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Republican in Form

A question of more than passing interest is suggested by the recent case of Ohio v. Park District, decided by the United States Supreme Court on March 12, 1930, and reported in the Advance Sheets of the Supreme Court Reporter, in Volume 50, page 228. It has provoked the present inquiry because one of the points raised was not, and apparently never has been, decided by the Court.

Section 2 of Article IV of the Constitution of Ohio provides that: "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of all but one of the judges, except in an affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void". The validity of a certain statute was sustained by the Court of Common Pleas and by the Court of Appeals. In the Supreme Court five justices declared the act unconstitutional, but two held for its validity and by virtue of the Section of the Constitution above quoted, the validity became established.

On appeal to the United States Supreme Court, this provision of the state Constitution was alleged to be repugnant to Section 4 of Article IV of the United States Constitution. This section provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence".

The Supreme Court denied its jurisdiction to decide such a question on the ground that it is a political question and properly belongs to Congress. This is the invariable
reply to such questions, and brings to mind similar denials of jurisdiction in cases involving the choice between two opposing state governments;\(^1\) initiative and referendum provisions in a state constitution;\(^2\) and referendum on legislative apportionment.\(^3\)

It may be of interest to note that although there is no express provision of the Federal Constitution committing this duty to Congress, the Court has been consistently courteous in refusing to invade the field of a question it has assigned to Congress. The numerous cases declaring Acts of Congress unconstitutional are evidence of the fact that Congress does not always return the courtesy.

The modesty of the Court in this respect compels the inquiring mind to seek elsewhere for the answer to a question which is of the highest interest and importance.

The cases and text books are regrettably reticent on the question of what constitutes a Republican Form of Government. The Courts mainly content themselves with presenting a host of ingenious arguments to prove that it is the duty of Congress, and beyond the powers of the Court as a political question. They do not offer any helpful suggestions to Congress on which to base its determination, but prefer to let the question severely alone.

It has been suggested that all of the States had Governments when the Constitution was adopted. In all of them the people participated to some extent through representatives variously chosen. They were accepted without change when the Constitution was adopted, so they may be regarded as evidence of what the Constitution contemplated as republican in form, and proposed to preserve.\(^4\)

This idea, however, seems rather foreign to the intent of the framers of the Constitution. They refused to finally adopt the provision in the form previously agreed upon guaranteeing to each state "a Republican Constitution and

\(^1\)Luther v. Borden, 7 How. 1.
\(^3\)Ohio v. Hildebrant, 241 U. S. 565.
\(^4\)Story, Commentaries, Sec. 1813, n.; Minor v. Happersett, 21 Wall. 175.
its existing laws”. Gouverneur Morris and William Houston instanced the objectionable features in the governments of Rhode Island and Georgia, so the provision was deliberately omitted.5

Shay’s Rebellion in Massachusetts in 1786-87 had brought the question into sharp focus before the Constitutional Convention. It was apparent that there was a necessity for some provision giving a state the power to call for aid when a situation went beyond its own powers of control. The convention was reluctant, however, to proceed too far and go to dangerous extremes in the matter of allowing the Federal Government unbridled authority to meddle in the internal affairs of the state. Martin of Maryland, championing the cause of State’s Rights, proposed “leaving the States to suppress rebellions themselves”, and regarded it as “a dangerous and unnecessary power”. Gerry of Massachusetts was against “letting loose the myrmidons of the United States on a state without its consent”. But Gouverneur Morris remarked: “We are acting a very strange part. We first form a strong man to protect us and at the same time wish to tie his hands behind him. The Legislature may surely be trusted with such a power to preserve the public tranquility”.6 On September 15, 1787, the clause in its present form was agreed to by the Convention.

What then, is this Republican Form of Government which must be preserved to the States by the United States? What are the distinguishing characteristics, or essential features, the absence of which brings conviction that a government is no longer republican in form? For, with the caution appropriate to so important a subject, it would perhaps be better to approach the question on the blind side, trusting to thus find it more vulnerable. Let us first consider certain forms of government which have been asserted to be republican in form, then certain other forms which are not considered to be such. From the vantage

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point thus obtained we may be able to discover the object of our search.

Four important factors have received sufficient recognition to deserve our further consideration in an effort to discover which, if not all, are the essential characteristics of a republican form of government. They are:

First: The existence of the ultimate sovereignty in the body politic, or as it has been so tritely phrased: “Government of the people, by the people”.

