

CSDI

BOX 72

FOLDER 23

SERIES ACADEMIC PROGRAM

SUBSERIES GENERAL

CONTENTS

REICHARDS, HOWARD; CONSTITUTIONAL IMPLICATIONS OF THE FIRST AMENDMENT

LIBRARY OF CONGRESS

TYPE:

FORMAT: THYSCRYPT

SUBJECT: UNITED STATES-- CONSTITUTION  
WEALTH

Constitutional Implications of the Mobility of Wealth

I

The government of the United States is a government of limited powers. Its powers are limited, first, by the high declarations contained in the Bill of Rights, and in the similar provisions contained in the constitutions of the several states. Secondly, the powers of any given unit of government are limited by the division of powers among the very many authorities that exist in our land.

American government is divided government; any office acting alone is weak, although together we are strong.

Powers are divided among the three branches of the federal government, and between the Federal government and the States. The States have divisions of their own, with legislative, judicial, and executive branches, with regulatory commissions and with subsidiary city and town governments, many of which have their own branches, each with powers carefully divided, each with privileges jealously guarded. In the states and in the nation there are corporations, universities, cooperatives, mutual water companies, telephone companies, TV networks, labor unions, masonic lodges, churches, and other organizations, each with privileges and duties recognized in law, each a fragment in the American pattern of self-government, and each limited by the other loci of authority that share its environment. <sup>I</sup>~~As~~ do not stop to ask whether the so-called "private governments" and the amalgams that we are not sure whether to call "private" or "public" are "governments" in the proper sense of the word. I only note that they are



they share in governing, by rule and by decree, the lives of the people who live in our country.)

The President, the first servant of our realm, is limited by the high officials of the vast establishment which he heads. The regulatory agencies -- the FCC, the CAB, the NLRB, the ICC -- have formal independence by statute. Other parts of the executive branch -- the air force, the navy, the internal revenue service, the FBI, the Bureau of Reclamation -- have informal independence by custom, by their influence on public opinion, and by the practical necessities of a busy world.

~~President Eisenhower once ordered an investigation to determine why the President's orders were not carried out, but, of course, the investigation led to no substantial changes.~~

CONTRAST

In ~~courtesy~~ to the express limitations imposed by the Bill of Rights, the limitations imposed by a multiplicity of organizations and authorities are sometimes difficult to see, especially since their practical effects are sometimes greater and sometimes less than what organizational <sup>charts</sup> ~~charge~~ <sup>one</sup> lead ~~me~~ to expect. Nevertheless, the underlying ideas and sentiments are very much in the American grain, and the results are, more often than not, pointed to with pride as evidence of the democratic spirit that pervades our way of life. Divided powers are what the Founding Fathers intended, and, because we expect the efficiency of independent and often competitive organizations working separately to make up for any losses that may be caused by confusion and duplication of effort, they are what we intend too.

The following paper concerns limitations on governmental powers that are even less visible, but even more important. As to whether they were intended by the Founding Fathers, there is room for doubt. As to whether we should intend them now, as citizens of a modern industrial society that spans a continent and influences a world, there is room for even more doubt. In any event, those who would recommend or endorse a constitution as fit to govern an industrial nation must come to grips with these limitations on government, and decide whether they are desirable, and if so why and to what extent.

The limitations referred to are intimately related to that institution which mankind has wisely deemed the root of all evil. They are imposed by the mobility of wealth: (1) By the power of the investor and the investment market to determine (a) where to invest, (b) whether to invest at all. (2) By the necessity to compete in foreign markets. These powers of mobile wealth, and the consequent tendency of the nominally governed to be in practice ungovernable, will be discussed in the pages that follow.

## II

"The Federal Constitution," writes Scott Buchanan, "is silent about most of the laws that it subsumes and silently confirms. But this constitutional silence is perhaps most impressive when it confirms the legal system which was, as it were, taken for granted, "received" from England as Roman law had once been received by European states."



then, not with the Constitution, but with those laws that the Constitution took for granted. We must go to England to understand the legal and political ideas early Americans brought with them, ~~and largely took for granted~~. At the forefront of these ideas are the laws of property. Property is one of the four major divisions of early English law, and in the initial stages of English legal history it was more important and more highly developed than the other three. It will be my contention that the forms in which property has been held have exercised a profound effect on social life, and on government, and that one cannot study government in modern times without studying the relationship of government to property, and the relationship of extant ideas about government to property institutions of another age.

The feudal system was never established in England as firmly as it was established on the continent. Nevertheless, Englishmen can trace their institutions back to the time when the farmer held his land of a <sup>mesne</sup> ~~mesne~~ lord (an intermediate lord) who in turn held his land of the king. The possession of the land was equivalent to the personal relationship one held to one's lord. One was "enfeoffed" or "seised of" the land in a <sup>manner</sup> ~~manor~~ which signified at once tenure in the land and personal allegiance to the mesne lord, and, through him, personal allegiance to the king. Here we had the perfect union of property and government. The government, in the person of the king, owned the entire nation. England consisted of those lands held by the king of England, France of those lands held

turn parcelled out land to their followers. The laws of property and the institutions of government were indistinguishable.

