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Government by Private Groups

W. Willard Wirtz*

I.

The attitude of a successful democracy's citizens toward their government is a strange alloy of affection and suspicion, of confidence and of fear. It is said proudly that government is of, by and for the people, but it is added quickly that the less of it there is the better. We think of ourselves as being "self governed," as having developed elective and legislative processes which assure a responsiveness of government to the popular will; yet in our reactions to the acts of "the Government" we seem almost to endow it with an anthropomorphic personality, ascribing to it interests antagonistic to our own.

Our attacks upon legislation we dislike rarely recognize it as the embodiment by duly elected representatives of majority sentiments with which we may as individuals disagree. It is our habit rather to conjure up a picture of malevolent, despotical lawmakers inspired wholly by the shades of Karl Marx or Niccolo Machiavelli. Those men and women who administer "the Government's" laws are presumed to be disloyal, dishonest and lazy until proven innocent. Those, on the other hand, who drill or find loopholes in these laws are hailed as Davids who have bested the Goliath of government. And with our every decision to expand the functions of government in our own behalf there develops increased criticism of its benevolence. Loyalty becomes, in a democracy, an ineffable blend of obedience and contumacy, of allegiance and disaffection.

* Professor of Law, Northwestern University.

This paper was delivered at Louisiana State University as one of a series which constituted the 1952 Edward Douglass White lectures. It has been subsequently revised to some extent for present purposes, although not enough to give it, apart from the other papers in the original series, even its hoped for meaningfulness. The fact that fewer footnotes have been included than law review custom dictates is explained partly by limitations of space, partly by a feeling that the custom has become subject to abuse. What appears necessary to the development (or questioning) of the central theme has been included in the text. Anything apparently justified only as a testament to the author's industry and accuracy has been removed from the footnotes. What remains in finer type is largely acknowledgement of fuller treatments of particular points which the text only summarizes. The entire lecture series will eventually be published by the Louisiana State University Press.

Much of this seeming paradox of attitudes derives of course from the basic democratic devotion to the ideal of individual freedom. More specifically, it is an incident of our awareness that the greatest threat to individual freedom lies in the corruptibility of the power people delegate to the agencies which govern them.

We consider freedom, to be sure, as something more than freedom "from government." Particular freedoms are obviously products of the restrictions we place by law upon ourselves and our neighbors, and much of the fabric of democratic freedom is woven of wholly volitional applications of the Golden Rule. Recognition of the "from" freedoms (from want and fear) along with the traditional "of" freedoms (such as speech and religion) constitutes acknowledgement of government's affirmative participation in this area.

Yet the fact remains that democracy's distinguishing characteristic, setting it off from other doctrines which pretend to similar objectives, is that it counts the group force which is concentrated *in government* the greatest potential despoiler of individual liberties. So it is that our basic ground rules for freedom, those which are spelled out in the Constitution, guarantee protection solely against the actions of government. Only governmental agencies are required to accord "due process" and are prohibited from invading, for example, a man's freedom to speak. If he loses his job, his corporate directorship, his union card, or his pastorate because his associates do not like what he says he finds no legal protection. Yet if his harangue from a modest platform in Union Square is interrupted by a policeman or if a city council prevents his playing religious phonograph records on other people's porches, the Supreme Court of the Nation will investigate these tamperings with the constitutional cornerstones of freedom.

To any suggestion that this preoccupation with *governmental* threats to liberty is a mistake, we find sufficient answer in the tragedies which have overtaken those peoples who have been less vigilant than we in fighting the habit-forming, potentially malignant, effects of government. Its power has fed on their freedoms until those who were the creators of government have become its creatures. There is in these experiences full confirmation of our belief that the group force created by people's delegation of little pieces of their own authority as individuals is the most treacherous force in society.

Yet today, despite our self-satisfactions, we are beginning to wonder—not whether we have viewed the group force of government with too great suspicion, but whether we have erred in assuming that the power of such force may prove wanton only when it is delegated to “governmental” agencies. The image of the potential corrupters of this kind of power has included only the “public” agencies of the nation, state and municipality. Yet today it is being pressed upon us in ever new and sometimes unpleasant ways that quite a lot of the control over our affairs as individuals has passed into the hands of a variety of “private” agencies—agencies which also find their source of power in the authority given them by large groups of people. We are looking more and more intently at billion dollar corporations, million member labor unions, powerful trade (and medical and bar) associations, growing cooperatives, influential veterans associations, churches that are entering politics, and newspapers that have bought up all competitors.

There is no more deep-rooted tradition than that which places all such organizations on the “private” side of the democratic equation. They are all called, in the law, “private associations,” and corporations have been expressly held to be “persons” within the constitutional phrase. It was as the heads of corporate empires that men of an earlier generation won great respect as “rugged *individualists*.” Labor unions have come to be considered, along with corporations (although not by them), as the very bastions of “free enterprise.” Church and State have been divorced by the stern mandate of bitter experience, and freedom of the press from any suggestion of governmental interference is a byword of democracy. The American Legion and the Daughters of the American Revolution and the Elks and the Moose are the very embodiment, in our thinking, of our privilege as individuals to choose our own company. It is a basic assumption in American traditions and emotions that any group power other than that which funnels through the public election booths is part of democracy’s *private* functioning—part of the exercise of freedom rather than in any sense a threat to it.

There has been general acceptance, too, of the correlative proposition that such private associations as corporations and labor unions are wholly subject to the “supremacy” of the State. The *wisdom* of particular laws regulating their activities will invariably be challenged on the ground that such laws constitute undesirable invasions of the individual freedoms of the group

members and unwarranted interferences with that contemporary form of "free enterprise" in which these organizations have become such an important part. But no question is raised as to the *authority* of the people, acting through their government, to adopt such laws. The proposition that the State holds a monopoly on ultimate authority is basic in the accepted Austinian tenets of monistic jurisprudence. Its acceptance by people generally, if perhaps in less abstruse forms, has made the organization of these private associations seem only a matter of social pleasure and economic profit, devoid of any serious implications in terms of "freedom" or "government" or "power."

There is abroad today, however, a new restlessness. There is new questioning of the exact nature of these familiar institutions, of their relationship to their members, of their apparently expanding influence over the interests of others, and most particularly of their relationship to government. As their powers increase, the limits upon them become some way less clear.

This concern is fed by nation-wide coal or steel strikes which seem to reveal the government as essentially powerless to keep the economy running if one or two private groups decree that it shall stop. Reports of oil cartels and charges of financial incest among the country's largest corporations revive latent concerns about the monopolistic instincts of big business units. Nor are they allayed by a highly placed government official's identification of the interests of one large corporation and the nation. What he says rings true, but the overtones are strangely discordant.

There is understandable uneasiness, too, when the nation's official wage control program is halted in 1951 by the withdrawal of the CIO and AFL members from the Wage Stabilization Board and again in 1952 by similar action on the part of NAM and Chamber of Commerce representatives. There are annual disclosures of new and obviously successful guerrilla attacks by "special interest" lobbies on Congressional legislative programs. Eyebrows raised at the report that over \$100,000,000 was spent on the 1952 election reflect realization that most of this money must have come, even if indirectly, from well organized private groups. There has been increased concern expressed about the growing concentration of the power of the press, about the "bloc voting" of various groups, and about the religious undercurrents which come to the surface occasionally in connection with the discussion and disposition of several of the most important issues of state.

There is, too, less and less inclination to rationalize every large scale exercise of private group power as being only the oak which has grown from some acorn of individual freedom. When General Motors Corporation and the United Automobile Workers enter into a five-year agreement covering wages and all other terms and conditions of employment their contract is properly identified as being derived from a "free enterprise" practice extending back to the time the first cordwainer in colonial Massachusetts hired his first helper. But man does not rely upon his remote ancestry as guarantee of his ability to breathe under water or hang by his tail from the limbs of trees. Neither does he wholly ignore, just because they have developed in an evolutionary manner, the facts that General Motors' total assets are now over three and a half billion dollars, that the UAW membership numbers more than the combined population of Delaware, Nevada, Vermont and Wyoming, and that these two organizations do now by a process of voting and working out one agreement what used to be done in the course of thousands of independent, "competitive" transactions.

