheriffs, clerks of counties including the register, clerk of the city and county of New York, coroners and district attorneys shall be chosen by the electors of the respective counties once in every 3 years. . . ."

The Governor was authorized to remove any officer mentioned in the section within the term for which he was elected, on notice and hearing.

A similar provision was contained in the Constitution of 1894, the only difference being that election of district attorneys in the counties of New York and Kings were to be held biennially, instead of once every three years as theretofore.

Although, as has been indicated, most of the criminal functions of the Attorney-General were transferred to county district attorneys, it has been pointed out that the effect of this was that the district attorney succeeded the Attorney-General, but did not necessarily supplant him.

Chapter 66 of the Laws of 1813 which provided that the district attorney was to attend the sittings of the Courts of Oyer and Terminer and

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prosecute therein, also declared that "it shall not be necessary for the Attorney-General to attend such courts, except when required so to do by the Governor or one of the judges of the Supreme Court."

Thus, it appears that between 1777 and the adoption of the Third Constitution in 1846, the Attorney-General was relieved but not deprived of the power to prosecute actions. In the 1846 Constitution, it was provided that, "The powers and duties of the Attorney-General shall be such as are now or may be hereafter prescribed by law."

Since 1846, the powers of the Attorney-General and district attorney have been amplified by statute, relating primarily to the performance of various duties by the Attorney-General at the request of the Governor, in place of the county district attorney (see, *e.g.,* Executive Law, sec. 65, 1892; par. 2 of Executive Law, amended by L. 1895, ch. 821, sec 1).

The foregoing analysis indicates that there is sound historical precedent for restoring either to the Attorney-General or to some other State officer or bureau of criminal jurisdiction and unifying under one head the State administration of criminal justice. Originally, the Attorney-General did have state-wide criminal jurisdiction. Assistant-Attorneys General and subsequently county district attorneys were established to assist, but not to supplant, him. Provision for a State Department of Justice, therefore, under a single head, with appointed county district attorneys, would represent, not a radical innovation, but a return to the principles of the original systems.

Consolidation of the District Attorneys' Offices in New York City. The foregoing historical analysis of the development of the county district attorney in New York State has shown that from the very beginning special attention was devoted to the administration of the Criminal Law in New York City. When the office of the county district attorney was first established and the State divided into seven districts in each of which an assistant district attorney was to function under the supervision of the Attorney-General, it was provided that the Attorney-General himself was to administer criminal justice in New York county. When the State was divided into districts for purposes of criminal law prosecutions, these districts in many cases running across county lines, the county of New York was made a separate district. It should be noted, moreover, that when provision was first made in 1818 for a district attorney in each county, New York City consisted of only one county.[1]

[1] The Counties of New York, Kings, Richmond and Queens were consolidated into New York City by Laws of 1896, ch. 488. Bronx county was created in 1914.

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George Z. Medalie, at the Governor's Conference on Crime, the Criminal and Society, in discussing the proposal for a State Department of Justice, paid particular attention to the matter of consolidating the district attorneys of New York City. He pointed out that while New York City had a unified police force, it had five separate district attorneys "or, in other words, five disunited varieties of prosecution."

Examination of the files of the *National Municipal Review,* a periodical devoted to the progress and development of county and local government in the United States, indicates a vigorous movement in many states toward the consolidation of counties for various governmental purposes. Remarkable savings have been made in the cost of local government and the efficiency and quality of local government have been considerably improved by the many consolidations which have taken place in recent years. This movement for county mergers, thus far confined to the administration of government generally, may well be translated into the field of criminal law enforcement.

The movement toward the consolidation of offices in local government has had expression in this State in a constitutional amendment adopted in 1935, in accordance with which jurisdiction over all county officers, except judges, district attorneys and county clerks, was conferred upon New York City. The amendment (art. X, sec. 2), provides that in counties in the city of New York, the city is vested with power by local law to abolish the office of any county officer other than judges, clerks and district attorneys and to assign any or all the functions of such officers to city officials, to prescribe their powers and duties and to make all other relevant regulations.

A simple way of authorizing the city of New York itself to create its own city-wide Department of Justice would be to eliminate the proviso in this section which excludes district attorneys from the power given the city to regulate county offices. Such an amendment would have the virtue of not attempting to require any local jurisdiction to submit to outside control. Up-State activities would in no way be affected and, in the city of New York, the city's Council would have the discretion to decide whether or not a city-wide Department of Justice should be created.

Status of the District Attorney in the Other States. The difficulty of effecting any change in the office of the prosecuting attorney results from the fact that the office is substantially buttressed by constitutional provisions in most of the forty-eight states. (Baker and De Long, 23 Journal of Criminal Law and Criminology, 1933, pp. 927–63.)

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Thirty-eight state Constitutions contain definite provisions for a prosecuting attorney. Only three of these Constitutions appear to leave the Legislature free to alter the office as it chooses. (Okla. Const., art. XVII, sec. 2; Nev. Const., art. IV, sec. 331; Ariz. Const., art. XII, sec. 3.)

The significant feature of practically all these provisions, however, is the fact that they provide for the popular election of district attorneys for local governmental subdivision. Centralization is completely nonexistent, except in Delaware and New Jersey.

Of the thirty-five states referred to, the Constitutions of thirty-one provide that the office be filled by popular election in the various governmental subdivisions. As exceptions to this rule, the provisions of the following states are to be noted:

Connecticut, states' attorneys and prosecuting attorneys are appointed by the courts in which they prosecute (Gen. Stats. 1930, sec. 5365; *The Office of Prosecutor in Connecticut,* Walter M. Pickett, 17 Journal of Criminal Law and Criminology, pp. 348–58 (1926).)

Delaware, the Attorney-General appoints the county attorney for each county (Stats. 1915, ch. 17, sec. 539).

Florida, state attorney is appointed by the Governor with the advice and consent of the Senate; prosecuting attorneys, however, are elected in the various counties (Fla. Const., art V, sec. 15; Fla. Comp. Gen. Laws (1927), sec. 8279).

New Jersey, the Governor, with the consent of the Senate appoints the prosecutor of the pleas in each county (Const., art. VII, sec. II, par. 3).

Thirty of the forty-eight state Constitutions definitely establish the governmental unit for which the prosecutor is to be chosen as either the county, judicial district or circuits.

Most states entrust the power of removal of the prosecuting attorneys to the courts. In general, courts may institute removal proceedings upon a taxpayer's petition, on information lodged by the Attorney-General, on indictment by a grand jury, or upon their own initiative. The grounds for removal are carefully stated in constitution or statute. In Connecticut where the court is the original appointing authority, it has full power summarily to remove its appointees (Conn. Stats. (1930), sec. 5365).

In twelve states, the voters may petition for a recall election to determine whether or not the procesuting attorney shall continue to hold office.

Georgia, Louisiana, New Jersey and Tennessee provide for the impeachment of the prosecutor by the usual process. In Maryland, a

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two-thirds vote of the Senate on the recommendation of the Attorney-General is required (Const., art. V, sec. 7).

In Delaware, the Attorney-General, who appoints local prosecutors, is vested with full power to remove them (Const., art. VI; Rev. Stats. (1915), ch. 17, sec. 539.) In Maine, where only the county attorney is elected, he may be removed by the Governor and council (Rev. Stats. (1930), ch. 93, sec. 15).

In Michigan, Minnesota, New York, South Dakota and Wisconsin, the prosecuting attorney may be removed by the Governor, usually for cause and after a hearing (see Baker and De Long, *op. cit.*, p. 956).

The functions of the local prosecuting attorney do not call for extended comment. They have been summarized in the Report on Prosecution of the National Commission on Law Observance and Enforcement (1931) to include the function of the criminal investigator (gathering evidence), the magistrate (deciding whether or not to prosecute), the solicitor (preparing the case), and the advocate (trying the case).

It would be difficult to overemphasize the importance of these functions in the administration of criminal justice. As stated in the Report of the Missouri Crime Survey (Macmillan, 1926), by Mr. Arthur V. Lashley:

> "A prosecutor who is lacking in ability, diligence and energy or who, for political or other reasons may be inclined to temporize with the lawless elements or yield to the pressure for special favors can do more to break down the whole machinery of criminal law administration than probably all other agencies together."

(b) The Attorney-General [2]

Popular election of Attorneys-General, as in the case of district attorneys, is the predominant system in the United States.

In every state with the exception of Connecticut, Indiana, Oregon, Vermont and Wyoming, the office of the Attorney-General is created by Constitution. Of these forty-three states, the Constitutions of thirty-eight require that the Attorney-General be chosen by popular election. In Maine, he is chosen by the Legislature (Const., art. IX, sec. 11); in Tennessee, by the Supreme Court (Const., art. VI, sec. 5); and in New Hampshire (Const., sec. 46), New Jersey (Const., art. VII, sec. II, par. 4), and Pennsylvania (Const., art. IV, sec. 8), by the Governor.

[2] The statutory material is taken from an article by Earl H. DeLong. *Powers and Duties of the State Attorney-General in Criminal Prosecution.* 25 Journal of Criminal Law and Criminology, pp. 358-400 (1934).

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In Indiana, Oregon, Vermont and Wyoming, the office is created by statute; in Oregon and Vermont, it is elective; in Indiana and Wyoming, the Attorney-General is chosen by the Governor.

After an analysis of the duties performed by the Attorney-General, Mr. De Long concludes that

> ". . . in the view of our state Legislatures, the powers and duties of the Attorney-General are primarily civil in character." (p. 360.)

It is true, however, that the office is often given some very substantial responsibility in the administration of criminal justice. Thus, Delaware and Rhode Island vest in the Attorney-General entire responsibility for the prosecution of violators of the state Criminal Law (Rev. Stats. Del. (1915), ch. 17; Gen. L. R.I. (1923), sec. 295.) It is more usual to require or permit only occasional participation by the Attorney-General in the process of Criminal Law enforcement or to impose upon his office the specific duty to prosecute for some particular offense.

An interesting question with respect to the office of the Attorney-General is the extent to which he is endowed with the common law powers of his English forbear to prosecute criminal cases. The case of *People* v. *Miner,* 2 Lans. (N. Y.) 396 (1868) is often cited in support of the proposition that the Attorney-General has full common law power to prosecute all types of criminal cases. The Court in that case said:

> "As the powers of the Attorney-General were not conferred by statute, a grant by statute of the same or other powers would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intendment, forbade the exercise of powers not thus expressly conferred. He must be held, therefore, to have the powers belonging to the office at common law, and such additional powers as the Legislature has seen fit to confer upon him." (P. 399.)

The subsequent case of *Ward Baking* v. *Western Union Telegraph Co.,* 205 App. Div. 723, 200 N.Y.S. 265 (1923), however, has been cited to the contrary (De Long, *op. cit.,* p. 366).

In Illinois, Kansas, Massacusetts and Minnesota, the Attorney-General appears to have unrestricted power to prosecute criminal cases without reference to any statutory authority. Illinois is unique in that its Constitution specifically forbids the Legislature to deprive the Attorney-General of his common law powers.

In many states, the courts have held that the Attorney-General does not possess any common law powers. However, according to Mr. De Long:

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> "There is no indication that the existence of this (*i.e.* common law) power in any state has led to any substantial participation by the Attorney-General in the process of criminal prosecution." (*Op. cit.*, p. 372.)

Many states require the Attorney-General to conduct all criminal proceedings before the state Supreme Court. In fifteen states, the Attorney-General is directed to appear for the state in all criminal cases appealed to the highest court of the state.

After discussing statutes defining the duties of the Attorney-General with reference, among other things, to extradition proceedings and the prosecution of specified offenses, Mr. De Long says:

> ". . . it is clear that the duties of prosecution specifically imposed upon the Attorney-General by these statutes do not attempt in any way to provide a solution for the major problems involved in the administration of criminal justice. . . . It seems to be the general view that these powers are granted for use in emergency situations and do not constitute a positive and continuing responsibility." (P. 379.)

Louisiana, Iowa, Nebraska, New Mexico, Pennsylvania, and South Dakota provide by Constitution or statute for a State Department of Justice. Whether or not a state has a department bearing this name is not, however, determinative of the degree of centralization of the prosecuting machinery.

Thus, although Delaware and Rhode Island do not have such a department, both states, as we have seen, give the Attorney-General full responsibility for all criminal proceedings under state laws. In Delaware, statutes provide for the appointment of Assistant Attorneys-General for the various counties to conduct criminal prosecutions. In Rhode Island, all prosecutions are handled directly from the Attorney-General's office without the appointment of assistants to act for subdivisions of the state.

The Louisiana Constitution of 1921 (art. VII, sec. 55) provided for a State Department of Justice to be composed of the Attorney-General and the necessary assistants. It provided that:

> "They, or any one of them, shall attend to and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings,

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civil or criminal, as they may deem necessary for the assertion or protection of the rights and interests of the State. They shall exercise supervision over the several district attorneys throughout the State and perform all other duties imposed by law. . . ."

Concerning this measure, Professor Willoughby in his book on the *Principles of Judicial Administration* said:

"This is a step in the right direction but it is, at best, but a short one. In the first place the Attorney-General is elected by the people, and thus cannot be used by the Governor as his chief officer in seeing that the laws are faithfully executed in the same way as he could if he owed his selection to the Governor. Secondly, the district attorneys, though declared to be subject to the supervision of the Attorney-General are elected by the voters of the districts in which they perform their duties. The supervisory power declared to be vested in the Attorney-General can thus be of but the most general character." (P. 121.)

In addition to Louisiana, there are ten states (Arizona, California, Florida, Idaho, Iowa, Michigan, Montana, New Hampshire, South Dakota and Utah) which give the Attorney-General the power to supervise the work of the local prosecuting officials. Such provisions have been interpreted by the courts to vest broad powers in the attorney-general. Thus, in *State ex rel. Nolan* v. *District Court,* 22 Mont. 25, 55 P. 916 (1879), it was stated that:

"A duty to exercise supervisory power clearly implies the possession of supervisory powers. There is, therefore, in the Attorney-General a right to . . . direct with supervisory oversight the official conduct and acts of such officials; and it is his prescribed duty to exercise and perform these acts, and to do whatever may be necessary and proper to render his power in these respects effective."

Mr. De Long concludes, however, that in most of these states, the Attorneys-General have not attempted to exercise these powers.

All of the states enumerated, with the exception of New Hampshire and North Dakota, give the Attorney-General the additional power to require the local prosecutors to submit to him written reports on their work. Alabama, Arkansas, Maine, Minnesota, North Dakota, Ohio, Texas and West Virginia provide for the submission of reports to the Attorney-General, but they do not confer upon him the power to supervise.

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3. California System

The pertinent provisions of article V, section 21 of the Constitution of California which were approved by the voters on November 6, 1934, are as follows:

> ". . . the Attorney-General shall be the chief law officer of the state and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the state. He shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such written reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to him may seem advisable. Whenever in the opinion of the Attorney-General any law of the state is not being adequately enforced in any county, it shall be the duty of the Attorney-General to prosecute any violations of law of which the Superior Court shall have jurisdiction, and in such case he shall have all the powers of a district attorney. When required by the public interest, or directed by the Governor, he shall assist any district attorney in the discharge of his duties."

(See Warren, *Organizing the Community to Combat Crime,* Proceedings of Attorney-General's Conference on Crime, p. 324; Warren, *A State Department of Justice,* 60 Reports of American Bar Association (1935), pp. 311–321, at p. 319.)

Eleven states confer complete authority on the Attorney-General to institute and conduct criminal proceedings. "From these grants of full concurrent powers to prosecute, the Attorney-General's powers in general criminal prosecution dwindle away through a number of similar but less generous provisions." (De Long, *op. cit.,* p. 389.)

Three-fourths of the states have provisions similar to that in Illinois which require the Attorney-General:

> ". . . to consult with and advise the several state's attorneys . . . and when, in his judgment the interest of the people of the state require it . . . attend the trial of the party accused of crime, and assist in the prosecution." (Illinois Revised Statutes (Cahill, 1933) ch. 14, sec. 4.)

Twenty states make it the duty of the Attorney-General to aid any prosecuting attorney who requests help.

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4. System in England [8]

According to Professor Pendleton Howard:

> "In England . . . the prosecution of criminal offenses save in those special classes of cases which are conducted through the agency of government officials such as the Law Officers of the Crown, the Director of Public Prosecutions or the Solicitors to the government departments and boards, is in legal theory left wholly to the agency of private individuals who are not compelled to set the law in motion and who have only within comparatively recent years been encouraged to do so by legislative provisions authorizing the repayment on a still inadequate scale of the costs of the action out of public funds." (29 Columbia Law Review, p. 716.)

Again, he says:

> ". . . what the United States has done is simply to graft on to the English (or as it is frequently called, the accusatory) type of criminal procedure, the continental institution of the public prosecutor, at the same time rejecting those fundamental juristic conceptions upon which the inquisitorial, or continental, system is predicated." (*Ibid.*, p. 717.)

The decentralized and "essentially litigious nature of English criminal procedure" is thought to derive from the old notion that criminals could be most effectively dealt with by leaving them to the private vengeance of the person injured, his kinsmen, or his friends.

Professor Howard indicates that the accusatory criminal procedure in England resulted from the change in the function of the jury, from a presenting body to a body of triers of the facts and from a similar change in the function of justices of the peace who, having originally performed duties ordinarily entrusted to public prosecutors, gradually ceased to function as criminal prosecutors and took on the character of judges.

> "And so it came to pass that while the jury trial resulted in the final abandonment of all of the earlier methods of determining guilt, the failure of the state to recognize its changing character and create public agencies other than the police, to undertake the task of managing criminal proceedings, was responsible for another par-

[8] The material dealing with the situation in England is taken largely from the excellent articles by Professor Pendleton Howard in 29 Columbia Law Review, pp. 715–47 (1929) and in 30 Columbia Law Review, pp. 12–59 (1930).

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tial reversion to the principles of private warfare in the form of privately instituted and conducted prosecutions." (29 Columbia Law Review, p. 719.)

Despite the theoretically completely decentralized system of English prosecution, based fundamentally on private initiative, the fact remains that the great majority of important prosecutions in England are instituted and conducted by the police or by the Director of Public Prosecutions.

In 1856, there were in England only three officials who could, in any real sense, be classified as public prosecutors. These were the Solicitor-General, the Attorney-General and the Solicitor to the Treasury Department. The Attorney-General is the chief legal representative of the Crown. He prosecutes some important criminal matters and supervises the Director of Public Prosecutions. The duties of the Solicitor-General, who is next in rank to the Attorney-General, are substantially similar to those of the Attorney-General.

The Solicitor to the Treasury conducts its legal business and co-operates with the Attorney-General in prosecutions of a criminal nature. He prosecutes in cases of murder, manslaughter and other serious offenses.

In 1879, Parliament created the office of Director of Public Prosecutions. He was to be chosen by the Home Secretary and to be empowered, under the superintendence of the Attorney-General, to institute and conduct criminal proceedings. The Attorney-General was authorized to require the Director to prosecute in any special case. Despite the general language of this statute, Professor Howard is of the opinion that what was really intended was that:

". . . the Director merely examine into those exceptional cases that seemed to call for government action and then direct the Solicitor to the Treasury to carry on the prosecutions." (30 Columbia Law Review, p. 23.)

In 1884, the powers and functions of the Director of Public Prosecutions were transferred to the Solicitor to the Treasury, although the office was not abolished. In 1908, the office of Director of Public Prosecutions, owing to the volume of business conducted by the Solicitor to the Treasury, was again revived as a separate office.

Professor Howard emphasizes that:

". . . it is essential to bear in mind that no provision in any of these acts precludes any private person from instituting and carrying on a prosecution wholly upon his own initiative; subject only to the power of the Director, under the law of 1908, to take over the con-

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duct of the prosecution at any stage of the proceedings. Thus, while the Director is charged with important powers, the principle of private prosecutions is kept virtually intact and pervades the theory and practice of the English penal system." (30 Columbia Law Review, p. 30.)

The Regulations of 1886 make it the duty of the Director to prosecute in the following classes of cases:

(1) Where the offense is punishable by death.
(2) Where the offense is of a type hitherto undertaken by the Solicitor to the Treasury, *e.g.,* offenses against the coinage.
(3) Where he is especially ordered to take action by the Attorney-General or a Secretary of State.
(4) "Where it appears to the Director that the offense, or the circumstances of its commission, is or are of such a character that a prosecution in respect thereof is required in the public interest, and that owing to the difficulty of the case, or to other circumstances, the action of the Director of Public Prosecutions is necessary to secure the due prosecution of the offender." (Quoted in 30 Columbia Law Review, p. 32.)

Since the Director of Public Prosecutions is appointed by the Home Secretary who has supervision of the police and of the administration of justice ("other than judicial") generally, a substantial amount of co-ordination in the field of Criminal Law enforcement has been achieved in England. Although the local police have only a limited county or borough jurisdiction, the existence of the Division of Criminal Investigation, staffed by highly trained detective officers, with jurisdiction to act in the provinces throughout England, as well as in London, renders available to the Director of Public Prosecution in important cases a police force, upon whose skilled co-operation he may rely for investigation in any part of the country, and results in the co-ordination of police and prosecution under the jurisdiction of the home office.

At the conclusion of his survey of criminal prosecution in England, Professor Howard says:

". . . the gradual development during the last half century of a speedy and efficient method of conducting criminal prosecutions in important cases has been a powerful factor in bringing about a restoration of popular confidence in the administration of criminal justice in England." (*Ibid.,* p. 59.)

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5. France

The power to initiate criminal proceedings in France belongs both to the public authorities and to the person aggrieved. If the public authorities do not act on the complaint or accusation of the injured party, then such party may himself set the machinery in motion.

The members of the public prosecutor's department constitute the Public Ministry. They are selected and advanced on the basis of ability and achievement. This is true of all the continental countries (Ploscowe, *The Career of Judges and Prosecutors in Continental Countries,* 44 Yale Law Journal, pp. 268–91 (1934)).

The prosecution is under the jurisdiction of the Department of Justice, whereas the French police are administered by the Department of the Interior. Since both are members of the same cabinet, it may be said that a substantial degree of co-ordination and co-operation throughout France in prosecution and police work, inevitably results.

C. ARGUMENTS FOR A DEPARTMENT OF JUSTICE*

The present system of local prosecution prevailing in the states has been sharply criticized by persons who advocate the creation of a State Department of Justice. They attack:

(1) The lack of co-ordination between the various criminal law enforcement agencies in the states. Mr. Clarence E. Martin expressed this view at the Attorney-General's Conference on Crime, as follows:

> "Were all of these agencies co-ordinated and each properly and adequately trained to do the work expected of them, and each placed under the directing hand of a department of justice in the state, similar to the Federal department, how much more effective would be their efforts. How much less lost motion would there be and how much less the cost of detection and prosecution."

(2) The provisions whereby in the great majority of the states the Attorney-General and the local prosecutors are popularly elected. It is argued that the system often results in incompetent and inexperienced prosecutors (Moley, *Tribunes of the People* (1932), p. 190.) It is also pointed out that under the present system there is too intimate a relationship between prosecution and politics. In the words of Professor Moley:

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* Arguments for and against the appointment of the Attorney-General—a question intimately related to the establishment of a Department of Justice—will be found on pp. 114 *et seq.*, this volume.

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"Thus the American prosecutor emerges as a completely political official. By virtue of the great advantages which the powers of the office lend to the political machine and the tremendous publicity values in the materials with which it is concerned, it has come to be sought as a means to a political end. Its political character is shown in two ways—First, in the large number of political careers which begin in the prosecutor's office and second, in the open and often sinister political domination of the large urban prosecuting officers." (*Politics and Criminal Prosecution,* p. 94.)

It has been urged that the Governor be vested with the appointive power since upon him is ultimately imposed the duty of law enforcement and the maintenance of law and order. (Attorney-General's Conference on Crime, Proceedings pp. 182–87.)

Advocates of a State Department of Justice point to the high degree of efficiency attained by the Federal department. They also assert that the growth of transportation facilities and scientific developments render the modern decentralized system of prosecution inadequate. (National Commission on Law Observance and Enforcement, Report on Prosecution (1931).)

D. ARGUMENTS AGAINST A DEPARTMENT OF JUSTICE

Opponents of the creation of a State Department of Justice rely on the following considerations:

(1) The vesting in the Governor of the power of appointment of prosecuting officials would not insure more competent prosecutions. It has been said that:

"In view of the character of some of the Governors who have held office in the last decade, it would not be surprising if voters should hesitate to turn over the whole machinery of prosecution to the state government." (25 Journal of Criminal Law and Criminology, p. 399 (1934).)

(2) The argument by proponents of the proposal based on scientific developments is unsound because such developments have no effect on prosecution. Mr. Gilbert Bettman, at the Attorney-General's Conference said:

" . . . before we run wild on this generalization about modern developments, let us insist that there be a casual connection between the particular change proposed and the modern development." (Proceedings, p. 163.)

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(3) The proposal is historically unsound, because the county is the historical unit of government, it being the successor of the Anglo-Saxon shire, the peace officer of which, the shire-reeve, is the predecessor of our modern sheriff.

(4) The proposal is humanly impractical because of the large volume of work now carried on by the Attorney-General, 95 per cent of which is civil in nature.

(5) Centralization tends toward bureaucracy and away from a virile democracy. Mr. Bettman expresses this argument as follows:

"The nearer government is to the governed, the more it can be watched and the more searching is the light of truth. Removal of authority to the state capital is no guarantee of higher ability nor higher purpose nor less politics." (*Ibid.*, p. 166.)