Through a long process of evolution, the rights of nobles in their lands became more secure against kingly powers although those rights still rested, in theory, on a symbolic allegiance to the king. The king's residual rights as ruler of the realm are <sup>recognized in</sup> ~~endowed by~~ the doctrine of escheat. If a lord should suffer great disgrace (the typical disgrace being precisely treason -- disloyalty to the king), or if he should die without heirs, his lands would "escheat to the king." "Escheating" was conceived as a return of the lands to their original source, the conditions under which the land was held having become extinct. Vestiges of this doctrine remain to this day in the states of the United States, although the states have taken the place of the king.

Perhaps the foregoing sheds some light on Thomas Jefferson's assertion that the legislature should spare no means to promote the division of property. When he spoke of property, he meant land. When he spoke of the legislature, he meant those deliberative bodies which had gradually taken from the king the ~~deliberative bodies which had gradually taken from the king the~~ law-giving powers. More specifically, Jefferson referred to the House of Burgesses of the Commonwealth of Virginia. It was well within the province of the legislature to ordain the conditions under which land was to be held for those powers had



but the promulgation of general laws to be applied without regard to persons. And in the Anglo-American tradition of gradualism it meant legislation in the context of, and with due deference to, the rights anciently honored in the land. The foregoing explication of what Jefferson meant is fully consistent with what Jefferson did when he wrote a new civil code for the State of Virginia. In the code he took the forward step, directed toward the division of property, of abolishing the estate tail, a device by which landed families had continued to keep their estates intact and within the family by requiring that they pass at death to the eldest son.

### III

The evolution of the law of land, and of its relation to government, is a fascinating story. There have been and are important debates concerning the relative weight to be accorded the interests of the freeholder and the neighbor, the mortgagee and the tax collector, the heir and the charity, and the many others who have or may have an interest in the land, its subsoil, or the air space above it -- complicated here in California by the community property laws we have inherited from the Spanish tradition. In addition, there are persistent contests between tradition and the exigencies of the present; and between clarity in the general law and justice in the particular case.

At this point, however, we turn away from the history

The conceptual background (<sup>Fond</sup>~~land~~) <sup>on</sup> which our <sup>ideas of</sup> government ~~has~~ have taken form has been that of an expanse of land, a territory, and its inhabitants. The territory constitutes the jurisdiction of the government, and the citizens who reside in that territory are its constituency. Only gradually has another feature of our environment come forward as crucial to the governmental process -- ~~xxx~~ movable wealth. (Here we may employ the civil (continental) law distinctions between immovables and movables. Immovables corresponds roughly to what we call real property; movables to all that we very inadequately term personal property.) The replacement of the land economy by an economy based on movable wealth has wrought changes in our lives that our philosophy of government has yet to assimilate.

Today a man does not have <sup>land</sup>~~land~~ as frequently as he has "interests." A man will hold stock, which represents an interest in a corporation, and whose value is continuously posted in a stock market. Besides stock there are other interests in going businesses, as well as bonds, debentures, and other securities. There are interests in mutual funds, pension plans, banks, insurance companies, and trusts, amounting in the aggregate to many billions of dollars. In addition, there are patent rights, copyrights, and trademarks of great value. A man may be rich because of performance rights to TV shows, or because of oil royalty payments, without owning a square inch of land. Wealth is becoming less and less tangible, and more and more movable.



#### IV

The word "land" means real property, as when one says, "The Hollister family owns a great deal of land." It also means country, as when one says, "Cancer is a major cause of premature death in many lands." The two meanings are not unrelated, and perhaps they were originally the same. A country is traditionally identified in terms of that portion of the earth's surface over which its jurisdiction extends. One says, for example, that Japan is that nation situated on certain islands off the Coast of Asia, and one presumes that the jurisdiction of the Japanese authorities will extend to persons and objects located on those islands, and to no others.

However, the mobility of wealth that characterizes the modern world has sometimes forced men -- in a haphazard, case-by-case, unphilosophical fashion -- to take a second look at territoriality as the basis of governmental authority. In an increasing number of cases it is becoming important to identify a nation not by its lands, but by whose allegiance it can claim and by what business enterprises it can regulate and tax.

An example is the case of Black vs. Florida. A Florida court wanted to compel Black to appear as a witness. Black claimed that since he was in Europe, he was beyond the jurisdiction of the court and could not be compelled to appear. The higher court held that Black was a citizen of the United States and of the State of Florida, and that he could be compelled ~~in~~ by the local court to come back to Florida to testify. The decision is perhaps atavistic in that it suggests a return to the tribal governments that were long ago replaced by government



over a demarcated territory. But it is very modern in that it reflects the need for jurisdiction on a basis other than territory in a world of highly mobile persons and property.

Another example is the application of American anti-trust laws to American companies operating abroad. When an American oil company wants to enter an international cartel agreement to divide the markets of Africa, the courts often held that Americans cannot engage in such conduct because it violates the anti-trust laws decreed by the legislative representatives of our citizenry. The lawyers for the oil company complain that the principle of territoriality is being violated, in that the Congress is presuming to govern events beyond our shores -- and indeed the principle of territoriality is being violated, but perhaps for a good reason.