It has become plain that it is no longer as Atlas-like individuals, but rather as members of one or more private groups, that men (and women, but to a much lesser extent) today conduct their most significant dealings with each other and participate most effectively in the affairs of public government.

This development appears sufficiently broad, and the expressed concern about it sufficiently general, to warrant some further inquiry into the scope of these various manifestations of "private" group power, particularly into those functionings of these private associations which seem to be related, by analogy or by commingling, to the exercise of that "public" group power which has been identified as so inimical to individual freedom.

II.

These private associations have all been developed through the voluntary participation in their activities of literally millions of people. Their growth has been enthusiastically encouraged. They have not operated secretly or mysteriously. It has been assumed that any power which they generate remains wholly subject to that of "government." If now it is to be suggested that there is a malignancy in this growth, or that it is getting out of hand, the evidence must lie in the interrelation or cumulative

significance of facts which have appeared innocuous and commonplace when viewed in isolation. The problem presented is in a sense like that of whether a man can expect to cope indefinitely with a growing animal he has lifted every day since its birth.

There are, it may be suggested, five areas of "private association" activity which are relevant to an appraisal of the effect of this kind of group force upon individual freedoms and to a consideration of its relationship to that exercised through the agencies of "government." (i) These private associations regulate, in varying degrees, their own members' interests and interrelationships. (ii) The activities of some of these groups have a direct effect upon the interests and welfare of non-members. (iii) Most of these groups participate to some extent in the *elective* processes of public government. (iv) Many of them participate, through their lobbyists and sometimes either more or less directly, in the public *legislative* processes. (v) Some of them participate in the *administrative* processes of public government. The first two of these areas cover those activities of private associations which involve the exercise of power which is at least arguably analogous to that of "government." The last three areas involve a commingling of "private" and "public" group forces and processes.

(i) *Regulation of Members' Interests*

A person joining one of these groups obviously submits certain of his interests to much the same form of control as that exercised by "the Government" over the broader interests of the whole body politic. He trades the power of self-administration for the right to vote as to the joint administration of whatever he and others have put into a common pool. The extent to which the consequences to him of the voluntary "private" pooling may or may not be said to be analogous to those of the pooling which constitutes "government" (and which is arguably, in theory, either voluntary or compulsory) undoubtedly varies from one type of situation to another.

There is, on this score of internal regulatory authority, little if any comparability between "government" and such private associations as the American Legion, the Daughters of the American Revolution, or Rotary International. The analogy seems similarly remote, despite vigorous philosophical arguments to the contrary, in the case of the churches. It is enough for present purposes to recognize that there is a special element of faith—in

the religious sense—which prompts the individual's participation in a church group and upon which he relies for whatever restraint may seem desirable so far as the exercise of power by the group agency over its members' freedoms is concerned.

In the case of the economic associations, the element of internal regulatory authority emerges in a form harder to distinguish from that of "government."

When a person buys a share of corporate stock he turns over to the corporation a representative authority not unlike that which the citizen delegates to his government. The interest which he has invested becomes subject to common control in which he shares only through his right to vote. And there could be developed, from the history of corporate finance, a record of violations by corporations of the interests of minority (and even majority) stockholders which could be made to suggest that group power is as easily corrupted by "private" as by "public" stewards.

Yet any such comparison would be substantially misleading, for there are obviously significant differences between the corporate and the government situations. It is important practically, even if not logically, that only financial interests are subjected to the corporation's control. There is, furthermore, a single-mindedness of purpose in normal corporation management which gives the investor predictability as to the course it will follow. There has already been established a set of "legal" or "governmental" restrictions upon the actions of corporate management which perhaps do not affect the philosophical issue presented but which are obviously relevant as a practical matter. And there is the important fact that the stockholder—unlike the citizen—can usually withdraw from participation if his dissatisfaction prompts him to do so. It seems worth noting here, therefore, only that there is *some* parallelism between governmental and corporate forms, and *some* evidence, too well known to restate, of the "private" abuse of the power delegated by individuals to groups.

An infinitely closer parallel between "governmental" and "private" regulatory control of the group members' interests emerges in the case of the labor unions. Disproportionate emphasis in the press and in political debates upon the unions' activities in extracting higher wages from beleaguered employers has unfortunately concealed from public attention their probably much more basic significance as agencies for establishing and administering comprehensive sets of relational rules for what are often very large employee communities.

The organic laws for these communities are included in the union constitutions and by-laws. These documents establish the organization of the union government, provide for the exercise of executive, legislative and judicial functions, and fix the terms for membership, including taxes (or "dues"), in the employee community. Many of them cover a great variety of matters relating to the union members' ideologies, politics and morals, going beyond their activities as employees. By virtue of these constitutional provisions, for example, no member of the Chemical Workers or the United Mine Workers may hold membership in a "communist, fascist or bundist organization"; no Asbestos Worker may be affiliated with "any agency or organization advocating the overthrow of the Government by force"; no Glass Bottle Blower may have "leanings toward dictatorial principles." Members of the United Packinghouse Workers are required to obligate themselves "to defend freedom of thought, whether expressed by tongue or pen," and this constitution provides that no member will "discriminate against a fellow worker on account of creed, color or nationality." The Locomotive Firemen and Enginemen have prohibited "immoral practices, wife abandonment, or improper treatment of family." Other constitutions contain injunctions against "theft," "serious wrongdoing," "desertion of family," "immoral practices," "habitual drunkenness."¹

These union constitutions and by-laws are much more than abstract statements of principle. The typical union organization includes its own system of courts and penalties. The Typographical Union has expelled some five hundred members after "trying" them for violations of the union constitution. A Mr. Bonham lost his membership in the Trainmen's Union when his brothers found him guilty of adultery, and a carpenter named Steinert paid the same price when he sold intoxicating liquor. Cecil B. DeMille lost his union membership when he refused to pay an assessment of \$1.00 to support political action designed to defeat anti-labor legislation pending in the California legislature.

The dominant "legislative" process in the unionized employee community takes the form (except in the few cases where the

1. This story of union constitutional provisions and internal regulatory procedures is expertly and interestingly told by Clyde Summers in two articles (Disciplinary Powers of Unions; Disciplinary Procedures of Unions) appearing in the *Industrial and Labor Relations Review*, at p. 433 of Vol. 3, and p. 15 of Vol. 4 (1950). The problems arising from abuses of these powers are discussed illuminatingly and constructively by Benjamin Aaron and Michael I. Komroff (*Statutory Regulation of Internal Union Affairs*) in 44 *Ill. L. Rev.* 425, 631 (1949).

prevailing democratic pattern has been corrupted) of a majority determination at the union meeting as to what terms and conditions of employment are considered desirable, followed by the bargaining out of these demands with the employer. The "collective bargaining agreement" which is the end product of this process is more like a statute or a code than a typical contract. The "seniority clause" establishes a law of job rights which parallels significantly the law of property rights which the courts and legislatures have evolved. The "grievance clause" provides complete administrative and adjudicative procedures for handling any disputes which arise during the contract term. The usual provision that "no employee will be discharged without just cause as determined in the grievance process" is not basically different from the "due process of law" protections accorded in public law. The pension and welfare provisions in these agreements bear obvious relationship to the Social Security laws. There is frequently included a "union shop" provision which has the effect of making membership in the union, like citizenship in a nation, a compulsory condition of remaining in the community.

The point is not simply that union organization and functioning offers parallels with that of public government and covers similar subject matter. Even more significant is the fact that there is building up around many unions that whole set of allegiances, dependencies and loyalties which are the attributes of government and the fabric of sovereignty. The interests which are the subject of determination and regulation within the union organization are among those which come closest to home. Unionism offers its members a community in which they can achieve status, and it gives them, too, by representation, an enlarged status in dealing with other economic groups of which they would otherwise be only controlled satellites. The union member probably finds in his union, so far as day-to-day activities are concerned, as much of what he would consider "governmental" functioning and authority if he thought about it as he finds in the combined agencies of the State. He may be wrong. But in a society where the authority of government of any kind is recognized as based wholly on the voluntary allegiance of the subjects of government, these loyalties are vital and significant factors.