(6) It has also been urged that local electorates are more familiar with local conditions than an appointing agency located elsewhere.

Summary

The foregoing presentation of the available material in connection with a State Department of Justice indicates that there is some dissatisfaction with the current system of decentralized law enforcement agencies. Although the proposals which have been made differ among themselves, their advocates feel that ancient county boundaries of prosecution must be eradicated and a State-wide organization established for the enforcement of the criminal law.

Unification of the administration of the criminal law in New York does not necessarily involve a change from the present system of the popular election of local prosecutors. On the other hand, it is urged, that as a practical matter, it is impossible to subject county prosecutors to effective coordination by State authority, as distinguished from nominal or occasional supervision, under a system where each county prosecutor is locally elected.

Appointment of the Attorney-General by the Governor is generally regarded as an integral part of the proposal. It is said that the popular election of an Attorney-General, who assumes a subordinate place upon the ticket, is ordinarily dependent upon the election of the Governor, the principal candidate. It is also argued that appointment of the Attorney-General by the Governor would vest in him not only the responsibility for law enforcement but also the power to discharge that responsibility.

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It is also argued that lack of administrative efficiency is unavoidably developed when the Governor is of one political party and the elected Attorney-General of an opposing one.

There is much disagreement as to the extent to which the State Department of Justice should supervise or control local prosecution. Various alternative provisions have been suggested by the National Conference of Commissioners which apparently run the gamut of the various proposals which have been made.

It is possible to have a State Department of Justice which would exercise a supervisory authority over the enforcement of the criminal law. This is the practice which has been adopted recently in California. It would represent no substantial innovation in New York, since the Governor has authority to supersede local district attorneys whenever he deems it advisable.

The second alternative suggested by the National Conference of Commissioners is to give the Attorney-General "exclusive control" over the prosecution of criminal proceedings. This does not provide for the appointment of local district attorneys by the Governor or the Attorney-General.

The third alternative, which represents the Federal practice, is to authorize the Governor to appoint the Attorney-General and to appoint the local prosecutors who, subject to the supervision and direction of the Attorney-General, shall have the authority to prosecute all violations of the criminal and penal laws.

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CHAPTER XVI

PROPOSED STATE DEPARTMENTS: REAL ESTATE

I. Introductory Statement

It has been widely suggested that the real estate business,[1] and the public generally, would greatly benefit from the creation of a separate civil department which would take over all the existing functions of government with respect to real property and assume such other functions as it might seem wise to assign to it. An adequate discussion of the problem requires a collation of the results of the experience of the real estate fraternity, as well as those of the public investors in real property.

The approach to the problem is a threefold one. In the first place, we have sought to outline the functions which a real estate department might perform. For that purpose a study has been made of the Constitutions and the statutory law of the forty-eight states to ascertain whether there exists in other states any precedent for such a department, and, if so, what the functions of the department are. We have also examined the statute law of the State of New York to determine the extent of supervision presently exercised by the State over the real estate business. The factual data thus collected reveal a wide variety of subject matter with which state governments have been prone to deal and which affect real property. To these must be added supervision over the proposed mortgage banks, if they become a part of our legal system.

In the second place, we have studied the nature of these functions in order to ascertain whether any common denominator might be found other than the mere fact that they deal, in some respects, with real property. It will be found that while many of the functions of government appertaining to real estate have a common denominator, many of them overlap into the proper functions of other departments. Thus, for example, the licensing of brokers and appraisers, while involving familiarity with real estate matters, also involves principles of licensing which are common to all privilege statutes. Again, supervision of real estate securities, while involving knowledge of real estate conditions, also involves considerations which are common to the supervision of other securities. It cannot be said, from our study, that all real estate

[1] In speaking of the real estate business reference is intended to the industry that concerns itself with the construction, operation, maintenance and financing of real property.

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problems are essentially unique, but it can be said that the presence of real estate considerations forms an important ingredient in all these governmental problems.

In the third place, we have studied the arguments and considerations which have been or might be advanced in favor of and against the establishment of a State Real Estate Department. Here we have considered the matter of functional efficiency from several points of view; from the point of view of encouragement to the industry; from the point of view of participation therein of large numbers of people; and finally, from the point of view of co-operation with other departments of the State.

It is not the purpose of this memorandum to advocate either the adoption or rejection of the proposal. It is only fair to state, however, that the Mortgage Commission of the State of New York, which has conducted this study, has in the conduct of its work felt the need of such a governmental agency.

In modern times, reorganization of investments has taken the place of liquidation. The days when default produced a prompt liquidation in which assets were turned into cash have now passed. It is no longer possible to sell large quantities of real property and convert them into cash to satisfy the claims of mortgage holders. Recent defaults in real estate, as in public utilities, have involved the issuance of new securities and the uninterrupted operation of the underlying security under the same or new management. In the case of the mortgages on New York real property which went into default, the new management has consisted largely of trustees appointed by the courts. Utility and industrial corporations, which have been the subject of reorganization for many years, are usually turned over to private management without the surveillance of the courts. This judicial supervision of the conduct of reorganized properties is a new departure in the history of reorganization and liquidation and it is too early to be able to say whether it will more effectively perform the task imposed upon it.

II. Constitutional and Statutory Provisions of Each of the 48 States Relating to a State Real Estate Department

CONSTITUTIONAL PROVISIONS

No Constitution of any of the forty-eight states provides for a Real Estate Department, Board, Commission, Bureau of Division, by that name or any similar name. Most of the Constitutions, however, do contain some provisions with respect to real estate or land. The most

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common relate to taxation of land, school lands owned by the state and forest lands. In addition, there is a definite tendency within recent years to include in the Constitutions more particular references to land and real estate.

Attached hereto, marked Exhibit "A", is an enumeration of each section of the New York State Constitution relating to the subjects of land and real property.

Attached hereto, marked Exhibit "B," is an enumeration of various sections of the Constitutions of several states, other than New York, relating to the subject of land, real estate and real estate finance. This exhibit makes no effort to be all inclusive, but merely serves as an indication of some of the subjects relating to real estate and finance which are treated in several of the state Constitutions.

STATUTORY PROVISIONS

Although, as indicated, the state Constitutions do not provide for the creation of Real Estate Departments, Boards or Commissions, nevertheless the Legislatures of at least twenty-two states have enacted General Laws providing for a State Real Estate Commission, either by that name or by a similar name.

Alabama	Alabama Real Estate Commission
Arizona	State Real Estate Commission (Ch. 53 of the Laws of 1938)
Arkansas	Arkansas Real Estate Commission
California	State Real Estate Department (Title 10, act. 112, secs. 1–20-a)
Colorado	State Real Estate Department
Delaware	State Real Estate Commission
Florida	Florida Real Estate Commission
Georgia	State Real Estate Commission
Iowa	State Real Estate Commission
Louisiana	State Real Estate Commission
Montana	Real Estate Commissioner
Nevada	State Real Estate Board
New Jersey	State Real Estate Commission
North Carolina	State Real Estate Commission
Ohio	State Board of Real Estate Commissioners
Oregon	Real Estate Commissioner
Vermont	State Real Estate Commission
Virginia	State Real Estate Commission
Washington	Office of Real Estate Director
West Virginia	West Virginia Real Estate Commission
Wisconsin	State Real Estate Commission
Wyoming	State Real Estate Commission

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The name "Real Estate Commission" implies supervisory powers over various phases of land and real property. However, this is not the fact. An examination of the powers and duties of each commission reveals that in every instance, with two exceptions, the commissions' functions are confined solely to the licensing of real estate brokers and real estate salesmen.

The two exceptions are the states of Arizona and California where, in addition to licensing powers, the Real Estate Commissions are granted powers relating to the supervision of the sale of subdivided lands.

In most of the twenty-two states, the commission consists of three members appointed by the Governor and serving for a term of three years. In at least twelve the compensation of the members is on a per diem with expenses basis, with the per diem fee ranging from $3 to $25. In at least four states, the members receive expenses only.

The commissions' primary functions consist of the granting, denial, suspension or revocation of licenses to real estate brokers and real estate salesmen. The applicant for a license must possess certain required character qualifications, and a fixed minimum of education and knowledge of real estate. In at least nine states a bond in favor of the state, conditioned upon the applicant's compliance with the proper conduct of his business, is required to be given as a prerequisite to a license. The privilege of the broker to remain in business depends upon his continued compliance with particular standards of conduct. Departure from the standard invites complaint. After a hearing the commission may suspend or revoke his license.

Most of the commissions are granted powers to:

(1) Investigate the conduct of brokers and real estate salesmen;

(2) Conduct hearings; and

(3) Compel the attendance of parties and witnesses by subpoena.

All of the commissions are empowered to collect license fees ranging from $15 to $25 as a prerequisite to the issuance of a license.

The definition of a broker varies in each of the states. The most common definition includes the following:

(1) Sells or offers for sale real property;

(2) Buys or offers to buy real property;

(3) Negotiates the sale, purchase or exchange of real property;

(4) Leases or offers to lease real property;

(5) Rents or offers to rent real property;

(6) Exchanges or offers to exchange real property.

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In at least three states: Florida, North Carolina and Oregon, the definition of a broker includes "appraises or offers to appraise" real property.

In at least three states: Arkansas, Florida and North Carolina, the definition of a broker includes "auctions or offers to auction" real property.

In at least eighteen states, the commission of "one act," as defined by the Legislature, results in the requirement that the person be licensed.

Most of the originating acts exempt certain classes of persons from the necessity of being licensed. The most commonly exempted classes are:

(1) Owners;
(2) Lessors, who lease property in connection with management or investment therein;
(3) Persons with powers of attorney;
(4) Attorneys at law, acting as such;
(5) Executors and court appointed officers, such as receivers and administrators;
(6) Trustees under a deed of trust or will.

The majority specify grounds for the suspension or revocation of licenses, such as:

(1) Fraudulent practices;
(2) Acting for more than one party in a transaction without the knowledge of all the parties for whom he acts;
(3) Failing to account for or remit moneys properly coming into his possession, which belong to others;
(4) Paying a commission or consideration for acts performed in violation of this chapter;
(5) Forgery, embezzlement, obtaining money under false pretenses, conspiracy to defraud, larceny;
(6) Dishonest advertising;
(7) Violations of provisions of the chapter relating to the licensing of brokers and real estate salesmen;
(8) Untrustworthiness or incompetency to act as a real estate broker or salesman.

Penalties for operating without a license vary with each state. In several states it is a misdemeanor; in others provisions are made for fines or imprisonment or both; and in most states the unlicensed broker is prohibited from suing for commissions.

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Most of the statutes provide for the right to appeal to the courts from an adverse decision of the board or commission.

As already indicated, only the states of Arizona and California grant additional powers to their respective Real Estate Commissions. In the State of Arizona, chapter 53 of the Laws of 1937, section 31, *et seq.*, and in the State of California, title 10, act 112, section 20 (a) *et seq.* deal with the subject of subdivided lands.

The substance of the California provisions is as follows:

Prior to the offer of sale of subdivided lands by an owner or subdivider he must notify in writing the Real Estate Commissioner, who is the chief officer of the Real Estate Department, of his intention to sell, and he must furnish the following information:

(1) Name and address of owner;

(2) Name and address of subdivider;

(3) Legal description and area of land;

(4) True statement of condition of title of land including encumbrances thereon;

(5) The terms and conditions of sale;

(6) Copies of contracts intended to be used;

(7) Such other information as owner, agent or subdivider may desire to present.

The Real Estate Commissioner may require additional information, at the expense of the owner or subdivider, and he may investigate the subdivisions being offered for sale. If the examination or investigation discloses that the sale or lease of the land would constitute misrepresentation to or deceit or fraud of the purchaser, orders of prohibition may issue from the Real Estate Commissioner, preceded, however, by a hearing.[2]

The subjects of land, real estate, real property, finance and mortgages are treated in one form or another by many of the departments, divisions, boards or bureaus now existing in the State of New York. Attached hereto, marked Exhibit "E", is an enumeration and brief description of each of said departments, divisions, boards or bureaus having functions relating to such subjects.

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[2] The Arizona statute is, in substance, similar to California's. Art. 9-a (N.Y.R.P.L.), adopted in 1936 contains elaborate provisions for supervision by the Department of State with the aid of the Attorney-General over the sale of subdivided lands.

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State Planning Boards

A recent and significant development in many of the states has been the creation of State Planning Boards.[8]

In New York, chapter 304 of the Laws of 1935 created in the State Executive Department a Division of State Planning with a State Planning Council at its head. Generally, the powers and duties of the various State Planning Boards are to make surveys, prepare maps and publish information on land use and classification; to make studies of matters relating to the physical, social and economic development of the resources in their respective states; to prepare plans for the physical development of the state and to advise and co-operate with the various departments and agencies of the state; to develop long-term policies in relation to agriculture, land and water utilization, flood control, conservation and other regulations for land settlement, tree-cutting, watershed protection and the preservation of the beauty of the country-side; and to promote public interest in the problems of state planning.

State Housing Boards

Another recent development in most of the forty-eight states has been the creation by the various state Legislatures of State Housing Boards. The following thirty states have adopted legislation with respect to State Housing:

Alabama	Louisiana	Ohio
Arkansas	Maryland	Oregon
Colorado	Massachusetts	Pennsylvania
Connecticut	Michigan	Rhode Island
Delaware	Montana	South Carolina
Florida	Nebraska	Tennessee
Georgia	New Jersey	Texas
Illinois	New York	Vermont
Indiana	North Carolina	West Virginia
Kentucky	North Dakota	Wisconsin

In New York, the Division of Housing was transferred from the Department of Public Works to the Department of State. (L. 1932, ch. 507.) It is supervised by a Board of Housing consisting of five members appointed by the Secretary of State with the approval of the Governor, who serve for a term of five years. Its duty is to study housing needs and conditions throughout the State, co-operate with local housing and planning boards and promote and supervise low rental

[8] Some of the states having such boards are: Florida (1935), Georgia (1937), Iowa (1937), Maryland (1933), Nevada (1937), North Carolina (1937), Tennessee (1935), Wisconsin (1935).

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housing projects under the terms of the State Housing Law. (L. 1926, ch. 823, as amended by L. 1927, ch. 35; L. 1928, ch. 722; L. 1930, ch. 872; L. 1931, ch. 557; L. 1931, ch. 558; L. 1932, ch. 507; L. 1933, ch. 802; L. 1934, ch. 4; L. 1934, ch. 540; L. 935, ch. 310, in effect April 5, 1935.[4])

Real Estate Affected with a Public Interest

Almost 40 per cent of the national wealth consists of land values. It has been estimated[5] that in 1932 land worth 112.4 billions of dollars constituted 30 per cent of the national wealth; and that buildings on that land worth thirty-seven billions of dollars constituted 9.9 per cent more.

A statistical survey[6] of the total land assessments in the forty-eight states indicates:

(1) That the value of real estate in the State of New York is approximately two and a half times greater than the state having the next highest assessed valuation.

(2) That the value of real estate in the State of New York is approximately ten times greater than the average of the other states.

(3) That the value of real estate in the State of New York has increased from 1928 to 1938 from $12,969,433,733 to $25,-548,805,000.

A legislative declaration that a particular business or occupation is clothed with a public interest appears to be no more than the crystallization of public opinion at a given time. Two enlightening statements pointing to a description rather than a definition of public interest appear in the case of *Nebbia* v. *New York,* 291 U. S. 502, and *Tyson and Bro.* v. *Banton,* 273 U. S. 418. In the Nebbia case Mr. Justice Roberts, speaking for the Court, said:

> "It is clear that there is no closed class or category of businesses affected with a public interest and the function of courts in the application of the Fifth and Fourteenth Amendments is to deter-

[4] For a comprehensive report on the advisability of reposing in a State Department of Real Estate functions and duties relating to slum clearance and low cost housing, reference is made to "Housing and Old Law Tenements," a report prepared by the Mortgage Commission of the State of New York (1938) under the supervision of Saul Bernstein, C. E., and Ernest E. Smith.

[5] See Robert R. Doane, *Measurement of American Wealth* (1933).

[6] The attached exhibits C and D are respectively an enumeration of the assessed land valuations in each of the forty-eight states and the assessed land valuations in New York from 1920 to 1938.

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> mine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

and Mr. Justice Holmes in his famous dissent in the Tyson case said:

> "that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."

The advocates of the creation of a State Department of Real Estate contend that they represent a preponderant public opinion on the necessity of governmental regulation of all phases of the real estate business. They argue that a State department upon which is to be imposed regulatory and supervisory duties over real estate activities has become a crying need within the past ten years.

III. Functions of a State Real Estate Department and Arguments in Support of its Creation

After a thorough and comprehensive study of the entire guaranteed mortgage situation, the Joint Legislative Committee to Investigate the Guaranteed Mortgage Situation, in February 1936, rendered its report to the Legislature of the State of New York (Legislative Document 1936, No. 79), in which it unequivocally recommended an amendment to the New York State Constitution providing for a Department of Real Estate and Mortgages, and said:

> "We recommend an amendment to the Constitution providing for the creation of a Department of Real Estate and Mortgages. After the creation of such department, we recommend that the future operation of mortgage banks, savings banks, and building and loan associations and title insurance companies be placed under the supervision of such department. This department could also perform a useful function by gathering statistics and information of building activities throughout the State. This would be valuable to mortgage lenders, real estate owners, and builders alike. It is self-evident that a lending institution may make a sound mortgage loan on an office building or an apartment house in a community which needs the same, but that much loan may become impaired in the future if *too many* office buildings or apartment houses are

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built in that community. Such departments should also be charged with the study and improvement of building codes so as to improve the quality of buildings; with the study of improved new materials and the power to permit the use of same without excessive delays or expense; with the promulgation of regulations for the improvement of sanitary conditions in buildings, reduction of fire hazards, etc.

"Pending the adoption of such constitutional amendment, we recommend that a bureau be created in the Department of Banks to be known as the Bureau of Real Estate and Mortgages, which shall be charged with the duties above set forth."

In fact prior to this report Assemblyman Holley in 1935 introduced a proposed amendment to article V of the State Constitution which would have added a new State Department of Real Property to the departments already provided for by that article. (A. Int. No. 88, Pr. No. 88.) This proposed amendment was referred to the Committee on Mortgages of the Assembly but was never reported out of that committee. (New York Legislative Index 1935.)

The following is an outline of the functions and arguments in favor of a State Real Estate Department.

A. Real Estate Brokers and Salesmen

Functions:

To supervise and administer all of the functions relating to the issuance, denial, suspension or revocation of licenses of real estate brokers and salesmen.

Comment:

(1) In at least twenty-two states the supervision and administration of the licensing of real estate brokers and salesmen is performed by a Real Estate Department, Board or Commission. A detailed statement of the organization, personnel, powers, duties and other related matters with respect to such supervision and administration in other states is contained under statutory provisions of section II of this chapter.

(2) At the present time, in New York, these functions are being performed by the Division of Licenses of the Department of State, pursuant to article 12-A of the Real Property Law.

(3) Despite the existing requirements for the licensing of real estate brokers and salesmen, evils have arisen. The various real estate boards have from time to time recommended changes in the present laws. More stringent regulation is apparently the consensus of opinion. At the

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present time the issuance, denial, revocation and suspension of licenses of real estate brokers is merely one of the numerous licensing functions of the Division of Licenses of the Department of State. In addition to such licensing, the division supervises the licensing of private detectives, auctioneers, steamship ticket agents, theatre ticket brokers, billiard and pocket billiard rooms, and records the appointment of notaries public.

The duties attendant upon the proper conduct of the licensing of real estate brokers are said to be of sufficient importance to have them performed by a State Real Estate Department. At least twenty-two other states have deemed it advisable to have State Real Estate Departments or Commissions perform such functions. Many have urged that the State of New York do likewise.

B. Subdivided Lands

Functions:

To supervise the sale of subdivided lands, particularly with respect to installment contracts.

Comment:

(1) As indicated, in the states of Arizona and California, the State Real Estate Commission and the State Real Estate Department respectively, have the powers of administering and supervising the sale of subdivided lands. A resumé of the powers of the California Real Estate Department is contained under statutory provisions of section II, *supra*.

(2) At the present time, in New York, these functions are being administered by the Department of State, with the legal aid of the Attorney-General, pursuant to article 9-A of the Real Property Law enacted in 1936.

(3) The advantage of having a State Real Estate Department supervise and administer these functions has often been stressed. The personnel of the Real Estate Department would be comprised of men thoroughly experienced in real estate and particularly acquainted with the abuses which have heretofore arisen in connection with the sale of subdivided lands.

Innocent people, particularly of the so-called middle and lower classes, people who have worked hard to eke out a livelihood and who have succeeded in saving several hundreds of dollars, have been the victims of real estate sharpsters and have been mulcted of their life's savings. At the present time there are prosecutions pending in the Court of General Sessions, New York county, against a group of so-called "real estate developers" for the fraudulent sale of subdivided lots. The

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Department of State of New York, as now constituted, has at least eight different divisions, each of which covers a particular sphere of State government and at least fifteen different bureaus. Its functions are numerous and varied. The same may be said of the Attorney-General. His duties are arduous enough without saddling his department with additional functions. The subject matter is said to be so coupled with a public interest as to warrant supervision by a separate, specialized State agency. Such an agency would be fully equipped for the supervision and administration of the sale of subdivided lands. In fact, such supervision would be one of its chief functions. It would not be as it is today, and incidental function constituting just another phase of the existing State department—the very name of which negatives the existence of any duties relating to real estate.

C. Research and Statistics

Functions:

(1) To gather and collate statistics and information of building activities throughout the State and to furnish such information to real estate owners, mortgage lenders and builders.

(2) To make researches and appraisals and to supply said information to all local subdivisions of the State whose proper functioning requires such data.

(3) To furnish appraisals to fiduciaries, such as guardians, executors, administrators, etc., seeking to make investments of trust funds.

(4) To make appraisals of real estate of estates of deceased persons.

Source:

Suggested by a reading of the following:

(a) An article by M. Morgenthau, Jr., chairman, Committee for the Creation of a State Real Estate Mortgage Authority, appearing in the *Real Estate Record and Builders Guide,* March 10, 1934, pp. 6 and 7.

(b) Decedents Estate Law, section 122.

D. Liquidation and Reorganization of Certificated Mortgages

Functions:

To supervise and administer the liquidation and reorganization of certificated mortgages at the termination of the existence of the Mortgage Commission of the State of New York.

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Comment:

The Mortgage Commission was created by chapter 19 of the Laws of 1935 and commenced active functioning in April 1935. The statute provides that the commission exist until January 1, 1940. It was created for the express purpose of aiding certificate holders of the various title companies of the State of New York to reorganize and liquidate their holdings. It assumed its tremendous task and has, and is, accomplishing its purposes in a most expeditious manner. (See the Annual Report of the Mortgage Commission for the period ending December 31, 1937. Legislative Document 1938, No. 60.)

Despite the scheduled termination of the commission by January 1, 1940, there are certain functions now being performed by the commission, the necessity for which will continue.

Upon the reorganization of an issue, the general policy has been to appoint trustees who have taken over jurisdiction of the respective issues. However, in certain instances, certificate holders have objected to the appointment of outside trustees and have desired supervision and administration over the issue by the Mortgage Commission, and in other issues appointed trustees have refused to take over because the issues involved were too poor. The Mortgage Commission has been appointed trustee in reorganization proceedings in twenty different certificated issues and is now actively engaged in such capacity in nineteen of said twenty issues, the twentieth one having been wholly satisfied during its trusteeship.

At the present time, the commission has under its jurisdiction issues in an aggregate amount of about $176,000,000. The present indications, from the commission's experiences, are that issues aggregating almost $50,000,000 will not be reorganized at all, either because the issues are very good as to income and certificate holders do not desire the appointment of outside trustees, or because the issues are very poor and the appointed trustees refuse to take over. In any event, the Mortgage Commission, or some other State agency, will have to continue the administration of these $50,000,000 of certificated issues.

It has been the practice of the Additional Special Terms of New York, Kings and Westchester counties, handling the reorganization of certificated issues, to require submission of all plans for the extension and modification of mortgages or any other type of reorganization of the issue, to the Mortgage Commission, and to obtain its recommendations.

Pursuant to section 14-A of the Mortgage Commission Act (ch. 708, L. 1937), trustees are required to file an annual account setting forth their income, expenditures and distributions for the fiscal year. A copy

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of the accounting must be served on the Mortgage Commission and it is the function of the commission to examine the accounting and to make recommendations to the court concerning it. The commission will cease functioning by January 1, 1940, and possibly sooner. The thousands of certificated issues which have been trusteed will not be liquidated for many years to come. The Legislature has deemed it necessary to direct a State agency to examine the trustees' accountings and to aid the Court in its determination of their propriety and accuracy. At the termination of the commission, another State agency will have to assume the burden.

We, therefore, have the following four concrete functions now being performed by the Mortgage Commission, the necessity for which will continue to exist for many years to come and which will have to be continued by another State agency:

(1) To act as trustee with respect to the issues where it has been duly appointed trustee by court order.

(2) To administer approximately $50,000,000 of certificated issues which cannot be reorganized.

(3) To examine all proposed plans of reorganization and to make recommendations to the court with respect thereto.

(4) To examine all of the trustees' accountings and to report recommendations to the court thereon.

A State Real Estate Department is said to constitute the logical recipient of the functions now being performed by the Mortgage Commission.