Perhaps the surest sign that territoriality is the older doctrine, defended by nostalgia and inertia, but slowly giving way before the exigencies of modern times, is the adoption of fictions to conceal the fact that the old idea that jurisdiction follows land is being violated, when in fact it is. This is the traditional tale of the fiction, recounted by Sir Henry Maine in Ancient Law -- to make the new more palatable by pretending that it is the old. An example is the attempt to find a "situs" for an "intangible." When a ~~man~~ man dies in Chicago, leaving shares of stock in a safe in ~~Chicago~~ Milwaukee, which constitute an interest in a Delaware corporation (which does business only in California), and in which a New York brokerage house has a security interest, certain practical questions must be answered. What state's law will decide who



inherits the stock? What state will collect the estate taxes? The result will usually depend, in practice, on fairly sensible considerations relating to each state's interest in the subject matter. But very frequently the ostensible question will be the fictitious one: "What is the situs of this stock? Where is it located?"

Other examples may be found in the area of conflict of laws. Suppose that the carelessness of a brakeman in Alabama results in a train wreck in Mississippi. (Let us suppose further that the brakeman, the plaintiff in the case, and the railroad company, are all Georgians -- the latter, of course, a ~~corporation~~ corporate, rather than a natural, Georgian.) What state's law governs? Under the old rules, the question "what law governs?" reduced to "where did the acts on which liability is predicated occur?" and the answer was "Alabama law," since liability is predicated on the brakeman's carelessness. Recently, some of the more progressive courts have given less weight to deciding where the fault occurred in order to decide what territorial jurisdiction can prescribe rules governing the case. (For example, some would hold that a Georgia court should apply Georgia law, since it is Georgians whose rights and interests are at stake.) But their hesitation to replace old habits of thought with ideas more suited to modern times is shown by their tendency to pretend to base the decision on the answer to a question beginning with "where?" even when that is not in fact the most persuasive factor.\*

\* See, e.g., Grant vs. McAuliffe

## V

The federal government of our nation is a government of delegated powers. The great reservoir of powers not specifically mentioned lies in the States. Therefore, when one considers limitations on American government, one should think first of limitations on state government.

The classic, and decisive, limitation on state regulation of business activity is that the business regulated has the option to move to another state. The classic example is the government of corporations. The corporation is the principal institutional form of our economic life, and the provision of the framework of law that creates and sustains the corporation, and informs the lives of those who live and work within it, is one of the highest responsibilities of government. Unfortunately, however, any attempt to write a corporation law in the light of the common welfare of the citizens of a state will be met by simply incorporating in another state, in those cases where the interests of the promoters and the legislature's view of the common welfare conflict. The "Delaware corporation" is one of the <sup>farces</sup> ~~farces~~ of American law. A Delaware corporation is a mail-order bride, who will ~~for~~ prostitute herself completely, at the cost of a few dollars paid to the treasury of the state of Delaware. But Delaware is not the only seller in this great marketplace of law; the state of Nevada is also anxious to pocket the buyer's few dollars, and Nevada has recently written a corporation law that permits the buyer even more wantonness than may be purchased from Delaware.

Land is the least mobile form of wealth, since, by



definition, it always stays in one place. A corporation is perhaps the most mobile. A corporation can travel to Delaware and set up residence there while all its promoters, all its employees, all its assets, and all its activities remain in California. It travels in a sealed envelope, propelled by a postage stamp. Its journeys are like the astral journeys of oriental mythology, where the disembodied spirit roams the earth at will, while the body remains rooted in place.

On the continuum of more and less mobility that stretches from land at one end to the corporation on the other, there are many other entities that may be moved out of a jurisdiction whenever that jurisdiction promulgates laws such that it would be profitable to move somewhere else. State minimum wage laws <sup>suggest</sup> ~~are~~ an example. To raise wages in North Carolina is to persuade textile factories to move to Virginia. Normally, however, the process occurs the other way about; the state will pass special laws designed to attract industry -- the market conditions are such that it is government that goes begging to business, seeking to persuade mobile wealth to come to rest within its jurisdiction. An examples is the Arkansas legislation designed to attract business by providing especially lenient regulations. Another example takes the form of a major argument in favor of "right-to-work" laws: that they attract industry away from states where collective bargaining is ~~now~~ encouraged.

The position of the American states is similar to that of the Latin American nations. Each seeks to attract investment by providing fewer regulations, lower taxes, cheaper labor, and higher profits. Generally, this is the bargaining disadvantage.

of stationary territorial governments in a world where wealth is mobile. It constitutes a massive limitation on the government of some of the most important and pervasive types of human activity.

The conclusion to be drawn from the considerations set forth above is that insofar as the powers<sup>to</sup> regulate mobile wealth is deemed to be a desirable power for a jurisdiction to have, that power must extend over (or penetrate into) all havens to which the interests to be regulated are likely to move. Otherwise it is necessary to admit that that mobile wealth is above all constitutionally ~~based~~<sup>founded</sup> jurisdictions -- it is governed only by the interests of the promoters, by market conditions, by caprice, or by a combination of the three.

## VI

The federal government is in some ways in a better position than the states, except, of course, for the express constitutional limitations which prevent it from doing things which the states, in practice, cannot do either. The federal government has jurisdiction over a wider area, so it is harder for a business to move away. Nevertheless, it has some of the same problems the states have. For example, the Open Market Committee of the Federal Reserve Board recently took action to raise interest rates. This means that the people of the country will pay interest rates higher than they would otherwise pay, and also that it will be more costly to service the national debt. The reason: higher interest rates were needed to prevent the flow of American gold to foreign countries where interest



rates are higher. Thus American government is <sup>impelled</sup> ~~impelled~~ to act in accordance with the dictates of an international money market.