Second: The expression of the popular will by the method of representation, either personal or political.

Third: The subservience of the entire group to the will of a majority of the body politic, or majority rule.

Fourth: The independence of the Executive, Legislative and Judicial Departments of Government.

Collier’s New Dictionary (1929 Edition) informs us that the noun “republic” means: “A state or country in which the supreme power is vested in representatives elected by popular vote”. It may safely be assumed that the principle of representation in government is one of the characteristics which distinguish a republican form from other forms of government. But more than this, we note that the representatives are to be “elected by popular vote”. This qualification, in further explanation of that suggested by the meaning of the term “representative”, imports a constituency in which resides the power to create representatives, or the ultimate sovereignty.

Nor is this latter qualification without importance to the inquiry, in view of the fact that government by representation was a familiar principle long before the doctrine of sovereign rights in the people was anything more than a treasonable utterance. The messengers who bore the King’s prerogative, were called his representatives, and were vested, pro tanto, with supreme power; yet no stretch of the imagination could such a representative government be called republican, even in form.

The existence of the governing power in a representation of the ultimate popular sovereignty, molds the idea into a form similar to that conceived by Madison in the Fed-
eralist7 as the ideal aimed at by the framers of the Constitution through the clause in question, when he says:

"If we resort, for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of 'republic'. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people, and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior".

7No. XXXVIII.
The principle of representation is insisted upon to distinguish the republican form of government from the democracy, in which the people act solely as a collective group of individuals and not through representatives. The idea of representation and the idea of democracy are thus incompatible and the name of "representative democracy" sometimes applied is an anomaly.

Since representation is seen to play so important a part, it would be well, perhaps, to examine the principles and history of government by representation, and to learn whether or not the United States Government may have been considered by the Constitution makers as the paragon, republican in form.

History tells us that various theories of sovereignty have existed and received the habitual obedience of the individuals subject to their application. These have been called governments, and may be divided into several great classes, characterized in the following way:

I. Ideocracy (or theocracy) in which the people are governed by a god or gods, of whose wishes priests are the supposed exponents. Superstitious belief in the superhuman power of these persons secures them their office until it is indicated by some oracle, revelation, or other manifestation of the divine that a change should be made. Ideocracy is among the very oldest forms of government, and its theories persist in varied forms in many of the countries of today, although enlightened thought has, to a great extent, demonstrated its impracticability for the administration of temporal affairs, and has confined it largely to ecclesiastical fields.

II. Monarchy, or government by one head, who in his own person is the State, and whose authority over all is supreme and absolute in that he is accountable to none.

III. Aristocracy or government by a limited class, usually greatly in the minority, in which the ruling class exercises absolute sovereignty over the remainder, without accountability to any, although the members of the ruling class are accountable, as individuals, to the class as a whole.

IV. Democracy, or government by a whole people of
themselves; in which the absolute sovereignty exists only in the whole people. The relation of subject and ruler still appears, but each member is a subject, and at the same time an integral part of the Government. Theoretically, this form furnishes the most complete protection to the individual, since no action can be taken to affect him as an individual, until he has taken part therein as a part of the collective mass which wields the sovereign power. Diffusion of the sovereignty proportionately increases the justness of a government, but in like proportion decreases its efficiency.

The pure democracy is the most logically perfect government yet conceived. The more closely any governmental system approaches to the principle of responsiveness to individual expression, the more nearly perfect it becomes. Such a government, however, when applied to large groups becomes too cumbersome for efficient operation because no effective method has ever been devised to accurately ascertain and carry out the popular will on every question arising in a large and widely scattered group. Some system of concentration is necessary, and in the process of concentration, some of the effect of the principle of individual expression is lost.

The expression “the whole people”, is only relatively correct, for the whole people never have and never could participate actually in their government, except under an ideal state of things as yet unconceived. The pure democracy would require the nonexistence of distinctions based upon social condition, color, sex, property or intellectual capacity. Incapacity to meet the requirements imposed upon the right to vote or otherwise exercise the rights of citizenship, necessarily denies to a large class the right of any participation in government. To this extent the actual government falls short of theoretical democracy; and becomes difficult to distinguish from the Aristocracy. The difference is more to be found in the spirit which actuates the definition of citizenship than by the enumeration of rulers and subjects. The latter form is based upon a supposed hereditary distinction between higher and lower
classes of humanity, and embodies and perpetuates such distinctions in its visible forms and customs. The former is based upon the equality of all of the individuals who compose it, and purports to represent the community more perfectly insofar as its requirements may and do extend to and embrace groups which were previously excluded from participation in Government. All modern forms of government may be classified in one or the other of these forms, or are more commonly, a combination of some of the features of each.

