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WESTEL WOODBURY WILLOUGHBY.

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THE POLITICAL AND LEGAL THEORIES

OF

WESTEL WOODBURY WILLOUGHBY

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1961

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PREFACE

Westel Woodbury Willoughby (1867-1945) was one of the pioneers of academic political science in the United States. Referred to as the "dean" of American political scientists,[1] he was responsible not only for the establishment of one of the leading departments of political science in America, but also for the training of sixty-nine Ph. D.'s at The Johns Hopkins University. Hundreds of other students, both past and present, having read his works (aggregating a staggering fourteen thousand pages) are likewise indebted to him. Moreover, having taken a leading part in the founding of the American Political Science Association and serving as the editor of its journal from 1906 to 1916 he was in a position to do much to determine the nature and development of academic political science for many years.

Although primarily intended as a summary and analysis of W. W. Wil-

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1. James W. Garner, "Westel Woodbury Willoughby: An Evaluation of His Contribution to Political Science," Essays in Political Science in Honor of Westel Woodbury Willoughby. Edited by John Mabry Mathews and James Hart, Baltimore, 1937, p. 3.

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loughby's political and legal theories this dissertation seeks to place these theories in the perspective of the time in which they were written. Since Willoughby was one of the founders of the academic discipline of political science in the United States, a study of his writings should reveal something significant about the origins of that discipline. For that reason this dissertation might be regarded as supplying an important chapter in the history and development of political science in this country. It is for this reason that considerable attention has been given not only to an analysis of Willoughby's own major theoretical writings but to the details of his professional career, to a consideration of the kinds of problems with which his contemporaries were concerning themselves and to the intellectual and academic climate out of which Willoughby developed his own ideas.

Political science was largely the province of public men prior to the Civil War but was taken over by academicians soon after that conflict, and in their hands some of the older theories of politics were altered. Willoughby and his colleagues for the most part abandoned the older theory of natural law and rights, the contract theory of government and society, and generally replaced the doctrine of the Politzeistaat with the doctrine of the Kulturstaat. Moreover, under the leadership of John W. Burgess and Willoughby dual-sovereignty was abandoned for the nationalistic indivisible and absolute sovereignty, a development that seriously altered the traditional concept of federalism. Some of these developments were anticipated earlier in the teachings of Francis Lieber and Theodore D. Woolsey who may be said to be America's first academic political scientists, but it was largely owing to the influence of that small group of political scientists who began their careers in the last two or three decades of the nineteenth

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century and the first years of the twentieth that political science took on its particular coloration.

In a sense there are two Willoughbys (no reference here to his twin brother, William F. Willoughby), for in his ethical political theories he is an idealist of the Oxford School, and in his legal philosophy he is a follower of Austin and the Analytical School. Self-perfection of individuals is the ethical goal in the former, and whatever the state can do practically to help in the accomplishment of that end is just. On the other hand, the goal of legal political theory is a consistent, logical theory of the state considered exclusively as a legal phenomenon, without reference to the moral content of the law involved. In contrast to his political theory which is ethical, his legal theory is a-moral. What reconciliation, if any, Willoughby effects between these two bodies of theory will be revealed in the pages that follow.

Willoughby is perhaps best known to many scholars for his work in American constitutional law. In so far as his political and legal theories are embodied in his _magnum opus_ of 1929[2] an analysis of this aspect of his contribution to political science will be considered. Just preceeding the concluding chapter there is brief mention of his writings on China and the Far East, a field of study which absorbed much of his time in the latter years of his academic career. This is included in a chapter which deals primarily with his thoughts on international law and relations.

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2. Westel W. Willoughby, _The Constitutional Law of the United States_, (second edition), New York, 1929.

William H. Hatcher

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THE POLITICAL AND LEGAL THEORIES

OF

WESTEL WOODBURY WILLOUGHBY

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Chapter I

WILLOUGHBY'S LIFE AND CAREER

Westel Woodbury Willoughby[1] and William Franklin Willoughby were born July 20, 1867, in Alexandria, Virginia, the twin sons of Westel and Jenny

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1. The available sources on Willoughby's life and career are sketchy and scattered. Unfortunately there is no biography of him, and the material here is gathered from many and varied sources. The best account is James W. Garner, "Westel Woodbury Willoughby: An Evaluation of His Contribution to Political Science," _Essays in Political Science in Honor of Westel Woodbury Willoughby_. Edited by John Mabry Mathews and James Hart, Baltimore, 1937, pp. 3-32. Also useful are: James Hart, "Westel Woodbury Willoughby," _The American Political Science Review_, XXXIX (1945), 552-54, a brief biographical sketch in _Annals of the American Academy of Political and Social Science_, V (1894), 278, and _The National Cyclopaedia of American Biography_, XIII, 435. Some of the most important information on Willoughby was obtained by corresponding with many of his former students, colleagues, and by personal interviews. In many ways the most helpful information of all was supplied by Willoughby's son, Westel R. Willoughby, of Chevy Chase, Maryland. It was he who made available Willoughby's private papers, and who contributed a great deal to the biographical material in an informal interview at his home in March, 1959. _The Johns Hopkins University Circulars_ were consulted for the information concerning his college career and his subsequent teaching career, and The Johns Hopkins University Alumni Office supplied helpful information on several occasions.

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R. (Woodbury) Willoughby. Westel Willoughby (1830-97),[2] a native of New York, served in the Civil War as a Major in the Union Army, and was severely wounded at the Battle of Chancellorsville. Shortly after the end of the War he took up residence in Alexandria. After serving a short term in the latter 1860's as Judge of the Virginia Military Court of Appeals[3] Judge Willoughby established in Alexandria, and later in Washington, a private law practice in which he remained professionally active until his death.

Quite close as twins are wont to be, Westel and William attended the same schools, from the local ones in Alexandria, including St. Johns Military Academy (1879-82), through their undergraduate education at the newly established Johns Hopkins University. Even after graduation, when their professional careers took them to different posts, they were seldom apart for long periods of time. Indeed, for a number of years they were colleagues at Johns Hopkins—Westel as Professor of Political Science and William as Lecturer in Administration. They frequently spent their summers together in Canada, where they jointly owned a summer residence, travelled abroad together on numerous occasions, and, in the years following Willoughby's retirement, resided in close proximity in Washington, D. C.

The Willoughbys attended Washington High School, located at D and Sev-

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2. John Willoughby came to America in the latter eighteenth century from England, and settled in Goshen, Connecticut. From him the descent to Willoughby is through his son, John; his son, Josiah; his son, Franklin W.; and his son, Westel Willoughby, the father of Westel Woodbury Willoughby. The National Cyclopaedia of American Biography, XIII, 435.

3. Little is known of his career as Judge, except that he served in this capacity from October, 1869, to January, 1870, and with two other judges decided eight cases. This court temporarily replaced the Virginia Supreme Court of Appeals, the highest state court, and was, of course, during Reconstruction when Virginia was "Military District No. 1." Lloyd M. Richards, Virginia State Law Librarian, "written communication," April 20, 1959.

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enth Streets in Washington, D. C., from 1882 to 1885. This school was organized remarkably like a college, with departments of study, each with its specialists. The Department of History and Political Science had a staff of three full-time instructors and one part-time assistant. Other departments in the school included English, Mathematics, and the Physical Sciences.[4] Courses of study for the first year were prescribed, but there were a limited number of electives from which students could choose the remaining two years. The level of instruction in all the departments was apparently of high calibre, with the Department of History and Political Science being particularly outstanding.

The Willoughbys received good grounding in history, political economy, and political science there, taking courses in the history of Greece and Rome, historical biography, English history, general European history, elements of political economy, and social and economic problems.[5] The library of the school contained five-hundred volumes in history, political economy, and political science, and there was easy access to the Library of Congress nearby. In the course in political economy the instructor required reading in _The Nation_, _The Political Science Quarterly_, _The Quarterly Journal of Economics_, _The Citizen_, _The Baltimore Civil Service Reformer_, _Economic Tracts_, _Work and Wages_, several labor journals, and texts of the leading economic bills before Congress.

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4. E. R. A. Gould, "History and Political Science in the Washington High School," Herbert Baxter Adams, _The Study of History in American Colleges and Universities_, Washington, D. C., 1887, p. 258.

5. This is described in some detail in E. R. A. Gould, _Ibid._, pp. 258-64. Apparently, from this description, the methods used in this school were not at all those used in most American high schools of that era. There was a great deal of student participation in class room discussion of current political events, historical authorities, and the like.

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In the fall of 1885, after graduation from high school, the Willoughbys entered The Johns Hopkins University. The first American institution to be established primarily for post-graduate study, the school in 1867 was endowed with seven million dollars by a prominent Baltimore merchant, who instructed that one-half of that amount be used for a hospital. The University opened her doors in the fall of 1876, and the Hospital was organized thirteen years later.[6] Because the founder provided that none of the capital was to be used for buildings, the University had a rather inauspicious beginning in downtown Baltimore.[7] It was never intended that this school be a mere college. Colleges there were by the score, but as President Gilman said, "In the middle of the century the word 'university' was in the air,"[8] and in the air it remained until 1876. Only a very few men saw the need for universities in the United States, most of them feeling that colleges were quite adequate. "But the American Colleges," commented Gilman, "had been based on the idea of an English college, and upon this central nucleus the limited funds and the unlimited energies were concentrated, not indeed exclusively, but diligently."[9] He continued:

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6. The first President, Daniel Coit Gilman, after some thirty years had passed since the opening of the University, recalled, "The founder was wise as well as generous. He used the simplest phrases to express his wishes; and he did not define the distinguished name that he bestowed upon his child, nor embarrass its future by needless conditions." Daniel Coit Gilman, The Launching of a University and Other Papers: A Sheaf of Remembrances, New York, 1906, p. 7.

7. The Circular of 1918 describes thus the rather humble early home of the University: "The work of the University began in two houses at the corner of Howard and Little Ross Streets, in Hopkins Hall, and in a Chemical Laboratory on Little Ross Street—the last two buildings having been erected by the Trustees." "Historical Statement," The Johns Hopkins University Circular, XXXVII (1918), 82, hereafter cited as Circular.

8. Gilman, Launching a University, p. 506. 9. Ibid., p. 6.

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Opportunities for advanced, not professional, studies were then scanty in this country. In the older colleges certain graduate courses were attended by a small number of followers—but the teachers were for the most part absorbed with undergraduate instruction, and could give but little time to the few who sought their guidance.[10]

Returning from Europe in the summer of 1875 where he conferred with university leaders, Gilman recruited a faculty and organized the University for instruction and research. He and the trustees started rather modestly with the "Faculty of Philosophy," meaning languages, mathematics, ethics, history, and the sciences; but in his inaugural address President Gilman set the tone for high scholarship: "If we would maintain a university, great freedom must be allowed both to teachers and scholars. This involves freedom of methods to be employed by the instructors on the one hand, and on the other, freedom of courses to be selected by the students."[11]

The initial composition of the University included six faculty members, fifty-four graduate students, and thirty-five undergraduates.[12] Within ten years the faculty had nearly doubled in number, and the student body had trebled.[13] Despite this rapid growth the University was still small compared to many of the older schools, but during this decade it conferred eighty-four doctor of philosophy degrees, a record no rival equalled for many years.[14]

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10. Ibid., p. 8.

11. Gilman, "The Johns Hopkins University, 1876-1891," Studies in Historical and Political Science. Edited by Herbert Baxter Adams, IX (1891), 197.

12. Circular, XII (1892-93), 21.

13. The figures are: Faculty, 49; graduate students, 159; and undergraduates, 100. Ibid., p. 21.

14. Ibid.

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When the Willoughbys entered Johns Hopkins on October 1, 1885, they found there perhaps the strongest faculty, although by no means the largest, in any college or university in America. Of the forty-two faculty members, twenty-nine were Ph. D.'s, thirteen of them having received their doctorates at German universities.[15] At this time there were 128 graduate students and only ninety-four undergraduates.[16] Along with twenty-eight others, the Willoughbys entered as candidates for matriculation, there being sixty-four enrollees.[17]

In his will Johns Hopkins had requested the trustees of the University to create full scholarships for deserving young men from Maryland, Virginia, and North Carolina.[18] Pursuant to this, the trustees established a system of scholarships, some of which were designated "Ordinary Hopkins Scholarships," which yielded free tuition; and others, which were designated "Honorary Hopkins Scholarships," yielding an annual stipend of two-hundred and fifty dollars in addition to free tuition. Both Westel and William were granted Honorary Hopkins Scholarships throughout their three years as undergraduates. This made it possible for them to finance their college education without any expense to their father.[19]

Finding quarters at 266 North Howard Street in Baltimore, the Willoughbys were inseparable for the next three years, attending the same classes and functions of the University. They spent the greater part of

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15. Ibid., V (1885-86), 15-16.

16. Ibid., p. 16.

17. Ibid.

18. Ibid., p. 53.

19. Westel R. Willoughby, "written communication," April 2, 1958.

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their first academic year attending classes in classical languages, literature, and history.[20] Their major studies were in the Department of History and Political Science (as it was then called), the second largest department in enrollment in the University. Mere size is an unreliable criterion for the evaluation of excellence, of course, but in this instance it is not entirely misleading, for the Department was one of the more competent as well as one of the most popular at Johns Hopkins, and indeed, in the nation.[21] The Chairman of the Department was the celebrated Herbert Baxter Adams under whose guidance many notable historians, political scientists, economists, and sociologists were trained: The Willoughbys, Frederick Jackson Turner, Woodrow Wilson, Charles Homer Haskins, Charles M. Andrews, Albert Shaw, John Franklin Jameson, John Martin Vincent, John R. Commons, Bernard C. Steiner, Jacob H. Hollander, John Spencer Bassett, and Thorstein Veblen, among others. Many of these scholars have trained present-day leaders in various disciplines. Daniel Coit Gilman, President of the University from 1874 until his retirement in 1902, had this to say about Adams:

> Professor Adams came to us at the very opening of the University, fresh from his studies under Bluntschli in Heidelberg. He quickly showed the rare qualities which were manifest through his life—enthusiasm, application, versatility, and a generous appreciation of others. His mind was suggestive, capable of forming wise plans, and quick in devising the methods by which those plans could be carried out. A remarkable trait was the power of perceiving the adaption of his scholars to such posts as were open. He could almost always suggest the right man for a given vacancy; and he was just as ready to deter one that he thought unsuitable from seeking a place beyond his powers.[22]

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20. During the first half-year the Willoughbys attended these language courses: Latin, German, English literature, and elocution.

21. The largest department in enrollment was German (111 students), while History and Political Science had ninety-seven.

22. Gilman, Launching a University, p. 16.

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A graduate of Amherst College in 1872, Adams followed the educational trail of many young Americans of his day in pursuing his graduate studies in Germany. In 1874 he entered Heidelberg University, and studied Roman history under Wilhelm Ihne and politics under Heinrich von Treitschke. When the latter moved to the University of Berlin in the winter of 1874-75, Adams and other American students followed him there for the remainder of the academic year. The next year Adams returned to Heidelburg to study under J. C. Bluntschli, and received his doctorate there in July, 1876. That fall he came to Johns Hopkins as a Fellow, and in 1885 was an Associate Professor. One of Adams' students, Woodrow Wilson, shortly after Adams' death wrote:

> His head was a veritable clearing house of ideas in the field of historical study, and no one ever seriously studied him who did not get, in its most serviceable form, the modern ideals of work upon the sources; and not the ideals merely, but also a very definite principle of concrete application in daily study. The thesis work done under him may fairly be said to have set the pace for university work in history throughout the United States.[23]

Another member of the departmental faculty was Richard T. Ely, at that time Associate in Political Economy. He, too, had gone abroad for graduate work, receiving in 1879 his doctorate at the University of Heidelberg.[24] He became one of the leading lights in the latter nineteenth-century movement away from the classical English doctrines of laissez-faire. In the same year that the Willoughbys entered Johns Hopkins Ely presided over the formation of the American Economic Association.

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23. Ray Stannard Baker, Woodrow Wilson: Life and Letters, Garden City, New York, 1927, I, 179.

24. Previously he had taken his A. B. and A. M. from Columbia College in 1876 and 1879 respectively. Circular, V (1885-86), 15.

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The other full-time faculty member in the Department was John Franklin Jameson, at that time an Associate in History, having only recently (1882) received his doctorate at The Johns Hopkins University. He perhaps is best known today for his pioneer work on the American Revolution.[25] In addition, Professor Charles D. Morris came over from the Latin and Greek Departments to conduct a class on Herodotus, and William P. Holcomb, a graduate student in the Department, offered a course in general European history.[26]

Classes in history and political science met at this time in the rooms of the Bluntschli Library. This valuable departmental component of the University had as its nucleus the gift by German citizens of Baltimore of some five-thousand volumes and pamphlets, mostly in law and political science.[27] Thirteen courses were offered by the Department[28] in the fall of 1885. Adams held his already-famous seminary of history and politics, and taught history of politics, church history, international law, and ante-classical history. Ely offered studies in administration,[29] advanced political economy, and elements of political economy. Jameson taught English and French history, the English constitution, and Greek and Roman history.[30] Of these the Willoughbys took three—one being Adams' course in ante-classi-

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25. John Franklin Jameson, _The American Revolution Considered as a Social Movement_, Princeton, New Jersey, 1926.

26. _Circular_, V (1885-86), 26.

27. _Ibid._, II (1882-83), 61.

28. At this time there were sixteen departments of study at the University.

29. This course was taken over by Woodrow Wilson, who came to lecture each second half-year, beginning in 1887-88, and continuing for ten years.

30. _Circular_, V (1885-86), 25-26.

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cal history, being according to the Circular, a course in which—

. . . the introductory lectures by Dr. Adams related to the early history of society, the more interesting aspects of such ancient peoples as the Egyptians, the Babylonians, the Assyrians, and other oriental nations. The lectures were illustrated by objects from the historical museum, e. g., by the Ellinger Collection of Egyptian antiquities. One lecture was given to the class by Mr. Adler, Fellow in the Shemitic Languages, on ancient Babylonia.[31]

Another course the Willoughbys took in the Department was Greek and Roman history under Jameson. This course was an account of the history of Greece, Rome, and the Roman Empire down to the fifth century, A. D.[32] Completing their schedule for the first half-year, they attended a class on Herodotus under Professor Charles D. Morris.[33]

The Willoughbys continued their studies during the second half-year with little change. In the Department of History and Political Science they continued with the second half of Greek and Roman history, and in addition, took courses in Thucydides and physical and historical geography under Jameson.[34] Having done well their first year their scholarships were renewed, and they returned in the fall of 1886-87 to continue academic work. The faculty remained essentially the same, although there was already a discernable trend to draw faculty members from Johns Hopkins graduates, whereas in the earliest years the faculty was often recruited from young Ph. D.'s from German Universities.

For their second year's work Westel and William continued with funda-

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31. Ibid., p. 135.

32. The texts were Fyffe's Greece, and Leighton's Rome. Ibid., p. 26.

33. Ibid.

34. Ibid., pp. 66-70.

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mental studies, although they did tend to take more courses in the Department of History and Political Science than before. With their classical languages and literature behind them they plunged into their only physical science course, a one-year course in chemistry, under Ira Remsen, one of the leading chemists of his day and successor to Gilman as President of the University. The Willoughbys took three courses in the Department of History and Political Science: Political economy, English and French history, and Adams' course in church history "in its relation to the Roman and German Empires."[35] The texts used in this course were Ploetz, Epitome of Mediaeval History and Bryce's Holy Roman Empire. In addition there were assigned readings in Gibbon's Decline and Fall of the Roman Empire and Milman's Latin Christianity. Each member was required to write two historical essays.[36] Jameson's course in English and French history required the reading of Green's Short History of the English People and the Student's History of France, supplemented daily by "informal lectures."[37] Ely's course in political economy required the reading of Mill's Principles of Political Economy and Francis A. Walker's Political Economy. This course was not altogether theory, however, for such questions of current interest as the silver question and the national treasury surplus were discussed. Professor Ely required of his students two essays on assigned topics, a sampling of which are: "Distributive Cooperation," "Productive Cooperation," "The Clearing House," "Charity Organizations," "Society of London,"

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35. Ibid., IV (1884-85), 105.