Unlike the smaller nations, the United States does not have as a major limitation on government a tendency for investors to place their money in foreign nations when the laws at home are not to their profit. That is to say, in general this is not a major limitation. That it is, however, a limitation of some importance is demonstrated by the state of the U.S. shipping industry. A ship is a mobile form of wealth in an unusually literal sense; it is its national allegiance that becomes intangible. It moves from place to place by the power of its turbines, but it moves from jurisdiction to jurisdiction by an act of registration that determines what flag it shall fly.

The United States merchant marine, that is to say, the merchant marine owned by American interests, has found that American laws are not to its profit. In particular, the laws concerning collective bargaining and the rights of workmen create conditions less favorable for profit than those created by sovereigns more anxious to ~~protect~~ pocket the investor's dollar. The result is that the tiny nations of Liberia and Panama now have the largest merchant marines in the world (owned by Americans, staffed by men from wherever labor is cheapest). What Nevada is to divorce, Panama is to shipping.

But the shipping industry is the least of America's problems. In general, although flight of capital abroad is a major problem for Bolivia, it is a comparatively minor problem for the United States.

A major problem for the United States is that often mobile forms of wealth are not used at all. The many useful objects with which homo sapiens surrounds himself are intended to be put to work to serve his welfare. Strangely, in many instances these objects are not put to work, and they are not put to work precisely in those cases where government dares to construe the common good in a way that reduces the prospect for profit. One can imagine a host of nobles at the time of Henry II, threatening the king that unless a boon be granted them they will not plant seed in the spring, and will keep closed the gates to their stud pastures. What Henry II's reaction would have been we do not know. We do know that when the stock market sags and banks accumulate excessive reserves the federal government of the United States quakes with terror. The laments of part of the electorate, those unemployed and those who are likely to become unemployed, will rise to a menacing pitch. The government's own income declines through losses in forms of revenue whose magnitude is pegged to the volume of commercial activity (e.g. income taxes).

Measures taken by the authorities to propitiate the initiation and maintenance of business activity are many and important. An example is the institution of the dual tax system -- a high tax for income that is earned (the income tax), and a low tax for gains accruing from putting one's property in a situation such that its value will increase (the capital gains tax). The tax system also features depletion allowances, stock option plans, exemptions for corporations engaged in foreign trade, and other favors for those who have the power



to set our economic machinery in motion or to make it stand still. The moralist may condemn these "loopholes" as special privileges for the <sup>influential</sup> ~~powerful~~. The legalist may condemn them as asymmetrical (but he will be answered by other and better paid legalists who will claim that they are symmetrical, when the proper analogies are properly employed). The wise man, however, will make none of these complaints. He will recognize that a limited government would reduce the ~~disproportionate~~ rewards offered to the proprietors of mobile wealth at its peril, and that it increases them in the service of its own good and the public welfare.

The conclusion to be drawn from the considerations just set forth is that insofar as it is desirable that the constituted authorities govern the nation, it is necessary that they have the power to initiate of their own motion the utilization of the various objects homo sapiens employs. Whether the federal government, the states, municipalities, corporations, universities, or mixed commissions of archdukes and gardeners are the authorities constituted to govern the use of wealth is a secondary question. Whether the constituted authorities be called "public" or "private" is a secondary question, and a bad question to boot.

The current rules for handling mobile wealth presuppose and, in effect, enact that it is moved from place to place, or not moved at all, primarily according to the criterion whether it is reasonably expected that more will come back in than went out. The officers who apply this criterion are styled the owners, or, latterly, the management. While I have used the word government quite broadly in this paper, to the extent that any authority that issues rules and decrees with a view to the good and welfare

of a class of persons is likely to get called a government; I stop short of calling the process by which one judges by the criterion whether more will come back in than goes out a process of government. Accordingly, the owners and managers do not govern, and in fact they are as little capable of determining the direction and impact of their shaping of wealth as anyone else. But -- even though they do not govern -- the institutions that they operate constitute a crucial limitation on the authorities who do govern.

## VII

The root of all evil first wormed its way into the confidence of mankind by displaying virtues which conceal its slippery character. Plato mentions them in the following passage from the Republic:

Socrates: Again, in the city itself how are the various sets of producers to exchange their products? That was our object, you will remember, in forming a community and so laying the foundation of our state.

Adeimantus: Obviously, they must buy and sell.

Socrates: That will mean having a market-place, and a currency to serve as a token for purposes of exchange.

Adeimantus: Certainly.

Innocent money, the token of exchange, has features that tie in neatly with my theme of mobility. Money can be easily moved, and, more important, it can be moved in any quantity. Unlike a steel mill, which can be dismantled and transported only with considerable difficulty, a sum of money



can be credited to any account simply by a flick of the pen, pursuant, presumably, to a set of fairly rigorously enforced rules for the flicking of bankers' pens. A dollar bill can be infinitely divided, as we see when electricity is sold in terms of mills and amperes. It can be infinitely multiplied, as we realize when we calculate the interest on the national debt. The mills and the billions can be moved from account to account with equal facility, whether by lines of white collared clerks with green eyeshades or by banks of humming and clicking computers.

The prototype of money as token is the exchange of a unit of money for an object considered valuable -- for example, a penny for an apple. One also exchanges dollars for hats, checks representing dollars for automobiles, nickles for gum, and other sums for other items. This is a game which we moderns play skillfully, manipulating the relevant artifacts with consummate ease, although, of course, some individuals excel others in the finer points.