These divisions were used by Aristotle, and have been regarded by every constitutional authority since his time, although they are subject to constant attack on philosophic grounds. For the purpose of this discussion they may be regarded as substantially correct, for its limited field precludes a thorough examination of such objections.

The democratic form of government in the fullest and most logical state ever actually used, is exemplified by the Greek republics, of which the Athenian is perhaps the most typical representative. The freemen of the state enacted their laws directly, without the intervenion of other political devices, to an extent to which history records no parallel. All important questions of a public nature were discussed and determined by public meetings of the freemen which were held almost weekly. This general devotion to public life instead of to the struggle for daily sustenance and pecuniary advantage would be a practical impossibility in the life of today, when only a partial representation of the electorate can be cajoled to cease their labors for annual or semi-annual elections. But it is more readily understood when we remember that most of the labor of that day was performed by slaves.

In these public gatherings of a people exercising the right of self government, the ideal democracy found its first and most nearly perfect demonstration. The Athenian youth over twenty years of age could feel himself a part of the sovereignty and personally exercise all of those duties which now devolve on the legislature in a republican form of government. The characteristics of a democracy, in
which the majority rule must govern, were fully developed, and every citizen had the right to propose, discuss, and vote upon any law or other governmental action.

The government of the people by the people themselves is possible however, only when the territory of the republic is composed of one city, or is in so small a compass that citizens can readily meet at stated and frequent intervals, and at times of unforseen contingencies can be called together at the sound of a trumpet. A further condition of such form of government is the necessary leisure on the part of the citizen to devote his thoughts and time to public questions,—a leisure possible only if the want of the members of the community are but few and simple, and the laws to be enacted and enforced but few in number, or if the great bulk of the labor necessary to produce the commodities consumed by the people is performed by a subject race or class. For nations having an extensive territory, great variety and division of employment, and that intense competition in every human activity which make exclusive devotion to one business of life a condition of success, the form of democracy as the Athenians had it is utterly impracticable; such a people must, if they desire to preserve the democratic idea, do the work of legislation by deputies or representatives, and the business of administration by officers elected or appointed from time to time to administer this or that trust, and for the time being to wield this or that power.

Representative government, therefore, is not an original organic form, but a machinery necessitated by modern civilization and requirements of life to make democratic government possible,—a machine more or less perfect in proportion to its success in realizing the democratic idea of government by the people for the people.

Wherever in modern times the democratic form of government has been adopted—with the single exception of the case of some of the mountain cantons of Switzerland—the sovereign legislative power of the community has been delegated to representatives; and the power left to the voter is generally only the selection of members of the
representative body. So little did the ancients realize the fact of a representative system of government that even Aristotle said that a state should not be too large nor too small; it should not be so large but that all the citizens can be acquainted with each other, “for how else can they elect their magistrates?”

The representative system is the modern form of democracy, and as such, a glance at the history of representation will enable us to account for the existence of our present method of election.

Montesquieu was right in finding the germ of modern representative systems in the forests of Germany; those sturdy Teutons who became the conquerors of Rome were the originators of the thought, “no taxation without representation”. Their folkmote was not a city rabble, but a staid gathering of friends and neighbors, which not only satisfied the postulate of Aristotle, but went further, in never becoming even so numerous as to induce confusion. “To facilitate”, says Mr. Chas. Goepp, in his admirable essay “On the Legal Organization of the People” the execution of his edicts, Charlemagne devised an expedient, which, possibly without any such design, constitutes the most important epoch in the history of the institutions under which laws are made. At stated intervals he sent messengers from his court into the counties, to confer with the counts and the people, enforce the render of services, collect such taxes as were then imposed,—most of them payable in kind,—promulgate the laws, hold courts, hear grievances, and either redress or report them to headquarters. This measure altered the county from a mere geographical division into a self-acting municipal institution. The messengers were received by the most influential inhabitants of the county, coming from every part of it, who thus constituted a natural representation of the people. The question of taxation kept alive the consciousness of a common interest as against the government. The coming of the envoys was the occasion for discussing, in this plenary assembly, all the affairs of the shire, for disposing of appeals from the hundred courts, and for ad-
dressing the king on subjects of universal interest. A connecting link between the hundreds and the king’s court was established on the one hand, and on the other, the vast unwieldy ship of state was divided, like a modern steamer, into innumerable water-tight compartments, each of which could outlive the scuttling of any of the others and assist in floating them.