E. Real Estate Appraisers

Functions:

To supervise and administer the issuance, denial, revocation or suspension of licenses of real estate appraisers.

Comment:

(1) In at least three states: Florida, North Carolina and Oregon, the definition of a real estate broker who is required to have a license includes one who "appraises or offers to appraise" real property.

(2) Pursuant to section 4, subdivision 21 of the Mortgage Commission Act, which authorized and empowered the Mortgage Commission to initiate and carry on such investigations and researches as would assist it in recommending the enactment of appropriate legislation, the Mortgage Commission, on December 31, 1935, rendered a report to Governor Lehman and the Legislature of the State of New York

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(Legislative Document 1936, No. 63) making certain recommendation for proposed legislation. One of the items recommended was an amendment to the Real Property Law which would require the licensing and regulation of real estate appraisers. The report (p. 37) sets forth the proposed amendment.

(3) In February 1936, the Joint Legislative Committee to Investigate the Guaranteed Mortgage Situation, in its report to the Legislature of the State of New York, recommended the licensing and regulation of real estate appraisers and said:

> "Perhaps the most important element in connection with mortgage lending is sound appraisal. In California appraisers are licensed by the state, and may be removed by a state officer. A similar system should be adopted here. In this State anyone who chooses to call himself such is an appraiser. We, therefore, recommend that all appraisers of real estate, upon whose appraisal loans are made by corporations organized under the Banking Law or the Insurance Law, shall be licensed under the State Education Law after having passed such examination, oral and written, as the Department of Education shall determine. To be eligible for such license they should have had not less than eight years' actual experience in connection with real estate appraisal or in the purchase, sale or financing of real estate. We recommend that such appraisers shall be known as certified real estate appraisers, and shall be under the supervision of the State Department of Education, which may, after hearing and for cause, revoke the license of any certified appraiser for incompetence, dishonesty or other misconduct. All appraisals hereafter made by such certified appraisers shall be sworn to and shall set forth, among other things, the assessed value of the land, the assessed value of the improvement, a statement of sales of similar properties in the same general location for three years prior to such appraisal and the amount for which they were sold, if ascertainable, an itemized statement of the income and expenses of the property, and a detailed statement of the facts upon which the appraiser relies in fixing his appraisal of the land and his appraisal of the building, and the method used by him in arriving at the appraised value. In the case of appraisals for building loans, the appraiser shall make a detailed estimate of the income and expenses based upon the experience of similar properties in the same general locality. The original of such appraisal shall be retained in the files of the Mortgage bank, and a copy thereof shall be filed with the Superintendent of Banks. No loan

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shall be made unless such appraisal shows that said loan meets with the requirements above mentioned. Every property upon which a loan is made by a mortgage bank shall be re-appraised on each renewal of the loan."

(4) William Stanley Miller, president of the *City Tax Record,* in an article entitled "Needless Prejudices on Taxes Assailed," stated: "Give us new tools, a more scientific method of determining the values of your properties, and we will gladly revise our schedules."

There is such variance in appraisals of the same property that in many instances the values quoted seem to represent pure guesses. While there is room for slight variation in opinions with respect to the value of property, the disparities that presently occur seem due to the fact that appraisers often overlook some precise physical characteristic of the property. To overcome this, the National Association of Real Estate Boards, at its annual convention held in Boston in June 1929, prepared a pamphlet on Standards of Practice for Real Estate Appraisers. It sets forth facts which the appraiser must consider in arriving at his appraisal. In inquiring into the facts so set forth, the appraiser is precluded from arriving at an opinion out of all proportion to the value of the property—a situation made possible by the conscious or unconscious disregard of some physical characteristic of the property. One decided advantage in having uniform standards of appraisal would be to create a single and proper standard for the assessment of real estate for the purpose of taxation. It would also serve to create stability in private sales and to instill confidence in owners and purchasers of real estate.

The licensing and regulation of real estate appraisers by a State agency would require that the personnel of the agency be comprised of real estate experts familiar with the problems of real estate financing and mortgage investments. A State Real Estate Department would have such a personnel and would logically and properly be the agency to administer such functions.

F. Real Estate Contractors

Functions:

To supervise and administer the issuance, denial, revocation and suspension of licenses of real estate contractors.

Comment:

(1) The state of Arizona has enacted an elaborate law (L. 1933, ch. 104) relating to and regulating the business of real estate contracting. The law defines "contractor" as:

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"A person, firm, co-partnership, corporation, association or other organization, or any combination of any thereof, who for either a fixed sum, price, fee, percentage of other compensation other than wages, undertakes or offers to undertake, or purports to have the capacity to undertake to construct, alter, repair, add to or improve any building, highway, road, railroad, excavation or other structure, project, development or improvement other than to personalty, or any part thereof; provided, that the term 'contractor,' as used in this act, shall include sub-contractor, but shall not include anyone who merely furnishes materials or supplies without fabricating the same into or causing the same in the performance of the work of the contractor as herein defined."

The law provides for certain prerequisite qualifications prior to the issuance of the license to the contractor.

(2) If such a law be enacted in New York, the State Real Estate Department would have the personnel properly to supervise and administer such licensing.

G. Real Estate Abstractors

Functions:

To supervise and administer the issuance, denial, revocation and suspension of licenses of real estate abstractors and examiners. (This provision not to apply to duly admitted attorneys.)

Comment:

(1) The state of Montana has adopted a statute (L. 1931, ch. 105) providing for the regulation and licensing of real estate abstractors and examiners.

(2) Real estate abstractors fulfill an extremely important function. Purchasers of real property investing large sums of money depend upon the abstractors' examination of the public records to ascertain whether their sellers have good and marketable titles. The work, if properly performed, requires expert training. Its personnel should be under State regulation and if it is, the State Real Estate Department would be the appropriate State agency.

H. Outdoor Advertising

Functions:

(1) To regulate outdoor advertising.

(2) To supervise and administer the issuance, denial, suspension or revocation of licenses to outdoor advertisers.

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Comment:

(1) In his 1938 annual message to the Legislature of the State of New York, Governor Lehman stated: "Again I most strongly urge that action be taken to regulate outdoor advertising. The public interest clearly demands it."

(2) Constitutional and statutory provisions in other states:

(a) The Constitution of the state of Massachusetts contains the following provision: "Section 180. Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law."

(b) The state of North Carolina, in 1935, enacted section 7880 (83) of the North Carolina Code, which provides for regulation by the state of outdoor advertising and requires every person, firm or corporation who or which is engaged in the business of outdoor advertising to obtain a license as a prerequisite to the conduct of such business.

(c) The state of Vermont, in 1933, passed Public Act No. 146, restricting and regulating outdoor advertising.

(d) The state of California, in 1933, enacted chapter 341 of the Laws of 1933, which is a detailed and elaborate enactment with respect to the regulation and licensing of persons engaged in the business of outdoor advertising and the issuance of permits to them.

The enactments of the states of North Carolina, Vermont and California are for revenue as well as regulatory purposes.

(3) New York State:

(a) The Village Law of the State of New York provides:

"Sec. 89 (1927). The board of trustees of a village: Subd. 47 (Billboards) may regulate and control the erection, construction and use in, upon and near streets and other public places, of billboards and other advertising media."

(b) The Conservation Law, section 675 (L. 1934, ch. 44) restricts the use of signs and advertising structures and devices adjacent to State parks.

New York has no State-wide regulation of outdoor advertising at the present time. If the Governor's recommendation is adopted, it has been suggested that the State Real Estate Department would be the proper State agency to supervise, administer and regulate the issuance,

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denial, suspension or revocation of the licenses. It has further been suggested that in New York State the requirement that outdoor advertisers be licensed should be primarily for regulatory purposes. The objects and purposes of such legislation should be to enhance safety of travel, prevent obstruction of vision, increase values of real estate and maintain the natural beauty of the State.

I. Public Lands

Functions:

(1) To aid in acquiring lands for public use.

(2) To negotiate all leases and approve recommendations, if called upon to do so, with respect to the handling of sales, exchanges or leasing of State-owned land, such as watersheds, aqueducts, roads, bridge approaches, parks, playgrounds, camp sites for State and Federal use.

(3) To act as consultant in the settling of disputes by the Attorney-General in riparian rights, land under water, grants, etc.

(4) To act in advisory capacity to the Attorney-General in all real estate matters handled by him, such as condemnation proceedings, grade elimination and other litigation concerning real estate.

(5) To supervise, operate and dispose of State lands whether acquired by purchase, escheat, forfeiture for taxes, grant or otherwise.

Source:

Suggested by a reading of the following:

(a) Article II of the Public Lands Law.

(b) Statutes of Arkansas, 1937, chapter 99, section 8601, *et seq.*

(c) Legislative Manual of New York 1937, pp. 402, 409.

Comment:

Public lands in the State of New York not devoted to any specific purpose are administered by the Commissioner of the Land Office. All State buildings under the supervision of trustees are administered by the Division of Public Buildings. These functions might more appropriately be granted to the State Real Estate Department, thus centralizing into one department the various functions relating to real estate which are now distributed among numerous State departments, divisions and bureaus.

J. Housing

Functions:

(1) To integrate and supervise all local housing authorities.

(2) To perform all of the functions of the present State Housing Board.

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(3) To furnish authoritative data and charts showing real estate trends, sales, construction volume and current prices of material and labor.

(4) To supervise the enforcement of the Multiple Dwelling Law.

(5) To act as arbitrator in all major labor disputes affecting real estate.

(6) To co-operate with all municipalities for the elimination of slums.

(7) To encourage all types of new construction:

(a) For the low income group.

(b) For all other classes of population.

(8) To encourage capital to participate in low rent housing:

(a) By encouraging labor to change its basis for hourly rates to yearly rates.

(b) By regulating material prices.

(9) To receive grants from the Federal and State governments and with funds so obtained to acquire real estate.

(10) To make studies of housing facilities and congestion in the cities.

(11) To construct model communities for low cost housing in suburban areas near industrial centers.

Comment:

In his 1938 annual message to the Legislature of the State of New York, Governor Lehman said with respect to housing:

> "In order to enable the State to become an active member of the partnership I submit to you the following recommendations for constitutional changes:
>
> "That the State be authorized to establish a revolving fund from which loans can be made to municipal housing authorities and to limited dividend public housing companies.
>
> "That the Legislature be empowered to grant subsidies in limited amounts to municipal housing authorities.
>
> "That cities be empowered to make loans for low-cost housing within prescribed limits to municipal housing authorities for the same purpose. Any indebtedness so incurred should be exempted from constitutional debt limitations. Similar permission should be granted to other local units of government which may establish housing authorities.

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> "We can no longer afford to be backward in low-cost housing. We must forge the implements to make housing in the State of New York as progressive as any in the world. We cannot shirk that responsibility."

It has been urged that active participation by the State in slum clearance and low cost housing will be greatly facilitated by the creation of a State Department of Real Estate under whose supervision such participation would take place.

K. Zoning and State Planning

Functions:

(1) To perform all of the existing functions of the State Planning Council.

(2) To make surveys of the physical, social and economic resources of the State, so as to derive the best use therefrom.

(3) To maintain an up-to-date file of base maps for the State and to make all data available for each of the State departments, bureaus and commissions.

(4) To confer with the local planning boards and local zoning boards.

(5) To co-ordinate the development of cities, villages and incorporated towns lying within the same county with the development of the territory lying between or contiguous to such incorporated areas.

(6) To protect incorporated communities from adjacent non-conforming areas.

(7) To bring into a uniform plan regulations that may be imposed by cities upon territories outside of their borders; with respect to such plans, to determine the locations of cemeteries and offensive businesses.

Comment:

(1) Charles A. Rathkopf, in his *Law of Zoning and Planning,* 1937, points out that there is a distinction in form and function between zoning laws and planning laws.

He states:

> "The zoning laws were designed and intended to provide for the use of the land in the municipality, for it is well established that zoning ordinances constitute an essential feature of intelligent, progressive and adequate civic developments and such ordinances are encouraged and upheld for the health, safety and general welfare of the community.

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" 'Planning' was designed and intended to promote the making of a plan or general scheme for the future physical development and growth of the municipality. While there is co-ordination, they are separate and distinct in their functions and forms.

"The purpose of planning is to preserve through governmental agency the uniform harmonious development of municipalities and to prevent individual owners from laying out streets at their own will without official approval."

L. Taxation

Functions:

To create, as a wholly owned and controlled subsidiary of the Real Estate Department, a finance corporation. The State of New York could appropriate to such a corporation, a substantial sum of money to be used as a revolving fund. The corporation would have the power:

(a) To borrow money from Federal agencies.

(b) To lend money to owners of real property who have fallen into arrears of taxes and whose properties have become non-income producing, through no fault of their own, but through a catastrophe, such as fire, flood, tornado, etc. The loan to the owners is to be used for paying the tax arrears on the real property to the local taxing division.

(c) To take as security a first lien on the property.

(d) To grant the owner the right to pay off the arrears in installments proportionate to his financial capacity and the income from the property.

Source:

Suggested by a reading of the article by M. Morgenthau, chairman committee for the Creation of a State Real Estate Mortgage Authority, appearing in the *Real Estate Record and Builders' Guide* of March 10, 1934, p. 7.

Comment:

It has been urged that a State Real Estate Department cannot do much in regard to the assessment of real estate for tax purposes or with respect to the collection of the tax.

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In New York State taxes are raised by the following political subdivisions:

(a) State
(b) County
(c) Town
(d) City
(e) Village
(f) School District
(g) Highway Commission

In large cities, one annual tax provides for all purposes. (Benson and North, *Real Estate Principles and Practices,* pp. 24, 25.) The State has not imposed taxes on real estate since 1929 (*New York Real Estate, Its Taxation and Assessment*, by John E. Burton and Dorothy C. Burton, reported in the Journal of Land and Public Utility Economics of August 1937, at p. 257). The right to assess taxes on real property is lodged in the local subdivision of the State. Each county has a commission of equalization appointed by the supervisors (Tax Law, art. III). The assessment and collection of taxes is at the present time a purely local function. The State Tax Commission which deals with State taxes, exercises very little jurisdiction over assessments or taxes affecting real property, although it does act in an advisory capacity to the boards of supervisors (Tax Law, sec. 171). It attempts to determine the best methods of assessing all real property equitably and equally and to avoid conflicts and duplication of taxation on the same property (Tax Law, sec. 171). It examines and revises the valuation of real property to the end that there shall be equalization among all counties (Tax Law, sec. 174).

The advisory functions now performed by the State Tax Commission with regard to real estate taxation is said to be more properly a part of the proposed State Real Estate Department. Because of its greater familiarity and experience with real estate the department is urged as the logical State agency to integrate local taxation problems.

M. Cemeteries

Functions:

(1) To control lands for cemetery purposes.

(2) To grant its consent to use lands for cemetery purposes upon such conditions, regulations and restrictions as to it may appear necessary for the public health or public good.

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Source:

Suggested by a reading of section 451 of the Real Property Law; sections 65 and 83 of Membership Corporation Law.

Comment:

Under section 451 of the Real Property Law, power is conferred on the board of supervisors in the counties of Westchester, Rockland, Suffolk, Putnam and Nassau and on the board of aldermen in the counties of Kings, Queens and Richmond, to grant its consent to the use of land for cemetery purposes. The existence of cemeteries in cities and incorporated villages is forbidden, except with consent of the common council of the city or board of trustees of the village (sec. 65 of the Membership Corporation Law; see also sec. 83 of the Membership Corporation Law. sec. 62, Membership Corporation Law includes Erie county within this prohibition). Under Article 12 of the Village Law, cemetery lands are placed under the supervision of the Board of Cemetery Commissioners.

N. Trust Mortgages and Bond Issues

Functions:

To supervise the sale of trust mortgages and bond issues, the supervision thereof to be similar to that exercised by the Securities Exchange Commission.

Source:

Suggested by a reading of Benson and North, *Real Estate Principles and Practices*, p. 175.[7]

O. Real Estate Securities Exchange

Functions:

To supervise the sale of bonds and mortgages sold on the Real Estate Securities Exchange, the supervision thereof to be similar to that exercised by the Securities Exchange Commission over the listing and sale of securities in interstate commerce.

Source:

Suggested by a reading of an article on the Organization of the Real Estate Exchange, Inc., New York City, reported in the American Academy of Political and Social Sciences of March, 1930, pp. 26–32, entitled *An Organized Real Estate Securities Exchange* by Cyrus C. Miller.

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[7] For an unusually comprehensive study of possible rules and regulations to be applied by an administrative agency to the issuance under trust indentures of corporate obligations secured by real estate mortgages, see *The Trustee and the Trust Indenture: A Further Study*, Louis S. Posner (Yale L. Journal. March, 1937).

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P. Referee to Take Testimony

Functions:

(1) To take testimony in any proceeding or action involving real property in cases where a referee has heretofore been appointed by the Supreme Court.

(2) To hear and report thereon to the Supreme Court with its opinion, said report to be subject to confirmation by the court.

Source:

Suggested by a reading of the Real Property Law, sections 105, 116, 471, 473, 510, 511, 574, and 576.

Q. Condemnation Proceedings

Functions:

To determine the value of real estate taken in condemnation and to report thereon to the appropriate court with its opinion.

Source:

Suggested by a reading of the following:

(a) Condemnation Law, sections 13 and 14

(b) New York Constitution, articles I, VII

(c) Virginia Code of 1936, title 39, chapter 176, section 4360, etc.

R. Partition Actions

Functions:

In any partition action pending in the Supreme Court to determine how to divide the property among the parties to the suit, and to report thereon to the court with its opinion.

Source:

Suggested by a reading of the following:

(a) Civil Practice Act, section 1024

(b) Arizona Revised Code of 1928, article VI, section 4328, etc.

Comment:

Section 1024 of the Civil Practice Act provides that in a partition suit a physical division of the real property be made by three reputable and disinterested freeholders as commissioners. It would be preferable if such division were made by a State agency which specialized in real estate matters and whose real estate experiences could be utilized for the benefit of the parties involved.

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S. Receivers' Accounts

Functions:

To hear and report to the appropriate court on all accounts filed by the receivers of real property in foreclosure actions.

Source:

Suggested by a reading of General Corporation Law, section 190.

T. Payments of Amortization Under Present Moratorium Law

Functions:

To take testimony, conduct hearings and determine the installment payments of principal which an owner is required to make pursuant to section 1077-c of the Civil Practice Act.

There has been some suggestion to taper off the moratorium legislation by creating three categories of real estate to which the benefits of the legislation would not be available. Should such a suggestion find legislative approval, proponents of the new State department urge that it would be the best qualified and the most impartial agency to determine whether or not a particular piece of property falls within any of the three categories.

U. The Torrens Laws [8]

Functions:

(1) To examine and certify the official examiners of title under the Torrens Law, pursuant to the requirements laid down by the Court of Appeals.

(2) To act as guardian ad litem to represent incompetents, in connection with the Torrens Law.

Source:

(1) Suggested by a reading of the following: Section 377 of the Real Property Law; Benson and North, *Real Estate Principles and Practice,* p. 203.

(2) Suggested by a reading of the following: Section 388 of the Real Property Law; Benson and North, *Real Estate Principles and Practice,* p. 205.

Comment:

If by legislative enactment or by constitutional amendment land title registration were compulsory in all cases to the exclusion of the present

[8] Wendell P. Barker, Esq., has written an informed and enlightened article on *The Torrens Law—An Argument for It* (Printed by J. B. Lyon Co., Albany, N. Y.).

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recording practice, the proposed State Real Estate Department is urged as the most competent agency to certify official examiners under the Torrens Law and to act as guardian ad litem for all incompetents in connection with Torrens proceedings.

It is enlightening to note that in Pennsylvania by constitutional amendment the Legislature is empowered to pass laws providing for a system of registering land titles. (See Exhibit "B," infra.)

V. Trust Guardianship or other Representative Capacity

Functions:

(1) To take title to real property for charitable purposes where no trustee is named by the instrument creating the trust, or where the trustee named in the instrument has died or otherwise become incompetent.

(2) To act as special guardian for minors, lunatics, persons of unsound mind or habitual drunkards who are not represented by a committee duly appointed and where real property only is involved.

Source:

(1) Suggested by a reading of the Real Property Law, sections 111, 112, 113 and 116.

(2) Suggested by a reading of the Real Property Law, sections 107 and 116.

W. Fees and Commissions of Real Estate Brokers

Functions:

(1) To fix a uniform rate of fees and commissions for real estate brokers.

(2) To fix a uniform rate of commissions to which a broker would be entitled in the absence of an express agreement between himself and his principal.

Comment:

Attempts to fix the rates of real estate brokers' commissions have been made in the past by private real estate boards and frequently rates in the same locality have been conflicting. The rates fixed by a State Real Estate Department would have the stamp of fairness and would avoid conflicts in rates fixed by competing private organizations in the same locality.

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X. Trust Indentures

Functions:

To act as trustee under trust indentures executed pursuant to article 4-A of the Real Property Law.

Source:

Suggested by a reading of article 4-A of the Real Property Law.

Comment:

The Real Estate Department, being a State agency, would inspire greater confidence in prospective purchasers of securities issued under trust indentures. Furthermore, as an impartial body representing the interests of the investing public to the same extent as those of the obligor, it would be more likely to perform the functions of a trustee in an expeditious and competent manner.

Y. Repairs and Improvements

Functions:

(1) To create as a wholly-owned and controlled subsidiary of the Real Estate Department, a Finance Corporation. As indicated the State of New York could appropriate to the corporation a substantial sum of money to be used by it as a revolving fund. In addition to the powers heretofore noted under "L" this corporation could have the power:

(a) To borrow money from Federal agencies;

(b) To guarantee loans made by others to owners of real property for the purpose of making repairs and improvements on their property;

(c) To guarantee payment of loans secured by mortgages on real property; and

(d) To grant the owner the right to repay the loan in convenient installments.

Source:

Suggested by a reading of the Federal Housing Administration Act.

Comment:

The Federal Housing Administration Act may be used as a model for the creation by the proposed State department of such a finance corporation. The corporation's powers and functions may likewise be modeled after the Federal Housing Administration Act. Its creation would enable individuals to purchase homes for themselves and their families, would enable owners of real property to make necessary repairs

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and improvements on their homes and to comply with the provisions of the Multiple Dwelling Law. It is also asserted that its facilities would enhance and encourage the building industry.

Z. Mortgage Banks

Functions:

To be and act as a State agency designated to supervise and administer mortgage banks.

Comment:

At the present time* there are pending in the Senate and the Assembly of the State of New York bills authorizing the creation of privately owned mortgage banks under the supervision and regulation of the State. (See S. Int. No. 476, Pr. No. 484, January 15, 1938; A. Int. No. 745, Pr. Nos. 767, 2275, 2428, January 26, 1938.)

(For a clear and concise statement of the fundamental facts with respect to the creation, organization, functions and principles of mortgage banks, see an article by Prof. Maurice Finkelstein, General Attorney of the Mortgage Commission of the State of New York and John J. Clarke, Esq., formerly assistant to the chairman of the Mortgage Commission entitled: *Mortgage Banks—a Study in Real Estate Finance* (St. John's Law Review, November 1937) and an article by Wendell P. Barker, Esq., formerly chairman of the Mortgage Commission of the State of New York, entitled: *Why Mortgage Banks* (January 1936).)

Governor Herbert H. Lehman in his annual message to the Legislature in 1938 pointed not only to the desirability of mortgage banks but also to the necessity for governmental regulation. The pending bills provide for supervision by the Superintendent of Banks. Advocates of the proposed State Department of Real Estate claim that the Superintendent of Banks is not the proper state official in whom should be lodged supervision over mortgage banks. They argue that the name mortgage bank is a misnomer because, taking as a criterion the functions of the proposed banks, the name is misleading. The mortgage bank is not a bank at all. It will not receive deposits nor hold deposits subject to withdrawals of depositors. Nor will it perform banking functions. Essentially it will lend money to owners of real property, receive bonds and mortgages as security and sell its debentures to the public, secured by all of the bonds and mortgages it acquires. The one outstanding and fundamental characteristic of the business will be real estate.

* This study was submitted to the New York State Constitutional Convention Committee on February 15, 1938.

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Should these bills as urged by the Governor be adopted and the creation of privately owned mortgage banks thus be authorized, advocates of a State Department of Real Estate urge that the existence of such banks is of itself a sufficient reason for the creation of a State Real Estate Department. They say that the public welfare demands exact and expert supervision over these institutions and that a repetition of the sad experiences with respect to the guaranteed mortgage certificates sold by the title companies should not be risked. The State Banking Department and the State Insurance Department, which has also been suggested as the possible repository of supervisory powers, have at the present time a sufficient number of numerous, varied and responsible duties to perform. Their personnel is limited. To allocate the important duties of safeguarding the millions of dollars of public moneys which it is contemplated will be invested in the securities of the mortgage banks to an existing department not adequately equipped to handle the situation, may prove disastrous. The proposed Real Estate Department with its expert personnel and peculiarly apt facilities, one of whose primary functions will be the supervision and administration of mortgage banks, is urged as a much more effective mechanism for achieving the desired result.

IV. Arguments Against the Creation of a State Real Estate Department

Although there are many advantages, as above set forth, which would result from the creation of a State Department of Real Estate, there are certain disadvantages which must be analyzed.