36. Ibid.

37. Ibid., VI (1886-87), 113.

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"Income Tax," "Arbitration," and "Money."[38]

The Willoughbys continued these courses during the second half-year the only alteration being that a course in the Renaissance under Adams followed the church history of the first half.[39] Their work was once again of sufficiently high quality to merit Honorary Hopkins Scholarships for the following year. Westel's record in English and church history and political economy was particularly outstanding.[40]

They registered in the fall of 1887 for their third and last year of undergraduate study, taking only two half-year courses outside the History and Political Science Department: Logic and psychology.[41] Four courses in the Department of History and Political Science particularly attracted the Willoughbys for the first half-year: Ancient politics, international law, finance, and English and American constitutions. Adams' course in ancient politics was the introduction to a three-year course in the history of politics. More specifically, the Circular points out, the course—

> . . . relates to the origin and development of early society, with a consideration of the theories of Morgan, McLennan, Spencer, and other writers. It treats also of ancient oriental forms of state-life, with a review of oriental doctrines of government. It considers, in greater detail, the origin and development of Greek institutions, with a rapid review of Greek Political Philosophy. Books will be recommended to the class for private

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38. Ibid.

39. Ibid., pp. 65-71.

40. Westel W. Willoughby's academic record was examined in The Johns Hopkins University Registrar's Office.

41. George Henry Emmott, Associate Professor of Logic and Ethics taught the logic course, and G. Stanley Hall, Professor of Psychology and Pedagogies, offered the course in psychology.

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reading and monthly written examinations upon assigned topics will be required.[42]

Also under Adams the Willoughbys studied international law conjointly with English and American constitutions. There were introductory lectures on the history of international law and politics, followed by discussion of Bluntschli's Moderne Völkerrecht der Civilisierten Staaten. A reading knowledge of French and German was required, and reports on topics in diplomatic and contemporary international questions were assigned to the members of the class.[43]

Jameson's course in English and American constitutions is described as "a course in the study of the development and present forms of constitutional government in England and the United States."[44] The material on the English Constitution was "mainly descriptive," and attention was given to the origin and nature of the United States Constitution. Although in later years Willoughby professed a lack of training for his series of lectures at Johns Hopkins on United States constitutional law (out of which emerged his great 1910 and 1929 treatises),[45] Professor Jameson's course must have provided some foundation upon which to build. Ely's course in advanced political economy was concerned on both state and municipal levels with such subjects as taxation, public debts, and the financial history of the United States.[46]

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42. Circular, VI (1886-87), 110.

43. Ibid., p. 112.

44. Ibid.

45. Harold W. Stoke, "written communication," February 18, 1958.

46. Circular, VI (1886-87), 111.

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During the second half-year the Willoughbys for the most part continued the courses they had started in the fall, such as international law, and English and American constitutions. There were two notable exceptions, however. With fellow-students, Charles M. Andrews and Charles Homer Haskins, they registered in Adams' course in Prussian history, a course which was supposed to "complement . . . the course in Ancient Politics."[47] The description of this course laid special emphasis on the nationalistic regeneration of Prussia under the stimulus of vom Stein's reforms, the rise of Prussia and of the federal empire.[48] The other exception was a course in social statistics taught by E. R. A. Gould, a Reader for 1887-88.[49] This course was the first of its kind in American college or university curricula, and from the description seemed to be primarily concerned with comparative data on living conditions in America and various European countries.[50]

On June 14, 1888, thirty-four A. B.'s were conferred at The Johns Hopkins University, two of the recipients being Westel and William Willoughby.[51] Thus ended three years of intensive study which prepared William for a successful career in government administration and teaching, and Westel

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47. Ibid., p. 110.

48. Ibid.

49. Ibid., VII (1887-88), 10. Gould, who received his Ph. D. from Johns Hopkins in 1886, was attached to the Bureau of Labor in Washington.

50. Ibid., VI (1886-87), 111.

51. In addition, the University conferred twenty-seven Ph. D.'s, three of which were in the fields of history, political economy, and political science. Ibid., VIII (1888-89), 105.

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for graduate work and a subsequent successful career in teaching, writing, and public service. Immediately after graduation both Willoughbys applied for scholarships at Johns Hopkins, and William's was granted, while Westel's name was placed on the alternate list.[52] Strangely enough, however, it was not William but Westel who was destined to go on to graduate school and the doctorate, for the former, declining his scholarship, went into government service as a labor expert. After a year's absence Westel returned to Johns Hopkins to pursue graduate studies. This year was spent as Principal of the Weightman Public School in Washington, a position that was not at all satisfying, for he preferred to work with serious graduate students, and this meant procuring a doctorate.

Unique in the history of higher education in the United States, The Johns Hopkins University conferred the doctorate before it conferred an undergraduate degree.[53] Definitely one of the few schools in the United States at that time with a full university program, by 1889 the University had conferred doctorates upon 151 candidates and had awarded 213 Bachelor of Arts degrees.[54]

A separate department of political science was not established at Johns Hopkins until 1904, therefore, Willoughby was forced to take his degree in what was essentially a combined Department of History, Political Economy, and Political Science. At that time the University requirements for the

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52. Ibid., p. 106.

53. Ibid., X (1890-91), 114. In 1876, four Ph. D.'s; in 1877, its first A. B.

54. Ibid., p. 114. At this time the University was not conferring the Master of Arts degree.

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doctorate necessitated only two years of study and writing.[55] Procuring quarters at 914 McCulloh Street in Baltimore, Willoughby eagerly entered into graduate work, finding upon his return that the University had grown somewhat in faculty and student body. There were now fifty-three faculty members,[56] 202 graduate students, and 175 undergraduates.[57] There was in the strictest sense no graduate "school" at the University at this time, there being no "dean" of graduate studies, or the like. Direction of graduate work was in the hands of the individual departments of study and the Board of University Studies, composed of the principal professors of each department. With a few exceptions, each of the departments offered advanced courses, conducted seminars, and directed graduate research and writing.[58] Willoughby listed as his major fields of study history and po-

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55. Specifically, the requirements were: After having taken his first degree the candidate "must pursue university studies under conditions approved by the Board of University Studies, of which the last year must be as an accepted candidate in the philosophical department of this University." In practice, in Willoughby's day—at least in the Department of History and Political Science—this meant that the student would remain in residence two years, during which time he would take advanced courses and write his dissertation. Secondly, the student had to prepare a dissertation, and pass a written and oral examination in one principal and two subsidiary subjects approved by the Board. Thirdly, the dissertation, except under extraordinary circumstances, had to be presented at least three months before the candidate intended to take his degree. Fourthly, the dissertation had to contain an analytical table of contents, and "in case the author does not write a perfectly legible hand," it must be typed. Finally, the candidate had to make formal application in writing to the Board at least one year in advance of the anticipated time of the final examination. Circular, IV (1884-85), 38.

56. The number who received doctorates at German universities had declined to eleven, while the number who had received doctorates at Johns Hopkins had increased. Ibid., IX (1889-90), 1-2.

57. Ibid., pp. 3-7.

58. The departments were: Chemistry, Biology, Greek, Sanskrit, Latin, English, Pathology, German, Electricity, History, Oriental Languages, Geolo-

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litics.[59]

Dr. Jameson had left the Department to become Professor of History at Brown University, but aside from this the personnel remained the same. It was the second largest department in the school with one hundred and thirty enrolled students. During the first half-year of 1889-90 Willoughby took six courses, two of which were outside the Department of History and Political Science. One of these was cuneiform inscriptions and the Old Testament offered in the Department of Semitic Languages.[60] The other course was history of philosophy, being simply described as "an outline of the History of Philosophy."[61]

In the Department of History and Political Science Willoughby, along with thirty-six fellow graduate students, attended Adams' famous historical seminary in the familiar Seminar Room of the Bluntschli Library each Friday evening from eight to ten. Other graduate students present were John R. Commons, later to become one of the leading institutional economists in America, Charles Homer Haskins, and Bernard C. Steiner, later to become leading historians.[62] The seminary had been initiated in 1876 by Austin Scott, who, along with George Bancroft, led weekly meetings in the library

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gy, Semitic Languages, Astronomy, Mathematics, Physiology, Morphology, Physics, Political Economy, Philosophy, Romance Languages, Political Science, and in combinations of many of these. Actually not all of these subjects constituted departments, for, as has been said, history, political economy, and political science were all in one department.

59. Circular, IX (1889-90), 5.

60. This course is described in the Circular as "lectures on the confirmation of biblical history from Assyrian sources." Ibid., VIII (1888-89), 90.

61. Ibid.

62. Commons was in residence for two years but did not receive his doctorate from Johns Hopkins University, while Haskins and Steiner did.

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of the Maryland Historical Society. The seminary in these early years was chiefly concerned with Bancroft's specialty, constitutional history.[63]

Under Adams' direction the seminary met, beginning in 1883-84, in the library building at the University. Adams describes the seminary thus:

As you enter the seminary library, which occupies a room 51 by 29 feet, the most noticeable object is the long seminary table around which students are seated, every man in his own place, with his own drawer for writing materials. Upon the walls above the table are portraits of men who have influenced the development of the Baltimore Seminary—B. H. Pertz, Bluntschli, Freeman, Bryce, Bancroft, Von Holst, Cooley, Diman. Busts of Jared Sparks, Francis Lieber, Alexander Hamilton, John C. Calhoun, and other distinguished representatives of history and politics, give to mere aggregations of books the presence of personality. The library is arranged in alcoves around the seminary table with primary regard to the convenience of students who help themselves to books without any formality. American History (State and National) occupies the most honored place. International Law, politics, administration, economics and social science, history (European, ecclesiastical, classical, oriental), archaeology, and law (Roman, German, French, and English), has each its proper place. Within the alcoves are tables for special work, which places are assigned, to advanced students holding the honors of the department. These book cases, where books in current use are placed, as we say, "on reservation." The newspapers taken by the department are distributed in the various alcoves of politics, economics, law, history, &c. Religious journals are to be found upon the ecclesiastical table.

The current magazines of historical and political science, together with new books and university publications, are kept upon the long seminary table, which represents the center of scientific life for those who gather about it. The latest and freshest contributions are here displayed; and when the new becomes old, it is swept away into the alcoves, to side tables, where it still remains for some weeks on exhibition until it is finally classified in pigeon-holes, pamphlet files, or bound volumes. The back numbers of all special magazines, like the Revue Historique, Historische, Zeitschrift, Preussische Jahrbucher, Tubinger Zeitschrift, Conrad's Jahrbucher, Revue de Droit International, taken by the department are kept for consultation in a room specially devoted to that purpose. In addition to these rooms, there are several offices for the various instructors, two lecture rooms, a newspaper bureau, a geographical and statistical bureau, and the beginning of an historical museum, some of which features of the seminary will be described in another connection.[64]

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63. Herbert Baxter Adams, The Study of History in American Colleges and Universities, pp. 171-200.

64. Ibid., pp. 175-76.

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Woodrow Wilson, according to his biographer, Ray Stannard Baker, was charmed with this seminary upon his first visit in 1883 as a graduate student. "It had the atmosphere of quiet studiousness which was dear to his soul. He felt that this, after all, was his home."[65] "It was," Baker says, "the veritable keynote of the system, an analogue, so far as the so-called cultural subjects were concerned, of the laboratory method pursued in the natural sciences."[66] The Circular described the seminary as follows—

> . . . an association of instructors with the fellows and other graduate students in this department for the prosecution of original studies in American history, institutional, social and economic. Reports of progress are made from week to week, and these are discussed and criticized for the benefit of all. For the training of members in the art of criticism and succinct statement, a system of cooperative reviewing has been instituted. Brief digests of new and of special monographs are prepared in writing, and afford the basis for systematic reports on the progress of American historical literature to the Revue Historique and the Jahresbericht of the Berlin Historical Society.[67]

Willoughby also attended Adams' course in Germanic institutions, which dealt with "the origin and development of Germanic statelife in the old world and the new, with special reference to Anglo-American institutions of government."[68] In addition to lectures and written examinations Adams had the advanced students present lectures in American history "for pedagogical purposes."[69] In Ely's advanced political economy Willoughby studied money

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65. Baker, Wilson, I, 176-77.

66. Ibid., p. 176.

67. Circular, VIII (1888-89), 92.

68. Thirty-eight attended this class in addition to Willoughby, including John R. Commons, Charles Homer Haskins, and Bernard C. Steiner.

69. Circular, VIII (1888-89), 92.

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and banking,[70] and along with a few other advanced students went to Ely's home to attend his economic conferences for a critical study of Ricardo's writings.[71]

This constituted Willoughby's formal class work for the semester; however, each month he and the other graduate students and the faculty of the Department together with students of history and politics from other colleges and universities and distinguished visitors met as the Historical and Political Science Association. Professors, students, and visitors presented papers at these meetings, Willoughby in the December meeting presented a paper, "The Supreme Court as a Check in our Constitutional System." In the January (1890) meeting he presented another: "Practical Workings of the Supreme Court."[72] This indicates that he had started work on his dissertation which he completed the following year. It is also striking to note that he found time to collaborate with his brother in publishing a short work, Notes on the United States Government and Administration, published in 1889.[73]

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70. Willoughby had studied under Dr. Ely for two years as an undergraduate, and was destined to study under him for two more as a graduate. Once again, Commons, Haskins, and Steiner were classmates of Willoughby of the total enrollment of twenty-three. It was noted in the announcement that "bimetallism and silver question will receive special attention," and the content of the course was the nature and functions of money, the development of the present monetary systems, and the treasury systems of the world. Ibid., p. 93.

71. Willoughby, Commons, and six others attended this class which met each Wednesday evening from eight to ten. Ibid.

72. Circular, IX (1889-90), 33.

73. It is possible, of course, that Willoughby did his part of the writing of this book before he reported for the fall quarter at Johns Hopkins. It is a relatively small book of only seventy-two pages.

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In the second half-year Willoughby continued his work in Adams' seminary, Ely's advanced political economy,[74] and the course in the history of philosophy. In addition, he took three new courses: Historical German,[75] Adams' course in American history, and Wilson's course in administration. This latter course, according to the announcement, was to comprise—

. . . a discussion of the general questions and principles of city government and a description of the methods and machinery of city government in the United States, England, France, and Prussia. This completed, as full a discussion as possible will be added of the principles and development of Administrative Science in general.[76]

Willoughby had managed through the year without University aid, but was appointed a Fellow for 1890-91, the only other member of the Department to be so honored being Bernard C. Steiner. Adams and Ely recommended Willoughby highly for the fellowship, undoubtedly assuring his acceptance by the University Scholarship Committee.[77] He returned to the University

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74. Ely's course took up such subjects as: The nature and functions of banks, the history of banking, the old state banks and the present national banks, and a comparative study of banking systems of foreign countries. Circular, VIII (1888-89), 93.

75. This was to prepare for his language examination.

76. Circular, VIII (1888-89), 93.

77. The letter of recommendation reads: "Of the applicants for a University Scholarship I recommend Mr. W. W. Willoughby for the scholarship in Political Science. Mr. Willoughby is one of our own graduates who took a high rank as an undergraduate and held a Washington Scholarship. He graduated with honor two years ago. He has done excellent work during the present year." (signed) Richard T. Ely; to which was appended, "I heartily concur in this recommendation." (signed) H. B. Adams. Letter to the Committee on University Scholarship, The Johns Hopkins University Registrar's Office, dated January 9, 1890. Dr. Jameson thought highly of Willoughby's work also, having written a letter of recommendation two years previously. It reads, in part: "Both in respect to acquisitions and in respect to ability, he is one of the best students I have had, and I feel confident that he will succeed as a teacher and in any work he may undertake." (signed) J. F. Jameson. This letter is in Willoughby's "Personalia," a collection of personal papers located at his son's home in Chevy Chase, Maryland.

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in the fall along with 275 other graduate students and 192 undergraduates.[78]

In the first half-year Willoughby took all but one course in the Department of History and Political Science. This exception, the history of English ethics, was taught by Professor Edward H. Griffin of the Philosophy Department. It is perhaps here that Willoughby first became acquainted with the writings of Thomas Hill Green, which were to have such a profound influence upon his ethical political thought.

In the Department of History and Political Science Willoughby once again was a member of Adams' seminary, and in addition attended his course in early institutions and Greek politics. This latter was a large class (fifty students), dealing with "the origin of domestic and social institutions, the development of religion, law, and government in tribal and village society."[79] Referring to the "Greek Politics" portion of the course the announcement said, it "will trace the growth of the village community into the city and of the city into municipal federations. The leading institutions of Greek political society will be reviewed, and some attention will be given to the Greek colonial system and to historic parallels between ancient and modern civic life."[80] Willoughby continued his work in political economy with Ely, taking finance and taxation, a course which considered taxation from an economic and legal point of view, traced the history of taxation in the United States, and finally reviewed tariff legislation in the United States.[81] Each Wednesday evening Ely's economic confer-

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78. Circular, X (1890-91), 114.

79. Ibid., IX (1889-90), 114.

80. Ibid., p. 97.

81. Ibid., p. 98.

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ence met at his home, this time examining the works of Adam Smith, and his English and Scotch predecessors in political economy, and also discussed recent economic literature.[82]

Willoughby also attended Emmott's historical and comparative jurisprudence, and an undergraduate course in English constitutional law and history under the same professor. Finally, under John Martin Vincent (Ph. D., J. H. U., 1890), Willoughby took the sources of history.[83] He, thus, took eight courses during the fall of 1890, a remarkably heavy course load. Considering Willoughby's work habits, however, it is not altogether strange that he could do this, for he had remarkable powers of concentration and an equally remarkable devotion to work.

During the second half-year Willoughby continued his work with Adams in his seminary, Ely in advanced political economy, and Emmott in historical and comparative jurisprudence. He stopped attending Ely's economic conference probably because of the pressure for time. In addition to these courses Willoughby attended Adams' Prussian history. The announcement said of this course:

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82. Ibid.

83. According to the Circular, "He [Vincent] will first outline the domain of historical and political science and show its relation to the various auxiliary departments of knowledge. The different classes of historical material will then be described and methods of finding, proving, criticising, and using the same in the study of literary construction of history will be discussed. This introduction will be followed by a systematic study of the sources of the history of leading modern states. The chief historians will be characterized and descriptions given of important bibliographical books, collections of chronicles, annals, memoirs, biographies, publications of societies, collection of treaties, state papers, laws, public documents, and other materials which form the historical records of each country. Practical exercises in the interpretation and criticism of documents and writers will give opportunity to apply the theories brought forward and to cultivate the power of historical judgment. Ibid., p. 98.

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This course of lectures will relate to the origin and development of the Prussian military state, to its historic relations to other members of the old German Empire and to the reconstruction of Germany. Particular attention will be devoted to the economic, administrative, and educational reforms instituted by the Baron vom Stein. In connection with this course, the class is recommended to read Droysen's Preussiche Politik, Carlyle's Frederick the Great, Seeley's Life and Times of Stein, and Tuttle's History of Prussia.[84]

Finally, Willoughby returned to Wilson's lectures on administration, which was the first of a three year series. On this course the Circular says—

. . . a discussion of the general question of Public Law with which Administration concerns itself, and in the second place, an examination of the question of the establishment and training of a professional civil service. This plan will involve, as its first part, a tolerably wide survey of the history and general principles of foreign experience in the establishment of a trained, technical, public service, the feasibility and desirability of the introduction and enforcement of a similiar training in our own administrative organization, the means necessary to its introduction, and the results to be expected.[85]

Johns Hopkins University conferred the doctorate on twenty-eight in 1891, including nine in the Department of History and Political Science.[86] Thus ended two rather busy and highly satisfying academic years for Willoughby. He had studied under some of the best scholars in any American university in an atmosphere that promoted a high degree of scholarly work.[87]

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84. Ibid., p. 97.

85. Ibid., p. 98.

86. The other eight were: James William Black, George Petrie, Edward A. Ross, Sidney Sherwood, Bernard C. Steiner, William H. Tolman, Stephen B. Weeks, and Arthur B. Woodford. Ibid., X (1890-91), 145.