The strongest supporters of unionism are most acutely conscious that there has emerged in this development full evidence of the potential power of delegates of group force to corrupt it

and thereby abuse the interests and freedoms of those who created it. It has been necessary for the CIO to take strong measures to dig out the roots of communism which were spreading through some of its international and local unions. The AFL has had to fight hard against the dictatorial influences which have emerged in some of its brotherhoods and against such manifestations of this influence as are reflected, for example, in the recent disclosures of criminal practices on the New York waterfront. Some unions have practiced racial discrimination in its most extreme forms. The whole issue of closed-shop against open-shop has presented in sharp focus the possible clash of institutional and individual interests.

The "private government" of labor unions is of course only one illustration of a much broader institutional development. Even this functioning of the union has to be recognized as having developed not as a displacement of individual employee decision-making but rather as an alternative to dominion over the employment relationship by the representatives of another private group—the stockholders in the employer corporation. The broader picture of this movement towards private group controls would have to include recognition of the implications of bar association regulation of membership and conduct in the legal profession, medical association dictation of doctors' practices and ethics, the broad influence of trade associations over their membership, the dependence of milk producers upon the determinations of dairy cooperatives, and innumerable other similar organizational situations.

Indeed our acceptance, by membership in various private associations, of group controls which at least resemble those of "government" has become too commonplace to warrant belaboring. It is important that we realize how much more of it there is than there used to be, and that it *may* create the same questions we have about the dangerous powers of "the Government." But whether it does or not, whether it is resulting in a net diminution or enlargement of individual freedoms, depends upon a complex of factors and judgments—and upon what is meant by "freedom."

(ii) *Regulation of Non-member's Interests*

Perhaps it is in a sense only a further exploitation of the obvious to mark the extent to which some of these private groups have come to exercise broad influence over the interest of others

than their members. If it is true that there has been great expansion of this influence during recent decades it is equally true that this development reflects forces which are inherent in democratic capitalism and which we deem essential to our continued well being.

It is the accepted basic premise of the "free enterprise" system that people's economic interests and welfare will be best regulated not by the centralized determinative process of "government" but by the "decentralized decision-making of the market place." So "the law" has traditionally entered much more reluctantly into the affairs of people's stores and factories than into those of their homes. It writes marriage contracts but not those of commerce, and affords full legal redress if one man bloodies another's nose but virtually none if a union strikes a company with resultant loss of thousands of man hours of earnings and production. Where the forces of competition can operate to produce answers we have abjured the decision-making of even the wisest solons.

It has been recognized, too, that competition exercises a certain centripetal force on the institutional organization of the economy. "Free competition," Justice Holmes wrote, "means combination, and . . . the organization of the world, now going on so fast, means an ever-increasing might and scope of combination." It was in this context that he reaffirmed the generally accepted doctrine that "free competition is worth more to society than it costs."

It would be therefore delusory to set out here the extent to which man's affairs are controlled by the inter-play of economic units—and to suggest that because these effects are so great these forces should be recognized as "governmental" in nature. The distinction between "public" or "governmental" controls on the one hand, and "private" or "economic" controls on the other is not, in our system, that all major controls are the former and all minor ones the latter. The distinction is not to be made in terms of the quantum of the power exercised or the significance and scope of its effects. The distinction is rather, traditionally, between controls resulting from the deliberative decision-making of representatives vested by people with the power to write their decisions into binding law, and controls which represent only the results of the inter-play of competitive forces in the market place.

Yet just to restate the traditional distinction in the context of a consideration of the functioning of modern corporations and labor unions is to realize how the moths of contemporary reality have eaten away at the fabric of tradition. It is clear enough that the emergence of the group economic units has not *eliminated* the force of competition, that "competition" between two or three Brobdingnagians produces *some* of the same effects that flow from competition between a thousand Lilliputians, and that the force which Professor Galbraith so expertly describes as "countervailing power" offers *some* of the same built-in self-administering restraints that come from the older form of competition.² It is no less clear, however, that in a very broad area of economic activity, results which used to be almost wholly the product of the interplay of competitive forces are now to a very substantial degree the result of deliberative, discretionary decision-making by the human representative of one or more non-competing groups, which decision-making reflects at least in good part the collective appetite or self-restraint of the members of the group or groups involved.

Part of the evidence of this change is contained in the record of federal legislation which starts (although there were earlier roots) with the Sherman Anti-Trust Act of 1890 and continues on down through the long line of statutes which have resulted in conferring broad regulatory powers on the Interstate Commerce Commission, the Securities Exchange Commission, the Federal Power Commission, the Federal Trade Commission and innumerable similar governmental agencies. These laws have been invariably opposed in bitter diatribes against "government interference with business and the free enterprise system." Such analysis is easy enough if it be assumed that whatever happens outside of governmental halls is the result of the free play of competitive forces, and that what happens within those halls is only the fermentation of powers possessed by "the Government"—a force incarnate and disembodied from the people it is supposed to represent.

A calmer view suggests that these laws are not themselves the interferences with the forces of competition but that they are rather the results of "private" interference with those forces. These enactments have come, in every case, only after the industries affected have substituted centralized, human, group repre-

2. Galbraith, *American Capitalism* (1952).

sentative decision-making for the old form of "decentralized decision-making of the market place." They represent public conclusions that if group representatives are to make decisions affecting the economic interests and welfare of a lot of people under circumstances in which those people have no alternatives but to accept such decisions, the decision-makers should be the representatives of "the public" rather than of a smaller producer group. All of these statutes constitute, in a sense, evidence that the power vested by individuals in "private" economic group representatives is as likely to necessitate imposed controls as is that power which is turned over to public agencies.

This is not, however, the whole of this picture, for it is clear that despite all this legislation there are still operative in today's market place forces which regulate, other than by the inter-play of the forces of "free" competition, people's economic interests and welfare.

There are only a very few who still pretend that "basing-point" or "fair-trade" pricing practices are the result of the operation of natural forces of competition roaming unbroken and unharnessed in the market place, or that the decisions to adopt them are more "decentralized" for having been made in private rooms in Pittsburgh and New York instead of in public rooms in Washington.³ Those of us who are laymen (a synonym here for "consumers"—and "lawyers") may rejoice, at the outbreak of a gasoline price-war, that the freedom-loving Graces of competition have apparently made a jail break and that the forces of good have once more shown their irrepressible superiority over those of evil. Yet when that war ends as apparently spontaneously as it started we can only contemplate our naivete. We are not persuaded that the great natural leveler of the market place is responsible for our paying identical prices for all comparable leading brands of cigarettes, or for our paying our milk dealer the same half cent increase that our neighbor pays the same day to an entirely different dairy. We strongly suspect that it is at the green covered tables of private "legislatures" rather than in the halls of the mountain kings of competition that something has happened when a dozen manufacturers release almost simultaneously a new, improved, cheaper product which someone must have thought of before everybody else did.

3. The broad implications of the development of the "basing-point" pricing practice are graphically described in Latham, *The Group Basis of Politics* (1952).

Perhaps it begs the question to identify as "law" the fine print which appears on insurance policies, mortgages and installment purchase agreements, and the rules printed on parking lot signs, theatre tickets and the stub received from the redcap as he moves away with your luggage at the railroad station. There is, to be sure, nothing iniquitous here; life's minor commerce would slow down deplorably if it were to become necessary to negotiate out anew all the terms and conditions of every such transaction. Yet the cumulative effect of that part of such rulings as are dictated wholly by the managers of these enterprises is obviously substantial, and they are accepted because these group representatives have a sufficient control over the situation that you either accept their rules or park on the street and carry your own bag. If the rules become outrageous the likelihood is that they will be corrected not by operation of the laws of supply and demand operating through the forces of competition but by a public "legislative" process remarkably similar to the private process which originally produced them.⁴

It is in the "collective bargaining" process, involving labor unions and incorporated employers, that the replacement of the forces of competition by a process of deliberative group determination becomes perhaps most obvious. "Bargaining" is patently a "competition" concept, and adding the "collective" element to the employees' bargaining power undoubtedly creates something more like competition than what there was when a large corporation dealt with each of its employees as an individual. It is true, too, that both the union and management bargaining committees will be governed to some extent in their negotiations by prevailing market conditions.