(1) Students of government have often stated that efficiency and economy in the administrative end of government call for a minimum of State departments. (See A. E. Buck, *Administrative Consolidation of State Governments,* 1930.) When the number of departments increases, it becomes difficult for the executive head of the government to keep close watch over them and get the benefit of constant counsel with them. Hence, it might be argued that the creation of a new Department of Real Estate would tend to make our government less efficient. It is doubtful, however, how much practical validity this argument has when it is remembered that there are already eighteen active State departments. In addition, it would seem that the Governor would be aided in his administration of government by the counsel of the head of a separate Real Estate Department; the problems of real estate are tremendously important in New York, and the creation of a unified department to handle these problems would seem an aid to efficiency in administration rather than the opposite.

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(2) It is also argued that all State departments should have as their basis a major function of government and that the proposed Real Estate Department would not have such unified major function. Thus it is said that the Real Estate Department would simply be a catch-all department encompassing within its bounds numerous miscellaneous matters, the only common denominator of which would be that they all touch on real estate in some way or other. Thus, by way of contrast, all the work of the Banking Department revolves about banks; similarly in the Insurance Department.

(3) Another argument against the establishment of a State Real Estate Department is that the various functions in connection with real estate are at present being handled by various bureaus, departments and statutes; no good purpose, it is said, would be served by taking these functions from their present repositories and consolidating them into the new Real Estate Department. In fact, some have urged that by so doing, the valuable relationships at present existing between the different bureaus among themselves and with the public would be lost. (See Harold Walker, *Theory and Practice in State Administrative Organization,* 1930, p. 251).

In answer to this argument advocates of the new department point to the years following the Constitutional Convention of 1915 during which the numerous independent departments were consolidated into the relatively few State departments which we have today. At that time, they say the same cry was raised but the change resulted in better administration of government. For example, at the present time they call attention to the fact that the Division of Housing and the licensing of real estate brokers are in the Department of State, and urge that there seems to be no logical reason why this should be so. On the contrary, the orderly administration of government would seem to call for the consolidation of these functions along with the other real estate functions in one real estate department.

(4) Another disadvantage to the creation of a State Department of Real Estate is that such a proposal would bring forth opposition pressure groups anxious to defeat the new proposal for selfish purposes. In this way it is argued the important substantive reforms of real estate in this State would be defeated simply because of the procedural set-up, under which it is sought to have them brought about, to wit, the creation of the State Department of Real Estate. (See W. Brooke Graves, *American State Government,* 1936, p. 77.)

Again, the advocates of the plan claim that the same situation exists whenever any reform is promulgated and, as in the case of every other reform, the opposition pressure groups can usually be defeated if the

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reform is important enough and vital enough to the general interests of the State, as the Real Estate Department is claimed to be.

(5) Another argument in opposition to the State Department of Real Estate is that real estate problems vary widely in the State and, therefore, many of these problems do not lend themselves to State-wide treatment. Although it is true, the advocates answer, that farm land in upper New York State does not present the same problem as land in the heart of New York City, yet many of the problems of real estate are the same throughout the State and even in the cases where they are different, all phases can benefit by a central, co-ordinating department. Even in strictly local problems, such as zoning, for example, the importance of larger treatment, so that the local problem may be treated as a part of a co-ordinated whole, is said to be of much value. Thus, housing is pointed to as essentially a local problem which differs from locality to locality. Yet the Federal government feels that housing is enough of a national problem to set up a national authority to deal with it. Obviously, then, we are told that the problem of housing and many other real estate problems may well be treated by a State-wide authority.

(6) To the further argument that the creation of a Real Estate Department will be wasteful and expensive, the proponents answer that to the extent that it will take over the functions presently being performed by other bureaus and departments, the expenses of the Real Estate Department will merely be a replacement of the expense of these other bureaus; and because of the economies which would be effected by unified operation of these functions important savings are claimed. Insofar as new functions, not already performed, will be undertaken by the Real Estate Department, the extra expense is conceded but it is contended that it will be money well spent.

(7) The creation of a Real Estate Department might interfere with various phases of real estate as, for example, real estate financing. Thus, it is argued that if a Real Estate Department were set up, there must of necessity be restrictions and regulations which would hamper free activity in different phases of real estate and real estate financing. This is true, but people and temptations being what they are, there must of necessity be these restrictions and regulations. The same cry was raised when the Securities Exchange Commission was set up but it seems to be generally conceded now that the advantages of the Securities Exchange Commission more than outweigh its disadvantages.

The recent history of real estate and real estate financing clearly indicates the need for regulation if real estate is to remain an important

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field for investment. Those who urge the creation of the new department claim that it is the proper and natural agency to promulgate and administer adequate criteria of conduct in this field.

V. Factual Conclusions

(1) No Constitution of any of the forty-eight states provides for a Real Estate Department, Division, Bureau or Board, by that name or any other similar name.

(2) The Constitutions of the various states, although they contain only general provisions relating to the subject, indicate a definite tendency within recent years to include more particular subjects relating to land and real estate.

(3) At least twenty-two states have Real Estate Commissions, Departments or Bureaus by virtue of statutory enactment. The powers of these agencies are restricted to the supervision of the licensing of real estate brokers and salesmen, except in the states of Arizona and California, where their powers also include supervision over the sale of subdivided lands.

(4) Many of the Legislatures of the forty-eight states, including New York, have recently created State Planning Boards and State Housing Boards, indicating an enhanced consciousness of and increased interest in real estate as a vital public concern.

(5) The value of real estate in the State of New York is many times greater than in any other state and its value has increased about 100 per cent from 1920 to the present time.

(6) As in every other state, real estate plays a most significant part in the business, financial, economic, governmental and social structure of the State of New York.

(7) Functions pertaining in one form or another to real estate, finance and mortgages are now being performed by numerous departments, divisions, bureaus and boards of the State of New York.

(8) In New York State, the subject of real estate is definitely coupled with a public interest. It is certainly as important, as vital and as great a public concern as particular subjects incorporated in many of the various State Constitutions.

(9) If a Real Estate *Department* of the State of New York as a *civil department* of the State government is to be created, it must be created by a constitutional amendment. Opinions as to the form of such

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an amendment will vary. It has been suggested that article V of the New York State Constitution be amended to include the following:

> "Sec. 2-a. There shall be the following additional civil department in the State government: Real Estate Department of the State of New York.
>
> "Sec. 2-b. At the session immediately following the adoption of section 2-a of this article, the Legislature shall provide by law for the assignment of appropriate functions to the Real Estate Department of the State of New York."

(10) If a Real Estate *Division, Bureau, Board* or *Commission* in the State of New York is to be created as a *subdivision* of one of the eighteen existing civil departments, it may be accomplished without constitutional amendment.

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EXHIBIT "A"

SECTIONS OF NEW YORK STATE CONSTITUTION RELATING TO LAND AND REAL PROPERTY

Article I

§7. *Compensation for taking private property; property acquired by city of New York; private roads; drainage of agricultural lands; excess condemnation.* When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by the Supreme Court with or without a jury, but not with a referee, or, in proceedings affecting property located within the city of New York and to be acquired by the city of New York, by a term of said court to consist of one or more justices thereof without a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited. The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions on making just compensation, and such compensation together with the cost of such drainage may be assessed, wholly or partly, against any property benefited thereby; but no special laws shall be enacted for such purposes.

The Legislature may authorize cities and counties to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased.

§ 10. *Escheats.* The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people.

§ 11. *Feudal tenures abolished.* All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved.

§ 12. *Allodial tenures.* All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

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§ 13. *Leases of agricultural lands.* No lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind shall be valid.

§ 15. *Purchase of lands of Indians.* No purchase or contract for the sale of lands in this State, made since the fourteenth day of October, one thousand seven hundred and seventy-five; or which may hereafter be made of, or with the Indians, shall be valid unless made under the authority, and with the consent of the Legislature.

§ 17. *Grants of land made by the king of Great Britain since* 1775; *prior grants.* All grants of land within this State, made by the king of Great Britain, or persons acting under his authority, after the fourteenth day of October, one thousand seven hundred and seventy-five, shall be null and void; but nothing contained in this Constitution shall affect any grants of land within this State, made by the authority of the said king or his predecessors, or shall annul any charters to bodies politic and corporate, by him or them made before that day; or shall affect any such grants or charters since made by this State, or by persons acting under its authority; or shall impair the obligation of any debts, contracted by the State or individuals, or bodies corporate, or any other rights of propery, or any suits, actions, rights of action, or other proceedings in courts of justice.

Article III

§ 18. *Cases in which private and local bills shall not be passed; restrictions as to laws authorizing street railroads.* The Legislature shall not pass a private or local bill in any of the following cases: . . .

Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other lowlands. . . .

Granting to any corporation, association or individual the right to lay down railroad tracks. . . .

Granting to any person, association, firm or corporation, an exemption from taxation on real or personal property.

Providing for building bridges, and chartering companies for such purposes, except on the Hudson River below Waterford, and on the East River, or over the waters forming a part of the boundaries of the State.

The Legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

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Article VII

[1]§ 7. *Forest preserve.* The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. Nothing contained in this section shall prevent the state from constructing a state highway from Saranac lake in Franklin county to Long lake in Hamilton county and thence to Old Forge in Herkimer county by way of Blue Mountain lake and Raquette lake, and nothing shall prevent the state from constructing a state highway in Essex county from Wilmington to the top of Whiteface mountain. The Legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, for the canals of the state and to regulate the flow of streams. Such reservoirs shall be constructed, owned and controlled by the state, but such work shall not be undertaken until after the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination that such lands are required for such public use. The expense of any such improvements shall be apportioned on the public and private property and municipalities benefited to the extent of the benefits received. Any such reservoir shall always be operated by the state and the legislature shall provide for a charge upon the property and municipalities benefited for a reasonable return to the state upon the value of the rights and property of the state used and the services of the state rendered, which shall be fixed for terms of not exceeding ten years and be readjustable at the end of any term. Unsanitary conditions shall not be created or continued by any such public works. A violation of any of the provisions of this section may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.

[2]§ 7-a. *Construction of State highway in Forest Preserve.* Nothing contained in section seven of this article, shall prevent the state from constructing a state highway in Hamilton county from Indian lake to the village of Speculator by way of the existing highway whenever practical.

[3]§ 8. *Canals, not to be sold; not applied to certain canals; barge terminal canal lands in New York city; disposition of funds.* The legislature shall not sell, lease or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, the Cayuga and Seneca canal, or the Black River canal; but they shall remain the property of the state and under its management forever. The prohibition of lease, sale or other disposition herein contained, shall not apply to the canal known as the Main and Hamburg street canal, situated in the city of Buffalo, and which extends easterly from the westerly line of Main street to the westerly line of Hamburg street, nor to that portion of the existing Erie canal between Rome and Mohawk. The prohibition of lease, sale or other disposition herein contained, shall not apply to the barge terminal canal lands situated at the foot of West Fifty-third street and the Hudson or North

[1] As amended November 5, 1918 and November 8, 1927.
[2] As adopted November 7, 1933.
[3] As amended November 5, 1918; November 8, 1921; November 7, 1933.

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river, known generally as pier ninety-three, North river, in the borough of Manhattan and city of New York. All funds that may be derived from any lease, sale or other disposition of any canal shall be applied to the improvement, superintendence or repair of the remaining portion of the canals.

[4]§ 8. The legislature shall not sell, lease or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, the Cayuga and Seneca canal, or the Black River canal; but they shall remain the property of the state and under its management forever. The prohibition of lease, sale or other disposition herein contained, shall not apply to the canal known as the Main and Hamburg street canal, situated in the city of Buffalo, and which extends easterly from the westerly line of Main street to the westerly ine of Hamburg street, nor to that portion of the existing Erie canal in the city of Utica between the westerly line of Schuyler street and the easterly line of Third street, provided that a flow of sufficient water from Schuyler street to Third street to feed that portion of the canal east of Third street be maintained; nor shall such prohibition apply to that portion of the existing Erie canal in the county of Herkimer between the easterly portion of the village of Mohawk and the county boundary line between the counties of Herkimer and Oneida. All funds that may be derived from any lease, sale or other disposition of any canal shall be applied to the improvement, superintendence or repair of the remaining portion of the canals.

§ 9. *No tolls to be imposed; contracts for work and materials; no extra compensation.* No tolls shall hereafter be imposed on persons or property transported on the canals, but all boats navigating the canals and the owners and masters thereof, shall be subject to such laws and regulations as have been or may hereafter be enacted concerning the navigation of the canals. The Legislature shall annually, by equitable taxes, make provision for the expenses of the superintendence and repairs of the canals. All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price, with adequate security for their performance. No extra compensation shall be made to any contractor; but if, from any unforeseen cause, the terms of any contract shall prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel such contract.

§ 10. *Canal improvement, and cost thereof.* The canals may be improved in such manner as the Legislature shall provide by law. A debt may be authorized for that purpose in the mode prescribed by section four of this article, or the cost of such improvement may be defrayed by the appropriation of funds from the State treasury, or by equitable annual tax.

[5]§ 12. *Improvement of highways.* Debts hereafter authorized for the improvement of highways shall be created only in the manner provided in section four of this article. No provision of this article shall be deemed to impair or affect the validity of any debt of the state heretofore contracted or any right or obligation heretofore created between the state and any of its civil divisions.

[6]§ 15. *Creation of State debt for construction of public buildings and works.* In addition to any other debt, authorized by or pursuant to this article, the

[4] Two separate amendments to this article, in the foregoing and following language, were approved by the people of New York State at the general election, November 8, 1921.
[5] As amended November 2, 1920.
[6] As adopted November 3, 1925.

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Legislature, in each of the ten calendar years following the adoption of this section, may authorize by law the creation of a debt or debts, not exceeding in the aggregate in any such year the sum of ten million dollars, to provide moneys for the acquisition by the State of real property and for the construction of buildings, works and improvements for the State, or for any one or more of such objects. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the State and the maturity and payment thereof, shall apply to a State debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section four of this article.

[7]§ 16. *Purchase and reforestation of lands.* The Legislature in each of the eleven calendar years immediately following the adoption of this amendment shall appropriate out of any funds in the treasury not otherwise appropriated moneys for the acquisition by the State of land, outside the Adirondack and Catskill parks, as now fixed by law, best suited for reforestation, for the reforesting of the same and the protection and management of forests thereon; for the acquisition of land for forest tree nurseries, and for the establishment and maintenance of such nurseries, such appropriations to begin in the first year with the sum of one million dollars ($1,000,000) and increasing annually by the sum of two hundred thousand dollars ($200,000) to and including the sixth year and in each of the five years immediately following, a sum equal to that appropriated for the sixth year. All such appropriations to be available until expended. A law enacted pursuant to this section shall take effect without submission to the people.

Article XII

[8]§ 8. *Annexation of territory to cities.* No territory shall be annexed to any city until the people of the territory proposed to be annexed shall have consented to such annexation by a majority vote on a referendum called for that purpose.

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[7] As adopted November 3, 1931.
[8] As adopted November 8, 1927.

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EXHIBIT "B"

SECTIONS OF SEVERAL OF THE STATE CONSTITUTIONS RELATING TO LAND, REAL ESTATE AND FINANCE

Constitution of Massachusetts

Article XLIII

Section 145. Powers of the general court relative to the taking of land, etc.:

"The general court shall have power to authorize the commonwealth to take land and to hold, improve, subdivide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens: provided, however, that this amendment shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof."

Article L

Section 180. Regulation by law of advertising on public ways, etc.:

"Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law."

Article LI

Section 181. General court may prescribe for taking ancient landmarks, etc.:

"The preservation and maintenance of ancient landmarks and other property of historical or antiquarian interest is a public use, and the commonwealth and the cities and towns therein may, upon payment of just compensation, take such property or any interest therein under such regulations as the general court may prescribe."

Article LX

Section 190. Building zones in cities and towns:

"The general court shall have power to limit buildings according to their use or construction to specified districts of cities and towns."

(The general court of Massachusetts is the Legislature consisting of two houses.)

Constitution of Washington

Article XII

Corporations other than Municipal

Section 12. Receiving deposits by bank after insolvency.

"Any president, director, manager, cashier or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances shall be individually responsible for such deposits so received."

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(The substance of this provision may, by analogy, be applied to a possible provision with respect to title guaranty companies, if and when they are permitted to resume the sale of mortgage guaranteed participation certificates. The analogous provision might read as follows:

"Any president, director, manager, cashier or other officer of any title guaranty company who shall receive or assent to the reception of moneys for the purpose of purchasing mortgage guaranteed participation certificates from said title company, after he shall have knowledge of the fact that such title company is insolvent or in failing circumstances, or of the fact that the underlying security of the particular bond and mortgage in which participation certificates are to be sold is valued at less than a certain specified amount, shall be individually responsible for such moneys so received.")

Constitution of New Mexico

Article XVII

Section 2:

"The Legislature shall enact laws requiring the proper ventilation of mines, the construction and maintenance of escapement shafts or slopes, and the adoption and use of appliances necessary to protect the health and secure the safety of employees therein."

Constitution of Texas

Article XVI

Section 59-a.:

"The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflow lands and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters and the preservation and conservation of all of such natural resources of the State, are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws that may be appropriate thereto.

Section 59-b.:

"There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the Constitution, which districts shall be governmental agencies and bodies politic and corporate, with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law."

Section 59-c.: (This section relates to the issuance of bonds to raise funds to carry out the purposes of this article.)

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Constitution of Colorado

Article X

Revenue

Section 15:

"Boards of equalization.—Duties.—There shall be a board of equalization for the state, consisting of the governor, state auditor, state treasurer, secretary of state and attorney-general. The duty of the said board of equalization shall be to adjust, equalize, raise or lower the valuation of real and personal property of the several counties of the state, and the valuation of any item or items of the various classes of such property.

"There shall be in each county of this state a county board of equalization, consisting of the board of county commissioners of said county. The duty of the county board of equalization shall be to adjust, equalize, raise or lower the valuation of real and personal property within their respective counties, subject to revision, change and amendment by the state board of equalization. The state board of equalization and the county board of equalization shall equalize to the end that all taxable property in the state shall be assessed at its full cash value and also perform such other duties as may be prescribed by law; provided, however, that the state board of equalization shall have no power of original assessment."

Article XVIII

Miscellaneous

Section 1:

"Homestead law.—The general assembly shall pass liberal homestead and exemption laws."

Constitution of California

Article XVII

Land and Homestead Exemption

Section 1:

"Homesteads. The legislature shall protect, by law, from forced sale, a certain portion of the homestead and other property of all heads of families."

Annotation to section:

"The word 'homestead' is here used in the popular sense, and represents the dwelling house at which the family resides, with the usual appurtenances, including outbuildings, of every kind necessary and convenient for family use and land used for the purpose thereof. 30 Cal. 220."

"It looks to the legislature to fix the extent of the right and the mode of its protection, with the limitation of the rights of creditors therein. 111 Cal. 484. Mechanics' liens on homestead—note 65 A.L.R. 1192."

Section 2:

"Land Monopoly. The holding of large tracts of land, uncultivated or unimproved, by individuals or corporations, is against the public interest and should be discouraged by all means not inconsistent with the right of private property."

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Section 3:

"Lands granted only to actual settlers. Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers and in quantities not exceeding 320 acres to each settler, under such conditions as shall be prescribed by law."

Article XX

Miscellaneous Subjects

Section 15:

"Mechanics' Liens. Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done or materials furnished, and the registrar shall provide by law for the speedy and efficient enforcement of said liens."

Constitution of Pennsylvania

Amendments not referred to in particular article or section:

"Registering, transferring, insuring and guaranteeing land titles. Laws may be passed providing for a system of registering, transferring, insuring and guaranteeing land titles by the State, or by the Counties thereof, and for settling and determining adverse or other claims to an interest in lands, the titles to which are so registered, transferred, insured and guaranteed; and for the creation and collection of indemnity funds; and for carrying the system and powers hereby provided for into effect by such existing courts as may be designated by the registrar and by the establishment of such new courts as may be deemed necessary. In matters arising in and under the operation of such system, judicial powers, with right of appeal, may be conferred by the registrar upon county recorders and upon such other officers by it designated. Such laws may provide for continuing the registering, transferring, insuring and guaranteeing such titles after the first or original register has been perfected by the Court, and provision may be made for raising the necessary funds for expense and salaries of officers, which shall be paid out of the treasury of the several counties." (Amendment of November 2, 1915.)

Constitution of Montana

Article XI

Education

Section 4:

"The governor, superintendent of public instruction, secretary of state and attorney-general shall constitute the state board of land commissioners, which shall have the direction, control, leasing and sale of the school lands of the state, and the lands granted or which may hereafter be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be prescribed by law."

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Constitution of Idaho

Article XI

Education and School Land

Section 7:

"State board of land commissioners. The governor, superintendent of public instruction, secretary of state, attorney-general and state auditor shall constitute the state board of land commissioners who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law."

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EXHIBIT "C"

ASSESSED VALUATION OF REAL ESTATE IN EACH OF THE FORTY-EIGHT STATES

State	*Assessed valuation of real property*
Alabama	$ 608,769,000
Arizona	150,858,000
Arkansas	286,427,000
California	5,672,692,000
Colorado	702,320,000
Connecticut	2,978,000
Delaware	304,951,000
Florida	408,574,000
Georgia	1,050,819,000
Idaho	374,403,000
Illinois	2,048,725,000
Indiana	3,733,193,000
Iowa	2,500,000,000
Kansas	2,710,977,000
Kentucky	1,163,383,000
Louisiana	1,291,283,000
Maine	661,209,000
Maryland	2,216,643,000
Massachusetts	5,760,356,000
Michigan	5,720,275,000
Minnesota	1,393,775,000
Mississippi	543,000,000
Missouri	3,795,635,000
Montana	1,051,669,000
Nebraska	1,580,200,000
Nevada	199,597,000
New Hampshire	504,141,000
New Jersey	4,853,395,000
New Mexico	286,276,000
New York	25,548,805,000
North Carolina	1,578,850,000
North Dakota	711,892,000
Ohio	149,990,000
Oklahoma	746,658,000
Oregon	892,808,000
Pennsylvania	10,654,435,000
Rhode Island	947,825,000
South Carolina	370,000,000
South Dakota	789,402,000
Tennessee	1,087,681,000
Texas	3,333,000,000

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Utah	140,299,000
Vermont	241,374,000
Virginia	1,144,452,000
Washington	1,101,055,000
West Virginia	1,737,626,000
Wisconsin	3,828,617,000
Wyoming	308,500,000

(Source—*World Almanac*, 1938, p. 238.)

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EXHIBIT "D"

ASSESSED VALUATION OF REAL ESTATE IN THE STATE OF NEW YORK FROM 1920 TO 1938

Year ended June 30	*Assessed valuation property*
1920	$12,989,433,733
1921	14,850,989,607
1922	15,390,393,973
1923	16,233,729,387
1924	17,346,635,443
1925	19,018,981,378
1926	20,795,221,086
1927	22,958,837,107
1928	25,332,627,968
1929	27,034,695,261
1930	28,602,349,548
1931	29,513,043,980
1932	29,553,417,426
1933	28,281,820,555
1934	26,257,985,654
1935	25,675,672,127
1936	25,667,925,760
1937	25,559,625,288

(Source—*World Almanac,* 1938, p. 460.)

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EXHIBIT "E"

ADMINISTRATIVE DEPARTMENTS, DIVISIONS, BOARDS AND BUREAUS OF THE STATE OF NEW YORK HAVING FUNCTIONS RELATING TO REAL ESTATE, MORTGAGES AND FINANCE

I. Executive Department

Head: Governor

(a) Division of State Planning

(1) Created by chapter 304 of the Laws of 1935.

(2) Head: State Planning Council—five members appointed by the Governor—no salary.

(3) Duties: To co-operate with State departments and agencies in the preparation and co-ordination of plans and policies for the development of the State and for the use and conservation of its resources in so far as conservation or development may be influenced by a State agency; advise and co-operate with municipal, county, regional and other local planning commissions; executive, legislative or planning authorities of the United States or neighboring states; and adopt measures calculated to promote public interest in State planning.

II. Department of Taxation and Finance

Head: Commissioner of Taxation and Finance

(a) Division of Taxation

(1) Mortgage Tax Bureau

(2) Research and Statistics Bureau

(3) Local Assessments, Special Franchise, Land Tax and Equalization Bureau

III. Department of Law

Head: Attorney-General

(1) Bureau of Conservation

(2) Bureau of Real Property

(3) Bureau of Taxation and Finance

(4) Bureau of Securities

IV. Department of State

Head: Secretary of State

(a) Division of the Land Office

(1) Created by chapter 60 of the Laws of 1784

(2) Head: Board of Commissioners of the Land Office, consisting of Secretary of State, Attorney-General and Superintendent of Public Works

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(3) Duties: Has charge of all State-owned lands not devoted to any specific purpose, such as lands under water, abandoned canal lands, lands acquired for taxes and through the foreclosure of United States Loan mortgages. All sales of these lands are made by this board. All original records of patents of lands by the Crown, Colony and State are in the custody of the board.

(b) Division of Licenses

(1) Head: Executive Deputy Secretary of State

(2) Duties: This division is the general licensing one of the Department of State, and includes the licensing of real estate brokers and salesmen, private detectives, auctioneers, steamship ticket agents, theatre ticket brokers, billiard and pocket billiard rooms, and records the appointment of notaries public made by the Secretary of State.

(c) Division of Housing

(1) Head: Board of Housing, consisting of five members, serving for the term of five years.