87. Johns Hopkins Ph. D.'s received good appointments, as for example: Woodrow Wilson, Associate Professor of History, Bryn Mawr College; Charles Homer Haskins, Instructor in History at the University of Wisconsin; Albert Shaw, Professor of International Law at Cornell University; Arthur B. Woodford, Assistant Professor of Political Economy, University of Pennsylvania; John Dewey, Professor of Philosophy, University of Chicago, Josiah Royce, Professor of History of Philosophy, Harvard University, and many other substantial appointments at leading schools.

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He had written a dissertation, _The Supreme Court of the United States_, which had been published as extra volume VII of _The Johns Hopkins University Studies in Historical and Political Science_, and which had won for him a prize of fifty dollars as the "best contribution to institutional history in the year 1890-91."[88] Adams in a letter to President Gilman said of the dissertation, "The monograph has been commended by various members of the Supreme Bench and by other legal specialists."[89] Moreover, he had collaborated with his brother in writing another book, _Government and Administration of the United States_, published as volume IX of _The Johns Hopkins Studies in Historical and Political Science_.[90] Furthermore, he had acquired a taste for the academic life that he came to love so much.

The previous pages bring this biographical sketch through Willoughby's formal schooling. The remaining pages of this chapter will describe his career as professor, scholar, advisor to China, and the final years of his life in retirement. For convenience these years will be divided into four periods: Apprenticeship (1894-1904), professional maturity (1904-1916), advisor to China (1916-1933), and retirement (1933-1945). First, however, it is necessary to point out that for about three years after he received his doctorate Willoughby was somewhat indecisive as to his future professional career. He spent the summer of 1891 in Europe, in all probability a combined pleasure and business trip, for in 1892 there was published his and

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88. _Annual Report of the President of The Johns Hopkins University_, 1891, p. 61.

89. Letter from Herbert Baxter Adams to President Gilman, February 16, 1891, in The Johns Hopkins University Registrar's Office.

90. This was published in 1891 as numbers one and two of volume IX.

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William F. Willoughby's Civil Service of France and Prussia. He undoubtedly spent part of his summer in Europe gathering material for this work. Upon his return home Willoughby entered into law practice with his father.[91] He found, however, that law was not a sufficient challenge to his inquisitive mind, and when opportunity came in 1894 to lecture at the new Leland Stanford University and also at The Johns Hopkins University he readily accepted. In the interim, however, he met Miss Grace Robinson of Dubuque, Iowa, and they were married June 27, 1893.[92] After a honeymoon at Lake Winnipesaukee, New Hampshire, the Willoughbys set up housekeeping in an apartment in Washington. After a summer vacation at a northern resort the Willoughbys moved in the fall of 1894 to Alexandria to live with his parents. In December he went to Stanford University to present a series of lectures on the "Philosophy of the State."[93] His wife, however, became ill (apparently the first of a series of illnesses that finally resulted in her premature death in 1907) and they returned to Dubuque in April of 1895, remaining there until the fall of the year. After a recuperative trip to Colorado in the summer the Willoughbys returned to Washington in September and began housekeeping at 2826 14th Street.

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91. In the collection of "Willoughby's Letters" at The Johns Hopkins University Library there is one, the letterhead of which reads: "Law Offices of Willoughby and Willoughby, Walker Building, 458 La. Avenue, N. W." Willoughby did not, as has been shown, attend law school, but rather read law in his father's office and was admitted to the Bar of Virginia and of Washington, D. C. Theirs, apparently, was a general practice.

92. Willoughby met Miss Robinson through a first cousin, Judge Ben Lacy of Dubuque. Judge Lacy was married to Willoughby's sister-in-law. W. R. Willoughby, "written communication," April 2, 1958.

93. His position at Stanford was that of Acting Assistant Professor of Political Science.

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Beginning in October of 1895 Willoughby presented twenty-five lectures (two hours weekly) on the "Theory of the State" at Johns Hopkins, his position on the faculty being that of Reader for the year.[94] His 1895 lectures were based on Bluntschli's Lehre vom Modern Staat and also included "recent English authorities upon the theory and science of government."[95] Willoughby found some staff changes in the Department of History and Politics[96] (as it was now referred to in the Circulars). Adams was still there, and since 1891 had been Professor of History, but Ely had resigned in 1892 to accept a post at the University of Wisconsin. Professor Emmott was now devoting full time in the Department, teaching courses in English law and constitutional history (Jameson's old courses). Vincent was teaching courses in European history, and Sherwood and Hollander were handling the courses in political economy. Woodrow Wilson continued to lecture in the spring on administration.[97]

Willoughby was promoted from Reader to Associate in Political Science, and returned in the fall of 1896 to present lectures on the federal state

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94. Indeed, he had been appointed Reader for 1894-95 and was to have presented, beginning in December, "ten or more" class lectures on the "Theory of the State," but because of the Stanford appointment and his wife's illness this had been impossible.

95. Circular, XIV (1894-95), 99. This course was open only to graduates, and was the first course in political theory, as such, to be offered at Johns Hopkins.

96. The name of the Department changed over the years. Referred to at first as the Department of History and Political Science, in 1888-89 it became known as the Department of History and Politics. Then, in 1896-97 it became the Department of History, Economics, and Politics. In 1902 economics became a separate department, and likewise political science in 1904.

97. All but two members of the faculty were Johns Hopkins' Ph. D.'s: Adams and Emmott.

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in theory and practice.[98] As was true the previous year, he did not lecture during the second half-year, not as yet being a permanent member of the faculty. It was becoming apparent, however, by this time that Adams wanted Willoughby to assume the direction of political science in the Department on a permanent basis, and it was also clear by this time that Willoughby himself had decided to leave the practice of law for the academic life.

He served his first full year on the faculty in 1897-98, teaching three year-courses: American public law, history of political philosophy, and a political conference.[99] This latter course was patterned after Adams' seminary, and indeed, was destined to be named "Seminary" in a relatively short time. Thus was established a precedent of conducting two lecture courses of two hours per week each and his seminary of two hours. He spent, therefore, normally six hours per week in the classroom and seminary, being thereby free to conduct research and writing, a luxury which only Johns Hopkins and a very few other universities in the United States afforded. Willoughby took full advantage of his time to read avidly and to write a quantity of material that few political scientists of his day, and perhaps of any time, have matched.

Willoughby continued to conduct his seminary, and offered courses in political theory, constitutional law, and at times alternating one or the

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98. This class met twice weekly and fourteen students attended. Circular, XVI (1896-97), 7.

99. His classes continued to be small for some time, being attended in this instance by from seven to fifteen students. Ibid., XVII (1897-98), 29.

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other of these with a course in legal aspects of economic and industrial problems,[100] or some other subject.[101] His brother joined the faculty in 1900 for one year as Lecturer in Social Economics, presenting a course in labor problems.[102] Adams resigned in 1901 after twenty-five years at the University, and died shortly thereafter. The Department had grown substantially, both in staff and student body under his guidance. Moreover, his was the guiding hand in the training of one hundred and three Ph. D.'s in history, political economy, and political science during that period.[103] Less well known today perhaps than many of his students, he was a pioneer in the study of local history in the United States. Because his emphasis was upon political history he encouraged a number of his students to take up the study of political science. Most important of all, undoubtedly, he

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100. This latter course Willoughby presented seven times during his teaching career and reflects undoubtedly his interests in matters economic. However, he did not venture to set down his thinking on the subject in a treatise.

101. His schedule of courses for the remaining years of the "apprenticeship" period were: 1898-99—political conference (3 students), United States constitutional law (7 students), and legal aspects of economic and industrial problems (12 students); 1899-1900—political conference (6 students), comparative constitutional law (8 students), and history of political philosophy (13 students); 1900-01—political conference (12 students), history of political philosophy (12 students), and United States constitutional law (11 students); 1901-02—political conference (9 students), legal aspects of economic and industrial problems (14 students), and history of political theory since 1750 (12 students); 1902-03—political seminary (as it is now called, 7 students), introduction to public law (17 students), and history of political theories (15 students); 1903-04—political seminary (11 students), United States constitutional law (24 students), current congressional history (24 students), and history of political theories (18 students). Circulars, XVII-XVIII (1898-1903).

102. In 1901 he was appointed Treasurer of Puerto Rico, a post he held seven years.

103. Circular, XXI (1901-02), 40.

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he encouraged scholarly research, the seminar method, and industry in his students.

With Adams gone the old Department began to break up into its component parts. The first discipline to break away was political economy which was established as a separate department in 1902. Political science became a separate department two years later. Willoughby was the only permanent member in this new department until the 1920's, although he was able to enlist part-time assistance prior to that time. Now that Willoughby was a department head he became a member of the Board of University Studies, which had charge of the arrangements for instruction of graduate students, and also of the examinations for the doctorate.[104]

Thus ended an era of intellectual growth and professional apprenticeship. Surveying the decade the accomplishments can be briefly assessed. Willoughby was firmly established as a teacher, graduate counsellor, and writer at a leading university, indeed the only one in America that stressed graduate instruction to such a high degree. Unique among scholars of his day, his teaching experience was solely with graduate students.[105] He had contributed to the literature of political science, and was laying the foundation for his great work in United States constitutional law to be published in 1910. Other published writings besides his doctoral dissertation[106] and his works on the United States Government written in collabo-

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104. Ibid., XXIII (1903-04), 56.

105. This is true at Johns Hopkins, however, the writer is not sure but that there were undergraduates in his class at Stanford.

106. The Johns Hopkins University at this time published, through its University Press, many if not all of the doctoral dissertations of her graduates.

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ration with his brother were: The Nature of the State, 1896, a treatise on political philosophy which undoubtedly strengthened his chances of procuring a permanent position on the faculty the following year: The Rights and Duties of American Citizenship, 1898; Social Justice, 1900; The Political Theories of the Ancient World, 1903; and The American Constitutional System, 1904; altogether eight volumes, and he was only thirty-seven years of age.

In addition to his books, Willoughby contributed twenty-two articles to journals, wrote a number of book reviews, served as Editor of the American State Series, of which his The American Constitutional System was the first of eight volumes by outstanding political scientists of the day, and began his long tenure as Co-Editor of The Johns Hopkins University Studies in Historical and Political Science. His articles cover a broad range of subject matter, his three most important ones, however, being in political theory. These were: "The Right of the State to Be,"[107] "The Value of Political Philosophy,"[108] and "The Ethics of the Competitive Process."[109]

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107. International Journal of Ethics, IX (1899), 467-83.

108. Political Science Quarterly, XV (1900), 75-95.

109. American Journal of Sociology, VI (1900), 145-76. The range of his interests can be seen from an enumeration of his other articles of the decade: "A National Department of Health," Annals of the American Academy of Political and Social Science, IV (part one), (1893), 292-97; "The New School of Criminology," American Journal of Politics, II (1893), 496-502; "The Penalties of a Higher Life," The Stanford Sequoia, IV (1895), 224-26; "Registration of Land Titles," The Current Encyclopedia, I (1901), 754-56; "The Teaching of the Law," Maryland Law Review, I (1902), 30-41; "The Federal Law of Bankruptcy," The World Today, II (1902), 1093-95; "Government Publications," Ibid., II (1902), 1129-32; "Johns Hopkins University Quarterly Centennial," Ibid., II (1902), 1143-46; "Labor Law—Recent Important Decisions in the English House of Lords," Ibid., II (1902), 1422-23; "Uniform State Legislation," Ibid., III (1902), 1543-46; "Compulsory Arbitration of Labor Disputes," Ibid., III (1902), 2153-55; "Annual Meeting of the Indus-

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His many book reviews include those of Ritchie's Social and Political Ethics, Dunning's History of Political Theories, and Merriam's History of American Political Theories.

A further accomplishment of the decade was the establishment of a separate department in 1904. Apparently, Adams had acted as a barrier to departmentalization, for soon after his retirement and death in 1901 the Department of Political Economy was established, and the setting up of the Political Science Department completed the movement. Looking back in 1925, Willoughby refers to this "movement" saying, "Before 1900 the desirability of erecting a separate department of Political Science became manifest . . . ."[110] From this time on Willoughby was free to develop his courses and train political scientists as he saw fit, and by 1933 his Department had graduated sixty-nine Ph. D.'s and several M. A.'s. In many ways this was the most productive small department of political science in the history of American higher education.

Another accomplishment of the decade, one in which Willoughby played a leading part, was the establishment of the American Political Science Association. Willoughby lays claim to being one of a triumverate of Johns Hopkins scholars who established professional societies in the disciplines

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trial Department of the National Civic Federation," Ibid., IV (1903), 196-97; "The Conduct of Business in Congress," Ibid., IV (1903), 198-205; "The Legal Rights and Obligations of Trade Unions," Ibid., IV (1903), 655-57; "The Aim of a Social Philosophy," The Johns Hopkins Hullabaloo, (1903), pp. 13-15; "A Popular Congressional Record," The World Today, VI (1904), 116-17; and "The American Political Science Association," Political Science Quarterly, XIX (1904), 107-11. Most of the articles were quite short with a few exceptions being no longer than three or four pages each.

110. Willoughby, "The Department of Political Science," The Johns Hopkins Alumni Magazine, XIV (1925), 88.

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of history, political economy, and political science. On this he says:

> Just as it was Professor Herbert B. Adams of Johns Hopkins who played the leading part in establishing the American Historical Association and Professor R. T. Ely who was chiefly instrumental in the creation of the American Economic Association, so it was Professor Willoughby who was the most prominent in the formation, in 1903, of the American Political Science Association.[111]

A more thorough account of the founding of this Association is treated in a later chapter, but it should be said here that Willoughby's claim has factual support, although by no means was it a one-man task. It is correct to say, however, that Willoughby was the most active of all his colleagues in founding the organization.

During the academic year 1902-03 Willoughby directed his first doctoral dissertation. Although he had taught only graduate students, none had chosen political science as his principal subject before this. To be sure, he had previously served as a "referee" on two dissertations, but he was not the principal advisor, as the students concerned chose either history or political economy as majors. This first candidate was Roland Jessup Mulford, who had obtained his A. B. from Harvard in 1893. The title of his dissertation was "The Political Theories of Alexander Hamilton," and the degree was conferred in 1903. Strangely enough, although Willoughby was always interested in political theory and contributed much literature to it, this is the only dissertation on the political theory of a particular political thinker that he ever directed.

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111. This claim appears in an unsigned article written by Willoughby in the Johns Hopkins Alumni Magazine, XIV (1925), 89. The fact that the article was unsigned accounts for the method of referring to himself. He lists this article in his bibliography which he prepared for Messrs. Hart and Mathews for their Essays in Political Science in Honor of Westel Woodbury Willoughby.

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These first few years of Willoughby's professional life saw a number of honors bestowed upon him. In 1895 he was elected a member of the Alpha Chapter of Phi Beta Kappa (Johns Hopkins University).[112] The next year he was the recipient of the John Marshall Prize. This prize, a bronze likeness of Chief Justice Marshall, was awarded annually to "that graduate of the University who is considered to have made within the year the most valuable contribution to historical or political science."[113] Willoughby won the prize as a result of his The Nature of the State. Thus, Willoughby joined a number of distinguished scholars of the University who were awarded this honor: Woodrow Wilson in 1892, Charles M. Andrews in 1893, Albert Shaw in 1895. In 1897 Willoughby's former history professor, John Franklin Jameson, was the recipient.

Willoughby's personal life during this decade was a combination of great satisfaction and profound sorrow. Two children were born to the Willoughbys: Westel R. in November of 1895, and Laura Robinson in March, 1897. The following year the Willoughby family moved to Roland Park, Maryland. Early in 1904 Mrs. Willoughby fell ill, an illness that lasted with increasing severity until her death in August, 1907.

The period, 1904-16, was one of great professional accomplishment for Willoughby for he helped to train some of the nation's outstanding political scientists, raised the Department of Political Science at Johns Hopkins from obscurity to one of the leading graduate departments, set a high standard for The American Political Science Review as editor, 1907-16, and published what has been called the most important commentary on the United

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112. Willoughby, "Personalia."

113. Circular, XXV (1905-06), 13.

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States Constitution since the works of Kent and Story.

This is also the period when Willoughby was most active as a teacher. During these years he taught nine courses in political theory,[114] on the average these lectures being attended by about twenty students, some of whom were majoring in history, political economy, and other disciplines besides political science. He lectured in these and other courses but twice weekly for a total of two hours, in keeping with the University policy of freeing her scholars for research and writing. Willoughby lectured in constitutional law eight times in these years,[115] his classes normally numbering twenty students. Also in the field of public law he taught in 1908-09 American administrative law, in 1913-14 theories of law, and also in that year principles of jurisprudence, and on three occasions a course on introduction to public law.[116] Finally, on four occasions he offered legal aspects of economic and industrial problems.[117] Throughout these twelve years he conducted his political seminary which on the average a dozen students attended. In 1907-08 he instituted a Journal Club which met on alternate weeks to discuss current political literature in addition to his seminary.[118] This, along with his fortnightly seminary, made it possible

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114. History of political philosophy (1905-06), introduction to political philosophy (1915-16), theories of church and state (1906-07), political theories in England since 1688 (1910-11, 1914-15), history of political literature and theories in France since 1750 (1911-12, 1914-15), and history of American political philosophy (1909-10).

115. 1906-07, 1907-08, 1909-10, 1911-12, 1913-14, 1914-15, and 1915-16. These classes were attended by about twenty students.

116. 1905-06, 1908-09, 1912-13.

117. 1904-05, 1908-09, 1912-13.

118. Circular, XXVII (1908), 567. This Journal Club was discontinued after 1915-16.

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to meet informally with his students every week.

Willoughby recognized that his offering in political science was narrow, and that his students needed training in other fields of political science besides public law and theory. This broadening was accomplished to a limited degree, but not to his full satisfaction, by bringing to the Department guest lecturers and teachers.[119]

Quite often Willoughby's lectures were from material that later appeared in a book. For example, his work on the United States Constitution

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119. In 1905-06 Henry Jones Ford, best known today perhaps for his The Representative Government, lectured on theory and practice of politics. Also, beginning in 1909-10 and continuing through 1915-16 James Brown Scott gave one or two courses each year on international law and diplomacy. Scott was not a permanent member of the staff, for he was at that time and for many years after the Secretary of the Carnegie Endowment for International Peace. Additional help was provided by Bernard C. Steiner of the History Department who offered courses in historical development of the English law. An instructor in classical history, Dr. Magoffin, gave a course in the historical development of the Roman law in 1908-09, and municipal government was offered in 1909-10 by Walter F. Dodd. In 1911-12 Professor Munroe Smith presented fifteen lectures on data and principles of jurisprudence. In 1904-05 John Philip Hill, a member of the Baltimore Bar, gave a course of six lectures on the organization and administration of the executive departments of the United States Government. Willoughby also asked Ernst Brunken of the Library of Congress to give ten lectures on the theory of the state and Charles G. Fenwick, a recent graduate of the Department, presented ten lectures on historical foundations of present European international politics. James Schouler established the "James Schouler Lectureship of History and Political Science" in 1908, and under this program each year a well-known person lectured to students of political science and history. Abbott Lawrence Lowell, President-elect of Harvard, lectured on public opinion in 1909, and in 1911 John Bassett Moore of Columbia University lectured on four stages of American development—federalism, democracy, imperialism, expansion. In 1914-15 William A. Dunning of Columbia University presented four lectures on early phases of nineteenth century political theory. Others who lectured under this program were: George Walter Prothero, Charles Francis Adams, Paul S. Reinsch, David Jayne Hill, James Schouler, and Joseph Redlich. Under other arrangements William Howard Taft in 1914-15 lectured on the executive function of government, Ernst Freund, of the University of Chicago, presented six lectures on principles of social legislation, James W. Garner, of the University of Illinois, gave four lectures on French administration and judiciary, and John Bassett Moore spoke on American contributions to international law.

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which appeared in 1910 was the result of work he did preparing his lectures for the constitutional law course. His seminaries were particularly effective. In them he allowed his students to present progress reports on their dissertations, and to get a taste of what their oral examinations would be like. Robert Treat Crane, Willoughby's first Ph. D. candidate, although not his first Ph. D., recalls, "I have yet to meet anyone who could be so devastatingly critical of your work and leave you so buoyantly certain of your ability to do well."[120] Willcughby's seminaries were considerably less formal than his lecture courses. Once monthly, at least during the early years, he would invite the seminary to his home where the presentation of papers and reports would be followed by a pleasant period of refreshments.[121] Before the University moved to the Homewood Campus in 1915 the seminary met in a room of the Library in down-town Baltimore, and after the move, except for those at Willoughby's home, was held in the Gilman Library.