Yet a public which sits through month after month of a nation-wide coal strike and then has passed on to it in higher prices whatever wage increase is agreed to is hard put to it to detect the operation here of any forces except the decision-making of private legislators—guided very largely by their judgment as to desires and interests of their own group constituents. The typical situation today is that those who put their labor into what the consumer buys have set their price on that labor by voting at a union meeting; those whose dollars went into its manufacture have also voted, directly or indirectly, on key production and marketing decisions; there has been then an agree-

4. There is further development of this point in Timberg, *The Decline and Renaissance of Economic Liberties*, 47 *Ill. L. Rev.* 147, 164-67 (1952).

ment between representatives of these two groups, possibly another agreement or understanding between the one producer corporation and others, and perhaps still another agreement with the retailer that he will not sell below a certain price. The terms upon which the product goes to the consumer are the result of group "votes" and "agreements" and "understandings." He accepts them because he has no choice, for those who might have offered alternative choices have decided to vest and vote their individual power in a common pool instead of using it to compete against each other.

In this collective bargaining situation, as in the others previously mentioned, the private groups appear to exercise, by a process hardly distinguishable from that of "government," in a form very similar to that of government, a force strongly resembling that of government. And not only do the decisions made by this process affect directly the interests and welfare of individuals, both group members and non-members. They will also affect, probably as much as will the deliberations of the Senate and House of Representatives, all of the important national economic issues of the future: whether, for example, there will be inflation or deflation; how much risk capital will be invested; whether the housing situation will be improved or worsened; and how much unemployment there will be.

It remains to note, in this area where the layman-lawyer-consumer treads unattended by angels (or economists), one other feature of private institutional development in the United States which would appear to contribute to the influence of these privately organized producer groups. In virtually all other democratic nations there has emerged an effective "consumer cooperative" movement. We in this country, however, though strongly organized in our capacity of producers, are organized hardly at all in our capacity as consumers.

There are, to be sure, three million rural establishments which today receive electricity from cooperatively owned and managed enterprises. But this is a government financed program. The total volume of business (about two and a half billion dollars) done by all the farmer purchasing cooperatives in the country (about three thousand) in 1950 was less than that done by Sears Roebuck and Company alone. Only in a few limited areas in two or three states has the cooperative movement developed to a point where it represents a substantial "counter-

vailing power" in the consumer goods market, and no place does it even compare in its influence with the power exercised by the co-ops in, for example, the Scandinavian countries.⁵

There was a theory behind the Wagner Act of 1935 that the consumer interest would receive organized protection, in this battle of the economic titans, through the organization of employee groups. The fact that the standard of living for low and middle income families has increased as much as it has since that time offers a possible basis for arguing that this has actually happened. Yet there is serious question whether the general (although not universal) union emphasis upon higher wages regardless of the effect on prices will result in continued protection to consumer interests, except possibly under the special circumstances of the past few years.

It appears, in general, that the consumer stands today as the subject of an economic decision-making process in which the law of supply has been made subject to private group amendment, but the law of demand has not. To the extent that this is true it can be explained, to the economists' satisfaction, by substituting Keynesian doctrine for Say's Law of Markets. Or a semblance of consumer protection can be erected in terms of Galbraith's "concept of countervailing power," a power exercised by buyers as well as sellers—but only indirectly by ultimate consumers. Regardless of the rationale, the consequence is that private economic groups now perform, in their own forums, the kind of decision-making functions which were traditionally conceived of as being characteristically "governmental." The restraining forces of competition are at least substantially diminished, and with that diminution there emerges increasingly the question of whether private concentrations of group power will operate with less resultant danger to individual freedoms than is deemed to flow from "public," or "governmental," concentrations.

5. It is interesting to note, in this connection, the extent to which the incorporated produced groups are willing to go in opposing the development of cooperative consumer groups. Each of 43 private power companies and 95 other corporations contributed \$500 or more in 1950 to a lobbying organization which operates under the euphemistic title of "National Tax Equality Association" but which uses its half-million dollar budget solely to fight the cooperatives. This money goes, for example, into the printing and distribution of chain letters, "phony bucks" and Christmas cards—all pointing out the parasitical instincts of the co-ops. One member of Congress reported receiving over 5,000 of the Association-inspired Yuletide greetings. See, for more of this story and for data supporting the figures used in the text, the Senate Hearings on the Revenue Act of 1951, pp. 1232, 1240-41, 1321, 1348, 2044-45, 2118, 2136-38, 2153, 2226, 2250-53, 2462, 2475.

Only timidity would explain leaving this second area of private association activity and influence without noting the special role of the newspapers. It may be doubted whether the control exercised over people's economic affairs by any combination of industrial corporations and labor unions poses more fundamental questions as to the relationship between "public" and "private" controls than those which arise in any objective appraisal of the "power of the press."

It is wholly without regard to whatever may be the politics or positions of any or all newspapers that notice is taken of the fact that they represent the least restrained (except as there may be self-restraint exercised) forces in contemporary democratic life. There is a whole system of checks and balances within the system of public government, and there are forces of either competition or countervailing power operative within the economy. But in most, now, of the nation's communities, people are dependent for their principal source of information upon a single, incorporated institution which is subject only to the evanescent restraints of the laws prohibiting the publication of libelous or obscene matter. And if it be protested that this corporation is subject, too, to the built-in compulsion of having to make money, it is a fair reply that experience does not suggest that this compulsion operates at all consistently in the direction of elevated or even objective news service.⁶

To note these concentrations of private power is in no way to condemn them. No thinking person is likely to let his concern about newspaper monopolies persuade him to recommend the slightest restraint upon freedom of the press—or even that copywriters be required to take loyalty oaths. And any judgment that either corporations or labor unions have become too big or too strong requires a broad consideration of the alternatives and of the price of achieving them.

The purpose here is simply to note the greatly increased extent to which our affairs are now regulated by the deliberative decision-making of private group representatives who use the power delegated to them by others to enforce these decisions upon a public which often has no alternative to accepting them. What we have feared when it was identified as "government" has

6. An infinitely better qualified judgment on this whole issue is apparently expressed in a volume being released just as this article goes to press. This book, *The News in America*, by Frank Luther Mott, is reviewed by Erwin D. Canham, respected editor of the respected *Christian Science Monitor*, in the *Saturday Review* of February 14, 1953, at p. 19.

become now a characteristic of what we used to rely on as the decentralized decision-making of the market place. There are perhaps other factors which distinguish the two situations. But there has been this now obvious change in our private processes, and it probably makes "individual freedom" a rather basically different thing from what it used to be.

(iii) *Participation in the Public Elective Process*

The picture drawn thus far has been of certain parallels which appear to have developed between the functionings of public and private group forces. If that were the whole of this picture it would amount to little or nothing in terms of general interest. There may be a good deal of expressed concern today about the emergent power of labor unions, and some about the increasingly obvious domination of markets by large manufacturers and chain stores, but there is a strongly soporific assumption that if any private group misbehaves too badly the public group will spank it and set it back in its place at the table of democratic law and order. There is comfortable confidence that what the Sherman Act is supposed to have done to big business can be done to any other private economic or social units which get too big for their breeches.

It seems not unduly cynical to suggest that if the democratic system ever collapses it will be because people, despite their distrust of government, assume, as individuals, that they are always going to have "good" government. Those public servants who are the most humble in the exercise of their powers are constantly appalled at the manifestations of the popular assumption that "the Government" has its roots planted directly in Everyman's heart and mind, so that his desires feed upward by a natural process of osmosis regardless of whether he does anything about it or not. People's sublime confidence in "the law," which they conceive of as something *inherently* fair and as being both certain and yet *automatically* responsive to every social change, frightens responsible lawyers. It is probably the disease of democracy's maturity that individuals come to take its functioning for granted.