The empire of Charlemagne, as an empire, was short lived, because his successors lacked the ability required to perpetuate the throne. But the institutions on which that throne was reared, and which are really his handiwork, survived for centuries, and furnished the vital germ of those under which we are now living. The founders of England and Hungary regarded the great Frankish chieftain as the highest authority in matters of government, and organized the shires on the plan of Charlemagne.

On the continent, during the Middle Ages, the diets were meetings principally of the aristocratic classes, and not until the thirteenth century were the cities allowed to send a delegation of their leading burghers. The growing power, however, of the cities forced a recognition to representation, and though reluctantly granted, it was the entering wedge to the representation of the third estate. In England, the system of representation developed, as Hallam observes, partly from the fears entertained by the sovereign of the influence of a multitude who assumed the privilege of coming in arms to the appointed place. Long before the period referred to, we know that the earliest English kings not only acted on the advice and consent of certain persons eminently powerful among their subjects, but stated the concurrence of such persons in the official promulgations of the royal will, as giving it strength and validity, from their constitutional authority. Whatever were the qualifications of the advisers who surrounded the early Norman kings, they must have been expected to be numerous, since Westminster Hall was built by Rufus for their reception. The term Parliament was first used toward them in the reign of Henry III. “If there be any date in the early period of English History”, says Mr. Cox, “which
above all others deserves to be implanted in the memory of Englishmen, it is the year 1265,—the forty-ninth year of the reign of Henry II. Historians and antiquarians are agreed in referring to that epoch the earliest parliament of lords, knights, citizens, and burgesses. Before that time, indeed, there had been held many great councils of the nation, but none, so far as extant records show, in which the counties and boroughs of England were represented together".8

In the reigns of William the Conqueror and his immediate successors, councils were frequently convened, and were attended by the principal men of the kingdom,—bishops, abbots, earls and barons. The councils convened by the Conqueror, ordinarily at Easter, Whitsuntide, and Christmas, acted rather in an administrative than in a legislative capacity. The chief business of the councils of William I., so far as we have now records of them, related to matters of executive government, such as the grant of local charters and the decision of questions of title to land. The same observation applies to the reign of Rufus and several succeeding kings.

The first instance of a representative assembly is supposed to have been in 1213, the fifteenth year of King John. Writs were addressed to the sheriff of each county commanding him to cause four discreet knights of the country to attend the king at Oxford to consult with him on the affairs of the kingdom. No provision was made for the representation of boroughs.

This transaction took place two years before the Magna Charta, which was granted by the king at a great assembly of barons, held at Runnymede, in the seventeenth year of John (A. D. 1215). One of the provisions of this celebrated treaty provided that "no scutage which shall be imposed in the kingdom, except by common council of the kingdom, except to ransom the king's body, and to knight his eldest son, and to then marry his eldest daughter, and for this there shall be reasonable aid". The articles in

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which this passage occurs constituted the original treaty
between John and the barons of Runnymede, and are en-
titled "These are the articles which the barons require and
the king concedes". The charter itself provides how this
council is to be constituted "for holding the common coun-
cil of the kingdom, for assessing an aid otherwise than in
the three cases aforesaid, or for assessing a scutage, we
will cause to be summoned the archbishops, bishops, abbots,
earls, and greater barons by our letters under seal; and,
moreover, we will cause to be summoned in general by our
sheriffs and bailiffs, all those who hold of us in capite, at
a certain day, to wit: at the expiration of forty days at
least, and to a certain place; and in all letters of that sum-
mons we will express the cause of summons; and the sum-
mons being so made, the business shall proceed at the ap-
pointed day according to the counsel of those who shall be
present, although all the persons summoned do not at-
tend". It will be seen that this council was to be convened
for fiscal purposes only. The prelates, earls, and greater
barons were to be summoned singly by royal writ, just
as the members of the House of Lords are to this day.