As has been seen, Willoughby gave no lecture courses on international law, but in the early seminaries especially, he emphasied that subject. Most of the papers presented were concerned with some aspect of international law or international relations.[122] Not all of the students attending

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120. Robert T. Crane, "written communication," May 8, 1958.

121. James Mabry Mathews, "written communication," May 5, 1958.

122. Some of them are: J. F. Bledsoe, "The International Status of China," G. A. Bagge, "Parliamentary Government in Sweden," S. Blum, "The Evolution of the Monroe Doctrine," R. G. Campbell, "Questions of International Law Involved in the British-Boer War," L. G. Corkran, "Insurgency," H. E. Flack, "The International Law and Diplomacy of the Spanish-American War," Douglas S. Freeman, "Questions of International Law Involved in the Chinese-Japanese War," J. C. Hildt, "The Development of French Power in the Far East," and "Russian-American Diplomacy, 1799-1812," J. B. Kennedy,

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these seminaries were majoring in political science. Douglas Southal Freeman, for example, who was later to become the biographer of Robert E. Lee, and a noted Richmond editor, was a major in history. The quality of the papers presented in these seminaries was high, and the University Press from time to time published extracts from them, as for example, that of 1907-08.[123] Not all the papers were presented by students, the offering being enriched by papers and reports of outsiders.[124]

Willoughby supervised the work of eighteen doctors of philosophy during these years.[125] Many of these graduates went on to become outstanding political scientists, while others went into law practice or into government service. All were successful in their chosen pursuits, to a remarkable extent because of Willoughby's influence. It is amazing to note the breadth of subject matter represented in the eighteen dissertations, attesting to Willoughby's wide interests in political science, and his determina-

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"Wireless Telegraphy and Submarine Cables in Time of War," J. R. Tucker, "The Persian Question," W. C. Schmeisser, "Contraband," B. F. Wilson, "The Anglo-French Treaty of 1904," Circular, XXV (1906), 75.

123. Published as "The Political Science Seminary, 1907-08," and which appeared in the Circular, XXVII (1908), 163-227.

124. For example, Henry Jones Ford read a paper on "Direct Legislation and the Primary in the Northwest," W. F. Willoughby presented "The Proposed work of the Federal Commission in Efficiency of Government," James B. Scott reported on "The Fisheries Case Before the Hague Tribunal," Arthur O. Lovejoy read "Organismic Theories of the State," and J. W. Bryan, a recent graduate, presented "Injunctions in Labor Disputes." Ibid., XXXI (1912), 58.

125. Horace E. Flack, 1906; Robert T. Crane, 1907; James W. Bryan, 1908; Robert G. Campbell, 1908; John M. Mathews, 1909; Karl Singewald, 1910; Frank A. Magruder, 1911; Charles G. Fenwick, 1912; Warren B. Hunting, 1913; John H. Russell, 1913; Floyd B. Clark, 1914; John L. Donaldson, 1914; Lindsay Rogers, 1915; Tomikichi Yokoyama, 1915; Arthur C. Millspaugh, 1916; Oscar L. Owens, 1916; Roger Howell, 1917; and Malcolm H. Lauchheimer, 1917.

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tion to encourage each of his students to follow his own special field of interest in the discipline.[126]

Despite the outside help that Willoughby was able to obtain he was not at all satisfied with his Department. The resources of the Department were being severely taxed, and Willoughby felt that a broader offering in political science was necessary to keep pace with the growth of the discipline. He wanted instruction on the undergraduate level, and sought to strengthen graduate instruction. Specifically, in 1916 he listed among the "most urgent" needs of the Department an instructor to conduct undergraduate courses and possibly one graduate course. On the graduate level Willoughby urged the establishment of a Chair of Government and Administration, which would provide for courses on the forms of governmental organization, central and local, national and colonial. Also, he wanted instruction in international law placed on a more permanent basis, either in the form of an additional staff member, or by an appropriation in the budget to keep J. B. Scott permanently in that post. On the addition of a Chair of Government Willoughby pointed out, "These are questions of the greatest scientific as well as of practical interest, and it is most unfortunate that they do not receive adequate consideration in this University."[127] Unfortunately, Willoughby was to wait until after World War I before there was to be any appreciable

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126. Some examples: H. E. Flack, "The Adoption of the Fourteenth Amendment," R. T. Crane, "The State in Constitutional and International Law," F. A. Magruder, "Recent Administration in Virginia," C. G. Fenwick, "The Neutrality Laws of the United States," J. H. Russell, "The Free Negro in Virginia, 1619-1865," J. L. Donaldson, "State Administration in Maryland," Lindsay Rogers, "The Postal Powers of Congress: A Study in Constitutional Expansion," and A. C. Millspaugh, "Party Organization and Machinery in Michigan Since 1890."

127. Circular, XXXV (1915), 89.

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realization of his aims for the Department.

Willoughby continued to work industriously, a trait that elicited this comment from one of his first students:

> In the old building downtown the Department of Political Science occupied a single, not a very large room, lined with shelves to the ceiling on two sides, which contained practically the whole Political Science collection. There was a general library (the Bluntschli Library) and a joint history-economics-political science library—but substantially our working tools were in the one room. W. W. W. had a desk next to the window, and had another desk placed beside it for me. He wrote pretty steadily, putting in, with utter regularity, six hours a day at his desk. Occasionally there would be some discussion about something he was doing or I was doing, but often silence would be unbroken during these six hours. He simply expected that I would work as he did.[128]

His pen continued to flow at an undiminished pace. What many consider to be his major contribution to political science, his treatise on United States constitutional law, was written and published during this period. This was, of course, his _The Constitutional Law of the United States_, a two-volume work published in 1910. This work developed out of his lectures on the subject during the early 1900's. Unless one considers three books published during the War—_The System of Financial Administration of Great Britain_, _The Canadian Budgetary System_, and _Prussian Political Philosophy_, the first of which he co-authored with W. F. Willoughby and S. M. Lindsay, and the second which he co-authored with H. G. Villard—as products of this period, his other contributions to the literature of political science were in the form of articles and reviews.

He contributed eighteen articles to journals, some of the most important of which were: "Political Philosophy,"[129] "Political Science as a Uni-

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128. Robert Treat Crane, "written communication," May 8, 1958.

129. _South Atlantic Quarterly_, V (1906), 161-175.

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versity Study,"[130] "Citizenship and Allegiance in Constitutional and International Law,"[131] "The Legal Nature of International Law,"[132] "The Political Theories of Professor John W. Burgess,"[133] "Taxation of Federal Government Agencies by the States in the United States,"[134] "Punitive Justice,"[135] "The Individual and the State,"[136] "Energy and Leadership in Government,"[137] "Observations with Reference to the Adoption of a Written Constitution,"[138] and "Budgetary Procedure in its Relation to Representative Government."[139] In addition, he contributed forty-one chapters in books, articles in encyclopedias, proceedings of societies, and several book reviews.

Willoughby's editorial activities went on unabated. He continued as Co-Editor of *The Johns Hopkins University Studies in Historical and Political Science*. He also was Managing Editor of *The American Political Science Review*, volumes I-X, 1906-16, and edited the *Proceedings of the American Political Science Association*, 1904-11. Activities at the University also

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130. *Sewanee Review*, XIV (1906), 257-66.

131. *American Journal of International Law*, I (1907), 914-29.

132. *Ibid.*, II (1908), 357-65.

133. *Yale Review*, XVII (1908), (old series), 59-84.

134. *Zeitschrift fur Volkerrecht und Bundesstaatsrecht*, III (1909), 537-52.

135. *Journal of Criminal Law and Criminology*, I (1910), 354-77.

136. *The American Political Science Review*, VIII (1914), 1-13. This is the Presidential Address at the Tenth Annual Meeting of the American Political Science Association.

137. *Chinese Social and Political Science Review*, I (December, 1916), 5-17.

138. *Ibid.*, I (October, 1916), 13-46.

139. *Yale Law Journal*, XXVII (1918), 741-52.

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required a great deal of his time. He continued to serve as a member of the Board of University Studies, which supervised the graduate program of the University. The University's first president, Daniel Coit Gilman, resigned in 1901 and was succeeded by Ira Remsen of the Chemistry Department. The latter resigned in January, 1913, and his duties were assumed by a temporary Administrative Committee of the Faculty composed of seven members, of which Willoughby was one. One of Willoughby's students, Karl Singewald, remarks:

> It was the impression that Dr. Willoughby was considered for the presidency of Johns Hopkins University, to succeed Dr. Remsen. If so, it was consistent with his nature to decline, as the distinction of the office was not attractive to him and he would prefer to devote himself entirely to his own chosen field. I have no doubt that he exercised considerable influence in the selection of his good friend, Dr. Goodnow, for the presidency.[140]

This Committee administered the affairs of the University until Frank Goodnow was inaugurated in May, 1915. Professor Goodnow was for many years in the School of Political Science at Columbia University, and was the first President of the American Political Science Association. At the same time that he was inaugurated the new buildings on the Homewood Campus were dedicated, and most of the departments of the University were moved there. Willoughby served for years on the Homewood Committee, and the Committee on the Library. With the move to the new campus Willoughby occupied a rather spacious office in the library building. The University continued to grow during these years, indeed, more than doubling between 1904 and 1916.[141]

In November, 1906, there appeared the first number of the new journal

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140. Karl Singewald, "written communication," May 20, 1958.

141. The figures are: 1904—756 and 1916—1668. Circular, XXXVII (1918), 1220.

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of the American Political Science Association, The American Political Science Review, with Willoughby as Managing Editor. He was to continue in this post until mid-1916, when he was succeeded by John A. Fairlie. Aided by his Board of Editors[142] he was to set the style of the new journal. Restricted to fewer than two-hundred pages per issue at first, Willoughby was forced to utilize the space available for only a few leading articles (seldom more than four or five, and more commonly three), "Notes on Current Legislation," "News and Notes," "Book Reviews," and "Index to Periodical Articles." To this was added in the second number of the journal "Recent Government Publications of Political Interest." Among the most frequent contributors to the journal during Willoughby's editorship were Paul S. Reinsch, Herman G. James, Frank J. Goodnow, Norman Dwight Harris, James D. Barnett, A. L. P. Dennis, Walter F. Dodd, and James W. Garner. Of the 156 leading articles selected during this period there were more in the field of what would now be called comparative government than any other. Of the remaining articles, state and local governments, constitutional law and jurisprudence, international law and relations, public administration, American national government, political parties and elections, legislation, political theory, and general political science follow in that order.[143]

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142. The first Board was: John A. Fairlie, Frank J. Goodnow, John H. Latane, C. E. Merriam, Paul S. Reinsch, Benjamin F. Shambaugh, Eugene Wambaugh, and Robert N. Whitten. The American Political Science Review, I (1906).

143. The writer's rather arbitrary classification and tabulation is as follows: Comparative government, 44; state and local government, 25; constitutional law and jurisprudence, 20; international law and relations, 19; public administration, 13; American national government, 10; political parties and elections, 8; political theory, 7; legislation, 7; and political science, 3.

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There were one-hundred and fourteen contributors to the leading articles, thus indicating Willoughby's desire to encourage contributions from many scholars and public men. The most surprising fact that one sees in the materials selected for publication is the small number of articles on political theory. This is all the more surprising in view of Willoughby's own interest in theory, and of his estimate of the value of theory to the discipline. The reasonable explanation for this seems to be general waning of interest in political philosophy[144] and the preoccupation of the profession with more "practical" political subjects, such as municipal affairs, state constitutions, the initiative, referendum and recall, colonial affairs, international politics, among others.

In his personal life Willoughby sustained a tragic loss when his wife died in August, 1907, after several years of illness, just a few weeks before their new house in Roland Park, Maryland, was ready for occupancy. Furthermore, he lost his mother in January, 1912, and shortly afterward he was himself stricken ill, and was forced to forego meeting his classes for the greater part of the second half-year. Nonetheless, this era of his life did provide many satisfying and pleasurable moments. In 1914 he went to Europe with his brother and family and the next year he sailed to the Far East with President and Mrs. Goodnow, where he visited his brother, who was then acting as Constitutional Adviser to the Chinese Government.

From 1916 to his retirement in 1933 Willoughby engaged more and more in the field of international affairs and less and less in academic instruction. He was employed by the Chinese Government on numerous occasions as

144. This is supported by the findings of the Committee on Instruction of the American Political Science Association in its report, The Teaching of Government, New York, 1916, pp. 190-91.

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adviser, counsellor, and technical expert, and out of these experiences emerged several volumes on China and Far Eastern affairs. He taught fewer classes by virtue of his frequent absences from the campus, and indeed, when on duty at the University his teaching load was considerably reduced. He did not lose touch with his students, however, nor did he abandon altogether his first loves, law and theory, for he wrote two volumes on theory and one on public law during these years. The emphasis of his work, nonetheless, was upon China and the Far East. Some of his wishes for the Department of Political Science were fulfilled. The course offering was enriched by the addition of instructors, and by visiting and part-time professors from other departments or from the outside. The number of doctoral candidates increased significantly during the 1920's and the doctorate was conferred on many who were to become leading scholars and teachers in political science in this country and abroad.

Because of his reputation in the field of public law, and especially of constitutional law, Willoughby was appointed Constitutional Adviser to the Chinese Government in 1916, and he served in this capacity for one year at Peking. In his absence Professor Latane of the History Department, President Goodnow, Professor Lovejoy of the Philosophy Department, and others conducted his seminary and taught the political science courses. With the end of the War and Willoughby's return to the Department regular course offerings were resumed. From 1919-20 to 1933 he taught a variety of courses, as for example, political philosophy, juristic theory, constitutional law, courses on the Far East, the League of Nations, among others.[145] Most fre-

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145. His teaching program for the remaining years of his career at Johns Hopkins was: 1919-20, foreign rights and interests in China, juristic

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quently he taught but one semester per year, being on duty for the Chinese Government or travelling the remainder of the year.

On no fewer than five occasions Willoughby was employed by the Chinese Government. In 1916 he was Constitutional Adviser; in 1921 he was Technical Expert to the Chinese Delegation to the Washington Conference; in 1924 he was named Counsellor and Adviser to the Chinese Delegation at the two International Opium Conferences; in 1931 he was Counsellor to the Chinese Delegation to the League of Nations Conference on Narcotic Drugs; and in that same year Legal Adviser to the Chinese Representation in the Council of the League of Nations. Moreover, for several years following he was an adviser to the Chinese Legation in Washington. Alfred Sao-Ke Sze, Chinese Minister to Great Britain (1914-21, 1929-32), China's representative in the United States (1921-29, 1933-35), and Chinese Delegate to the Council of the League of Nations in 1931, said this of Willoughby's work:

> His work in that capacity [Washington Conference] was of the greatest value to the delegation and the Chinese will always be grateful to him for the assistance they then received, . . . [and he] played a large part in

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political theory, and American constitutional theory; 1920-21, principles of political philosophy and legal aspects of industrial and commercial problems; 1921-22, problems of the Far East and the Washington Conference and principles of jurisprudence; 1922-23, juristic political theory; 1923-24, ethical political philosophy; 1924-25, political philosophy; 1925-26, jurisprudence and legal aspects of economic and industrial problems; 1926-27, the Far Eastern situation; 1927-28, United States constitutional law; 1928-29, political philosophy; 1929-30, underlying factors in the Far East; 1930-31, jurisprudence; 1931-32, League of Nations; 1932-33, the League of Nations, and 1933-34, jurisprudence of the League of Nations. Throughout this period he conducted his traditional seminary when he was present on the campus, leaving it in the hands of a colleague when he was absent. Important additions to the staff were made from time to time, as for example, in 1926 James Hart, a recent graduate of the Department, was made a permanent staff member. The faculty, however, throughout this period remained small.

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drafting the so-called "ten points" of China upon which she based her case before the conference . . . . I was China's representative upon the Council at that time and I can testify personally to the great value of his judgment, his accurate knowledge of Far Eastern conditions, and his technical training in international law and the practice of jurisprudence of the League were to me in my efforts to secure for China the aid of the League in the maintenance of her just rights.[146]

In recognition of his services to the Chinese Government Willoughby had conferred upon him The Order of the Golden Grain in 1922, the Lin Tse-hsu Memorial Medal in 1930, and the Blue Grand Cordon of the Order of the Jade in 1937.[147] Johns Hopkins University, in recognition of his long and fruitful service to that institution, conferred upon him the LL. D. in 1936. The presentation speech was by an old friend and associate, Jacob H. Hollander, of the Department of Political Economy, who said:

During all these years we have been witness to the alertness of his mind, the keenness of his discernment, the originality of his thinking, the certainty of his scholarship. And all the while, we have been captivated by the grace of his presence, the sparkle of his wit, the cultivation of his manner.[148]

It was also to Willoughby's credit that he was admitted to the Bar of the United States Supreme Court on October 12, 1920, upon the recommendation of Charles Evans Hughes, at that time a private citizen, but previously (1910-16) an Associate Justice of the Supreme Court, and subsequently, Secretary of State (1921-25), and Chief Justice of the United States (1930-41). Willoughby and Hughes were close personal friends, and on at least one oc-

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146. Quoted in James Garner, "Westel Woodbury Willoughby," p. 28.

147. These citations are in Willoughby's "Personalia" at his son's home in Chevy Chase, Maryland.

148. A copy of Professor Hollander's statement is in Willoughby's "Personalia."

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casion the latter asked Willoughby to assist with a case, and indeed Willoughby did submit a brief to the United States Supreme Court. This was the Federal Land Bank case of 1920[149] in which the constitutionality of the Federal Land Banks was questioned. Willoughby's brief as Counsel for the Bank, in which he defended its constitutionality, was accepted by the Court as the correct constitutional law on the subject. Another case in which he prepared and submitted a brief was a public utilities case in which he represented a Baltimore corporation before the United States Supreme Court.[150]

Willoughby's published writings show a decided, although not exclusive, interest in the affairs of China and the Far East. His books for the period between World War I and 1940, when his last one was published, are: Types of Restricted Sovereignty and of Colonial Autonomy (1919) which he wrote in collaboration with a former student, Charles G. Fenwick; Foreign Rights and Interests in China (first edition in 1920, with a revised two-volume edition in 1927); An Introduction to the Problem of Government (1921) which he wrote with Lindsay Rogers, a former student; China at the Conference (1922); Constitutional Government in China (1922); The Fundamental Concepts of Public Law (1924); Opium as an International Problem (1925); The Ethical Basis of Political Authority (1930); The Sino-Japanese Controversy and the League of Nations (1935); and Japan's Case Examined (1940).

He also wrote thirty-two articles that appeared in journals, seven of which, because of their importance, will be listed: "The Juristic Concep-

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149. Smith v. Kansas City Title Co., 255 U. S. 180 (1920).

150. United Railways and Electric Company of Baltimore v. West, 278 U. S. 567 (1928). In neither case did Willoughby appear for oral argument.

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tion of the State,"[151] "Japan and Korea,"[152] "The Study of the Law,"[153] "The Scientific Method as Applied to the Study of Politics,"[154] "The Value of Juristic Philosophy,"[155] "The Juristic Theories of Krabbe,"[156] "Political Pluralists."[157] In addition, he wrote numerous chapters in books, articles in encyclopedias, introductions to books, and the like. A few of the more important of these are: "The Underlying Concepts of Democracy,"[158] "The Fundamentals of the American Political System,"[159] and "Principles of International Law and Justice Raised by China at the Washington Conference."[160]

Willoughby was responsible for training nineteen Ph. D.'s prior to World War I. From that date until his retirement, however, there were fifty-one who received doctorates in political science at The Johns Hopkins University.[161] Students came to Willoughby's Department in greater numbers as

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151. The American Political Science Review, XII (1918), 192-208.