Mystery enters the picture when credit is introduced, when the token is exchanged not for an object but for a promise. A promise is not at all like an object -- it is a complicated network of conventions prescribing rights and duties, of ~~action~~ <sup>promissory</sup> and promises, summarized in a noun not so much by courtesy as by the practical necessity to think in simple ways even while acting in complicated ways. To complicate things more, money retains its rapid mobility and divisibility when it plays at credit instead of at buying and selling. Nonetheless, a

typical example of a credit transaction can be adduced, which is so familiar that we can easily be deluded into thinking it is easy to understand. In exchange for \$100, B promises to repay A \$100 plus six per cent, one year hence.

The ontological status of the six per cent has been the subject of much commentary. It has been declared to be "the rent for the use of the money." "B's compensation for taking the risk that A might not pay," "B's reward for spending his money later instead of now," "B's salary for his service, in deciding whether to lend to A or to someone else." Whatever label one attaches to the six per cent, and however one justifies it, it is commonly allowed, "both by philosophers and by civilians that collecting the six per cent is easier than working.

My present concern, however, is not with the proper analysis of credit, nor with the justification or lack thereof of the institution of charging and paying interest. It is rather with the central role of credit in our common life, and the constitutional implications of that role.

The operation of American industry, commerce, and agriculture is carried on on credit. Here I refer not only to loans from individuals and banks. I refer also, for example, to the purchase of shares of stock; the investor advances money in return for the promise that he will have a share in the corporation's profit. My assimilation of shares of stock to loans is not a novel concept: accountants tote up shares outstanding on the liability side of their balance sheets. Investors compare the relative ~~profit~~ profitability of stocks along with bonds,



trust deeds, commercial loans, and other ways of extending credit.

In a larger sense, all investment of money is a form of credit -- one gives money now for the promise of getting more later. Of course, if one complains that he was cheated out of his money because he broke his promise to himself to ~~run~~ ~~win~~ a successful business, he will get comparatively little sympathy. (The moral of this is that it is wiser to grant credit with collateral, and let someone else try to run a successful business.)

The credit way of life is, in a sense, governed by law. But it is largely governed by state law, which is, for reasons already set forth, more often than not limited to the point of abject servility. As for the federal government, its inability to govern the "money market" is apparent for all to see. When not enough credit is being extended to keep a sufficient number of dollars in circulation and a sufficient number of wheels turning, the gentlemen in Washington abandon any program deemed desirable on other grounds but afflicted with the fatal flaw that it motivates fewer B's to extend credit to fewer A's. Instead, they rush about to invent means (a) to convince A's that it will be profitable to borrow, (b) to convince B's that it will be profitable to lend. The constituted authorities in the city of Washington watch the ticker tape of the stock market and statistics on loans made by banks, in the way that courtiers of old watched the frowning face of the king -- nervously.

Two morals are to be drawn from the tale just told.

The first is that the limitation that government can do nothing that reduces the extension of credit (often expressed by saying, "government must not impair the health of the economy") is one of the central limitations on government. A new constitution that will state or imply the principal offices needed to govern the United States, must decide whether this limitation is desirable, and if so to what extent, and if not who should govern what is now governed by officers whose powers have not been adequately reflected on, or not governed by that non-government called the market.

The second moral is prompted by the observation that extending credit is one of the easiest and most profitable businesses around. It does not call for the skills needed to run a successful business, nor even for the stick-to-itiveness required to stay at one's desk from 9 to 5 five days a week. If one operates on a large enough scale, one can extend credit only to banks, which make s it unnecessary to soil one's hands by dealing with the general public. In practice, the work is done by professionals, products of Harvard Business School, where minds are molded to the requirements of whatever set of credit-extending procedures is currently practiced.

The natural conclusion is that the federal government should engage in extending credit. All hands agree that the federal government is thoroughly incompetent. It is in the position of Plato's shopkeepers:

"Men not strong enough to be of use in any other occupation. They have to stay where they are in the market-place and take goods for money from those who want to sell, and

money for goods from those who want to buy."



If the government is qualified by its incompetence to collect interest, it would be justified in spending the proceeds by any relief it could give us from the pain of paying the taxes from which its income is now principally derived. Socialites, patrons of the arts, universities, churches, animal shelters, botanical gardens, and other ornaments of our culture have learned that it is easier to hire whiz kids to "put your money to work" than it is to persuade people to pay you a tax. A wise constitution will profit from what they have learned.

## VIII

In early times all lands were "held of" the king. The crown lands were held directly by the sovereign, and the other lands were held "by" a noble, but "of" the sovereign. The ultimate title of the sovereign was recognized by the services that the nobles yielded him as a condition of their tenure. For example, those who <sup>held</sup> ~~held~~ of the king under the type of tenure called knight's service were required to furnish a specified number of knights for a specified number of days per year. In this and in other ways the sovereign translated his underlying title to all the lands of his realm into revenues and services.

For our purposes perhaps the most interesting form of early land tenure was that known as Frankalmoign. Lands held in Frankalmoign tenure were devoted to religious use. That is to say, the income and increase of the land went to the monks of the religious order that held the land of the king in Frankalmoign. As time went on the services due to the king became less and less definite\*, until Frankalmoign became, in effect, an endowment in land for an institution deemed worthy, the church. Thus an autonomous institution was allowed to exist within the sovereign realm, and, more important, not only allowed to exist, but financed. The land was its endowment, <sup>its</sup> ~~was~~ share of the wealth and produce of the kingdom. The deed declared the land to be granted, principaliter, to God, that is to say, to an ideal, and secundarium, to a particular religious order, that is to say, to a body of men pledged to an ideal.