The tenants in chief only are to receive a collective
summons by the sheriffs and bailiffs. But in the next reign
the principles of representation received a great develop-
ment, much more nearly in accordance with the old tra-
ditions of popular government in the Saxon times. For
example in the year following the grant of Henry's charter
(12 Henry II., A. D. 1226), a great council was held at
Lincoln, which was attended by the representative knights
of several counties, who accused the sheriff of infractions
of the charters. The manner in which the knights were
chosen shows that they are regarded as representatives.
At a previous assembly of magnates at Winchester, the
crown had agreed to call the Lincoln assembly; and for that
purpose writs were directed to the sheriffs of certain coun-
ties, directing the election of four knights of each county
by the milites and good men (probi homines) thereof. This
assembly was called only for a special, though very im-
portant, purpose, namely, to examine complaints against
The sheriffs of violating the charters. The Lincoln assembly was not a complete parliament in the modern sense, but shows a great advance beyond the narrow system of representation contemplated by John's charter. It is remarkable that the electors included all persons comprised under the wide designation of *probi homines.* In the thirty-eighth year of Henry III., A. D. 1254, the first representative council was assembled for the purpose of granting an aid. The sheriffs of each county were commanded "to cause to appear before the king's council, at Westminster, two legal and discreet knights, whom each county court was to elect for this purpose in the stead of the same". As yet there was no provision for the representation of the boroughs.

Four years later, by the "Provisions of Oxford" (A. D. 1258) in a parliament, it was provided that in every county four discreet and legal knights should be chosen to inquire into grievances, and, upon oath, make a report on the same, which report, sealed with their own seal, and that of the county, was to be personally delivered by the sheriff to the parliament, to be holden at Westminster on the octaves of Michaelmas next ensuing.

We come now to the memorable occasion when the representation as well of boroughs as of counties appears to have been first instituted. In 1264 King Henry was taken prisoner. In the following year a parliament was held in London in obedience to writs of summons addressed in the king's name to a numerous body of barons, prelates, abbots, and other dignitaries, and also to the sheriffs of counties, and to various cities and boroughs. The sheriffs of each county throughout England were commanded to cause two knights of the more loyal and discreet knights of the several counties to attend at the time appointed. In the same manner summons were addressed to the citizens of York, the citizens of Lincoln, and to the other boroughs of England, to send on the aforesaid form "two of their more discreet and approved citizens and burgesses"; and

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9Cox's Antient Parliamentary Elections, p. 66.
similar writs were sent to the Cinque Ports, which are addressed to their barons and bailiffs, which command them to send four of their loyal and discreet men to treat with their prelates and magnates, and grant an aid.  

We thus arrive at the great epoch of the history of English representative institutions, of the summons of a complete representative assembly. The earlier parliament included only the barons and great men of the kingdom, except in the mentioned cases, when knights of the shire were summoned. Even the provisions of Oxford, which added greatly to the political power of the people, made no provision for the representation of towns. To ascertain the mode in which the election was conducted we must refer to the returns of the sheriffs of that period. They state the elections to have taken place in “full county court”, or by the assent of the whole county. The right to vote seems to have been much more general at that early period of English history than it is now, notwithstanding the recent reform acts; and this right was restricted at a much later period than the period of the Third Henry (1216-1272), when all freemen were entitled to the suffrage, to wit: the statute of 8 Henry VI. (A. D. 1429), which limited the right of suffrage to those who are commonly called forty-shilling freeholders, and this limitation of the right of suffrage was the direct cause of the decline of the influence of Parliament from that period down to the time of James I.

In 1295 (23 Edward I.) we come to another chief epoch in the history of parliamentary institutions, the regular and general representation of cities and boroughs. In that year the sheriffs received writs for the election of two knights of every county, and two citizens of each city, and two burgesses of each borough therein, with full and sufficient power for themselves and “communities” of their several counties, cities, and boroughs to do what should be ordained of the common council in the premises.

The reasons assigned by the king for convening this assembly are very remarkable. He recognizes explicitly

10Cox's Antient Parliamentary Elections, p. 68.
the right of the whole community to be consulted on matters affecting their common interests. The commencement of the writs to the prelates runs thus: "Whereas, a most just law, established by the provident circumspection of sacred princes, exhorts and ordains that what affects all by all should be approved; so also it declares evidently that common dangers should be met by remedies provided in common". He then refers to a contemplated invasion by the King of France, with a very great fleet and multitude of armed men, with which he is about to attack the kingdom and its inhabitants, and if his power correspond to the detestable purpose of his conceived iniquity (which may God avert), to utterly efface the English language from the earth. The writ then proceeds to command the attendance of the prelates and clergy "to treat, ordain, and determine with us and the rest of the prelates, chief men, and other inhabitants of our realm, how dangers and designs of this kind shall be obviated".11

The theoretical measure of the efficiency of any representative body is the degree of its responsiveness to the prevailing popular sentiment. It is only in its approach to this ideal state that the principle of government by representation can find any justification in logic and reason. A governing body, though it be called super-representative, which does not accurately reflect the popular will of the moment, is no more entitled to respect, from a purely logical viewpoint, as a popular government, than was the "divine right" theory of the French Monarchs and the Stuarts.