152. The Unpartizan Review, XIII (1920), 24-42.

153. Virginia Law Review, VI (1920), 461-81.

154. The Calcutta Review, IX (1923), 339-50.

155. Ibid., X (1924), 87-96.

156. The American Political Science Review, XX (1926), 509-23.

157. Chinese Social and Political Science Review, X (1926), 509-23.

158. Democracy in Reconstruction. Edited by Frederick A. Cleveland and Joseph Schafer, Boston, 1919, pp. 48-66.

159. Publications of the National Security League, Constitutional Series, No. 4, New York, 1919.

160. Proceedings of the American Society of International Law, (1922) pp. 19-26.

161. The doctorates were: 1919, James Treat Carter and William L.

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his reputation became established, with a large number being from China and Japan. To be sure, because of his frequent and sometimes prolonged absences from the University, they did not see as much of Willoughby as did his earlier students, but all of them attended his courses and his famous seminary and benefited from his long experience as a practitioner in international conferences.

Willoughby continued to be active in campus affairs during his last years at Johns Hopkins. He was a member of the Board of University Studies, as before, Committee on the Library, Committee on the Johns Hopkins Press, Committee on Public Lectures, and the Academic Council.

After retiring Willoughby's efforts in political science tapered off considerably, although as late as 1940 he was still writing. In the later years of his life he tended to withdraw from the profession, seldom if ever attending professional meetings, and retiring to the comfortable confines of his family. Immediately after his work at Johns Hopkins was terminated in 1933 he moved from Baltimore to Washington, taking up residence scarcely a block from the residence of his brother. It was his custom to spend the winters in Washington, or as was quite often the case in travelling, and

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Wanlass; 1920, Edgar T. Fell, Youel B. Mirza, Dorsey Richardson, and Bruce S. Williams; 1921, Mingchien J. Bau; 1922, Johannes Mattern and Tomio Nakano; 1923, James Hart and Pao Chao Hsieh; 1925, Herbert W. Briggs, Albert G. Langeluttig, James E. Pate, and Robert D. Watkins; 1926, George W. Spicer; 1927, Ken Shen Weigh; 1928, Marshall E. Dimock, Frederick S. Dunn, Edward P. Herring, Peter Shun-Yuen Lum, George K. Reiblich, Leslie B. Tribolet, Yu Hao Tseng, and Shao-Kwang William Wu; 1929, Chung Fu Chang, Harry J. Green, Aaron Margaleth, Paul K. Walp; 1930, Feng Djen Djang, Chao Wei Liang, Norman J. Small, Nasim Sousa, and Harold W. Stoke; 1931, Valentine de Balla, Hsi-Lin Chao, Ambrose J. Fahy, Stuart A. McCorkle, C. Percy Powell, Charles J. Rohr, and C. Walter Young; 1932, Kwoh-Mo Tsu, K. C. Wang, Herbert A. Wilkinson, and Woodbury Willoughby (W. F.'s son); 1933, Henry G. Burke, Tuig-Young Huang, Vernon O'Rourke, Charles G. Post, Earnest B. Price, and Cromwell A. Riches.

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his summers at Stoney Lake, Ontario, where for almost half a century he and William F. owned a summer residence, and where the Willoughby family spent many pleasurable summers. On March 26, 1945, approaching his seventy-eighth birthday, Willoughby died at his home at 1921 Kalorama Road in Washington.

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Chapter II

POLITICAL SCIENCE IN WILLOUGHBY'S DAY

Political science is one of the oldest studies but, paradoxically, one of the youngest of the academic disciplines. It first appeared as a separate branch of study in leading American colleges and universities in the late nineteenth and early twentieth centuries. For this reason the years of Willoughby's student and professional career coincide closely with the birth and growth of political science in the United States. In 1885 when he enrolled as a first-year student at The Johns Hopkins University formal instruction in political science was for the most part in the hands of the professors of history, law, political economy, moral philosophy, or some other recognized discipline. The political science department as it is known today did not exist. On the other hand, upon his retirement in 1933 virtually all the leading colleges and universities accepted political science as a separate branch of study both on the undergraduate and graduate levels. Because this acceptance was largely owing to the work of a few political scientists, among whom Willoughby was one of the most energetic

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and influential, a brief account of the rise of the discipline is in order here.[1]

The development of political science during Willoughby's lifetime is an extremely complicated matter for many reasons, not the least of which is the fact that it is a new discipline, one that emerged from a confusing array of older studies, particularly political history and law. Reasonable clarity can be obtained only if some appropriate organizational arrangement is provided for the presentation of the wealth of raw material on the subject. The plan followed here inevitably contains a degree of arbitrariness, but this can hardly be avoided. The writer has seen fit to divide the era (1880-1930) into three parts: 1880-1903, 1904-1916, and 1917-1930. The first period represents the formative years of political science when the first departments were extablished in a few leading schools, and when American professors first gave attention to a reasonably precise definition of political science. It was an era in which John W. Burgess of Columbia was the dominant figure, and an era, as a consequence, in which the German influence was profound. Political science was commonly defined as the "theory of the State," and abstract political theorizing was to play a greater part in the discipline than in the subsequent periods. This period ends with the establishment of the American Political Science Association, the fulfillment of the desire of the vast majority of political scientists for a professional society apart from those of history, economics, sociology,

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1. The only published work that attempts to survey the development of political science as an academic discipline in the United States is Anna Haddow's Political Science in American Colleges and Universities, 1636-1900, New York, 1939. While this is a very useful book it is, for the present purpose, only a beginning, for, as the title indicates, the narrative ends with 1900.

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law, and others.

The second period (1904-1916) is one in which many new departments of political science were established as college enrollment increased rapidly and as courses in political science, particularly "Government," became popular. It is a period in which political scientists took stock, and many became disenchanted with formalistic studies inaugurated by Burgess and the earlier school, and a tendency to broaden the discipline to include what Albert B. Hart of Harvard called "actual government" set in. New courses in political parties made their first appearance in this period, and greater emphasis was given to the history of political theory under the influence of William A. Dunning of Columbia. Also more attention was given to courses on state and municipal government, public administration, and other practical courses, all in keeping with the general trend toward a more pragmatic study of all the social sciences.

Growth and departmentalization were interrupted by World War I, and only with the early 1920's did political scientists turn their attention once again to an examination of the domain of their discipline. Needless to say, the War and its aftermath gave impetus to more course offerings in international affairs, but the most significant trend in the 1920's was the effect of political pluralism on the traditional legal approach and the acceptance by a few political scientists of the almost impossibly complex contributions of other disciplines, such as sociology, economics, and perhaps even of greater significance for the future of the discipline, psychology—subjects that traditional political science felt to be outside its province.[2]

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2. Information for the material in the chapter has been gleaned from

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Instruction in political science dates from the founding of the first colleges in Colonial America. It was, however, in connection with moral philosophy, ethics, and in later years, with municipal law, political economy, history, international law, and constitutions that this instruction was given prior to the Civil War.[3] Only after that conflict were there course offerings in what may be called systematic political science in American colleges and universities, and only with the last two decades of the nineteenth and the early decades of the twentieth centuries was there a genuine division of labor that allowed either the establishment of departments of political science, or if not this, at least the devotion of at least one professor to full-time instruction in the subject.

Political science did not come of age in the United States until a separate professional organization was founded and a journal established. Its birth as an academic discipline, however, antedates this. The date usually accepted is 1880 when a School of Political Science was founded at Columbia College. It is true, nonetheless, that some attention was given to systematic political science prior to that time. At Columbia, for ex-

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old college catalogues (1880-1930) as to course offerings, faculties of political science, and Ph. D.'s conferred in the field. Also, comments of some of the leading political scientists in journal articles, texts, and treatises on the province of political science have been consulted. In addition, the general tendencies of political science journals and other publications that carried political science material have been noted to see what particular subjects absorbed the interest of scholars at particular stages in the development of the discipline. Finally, reports of special committees of the American Political Science Association that have made studies on the progress of political science have been utilized. Catalogues of the following schools were used: Columbia, Harvard, Princeton, Johns Hopkins, Yale, Cornell, Pennsylvania, Chicago, Illinois, California, and Wisconsin.

3. Haddow, Political Science, p. 171.

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ample, Francis Lieber held the Chair of History and Political Science from 1857 to 1865 and that of Constitutional History and Public Law from 1865 to his death. His books[4] were widely read and used as texts, and represent a break with the traditional American concentration on constitutional questions. Also at Yale Theodore Dwight Woolsey taught courses in politics and international law during much of his tenure (1830-70).[5] Aside from these offerings there was little political science to be found prior to 1880.

It was John W. Burgess who initiated the movement for greater concentration on systematic political science when he founded the School of Political Science at Columbia in 1880. Like Lieber, he was trained at German universities, bringing back to the United States much of the then current ideas on education, political science, and high nationalism that prevailed in the Bismarckian Empire. Although this "School" stimulated the growth of political science in the United States it was far too comprehensive in scope to serve as an exact model for other schools, for it included history, philosophy, economics, public law, jurisprudence, diplomacy, and sociology.[6] When the School opened in October, 1880, the faculty and the course offerings were: Richard Mayo-Smith—English history and economics,

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4. Manual of Political Ethics Designed Chiefly for the Use of Colleges and Students of Law, Boston, 1838-39, 2 vols., and On Civil Liberty and Self-Government, Philadelphia, 1853, 2 vols.

5. His books include: Introduction to the Study of International Law, New York, 1860, a widely used text, and Political Science; or, the State Theoretically and Practically Considered, New York, 1878, 2 vols.

6. John W. Burgess, "The Study of the Political Sciences in Columbia College," International Review, XII (1882), 346-51. Cited in Haddow, p. 181. It is true, however, that a "School of Political Science" was established at the University of Michigan in 1881 somewhat on the Columbia model, but it did not survive the decade. Haddow, Political Science, pp. 206-07.

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Munroe Smith--Roman law and comparative jurisprudence, Clifford R. Bateman--comparative administrative law of European states and of the United States, John W. Burgess--political history of continental Europe and the United States, comparative constitutional law of the European states and of the United States, international law, and history of diplomacy.[7]

Columbia undoubtedly had the strongest faculty and the best political science offering during the earliest years of the discipline. The faculty was further strengthened by the addition of Frank J. Goodnow in 1883, by E. R. A. Seligman in economics in 1885, and by William A. Dunning in history and political theory in 1886. The School provided a three-year-program culminating in the doctorate, and it was possible to enter in the senior year either from Columbia or a comparable institution. A significant step forward was taken in 1886 with the publication of the first number of the Political Science Quarterly, a journal edited by the faculty. This was to be America's chief political science journal until The American Political Science Review was first published in 1906. Its coverage, however, was broader than the title indicates. A survey of its first ten years of publication shows approximately sixty articles in the field of politics (including political theory), over one-hundred in economics, and about eighty in law.[8]

The University of Chicago, as a result of the munificence of John D. Rockefeller, opened her doors to both graduates and undergraduates in 1892,

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7. Burgess, Reminiscences of an American Scholar: The Beginnings of Columbia University, New York, 1934, p. 161.

8. "Political Science Quarterly, A Retrospect," Political Science Quarterly, X (1895), 566.

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and was the first such institution to have a department of political science at its inception. The chairman of the department was Harry Pratt Judson, and with the assistance of four part-time instructors the following courses were offered during the academic year: Seminar in politics, comparative politics, state and municipal government in the United States, comparative politics (federal government), American constitutional law, research, the elements of political science, international law, civil government in the United States, Spanish-American institutions, and political geography.[9] This shows both a more restricted view of political science held at Chicago and the better balance of courses in the political science field itself than that of Columbia twelve years earlier. It was the Chicago example rather than that of Columbia that was followed in the formative years of political science in the United States.

Other departments established before the century closed were those at the University of Iowa and George Washington University in 1898, but for the most part political science remained the captive of history, economics, or some other discipline or a combination of a few or several of them. It was not until the first, second, or even third decades of the twentieth century that many of the now leading departments of political science were formed: University of California (1903), Johns Hopkins University and the University of Wisconsin (1904), Harvard University (1911), Northwestern University (1915), Stanford University (1919), and Princeton University (1924).

Despite the dearth of departments in the last two decades of the nineteenth century there was definite progress in the variety of course offer-

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9. The University of Chicago Annual Register, (1892-93), pp. 42-43.

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ings during these years. At the University of Pennsylvania, for example, the 1880 offering in political science was confined to one course in the Arts Department, "Social Science—International Law and Thompson's Social Science and National Economy," and in the Law Department, "Constitutional Law" and "International Law" were offered.[10] Both of these were undergraduate, there being no graduate courses at this time. In 1890, by way of contrast, in the Wharton School of Finance and Economy the undergraduate offering in political science was: Constitution of the United States, constitutions of leading foreign countries, history and theory of the state, state constitutional law, public administration in the United States, and public administration in leading foreign countries.[11] In the graduate school (Department of Philosophy) the following courses were presented: History and theories of the state, seminar, development of constitutional government in the United States, both state and national, the origin and history of the common law, and its part in international law.[12] The person mainly responsible for this growth was Professor Edmund J. James who offered most of these courses, and it is notable that he is probably the first political scientist to offer a course in public administration in the United States.

If one can conclude that at least a suggestion of what political scientists thought their discipline to be can be gleaned from a "consensus" of course offerings in this period under study then the following may be of

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10. _Catalogue of the Trustees, Officers, and Students of the University of Pennsylvania_, (1880-81), pp. 23, 95.

11. _Ibid._, (1890-91), p. 86.

12. _Ibid._, pp. 131-35.

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some aid. In nine leading colleges and universities in 1880[13] the following fields were most emphasized: International law (seven schools),[14] constitutional law (five schools),[15] Roman law and jurisprudence (three schools),[16] and "Political Science" (two schools).[17] Significantly, there was only one offering in local government (Herbert B. Adams' history of local self government), and only one course in administrative law (Columbia). There were no courses in political theory, political parties, public administration, and indeed, no American government, as such. The leading professors who taught courses in political science at that time were: Burgess and Munroe Smith of Columbia, Theodore D. Woolsey and Simeon Baldwin of Yale, William M. Sloane of Princeton, John B. Parkinson of Wisconsin, and Bernard Moses of California.

By 1890 there was a general advancement in the course offerings in political science, being far more diversified than those of 1880: International law (seven schools),[18] constitutional law (seven schools),[19] Roman law and jurisprudence (seven schools),[20] political theory (four

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13. Columbia, Harvard, Yale, Pennsylvania, Wisconsin, Cornell, Princeton, Johns Hopkins, and California.

14. Columbia, Wisconsin, Harvard, Yale, Princeton, Johns Hopkins, and Pennsylvania.

15. Columbia, Harvard, Cornell, Pennsylvania, and Wisconsin.

16. Columbia, Harvard, and Yale.

17. Princeton and California.

18. Columbia, Harvard, Princeton, Johns Hopkins, Pennsylvania, Wisconsin, and Chicago.

19. Columbia, Harvard, Princeton, Pennsylvania, Wisconsin, California, and Chicago.

20. Columbia, Harvard, Yale, Princeton, California, Johns Hopkins, and Wisconsin.

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schools),[21] constitutional government (four schools),[22] administration (three schools),[23] and comparative government (three schools).[24]

In 1903, on the eve of the formation of the American Political Science Association, one can see further diversification and refinement of the course offering in political science. Municipal government, scarcely touched upon before was now offered at seven of the leading universities,[25] and something like the modern introductory course in American government was emerging in the "Constitutional Government" or "American Government" offered at Harvard, Princeton, Chicago, Wisconsin, Cornell, and California. Administration or administrative law was offered at six schools,[26] comparative government at six,[27] and state government at three.[28] Moreover, in contrast to 1880, courses in political theory were now offered at eight colleges and universities under the direction of Dunning at Columbia, Edward G. Elliott at Princeton, Willoughby at Johns Hopkins, Leo S. Rowe at Pennsylvania, Paul S. Reinsch at Wisconsin, Bernard Moses at California, James W. Garner at Illinois, and Charles E. Merriam at Chicago. Also, Professor

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21. Columbia, Princeton, Pennsylvania, and California.

22. Harvard, Pennsylvania, California, and Chicago.

23. Princeton, Johns Hopkins, and Pennsylvania.

24. Princeton, Pennsylvania, and Chicago.

25. Harvard, Columbia, Cornell, Pennsylvania, Wisconsin, Illinois, and Chicago.

26. Columbia, Harvard, Wisconsin, Chicago, Pennsylvania, Cornell, and Illinois.

27. Columbia, Harvard, Yale, Pennsylvania, Illinois, and Chicago.

28. Illinois, Wisconsin, and Chicago.

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Merriam offered a course in political parties as did Samuel E. Sparling at Wisconsin. Nonetheless, international law, Roman law, and constitutional law retained a prominent position, despite the trend toward less formalistic studies.

There were a few attempts to define political science during this early era. Lieber and Woolsey approached political science from a moral point of view. They assumed that man's sojourn on earth was essentially moral in that his ultimate end was self-perfection, and felt that the state (which is the subject matter of political science) exists to aid in this endeavor. Burgess defined political science as the "science of the State," and it, he said, "consists of a doctrine of sovereignty, a doctrine of liberty, and a doctrine of government."[29] Of the three, however, he felt the first to be the most fundamental, for it is, he pointed out, the "basis of both government and liberty."[30] He defined sovereignty as "original, unlimited, universal power over the individual subject and over all associations of subjects."[31] He recognized no divine law, natural law, or international law as limiting sovereignty, pointing out that "power cannot be sovereign if it be limited; that which imposes the limitation is sovereign; and not until we reach the power which is unlimited, or only self-limited, have we attained the sovereignty."[32] The possessor of this sovereignty is the state, "the most perfect organ which has as yet been attained in the civilization

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29. Burgess, "Political Science and History," Annual Report of the American Historical Association of the Year 1896, I (1897), 206.

30. Ibid., p. 208.

31. Burgess, Political Science and Comparative Constitutional Law, New York, 1890, I, p. 74.

32. Ibid., p. 53.

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of the world for the interpretation of the human consciousness of right."[33] The "ultimate" end or purpose of the state, he said, is "the perfection of humanity; the civilization of the world; the perfect development of the human reason, and its attainment to universal command over individualism; the apotheosis of man."[34] However, this ultimate end of the state, which is remarkably Hegelian, is something for which man, as presently constituted, is not prepared. For the present and more immediate future the end of the state, according to Burgess, may be classified as primary and secondary. The first is the establishment of government and liberty, and the latter is the perfection of the state's nationality. Viewed historically, Burgess saw them in this order: Primary, secondary, and eventually the ultimate, which will be the world state. Before the world state can appear, however, the national state must everywhere be developed, hence the reason why political science must at present concentrate its attention upon the nation state. Burgess defined liberty as "a domain in which the individual is referred to his own will and upon which government shall neither encroach itself, nor permit encroachments from any other quarter."[35] However, he said, "there never was, and there never will be, any liberty upon this earth and among human beings outside of state organization."[36] One has liberty as against the government but not as against the state, for the state is the source of liberty.[37] To rescue himself from the dilemma of positing an ab-

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33. Ibid., p. 86.
34. Ibid., p. 85.
35. Ibid., p. 174.
36. Ibid., p. 88.
37. Ibid., p. 175.

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solute state and absolute liberty Burgess had to draw a distinction between state and government. Government, he pointed out, is not sovereign, but is subservient to the state. It exists to carry out the will of the state. "Back of the government," he said, "lies the constitution; and back of the constitution lies the original sovereign state, which ordains the constitution both of government and of liberty."[38]

Burgess' view of political science was never fully accepted among scholars in the United States, for its doctrine of sovereignty, particularly, was too absolute. The father of modern sovereignty, Jean Bodin, had been careful to soften its effects by holding it subject to divine law, natural law, leges imperii and "that common law of nations which embodies principles distinct from these," for they limit the power of the ruler.[39] Nonetheless, Burgess helped to direct the attention of early political scientists to a rather formal analysis of political structure and legal competence, to the virtual exclusion of the dynamics of political life.

Woodrow Wilson rejected the view of political science held by Burgess and his followers, viewing it not as a formal study of institutions or of law, but rather a study of political life. He said, "The method of political science . . . is the interpretation of life; its instrument is insight, a nice understanding of subtle, unformulated conditions."[40] "To

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38. Ibid., p. 57.

39. This is, of course, taken from Bodin's Republic, Book I, as quoted in William A. Dunning, Political Theories from Luther to Montesquieu, New York, 1905, p. 96.

40. Wilson, "Review of John W. Burgess, Political Science and Comparative Constitutional Law," Atlantic Monthly, LXVII (May, 1891), 694-99. In this review Wilson also criticizes Burgess' style as lacking inspiration, being far too mechanical. He also refers to Burgess' dogmatic spirit, and lack of insight into institutions.