\*Where specific acts were required, e.g., saying prayers for the king, the tenure was usually called Divine Service, instead of Frankalmoign.



The rights of lesser lords to lands held of the king gradually became strengthened. The element of personal allegiance and service implicit in early forms of land tenure became reduced, in many cases, to the duty to present to the lord each year <sup>a peppercorn or</sup> a rose at midsummer, and eventually even that was forgotten. But it was not the power of the nobles, resting on their hereditary rights to lands, that was decisive in destroying the power of the king. The nobles limited the king's powers, but parliament destroyed it. The principal weapon of parliament was power over a form of revenue based not on lands but on the newly dominant (mobile) forms of wealth -- the tax. The power of the purse strings was parliament's principal means of controlling the king. The king no longer stood in the position of supreme landlord; now he had to ask the commons every year to levy a tax on commerce and present it to his government. "Le roi remercie ses bon sujets, accepte leur benevolence et ainsi le veult."<sup>\*</sup>

In our modern industrial nation the people are sovereign. The people have inherited the powers of the king, but with them also those limitations which latterly restrained the king's government.<sup>\*\*</sup> Neither crown lands nor knightly service enrich the treasury of the sovereign people. It is the tax and virtually nothing but the tax that supports the state and federal establishments.

"To tax" means to exact a public revenue; it also means to tire, to strain, to burden. A tax is a burden. On the ordinary commercial exchanges -- paying wages, buying and selling, profit taking -- the tax is superimposed, as an extra, somehow unnatural, charge.

<sup>\*</sup> This is the traditional formula with which the English king accepts the tax revenues allowed him by parliament.

<sup>\*\*</sup> The sovereign people inherited the parliament's power to

-3-

That we pay for milk and bread is, in our culture's weltanschauung, as natural as night following day. But to add a tax to the transaction is not only unpleasant but almost illegitimate. Death and taxes are necessary but unpopular, and the great masses of mankind have never fully accepted them. It is fair to say that no government that depends on taxation for its sustenance will ever be loved by the governed.

Those who desire that the people bear toward their political institutions a chary animosity would, therefore, be well advised to insist that taxes -- and taxes alone -- sustain the state.

Not every modern nation depends on taxes alone. Italy runs a national lottery. The estancos of Spain are government stores which enjoy a profitable monopoly on matches and other products. The <sup>national</sup> ~~national~~ government of France is the source of one quarter of the nation's credit, on which it collects substantial interest. Other nations charge handsome prices for the severance of natural resources.

But throughout the world new sources of revenue are failing to keep pace with the new services that political institutions are expected to provide. Child-care, hospitalization, education, libraries, and pensions, to name a few, are becoming functions of tax-supported institutions. And, largely because they are tax-supported, they are supported in miserly and grudging fashion. An alternative would be to endow these services -- as the church was once endowed with land, as the universities are endowed with security portfolios, as many charities are endowed. An endowment, supervised by trustees,\* skims the cream off society's commercial activities. It takes the interest, the dividends, the profits. And no one ~~objects~~ <sup>objects</sup> that he has been taxed. A government that issues credit, collects the interest

---

\* The trustees can be compelled to do their duty by an accounting before a court of law, demanded by a beneficiary or by the attorney general.



~~-2-~~ - 4 -

and endows the proceeds to charitable uses can expect to be unusually popular in the long run, although in the short run the clamor of those who fear the new <sup>or</sup> profit by the old may reach deafening proportions.

In general, this principle may be established: If an institution is distrusted, and it is desired that it be constantly out of favor with the populace, then sustain it by taxes. But if an institution is deemed good, and it is desired that it be made strong and <sup>secure</sup> ~~secure~~, then endow it.

---

Income from land, whether by services attached to tenure, or by rent, is no longer the dominant form of income. It is the various rationales for distribution of wealth associated with commerce and manufactures that now answer most of our questions concerning who gets what. And a growing number of our institutions -- including, for example, agencies that care for the old and the sick -- lead a tenuous existence by the grace of special rationales periodically superimposed on the others, known as taxes.

To strengthen the institutions that ought to be strengthened we must first of all give them money. Not a lump sum, but a continuing source of money. This most movable form of wealth must be governed in such a way that substantial amounts of it regularly flow to the right places. It has been suggested that a proper organization of the credit business, such that the proceeds are assigned to those ideals deemed worthy of endowment, is the best way to do this.

Mobility of wealth is a general feature of modern society, in connection with which almost any social question can be discussed, as I have perhaps just demonstrated. Revenue and taxation, however, will mark the extreme limit of my attempt to write about everything in a paper on mobility of wealth, for I shall now turn to international trade and investment, subjects that are more obviously within the ambit of my topic.

Perhaps the principal reason for the formation of nations, or tribes for that matter, is to work together, all for one and one for all, in dealing with foreign powers. Our agents and citizens abroad carry with them the protection of our flag, insofar as our diplomatic corps (and sometimes our armed services) can afford them



protection. Every treaty that is signed signifies our promise to be bound as one man in our foreign obligations, and every passport that is issued signifies that our individual citizen will be protected by our collective institutions when he travels in foreign lands.