Not so of the private associations. Their special interests prompt them to an awareness of the protean nature of democratic government. Their facilities are such that they can implement their interests by participation in the elective, legislative and administrative processes of government. It may be among their

essential functions in a large, complex, successful democracy that they mobilize their members into a type of participation in public affairs, to which the alternative would be a lethal apathy of these members as individuals.

Yet it is these same activities of these private organizations as participants in the processes of public government which give the fullest significance to their other functionings as "private governments." For these are the processes of public government upon which there is general reliance for the correction of any abuses in the practices of the private associations. It has always been true that we rely upon individuals—the two-legged variety—to control their own bad habits through the exercise of their authority as participants in the processes of government. But we recognize, as has been indicated, the resultant dangers that special rather than general interests will be served unduly as a consequence of this concentration of authority. There may conceivably be, in this difference between individual and group participation in the functions of public government, the difference too, paraphrasing Lord Acton, between the creation of that power which tends to corrupt, and the creation of that absolute power which corrupts absolutely.

It is in any event essential to set beside the picture of private group functionings which parallel those of public groups, the further picture of these private groups' participation today in the various processes of public government.

The "evidence" as to special interest group influence on the public *elective* process is largely circumstantial, at best inconclusive, but by no means inconsiderable. The cost, two elections ago, of winning the Presidency of the United States was \$7,500,000; of losing it \$13,000,000. But that was before television started to replace the relatively inexpensive whistlestop. Every half hour of national hookup radio-television time used in the 1952 campaign cost between fifty and one hundred thousand dollars. Total campaign expenditures have been reliably estimated at over \$100,000,000. A few permitted glances into the activities of the political party financial committees confirm the inescapable inferences that this kind of money is not supplied by little contributions by little people.

It is an interesting reflection upon our national sensitivities that we get so much more upset over the payment of a poll tax being made a condition of some people's voting than we do over

the fact that *every* citizen's influence in any election campaign can be at least greatly augmented by his financial contributions and those of the groups to which he belongs. There are, of course, federal and state "Corrupt Practices" acts, theoretically designed to limit total campaign expenditures, to restrict the size of contributions by individuals, and to prohibit contributions by corporations, national banks and labor unions. Yet all of these purported limitations are notoriously ineffective. A dozen campaign committees can be set up (and are) so that the intended over-all limitation will apply only to each of them separately; the restrictions on the size of individual contributions are rendered meaningless by permitting maximum contributions to an unlimited number of technically different campaign organizations; and the contributions which would be illegal if they came directly from corporations or labor unions are purified by routing them through individuals or "political action committees."

It may well be, however, that the organized private groups (other than the corporations) are today exercising less influence on the public elective process by their financial contributions than they are through the "education" and the activating of their members as voters. This emerged, in the '40's, as an important feature, for example, of the labor unions' programs. There has been much talk, or had been until recently, about "bloc voting," and among those pretending to political sophistication there developed the tendency to base campaigns (and predictions) on complicated analyses of the "farm vote," the "labor vote," and the "veterans vote." It began to be assumed that voters were making up their minds not as citizens of the nation but as members of various economic, service and even religious organizations.

The 1952 election has at least cast encouraging doubt on this assumption. There are some indications that the posture of the "communist" issue resulted in one secular-denominational alignment of voters. But it is relatively clear that this election was not controlled by any special interest group "bloc" of votes, or by any combination of such blocs. There is even reason to believe that an effective antidote to the poison of large campaign contributions has been discovered in the increasing participation in the elective process of women and younger voters—two "groups" whose only "special interests" are in such matters as those of the family budget and war and peace.

It is probably only coincidence, but possibly more than that,

that a good many private organizations have recently started to broaden out rather substantially their "social action" and educational programs. No longer are they limited to those public issues which bear directly on the particular special interest of the group itself. Thus, the CIO adopts at its annual convention resolutions covering all aspects of national domestic and foreign policy, extending even to such far-flung problems as the control of the Suez Canal and the granting of statehood to Hawaii and Alaska. The American Legion formally censures a Secretary of State when it feels that his actions conflict with the "foreign policy of the American Legion." Although the American Medical Association continues its single-minded concentration on the issue of socialized medicine, the American Bar Association seeks to mobilize its members' sentiments on an infinite variety of matters, including the breaking up of industry-wide collective bargaining and the limitation of income tax rates to not more than twenty-five per cent.

The Council of Churches spoke out last year in the name of Christ against universal military training, and Pope Pius more recently sent communications to the President of the United States regarding the Rosenberg case. The Methodist Church, after facing a crisis precipitated when some of its bishops organized a free lance "social action" program, has now set up its own official committee to function in this area, and has included new sections in its Discipline which are of no lesser secular import for being at the same time expressions of Christian ethics. A Lutheran church conference early this year heard a proposal to consolidate its public affairs activities so as to meet the competition of the Catholic organizations.

It is not in any way whatsoever intended here to criticize, either directly or by implication, any of these expansions of group interests or broadened "social action" programs. They very probably reflect, as has already been indicated, a basic need for an awakening of citizen interests which have become lulled into dangerous somnolence by a feeling of individual inadequacy to participate intelligently or effectively in today's complex of public affairs. They are mentioned here only as illustrations of the extent to which private associations have become important participants in the basically essential public elective processes in America today.

(iv) Participation in the Public Legislative Process

It is in the story of "lobbying" that there is written probably the fullest record of participation by private special interest groups in the processes of public government. There is nothing new about this story.⁷ Its opening chapter has to do with the enactment by Congress of the Tariff Act of 1796. In 1857 Henry Clay called "the meddlesome agents and lobby members" a "sort of fourth estate in Congress." Woodrow Wilson protested at a press conference in 1913 that no one could throw a brick in Washington without hitting one of them. Senator Hugo Black reported, after his committee had investigated the lobbying practice in 1935, that: "Contrary to tradition, against the public morals, and hostile to good government, the lobby has reached such a position of power that it threatens government itself."

There are today in Washington, counting only those who are officially registered as lobbyists, four of them for every one Senator and Representative. Their budgets total tens of millions of dollars annually. Four hundred and ninety pressure groups, registered under the 1946 Lobbying Act, reported that they had collected over \$55,000,000 for lobbying purposes during a three-and-one-half year period ending in 1950. It is not as taxpayers but as consumers that we pay our biggest bills for the lawmaking we get.

The AFL admits to having spent over \$800,000 trying to defeat the Taft-Hartley Act in 1947. It was drafted in substantial part, though, by the lobbyists retained by the NAM and the Chamber of Commerce who spent weeks closeted with members of the House and Senate committees. Dr. Stephen K. Bailey has documented the story of how the industry and farm groups' lobbyists took the ambitious Full Employment Bill, introduced in Congress in 1945, and made it into the toothless Employment Act of 1946.⁸ The announcement in early 1952 that the AFL, the CIO, the National Grange and the National Farmers' Union were opposing universal military training was adequate notice of the ultimate fate of that legislation.

The clearer the dollar sign in any bill and the more com-

7. It is fully traced and best told by Karl Schriftgiesser in *The Lobbyists* (1951). Most of the statements appearing in the text above are based on much fuller treatments in this volume, and upon an incomplete examination of the reports of several of the legislative committees which have "investigated" this subject.

8. Bailey, *Congress Makes a Law* (1947).

plicated its provisions, the more completely is the legislative process transformed from one of geographical representation and party politics into one of economic group politics. Thus the tariff laws have operated, in addition to their midwifery function for infant industries, as a kind of bank into which the nation's consumers make deposits and from which the producer groups draw checks. If there were any general public understanding of the advantages derived by a few people from the loopholes drilled by special interest group lobbyists in the capital gains sections of the Revenue Code and in its "depletion" provisions, there would be tea parties in every harbor in the country—protesting representation without taxation. Lobbying thrives where the cost of benefitting one organized group handsomely can be spread by the legislators among so many who are unorganized that none will protest strongly.