(2) Duties: The board studies housing needs and conditions throughout the State, co-operates with local housing and planning boards and promotes and supervises low-rental housing projects under the terms of the State Housing Law.

V. Department of Public Works

Head: Superintendent of Department of Public Works

(a) Administrative Bureau

(b) Division of Canals and Waterways

(1) Duties: General care and superintendence of State canals, the State grain elevators, power houses, enforcement of the Canal Law, making of rules and regulations governing navigation, imposition of fines and penalties for any infraction of rules, the keeping of records of tonnage and traffic, and the registration of all boats used in canal service.

(c) Division of Highways

(1) Duties: General supervision of all highways and bridges constructed, improved or maintained through State funds, and exercises the powers of the Interstate Bridge Commission.

(d) Division of Public Buildings

(1) Duties: Charge of all State buildings in Albany (exclusive of Education Building) and exercises the powers of the Trustees of Public Buildings.

(e) Division of Engineering

(1) Duties: All the duties of the State Engineer and Surveyor, whose office was abolished, including engineering data, grade crossing elimination, surveys, construction of various public works, approving plans for docks and dams, water supply and sewerage and sewage disposal, and has general supervision of all construction and repair work on State owned buildings.

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(f) Division of Architecture
  (1) Duties: Charge of the designing and preparation of plans and specifications for buildings.
(g) New York State Bridge Authority

VI. Conservation Department

Head: Commissioner of Conservation Department

(a) Bureau of Publicity
  (1) Duties: Collects, compiles and distributes information and literature as to the facilities, advantages and attractions of the State, historic and scenic places of interest, as well as transportation and highway facilities in the State; and directs campaigns of publicity, promotion and advertising.
(b) Division of Lands and Forests
  (1) Duties: charge of forestry work in the State and administers the State Forest Preserve.
(c) Division of Fish and Game
(d) Division of Parks
  State Council of Parks

VII. Department of Health

Head: Commissioner of Health

VIII. Department of Social Welfare

Head: Commissioner of Social Welfare

New York State Rural Rehabilitation Corporation

(Since July 1, 1937, a part of the Department of Social Welfare)

(a) The corporation is a body corporate and politic created by chapter 526 of the Laws of 1935, constituting a public benefit corporation, to serve as a social and financial agency for the State, and for co-operation with the United States Government through the Agricultural Adjustment Administration. The purpose is to rehabilitate individuals and families as self-sustaining persons, by financial assistance or otherwise, to secure for them subsistence and gainful employment from the soil and other affiliated enterprises.
(b) County Rehabilitation Advisory Committee

IX. Banking Department

Head: Superintendent of Banks

(1) Duties: Supervises and examines State banks, trust companies, savings banks, savings and loan associations, industrial banking companies, investment companies, safe deposit companies, licensed lenders, credit unions, the Savings and Loan Bank of the State of New York and certain private bankers, and liquidates failed institutions.
(2) Banking Board created by chapter 118 of the Laws of 1932, consisting of nine members, including the Superintendent of Banks as chairman. This board is to advise and co-operate on rules and regulations of banking standards.

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X. Insurance Department

Head: Superintendent of Insurance

(1) Duties: Supervision over all insurance companies transacting business in the State; is custodian of securities required to be deposited by such companies under the law; licenses all insurance brokers and agents for corporations required to designate same through the department.

(2) Insurance Board created by chapter 524 of the Laws of 1932, consisting of seven members, including the Superintendent of Insurance, as chairman. The board is to consider and make recommendations to the Superintendent of Insurance on any matters submitted to them.

XI. Mortgage Commission of the State of New York

(a) The commission is a body corporate and politic, created by chapter 19 of the Laws of 1935, as amended, to provide a method for the relief of distressed holders of guaranteed mortgage participation certificates.

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CHAPTER XVII

PROPOSED STATE DEPARTMENTS: COMMERCE AND INDUSTRY

Introduction

There are already operating in this State several departments which regulate and control certain aspects of commerce and industry within the State. We may note as examples of such regulation and control the work of the Public Service Commissions in the field of public utilities; of the Banking Department in the field of banking; of the Insurance Department in the field of insurance. The milk industry, the liquor trade, and the drug industry are likewise under the control of State departments.

In addition to the State supervision of specific industries, commercial corporations are required to seek charters from the Department of State, and failure to live up to the terms of their charters are prosecuted by the Attorney-General in the courts. Furthermore, relations between employees and employers in all branches of industry and commerce are under the supervision of the Department of Labor. Finally, the proposed Department of Consumers would supervise relations between the industries of the State and the consumer.

The proposed Department of Commerce and Industry would, consequently, exert very limited functions. It would be confined in its activity to the prevention of unfair trade practises in industries which are not already under the control of some State Department; these industries must be entirely intra-state in operation, else they would come under the control of the Federal Trades Commission or the Interstate Commerce Commission. Such a department might also serve the purpose of encouraging industry in the State and of promoting co-operation between manufacturer and merchant.

History

In 1930 a proposal was jointly introduced in the Senate and the Assembly to amend article V, section 2, of the Constitution by adding a twenty-first department—the Department of Commerce. (Senate, Pr. No. 33; Assembly, Pr. No. 40.) In the Senate the measure went to third reading, but was not passed; in the Assembly it died in committee.

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In 1931 a similar amendment was proposed in the Assembly, but the amendment died in committee. (Pr. No. 688.) In the same year a proposal was jointly introduced in Senate and Assembly to amend article V of the Constitution by inserting a new section, 3-a, to provide for a State Trade Commission. The text of the amendment read as follows:

> "Sec. 3-a. State trade commission. Notwithstanding the provisions of sections two and three of this article or of any inconsistent provision of the sonstitution [so in original], the legislature shall, at its next session following the adoption of this amendment, enact such legislation as may be necessary to create, organize and maintain a state trade commission, either as a separate and new department of government or as a division of or a permanent commission in one of the existing departments of government. The primary function of such commission shall be to prevent unfair methods of competition in intrastate commerce, but the legislature may assign such other function, powers and duties to such commission as it shall deem necessary effectually to carry out such purpose." (Senate, Pr. No. 1627; Assembly, Pr. No. 1318.)

This proposal died in committee in both houses of the Legislature. No constitutional amendments relating to a Department of Commerce or a State Trade Commission have been introduced since 1931.

Reasons for the Establishment of a State Commerce Department

In order to obtain accurate and complete information as to the reasons for establishing a State Commerce Department, letters of inquiry were written to some of the sponsors of the measure in previous years. Hon. Seabury C. Mastick, chairman of the New York State Commission for the Revision of the Tax Laws, who introduced the amendment in the Senate in 1930, sent the following reply.

> "When I introduced the bill in 1930 there was a great deal of encouragement among the businessmen and manufacturers for such a department.
>
> "It would seem that New York by reason of its pre-eminent position in manufacturing, industry, and agriculture should have a department of government devoted to furthering its interests. At the time of introducing the bill I brought out the fact that goods such as men's and women's clothing, women's hats and other so called 'style' goods made in New York State and with the New

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York label on them stood for style and class in the West pretty much as such goods from Paris and London stand for style and class in New York. In other words people in the West would prefer goods from New York over goods from say Chicago at the same price or would even pay an additional price just because they came from New York just as people in New York are willing to pay a little more if they think the goods came from Paris or London. I thought this could be capitalized through a Department of Commerce so that New York sales of such goods could be increased.

"Another point is that there has been propaganda to the effect that it is more expensive for industries to conduct business in New York State than in some other states. The argument has been that our labor laws have been too liberal and taxes have been too high, etc., so that costs of operating have been greater than such costs in competing states. The arguments have always been one-sided in so far as taxes are concerned. They have compared only individual taxes instead of the total burden of taxation and I presume the same argument would apply in other directions. I thought that a Department of Commerce could issue authoritative statements with reference to this matter and thus induce industry to come to New York as well as to induce industry to stay in New York.

"As far as agriculture was concerned I felt that we did not advertise our New York products sufficiently but let other states get away with our agricultural products when we might as well popularize them ourselves. Specifically on one occasion at the Syracuse State Fair I noticed an exhibit of 'Vermont' maple syrup and maple products. I asked the man where they came from and he said they all came from New York State. I asked him why not call them New York maple products and he said because the Vermont products had been advertised and everybody wanted Vermont maple syrup. This is only one instance and could be multiplied with reference to our fruit, dairy products and vegetables.

"While we have a Department of Agriculture which in a measure takes care of the agricultural products we have no department of government specifically interested in developing manufacture and industry and yet the welfare of the state from the labor point of view and from the taxation point of view depends very largely upon the progress and growth of manufacture and industry.

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"I think that a Department of Commerce with even a relatively small appropriation to carry out the objects set forth above would pay for itself and for the state many times over."

Reasons against the Establishment of a Commerce Department

(1) In recent years there has been little public interest in the creation of such a department, and it is unwise to create departments needlessly.

(2) The functions, which it has been proposed a Commerce Department should exercise, might be performed by a bureau or division within an existing department. If the need of the performance of these functions were great, the Legislature could provide for their performance without the necessity of constitutional amendment.

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CHAPTER XVIII

PROPOSED STATE DEPARTMENTS: CONSUMERS' *

I. Scope and Summary of Issues

This chapter discusses the advisability of establishing a separate branch of the State government dedicated to the protection of the consumer and analyzes the functions which such a department might appropriately perform.

Those who feel it essential to establish an independent branch of the State government to guard the interests of the consumer, base their position upon arguments along the following lines. The interest of the consumer, it is pointed out, is not in any sense to be confused with the public interest. The latter is a combination or a synthesis of the interests of many distinct groups and cannot be properly served by neglecting any one of these. To take a crude example, the labor interest is best served by raising wages and lowering hours, the consumer interest by raising quality and lowering prices. These goals are not entirely parallel, even though they necessarily overlap. Consumers will lose in the long run if lowered prices mean an impairment of business efficiency and prevent a continuation of the smooth production of goods. Nevertheless, these are ultimate and not immediate considerations. At any specific point there is usually some conflict between these various interest groups. The public interest is best served by compromising that conflict so that the greatest net advantage to all will result.

The existence of a consumer interest as distinct from the public interest is particularly well expressed by Dr. Gardiner C. Means in an article in *The Annals of the American Academy of Political and Social Science* which appeared in May, 1934:

> "In meeting any specific situation it is essential to recognize that the public and the consumer interest are not identical. First, the public interest covers all spheres of human activity—religious, political, economic, social; while the consumer interest is purely in the economic sphere; and second, the consumer's interest is only one of the many economic interests involved in our economy—it is the interest of buyers rather than that of owners, or workers, or producers, or

*This study was prepared under the direction and guidance of the Sub-committee on Bill of Rights and General Welfare.

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> sellers. To confuse the public interest with the much more specific consumer interest is to lose sight of the even-handed balance which is implicit in the term "the public interest." True, all persons are consumers and also the public. But the public interest . . . calls for the protection of the owners of industry the managers of industry and the workers of industry as well as the consumers. . . . Probably no single element in the thinking of the past year has done more damage to the consumer than this confusion. Only as it is eliminated from our thinking can the role of the consumer be clearly seen."

It is argued by some that special representation of the consumer interest is unnecessary because "we are all consumers." However, every individual, in addition to his function as a consumer, virtually always has some further specific role in the economic field, *i. e.*, he is a worker, or a farmer, or a manufacturer, or a retailer, or a professional man. Usually this special interest overshadows in his mind his broader general interest as a consumer. The worker will ask for an increase in wages, the manufacturer for larger profits, the druggist for resale price maintenance, the farmer for crop control; all with comparatively little regard for their effect on the general price level. This is natural because the former effect is specific and immediate, the latter remote and general. In each of these contingencies, the individual is far more prone to consider himself as a producer than a consumer, and to advocate the former rather than the latter interest.

Accordingly consumers' organizations such as the Consumers' National Federation and other groups concerned with the welfare of the consumer urge the establishment of a department charged with the specific duty of representing the consumer and protecting the consumer interest. They point out that, during recent years, the rendering of protection and assistance to the consumer has become more and more accepted as an appropriate and necessary function of government. Various activities now being conducted by the government of the State of New York recognize and are concerned with the welfare of the consumer. In the absence of a specific agency representing the consumer, however, these functions have been scatterd among various existing agencies.

Those who favor the establishment of a Department of the Consumer argue that the State must inevitably become increasingly concerned with furthering the welfare of the consumer. They believe that the activities now being conducted with this end in view merely herald a wide number of new activities whose necessity is rapidly emerg-

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ing and which government will be forced to undertake. They favor the establishment of a department specifically charged with the duty of assisting and protecting the consumer as an agency to which new functions of this character can be assigned and in which existing functions might be economically merged.

Thus it has been suggested that a Department of the Consumer could logically conduct the following activities:

(1) It will represent the interests of the consumer before regulatory bodies such as the Public Service Commission on matters in which the interest of the consumer are intimately involved.

(2) It will carry on general investigations and submit periodic reports to the Legislature or to the Executive relating to any matters which affect the cost of living or the distribution of the consumer's purchasing dollar. It may conduct studies on such problems of consumer interest as consumer credit and consumer co-operation.

(3) It will assist the Executive and Legislature by rendering available to them data and recommendations pertinent to the interest of the consumer.

(4) It will seek to educate the consumer through a broad program of consumer education.

(5) It will act as an established point of contact between organized consumer groups and the State government.

(6) The department will seek to make it possible for the consumer to expend his money intelligently by promoting in every way the furnishing of adequate information regarding the character of commodities on the market.[1]

Proponents of this program argue that the performance of these functions will serve three broad and parallel sets of purposes.

(1) Organized consumer groups and others primarily concerned with the interests of the consumer maintain that the protection of the consumer is an adequate end in itself. These groups contend that the prevention of fraud and misrepresentation; the dissemination of adequate information with reference to commodities on the market; the elimination of factors making for unduly high prices, and general co-operation with organized consumer groups, will go far toward improving the standard of living of the people of the State.

[1] It has also been suggested that the department include a Fair Trade Bureau with functions similar to those of the Federal Trade Commission, to proceed against unfair and misrepresentative trade practices. Since the establishment of such a bureau is not clearly related to the central purpose of a Consumers' Department, the entire question of its establishment is discussed in the following chapter.

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(2) Economists believe that any factors which impair the most productive use of the consumer's dollar necessarily impede the smooth functioning of the economic structure of the State and of the Nation. They believe that the removal of such factors, by benefiting the consumer, will simultaneously improve the general efficiency of our system of production and distribution of goods and will make it possible to increase national wealth and to insure greater stability of production and of employment. Mr. Leon Henderson, Consulting Economist of the Works Progress Administration, summarizes this argument in the following terms:

> ". . . I have become increasingly impressed with the close relation existing between the most efficient use of the consumer's purchasing power and the achievement of an adequate and reasonably stable level of industrial production.
>
> "I think that it can be accepted as an axiom that the break which occurred in 1929 directly reflected the inability of the consumer's purchasing power to absorb the commodities which our industrial machine was able to produce. Again at the present time the same lesson is being brought home. The decline in industrial production and in employment which started during the summer of 1937 did not represent any failure in our productive mechanism but was due rather to the inability of the consumer to purchase the commodities which industry was producing.
>
> "A satisfactory level of prosperity and absorption of our present appalling surplus of unemployed can be most directly achieved through balance between income produced and income available at the consumption line . . ."

(3) Many business men strongly favor certain programs designed to protect the consumer. They point out that such programs, by preventing the use of unfair and deceptive methods of competition, will protect the ethical business man against his less scrupulous competitor.

Those who express general opposition to any proposal to establish a Department of the Consumer under the State government base their stand upon a basic disinclination to expand the functions of government and to establish new bureaus, except in response to urgent necessity. They contend that such urgent necessity is not present in this instance. They maintain that many of the functions to be assigned to a State Consumer's Department are now being performed with adequacy by existing State agencies, by the Federal government and by voluntary private organizations. They fear that action by individual states may result in the establishment of a multiplicity of different standards

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throughout the Nation which will impede the free flow of commerce and impair economic efficiency. They believe that business will be hampered by the activities of a new department and that its cost will represent an unwarranted expenditure of public funds and constitute a further burden on consumers.

There is an intermediate school of opinion which is inclined to favor the establishment of a Consumers' Department with strictly circumscribed functions. This school believes that such a department could render an important service to the consumer and to the community at large by acting as a fact-finding body, but maintains that the delegation of administrative responsibility or regulatory power to such an agency should be avoided. Research, publicity and the representation of the consumer interest are all favored as constituting highly desirable activities best performed by an independent Consumers' Department. On the other hand, regulatory functions are opposed, for the present at least, as constituting undesirable extensions of government control. Specifically it is urged that the establishment of standards must proceed on a Federal and not a State basis and that assistance to consumer co-operatives is an inappropriate activity for an agency concerned with the welfare of consumers as a whole. Accordingly, this school urges that any initial grant of power should be limited strictly to non-regulatory functions, but does not preclude the possibility of a later extension of functions.

Any decision as to the desirability of amending the Constitution to provide for the establishment of a Department of the Consumer and as to the character of the functions to be delegated to such a department if established, must necessarily be based upon an appraisal of the relative merits of these three points of view. In order to provide an adequate basis for such an appraisal, the following pages are devoted to a detailed consideration of the lines along which a Consumer's Department might logically direct its activities. The possible value of these functions may then be weighed in the light of the general considerations outlined. The subsequent discussion is confined to analyzing each possible line of activity purely on its own merits, entirely divorced from the fundamental issues upon which the ultimate decision must be based.

II. Representation of the Consumer Interest

A major function of a Consumers' Department would be to represent the consumer in legislative and administrative councils. At the same time the proponents of such a course believe that the department in its role of consumer's advocate, should assist and supplement rather than replace and supersede the voice of organized consumer groups. In

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other words they conceive of representation of consumer interests as taking two forms. The department should delegate one of its own officials to present its point of view and in addition it should facilitate efforts by organized consumer groups to prepare and present their views directly on any pending matter. This course is believed essential both in order to insure adequate representation of all shades of consumer interest and to permit consumer sentiment to crystallize into a driving force able to support the department's recommendations.[2]

The possible fields of governmental action in which the department may be in a position to specifically represent the consumer interest include:

(a) Proposed legislation affecting production, trade practices, living standards, etc.
(b) Proposed administrative action affecting consumers including the fixing of rates by regulatory bodies, fixing prices or production quotas on specific commodities such as milk, the prescription of manufacturing standards and the like.
(c) Proposed Federal legislation or administrative action where the interests of the consumers of the State are at stake.

A. Representation Before the Legislature

Those who believe that it is essential to provide channels for the expression of the consumer interest before legislative bodies point out

[2] This insistence that the establishment of the Consumers' Department must not operate to deprive organized consumer groups of their basic roles as defenders of the consumers' interest is strongly supported by Dr. Gardiner Means in the article to which reference has been made:

> "What, then, is the role of the consumer? . . . it is essential to realize that the consumer will get nothing for which he does not fight; however socially minded the agents of government may be. The actions of government agents are to an important extent, and almost inevitably, a resultant of the pressures which impinge upon them. If there is no pressure on government from people as consumers, there is little likelihood that their interests as consumers will be effectively represented. The existence in the government of bodies representing the consumer does not mean that the interest of the people as consumers will be protected but rather that channels are open whereby the consumer can become articulate. Only as the consumer representatives are backed up by pressure from consumers can their action exert a major influence on economic policy and provide that balance which will prevent administration in the direction of scarcity.
>
> "The important thing is not to organize *individuals as consumers* but to organize *the consumer interest*. This would involve the recognition by existing organizations of the fact that consumers can no longer adequately influence the economic process through the market place; that they must exercise influence not only through the market place but also directly upon the managers of industry. The organization of consumer interest would be accomplished as individuals use their influence through their existing organizations."

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that, to an increasing extent, legislative decisions are being influenced by by interested pressure groups.

Modern society is so complex that it is impossible for even the best informed legislator to become more than superficially acquainted with the problems existing in most of the fields upon which he is called to make decisions. Consequently, any well organized group, with an important and specific interest at stake, can, in the absence of an equally well organized group with opposing interests, usually convince the legislator of the wisdom and desirability of its proposals.

In matters in which the consumer is involved, there has almost never been any effective opposition by the consumer interest to the demands of pressure groups. This is largely due to the previously mentioned fact that consumer interest on any point is usually far more remote and diffuse than the interest of the pressure group behind it. In the drive for the Feld-Crawford Act, for example, resale price maintenance seemed to promise an immediate and major improvement in the prospects of the retail druggists, book-sellers and others who were driving for its enactment. To the consumer, on the other hand, its importance was far less overwhelming because of the fact that only a limited portion of the things he bought would be directly affected by the act. Without attempting to pass judgment upon the merits of the issue, there is no doubt that the case for the Feld-Crawford Act was presented far more vigorously than that against it.

In many cases, moreover, the problems involved are so complex that it is difficult for individual consumers or even for private consumer organizations to form any intelligent opinion. There is little doubt, for example, that the prices of virtually all commodities are affected to a greater or lesser extent by the Robinson-Patman Act. Yet the issues involved are so technical and so difficult for the layman to appraise that there was no expression whatever of any consumer interest in the hearings or debates which preceded its enactment.[3]

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[3] Thus Mr. Leon Henderson, Consulting Economist of the Works Progress Administration, writes:

> "Even more important, in my opinion, is the increasing extent to which legislative and administrative action affects the expenditure of the consumer's dollar. Rate making by regulatory bodies, production control in the case of certain major necessities such as milk, laws such as the fair trade and unfair practices acts, the Robinson-Patman Act, the Agricultural Adjustment Act and a host of others, all represent points at which law impinges directly upon the consumer. Moreover, the issues in each of these cases are extremely complex. It is virtually impossible for the individual consumer to form an intelligent appraisal of their meaning or desirability. Pressure groups representing industry, agriculture and labor have organized with considerable effect and have succeeded very frequently in impressing their will upon legislative and administrative bodies. The consumer, on the other hand, has been largely unorganized, largely unrepresented and therefore largely ineffective in protecting his own interest.
>
> "It seems imperative therefore that some public body be established whose specific function it will be to furnish the consumer with the information and with the protection which he now lacks . . ."

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In order to meet this lack, it has been suggested that the Department of the Consumer should be required to represent the consumer officially at all legislative hearings dealing with matters affecting the interest of the consumer. The imposition of such a statutory requirement upon the department would presumably insure an adequate representation of the consumers' point of view on pending legislation.

On the other hand, it is possible that the same ends may be achieved with equal effectiveness without the imposition of any such specific duty upon the department. As a matter of course, the department will have the right to present such facts to the Legislature as the Legislature itself may request, or to respond to a committee's inquiry by recording its reactions to any pending proposal. In all probability, the Legislature and its committees would find it possible to make frequent use of the services of the department and would welcome the existence of a source to which they could turn for an adequate presentation of the consumer's point of view.

Moreover, the department might well assist organized consumer groups in the preparation and presentation of their testimony before legislative committees and thus serve as a channel through which organized consumer groups could become effectively vocal.

B. Regulatory Commissions

It is also contemplated that the department represent the consumer before State regulatory bodies. Proponents of such a course argue along the following lines. To an increasing extent, they maintain, government interferes in the conduct of business affairs. The prices of an ever-growing number of services and commodities is being made subject to direct regulatory action. Conservation is introducing an element of production control into many fields. Broad schemes of regulation through such organizations as the Milk Control Commission, the Agricultural Adjustment Administration and the Bituminous Coal Commission, to mention just a few, furnish illustrations of the increasing area which government activity covers.

In all fields so affected, the decision of an administrative board or tribunal is substituted to some degree for the free workings of an open market. The consumer is being deprived in each such case of his power to influence production and prices through direct economic action; that is, by buying or refraining from buying the commodities affected. For better or for worse, he is forced to acquiesce in the decisions of those administrative bodies and to stake his economic well-being on their fairness and discretion.

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When regulatory bodies of this character were first established, some confusion seems to have prevailed regarding the functions which they were supposed to perform. In the political and economic thinking of a generation ago, each of these regulatory bodies was supposed, simultaneously, to fulfill two distinct roles. It was expected, first, to protect the public against the assaults of unregulated private enterprise and, second, to perform a quasi-judicial function in balancing the relative claims of private business and the public. (The distinction between the broad public interest and the specific consumer interest went virtually unrecognized.) With the passing of time, it has become increasingly apparent that these two functions are not identical and cannot properly be entrusted to a single body. It is clearly impossible for any one person or board at one and the same time to act as consumers' advocate and as an impartial arbiter.

Under the circumstances, it was inevitable that these administrative bodies would gradually come to emphasize one function to the virtual exclusion of the other. The logic of the situation dictated the subordination of the partisan to the judicial role. Rate making bodies, for example, such as the Public Service Commission or the Interstate Commerce Commission, must base their decisions upon a judicial balancing of the evidence presented to them and must not favor one side above the other. Undoubtedly these commissions do also constantly strive to represent the broad public interest, but they do not and obviously cannot act as the consumer's advocate.[4]

Recognition of this dilemma has been reflected in some of our more recent legislation. The National Recovery Act for example, specifically established the Consumers' Advisory Board as a virtually independent agency to protect and fight for the interests of the consumer against the equally partisan claims of the Labor and the Industrial Advisory Boards. The Consumers' Counsel of the Agricultural Adjustment Adminstration has a similar function. The Bituminous Coal Act establishes a Consumers' Counsel free from interference or control by the Coal Commission itself, leaving the latter body free to perform a purely judicial function.