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know anything about government," he advised, "you must see it alive."[41] He stressed the historical and comparative approach, as opposed to the legalistic or institutional. He said, "certainly it does not have to be argued that the only thorough method of study in politics is the comparative and historical."[42] Wilson's view was to be taken up by others as the discipline matured, but in the formative years it was in reality a minority, a dissenting view.

Willoughby was more in agreement with Burgess than with Wilson as to the nature and domain of political science. Unlike Burgess, however, he did not entertain a Hegelian view of history, and therefore he did not see in history certain inevitable developments from imperfect political forms. He did, however, view sovereignty in a way quite simiiliar to that of Burgess, that is as supreme legal power; but he tempered it with an ethical view that was more English than German. His first attempt at a definition of political science is found in his first theoretical treatise, The Nature of the State, published in 1896. He conceived of political science as a study of the state, and it includes four major subdivisions: Historical Political Science—the origin and development of political forms; Political Theory—a philosophical study of the fundamental concepts of the state; Descriptive Political Science—an analysis and description of existing political forms; and Applied Political Science—the principles that should control the administration of political affairs; the proper province and func-

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41. Quoted in Woodrow Wilson, Life and Letters. Edited by Ray Stannard Baker, volume entitled Youth, New York, 1927, p. 282.

42. Wilson, The State, Boston, 1908, p. xxxv. This text was widely used in colleges and university classes in political science for many years.

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tions of government.[43] A few years later he was to modify somewhat his concept of the components of the discipline to include three rather than four: Political theory, public law, and the general study of government. This was more in keeping with the consensus of opinion around the turn of the century, following the lead of such respected authorities as Johann K. Bluntschli whose three-fold division of political science was: General theory of the state, public law, and politics.[44]

Summarizing, then, the view of the founding fathers of American political science from the few statements that are available as to what they conceived political science to be, and from the course offerings in the leading colleges and universities from the founding of the School at Columbia to the eve of the founding of the American Political Science Association, it is clear that there were three sources of opinion. First was the heritage of constitutional studies which characterized the earlier American approach to political subjects, and secondly, the German "theory of the state" which was adopted by the many American students who went to German universities to study[45] and reflected in such works as that of Bluntschli. This meant that political science was, at least during these early years, restricted to either a study of constitutional matters usually from a le-

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43. Willoughby, The Nature of the State, New York, 1896, p. 4.

44. Bluntschli, The Theory of the State, Oxford, 1901, pp. 2-4. This book was used as a text in American schools during the late nineteenth and early twentieth centuries, but was probably replaced by Willoughby's treatise of 1896.

45. The list of those who went to Germany for graduate work includes: John W. Burgess, Munroe Smith, William M. Sloane, Edmund J. James, Ernst Freund, Herbert Baxter Adams, Paul S. Reinsch, Charles E. Merriam, Frank Goodnow, and Albert Bushnell Hart.

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galistic point of view, or a study of the state, conceptually considered. In either event, there was little consideration given to the functions of government, the institutions of state and local governments, political parties, elections, public opinion, administration, or what may be called government in operation. Moreover, the preoccupation of at least a few political scientists with the "state" led to many sterile analyses, as for example, that of sovereignty and its location in the United States. In truth, the "state" was a foreign concept that hardly applied (as then conceived) to the realities of American politics, for even in its mildest form it implied an all-embracing political organization that was alien to American thinking and American experience.

To the traditional constitutional and the imported "state theory" must be added a third strain, however, and that is the dissenting view of those like Wilson who felt that there should be less concern with laws and structure and more concern with the dynamics of political life. It was this point of view which was to present in due time a real challenge to the traditionalists, and was to modify significantly the approach to political science.

The early years of the twentieth century witnessed a continuing growth of political science as an academic discipline. College and university enrollments grew rapidly,[46] justifying further departmentalization; a trend toward a more systematic study of social institutions, spurred on, no doubt, by the long over-due reform movement which culminated on the national scene by the election of a political scientist as President of the United States;

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46. Some examples: Johns Hopkins enrollment jumped from 168 in 1880 to 651 in 1900; Princeton enrollment grew from 488 in 1880 to 1277 in 1900; and that of Cornell grew from 463 in 1880 to 2458 in 1900.

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significant and substantial contributions to the literature of politics by some of the leading political scientists, of which Willoughby's The Nature of the State was no small contribution—all of these helped to spur college and university administrators to provide for the creation of more courses, additional faculty, and greater student assistance in the form of fellowships, scholarships, and the like.[47] One of the most significant reasons, however, for the rapid growth of political science during the early decades of the twentieth century was the establishment of the American Political Science Association in December, 1903, for this gave the discipline a professional status which it had not previously possessed.

Until 1902 political scientists were content to attend the meetings of the American Historical Association, the American Economic Association (formed in 1884 and 1885 respectively), or some other of the then existing professional organizations. Many of them, however, began to see a real need for a separate society in which they would feel free to emphasize many fields of political science that the other organizations customarily ignored, particularly public law, political theory, legislation, and administration.[48]

The first positive action to form an independent organization was taken in 1902 when a group of political scientists, including John W. Burgess, Frank J. Goodnow, Jeremiah Jenks, and Munroe Smith[49] issued a call for a

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47. Worthy of mention is the fact that some leading political scientists became presidents of outstanding universities: A. Lawrence Lowell, Harvard; Frank J. Goodnow, Johns Hopkins; Harry P. Judson, Chicago; and Edmund J. James at Illinois.

48. Samuel E. Sparling, "An American Political Science Association," The American Monthly Review of Reviews, XX (1904), 212.

49. Others in this group were: Melvil Dewey, John H. Finley, Martin

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conference to meet in Washington in December of that year to discuss the advisability of establishing a professional organization to further the scientific study of comparative legislation. This conference, which Willoughby attended, felt that this proposed "American Society of Comparative Legislation" should be broadened to include all branches of political science. However, as they were not sure that there was sufficient demand for such a society they appointed a Committee of Fifteen to communicate with interested individuals and associations to see if a genuine need existed. J. W. Jenks was appointed Chairman of the Committee and Willoughby Vice-Chairman.[50] According to Willoughby,[51] the Committee found "an almost unanimous demand" for a political science association.[52] This Committee met in New York early in 1903 with representatives of the American Historical Association and the American Economic Association, and after communicating with individuals in both academic and public life agreed to push on with plans for organization. The next meeting of the historical and economic associations was scheduled to be a joint one in New Orleans on December 30, 1903. It was at this meeting that Willoughby presented a summary of the work of the Committee of Fifteen, and the American Political Science

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A. Knapp, Charles W. Needham, J. R. Parsons, Jr., Josiah Strong, Max West, Robert H. Whitten, and Carroll D. Wright. William Anderson, "Political Science Enters the Twentieth Century," Haddow, Political Science, p. 262.

50. Sparling, "An American Political Science Association," p. 212.

51. Willoughby states that Jenks was absent in Europe, leaving him in charge of the Committee which prepared the groundwork for the formation of the Association. Letter from Willoughby to President Remsen (JHU), May 9, 1903, in the Alumni Records Office of The Johns Hopkins University.

52. Willoughby, "The American Political Science Association," Political Science Quarterly, XIX (1904), 109.

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Association was formed. The avowed object of the organization was to encourage the study of public law, diplomacy, politics, and administration.[53] The officers of the new association for 1904 were Frank J. Goodnow, President; Woodrow Wilson, first Vice-President (declined); Paul S. Reinsch, second Vice-President; Simeon E. Baldwin, third Vice-President; and Westel W. Willoughby, Secretary-Treasurer. Also, Willoughby was named Chairman of the Standing Committee on Political Theory, other members being Charles E. Merriam and William A. Dunning.[54] Membership in the Association grew from 160 in 1904[55] to 205 in 1905, 335 in 1906, 410 in 1907, 621 in 1908, 800 in 1909, and 1100 in 1910,[56] thus confirming the need for the organization.

Now that there was a national professional society that represented the discipline there was a definite need to bring forth a definition of political science that would indicate clearly its distinction from history, from philosophy, from law, from economics, and from sociology, and guide the scholars in their investigations. Whether a committee of the organization would have been able to formulate such a definition of the discipline can easily be doubted, but this was not the method chosen, for it remained for the first president in his presidential address in December, 1904, to attempt a satisfactory definition.

In agreement with Burgess and his followers (Goodnow had been a stu-

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53. Sparling, "An American Political Science Association," p. 213.

54. Letter from Willoughby to Goodnow, January 19, 1904, in "Willoughby Letters," in The Johns Hopkins University Library.

55. Letter from Willoughby to Goodnow, April 23, 1904, in "Willoughby Letters."

56. Letter from Willoughby to Goodnow, December 2, 1909, in "Willoughby Letters." The figure for 1910 is Willoughby's estimate.

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dent of Burgess), Goodnow in general terms defined political science as "that science which treats of the organization of the State."[57] "It is," he said, both "a science of statics and a science of dynamics,"[58] but it is with the dynamic aspects that political science should be most concerned. It is the "State will" that is the essence of political science. For its realization, however, there must be governmental organs—for the formulation of this will, for the expression of this will, and for the execution of this will. The three "pretty distinct parts" of political science, then, are: The expression of the state will, the content of the state will as expressed, and the execution of the state will.[59]

In the division of labor within political science, said Goodnow, it is the task of political theory to aid in the determination of the expression of the state will, for, he said, "every governmental system is based on some more or less well-defined political theory whose influence is often felt in minute details of governmental organization."[60] More than political theory is needed, however, for "the problems involving what [governmental] organs shall be and how they shall act are [both theoretical and legal]."[60a] He had in mind here particularly constitutional law. More of the branches of political science must be employed here, however, "for the expression of the will of the State is in some cases directly facilitated by methods of procedure and by organization which are not commonly regarded

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57. Goodnow, "Presidential Address," Proceedings of the American Political Science Association, I (1904), 37.

58. Ibid.

59. Ibid.

60. Ibid.

60a. Ibid., p. 38.

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as parts of the political system."[61] He continued, "Our political science has, therefore, to do, not only with the theoretical and legal problems of State organization, but also with the somewhat more practical and concrete problem of party organization, and nomination methods, whether these matters are regulated by law or not."[62] As to the content of the "State will" Goodnow asserted that this is the special province of law, principally public law, but also conceivably private law in as much as the state can enter into many relations that a private individual can. Political theory also is helpful at this stage because a study of public law must embrace not only what the law is but what it ought to be. Goodnow felt that the execution of the state will is the most neglected field of political science. He said, "A study of government which excludes the consideration of the administrative system and actual administrative methods is as liable to lead to error as the speculations of a political theorist which have no regard to the principles of public law."[63]

Political science, then, according to Goodnow, speaking for the American Political Science Association, is concerned with the expression of the state will, the content of that will, and the execution of that will. Political theory and constitutional law are the chief branches concerned with the first, public law is chiefly concerned with the second, and public administration with the third. Thus, it is seen that Goodnow made no substantial break with the conception of political science of the previous two decades except that he emphasized the need for a study of public administration,

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61. Ibid.

62. Ibid.

63. Ibid., p. 43.

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important in itself to be sure, but the structure of political science as he built it is not at all unlike that of Burgess and others who thought of political science as the science of the state with a heavy emphasis on law, for they thought of the state as expressing itself most characteristically in the form of laws. What Goodnow added was merely a greater emphasis on administrative law as opposed to constitutional and legislative law. He also did open up the way for a study of political parties through the back door—that is as supplementary to political theory and constitutional law in studying the determination of the state will. It will also be noticed that Goodnow made political theory an integral part of the discipline, indeed to an extent that it could hardly proceed with the study of the state without this important branch. With this in mind an analysis of the concept of political science as seen in definitions of writers and course offerings of leading universities will be made of the years subsequent to 1904.

The next authoritative statement on the nature of political science was that of the fifth President of the Association, the Right Honorable James Bryce, at a joint meeting of the American Political Science Association and the American Historical Association in January, 1908, in Washington, D. C. Mr. Bryce, at that time British Ambassador to the United States, was well known to American professors and students because of his lectures at leading American universities, and more particularly for his The American Commonwealth, first published in 1888 and widely used as a text in American government. His definition of political science was different from that of Goodnow, Burgess, Smith, and Willoughby, and was more nearly that of Wilson's. He saw it not as an exact science in the sense of mathematics, for "the laws of political science are the tendencies of human na-

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ture and are embodied in the institutions men have created,"[64] and more properly, because of its close association with history it is the "data of political history reclassified and explained as a result of certain general principles."[65] But these general principles must be gleaned from history and not from mere speculation. He particularly singled out recent Germanic speculative thought and the analytical jurisprudence of John Austin for criticism as examples of the sterility of speculation without sound grounding in historical fact. He said:

> Some writers have treated it [political science] as a set of abstractions. They have tried to create by efforts of thought, and to define, such general conceptions as sovereignty, the State, the origin of political right, the ground of political obligation, and so forth, following the methods of metaphysics and keeping as far from the concrete as possible. So much time and toil have been spent on these discussions, and so many of them have a kind of historical interest as revealing the ideas current three or four centuries ago that we must speak respectfully of them. But what have they given us of substantial worth? How vague and cloudy are many of the German treatises of the last sixty years on the theory of the State? They take the writer's own conceptions as to make them express realities. What can be more windy and empty, more dry and frigid and barren than such lucubrations upon sovereignty as we find in John Austin and some still more recent writers.[66]

And he admonished the discipline: "Whoso seeks to understand the nature of the State will do better to enquire what forms the state has taken and which have proved best, what powers governments have enjoyed and how those powers have worked."[67]

As to the use to which political science could be put Bryce addressed

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64. James Bryce, "The Relations of Political Science to History and to Practice," The American Political Science Review, III (1909), p. 3.

65. Ibid.

66. Ibid., p. 9.

67. Ibid.

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himself particularly to how it can serve the whole community, and he found that there are two avenues open to the discipline: Teaching in the universities and supplying literary works for general reading. He realized, however, that these will reach only a small portion of the people directly, but felt that through a sort of perculating effect these may affect even a majority of the citizenry. It is particularly with the training of the five per cent who will attend university classes, or read the treatises of political scientists and will thus be able to exert an influence upon the most intelligent of the voters for the benefit of all with which he was concerned. Decrying the common belief held in America and elsewhere that all that is needed for intelligent citizenship is common sense, Bryce held that modern government and public affairs are far too complicated for a continuance of this Jacksonian assumption. He particularly felt (one might say hoped) that political scientists, by inculcating the scientific spirit among peoples in thinking about public questions, will encourage thoughtful participation in voting, avoidance of fits of emotionalism, rising above selfish interest and localism, and avoidance of undue nationalistic spirit. However, he did not entertain much hope that political scientists would fare well as advisors to governments. His reason seems to be that when it comes to questions of specific solutions to everyday political problems the political scientist is no better fitted than the ordinary politician, "for when it comes to the interpretation of historical facts and their application to a concrete controversy, each man interprets and applies according to his own personal or party proclivities."[68] The chief (perhaps only) service that

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68. <u>Ibid.</u>, p. 17.

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political science can serve then, is "to create in the class which leads a nation the proper temper and attitude towards the question which from time to time arise in politics."[69] This is an interesting observation from a man who, starting his career as Regus Professor of Civil Law at Oxford University, was to serve as a Liberal Member of Parliament, Under-secretary of State for Foreign Affairs, Chief Secretary for Ireland, among other positions, and took an active part in public affairs, agitating for home rule in Ireland, among other things. In fairness to him, however, it must be stated that his objection to reliance upon political science and political scientists for solutions of day to day governmental problems did not come from a desire to keep the professor of political science out of politics, but from a belief that he will not take sides in a partisan struggle scientifically. This stems from the fact that, unlike the physical sciences and mathematics, political science is not, in his view, an exact study.

Bryce's position on this, of course, is in contrast to a large body of American thought and practice at the very time he was speaking, for political scientists were being employed in increasing numbers to advise and participate in state administrative reorganization, municipal governmental affairs, and even national governmental posts, advisory and otherwise. A glance at most any number of The American Political Science Review in the "News and Notes" section will confirm this. Moreover, his position that political science will serve best by directly serving the least number was in contrast to a substantial body of American thought and practice, for one of the earliest concerns of the American Political Science Association was the

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69. Ibid., p. 16.

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teaching of good citizenship, particularly in the public schools, and there was great lament that so few youngsters were being given adequate instruction in "Civics" in the secondary schools.[70]

At the next annual meeting of the Association the presidential address was again devoted to the general subject of the province of political science. The President, Abbott Lawrence Lowell,[71] concluded that "it is our province to discover the principles that govern the political relations of mankind, and to teach these principles to the men who will be in a position to give effect to them hereafter."[72] Unlike Bryce, however, he felt that the "principles" should be drawn from data collected not from historical sources, but from political life; and unlike Willoughby, Burgess, and others, did not feel that these general principles should come from *a priori* assumptions.

His chief concern for political science was that it was not sufficiently scientific; it lacked an exact terminology and "suffers from imperfect development of the means of self-expansion."[73] He had in mind here that when compared to some of the physical sciences that have grown by segmentation, political science comes off a poor second. He particularly urged greater concentration by political scientists on the "physiology" or the

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70. See, for example, the "Report of the Committee of Five of the American Political Science Association on Instruction in American Government in Secondary Schools," *Proceedings of the American Political Science Association*, V (1908), 219-57.

71. Lowell was the first full-time political science instructor at Harvard. He was named Professor of the Science of Government in 1900, and was President of Harvard from 1909 to 1933.

72. Lowell, "The Physiology of Politics," *The American Political Science Review*, IV (1910), 15.

73. *Ibid.*, p. 1.

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actual workings or functions of governments and less concern with forms of government. Pronouncing political science an "observational, not an experimental, science," he decried the complete dependence of scholars upon libraries for their raw materials, and advocated that political scientists go out into the real political world and observe. Indeed, he maintained, much could be gained by actual membership on city councils, school boards, and other political bodies. Moreover, he pointed out that observation of non-political clubs and associations will render invaluable material on man the political animal. But, the political scientist must divest himself of his biases and prejudices and develop a sympathetic attitude. He said:

> He must be able to put himself in the place of all sorts and conditions of men, thinking as they do, and thus appreciating the reasons for their conduct. Above all he must instinctively conceive himself in the position of a man in public life, and feel the motives that press upon him from all sides. Only in that way will he learn the hidden springs of action, and have a keen perception of political forces, or, indeed, of the facts themselves which appear so plain when they have once been seen.[74]

In addition to personal observation of politics at first hand, he recommended the greater use of statistics in political science research. In this respect he felt that the natural sciences were well ahead of political science, and to close the gap somewhat he advocated the establishment of political laboratories for observation of politics. He said little about this except to suggest that they might be modeled after the "bureau of legislation at Madison."[75]

Like Bryce he objected to speculative political thought, pronouncing "abstract speculation" as "singularly barren."[76] He continued, "we may ex-

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74. Ibid., p. 9 75. Ibid., p. 11. 76. Ibid., p. 14.

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pect progress in political thought when we have compiled, arranged, and classified our data, and this would seem to be the most pressing task before the members of our profession."[77] And he concluded, "The ultimate object of political science is moral, that is, the improvement of government among men. But the investigator must study it as a science, as a series of phenomena of which he is seeking to discover the causes and effects."[78] Despite the fact that political science has a moral end the investigator must divest himself of all prejudice "for or against particular institutions," and must not "regard politics from an immediate moral standpoint; for if he does he will almost inevitably be subject to a bias likely to vitiate his observation."[79]

Some of the neglected areas of political science which he felt need to be studied in this scientific manner were: "The present working of political institutions," party voting in different public bodies, voting behavior, results of popular voting, public hearings by legislative committees, terms of office of public officers in various parts of the United States, among others. Strangely enough, no mention is made here of public opinion to which Lowell was to contribute so much shortly thereafter.

Willoughby also addressed himself to the question of the province of political science during the early years of the century. In an article written in 1904 he divided political science into three fields: Political theory—whose task it is to give exact definitions of the concepts employed in political thinking and which thus include the consideration of the es-

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77. Ibid.