The private group influence on legislation is probably even more pervasive at the state than at the federal level. The 1951 session of the Illinois General Assembly was not considered in any way extraordinary. At that session the truck lobby spent over \$200,000 trying to defeat a law which would compel truckers to pay half as much as "the public" for using the highways. A bill to prohibit liquor licensees from operating slot machines was defeated by a combination of Chicago's "west-side" bloc of representatives of hoodlum interests *and* by another group of legislators who deferred to protestations from the Elks, the Moose, the American Legion and the Veterans of Foreign Wars that their clubroom overhead expenses and their boys' baseball programs had to be covered from slot machine receipts. The organized interests supporting a race-track bill sold thousands of shares of stock to ten key legislators at ten cents a share, and were delighted when the passage of the bill resulted in a 3,600 per cent profit to the ten farsighted public representatives.

The "agreed bill" process has become an accepted part of Illinois' legislative practice.⁹ No legislative committee will seriously consider a bill involving certain basically important aspects of industrial relations unless it has previously been approved by the Illinois Chamber of Commerce, Manufacturers Association, AFL and CIO. In one recent eighteen-year period only one bill became law in Illinois over the objection of the Illinois Manufacturers Association. In that 1951 session the voting of the

9. See Steiner, *Legislation by Collective Bargaining* (1951).

Illinois General Assembly followed political party lines on only fifty out of 1,500 bills. To the other obvious partial explanations of these figures it seems not inappropriate to add recognition of the fact that lobbies operate on a strictly bi-partisan basis.

The lobbying practice is by no means confined to the economic groups. The Prohibition Act was a monument to the hypnotic influence of the temperance organizations upon legislative subjects. A recent study describes the battery of "legislative representatives" whom the churches have deployed in various houses on K and L and M Streets in Washington.¹⁰ Perhaps the frankest statement of the effectiveness of lobbying, based on notoriously successful first-hand experience, comes from the "legislative committee" of the American Legion:

"It must be recognized that Congress does not lead in settling questions of public, political or economic policy Legislation is literally made outside the halls of Congress by groups of persons interested in legislation, mainly with economic motives, and the deliberative process within Congress constitutes a sort of formal ratification."¹¹

There could be no point in dwelling longer here upon the extensiveness of the lobbying practice. Its existence, if not its real import, is thoroughly recognized. Its obvious partial justification has led to an acceptance of its evils, although this process of rationalization seems more than a little like condoning prostitution because of its common denominator with marriage. It is enough for present purposes, however, simply to note that this practice gives private organizations a form of control over agencies of government which casts serious doubt upon the practical validity of some of the most basic theoretical assumptions concerning government's monopoly of ultimate authority.

(v) *Participation in the Public Administrative Process*

Comparatively little public notice has been given the extent to which private association participation in the elective and legislative processes of public government has been increasingly paralleled by participation in the governmental *administrative* process. There are today an infinite variety of situations in which these associations or their representatives are entrusted by state or federal agencies with important roles in the devising or execution of "governmental" programs.

10. Ebersole, *Church Lobbying in the Nation's Capital* (1951).

11. Quoted in Duffield, *King Legion* 49 (1931).

In some cases what is involved is primarily the making of key administrative decisions by, or upon the recommendation of, or subject to the approval of, private groups. An act of Congress provides, for example, that certain milk marketing orders can be issued by the Department of Agriculture only if they are approved by two-thirds of the milk producers who are affected and by fifty per cent of the milk handlers. Tobacco sellers determine what are to be the recognized market places under the federal Tobacco Act. The Defense Production Act of 1950 provided, in effect, that the President could establish procedures for settling labor disputes only if he got prior agreement as to the procedures from the NAM, the Chamber of Commerce, the CIO and the AFL. The nation's raisin supply and the prices to be charged for it are nominally determined by an agency of the State of California, but under the California law a committee of raisin producers makes the key decisions in this controlled supply program. A great many state and city safety and building codes are only codifications of specifications fixed by private associations, and state minimum wage laws frequently provide that minimums shall be set only upon the recommendation of industry associations.

Occasionally the courts object to these "delegations of power." This happened when the New York legislature gave the Jockey Club the power to license trainers and jockeys, when the Oklahoma legislature turned state funds over to certain veterans organizations to handle an employment agency program, and when the Illinois General Assembly provided that masters in chancery should consult with representatives of churches before granting divorces. But in most instances these partnership arrangements between public and private group representatives are upheld.

An even closer kind of power-sharing plan is worked out in many instances by actually giving private group representatives official status as members of public regulatory agency staffs. It is probably the rare state or federal agency which does not today maintain a group of "consultants" or an "advisory committee" drawn from the staffs of the private groups affected by its regulatory program. These arrangements offer a dual advantage as far as the governmental agencies are concerned. They get a kind of expertness which is frequently lacking in government officers, often not themselves specialists in their field of activity. Oppor-

tunity is also afforded to do an educational or selling job among representatives of the groups who will be the particular subjects of the regulatory program.

Increasingly now it is becoming the practice to turn the actual administration of governmental programs over to men who take temporary leaves from their jobs as officers of the private economic groups which are to be the subjects of control. There were the "dollar-a-year men" in World War I. In World War II the War Production Board was staffed almost from top to bottom with men "loaned" by American industry. Representatives of the Friends' Society played a little appreciated role in the handling of some of the conscientious objector problems which developed during the second war. If there is disagreement about whether the representatives of the veterans groups have gone too far in improving their beach heads in the Veterans' Administration, there is less question about the contribution of the AMA representatives in the Public Health Service. The rules and regulations of state industrial safety commissions and unemployment compensation agencies have been greatly improved by the participation of private specialists in their drafting and revision.

It would be wholly unfair to cast the slightest question upon either the competence or the patriotism of the men and women who have served government agencies in these capacities. They are asked to serve, and frequently do so at substantial personal expense and inconvenience. It may be doubted whether the wartime programs of the WPB or OPA could have been administered without this kind of help. It is, nevertheless, equally a fact that their inevitably hybrid status gave the associations from which they came, and to which they were to return, a new kind of representation in the Government.

The implications of this whole new type of participation in the governmental process emerge most clearly in the case of the "tri-partite" organization of such agencies as the wartime War Labor Board and the more recent Wage Stabilization Board. These agencies are characteristically composed of equal numbers of members from labor, industry and whatever it is that is called "the public." All are nominally appointed by the President, but he names one-third of them upon the nomination of the NAM and the Chamber of Commerce, and another third at the recommendation of the AFL and CIO.

There is a great deal to be said in support of this tri-partite

system. It was very largely responsible for the maintenance of four years of virtually unbroken wartime production, and for the prevention of wage inflation during the war period. It transplanted the peace-time processes of collective bargaining into government during the period when they could not function privately, and thereby preserved them in better form than any other conceivable government procedure would have.

Yet what is involved in the development of this kind of joint public and private system of government is at least illustrated by what happened on the Wage Stabilization Board in the Spring of 1951. That was when the Labor Members of the WSB, all of them top union officers, withdrew from it in protest against the adoption of a key plank in the Government's wage stabilization program. This withdrawal had been directed by the AFL and CIO leaders who made up the then United Labor Policy Committee. The result was that the nation's wage control program simply stopped. The Director of Economic Stabilization (on leave from his job as head of the Motion Picture Association of America) then tried, with his assistant (on leave from his office as president of the Brotherhood of Railway Clerks), to repair the breach, working under the instructions of the Director of Mobilization and Defense (who had left his post as president of General Electric Corporation). Some revisions of the program which were satisfactory to all of these men in their capacity as top government officials were worked out. But this time the NAM and Chamber of Commerce officers vetoed them, and the Government's wage stabilization program stayed on dead center. The impasse was resolved only when a committee which included representatives from labor, management, farm organizations, and the sometimes seemingly ephemeral public, came up with a recommendation to the President.