But idealism can function only in the presence of idealism and under ideal conditions which the logician alone can invent to prove his theories. Certainly the loosely bound Confederation of infant states in 1787, with their widely differing social and economic conditions, jealously watchful, each of her neighbor, and every one of all, did not present exactly the proper, ideal conditions of intelligence, unselfishness, and national consciousness essential

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11Sterne's Representative Government.
to complete idealism. A compromise of some sort with idealism was expedient, and a “compromise of sorts” was the result. Alexander Hamilton tells us that: “The plan in all its parts, was a plan of accommodation”.\textsuperscript{12}

Looking back upon the history of those times and circumstances, our admiration is excited not only by the fact that they framed a government so well, but that they framed any acceptable and lasting structure at all. Groping, as it were, in the mists that shrouded the dawn of our present day conceptions of popular government, without the lamp of any successful and lasting example of a truly representative form of government to guide their feet and set them in the right paths, they nevertheless evolved the most successful structure known up to that time, and for some time thereafter.

One factor, perhaps more than all the others, contributed to, and made possible their success. This has been attributed to varied sources, including, the lack of other forms of amusement; the efforts of the pamphleteers; the existence of a real crisis in public affairs; and by some even the medium of Divine inspiration, though it has been noted that the claims to representation of this constituency in the convention, were negligible. Whatever the cause, all authorities seem to agree that at this period of American political history, statesmanship was enjoying a heyday unknown to any subsequent times. Our assemblies, and indeed, our entire political life was enlightened by a galaxy of intellectual stars, to whom the necessary unselfish devotion to the greatest good of the greatest number was their only toga, and not a fancy dress costume to be donned only before elections or other festivals of greater or less national importance.

Not alone the names of these men, but their very doctrines were practically household words, and passed freely current in the homilies of widely separated communities. They were the table-talk of poor and rich alike, and every man, however humble his rank or station, had a stock of

the maxims of statecraft hardly to be found today outside of the public libraries.

Better fitted, though these people may have been, for intelligent self-rule, than the indifferent masses of today, yet even they were not ready for idealistic conditions. In those trying times when the National Government presented the ludicrous spectacle of an infant in arms opposing its full grown rivals, the states, a truly representative form of government which accurately reflected every change of popular fancy, would have been an awkward fledgling foredoomed to an early demise. The crying need was for strong minds in the Presidential chair, in the Supreme Court, and in the National Assembly, to protect this new creation for the period of the development of its powers, and to educate the people to the advantages of a national consciousness.

In the Convention, Madison, with a wisdom beyond the experience of the times, advocated a policy which should avoid the dangers of a too responsive representation, yet should embody substantial safeguards against a possible oligarchy of the State governments, by providing for a popular election of the House of Representatives. On the other hand, factions were present even in those days, and there was need to make provision against abuses by a majority united through common interest in the more thickly populated communities, against the minority. To guard the interests of the latter, a system of diffusion of power was needed. The protection he proposed was: "The enlarging of the sphere (by the formation of a House of Representatives), and thereby dividing the communities into so great a number of interests and parties that, in the first place, a majority will not be likely at the same moment to have a common interest separate from that of the whole, or of the minority; and in the second place, that in case they should have such an interest, they may not be so apt to unite in pursuit of it. It was incumbent upon us, then, with that view, to frame a republican system on such a scale, and in such a form, as will control all the evils
which have been experienced".13

A government purporting to be representative must satisfy the first test by providing a system of selection which will insure equable representation of each natural or economic interest found in the body politic. The next, and equally important test of its worthiness, is its responsiveness to prevailing popular sentiment on every public issue. The assembly which is most responsive to prevailing popular thought of its constituency on matters of general interest, is the most easily justifiable from a philosophic viewpoint. The expedient of popular referendum on all legislation is coming more and more into popular favor for this purpose. The merit of this system is plainly apparent from a theoretical view, yet it has the very considerable disadvantages of being both expensive and cumbersome.