[4] Thus, Dr. Means says in his article:

> "We would never think it appropriate for a man placed in the position of protecting the public interest to act primarily in the interests of an owner against labor, or for him to act primarily as an agent for labor against the owners. We would call on him to balance the two interests against each other as the case for each was argued before him. So where, for instance, the interests of consumers and of owners come in conflict, it is in the public interest, not that the decision should be rendered in the interest of consumers, but that a balance should be reached in terms of the economic whole. Therefore to place any government official in the position of having to represent both the public interest and the consumer interest of the public is to make him both judge of all parties and prosecutor for one of the parties at interest."

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The necessity of specifically providing for this form of independent consumer representation before quasi-judicial administrative bodies is urged by Mr. John Carson, the present Consumers' Counsel of the National Bituminous Coal Commission:

> "The office of the Consumers' Counsel of the National Bituminous Coal Commission has, under the Bituminous Coal Act of 1937, had less than one year of active existence and during that period, I have been associated in the work as the Consumers' Counsel.
>
> "When I came to this office, I was doubtful that we could justify the expenditure of public funds for the protection of consumers in connection with the work of a commission which I believed was appointed to adequately consider consumers' interests in administering the act. Frankly, I had not distinguished between a 'consumer interest' and a 'public interest.' I still was inclined to have a concept of a commission similar to that which I had thirty years ago—that it was a militant force for justice—an active referee in the public interest. At times, though, I had been irritated by the readiness with which such commissions became courts and such commissioners became 'judges.'
>
> "We have now gone far enough to satisfy me that an agency such as the Office of the Consumers' Counsel is necessary and that regardless of any wish we may have, the commissions in government are certain to move more and more into the judicial field. However, I have also dealt with state commissions, such as public service commissions, in five states—dealt intimately with them—and the situation in each state showed the need for a consumers' counsel or a public defender, or some militant agency. I think the commissions failed in each of those states and the theory of regulation failed and will continue to fail because it cannot succeed without a 'soul' which can be free from the regulatory body.
>
> "I hope that the State government in New York will provide for a consumers' counsel. One other state has made a beginning and more states will follow, I am certain."

C. Other State Agencies

In addition to appearing before quasi-judicial regulatory bodies as the official representative of the consumer interest, the department will be equipped to co-operate with other State agencies by furnishing them with data pertaining to the consumer's point of view. Very frequently, administrative action taken by various State agencies intimately

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affects the position of the consumers of the State. Obvious advantages would appear to flow from the existence of some channel through which pertinent facts may be presented relating to the consumer interest.

The precise status of the Consumer's Department will be of considerable importance in determining the manner in which it represents the consumer before other State agencies (other than quasi-judicial regulatory bodies). There are two possible alternatives:

(1) The department would constitute an integral part of this State government with primary immediate responsibility to the Governor and with a status essentially similar to that now occupied by the Department of Labor. On this basis, the department would have access to all information secured by other State agencies and would constantly co-operate with them. It could render confidential advice to the Governor or to any other department or agency. It could work actively to protect the consumer by taking every possible step to insure an adequate presentation of his point of view before other State officials.

However, the department would, necessarily, observe one fundamental limitation. It could not appeal directly to the consumer against any administrative decisions of other State officials. It could not issue public reports criticizing the action of any State officials, any more than the Department of Labor could openly criticize the work of the Department of Agriculture. It would be in every sense an "inside" department, constituting a cog in the administrative machinery of the State. It would be able to work freely within that machinery, but not to assume the role of an independent critic.

(2) The department might, on the other hand, be established as an "outside department," free to express its opinion in any manner in which it sees fit and to appeal directly to the consuming public against any decisions of other State administrative officials. This position would be somewhat analogous to that occupied by the Consumers' Counsel of the National Bituminous Coal Commission. In such a role, the department would probably have only limited access to the files of other State agencies and would act as an independent critic, rather than as a partner in the business of State government. It would become a virtually independent consumers' advocate with the duty of fighting for the consumer rather than merely an adviser presenting the consumer's point of view.

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Precedent strongly favors the first of these alternatives despite such exceptions as the Consumers' Counsel of the Coal Commission. Moreover, the establishment of a Consumers' Department as an "inside" State agency will in no sense preclude an adequate public presentation of the consumer's point of view. Organized consumer groups will have every opportunity to advocate or criticize the action of State administrative officials. Such groups, completely detached from the State government, can do so with far more propriety and probably with far more effectiveness than a branch of the State government itself. Moreover, the very fact that the necessity for such action will devolve upon organized consumer groups, will serve the useful purpose of stimulating their activities. A parallel may be drawn with the Departments of Labor and Agriculture. These agencies do not themselves publicly urge or criticize action by any other administrative bodies. That duty is properly entrusted to labor unions and to organized farm groups.

If this point of view is accepted, the Department of the Consumer will be charged with the duty to represent the consumer before quasi-judicial regulatory bodies and will co-operate with other State agencies and departments by making available to them the benefit of its advice on matters affecting the consumer. It will also render information available to organized consumer groups that wish to present their points of view to State agencies.

D. Federal Bodies

Finally, the department may be able to represent the interests of New York State consumers in proceedings before Federal legislative and administrative bodies. Presumably such representation will be undertaken only at the request or direction of the Governor, since only the Governor can properly represent the interests of the State outside of its boundaries. Here again there is nothing to preclude, and much to recommend, assistance by the department to any organized consumer groups which wish to present their case to any branch of the Federal government.

III. Research and Statistics

A Department of the Consumer could conduct intensive studies in various fields in which the consumer is vitally interested. The services which the department could render to the community in its capacity as a research agency have been stressed as one of its most valuable potential contributions. The precise fields in which such research can

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profitably be conducted are somewhat difficult to delimit in advance of actual experience. However, the consensus is that the department should be required to:

(1) Gather and currently maintain information as to the actual standard of living in the State and as to the division of the consumer's dollar. Relative expenditures on different commodities as well as the proportion of the consumer's dollar going to the retailer, wholesaler, manufacturer and primary producer should be carefully analyzed.
(2) The department should investigate all matters affecting the standard of living and should devote particular attention to discovering obstacles to the increase of that standard among the people of this State.
(3) The department should be required to maintain adequate current statistical information with reference to the cost and standard of living.
(4) The department should be required to report the results of its research activities periodically to the Executive and to the Legislature, and to submit recommendations calculated to raise the living standard and to improve the welfare of the consumers of this State.

Within the scope of these objectives, the department might investigate trade practices in various lines of business and the operation of existing laws affecting the welfare of the consumer. It could devote study to various proposals designed to decrease the cost and improve the standard of living. It could recommend appropriate administrative or legislative action based upon such investigations.

The department would also be well qualified to undertake such special investigations as the Executive or Legislature might direct. It may, of course, be suggested that the research activities of the department should be confined to the conduct of studies specifically requested by the Executive or the Legislature. This would parallel the manner in which the Federal Trade Commission now operates. Its economic division has no regular program of studies, but merely acts at the request of Congress or the President.

This scheme, however, has proven far from satisfactory. In the absence of a regular program and a regular appropriation, the commission has found it very difficult to establish and maintain a trained research personnel and to achieve any continuity in effort. Persons familiar with the situation maintain that the Federal Trade Commission

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could have made a far more valuable contribution had its economic division been permitted to undertake and pursue broad investigations at its own initiative.

Experience would, therefore, dictate granting a high degree of freedom to the department in the initiation and conduct of its research program. It should be permitted to plan its studies within broad statutory limits (guided, of course, by the amount of its available appropriation). In order to permit its work to be conducted effectively, the department should have the power to require the submission of evidence and testimony.

Much of the research work of the department would undoubtedly be directed toward developing a positive program for fostering the well-being of the consumer. For example, the department might properly devote study to methods designed to reduce the cost of distribution of farm products and to prevent their deterioration during the processes of handling and transportation. The department might promote joint conferences of producers and consumers for the purpose of simultaneously furthering the interests of both.[5]

In addition study might well be devoted to conditions which might affect the consumer adversely. Thus the department might investigate various forms of restraint of trade such as price agreements or other forms of concerted action by private groups. It might keep consumers informed of the specific effects on prices and production of such laws as the Feld-Crawford Act or the Robinson-Patman Act. It might investigate the possible effect on the consumer of such proposed legislation as the proposed chain-store tax. In general, it would be prepared to study the effect on prices and quality of any type of private or governmental action in which the consumer has a stake.

In the planning of its programs, the department will, as a matter of course, avoid duplicating work now being adequately performed by other State or Federal agencies. It will undoubtedly find it possible to make good use of many existing sources of information and thereby achieve economy in its operations and avoid any conflict of jurisdiction. Obviously, it would be necessary to prescribe that the public reports

[5] Thus, Mr. Donald E. Montgomery, Consumers' Counsel of the Agricultural Adjustment Administration, suggests that a State Department of the Consumer

> "should be charged with responsibility to discover and promote government policies and commercial practices looking to the improvement of the processes of marketing and distribution. First steps in this field might be taken in the marketing of farm products. Organized groups of farmers and consumers need to be brought together to attack this problem jointly for the mutual advantage of both. Collaboration in research and in furnishing expert technical advice by the State Department of Agriculture and the State Department of the Consumer would stimulate municipal as well as non-governmental interest and action on this major problem."

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of the department scrupulously avoid the disclosure of confidential data. This would merely conform to the practice of all other government research agencies.

In order to attain maximum usefulness, the department should issue reports based on its research activities at regular and reasonably frequent intervals. These reports should summarize all the important factual data collected by the department in the course of its investigations and should include interpretative comments and such recommendations as the department believes may further the interests of the consumers of the State.

Technical Research and Laboratory Facilities

In addition to the maintenance of basic statistical data and to these broad programs of economic research which appear to constitute an indispensable part of the functions of a Department of the Consumer, it is suggested that the department maintain laboratory facilities and conduct various technical studies. Thus, the Consumers' National Federation proposes:

> "Laboratory facilities should be available, under reasonable rules and regulations, to individual consumers or groups of consumers, at fees based on cost, to test products suspected of not complying with Federal or State requirements, as, for instance, fruit or vegetables suspected of not complying with poisonous spray-residue tolerances, or color-added oranges suspected of being immature or otherwise defective. In view of the major public interest in public and private low-cost housing, the department should co-operate with the State Housing Authorities and other housing agencies in research from the consumer standpoint on home-building materials, pre-fabricated housing, and on housing requirements.
>
> ". . . it should work in general toward strengthening the application and enforcement of the existing Food and Drug Act, broadening its protection of the consumer, as for instance by making surveys pointing toward the need for disclosing formulas of drugs and cosmetics, including advertising under State control, especially advertising of drugs and proprietary medicines, applying of existing provisions to 'distinctive name' products, etc. It should also supplement the work of the State Department of Health in special lines not at present adequately covered, as for example, research in diet and toxicology, in order to keep pace with the growing utilization of chemicals in the processing of food, the effects of which are not known in advance."

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Presumably, the department will embark on technical work of this character only after a thorough survey of the facilities now available in other agencies. In all probability the department, at least in its initial stages, will find it possible to function with a minimum of laboratory equipment of its own. Co-operation with other departments will permit it to conduct its necessary activities on an economical basis. It will be able to refer requests from consumers or consumer groups for special tests to those bodies now best equipped to comply with such inquiries. It should find it possible to plan any specific program of technical study in such a manner as to make maximum use of already established laboratories.

IV. Misrepresentation, Informative Labeling and Commodity Standards

A. Value of the Program

Those who advocate the establishment of a Department of the Consumer with comprehensive functions believe that one of the most promising methods for improving the standard of living of the people of the State proposes to furnish the consumer with adequate information respecting the content and quality of merchandise offered for sale so that he may be enabled to expend his purchasing dollar more intelligently. Accordingly, it is urged that a Department of the Consumer should devote major effort toward promoting informative labeling and the adoption of standards of grade and quality, and toward combating misrepresentation and deception in the sale of commodities.

An effective program along these lines will serve a three-fold function. It will help the consumer directly by permitting him to plan his purchases wisely and to avoid wasteful expenditures on inferior or unsuitable goods. It will strengthen the position of the honest and ethical business man by restricting unfair and deceptive selling tactics. Finally, it will promote economy in production by eliminating wasteful multiplication of grades, container sizes and the like, and by permitting productive effort to concentrate upon a limited number of standardized items.

B. Scope and Inadequacy of Existing Law

The scope and objectives of such a program must necessarily be appraised in the light of an examination of the present legal structure. For many years the Federal, State and local governments have co-operated in seeking to promote standardization and combat misrepresenta-

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tion both by law and by encouragement of private action. However, according to a report prepared by the Division of Industrial Economics in 1937 for submission to the President:

> "Much of this legislation is far-reaching in effect. Nevertheless, it has failed to afford adequate protection to consumers, and to business competitors or full encouragement to the elimination of economic waste. The factors contributing to this partial failure include principally the following:
>
> (1) On account of gaps in the existing legal structure, areas exist in which regulation is absent or inadequate, although relatively complete control is exercised over the marketing of some commodities, and although certain undesirable practices are effectively barred.
>
> (2) Most existing legislation is negative in character. It prohibits falsehood without establishing any standard of truth.
>
> (3) Many of the provisions contained in these laws are not mandatory. They encourage action along lines believed to be socially desirable, but prescribe no penalties for nonconformance.
>
> (4) Procedural delays hamper effective enforcement."

The area in which the coverage of existing law is probably most effective, is in the sale of certain foodstuffs. Both the Federal and State laws prohibit the sale of adulterated commodities. In addition, the Federal government has established specific standards for butter, milk, flour and certain staple grains. New York State prescribes specific requirements in connection with the sale of milk, butter, eggs, apples and for certain commodities used by farmers, such as feed stuffs, seeds and fertilizers. The State also establishes certain other specific requirements such as prescribing that when food is sold in containers, the quality of the food at the open face must represent a fair average of the contents of the entire container.

For the vast bulk of commodities, however, no such specific standards are established. Instead, misrepresentation and deception is restrained only by general provisions prohibiting adulteration and false advertising. The foremost difficulty encountered in the enforcement of these statutes is the fact that they prohibit falsehood without establishing any specific standard of truth. This constitutes a major defect since silence can deceive the consumer as effectively as the dissemination of false claims.

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Thus, according to W. G. Campbell, Chief of the Food and Drug Administration:

> "The present statute is largely negative in its requirements as to labeling. It provides not for what must be stated on the label, but for what must not appear thereon. It enjoins truth, but does not enjoin the whole truth. Its prohibitions are against false and misleading statements, but it does not insist on positive and informative statements, except declarations of the quantity of content of foods in package form and certain other very limited specific declarations."[6]

Moreover, in the absence of any accepted standards, it is extremely difficult to draw the boundary between truth and falsehood to the satisfaction of a court of law. For example, an article containing a large proportion of shoddy may be sold to the public as wool, but before the Federal Trade Commission can proceed against the vendor for misrepresentation, some legally accepted definition for the term "wool" must be available. The resulting handicaps imposed on the Federal government in its efforts to enforce the laws against misrepresentation are described by Dr. Campbell in the following terms:

> "The present law gives the Department of Agriculture no authority to establish legal standards for food products except in the limited field of canned foods. The food standards announced by the department are wholly advisory in character and compliance is a voluntary matter on the part of the manufacturer. Such advisory standards are based upon the consensus of consumer understanding and upon good manufacturing practice. In order to prove that a product sold within the jurisdiction of the Food and Drugs Act failing to comply with the advisory standards is adulterated or misbranded, it is necessary for the department to present to the court and jury convincing evidence that the advisory standard represents the actual composition of the product expected by the consumer and recognized by the majority of the trade.
>
> "Proof that the product on trial does not meet the advisory standard is of no avail unless the validity of the standard is first established. This imposes a double burden of proof upon the government as well as the expense of bringing into court trade and consumer witnesses who are prepared to testify that the advisory

[6] *Food and Drug Review*, Food and Drug Administration, Department of Agriculture, Vol. 17, July, 1933, No. 7, pp. 121-2.

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> standard accurately represents the product. It has long been recognized that this necessity imposes a handicap of undue proportions upon the government and that the lack of legal standards is a distinct disadvantage to ethical manufacturers who are forced to compete to their cost with products which differ from the advisory standards."[7]

Adequate legal proof of misrepresentation requires the existence of some standard of truth generally accepted both by the trade and by consumers. The Federal Trade Commission has attempted to supply the need of such standards by calling conferences of business men engaged in various lines of trade and by thus endeavoring to establish rules whose acceptance would be sufficiently widespread to constitute adequate legal evidence. However, rules established by the commission have no legal force as such until they have been specifically reviewed by the courts. Moreover, the jurisdiction of the commission extends only to merchandise involved in interstate commerce.

Even more significant, perhaps, from the point of view of the consumer, is the fact that the commission has no authority to proceed against misrepresentative practices as such, but can only intervene in cases where injury to competition exists. When the commission attempted to restrict the marketing of an alleged obesity cure on the ground that it was potentially harmful to consumers, it was over-ruled by the courts which held that

> "the general law of unfairness uses the misleading of the ultimate purchaser as evidence of the primary vital fact, injury to the lawful dealer. The commission uses this ultimate presumed injury to the final user as itself the vital fact."[8]

The Supreme Court upheld the Circuit Court of Appeals in this case on the ground that all other sellers of obesity cures used the same questionable tactics and that it could not bring itself to believe that Congress had set up the commission "for the purpose of preserving the business of one knave against another" (nor apparently for the purpose of protecting the public against both).

Cumbersome legal procedure has seriously hampered the efforts of the Federal Trade Commission to prohibit falsehood and misrepresentation. The commission has no authority to enforce its orders and can invoke no penalties for failure to obey. In order to secure compliance,

[7] *Ibid.*

[8] *Raladam Co. v. F.T.C.* 42 F. (2nd) 430 (1930); 51 S. Ct. 587 (1931).

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it must appeal to the Federal courts and secure an injunction against a continuance of the practices it has found unlawful. According to the commission:

> "Punishment for a violation of the law cannot be secured until the commission has proved in its own proceeding that the statute has been violated, and has proved that the offender is in contempt for a violation of the decree of the court. The requirement to thrice prove a violation of a prohibitive statute before punishment can be inflicted, to prove it twice before an injunction can be secured, probably does not have parallel in our statutes."[9]

Within the State of New York, the Department of Agriculture and Markets is empowered to proceed against adulteration and misrepresentation in certain specific cases and, as stated previously, standards have been established for a few specific food products and for certain commodities used by farmers. In a few cases such as milk, the size of containers has been specifically prescribed by law in order to assure the public a full measure. Similarly, the weight of loaves of bread has been specified. All these State activities, however, affect only a very small fraction of the total commodities in which the consumer is vitally interested.

Business men have joined the consumers' representatives in urging the need for a comprehensive program designed to acquaint the consumer with the nature of the goods he is purchasing.[10] Thus the American Standards Association has established a special Advisory Committee on Ultimate Consumer Goods with the object of developing standards of grade and identity for commodities in which the ultimate consumer is interested. However, any standards adopted by such a committee will still lack force in a court of law. The procedure necessary to prove misrepresentation in the case of any departure from such standards remains cumbersome and subject to all the procedural difficulties which have been outlined above.

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[9] Federal Trade Commission, *Annual Report*, 1928, pp. 77-8.

[10] Thus Mr. H. W. Brightman, vice-president of Bamberger and Co., Newark, N. J., chairman of the Advisory Committee on Ultimate Consumer Goods of the American Standards Association and chairman of the Consumer-Retailer Relations Council, writes:

> "Consumer interests are becoming more and more articulate in demanding fuller information about the merchandise they are buying, so that they may the better judge for themselves the value and stretch their incomes to give them more for their money. They want not only information in the way of buying aids, but they want information that will enable them to buy more easily . . . they want intelligent standardization of sizes, standardization of terminology, so that they can judge between conflicting claims; they want information as to how to use merchandise for greater comfort, for longer wear, for better satisfaction . . . they want completely honest advertising that will

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C. Legal Standards and Grades to be Established by the Department of the Consumer

Accordingly, representatives of organized consumer groups such as the Consumers' National Federation urge that a Department of the Consumer be permitted to establish:[11]

(a) Standards of identity and quality for consumers' goods.

(b) Standard nomenclature.

(c) Standards for garment sizes, multiple grades for foods or other consumers' goods and the like.

Obviously in this phase of its work, the department will co-operate closely with State agencies such as the Department of Agriculture and Markets as well as with Federal agencies.

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tell not only the truth, but the whole truth. They want completely honest and informative labeling, and fully informed salesmanship . . .

"Within recent months, . . . through the co-operation of the National Retail Dry Goods Association and a number of consumer and governmental agencies, there has been set up under the supervision of the American Standards Association an Advisory Committee on Ultimate Consumer Goods.

"This committee, . . . is at the present time working on standard specifications and standard terminology, and informative labeling on bed sheets, woven cotton materials, women's hosiery, bedding and upholstery, and several other items of merchandise. Projects recommended for future action include mothproofing and waterproofing of materials, the development of standard specifications covering measurements, construction and labeling of over one hundred articles of men's, women's and children's clothing; standard counts in nine different types of textiles, and the study of many items in the home furnishings field . . .

"Our customers, as I understand it, want minimum standards for materials and other staple products, together with adequate publicity as to whether merchandise conforms to these minimums . . . then they will know whether they are buying standard or substandard merchandise, and, taking the price into consideration, can govern themselves accordingly. They want simple grading or staple merchandise above the minimums so they can compare grades and see if they are getting their money's worth.

"They want a degree of standardization in sizes both between stores and within individual stores, so they will not have to face, as they do now, in children's dress, for example, a multiplicity of size ranges between two and sixteen, and further wide discrepancies in individual sizes varying according to manufacturer, retailer, material, and price.

"The informed consumer, thanks to the excellent work of many consumer organizations, wants, as I see it, standardization of terminology so that 'colorfast' means an adequate degree of color permanence, and not just the opposite when the words 'colorfast' are preceded by that otherwise honorable word 'commercially.' They object to the word 'standard,' meaning top grade in some merchandise, and fourth grade in others; and Grade 'A' meaning tops in milk and 'super colossal' tops in olives. They may want color standardization in housewares and 'capacity' or 'efficiency' standards in electric refrigerators. And they certainly want to know how to appreciate quality and durability, and how to get greater serviceability out of most of the things they buy." (*Industrial Standardization and Commercial Standards Monthly*, Feb. 1937, pp. 41-2.)

[11] The Consumers' Counsel of the Agricultural Adjustment Administration and the former technical director of the Consumers' Advisory Board of the N.R.A. strongly concur in the opinion that a State Department of the Consumer can perform invaluable services by fostering standardization and informative labeling. The former writes:

"It should promote the definition and adoption of consumer standards and grade designations for consumer goods. In the case of farm products this again calls for

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The proponents of this program urge that the department be authorized to promulgate such standards as "permissive" standards in the State of New York. Conformance would not be mandatory but any manufacturer or distributor would be *privileged* to label his merchandise in accordance with these permissive standards. Any false claim of adherence either on the label, in advertising or in direct sales talk, would constitute prima facie evidence of misrepresentation. It is argued that this system will greatly simplify court procedure in cases in which misrepresentation is alleged, since it will no longer be necessary to undertake the cumbersome process of proving that a standard which has been misused is a "generally accepted standard." Presumably, the courts would be instructed to accept the factual conclusions of the department with reference to any standards it may promulgate as prima facie evidence in any action alleging misrepresentation or deception.

Therefore it will be essential for the Department, if its findings are to be endowed with legal force, to proceed with the utmost care in the promulgation of grades and standards. It must meticulously observe all the requirements of "due process." In all probability, the Department will be confronted with two different types of problems, depending upon the extent to which any scheme of grades or nomenclature has found general acceptance within a trade.

(1) Generally Accepted Standards

In many fields, objective standards already exist which have found wide acceptance by the bulk of an industry. These standards may have been adopted by Federal bureaus such as the Department of Agriculture or the National Bureau of Standards, or they may represent the work of private agencies such as the American Standards Association. In cases of this sort, the department would presumably proceed by advertising its intention to give such generally accepted grades or standards the force of legal authority. It should afford ample opportunity for the recording

collaboration with the Department of Agriculture to the end that market grades which serve to protect the producers of these products may be appropriately supplemented, when necessary, by consumer grades which will assist ultimate purchasers of these products.

"Existing market grades are not fully adapted to the needs of consumers, but neither are they inconsistent with the consumer grades which might be used to supplement them. A gain to both producers and consumers of farm products is indicated if standards and grades can be developed to meet both purposes.

"Joint action with other states and with the Federal government is obviously called for in defining grades and standards. Diversity of standards creates serious problems in distribution which can be avoided if the necessary compromises and adjustments are effected through joint action across state lines. Similar problems arise from the diverse regulations of municipalities within the State. A State consumer agency should undertake to bring about voluntary collaboration of municipalities toward greater uniformity."

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of any objections and should hold public hearings in case any material controversy develops.

In most cases, however, little controversy will be encountered in the adoption of such standards as have already won fairly general acceptance. The major contribution rendered by the department in cases of this sort would be the simplification of legal procedure. It will no longer be necessary to predicate a charge of misrepresentation upon a cumbersome proof to a court and a jury that certain specific grades or nomenclature enjoy practically universal acceptance by the trade and the consumer. Instead, misrepresentation will hinge merely upon a comparison with the standards of truth prescribed by the department unless the offender can affirmatively show that the department erred in its action.