Even a wholehearted belief that "tripartitism" is a necessary and essential form of governmental administration of certain types of regulatory programs requires recognition that it results in a marked shifting of the decisional center of gravity from where it lies on an "all public" administrative body. It brings that point very close to wherever it is that the views of the industry and labor members of the decision-making board can be reconciled. Quite a lot of romanticism underlies the popular assumption that the public members on the Federal Government's tri-partite agencies can establish a program on a basis of

their personal judgment as to what would be, independently of the views of the industry and labor organizations, "good for the country."¹²

The public members control, as these boards are usually set up, only one-third of the voting power. Even when they are fully persuaded to join their colleagues on one side of the table they must take account of the obvious desirability of not antagonizing those on the other side to destroy the board's program by walking off it. (The Industry Members on the WSB did, in 1952, just what the Labor Members had done in 1951.) This concern reflects no interests in personal reputations, but only an awareness of administrative responsibility.

There is the further consideration that these "public members" must do their deciding without any specific frame of reference. The statute and executive order which they administer rarely offer any more definite guidance than is contained in such phrases as "necessary," "rare and unusual," "correction of inequities," and the like. There is of course always the suggestion that they can and should decide their cases on the basis of the "public interest." As set forth where? By the scholars with whose works these public members are familiar? But by which ones in the spectrum that spreads from Adam Smith through Keynes to Marx? By the newspapers? It seems not unduly cynical to suggest that the country would be at least as well administered if more public servants read fewer newspapers. By the man in the street? But this is a nation of hundreds of thousands of streets and millions of men. Every man's view of the public interest is his view of his own interest.

It is often suggested, too, that the public interest can be isolated by looking at the consumer interest. But whenever a public member of the War Labor Board used that argument it brought derisive snorts from both sides of the table. The Industry Members said they represented the consumers because they were trying to keep wages, and therefore prices, down. The Labor Members insisted that they represented the consumers because the fifteen million union members constitute the biggest

12. See Clark Kerr's blunt statement, based on extensive first-hand experience, included in his paper on Governmental Wage Restraints: Their Limits and Uses in a Mobilized Economy. 1951 Papers and Proceedings of the American Economic Association, p. 369. It is possible to feel that Kerr perhaps overstates the "compromising" elements in this situation but that his description illuminates some aspects of it which have received woefully little rational recognition.

organized group of consumers in the country. Neither argument was wholly frivolous. The "public interest" is infinitely clearer to someone who can use that phrase to dignify his own view than it is to one who must seek to give it more objective content.

It is also relevant here that even assuming that there is a relatively clear "public interest" in a particular situation the "public" members on these boards can expect to receive not the slightest help from the owners of that interest either in connection with formulating it or later in connection with supporting a decision based on it. When a body such as the Wage Stabilization Board recesses for caucuses, the industry and labor members phone the AFL, CIO, NAM and Chamber of Commerce headquarters; the public members ask of each other "what do *you* think," and then they look out the windows, and up at the stars. What newspaper editorial comment there is will usually seem to lean so far one way or the other that it cannot be relied upon as a "public" testament. Calls from Congressmen are invariably traceable directly to one or the other parties to a particular case, and rarely if ever sound much like the voice of the public. There was the sorry spectacle, after the 1952 Steel case in the Wage Stabilization Board, of one Congressman's indicting the members of that board publicly as being in the pay of labor unions. Here was the classical half-truth indeed, for the facts were that these men had in prior private life done arbitration work for which they were paid *jointly* by the unions *and the companies* who had hired them for this service.

It should be added that there is probably a direct relationship between the effectiveness or ineffectiveness of the "public" members on these tri-partite agencies and the strength or weakness of the chief executive and the majority party in Congress. There is reason to believe that not only in the tri-partite agencies, but also in the case of those regulatory boards which are manned entirely by "public members"—the FCC, the CAB, the ICC, the FTC, the SEC, and others—the regulated industries manage to exert excessive influence over the governmental administrative agency which is regulating them to about the same degree they have achieved influence in the White House and on Capitol Hill.

It seems a fair summarization of this private group participation in the public administrative processes that it represents today probably at least as great an influence as that which is exercised in connection with either the public elective or legislative proc-

esses. There is a rapidly increasing amount of it. It can by no means be considered all "bad." Much of it seems unquestionably good. But it does pose some new questions as to the channels which are best suited to carry the viewpoints of individuals into the decision-making forums of Government. More and more of those being used are marked "Private"—for dues paying, rather than tax-paying, members only.

III.

It would be a reasonable reaction to this description of some of the functionings of democracy's private organizations that it amounts to little more than an inventory of the familiar and the commonplace. These associations have become an integral and essential part of democracy's structure. Their powers are not enlarged by analogizing them to those of government, and any expression of surprise at the extent of pressure group politics seems at this date a little like getting excited about discovering that a lifetime has been spent speaking prose.

There is something a little sobering, nevertheless, about the realization that the present state of affairs is so markedly different from what it was only a few years ago, that its salient features conform so poorly to accepted tenets of political theory and legal doctrine, and that it would offer so much sustenance for the apocalyptic gloom of those philosophers who have warned that democracy will be buried in the graveyard of syndicalism. It is easy enough to set aside, in the light of three centuries of actual experience, Hobbes' admonition, when he launched the Leviathan, that any "private societies" which might ever be allowed to develop would work within the body politic like "wormes in the entrayles of a natural man." It is harder, though, to disregard the confirmation which time has given some of Veblen's and Bentley's cynicisms of fifty years ago. They would see in this record—of industry-wide strikes, closed shops, reported oil cartels, basing point and "fair-traded" prices, political pulpits, virulent lobbies, monopolistic newspapers, devastating depressions aggravated by controlled prices and production—the inevitable fruits of the planting in democracy's soil of the dragon's teeth of pluralism. It is only good sense to realize that social architects, no less than nuclear physicists, *could* produce on democracy's stage tragic reenactment of that final scene in Capek's play where Rossum's

Universal Robots become masters of the laboratory and are marching inexorably, as the curtain falls, upon their creators.

So familiarity with the present day functionings of even essential institutions will not be permitted to breed contempt for their possible implications. Nor will we advisedly, on the other hand, exaggerate such implications, or jump to the immoral conclusion that they doom democracy to inevitable destruction. It must be left for another occasion to attempt any broad appraisal of the net significance of the developments which have been traced in this paper. A few comparatively obvious and circumscribed conclusions may, however, be simply adumbrated here.

There appears, in the first place, no justification for considering the emergence of strong private groups as in any way aberrational, or as indication that democracy has been diverted from its natural course. The personal devil theory, for example, which finds in such organizations simply reflections of the egos and lusts of Morgans, Vanderbilts and John L. Lewises, only confuses whatever problems of diagnosis or prognosis may be presented. Indeed the clearest impression from a review of this development is that it represents an inevitable concomitant of large, "free-economy size" capitalistic democracy.

Insofar as the social (as distinguished from economic) private organizations are concerned, this emergent "groupism" appears to have obvious sociological and psychological as well as political explanations. It seems not amiss to suggest, in passing, that lawyers probably err dangerously when they disregard the knowledge of these other disciplines in their formulations and applications of such doctrines as those of sovereignty—and even of property rights. There has been a tendency to ignore the implications here of such simple facts as that there are now over 150,000,000 of us, that we are gregariously inclined, that there is a greater desire for group status than the offices of public government can possibly satisfy, and that the apparently national instinct to form an organization around every impulse for pleasure or betterment is bound to produce at least a few chain reactions which become self sustaining.

Today's highly complex circumstances probably require, furthermore, some organized mobilization, or at least stimulation, of people's talents for democratic citizenship. It is perhaps a wholly personal view that the League of Women Voters offers, in this connection, a model of desirable divorcement of special

from general interests. Yet the enlarged social action programs of other organizations, formed around more specialized interests, may be fairly expected to yield a net profit in terms of greater individual participation in public affairs.