But it is only partly true that our nation acts as one abroad, for our commercial interests typically conduct themselves abroad as if they were at home -- that is to say, they attempt to maximize profit for themselves. There is much to be said both for and against this built-in characteristic of our commercial institutions -- it is submitted that there is less to be said for, and more to be said against, this way of doing things when the context is foreign than when it is domestic.

On election night our President, who had just won a great electoral victory, reassured a nation recently divided by political polemics that "we face the world as one." The President's declaration contained some truth. But it contained more poetry than truth.

The television cameras had hardly finished recording the face of our smiling President as he confidently told us that we face the world as one, when an unfortunate event befell us. Our interest rates went up. Henceforth, we learned to our sorrow, it will cost more to build or buy a home. It will cost more to start a business, and more to build a school. That is to say, it will be harder to borrow money, and therefore harder to do any of the things for which we need to borrow money.

Who/<sup>inflicted</sup> ~~XXXXXXXXXX~~ this injury upon us? It was not our smiling President -- he read about it in the papers, as we did. It was not

IX

-3-

the gentlemen we elected to make the laws of our land, for our legislatures -- state and federal -- were not even in session. It was not our local banker -- he was busy processing loan applications and going to ~~xxx~~ Rotary luncheons.

We learned from the papers that this action had been taken by the Federal Reserve Board.

But this Board is not a political institution at all -- although Congressman Patman would like to make it one. It is a Board of somewhat elderly, probably very honest, conscientious bankers who determine our fate not by wisdom but by expertise. They made their decision, they will tell us, because England raised its interest rates and we must raise ours to prevent a "flow" of money to England. That is to say, Americans with money would -- were they not <sup>bribed</sup> ~~bribe~~ with higher interest rates -- undermine our economy by loaning there instead of here. But don't American investors know that we face the world as one? What kind of conduct is that? To send money to England when it injures our fellow citizens! The answer is that that is the normal and expected way for American investors to conduct themselves, the way they have been taught from the cradle up, the way that the system rewards them for following and punishes them for deviating from

One could go on to give other examples of the national government being at the mercy of the international market. One might instance the decision of the U.S. Supreme Court in the ~~xxx~~ Phoebe case, that the antitrust laws of the United States must sometimes give way before the policy of encouraging investment in foreign nations; i.e., before the necessity of creating conditions such that investors



will choose to invest. One might instance the problem of the Congo, where Mr. Firestone's one-third interest in United Mines of Katanga may involve us in that nation's destiny somehow more than we want to be involved. In such cases we can only hope that the international invisible hand has our best interests at heart.

Efficiency is thought to be obtained through the rigors of a system of buying cheaply and selling dearly. Thus producers are constrained to be efficient, for they must produce at a cost low enough to be able to attract buyers. Such a system implies moving money and goods from place to place, and from jurisdiction to jurisdiction according to the state of the market. If Costa Rican coffee costs more than Guatemalan coffee, then money will move from New York to Guatemala, and goods from Guatemala to New York. To those who lose out in this international expansion of the buying and selling game -- and it turns out that everybody who sells raw materials and buys manufactured products loses out -- we send the international version of the welfare ~~XXXX~~ check: foreign aid. Costa Rica does not like the system, but the system is bigger than it is, and any changes will have to be initiated by jurisdictions which are still under the illusion that they are bigger than the system. Perhaps the system is efficient, but political virtues, among them friendly relations between neighbors, tend to go by the board even more completely than where those who buy and sell at arms length are themselves united by allegiance to a common polity.

In conclusion and in summary, the modern nation is no longer a land, in the sense in which a tract of territory and a

sovereign realm are interchangeable. It is also people and movable objects, and counters (notably money). Its government, divided however it may be among "public," "private," and "quasi-public" governments, must govern people, and movable objects, and counters (notably money) ~~✓~~ wherever they may move, from state to state, or from nation to nation. A constitution shall set out the principal features of a nation's government, and shall make explicit its limitations.



By JAMES E. BYLIN

Staff Reporter of THE WALL STREET JOURNAL

SAN FRANCISCO—In Manzanillo, Mexico, a food processing plant will soon be assembled to prepare fruits and vegetables for sale in the U.S. In Orrville, Ohio, J. M. Smucker Co. recently contracted with an Australian apricot grower to supply frozen apricots for its jams and jellies; Smucker previously used U.S. apricots exclusively. In California's hot, fertile Imperial Valley the Salinas Marketing Cooperative is cutting back its winter lettuce plantings.

All these moves reflect the uncertainty currently shrouding California's \$3.4 billion-a-year business of raising some 200 crops, including more than 42% of the vegetables, fruits and nuts grown in the U.S. The uncertainty stems from the fact that most California growers fear they will soon see the last of the braceros, the temporary Mexican laborers whom they long have relied on to help work their crops.

The present bracero program was initiated by Congress in 1951 when the Korean War boom was providing factory jobs for domestic farm workers and thousands of "wetbacks" were swarming illegally in from Mexico to take their places. The law, which permits Mexican farm laborers to enter the U.S. legally and return to their homelands after harvest time, was extended through 1964 by an 11th-hour Congressional decision reached late last year. But Congressional leaders made it clear no further extensions were likely and the law is expected to expire Dec. 31.

#### Union Criticism

The program is opposed by most labor unions and social welfare groups. They charge that the use of braceros tends to depress wages, perpetuate unemployment and breed poor working conditions.