(2) Establishment of Standards where Custom Has Not Crystallized

In the majority of fields, however, custom has not so crystallized that the department need only promulgate existing standards. In these cases, it is argued, the department could perform a very useful function by sponsoring conferences among producers, distributors and consumers in order to facilitate and hasten the adoption of uniform practices. According to an official of the American Standards Association, even purely voluntary conferences have often succeeded in bringing substantial agreement as to standards, grades and nomenclature, where apparently irreconcilable differences previously seemed to exist.

On the other hand, any State agency must exercise the utmost caution in the promulgation of standards and must take every precaution to avoid conflict with the requirements of the Federal government or with those of other states. Manufacturers, distributors and consumers unite in emphasizing the importance of this precaution.

Thus, Mr. Donald Montgomery, Consumers' Counsel of the Agricultural Adjustment Administration, writes:

> "I would like to voice my hope that whatever consumer services are provided by the State of New York, care is exercised to avoid the growing tendency toward what might be called sub-nationalism on the part of the states. It is very unfortunate, I think, to attempt to create artificial preference on the part of consumers for products of local origin. Apart from the obvious desirability of the greatest possible freedom of trade among the states, it is quite certain that consumers should be permitted to choose between rival products on their merits. Any attempt to prejudice their choice is, to say the least, not an appropriate function of a state consumer agency."

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Several experts in the field of retailing feel that the danger involved in any promulgation of standards, state by state, is so great as to outweigh any possible benefits. They contend that the only body competent to establish standards to be used in interstate commerce is the Federal government, and that a State Department of the Consumer should avoid this field entirely.[12] Similar warnings have been received from representatives of manufacturers' associations.

In fact some business men such as Mr. Frank B. Jewett, vice-president of the American Telephone and Telegraph Company, go so far as to oppose any action by government toward investing standards with the force of legal authority.[13] However, an official of the American Standards Association expressed the conviction that intelligent standardization does not impose any bars to progress and that if government proceeds intelligently, there should be little ground for fearing the results of the legalization of grades and standards.

Nevertheless, it is clear that the Department of the Consumer, if it is to guard the interests of the consumer, must, except in the most unusual circumstances, base its standards upon practices which have won, or are almost certain to win nation-wide acceptance.

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[12] A retailing expert, with long experience in the problems of distribution, writes:

"We have a National Bureau of Standards and the Federal Trade Commission which, together, accomplish a great deal toward the establishment of fair trade practices on a national basis, and the importance of establishing such standards and practices on a national basis is quite apparent. They must be established at the source of production and not of distribution and so must control all producers in whatever state located on a basis of equality. This equality would probably be destroyed if various states set up their own standards, and there would, of course, be a continuous clash of jurisdiction between intra and interstate commerce."

[13] "Long ago Mr. Root pointed out to me the inherent fragility of action based primarily on legal authority and the almost irresistible power which inhered in the judgment of a body of men possessed of no power to enforce that judgment but who were recognized to be men of ability and character and who formed their opinions with studied deliberation.

"My distrusts of government as a maker of standards that affect commerce and industry, *i. e.*, outside those sectors of public health or safety or national defense where government alone can act, are more basic than fear of intrusion of political factors. They reside (1) in the belief that the agencies of government, circumscribed as they are of necessity by the restraints of government, are not in the best position to obtain and appraise all the facts; and (2) that being agencies of government anything they emit tends to appear more important than it really is and more difficult to abandon or modify.

"In other words, standards made by government are, it seems to me, more likely to become instruments of restraint to progress than are those emanating from a mobile body like the American Standards Association. When to this is added the almost inevitable tendency that develops in men clothed with apparent authority to exercise it punitively, it seems to me that the case for the voluntary association in the field of standardization is substantially iron-clad.

"Nothing of what I have just said should be construed as a belief on my part that government should be excluded from participating in the making of standards—quite the contrary. Government should participate largely but, I think, on the same voluntary basis as the other members of the association." (*Industrial Standardization and Commercial Standards Monthly*, Dec. 1937, pp. 328-9.)

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D. Mandatory or Permissive Standards

One of the most important decisions to be made with reference to this phase of the work of the department will relate to the precise degree of legal force with which its grades and standards are to be endowed. Two major alternatives are apparent:

(1) The standards established are to be entirely permissive. No person will be permitted to claim falsely that he is adhering to the grades or standards prescribed. On the other hand, there will be no positive requirement of conformity. In other words, if the department should adopt the A. B. C. grading system for canned goods, it will be illegal to sell any canned goods labeled either A, B or C, which fail to comply with the required specifications, or to label ungraded goods in any manner which may mislead the consumer into believing that he is purchasing a graded product. There will be nothing, however, to prevent the marketing of cans which are simply and frankly unmarked as to grade. Similarly, if the department should adopt some scheme of labeling designed to inform the consumer as to the precise quality or proportion of wool included in a textile product, any merchant will still be free to sell a completely unlabeled product, provided that he makes no false or misleading claim as to its wool content.

(2) Conformance with certain standards is to be made mandatory. Thus, there may be a positive requirement that all canned goods be labeled in accordance with the grades established, or that a specified minimum of information be included on the label of all fabrics sold as containing wool.[14] Mandatory grade labeling is at present required by the State in connection with a few products such as eggs.

On the other hand, a very important question arises as to whether the interests of the consumer would actually be served by the adoption of mandatory grading or labeling on a State-wide basis. In practice, it would probably prove very difficult for an out-of-State manufacturer to use special labels for those goods which he ships to the New York

[14] Thus, the Consumers Union of United States, Inc., advocates in a letter to the committee:

"A law requiring the grading of staple products, such products to reach the ultimate consumer marked with their grade . . . A law requiring the honest labeling of all commodities not subject to grading, for example, textiles."

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market, or to grade those goods separately from the rest of his product. It would undoubtedly add materially to his costs and probably his prices, were he forced to do so.

Even if the job of grading and labeling out-of-State goods were left to the New York distributor, there would still be a considerable cost involved. This difficulty was strongly emphasized by a large distributor who himself strongly favored the principle of grade labeling. He pointed out that certain manufacturers would strongly object to shipping goods into New York if grading or labeling were made mandatory in New York alone, and that the result might be a diminution in the supply and a resulting increase in the price of goods offered on the New York market.

The alternative—permissive labeling—has much to recommend it. It will depend for its widespread adoption upon pressure by informed consumers and upon the co-operation of the ethical retailer, wholesaler, and manufacturer. The rapidity and effectiveness with which consumers are succeeding in their current "truth in fabrics" campaign is an illustration of the ability of organized consumers to induce business men to furnish adequate information as to the character and quality of merchandise. Moreover, a State department would be in an excellent position to stimulate such demand by the consumer for the voluntary adoption of permissive grades and standards, by undertaking an adequate program of publicity—an activity which will be considered elsewhere in this report.

Undoubtedly permissive grades and standards will not be adopted as quickly as would be the case were requirements made mandatory. However, it seems entirely possible that this sacrifice in speed will be amply repaid by avoiding the dangers inherent in imposing mandatory requirements. It may, therefore, be advisable to restrict the activities of a Consumers' Department to the prescription of permissive grades and standards. The Consumers' Federation seems to accept the validity of this principle by proposing that the department:

> ". . . should recommend when grades and standards should be made mandatory or when minimum standards of quality should be prescribed for products affected with a vital public interest, such as the health of the community."

Where such considerations as public health require stronger action, the Legislature would still be entirely free to enact the specific statutes necessary.

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E. Mandatory Minimum Standards

A similar set of problems arises in connection with the possibility that the department be given authority to establish minimum standards of quality for certain products and to bar merchandise failing to conform with such standards from sale within the State. Such a proposal involves both an economic and a constitutional question.

Thus, when the state of Florida prohibited the marketing of immature citrus fruits, the Court found:

> "It is competent for the Legislature to find that it was essential for the success of that industry that its reputation be preserved in other states where such fruits find extensive markets."[15]

Similarly, state laws prohibiting the sale of fertilizers with less than a specific minimum content of available plant foods have been held legal on the ground that it is competent for the State to prevent fraud in the marketing of a commodity with respect to which misrepresentations are difficult to detect.

On the other hand, where considerations of this character were not present and where public health was not involved, the courts have usually found that attempts to establish minimum standards of quality were unconstitutional. The State of Illinois, for example, attempted to prohibit the use of second hand materials in the manufacture of bedding. It was contended—apparently by those manufacturers who did not use the second hand materials—that such a practice was unsanitary and endangered the public. The Court found that second hand material could be made perfectly safe through sterilization, and the law was declared unconstitutional.[16]

The Supreme Court of the United States rendered a similar decision in connection with the attempt of the state of Pennsylvania to outlaw the same practice.[17]

The same principle was involved in the nullification of a Connecticut statute designed to prohibit the sale of motor oils not meeting a definite government specification.[18]

In general, it is probable that these court decisions have largely paralleled the true interests of the consumer. Substandard commodities which are not dangerous or injurious to health, find a perfectly proper market among the low income section of the population. It is impor-

[15] *Sligh* v. *Kirkwood*, 237 U. S. 52 (1915).
[16] *The People of the State of Illinois* v. *Weiner*, 271 Ill. 74, (1915).
[17] *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402 (1926).
[18] *Atlantic Refining Co. et al.* v. *Trumbull Governor, et al.*, 43 F. (2nd) 154 (D. C. Conn. 1930).

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tant merely that the consumer be made aware of what he is buying, and that the price for substandard commodities be sufficiently below that of the standard product to make their purchase a true economy. Thus the Consumers' Advisory Board of N.R.A. instructed its personnel that:[19]

> "The consumer desires to buy the quality of product which is appropriate to the intended use at the lowest 'socially necessary' cost. It is not to his interest that low-quality goods should be taken off the market altogether if
>
> (1) low quality sells for a correspondingly low price,
> (2) it serves a usefulness commensurate with the price,
> (3) it does not impede the acquisition of better quality at an equally low price or affect costs of distribution in such a way that the consumer has to pay unnecessarily high prices for better quality."[20]

Here again it seems probable that the useful function of a State Department of the Consumer will be limited to permitting the public to recognize substandard merchandise when it is offered for sale. Where public policy seems to demand more positive action, the department would still be a position to recommend specific enactments. It will remain for the Legislature to take any action designed to bar injurious or undesirable merchandise from the market entirely.

F. Enforcement Problems and Procedure

There are various possible procedures which may be followed to curb false or misrepresentative claims of adherence to the standards established by the department. The first question presented is whether the department itself should take action against offenders or whether other State agencies be entrusted with the duty of securing compliance.

The proposal of the Consumer's Federation suggests that the Department of the Consumer should assist and co-operate with the appropriate law enforcement agency in prosecuting any false claim either on the

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[19] Office of National Recovery Administration, Division of Review, Information concerning Commodities, *A Study in N.R.A. and Related Experience in Control; Part B: Standards and Labeling* by Hunter P. Mulford, Work Materials No. 38, pp. 227–9.

[20] Similarly, Dr. Caroline F. Ware, Associate Professor of Social Economy at the American University, writes:

> "In supporting a program for adequate labeling and the development of standards, however, I consider it of the utmost importance to be sure that standards be not used to put off the market goods of low quality which, when sold at a price commensurate with their quality, may meet special needs, especially the needs of low income groups. It is also important to insure that standards be not used by certain manufacturers to discredit the different but legitimate products of others. The aim must be adequate and useful labeling of the wide range of high and low quality products now on the market."

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label, in advertising, or in direct sales talk that the merchandise conforms with State specifications. This procedure would parallel that now prescribed for the Department of Health under article 50 of the New York State Public Health Law.

> "Upon discovering any violation of the provisions of the penal law relating to the adulteration of foods and drugs, the state department of health shall immediately communicate the facts to the district attorney of the county where the violation occurred, who shall forthwith commence proceedings for the indictment and trial of the person charged with such violation. . . ."

The Federation does not, therefore, contemplate endowing the department with any direct punitive power of its own. This position is presumably based upon the belief that the Consumers' Department should be an agency devoted to protecting the interests of the consumer, and not an impartial body properly equipped to dispense justice. This stand seems to be accepted by virtually all individuals and groups which have expressed an interest in the problem.

It remains to be considered whether the department should undertake any extensive effort to police the observance of its standards by employing shoppers to detect violations and by similar active measures. The proponents of this course argue that vigorous effort on the part of the State to protect its citizens from deceptive and misrepresentative selling tactics is necessary, and that a Consumers' Department is an appropriate body to entertain such activities. Others believe that the department should confine itself only to such actual surveys of current marketing practices as may be involved in the course of such general investigations as the department may wish to pursue. If the latter view is adopted, the task of detecting violations will be left to existing State agencies such as the Department of Agriculture and Markets and to such local agencies as are at present performing similar duties.

In either event, the active co-operation of consumers individually and of organized consumer groups will probably be of invaluable assistance in promoting ethical merchandising practices. The department might well serve as an agency for receiving consumers' complaints, for verifying their accuracy and for transmitting them to the proper enforcement agency.

It has also been urged that the department should maintain laboratories for testing products suspected of being mislabeled or misbranded. Here again, presumably, the department will strive to avoid duplicating existing facilities.

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The second series of questions arising as to enforcement procedure relates to the precise type of action taken where misrepresentation has been shown to exist. Should such action be punitive or should it merely extend to correcting existing practices and preventing future violations? Serious objection has been raised to any extension of the present criminal penalties for misrepresentative practices. It has been contended by persons familiar with the problem that violation often results from a misunderstanding of requirements and that, frequently, perishable merchandise which conforms to grade specifications when packed, deteriorates during shipment or prior to resale. It has been urged that, for these reasons, criminal penalties should only attach to cases of misrepresentation or deception where there is clear evidence of wilfullness and bad faith.

Civil action can take the form of injunctive procedure initiated by the appropriate law enforcement officers. This alternative will undoubtedly prove slower than direct criminal action and will also permit an offender to retain the profits which have accrued to his deception. It will, however, prevent the injustices which might follow criminal action.

It has been suggested that the establishment of a State Fair Trade Board with powers similar to those of the Federal Trade Commission might furnish a means of enforcement which would be at once fair and reasonably expeditious. This possibility is considered in more detail in the next chapter of this volume.

V. Publicity and Consumer Education

It is conceded by virtually all persons conversant with the problem, that a Department of the Consumer will be successful in improving the standard of living, only to the extent to which it succeeds in educating the individual consumer to avoid wasteful expenditures and to distribute his purchasing power intelligently. Consequently, if this view is accepted the department will include a carefully planned publicity program as one of its essential activities.

This aspect of the work of the department is largely non-controversial. It is obvious that any State program looking toward the adoption of permissive grades and standards will be successful only to the extent to which consumers are educated to understand precisely what such grades and standards mean and to demand that merchandise be fully and properly labeled. The department should endeavor to inform the consumer fully as to the value and desirability of goods of different grade or quality and it should make it possible for him to choose intelligently between an expensive product of high quality and a cheaper

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one of poorer quality. It should make no effort to disparage the merits of either, but should confine itself to a factual summary of the different uses to which each can be properly put. In other words, it should make it possible for the consumer to select what he wishes to buy intelligently and on the basis of adequate information rather than to attempt to influence his selection in the direction of one or another type of merchandise.

The department might properly acquaint the consumer with other pertinent facts relating to products offered for sale within the State, somewhat in the manner of the *Consumers Guide* now published by the Consumers' Counsel of the Department of Agriculture. Moreover, it should stand ready to answer questions submitted by individual consumers or by consumers groups with regard to the uses of merchandise. In this work, of course, it will necessarily avoid distinguishing between the products of different manufacturers or in any way undertaking the sort of classification of competing products now being performed by Consumers' Union or Consumers' Research.

Presumably, the department would issue a periodical in popular form and in addition would seek to educate the consumer through bulletins, by radio, through study groups and meetings. It might well issue an interpretative survey of State and Federal laws which affect the interests of the consumer or afford them protection. It might inform consumers of proposed legislative or administrative action affecting their interests and act as a general clearing house for consumer information.[21] Obviously, in this phase of its work, it would be necessary for the department to avoid trespassing the bounds of departmental propriety. For example, it would necessarily confine itself to explaining rather than to criticising the policy laid down by the Legislature and the Executive.

It is pertinent to note that a similar though possibly less ambitious program has already been undertaken by one state. Michigan has

[21] On this subject, the Consumers' Counsel of the Agricultural Adjustment Administration writes:

> "Laws and regulations which directly affect the ultimate purchasers of goods and services need to be explained in non-technical terms to the end that consumers may arrive at an informed opinion of what can be done in this field, how much it costs, and what it accomplishes. Research and experiment into the possibility of translating more intricate economic happenings into plain consumer language is greatly needed. Controversy on questions of business control, unwarranted price manipulation, profiteering, the relation of wages to prices, and on similar subjects excites the interest of people in their consumer capacity, but for their comprehension of the facts and problems involved they are furnished a great deal more heat than light. An aroused citizenry sends its spokesmen to the seat of government to 'turn on the heat.' The power thus generated might result in more substantial progress if government for its part accepts a continuing responsibility to 'turn on the light.' Notoriously government research and information services have neglected the interpretation of economic developments in terms of their effect upon the people as consumers."

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established a Consumers' Counsel, authorized to disseminate factual and interpretative information to the consumers of the state. The government, in establishing the bureau, directed the Consumers' Counsel to plan for a weekly broadcast in order to facilitate the work of consumer education. It has been urged with no dissenting voice that an educational program of this character can perform a major service to the consumer and to the business community.

VI. Co-operation With Organized Consumer Groups

In other sections of this chapter, reference has been repeatedly made to the belief expressed by those conversant with the problem that the usefulness of a Department of the Consumer will be directly proportional to the extent to which it secures the co-operation of organized groups representing the consumers of the State.

The Michigan Consumers' Bureau contemplates the encouragement of consumer organizations as one of its major functions. It has been suggested in some quarters that a State Department of the Consumer should take active steps toward building up consumer organizations in every county and locality and that it might be desirable to designate some individual or groups in each locality as a sort of unofficial representative of the department. More modest suggestions have been limited to proposing that the State Department act as a clearing house for consumer information and constitute an established point of contact between consumer groups and the State of New York.

Undobutedly the exact procedure to be followed by the department in its efforts to encourage the development of consumer organizations will emerge most clearly from the test of actual experience. No legal or constitutional questions of any importance seem to be involved in the planning of this phase of the program.

In addition to the various organizations representing the broad interests of the consumer, there are a considerable number of specialized groups devoted to furthering some specific aspect of his interest. Here too, it is urged that a State department should be able to render valuable advice and assistance.

(1) Consumer Co-operatives

Representatives of the Consumers' National Federation and of other consumer groups urge that the department encourage the formation and conduct of consumer co-operatives. They maintain that consumers

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generally will benefit greatly through the spread of the co-operative principle. In addition, Mr. Corwin D. Edwards, the former Technical Director of the Consumers' Advisory Board of the N.R.A., suggests that the department might devote study to any laws or trade practices which hamper co-operatives in the conduct of their activities. He also suggested the possibility that the State, acting through the department, might extend financial assistance to co-operatives during their formation.

On the other hand, it has been objected that it is entirely inappropriate for a department concerned with the interests of consumers as a whole, to promote and assist consumer co-operatives. Those who hold this point of view argue that there is no warrant for assuming that the establishment of consumers' co-operatives will necessarily benefit consumers generally. They believe that the members of consumers' co-operatives constitute merely a special group not in any way identifiable with the broad consumer interest and maintain that it would be as improper for the department to favor co-operatives against private retailers as it would be to favor retailers against co-operatives.

However, this latter point of view does not preclude the possibility that the department may study the problem of co-operatives generally or in relation to specific kinds of commodities, and submit reports appraising the value or limitations of co-operatives.

(2) Credit Unions

Mr. Leon Henderson, Consulting Economist of the Works Progress Administration, urges that the department take steps to study and improve the credit facilities available to the consumer. The entire problem of instalment buying has recently been receiving major attention. It would probably be an entirely appropriate function for the department to examine carefully the effect on the consumers of the State, of the manner in which credit facilities are now available. (It has been suggested that the department might go further and assist in the formation and operation of consumers' credit unions in order to render available to the consumer, credit facilities on sound and favorable terms.)

The problem of consumer credit is treated more fully later in this chapter.

This section of the chapter does not purport to consider all the possible fields in which a State Department of the Consumer might find it possible to co-operate with consumer organizations. Mention has merely been made of a few possibilities which are receiving major present attention.

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VII. Special Consumer Problems

A. Consumer Credit

It has been pointed out elsewhere in this chapter that a Department of the Consumer could render a service of vital importance to the State by conducting a broad program of research into various problems which intimately affect the consumer interest. In order to present an illustration of the character of the fields which urgently require a comprehensive survey, a subject of great current importance—consumer credit—will be considered in somewhat more detail.

Consumer credit plays a role of major importance in our national economy. There are virtually no reliable estimates of the extent of consumer debt in all its various forms, but guesses have ranged as high as thirteen billion dollars. This estimate includes all forms of consumer credit including:

(1) Personal loans by banks.
(2) Morris Plan advances.
(3) Pawn brokers' loans.
(4) Personal finance company loans.
(5) Charge accounts.
(6) Illegal "loan shark" accommodation.
(7) Loans by various companies to consumers for the purpose of paying off old debts.
(8) Instalment credit.

Of all these forms of consumer credit, the last,—instalment selling—has been brought to the fore increasingly in recent months. Charges have been made frequently that the too-ready availability of instalment credit with small down payments has been largely responsible for the excessive swings to which the national economy has been subject; that periods of over-buying and over-stimulation of production have alternated with periods of exhaustion of consumer purchasing power and business recession.

Thus Mr. Wilford White, Chief of the Division of Marketing Research of The Bureau of Foreign and Domestic Commerce, said that:

> "Instalment contracts entered into during and immediately prior to 1929 contributed to the late depression."

The extent to which this is true has been disputed. However, the problem is a serious one and it has constituted a subject of increasing concern to government officials and business leaders alike.

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No very reliable figures are available as to the extent of instalment credit. However, it is estimated by the Bureau of Foreign and Domestic Commerce [22] that the total amount of instalment debt outstanding at any one time averaged two and one-half billion dollars during 1936.

As was perhaps inevitable, the growth of instalment selling to these huge proportions has been accompanied with many grave abuses. The consumer has often been required to pay exorbitant charges for credit; his standard of living has been correspondingly reduced. At the same time, the resultant diversion of purchasing power to improper channels has harmed the ethical business man and has had an adverse effect on the national economy as a whole. Several states, notably Massachusetts, Indiana and Wisconsin, have expressed their concern by ordering investigations of the problem. These have been supplemented by studies made by private agencies such as the Russell Sage Foundation.

There seems little doubt that instalment selling as such has performed many useful functions. It has brought within the reach of the consumer of ordinary means many commodities which would have been entirely unavailable on a strictly cash basis. This expansion of markets has simultaneously made possible the introduction of mass production methods and a consequent reduction of prices for many goods which would otherwise have remained on a semi-luxury basis. Thus according to the Wisconsin study:

> "This mass financing has brought within reach of the average individual a wealth of articles which were never thought of in previous years, has raised the standard of living of the common people, and has reduced the price of thousands of articles until they are within the reach of the average individual. Prior to the evolution of mass finance, an ordinary automobile cost approximately three times as much as it does today and this holds true with many other articles which are now considered in the realm of necessities for the average family."[23]

At the same time, these studies have disclosed a multitude of abuses, many of which have verged close to outright fraud. There seems little doubt, moreover, that the elimination of these abuses through a sound system of regulation would in no way impair the growth of instalment credit but would rather foster it upon a sound and equitable basis.

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[22] "Consumer Credit—The Cost to Business and the Charge to the Consumer," Dept. of Commerce, 1937.

[23] Report of the State Banking Commission and Interim Advisory Legislative Committee to Investigate Finance Companies, 1935, p. 5.

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These abuses are summarized by the Massachusetts Investigating Commission in the following manner:

"I. Concealed and misrepresented charges.
"II. Rebates, bonuses and 'packs.'
"III. Taking of extra security:
(a) Chattel mortgages covering non-sale merchandise.
(b) Endorsements of other parties.
(c) Wage assignments.
"IV. Repossession abuses:
(a) Hasty repossession, without warning purchaser.
(b) 'Fixed' auction sales.
"V. Exorbitant fees:
(a) Repossession fees.
(b) Delinquency fees.
(c) Recording fees.
(d) Legal fees.
(e) Refinancing fees.
"VI. Insurance abuses:
(a) Overcharging for insurance.
(b) Requiring duplicate insurance.
(c) Concealment of coverage.
(d) Failure to place insurance paid for by purchaser.
"VII. One-sided legal protection:
(a) Contract provisions all in seller's favor.
(b) Legal action brought, knowing customer will not defend himself.
(c) Remedies too costly for individual, but sellers bring action, even if uneconomical, for disciplinary effect.
"VIII. Inadequate refunds or none at all for payment of unpaid balances before they are due.
"IX. Refinancing abuses."[24]

B. Concealed or Misrepresented Charges

Perhaps the most important single abuse in connection with instalment credit arises from the practice of systematically misrepresenting to the consumer the precise amount of the charge which he is called upon to pay for credit. This is done in a wide variety of ways, many of them so plausible as to mislead all but the exceptionally well informed buyer.