Frequency of elections is the most effective method of reminding an assembly of its obligations in the matter of responsiveness, yet this is subject to the same objections if carried to extremes. Alexander Hamilton said: "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence upon and an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose does not appear to be susceptible of any precise calculation".14 The convention after much consideration chose biennial elections.

One of the respects in which our present form of party government falls most seriously short of the potentialities blocked out for it by the constitution, is the manner in which candidates for office are chosen. But like most others, this is a defect not of the plan itself but the method by which the plan is executed. Our popular vote is too

14Federalist No. LI.
often a popularity vote, and the only real issue, the ability of the candidate to fill the office which he seeks, is lost in the fog of party issues and the tumult of huzzahs raised by a well trained and well paid army of professional henchmen and calculated to imitate popular acclaim with sufficient success to deceive the mass voters incapable of uninstructed thought.

In theory, representatives are not considered as a class. To carry out their proper function in the scheme, they must be regarded as the people themselves on a reduced scale. The Statesman Mirabeau phrased this thought well in a speech in the assembly in 1789 when he said: "That a representative body is to the nation what a chart is for the physical configuration of its soil: in all its parts, and as a whole, the representative body should at all times present a reduced picture of the people—their opinions, aspirations, and wishes, and that representation should bear the relative proportion to the original precisely as a map brings before us mountains and dales, rivers and lakes, forests and plains, cities and towns. The finer should not be crushed out by the more massive substance, and the latter not be excluded; the value of each element is dependent upon its importance to the whole and for the whole. The proportions are organic, the scale is national".15

Two faults are apparent in our present system—the use of two artificial parties, and a geographical, instead of an economic, districting of representatives.

It is readily apparent that each time the principle of a majority is employed, its efficiency as a true expression of popular will is reduced, until cumulative minorities may exceed the total of the votes represented and favoring the measure. Government by a majority is sound in principle in a popular sovereignty, but it must not be forgotten that the principle defeats the purpose if carried beyond the first stage. The real purpose is government by majority, employing the principle of representation as an expedient. The rule of subtraction obtains, and a bare majority of a

15Sterne's Representative Government, p. 50.
bare majority becomes a minority of the original quantity, and the purpose of majority rule is defeated.

But the question goes deeper than mere matters of majority and minority. No government can be said to be truly representative when it permits the actual exclusion of any minority from all participation or voice in the affairs of government, no matter how perfect may be its design in other respects. Surely it is even less adequate when it is hampered by the struggle of two artificial parties for control, and the still more artificial division into meaningless districts, determined solely by population statistics and geographical location.

The varying occupations and pursuits of a people, the distribution of population, and the matter of supply and consumption of necessities are regulated by physical and natural laws, the operation of which is susceptible of more or less certain observation. These form the real basis for the diversity of human opinions on any given subject. Is it not logical that they should form the best basis for the selection of representatives who are to most nearly express the true sentiment of their constituency? Any given geographical district cannot fail to be composed of many natural classes of individuals, whose interests and opinions are so diversified as to be practically antagonistic. The representative who can combine in one person these antagonistic interests so as to promote the interests of each class, does not exist, and it would be idle to seek for such an illogical creature. It is better to alter a system which requires him.

To those who will agree that incalculable difficulties may be placed in the way of the business of law-making, the best answer is that incalculable and insurmountable difficulties should be placed in the way of the business of law-making as it is now conducted, such difficulties in fact as will compel a complete change. The two-party system has so restricted the enactment of legislation as to leave the balance of power in the hands of a small group of independents. This is indeed a far cry from the rule of the pure majority regarded as so sacred to the cause of a just, popular government by the idealists of the Athenian de-
mocracy and by the best minds among the convention delegates in this country.

Representation based upon occupational or other economic divisions is readily seen to be more representative of group thought than any geographical system of districting. The presence of a nucleus for this system in our existing assemblies is purely a matter of accident, yet happily it seems to exist in practically every one. It would be easily possible, under our present system, for the entire membership of an assembly to be drawn from the ranks of one occupation. They might be all farmers, all laborers, all tradesmen, or all professional men, if each geographical district should happen to choose the same type, for each district operates on the theory of complete independence of the others in choosing its representatives. Such a body would have to be called representative under our present theory, yet in fact it would be far from the case. Men most readily understand and sympathize with the problems of other men in the same lines of endeavor, and such a body could never be even approximately efficient and fair.