78. Ibid.

79. Ibid.

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sential nature of the state, its right to be, its ends, its proper functions, and its relation to its own citizens, and the nature of law. Public law—which would include constitutional, international, and administrative law. General study of government—which would include such matters as its different forms, the distribution of its powers, and its various organs, and the principles governing its administration.[80]

Two years later he gave further attention to the subject in an article.[81] He lamented the fact that political science as an academic discipline was such a late arrival. He pointed out that it had been independent of history and economics for no more than five to ten years in American universities. His concept of the extent and breadth of political science derives from his concept of "matters political." This in turn derives from his concept of the state, for he held that "a matter is political when it has reference to the State . . . ."[82] A state is "a group of individuals . . . viewed as an organized unit subject to the authority of a supreme will which is the source of all law."[83] The state expresses this supreme will through an organization called government. Its commands are called laws, both public and private. Thus, political science is concerned with three general topics: The state, the government, and the law. A matter is political, then, when it has reference to the state, whether it be as to its

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80. Willoughby, "The American Political Science Association," Political Science Quarterly, XIX (1904), 108.

81. Willoughby, "Political Science as a University Study," The Sewanee Review, XIV (1906), 257-66.

82. Ibid., p. 258.

83. Ibid.

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nature, its right to be, its form or organization, its activities, or its end.

The inquiry into the nature of the state, according to Willoughby, breaks down into three special subjects: Political theory, constitutional and administrative law, and international law. Political theory concerns itself with "the essential nature of the State, the discovery of those characteristics by the presence of which its existence may be determined, and by the possession of which it may be distinguished from other forms of aggregate human life."[84] Constitutional and administrative law are those laws "which control the action of the State in its relations to its own citizens, and towards the others temporarily subject to its authority."[85] International law, on the other hand has to do with rules with govern the relations of the states _inter se_.

Government, Willoughby said, is more descriptive and less analytical than a study of the state. In essence, the study of government is "an examination of the various existing and historical types of political machinery through which the State operates or has operated . . . ."[86] A political scientist, said Willoughby, studies government to discover its structure and to see how particular governments operate, to discover their merits and defects, and to ascertain the circumstances under which governments of all kinds may be expected to produce good or bad results. A study of government would include in addition such things as political parties, problems of colonial government and administration, municipal government, civil ser-

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84. _Ibid._

85. _Ibid._, p. 260.

86. _Ibid._, p. 262.

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vice, primary elections, proportional representation, the referendum, state and city ownership of public utilities, state regulation of the economic, social, and ethical interests of the citizen, and also the larger problems of national politics in the realm of world politics.[87]

Willoughby, like Burgess and Bluntschli, saw political theory as the core of the discipline, and he regretted that the subject had generally been neglected in the United States. Political theory logically is divisible into two fields: Teleological or ideal and scientific or analytical. The former "seeks to discover the nature of political society and the legitimate sphere of its authority as determined by the nature of man, that is, by their need of political organization for the satisfaction of their proper desires and for the realization of their possible perfection."[88] Analytical or scientific political theory, on the other hand, "is wholly concerned with the State as it is, with its nature as determined by the elements of which it is composed and by the manner in which they are united."[89] The characteristic duty of this branch of political theory is to provide the scholar with precise definitions of such terms as law, government, state, suzerainty, sovereignty, thus "rendering possible the formulation of exact definitions and classifications and, consequently, the creation of a political science."[90]

Willoughby is not at all times consistent on the proper role of the

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87. Willoughby, "Political Philosophy," South Atlantic Quarterly, V (1906), 162.

88. Ibid., p. 162.

89. Ibid.

90. Ibid., p. 165.

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two branches of political theory, nor on the value of teleological political theory. For example, in 1900 he defended "speculative" political science from its growing body of critics in the United States in an article.[91] Although he did not in this article condone political speculation that results in the advancing of "ill-advised schemes of political organization . . ."[92] he maintained "at the same time, the construction of an Utopia is not necessarily either a worthless or a dangerous task. In so far as the desirable is not confused with the immediately possible, such a political type, if properly framed, presents a stimulating ideal to be striven for, or a standard by which the success or moral validity of present conditions may be gauged."[93] At the same time, he pointed out that the chief purpose of the political philosopher is not the construction of Utopias, but rather "the scientific analysis of facts and forces in our political life."[94] In this same article he held that "the speculative side of politics deserves far more attention in our universities than it now receives."[95]

On the other hand in 1904 at the St. Louis Universal Exposition at which Willoughby, James Bryce, and George G. Wilson spoke on "Political Theory and National Administration" Willoughby all but excludes teleological or ideal political theory from the realm of political science. He said:

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91. Willoughby, "The Value of Political Philosophy," Political Science Quarterly, XV (1900), 75-95.

92. Ibid., p. 80.

93. Ibid., p. 81.

94. Ibid.

95. Ibid., p. 83.

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> The only meaning . . . which we may properly attach to the word, [philosophy] when used in the phrase "political philosophy" is that which it has when we speak of the philosophy of any science as that portion of it which is concerned with the theoretical discussion of the essential characteristics of the material and phenomena with which such science has to deal. When we thus speak of a philosophy of a science as dealing with its theoretical principles, it is not to be understood, however, that it is therefore concerned with its hypothetical or undetermined part. A philosophy in this sense is theoretical only in the sense of being abstract, that is, as dealing with generalizations rather than with particulars, and as predicating essential and fundamental qualities rather than accidental or unessential characteristics.[96]

In another place he asserted that political theory does not have as one of its tasks the formulation of general principles for the guidance of practical politics, for this belongs to the "art of politics" and not to political science.[97] It is invaluable as a university study, however, for it provides the student with a precise terminology, trains students to differentiate between form and substance, it aids in the interpretation of history, helps the student to understand present politics, and provides "pure intellectual delight."[98] It is difficult to see how a political theory which rightly sets out to determine the legitimate sphere of political authority should be powerless to formulate general principles for the guidance of practical politics. In fairness to Willoughby it must be said that his treatment of political theory in his serious treatises on ethical political thought is far more consistent than his ideas in these articles on the subject, for he consistently writes about matters that are not gleaned

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96. Willoughby, "Political Philosophy," Congress of Arts and Science, Universal Exposition. Edited by Howard J. Rogers, St. Louis, 1904, VII, 309-10.

97. Willoughby, "The Value of Political Philosophy," Political Science Quarterly, XV (1900), p. 83.

98. Ibid., pp. 87-95.

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from "real" political life via analytical inquiry. Indeed, the state itself, its personality, and its sovereignty are concepts and concepts only.

Brief mention might also be made of the definitions of two political scientists in the pre-World War I era, James W. Garner of the University of Illinois and Raymond G. Gettell of Amherst. Both produced in 1910 books with identical titles, Introduction to Political Science, intended as texts in the introductory course in political science. Garner presents the traditional Germanic definition of political science as Staatswissenschaft or a study of the state. He says political science "begins and ends with the state."[99] It includes, he says—

> . . . an investigation of the nature of the state as the highest political agency for the realization of the common ends of society and the formulation of fundamental principles of state life; second, an inquiry into the nature, history, and forms of political institutions; and third, a deduction therefrom, so far as possible, of the laws of political growth and development.[100]

Gettell defined political science as the "science of the state."[101] It includes, he asserted—

> . . . a historical survey of the origin of the state, tracing the beginnings of political life as they emerged from earlier social forms. It considers, also, the development of the state as it evolved from simple to complex, from the loosely organized tribal horde to the modern state with its highly specialized government. Such a study must include not only the actual historic evolution of the state, but also the development of political ideas and theories, since they powerfully influenced state development, especially after man began consciously to direct and modify what was at first largely unconscious growth. Political science must also analyze the fundamental nature of the state, its organization, its relation to the indivi-

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99. Garner, Introduction to Political Science, New York, 1910, p. 15.

100. Ibid.

101. Gettell, Introduction to Political Science, Boston, 1910, p. 3.

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duals that compose it, and its relation to other states. In addition, it must describe modern states as they actually exist and must compare and classify their governments. Finally, political science deals, to a certain degree, with what the state ought to be, with the ultimate ends of the state and the proper functions of its government.[102]

He then sums up: "It is thus a historical investigation of what the state has been, an analytical study of what the state is, and a politico-ethical discussion of what the state should be."[103]

Getting back to specific course offerings in the leading universities, which may be said to be the acid test of what political scientists thought the province of political science to be, one finds by 1916 a number of trends had set in. No longer were university presidents forced to await the return of Herrn Doktoren from the universities on the Continent, but were able to recruit their faculties from American graduate schools. The curriculum offering became more specialized as university enrollment increased, and there was a tendency to utilize new approaches to the study of public matters, without abandoning the traditional constitutional, legalistic, and historical methods altogether. A number of professors initiated such courses as "party government," "political institutions," "political problems," and "international politics." There was decidedly more concern with practical government, or government as it actually operates, than ever before. The comparative methods became increasingly popular, with perhaps the University of Chicago in the forefront. State and local government, especially the municipality, were studied, and administration, national, state, municipal, and even international, came under the scientific scruti-

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102. Ibid., pp. 3-4.

103. Ibid., p. 4.

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ny of scholars, prompted in part by the poineer work of Professor Goodnow of Columbia. One of the more singular developments was the inclusion of courses on colonies, dependencies, colonial administration, and the like, brought on, no doubt, by the American acquisition of the Philippines and Hawaii at the turn of the century.

Despite these "tendencies" it was the traditional legalistic approach in political science that remained dominant, with the historical a close second. The legacy of Burgess at Columbia, Willoughby's concentration on constitutional and legal questions at Johns Hopkins, Baldwin's influence at Yale, Wilson's at Princeton, Parkinson's at Wisconsin, among others, tended to retain a close tie with law. It is not insignificant that Burgess, Willoughby, Jessee Reeves, Paul S. Reinsch, Charles McIlwain, Woolsey, Goodnow, Wilson, Lowell, and W. B. Munro, either obtained LL. B.'s or, as in Willoughby's case, read law and passed state bar examinations. Indeed, some of these individuals at one time or another practiced law.

Course offerings between 1904 and 1916, then, underwent significant alterations, the general tendency being less emphasis upon legal and constitutional subjects, and more on international relations and diplomacy, state and municipal governments, political parties, and administration. If one considered, for example, only those courses that were listed in catalogues in 1904 but were not listed in 1916 one would discover that by far the largest category would be the field of public law. Taking Columbia as an example, with the retirement of Burgess in 1912 and the appointment of Goodnow as President of Johns Hopkins in 1914, their courses, almost entirely in the field of public law, were omitted from the 1916 listing. New courses at Columbia included Dunning's American political theory, and several courses offered by Charles A. Beard: Party government in the United

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States, principles of politics, seminar in contemporary politics, formation of the American constitutional system and the development of the American constitutional system.[104] New courses at Harvard in 1916 (compared with the course offerings of 1904) include: Municipal administration, state government, comparative administration, military administration, modern political theories, and history of political theories, executive power in central Europe, selected topics in municipal government, selected topics in state government, governments of the French Republic and German Empire, American institutions, federal government, and American constitutional law.[105]

At the American Political Science Association meeting at Buffalo in 1911 provision was made for the appointment of a Committee on Instruction in Government to "consider the methods of teaching and studying government now pursued in American schools, colleges, and universities, and to suggest means of enlarging and improving such instruction."[106] In its preliminary report the Committee found upon investigating 358 colleges and universities that the more commonly offered courses were:

American Government (national, state, and local)	168 institutions
International Law	151 institutions
General Political Science	141 institutions
Comparative Government	138 institutions
Municipal Government	91 institutions
Constitutional Law	63 institutions
Jurisprudence	55 institutions
Diplomacy	49 institutions

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104. Columbia University Bulletin of Information, History, Economics, and Public Law, Courses Offered by the Faculty of Political Science, Announcements, (1916-17), pp. 9-25.

105. Harvard University Catalogue, (1916-17), pp. 95-99.

106. "Report on Instruction in Political Science in Colleges and Universities," Proceedings of the American Political Science Association, X (1913), 249.

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Political Theories .... 43 institutions
Party Government .... 42 institutions[107]

Additional information gained by the Committee was that of the 358 institutions no fewer than 122 offered no instruction in political science at all, and that only thirty-eight departments of political science were in existence in the United States. They also found that political science in the vast majority of schools was combined with history, economics, sociology or some other subject.[108] The Committee lamented the fact that political science had no common meaning in the United States, but when time came for general recommendations to the discipline the Committee could do little more than to indicate that the following courses should comprise political science: American government (national, state, local, and municipal), general political science, comparative government, constitutional law, legislation and legislative procedure, administrative law and administrative methods, party government, colonial government, international law

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107. The remainder of the list includes: Commercial law (42 institutions), state and local government (40), national government (39), seminar (37), English government (34), legislative methods and procedure (23), colonial government (22), national, state, local, and municipal (20), Roman law (17), and state, local, and municipal (9). Ibid., p. 250.

108. Specifically, they found political science combined with:

History	89 institutions
Economics	22 institutions
Sociology	4 institutions
History and economics	48 institutions
Economics and sociology	45 institutions
Economics, history, and sociology	21 institutions
Philosophy	3 institutions
Economics, history, and philosophy	3 institutions
Economics, history, and English	4 institutions
Economics and English	1 institution
Latin	1 institution
History and director of athletics	2 institutions

Ibid.

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and diplomacy, elements of law, jurisprudence and judicial procedure, political theories, constitutional history, and history of political literature.[109]

The War years saw little or no progress in political science programs in the leading universities. In many departments, indeed, course offerings were cut back because of the loss of faculty members to governmental service or because of the decline in student enrollment.[110] But if the discipline marked time during the War it certainly advanced full-step during the decade of the 1920's. This resulted, undoubtedly, from a general increase in university enrollment, an increased popularity of political science courses, and to a continuing departmentalization which allowed freedom to expand course offerings. The number of Ph. D.'s conferred in political science increased sharply. During the 1890's there were slightly more than three hundred doctorates[111] conferred in the social sciences and history, of which probably no more than a score were in what would now be recognized as political science. By way of contrast, at Johns Hopkins alone twenty-

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109. *Ibid.*, p. 255. Other recommendations the Committee made are: Courses in political science be separated from others and that at least one instructor give full-time to its instruction, that a full year's course in American government be given as the basic undergraduate course, that comparative government be broadened to include self-governing colonies, South American republics, and important Asiatic nations, less attention be given to governmental structure and legislation and more attention to administrative methods and law enforcement, students be encouraged to prepare reports and surveys on actual political conditions, and departments of political science advise governmental officials. *Ibid.*, pp. 256-66.

110. At Columbia, for example, the offering was reduced from twenty-nine courses in 1916 to seventeen in 1920, and at Illinois the offering was reduced from twenty-six to nineteen.

111. *Annals of the American Academy of Political and Social Science*, vols. I (July, 1890 to June, 1891) to XIV (July, 1899 to December, 1899).

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seven doctorates in political science were conferred in the 1920's,[112] at Harvard likewise there were twenty-seven,[113] at Chicago, twenty-six,[114] at Wisconsin, approximately twenty,[115] at Illinois, nineteen,[116] and at Princeton, twelve.[117]

Political science faculties at the leading universities grew rapidly, increasing in some instances by more than one-hundred per cent., as for example, at Columbia. By the same token, course offerings in some cases doubled, and became more and more specialized. Not unnaturally, after the War the interest in international affairs increased measurably. For example, in the general field of international law and relations Wisconsin offered seven courses in 1916 and fourteen in 1930.[118] At Harvard the number of courses in this field increased from three to nine during those same years.[119] At California the increase was from one course in 1916 to eleven in 1930.[120] Such courses as studies in problems before the League of Nations (James T. Shotwell at Columbia), nationalism (Rupert Emerson at Harvard), Far Eastern politics (Frederic A. Ogg at Wisconsin), problems of the Pacific area (N.

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112. _Circulars_, (1920-30).

113. _Harvard University Catalogues_, (1920-30).

114. _University of Chicago Annual Registers_, (1920-30).

115. _The University of Wisconsin Catalogues_, (1920-30).

116. _The University of Illinois Annual Register_, (1920-30).

117. _Catalogues of Princeton University_, (1920-30).

118. _Catalogue_, (1916-17), (1930-31).

119. _Catalogue_, (1916-17), (1930-31).

120. _Register_, (1916-17), (1930-31).

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Wing Mah at California), the cause of war (Quincy Wright at Chicago), are symptomatic of this trend toward more specialized study of international relations. More attention was devoted to political theory than ever before, but it was largely a descriptive history of political thought rather than the earlier "theory of the state." For example, at Illinois the older course, nature of the state, was replaced in the 1920's by history of political theories. The principal texts used were Dunning's works on the history of political theories or Merriam's works on American political theory, both of which are largely descriptive historical works.[121] There was also increased emphasis on public administration, political parties, comparative government, legislation, and some increase in the study of non-municipal local government. Roman law and jurisprudence declined somewhat as did administrative law. Constitutional law, on the other hand, received new emphasis under the leadership of Corwin at Princeton and Cushman at Cornell.

One of the more interesting developments of the decade was the introduction of a course at the University of Chicago, non-rational types of political action, by Professor Harold Lasswell and the rather intensive studies there of political parties, elections, and voting behavior under Merriam, Harold F. Gosnell, and visiting professor Robert Michels. A few political scientists began to see in this decade the importance of psychology to political science, as well as sociology and other "related" disciplines.[122]

During the 1920's political scientists continued to examine the proper domain of the discipline, but less and less authoritatively. They seemed to

121. Charles E. Merriam, _A History of American Political Theories_, New York, 1903; and _American Political Ideas_, New York, 1920.

122. Merriam, "The Present State of the Study of Politics," _The American Political Science Review_, XV (1921), 173-85.

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be less concerned with drafting a final definition of political science than with exploring the possibilities of a broader and more inclusive relationship with allied disciplines. The realization that the health of political science depends upon the well-being of other social sciences led many scholars to seek interdisciplinary studies. The Social Science Research Council was established early in the decade to help accomplish this goal. Moreover, as more and more political scientists broke with the traditional legalistic, formal, and descriptive past they became more and more concerned with methodology. One might even suggest that many of them were obsessed with the subject of method to be utilized by the discipline, the general consensus of the innovators being that political science should emulate the physical sciences and therefore become more "realistic." Indeed, there was a general feeling of embarrassment that the physical sciences had forged ahead while political science had progressed little if at all.[123]

Charles E. Merriam, one of the leaders of the group that wanted to abandon the traditional approach, recommended less formal study and more attention to "political behavior."[124] He emphasized the relation between politics and statistics, and saw the need for greater collaboration among the social scientists. He urged an integration of all the social sciences, saying, "one of the great tragedies of our age is the high specialization of knowledge and the lack of unity in central wisdom."[125] He felt that politi-

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123. See, for example, W. B. Munro's presidential address, "Physics and Politics--An Old Analogy Revised," The American Political Science Review, XXII (1928), 1-11.

124. Merriam, "Progress in Political Research," The American Political Science Review, XX (1926), 7.

125. Ibid., p. 12.

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cal science was far behind other disciplines in the collection and classification of material, and he offered these suggestions to the discipline:

> 1. More adequate equipment for the collection and analysis of political material.
> 2. More adequate organization of the political prudence of our profession.
> 3. Broader use of instruments of observation in statistics and of the analytical technique and results of psychology; and closer regard to and relations with the disciplines of geography, ethnology, sociology, and social psychology.
> 4. More adequate organization of our technical resources, and its coordination with other and closely allied fields of inquiry.[126]

The concentration on methodology is very well illustrated by a series of conferences held beginning in 1923 with the blessings of the American Political Science Association. The statement of the Chairman of this National Conference on the Science of Politics will illustrate:

> It is the function of political science to provide [the] science of politics. Those in charge of public affairs rarely have the time and opportunity for political research. This throws the burden primarily upon the teacher and scholar. There is a considerable body of literature produced by this group, but most of it is historical and descriptive, and very little of it is analytical and statistical. Obviously there can be no real science of politics until we have developed a fact-finding technique that will produce an adequate basis for sound generalization. This raises problems of method and technique, both in finding the facts and in drawing conclusions. Until these problems are more vigorously and successfully attacked, political science cannot make any substantial contribution to the success of our political democracy.[127]

These conferences were held in 1923, 1924, and 1925, and in the following three years were held in connection with the annual meetings of the Association. Interestingly enough, there were no round table conferences on

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126. Merriam, "The Present State of the Study of Politics," The American Political Science Review, XV (1921), 184.