As for the economic groups, corporations and labor unions seem best understood as inevitable institutional outgrowths of the industrial revolution. The exploitation of the potentialities of machines required the expenditure of more capital than single individuals cared to risk. So joint investment was permitted by law and there was added the legal blessing of "limited liability." Perhaps there was not full realization originally of the extent to which the incorporation of employers would produce a resultant diminution in the bargaining power of individual employees, or of how the factories and machines and assembly lines would dwarf the men who tend them and erode their status as human beings. Labor unions developed primarily as an institutional counteraction whereby the collective strength of associated people was brought into a balance (whether equal, or more or less than equal) against the collective strength of associated dollars.

If it appears alarming that certain functionings of private economic organizations have become very much like those of public agencies it must also be realized that such functioning is in many instances the *alternative* to an increased exercise of "governmental" authority. The severest critics of the collective bargaining process, of strikes, and of big labor unions, seem to assume that if these were eliminated there would be then restoration of former "managerial prerogatives." This is only wistfulness, and expressing it in terms of devotion to the principles of "free enterprise" brings it no nearer the realm of reality. The Social Security Act of 1935 and the Fair Labor Standards Act of 1938 (as well as the English Ordinance of Labourers of 1349) illustrate what happens when serious imbalance develops in the relative bargaining power of employers and employees and if there is no private mechanism for fixing terms and conditions of employment which most people in a nose-counting society consider fair. They may be fixed for a time by the stronger private force, but before long the agencies of Government will step in and "repair" whatever abuses are considered to have developed.

This point becomes clearer if it is recognized that one incident of an employer's hiring of thousands of men and women is

the creation of a need for "governing" his relationships with them and theirs with each other, a need for determining "job rights." Perhaps this seems to beg the question. It is indeed arguable as a matter of logic that there is no matter here of "rights" at all, or that the determination of these "job rights" is clearly among the prerogatives of the owner of the "property rights" to the soil upon which the work is performed. But this, too, is only wistful thinking. Whether for better or for worse, that majority of the citizens of the world's democracies who are employees have rejected the idea that "ownership (of property) for power"—Hobhouse's phrase for what is involved in corporate ownership—includes the power of autocratic control over the terms and conditions of all work performed on it. Employee insistence on sharing in that control has been recognized in every society in any way similar to our own. In France and other continental countries this recognition has been enforced by the statutory establishment of "works councils." In West Germany there has been the recent adoption by law of the principle of *Mitbestimmung* (codetermination), so that employees in the iron, steel and mining industries are now given equal representation with stockholders on corporate boards of directors. The contemplation of these alternatives gives new meaning to the accomplishment of American labor and management in working out, in their 100,000 collective bargaining agreements, a *private* law of job rights.

Even in the consideration of the industry-wide, national emergency strike situations—which seem the worst and most unconscionably wasteful of the manifestations of private power—there is the necessity of recognizing that the only likely alternative to less "private government" is more "public government." This is borne out by the record of the wartime interposition of governmental dispute settlement in this country, by the resort to a comprehensive system of governmental compulsory arbitration in Australia and New Zealand, and by the establishment of the Labor Courts in the Scandinavian countries.

So it seems a necessary part of any appraisal of the developing pluralism of the democratic institutional structure to realize that the emergence and functioning of these strong private groups has been part of the filling of clearly felt needs. They have appeared and developed in the manner rather of Topsy than of Minerva. As the increasing complexity of the society

and economy has presented new necessities of "governing" people's relationships we have both instinctively and deliberately—and for proven good reason—drawn back from unlimited expansion of the role of public government. Much of the present functioning and authority of these private associations is resultant proof of the fact that in the laws of man's self-government, no less than in those of nature, a vacuum is intolerable. It will not help in the analysis of this development to assume, under the influence of nostalgia, that the choice is always between something being done by private groups or by individuals (or not at all). The lesson of experience is that the choice is more usually between something being done by little "private governments" or by big public ones.

There seems at the same time no justification whatsoever for uncritical acceptance, just because it is understandable, of a development which is bringing some of the most basic democratic premises into serious question. It appears clearly from a review of the history and present status of democratic institutionalism that there has been recently an extraordinarily sharp acceleration in the concentrations of power in private group organizations. This acceleration parallels the more generally recognized (and criticized) expansion during the past twenty years of the functions of *public* government. There must be further inquiry into whether there is a reciprocal relationship here and as to what is cause and what effect. That there is more than ordinary significance in the recent institutional evolution is suggested, too, by the coincidental emergence and wide acceptance of a basically revised theoretical economic explanation of capitalism's functioning.

There is substantial evidence that these accelerated developments are being rationalized, politically and popularly and "legally," on the basis of increasingly anachronistic premises. The old assumptions as to the restrictions which operate, or can easily be made to operate, upon private exercises of group authority, appear particularly rusted by the oxidizing process of changing circumstance. It is still being asserted that adequate restraints lie, on the one hand, in the laws of the market place—which these groups have already shown themselves capable of amending; and, on the other, in the regulatory actions of "the Government"—over whose processes these organizations are exercising an ever-increasing control. Perhaps the greatest doubt

arising from this record is as to "the law's" continuing reliance upon its assumptions of exclusive sovereignty and upon the traditional conception of its task as primarily that of implementing relationships between men and women who stand alone except for their membership in the community of the State.

More generally, and most basically, this record appears to confirm those doubts, mentioned at the outset, as to whether our concern about the threat of group force to individual freedoms has been broad enough. It seems to emerge as a relatively obvious proposition, not just of logic, but now of actual experience, that the danger of group force does not depend upon whether the agency exercising it is called "government" or a "labor union" or a "corporation" or a "momewrath"; it depends rather upon the degree of counter-force which operates against it. All that we have long recognized about the concentration in "the Government" of power delegated by individuals begins to appear equally true of concentrations of power resulting from similar delegations to *any* agencies. The question is not who has the power, or whether his use of it is an exercise of "sovereignty" or of "free enterprise." Private group agents manifest no more *self* restraint than do public group agents. The only question, in either case, is what outside restraints are operative.

"The Government" still stands clearly in this record as the outstanding custodian of such group force, to which there is no organized counter-force in any way comparable. And there is disturbing evidence of an apparently increasing exercise of this power at the expense of individual freedoms. Business men are pressed even harder to keep their heads above engulfing waves of "regulations," to stay abreast of mounting demands for reports and returns which seems to assume their dishonesty. Now, too, for the first time in the nation's history, voices which are no less loyal for being critical are being stilled by the indiscriminate fists of McCarthys and McCarrans made bullies by the power of their offices.

The increased participation of the private groups in governmental processes might seem to promise checks against encroachments upon individual liberties. This excuse is used to justify many of their programs. But there seems almost greater evidence to the contrary. It is only *certain* individuals whose freedoms each group champions, and the fine theory that their pressures will

act healthily against each other disregards such plainer facts as the propensities of lobbyists for logrolling.

Yet the more relevant point here is that there has developed now this other set of "private" group force concentrations, and that so far as can be seen their habits are no different from those of agencies of public government. The situation is not one, except in rare instances, of absolute, unchecked, private group force. This makes appreciation of the problem harder, for there can always be an argument made in terms of *some* counter-force being operative, of there being *some* competitive force at work, or *some* semblance of "governmental" control. But the point, clearly no less real for being one of degree, is that *to whatever extent* there is enlarged private centralization of delegated group power, and *to whatever extent* outside restraints upon such power are diminished, the consequences appear on scrutiny little different from those flowing from concentrations of power in "the Government." The rest of the point is simply that private concentrations of group power are today being enlarged and the restraints upon them diminished at a rate unparalleled in this nation's history.

Here is no invitation to even the slightest heresy. Powerful private organizations must be recognized, under present circumstances, as having some of the same essentiality to capitalism and democracy as do the agencies of government. But *no* institution has any significance except as a means to the end of individual satisfactions, and of these we count freedom the greatest, both for itself and for what it in turn produces. It is devotion to the basic democratic ideal which demands emphasis today upon the increasing evidence that individual freedom can be either enhanced *or destroyed* by *either* public or private group force. Not fear, but caution, comes from the realization that democracy's destruction in other nations has been less a consequence of an incumbent government's tyranny than of some private group's uncontrollable ascendancy.