The occupational system is the basis upon which we naturally analyze the composition of our assemblies, yet we fail to recognize as a fundamental political fact, the principle which we see in daily operation in every assembly in the land. The elected legislators, actuated by common interest and mutuality of understanding, naturally resolve themselves into occupational groups, conducting their efforts toward legislation more in accord with these principles than by the tenents of strict party affiliation. Examples of this are readily found in the farm and labor blocs, and other alliances of circumstance. A member from New Jersey does not support a measure because a member from Pennsylvania does, but if both are farmers or tradesmen, their common interest draws them to its support.

The principle is fair and reasonable, for if a majority of the people in a State are farmers, their interests are not accurately represented by less than a majority in the assembly, who can best understand and deal with the problems of their group. It is a logical application of the repre-
sentative principle in majority rule.

The fourth and last characteristic which we shall consider, is the separation of the legislative, executive, and judicial departments of government. We are not assisted to any great extent by definite expositions on the subject by any of the departments concerned, for it is a matter of extreme delicacy for any one department to attempt to ascribe well defined limits to the power of another department of supposedly equal authority.

The separation of these three departments was regarded by the framers thereof, as a matter of the most vital necessity to the preservation of liberty in the structure they had created. Hamilton says in the Federalist:16 "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny".

This separation does not require, in Hamilton's opinion, an absolute divorce of functional attributes as well as fundamental principles, but only, as he expresses it: "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted". Indeed, in the following number of the Federalist, he makes the assertion that: "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice be duly maintained"; and again: "that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all of the powers of government in the same hands".

It is the natural tendency in a republican form of government, to invest the legislative branch with powers of far wider scope than those of the other two branches. It

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16Federalist No. XLVI.
was even more natural for this to happen in 1787 when the reaction was so strong from "the overgrown and all-grasping prerogative of a hereditary magistrate, supported and fortified by a hereditary branch of the legislative authority". This was true more of the governments formed by the individual states than that formed by the nation. Many of the States, in their zeal to escape the clutches of one monster, fled straight into the grasp of another, to their sorrow when they found they had substituted a legislative for an executive despot. In their haste to escape monarchy, by dividing the supreme power into the numerous hands of a legislature, they failed to note the principle that divided power meant divided responsibility, and a responsibility sufficiently divided becomes no responsibility at all. Many of the States were later forced at no small cost and trouble, to devise new constitutions in which strict limitations were levied against the legislature to check its assumption of despotic powers.

The legislative is the most powerful branch of Government, especially in a state, and the most likely recipient of added powers at the hands of the people. This obtains for the reason, among others, that it is the most numerous branch, and susceptible of the largest field of contacts with the people as individuals, and the closest acquaintance. The possession of power leads naturally to the desire for more power, and the legislative branch is in a position to arrogate unto itself more and more powers, unless frequently checked by Constitutional authority. Had not the United States Supreme Court, under the courageous leadership of John Marshall, pointed out the way to other courts, by assuming unto itself the power to declare legislation unconstitutional and void, matters might soon have been in a bad way for the cause of liberty, and the delicate system of checks and balances so ably worked out by the founders of our present Government, and so essential to its preservation in republican form.

A real danger lies in disturbing this system of checks and balances, by which the departments are confined to their proper spheres of action, a danger of changing the
government into a different form. Certainly the assumption, by a legislature, of a greatly augmented sphere of authority, would upset the balance, and tend strongly to the exercise of despotic power by an assembly in which the responsibility is so greatly diffused over a large membership. This addition to the powers of the legislature could be accomplished as effectively, and with the same disastrous results to the republican form of government, by an Act of the people in their Constitutional capacity. Constitutional action by a people resembles democracy more than republican government, and a democracy is not the less republican in form than an aristocracy. An act taking away the veto power of the Executive Department, would have the same effect as one removing or restricting the power of the judiciary to protect the public as individuals, from the operation of unconstitutional legislation; either would greatly add to the powers of the legislative branch and tend toward the vesting of despotic power in that body. These powers of the executive and judicial branches are both intended as checks on the legislative branch, and the checks are as important to a republican form of government, as are the balances.

The provision of the Ohio Constitution previously quoted, unquestionably operates as a serious restraint upon the power of the court to defeat unconstitutional legislation, because it abrogates the principles of majority rule upon which the Courts most consistently operate in deciding cases. It serves its undoubtedly intended purpose in lessening the number of instances in which decisions of invalidity might be made. This enhances the power of the legislature to enact legislation of doubtful constitutionality, and to that extent, violates the principles herein asserted to be essential to a government republican in form.

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