[24] "Report of the Special Commission of the Commonwealth of Massachusetts to Investigate the Licensing and Regulation of the Business of Financing Purchases of Certain Personal Property," 1936, (p. 13).

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The most universal of these practices is the expression of the carrying charge in terms of discount rather than of interest. This distinction is one which few consumers are equipped to grasp. On an ordinary instalment contract, with payments spread over a period of months, the average outstanding balance is only half of the original indebtedness. The rate, however, is computed on the latter rather than the former basis. Thus the purchaser is assured that he is only paying, say, 6 per cent for his money when he is actually paying approximately 12 per cent. The Federal Trade Commission specifically branded this practice as misrepresentative and recently ordered automobile finance companies to cease advertising their rates as "6 per cent" when a 6 per cent discount was really meant.

In addition to this well-nigh universal practice, there are a wide variety of other concealed charges regularly added to the price paid by the consumer. A common scheme is to mark up the merchandise exorbitantly in the first place and then to allow a substantial discount for cash sales. The instalment buyer then is led to believe that he is paying but a small carrying charge whereas he is really paying an additional amount equal to the cash discount. For example, according to the Massachusetts Investigating Commission, a store charged $69 for a radio bought on the instalment plan, and added no carrying charges whatever. Upon offering to pay cash, a customer was granted a discount of 50 per cent. This means that the instalment buyer, who was generously permitted to spread his payments over thirteen weeks, was actually paying 881 per cent per annum for this privilege. This illustration may be somewhat extreme, but the Massachusetts commission cites a number of other cases in which the device of the cash discount is used to conceal exorbitant carrying charges on instalment sales.

Naturally, practices of this character impose a very serious burden both on the consumer and on the ethical merchant.

Thus, according to Mr. Wilford White, Chief of the Marketing Research Division of the Bureau of Foreign and Domestic Commerce:

> "Many stores . . . encourage their prospective customers to buy on the instalment plan . . . because the added charges which they make to cover the added costs is more than enough actually to meet the costs . . . in other words, in addition to the usual merchandise profit, there is a net profit in the instalment charges over and above extra expenses and average risks."[25]

[25] "Consumer Credit—The Cost to Business and the Charge to the Consumer," Dept. of Commerce, 1937.

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The study made by the state of Wisconsin finds specifically that:

> "because of this ignorance of true interest comparisons, the concealed charge has been . . . the greatest abuse in merchandising and cash credit."[26]

C. Packs, Rebates and Reserves

In the ordinary course of instalment credit transactions, the retail dealer plays the role of agent and not that of banker. The money required to complete the transaction is advanced by finance companies. Some of these finance companies are huge corporations operating on a nation-wide basis, while others are purely local institutions.

In any particular transaction, the selection of the finance company is entirely subject to the discretion of the retail dealer. Since finance companies depend for their profits upon the volume of business they handle, they have adopted various schemes in their efforts to win the favor of the retailer. Local finance companies pay dealers rebates or bonuses. Naturally, these fees are added to the financing charge and must be defrayed by the consumer himself. Yet in the vast majority of cases, he remains entirely unaware of this practice. Moreover, competition between rival finance companies operates to the detriment of the consumer because of the very fact that he has no voice in their selection. Competition takes the form of offering ever larger rebates and bonuses to the dealers rather than in the offer of more favorable terms to the consumer himself.

Mr. Rolf Nugent, Director of the Department for Remedial Loans of the Russell Sage Foundation, and Mr. Leon Henderson, Consulting Economist of the Works Progress Administration, summarized the situation in the following terms:

> "There are two unfortunate consequences of this failure to state finance charges openly and intelligently. First, the price competition is ineffective. Increasing competition brings bonuses to dealers but no reduction in the price of credit service to the consumer. Second, the consumer is utterly unable to measure the price he pays for instalment credit in terms of the disadvantages of saving and buying for cash, of using such cash resources as may be available to him or of finding cheaper credit facilities elsewhere."[27]

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[26] Report of the State Banking Commission, etc., *op. cit.* 1935, p. 5.

[27] "Installment Selling and the Consumer: A Brief for Regulation", by Rolf Nugent and Leon Henderson, *The Annals of the Amer. Academy of Political* N *Social Science,* May, 1934.

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The large national companies often allow "reserves" to dealers in order to offer them similar inducements. This practice is defended on the ground that dealers, in their agreements with these large national companies, usually undertake in advance to accept repossessed merchandise at stipulated prices. If the value of the repossessed merchandise is less than this amount, the dealer may suffer a loss on the transaction. Ostensibly, these reserves are intended to offset such contingent losses.

However, the Wisconsin board found that:

> " . . . while there may be some merit to this contention and a small reserve might be justifiable under certain conditions, the net result of allowing dealer's reserves, debates and packs operates in a vicious circle, and that under the present mode of operation in the important field of automobile merchandising and credit finance, the original purpose of the dealer's reserve, rebate and pack has been lost sight of, and that said items are used to make additional profit not legitimately earned."[28]

In addition to these rebates and reserves which are paid by the finance company to the dealer, the latter may also include in the gross financing charge a "pack" or extra charge made at his own discretion.

In its analysis the Wisconsin committee showed that the addition of reserves and packs may serve to double the actual net charge to the consumer. On an ordinary automobile transaction, the equivalent interest rate rose from 20 per cent to 40 per cent. Finally the committee found that:

> "The practice of adding packs in automobile sales financing, once begun, injected into the business unmitigated evil due to the the fact that the shrewd dealer learned to shop around, and now places his business with the finance company who will give him the largest pack and reserve. Therefore, finance companies who dislike to allow reserves and packs are obliged to do so in order to meet competition."[29]

D. Penalties for Delinquency—Repossession

In the vast majority of cases, instalment contracts impose very severe penalties in case a purchaser becomes delinquent in his payments and provide the latter with virtually no recourse. Moreover, the tendency to arbitrary action is increased because the finance company did

[28] Wisconsin report, p. 35.
[29] Wisconsin report, p. 38.

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not make the original sale to the purchaser and consequently has no direct relationship to him and little interest in his problems.

There is little uniformity of practice in the imposition of charges for delinquency. A few companies charge little or nothing. Others increase the interest rate on delinquent payments. Many impose heavy direct cash penalties. In the majority of cases, the consumer is given little warning of the nature or amount of these added charges. Their existence is usually concealed in small type somewhere in the mass of detailed contract verbiage.

In one case reported to the Russell Sage Foundation, a prominent instalment finance company charged an extra $3 in fines for twenty-three days in delinquency on the last payment of $38. In terms of simple interest, the fine was at the rate of 124 per cent per year. Nothing in the law or in the contract permitted such charge. Nugent and Henderson point out:[30]

> "This fine may have been a reasonable compensation to the finance company for its extra freight but the important element from the consumer's standpoint is that whatever the charge, he was in no position to contest it. The finance company could repossess his car if he failed to pay and his recourse to the courts was worthless considering the amount involved."

Of course, the ultimate weapon in the case of delinquency or default is repossession of the article purchased. Obviously, such recourse is entirely proper in principle and forms an essential basis of the instalment contract. However, it is a weapon very frequently abused. Some finance companies impose exorbitant charges upon purchasers who seek to recover repossessed goods. In one case reported to the Russell Sage Foundation, a purchaser of a car was delinquent on the final payment of $15. The car was repossessed. When the purchaser sought to recover it he was required to pay an additional charge of $35, or more than twice the amount of his remaining indebtedness.

Naturally the possibility of imposing these heavy charges offers so attractive a source of profit that some finance companies resort to repossession at every conceivable opportunity. According to Nugent and Henderson:[31]

> "Several companies financing secondhand cars in New York rely on repossession charges for a large part of their income."

[30] *Op. cit.*
[31] *Ibid.*

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In some cases, repossession is resorted to even without the existence of any delinquency. Nugent and Henderson cite one case in which a car worth several times the amount of the outstanding balance was repossessed. This was done despite the fact that payments had been made regularly and that the next instalment was not due for ten days. The owner called at the garage, showed his receipts and demanded the return of his car. The company insisted upon payment of the repossession charge of $65 despite the fact that the buyer had complied with all the terms of his contract. He refused to accede to this demand, declared that he would bring suit for the return of his property and proceeded to remove his license plates from the car. While he was doing this, two police officers entered the garage and arrested him, acting upon the complaint of the finance company, which had reported that someone was stealing a car from their garage. Naturally the case against him was dropped, but in the meantime he had been forced to spend the night in the police court jail.

In theory repossessed goods must be sold at auction for the highest price that they can bring in an effort to liquidate the remaining indebtedness. In practice these auction sales are often fictitious. The instalment purchaser rarely attends the sale and is usually ignorant of his legal rights. As a result the nominal price obtained by the repossessor at the sale is often absurdly low. This permits him to obtain a deficiency judgment against the purchaser, even though the security may have been more than adequate to cover the amount outstanding.

E. Garnishment Executions and Related Problems

Many instalment sellers, particularly in connection with the sale of such commodities as clothing, jewelry and furniture, require the purchaser to sign either a wage assignment or a confession of judgment upon which a garnishment execution may issue. Frequently such assignments or confessions are signed by unwary purchasers under the impression that they were merely signing receipts for merchandise. A recent study by Paul Blanshard, Commissioner of Accounts for the City of New York, revealed a total of 10,848 garnishment executions against 1,423 city employees. Forty-four per cent of the employees involved had signed confessions of judgment in connection with purchases of jewelry from racketeering dealers. The buyers assented to these contracts in the belief that payments were to be made in instalments. Yet, in most cases, salaries were garnisheed even before the first payment was due.

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Frequently instalment sellers require the purchaser to have some friend endorse his note. Theoretically, the finance company should resort to the guarantor in case of delinquency only after every possible effort has been made to collect from the original purchaser. In practice, the endorser is often sued long before the obvious remedies against the purchaser himself are exhausted.

F. Prepayment

In contrast to the care displayed in the drawing of instalment contracts in such a manner as to afford every conceivable protection to the seller, is the complete failure to recognize any of the legitimate interests of the buyer. Thus, practically never is any provision made for reducing the carrying charges in case the purchaser liquidates his obligation in advance of the due date.

G. Investigation of Instalment Selling

There has been no attempt here to detail all the problems which arise in connection with instalment selling practices. However, many persons concerned with the interests of the consumer maintain that abuses of the kind described are not at all uncommon and insist upon the need for comprehensive remedial action, based upon adequate study.

It has therefore been suggested that the welfare of the consumer of this State demands that such an investigation be undertaken and entrusted to a body specifically concerned with protecting the consumer interest. A Department of the Consumer could logically undertake such a study and present recommendations for appropriate action to the Legislature. It would also serve as an appropriate agency to provide the instalment buyer with continuing protection by affording him with a regular avenue for the registration and consideration of complaints.

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CHAPTER XIX

PROPOSED STATE FAIR TRADE BOARD *

Scope

This chapter discusses the possibility of establishing a Fair Trade Board under the government of the State of New York with functions generally similar to those exercised by the Federal Trade Commission.

Express constitutional authorization would be necessary for a State Fair Trade Board if it were to be established as an independent agency. It is, of course, conceivable that it could be set up by legislative enactment as a bureau of some existing department or as a board under the general jurisdiction of some department. However, most of those who favor the establishment of a Fair Trade Board oppose the latter course. They contend that the quasi-judicial functions which such a board would perform bear no close relationship to the duties now assigned to any existing department. They favor, moreover, a degree of independence which they fear could not be achieved by a subordinate bureau. In Wisconsin, a Fair Trade Bureau has been established under the Department of Agriculture and Markets, but the situation is not entirely parallel.

Functions of the Federal Trade Commission

Necessarily the desirability of establishing such a State board must be examined in the light of the functions which it could appropriately perform. When Congress established the Federal Trade Commission in 1914 as part of a general revision of the anti-trust laws, it hoped that the commission would exercise a broad influence toward improving the standard of competition in interstate commerce. Two of the purposes which the commission was designed to accomplish are pertinent to the present discussion of a State board.

In the first place Congress recognized that the multiplicity of business practices made it almost impossible to enact laws specifically defining unfair methods of competition. Accordingly the Federal Trade Commission act merely declared that unfair methods of competition in commerce were unlawful. It was hoped that the commission could, over a period of years, draw a line between fairness and unfairness more effi-

* This study was prepared under the direction and guidance of the Sub-committee on Bill of Rights and General Welfare.

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ciently than would be possible for Congress. It was believed that such a line could serve as a practical guide to business, as a protection to the ethical business man against his less scrupulous competitor and, incidentally, as a protection to the public against unfair methods of competition.

The second purpose was primarily procedural. Before the establishment of the commission, recourse against unfair methods of competition was complex and often very protracted. Moreover, in many cases criminal action under existing statutes seemed unwarranted because the offense was technical in character and required merely corrective rather than punitive action.

Accordingly it was hoped that the Federal Trade Commission, through its power to issue "cease and desist orders," could proceed against unfair methods of competition, quickly and effectively and could force their discontinuance without resort to criminal action. Moreover the commission, through its stipulation procedure, has made extensive use of an even more expeditious technique; one which secured the discontinuance of objectionable practices without any formal judicial procedure whatever.

Functions of a State Board

The authority of the Federal Trade Commission is, of course, limited to the field of interstate commerce. In addition, the very fact that its jurisdiction extends to the entire Nation and that its staff and resources are limited, makes it impossible for it to devote particular attention to the problems of any specific state or locality.

Presumably it would be necessary for a State Fair Trade Board to confine its activities to transactions in intrastate commerce. It would doubtless be essential to follow some plan of concurrent jurisdiction mutually acceptable to the board and to the Federal Trade Commission. This would be parallel to the situation now prevailing in the field of labor relations, where the national and State labor relations boards follow a well-defined policy in regard to their respective functions.

The state of Wisconsin has entrusted powers somewhat similar to those of the Federal Trade Commission to its Department of Agriculture and Markets. The law provides:

(1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.
(2) The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair.

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The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

(3) The department, after public hearing, may issue a special order against any person, enjoining such person from employing any method of competition in business or trade practice in business which is determined by the department to be unfair. The department, after public hearing, may issue a special order against any person, requiring such person to employ the method of competition in business or trade practice in business which is determined by the department to be fair. (1935, ch. 550, sec. 355.)

Mr. Francis A. Staten, former director of the Fair Trade Bureau of Wisconsin, describes the work of that agency in the following terms:

"In Wisconsin the statutory emphasis was upon the unfair competition law which was substantially similar to section 5 of the Federal Trade Commission Act. Our approach was dual: we had in mind both the protection of business from unfair practice and the protection of the consumer from high prices and deception. We found that the administration of the law by an administrative commission having the power to issue cease and desist orders was more effective than reliance upon court action under administrative statutes, except in those few cases where there was such an obvious intent to violate the law that a strictly construed criminal statute could be implied. . . . the cases where intent is legally apparent are rare."

It has been suggested that a similar agency might perform a useful function in the State of New York. As explained by Mr. Staten, an administrative commission of this sort can effectively proceed against a wide variety of undesirable practices even in the absence of conclusive evidence of wilfullness or criminal intent. It can, therefore, further the cause of fair competitive practices in intra-state commerce without subjecting casual or unwitting offenders to unwarranted and possibly untenable criminal prosecution.

If an agency of this sort were established within the State, it may be considered desirable to follow the recommendations recently made by the Federal Trade Commission and to permit it to proceed against unfair and deceptive practices in commerce as well as against unfair methods of competition. This would allow such a board to take effective action against practices which injure only the public and in which

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no competitor is adversely affected. The need for such a statement of the law became apparent after the decision of the Supreme Court in the Raladam case.[1] In this case, the courts ruled that the Federal Trade Commission had no authority to proceed against misrepresentative practices as such, but could only intervene in cases where injury to competition exists. When the commission attempted to restrict the marketing of an alleged obesity cure on the ground that it was potentially harmful to consumers, it was overruled by the Courts which held that:

> "The general law of unfairness uses the misleading of the ultimate purchaser as evidence of the primary vital fact, injury to the lawful dealer. The commission uses this ultimate presumed injury to the final user as itself the vital fact."[2]

The Supreme Court upheld the Circuit Court of Appeals in this case on the ground that all other sellers of obesity cures used the same questionable tactics and that it could not bring itself to believe that Congress had set up the Commission "for the purpose of preserving the business of one knave against another."

The decision as to whether a Fair Trade Board is to proceed against "unfair methods of competition" or "unfair and deceptive practices in commerce," involves something even more fundamental than the mere scope of jurisdiction. The difference in terminology carries with it a vital difference in emphasis. If the prohibition is against unfair methods of competition, the activities of the Board will inevitably focus upon the protection of business competitors against each other. The interests of the consumer would become secondary. In order to proceed against any specific unfair method of competition, it will still be necessary to prove that the public interest (as against the more special consumer interest) is involved, but the injury done by one business rival to the other will be the primary element in the case.

On the other hand, if the act prohibits unfair methods and practices in commerce, the basic element in any specific case would be injury to the consumer. The concurrent injury to a business rival may assist in establishing a case, but it will not form a necessary element upon which to base action. Consequently, this latter statement of the law will carry with it a fundamental advantage to the consumer public.

Presumably the procedure to be followed by a State Fair Trade

[1] At the present writing (March 14) an amendment to the Federal Trade Commission Act incorporating this change seems to be on the verge of enactment.

[2] *Raladam Co.* v. *F. T. C.* 42 F. (2nd) 430 (1930); 51 S. Ct. 587 (1931).

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Board would be generally similar to that used by the Federal Trade Commission. It would proceed against unfair practices by issuing cease and desist orders, reviewable by the courts—probably by the Appellate Division. Undoubtedly, too, it would find it possible to settle a very substantial number of controversial issues through some form of stipulation procedure without going through the formality of issuing a cease and desist order. The experience of the Federal Trade Commission has emphasized the effectiveness of this latter type of action.

It also has been suggested that a State Fair Trade Board could make use of trade practice conference procedure similar to that now employed by the Federal Trade Commission. It could sponsor conferences of business men engaged in various branches of intrastate commerce for the purpose of securing an expression of the industry's consensus with regard to what constitutes "fair practice." As in the case of the Federal Trade Commission's procedure, the rules promulgated by such conferences would merely clarify the law and would neither add new legal restrictions nor limit the force of existing ones.

Functions Related to the Protection of the Consumer

The preceding chapter in this volume deals with the possibility of establishing a Department of the Consumer. If such a department be established and charged with the specific duty of protecting the interests of the consumer, a Fair Trade Board would provide a logical tribunal for the disposal of many cases involving misrepresentative and deceptive practices. It might also make it possible to curb, far more effectively than is possible under the present law, various types of coercive and collusive action by business which have the effect of unduly raising prices or otherwise injuring the interests of the consumer. Any evidence collected by the Department of the Consumer in the course of its general investigations could appropriately be turned over to a Fair Trade Board for remedial action.

Moreover, certain specific functions related to the protection of the consumer might be turned over to a tribunal of this sort. The state of Wisconsin has a Fair Trade Law similar to the New York Feld-Crawford Act. Opponents of the Feld-Crawford Act maintain that it has raised the prices of many products unduly, while defenders of the act contend that the pressure of competition is adequate to forestall undue price increases. The Wisconsin law entrusts the duty of determining whether fair trade contracts stipulate an unreasonable resale price to the Department of Agriculture and Markets in the following terms:

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(7) (a) Upon complaint of any person that any contract containing the provisions referred to in subsection (3) is unfair and unreasonable as to the minimum resale price therein stipulated, the Department of Agriculture and Markets may in its discretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract should not be set aside. If upon such hearing the Department of Agriculture and Markets shall find that such contract is unfair and unreasonable as to its minimum resale price provisions, said department may by special order declare such contract to be in restraint of trade.

(b) The Department of Agriculture and Markets shall assess the costs of such proceeding against such contracting parties in case it finds such contract unfair and unreasonable and against the complainant if it finds such contract fair and reasonable, provided, however, that the costs against any one complainant in any one complaint shall not exceed five dollars.

(c) Decisions in such cases shall be subject to judicial review as provided in section 93.20.[3]

Opposing and Favoring Arguments

There are three distinct schools of opinion in regard to the desirability of establishing a State Fair Trade Board. Some business men oppose it entirely. They believe that the degree of regulation to which they are at present subjected by the government is already excessive and fear that the establishment of a new regulatory agency would merely impose new and heavy burdens upon the conduct of business. They contend that there is no need for an agency of the sort contemplated. They maintain that the Federal Trade Commission has succeeded in extending its jurisdiction to the bulk of business transactions within the State of New York through a gradual widening of the concept of interstate commerce. They point, in addition, to the work currently being done by such organizations as the Better Business Bureau. They maintain that since most business men are honest, that the use of unfair and deceptive practices is no more than sporadic and in any event subject to adequate control by existing law. They point out that, in the transportation field, this type of dual regulation resulted in intolerable confusion, the duplication of activities and needless expense to both government and private enterprise, that gradually state regulation became a mere echo of the Interstate Commerce Commission.

[3] Wisconsin Stat. 1937—133.25.

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Moreover, they oppose the sort of dual regulation by Federal and State authorities which the establishment of a State Fair Trade Board would entail. They maintain that such dual regulation must inevitably lead to conflict and confusion. They even envisage the possibility that some businesses might move their offices across the State lines in order to escape the jurisdiction of the State board. They believe also, that Federal rule is safer than State regulation in matters affecting trade because it is less influenced by political considerations and by the activities of local pressure groups. They also express the fear that, since the bulk of business in New York State is conducted so closely to State borders, the absence of identical control and conflicting decisions by abutting jurisdictions would expose New York enterprise to serious competitive sniping.

They contend, moreover, that if the Legislature wishes to prohibit certain methods of competition or competitive practices as unfair, it should define these practices specifically rather than leave this function to a board. They express their desire for a specific guide as to the legality of business conduct. They maintain that such a guide can only be afforded by definite statutory enactments and not by a Fair Trade Board with power to write administrative law. They fear that business men, pursuing a course which they believe to be entirely proper and lawful, may suddenly find themselves the subject of proceedings by such a board. Moreover, they do not believe that business practices within New York State require the sort of minute regulation which a Fair Trade Board might impose. Consequently they maintain that the establishment of a state agency to regulate a field now largely under the control of the Federal Trade Commission is not only unnecessary but burdensome and undesirable.

Against these arguments, proponents of the establishment of a Fair Trade Board contend that the protection of the consumer and of the ethical business men are major social and economic values. They contend that the limitation of the Federal Trade Commission to transactions in interstate commerce, and the impossibility of specifically defining each unfair competitive practice by statute, make the establishment of a Fair Trade Board necessary. They minimize the extent to which such a board would interfere with business men in the normal conduct of their affairs. They see no necessary conflict in jurisdiction between a State board and the Federal Trade Commission; they believe that each can function effectively in its proper sphere. They contend, moreover, that the fact that the board will proceed through civil, and frequently through informal action, will constitute adequate protection to business and will more than compensate for the fact that the board rather than

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the Legislature will define precisely what constitutes "unfair practices."

Finally, there is an intermediate school of opinion, voiced by many husiness men who favor a Fair Trade Board in principle but who fear too wide a grant of power to such an agency. This school believes that a State Fair Trade Board could perform very useful functions, particularly in combatting misrepresentations and deception in the sale of merchandise. They fear, on the other hand, the possibility that a board might widen the concept of "unfair practices" in such a manner as to restrict the freedom of price policy on the part of individual establishments or to impose other unwarranted rules which might hamper the conduct of their businesses. Consequently, they favor the establishment of a Fair Trade board with the function of proceeding against unfair practices which shall have been generally defined by the Legislature. Naturally, such legislative definition could not be rigid, but it might suffice to indicate the broad lines along which the board could act. The board might prescribe specific standards of legality based upon the policy defined by the Legislature. Those who favor this course believe that it would yield business men a greater degree of assurance in the conduct of their activities and would protect them against the possibility of having some sales policy which they believe entirely proper declared unlawful by the board.

Status of the Board

It is generally believed by those favoring a Fair Trade Board that, if established, it should be set up as an independent agency and not as a part of some other department. There has been some discussion of the possibility of combining such a board with a Department of the Consumer if provision should be made for the establishment of the latter agency. However, this proposal has been opposed both by business men and by consumers' representatives. The former argue that any body with jurisdiction over business practices should be independent rather than subject to the supervision of a department charged with the duty of protecting a specific group interest. Representatives of organized consumer groups believe that the maintenance of fair competitive practices does not bear a very close relationship to the basic purpose which a Consumers' Department is intended to serve. They fear that a Fair Trade Board with judicial responsibility for enforcing the law will inevitably render some decisions hurtful to the broad interests of the consumer and that, under such circumstances, it would be very difficult for the department to oppose the decisions of one of its own branches. They envisage the possibility that the occurrence of such situations may cause the consumers of the State to lose faith in the sincerity of the department

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and in its effectiveness as a guardian of their interests. Consequently they urge that a Fair Trade Board, if established, should be set up entirely independent of any Consumers' Department.*

* Thus Mr. Donald E. Montgomery, consumers' counsel of the Agricultural Adjustment Administration, writes:

> "On the question of a fair trade bureau, my vote is to keep this proposal separate from that of the Department of the Consumer. One of the consumer battles ahead of us is to clarify public policy on this matter of unfair competition. I do not need to tell you how often this phrase is used as a means of attacking the competitive process. . The Consumers' Bureau should be in a position to appear before the Fair Trade Bureau, without any embarrassing connection between the two except that both of them are parts of the State government."

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