But without the braceros, who numbered 61,000 of the 368,000 workers in the fields during California's peak harvest month last year, growers foresee a forced reduction of crop acreage. It's feared many growers will run into financial trouble, and the impact will be felt throughout California's allied industries—canning, packaging and transportation.

The new processing plant in Manzanillo, for example, which will be operated by Inter-American Products Corp., a Reno, Nev., firm, will contract for Mexican tomatoes, strawberries, papayas, bananas, limes and oranges and will employ hundreds of workers during peak production times.

J. J. Miller, manager of the Agricultural Producers Labor Committee, which represents the California citrus industry on labor matters, notes that such big U.S. food concerns as Campbell Soup Co., H. J. Heinz Co. and California Packing Corp. have built large Mexican plants in recent years. Although the companies generally say the facilities are for their Latin American markets, Mr. Miller and others worry that the products could be shipped into the U.S.

#### Form of Insurance

Jack Blas, executive vice president of the Grower-Shipper Vegetable Association of Central California, calls these plants "insurance." If there's not sufficient labor to harvest U.S. crops, he said, these firms could use their Mexican plants to supply the U.S. and foreign markets.

Says O. W. Millerup, executive vice president of the Council of California Growers: "If Mexico fills the market vacuum, and apparently she has the capacity to do so, it may make little difference to the consumer. But it will make a big difference to the many thousands of workers employed in our agriculture-related industries."

The growers' council points out that Mexican crops already have made considerable inroads in the U.S. market. U.S. imports of Mexican agricultural products climbed to \$271 million last year from \$164 million in 1952. Hand labor is plentiful and relatively cheap in Mexico and the greatest gains in Mexican exports have been in crops relying on hand labor for harvesting: Tomatoes, strawberries and melons.

BOX 72 FOLIO 27

CSDI

SUBSERIES: GUT 1A

SERIES: AUSTIN WORKS

BOX 72 FOLIO 27

CSDI

DATE: 1965

CONTENTS: RICHARDS, HOWARD! MEMORANDUM ON CONSTITUTIONAL

2

IMPLICATIONS OF THE MOBILITY OF HEALTH

TYPE: RESPONSE

FORMAT: TYPESCRIPT

SUBJECT: WEALTH

SEE ALSO CONSTITUTIONAL IMPLICATIONS OF  
THE MOBILITY OF WEALTH

## THE MOBILITY OF WEALTH



MEMORANDUM

February 4, 1965

File ref  
page 2

To: Staff

From: Howard Richards

As I reconsider "Constitutional Implications of the Mobility of Wealth" I am inclined to think that "mobility of wealth" was the wrong concept to select as a common theme for my various concerns. A better theme, and title, would be "Implicit Limitations on the Government of Economic Activities." My principal recommendations can be stated as pre-requisites for effective government of economic activity, and, since economic activity is so important, for effective government simpliciter.

In using the word "effective" I introduce a bias in favor of governing economic activities. A person of different persuasions might oppose my recommendations on the ground that they would make governing too effective, but he would be likely to replace "effective" with "tyrannical." This is not to say, however, that it is a matter of taste whether what I call effective government is desirable. I believe that I can give good reasons why it is, and I even believe that I can show that in an important sense the notion of "not governing economic activity" is meaningless, serving only as a cloak for bad or rigidly traditional governing.

The first of my recommendations is: (1) An effective government must be able to regulate business not just where it is, but also wherever it is likely to move. The well-known difficulties in this area are expressed by Archibald Cox in "Federalism and the Law of Labor Relations," where he points out that states tend to compete with one another to attract industry by passing "right to work" laws. Rexford Tugwell has referred to this type of phenomenon as a kind of Gresham's law, such that bad laws drive out good. Cox recommends that labor legislation be enacted at the federal level. But to move to the federal level is only to face the same problem in terms of international competition to attract industry. An example is Japan's inability to enact progressive labor legislation. Again on the international level jurisdictions are rewarded for encouraging investment by accepting laws that favor the investor vis-a-vis the other persons who have a claim on the fruits of industry. Effective government therefore requires either (a) a world economic government, or (b) national or regional governments divided by barriers to the flow of goods and investment. I favor (b), and therefore favor high tariffs, along with a high degree of regional self-sufficiency.

(2) My second recommendation is that effective government must be able to initiate enterprises and to extend credit. Here I invoke the slogan, "The power to lend is the power to create." The importance of such powers is illustrated a thousand times a day in the United States where otherwise desirable measures are shelved because they would drive out business, fail to attract business, slow business down, be bad for business et. al. -- in other words the measure would cause persons to be reluctant to invest or to loan, and therefore decrease economic activity, to the detriment of all. Government should not be biased in this way by a rigid conception of how, when, and by whom enterprises should be initiated and jobs created (or continued); it should be able to insure that economic activity properly deemed beneficial actually takes place.

(3) My third recommendation is that an effective government must govern the economic, as well as the political and military, foreign relations of its constituency. Of the three, economic foreign relations is most important for international goodwill, and it decisively influences the other two. For example, at the present American investments abroad occur largely in the developed nations such as Canada and West Germany. Many Canadians are unhappy because American interests control a large portion of Canadian industry. People in underdeveloped nations are even more unhappy for a different reason: industrialization is not taking place at satisfactory rate.

I might add a fourth recommendation, in language not quite as strong. An effective government should have a major source of income other than taxation.