127. Arnold B. Hall, "Introduction to Reports of the National Conference on the Science of Politics," Ibid., XVIII (1924), 119-20.

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political theory, as such, but there was one on "psychology and political science."[128] The members, representing a substantial segment of the political science fraternity, seemed to regard political theory as something that must await the fullest collection of data, or what a recent writer calls the empirical—hypothetical method.[129] This is, of course, analogous to the method used in the physical sciences, so popular in the social sciences in this post-war era.

Not all political theory of the 1920's was of this nature, however, because the older tradition of the founding fathers continued, although it was definitely in the minority now. Willoughby, as is seen elsewhere, still employed the deductive method in his theoretical works, as did Garner and a few others. The historical-descriptive approach stimulated by Dunning earlier in the century dominated the approach to political theory writing. This should not be interpreted to mean that there was great and spirited discussion during this era on the relative merits of the three approaches to theory. There was, to be sure, a short but spirited discussion of pluralism versus the traditional analytical theory of the state. This is treated in another place in this work, for Willoughby rose to defend the analytical position, but he was virtually alone in his stand. A general survey of the discussion that went on among political scientists as to the domain of the discipline during the post-war decade would seem to point in the general direction of acceptance of Merriam's definition of political science as "the statistical and quantitative analysis of the phenomena of

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128. Others were: Civil service, public finance, legislation, political statistics, public law, nominating methods and international organization.

129. Thomas P. Jenkin, The Study of Political Theory, Garden City, New York, 1955, pp. 15-21.

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politics so that political action may be based as far as possible on scientific evidence rather than upon personal opinion and judgment."[130]

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130. L. L. Thurstone, "Round Table on Politics and Psychology," The American Political Science Review, XIX (1925), 110.

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Chapter III

INTELLECTUAL INFLUENCES ON WILLOUGHBY'S THOUGHT

It is indeed difficult to trace with exactness the intellectual influences that are brought to bear upon a particular scholar, and it is perhaps even more difficult to ascribe to a particular thought a particular source. It is relatively easy now, of course, to see Plato's influence upon Aristotle, Aristotle's influence upon Thomas Aquinas, or Hegel's influence upon Marx; however, tracing the sources of Willoughby's theories is beset with problems which undoubtedly do not exist in the same magnitude when dealing with those of better known political theorists. First of all, Willoughby is a recent figure who lived in times not sufficiently distant for unquestionably correct analysis, and secondly, there were cross-currents of theories in Willoughby's era to an extent that probably did not exist in previous eras. His was an era of change, when old theories were undergoing serious questioning and new theories were being offered as replacements.

Despite the difficulties, it will be useful to attempt to point to the more significant influences on Willoughby's thinking, for by so doing addi-

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tional light will be thrown on his own theories. An analysis of his works will show two primary sources of his theories and a number of secondary influences. The bulk of the material of this chapter is devoted to a consideration of the primary sources, that is, the idealistic ethical theories of T. H. Green, and the analytical jurisprudence of John Austin. Before going into these, however, the secondary influences should be considered, for they will not entail the detailed analysis that the others will require.

First of all, it should be noted that Willoughby's formal education occurred at a time when the university was beginning to replace the traditional college; the scientific method was beginning to replace the philosophical; the Germanic ideals of education were beginnig to replace the traditional English; and nationalistic ideals were paramount over particularistic ones. For Willoughby personally this meant less emphasis on classical Greek and Latin, more emphasis on research and writing, the seminar method of instruction, scientific analysis rather than philosophical speculation, and a national as opposed to a sectional view of American politics.

Two of Willoughby's principal professors were German trained, and the other was a Johns Hopkins Ph. D. thoroughly schooled in the German method. Herbert B. Adams studied at Heidelberg under Treitschke and Bluntschli, and brought back to Johns Hopkins the seminar method of study, in which he attempted to emulate the methods of the physical sciences in historical studies. Richard T. Ely also studied at Heidelberg, receiving his doctorate in 1879 from that institution. John Franklin Jameson received his doctorate from Johns Hopkins in 1882. It was probably Adams who exerted the most influence upon Willoughby. He directed his dissertation, and until 1902 was the chairman of the History Department, in which Willoughby was employed. To be sure, none of these scholars was a political theorist, although

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it is likely that Bluntschli's ideas on the state were brought to Willoughby's attention by Adams, and Willoughby's first courses on political philosophy were based upon Bluntschli's _Theory of the State_. Although Willoughby later rejected some of Bluntschli's ideas, such as the organic theory of the state, he did retain the rather mystical concept of the state which Bluntschli and other German scholars expounded; as for example, the theory that holds the state to be something more than the sum total of individuals who are its parts, it has a personality and a will of its own, and liberty is something willed by the state and not innate in man or nature.

Willoughby's colleagues both at Johns Hopkins and other universities, such as Frank Goodnow, A. Lawrence Lowell, John W. Burgess, W. A. Dunning, Jacob Hollander, John H. Latane, and John Martin Vincent, were products of this new university spirit to a remarkable degree inspired by German university models. Specialized study, systematic thoroughness, and a professional pride in their discipline characterized the attitudes of these scholars.

Ranging more widely, however, one can see in Willoughby's political and juristic theories the influence of Georg Jellinek, John Marshall, Thomas Hobbes, Jeremy Bentham, Jean Jacques Rousseau, Immanuel Kant, and Georg Hegel. Georg Jellinek's concept of a legally omnipotent state, the only limitation on its authority being that of "auto-limitation;" the nationalism of Chief Justice Marshall, who never wrote a decision with which Willoughby disagreed; the separation of law and morals that characterize the works of Hobbes and Bentham (who are precusors of Austin); the mystical "general will" of Rousseau; the idealism of Kant, and the nationalism of Hegel are all to be found at least in minature in Willoughby's theories. With some exceptions he quotes the works of these writers with approval,

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although in fairness to Willoughby some of these exceptions are significant.

Willoughby was an avid reader (a student recalls that his bibliography for a single lecture would often include as many as twenty substantial works) who drew from many sources in constructing his theory. He cannot with justice be termed a Kantian, an Hegelian, an Aristotelian, a Rousseauian, a Hobbesian, or any such classification that would tend to be confining. He sipped of some and drank deeply of others, but he never swallowed whole any man's complete theory. In this sense he was an eclectic, selecting that portion of a theory that seemed to him true and rejecting all else. In some instances, as shall be revealed in later chapters, this made for inconsistency and contradiction in his thought. In any event what emerged was distinctly Willoughbian in the sense that for the first time these ideas were assembled and presented in a single form.

The nearest that Willoughby came to ascribing to the theories of single writers was his acceptance of the ethical theories of Thomas Hill Green and the juristic theories of John Austin, but even here it is not total acceptance, but judicious selection. The purpose of the remainder of this chapter is briefly to summarize these two trains of thought so that Willoughby's theories will have a philosophical setting. Although the final appraisal of Willoughby's thought will be delayed until the concluding chapter there will be at least a tentative critique of this philosophical influence on his thought at the conclusion of the present chapter.

Thomas Hill Green's ethical thought is found essentially in his *Prolegomena to Ethics*,[1] and his political theories are found in the *Works of*

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1. Edited by A. C. Bradley, Oxford at the Clarendon Press, 1884.

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Thomas Hill Green.[2] Green[3] was born April 7, 1836, in the West Riding of Yorkshire in the village of Birkin. His father, Valentine Green, was rector there. Green was educated at Rugby, and at Balliol College which he entered in 1855. In 1860 he was appointed to lecture at Balliol and was elected a fellow of the College, and in 1870 became a tutor at Oxford, teaching philosophy, specifically lecturing on ethics, logic, and metaphysics of Aristotle, on Plato, and the history of early Greek philosophy. R. L. Nettleship has this to say on this phase of Green's endeavors:

> The theory of life which found its final expression in Aristotle appealed to him on its own merits, because it was based substantially upon the same principles as his own; the principle that the higher or rational nature in man is that in which the impulse to knowledge and the impulse to society have their common root; that this is what makes him most truly man and most like God; and that to promote the growth of this nature is the highest service that he can render his fellow-men.[4]

Despite his interest in Greek philosophy, Nettleship says, "it was in the exposition and criticism of the English philosophy of the seventeenth and eighteenth centuries that he made his chief and most characteristic contribution to the cause of philosophical education, as he conceived it."[5] In July, 1871, Green married Charlotte Symonds, and there were no children of this union. In 1878 he obtained the position of the Whyte's Professor-

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2. This is a three-volume work, and specifically his political ideas are found in volume II, "Principles of Political Obligation," pp. 335-553; volume III, "Four Lectures on the English Commonwealth," pp. 277-364; and also in volume III, "Liberal Legislation and Freedom of Contract," pp. 365-386. This Works bears the place and date of publication of New York, 1906 and is edited by R. L. Nettleship.

3. The biographical material here is taken from Nettleship, "Memoir," Works, III, xi-clxi.

4. Ibid., p. lxxi.

5. Ibid., p. lxxii.

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ship of Moral Philosophy at Oxford University, and in the following year delivered his lectures on "The Principles of Political Obligation," with which the student of political theory is most interested. Green died March 26, 1882, at the relative young age, even for that day, of forty-six.

In his "Lectures on the Principles of Political Obligation" Green sets out to, as he says, "consider the moral function or object served by law, or by the system of rights and obligations which the state enforces, and in so doing to discover the true ground or justification for obedience to law."[6] This "true ground" was not, Green believed, to be found in a contract entered into by individuals, the fallacy of such a theory being illustrated, he believed, in Spinoza's thinking. On this he elaborates:

> The cardinal error of Spinoza's 'Politic' is the admission of the possibility of a right in the individual apart from life in society, apart from the recognition by members of a society of a correlative claim upon and duty to each other, as all interested in one and the same good. The error was the error of his time, but with Spinoza it was confirmed by his rejection of final causes. The true conception of 'right' depends on the conception of the individual as being what he really is in virtue of a function which he has to fulfill relative to a certain end, that end being the common wellbeing of a society.[7]

Another contract writer that failed in the attempt to tie political obligation to a contract was Hobbes, having dealt more, says Green, in fiction than in fact. Specifically on Hobbes, Green says:

> Not only is the supposition of the devolution of wills or powers on a sovereign by a covenant historically a fiction (about that no more need be said); the notion of an obligation to observe this covenant, as distinct from a compulsion, is inconsistent with the supposition that there is no right other than power prior to the act by which the sovereign power is

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6. Green, Works, II, 335.

7. Ibid., p. 362.

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established. If there is no such right antecedent to the establishment of the sovereign power, neither can there be any after its establishment except in the sense of a power on the part of individuals which the sovereign power enables them to exercise.[8]

Likewise, Green disapproves of Locke's theory of political obligation, basing it as he does on a contract. With particular reference to Locke's right of revolution, Green says:

> If the authority of any government—its claim on our obedience—is held to be derived not from an original covenant, or from any covenant, but from the function which it serves in maintaining those conditions of freedom which are conditions of the moral life, then no act of the people in revocation of a prior act need be reckoned necessary to justify its dissolution. If it ceases to serve this function, it loses its claim on our obedience.[9]

Green also feels that Rousseau fails to prove that political obligation as based on consent is valid. Although he admits that Rousseau is more consistent than others who advance this theory, "his result," Green says, "shows the hopelessness of the attempt. To the consistency of his theory he sacrifices every claim to right on the part of any state except one in which the whole body of citizens directly legislates, i. e. on the part of nearly all states then or now in existence; . . . ."[10] Furthermore, Green feels that Rousseau, more than any other theorist—

> . . . gave that cast to the doctrine of the origin of political obligation in contract, in which it best lends itself to the assertion of rights apart from duties on the part of individuals, in opposition to the counter fallacy which claims rights for the state irrespective of its fulfillment of its function as securing the rights of individuals.[11]

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8. Ibid., p. 369.

9. Ibid., p. 384.

10. Ibid., p. 396.

11. Ibid., p. 374.

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Green finds that all the contract writers—Hooker, Grotius, Hobbes, Locke, Rousseau, and Spinoza—though they may differ in some particulars, are all in agreement on certain basic assumptions: Men first live in a state of nature which is governed by the law of nature; that in this state of nature all men are somehow free and equal; because of many inconveniences they contract with each other to establish a government, a covenant which they are obliged by the law of nature to observe; and out of this covenant the obligation to obey the powers that be arises.[12] The contract theory held commonly by these writers, Green says, is "so full of ambiguities that it lends itself to opposite applications."[13] Summing up his objections to their theories, Green says:

> Looking back on the political theories which we have discussed we may see that they all start with putting the question to be dealt with in the same way, and that their errors are very much due to the way in which they put it. They make no inquiry into the development of society and of man through society. They take no account of other forms of community than that regulated by a supreme coercive power, either in the way of investigating their historical origin and connection, or of considering the ideas and states of mind which they imply or which render them possible. They leave out of sight the process by which men have been clothed with rights and duties, and with senses of right and duty, which are neither natural nor derived from a sovereign power. They look only to the supreme coercive power on the one side and to individuals, to whom natural rights are ascribed, on the other, and ask what is the nature and origin of the right of that supreme coercive power as against these natural rights of individuals. The question so put can only be answered by some device for representing the individuals governed as consenting parties to the exercise of government over them. This they no doubt are so long as the government is exercised in a way corresponding to their several wishes; but, so long as this is the case, there is no interference with their 'natural liberty' to do as they like. It is only when this liberty is interfered with, that any occasion arises for an explanation of the compatibility of the sovereign's rights with the natural right of the individual; and it is just then that the explanation that the right of the sovereign is founded on consent, fails.[14]

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12. Ibid., pp. 374-75.

13. Ibid., p. 375.

14. Ibid., p. 427.

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If these theories of contract are not the correct explanation of the principles of political obligation, then, what is the true theory? In answering this Green asserts that will, not force, is the basis of the state. By will he means "the capacity in a man of being determined to action by the idea of a possible satisfaction of himself."[15] Green says that will and reason together constitute the condition of a moral life. By reason Green means "the capacity in a man of conceiving the perfection of his nature as an object to be attained by action."[16] He says that the origin of all morality is found in reason, that is, "the idea of a possible self-perfection to be attained by the moral agent."[17] He continues:

> The value then of the institutions of civil life lies in their operation as giving reality to these capacities of will and reason, and enabling them to be really exercised. In their general effect, apart from particular aberrations, they render it possible for a man to be freely determined by the idea of a possible satisfaction of himself, instead of being driven this way and that by external forces, and thus they give reality to the capacity called will; and they enable him to realize his reason, i. e. his idea of self-perfection, by acting as a member of a social organization in which each contributes to the better-being of all the rest. So far as they do in fact thus operate they are morally justified, and may be said to correspond to the "law of nature," the _jus naturae_, according to the only sense in which that phase can be intelligently used.[18]

Green feels, then, that man is moral insofar as he is capable of conceiving of, as he puts it, "an ideal unattained condition of himself, as an absolute end." Because man is a moral agent he possesses rights, and

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15. _Ibid._, p. 337.

16. _Ibid._

17. _Ibid._

18. _Ibid._, pp. 338-39.

19. _Ibid._, p. 350.

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rights are powers possessed by one which are recognized by others as a means "to that ideal good of themselves which they alike conceive; and the possessor of the power comes to regard it as a right through consciousness of its being thus recognized as contributory to a good in which he too is interested."[20] Green concludes that a person has rights only as a member of society, and moreover, it must be a type of society in which "some common good is recognized by the members of the society as their own ideal good, as that which should be for each of them."[21] Moral capacity, Green continues, "implies a consciousness on the part of the subject of the capacity that its realization is an end desirable in itself, and the rights are the condition of realizing it. Only through the possession of rights can the power of the individual freely to make a common good his own have reality given to it."[22]

It is clear to Green that without the existence of society man could not be a moral agent. Life is inconceivable outside the state, at least any life that is meaningful to man. On this he says:

> To ask why I am to submit to the power of the state, is to ask why I am to allow my life to be regulated by that complex of institutions without which I literally should not have a life to call my own, nor should be able to ask for a justification of what I am called on to do. For that I may have a life which I can call my own, I must not only be conscious of myself and of ends which I present to myself as mine; but I must be able to reckon on a certain freedom of action and acquisition for the attainment of those ends, and this can only be secured through common recognition of this freedom on the part of each by members of a society, as being for a common good.[23]

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20. Ibid.

21. Ibid.

22. Ibid., p. 351.

23. Ibid., p. 428.

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If these conditions are not fulfilled, Green asserts, "the very consciousness of having ends of his own and a life which he can direct in a certain way, a life of which he can make something, would remain dormant in man."[24]

Green was first and foremost a moralist, and he conceived of morality in a social context, for, as he points out, ". . . only through a recognition by certain men of a common interest, and through the expression of that recognition in certain regulations of their dealings with each other, could morality originate, or any meaning be gained for such terms as 'ought' and 'right' and their equivalents."[25] On this he elaborates:

> Morality, in the first instance, is the observance of such regulations, and through a higher morality, the morality of the character governed by 'disinterested motives,' i. e. by interest in some form of human perfection, comes to differentiate itself from this primitive morality consisting in the observance of rules established for the common good, yet this outward morality is the presupposition of the higher morality. Morality and subjection thus have a common source, '<u>political</u> subjection' being distinguished from that of a slave, as a subjection which secures rights to a subject. That common source is the rational recognition by certain human beings—it may be merely by children of the same parent—of a common well-being which is their well-being, and which they conceive as their well-being whether at any moment any one of them is inclined to it or no, and the embodiment of that recognition in rules by which the inclinations of the individuals are restrained, and a corresponding freedom of action for the attainment of well-being of the whole is secured.[26]

The state exists to promote the idea of the common good, but Green readily admits that no state performs this function perfectly. Indeed, even the most informed publicists can not hope to know the common good in all its fullness, so it is hopeless to expect the common citizen to have full knowledge of it. However, both in the case of the informed and dispassionate

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24. <u>Ibid</u>.

25. <u>Ibid</u>., p. 430.

26. <u>Ibid</u>., pp. 430-31.

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publicist and the ordinary citizen this good that is recognized, though imperfectly, is the common good. Indeed, says Green, the average citizen instinctively realizes that his claim to rights is conditioned upon his recognizing a like claim in others.[27]

Green rejects the idea that force is the basis of the state. He repeats, "will, not force, is the basis of the state."[28] He grants that a state possesses sovereignty (and he accepts Austin's definition of sovereignty as being supreme coercive power) and this easily misleads men into thinking that force is the basis of the state. But Green contends that sovereignty is not naked coercive power, as such, but as he puts it, it is "supreme coercive power exercised in a certain way and for certain ends, that makes a state; viz. exercised according to law, written or customary, and for the maintenance of rights."[29]

Because man has rights only in a state he has no rights as against the state, according to Green. He says, ". . . so far as the laws anywhere or at any time in force fulfill the idea of a state, there can be no right to disobey them; or, . . . there can be no right to disobey the law of the state except in the interest of the state . . . ."[30] Because actual states only imperfectly perform their roles as states, ideally speaking, there are conceivable instances in which disobedience is warranted. If the laws of the state are inconsistent with the true end of the state "as the sustainer

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27. Ibid., p. 435.

28. Ibid., p. 442.

29. Ibid.

30. Ibid., p. 453.

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and harmonizer of social relations" then disobedience is right. But the citizen who disobeys must be able to show that such disobedience is in the public interest.[31] The burden of proof is with the individual to show how disobedience would accrue to the best interests of the common good, but as a general rule, he says, ". . . even bad laws laws representing the interests of classes or individuals as opposed to those of the community, should be obeyed."[32]

Man's goal is an ethical one, and that is self-perfection. The state exists to help the individual realize that goal, or at least to approximate it. Ideally, the state will command only that action of individuals that will be in the common interest, as opposed to class interest or the interest of one or a few individuals. The state exists for the individual, but an individual who, by definition, is a social being. Man has no pre-existing rights that he by the dictates of natural law or right keeps upon entering society; but on the contrary, he has rights only because he is a member of that society. Thus, it is seen that Green broke with the thought of classical liberalism over the justification of political authority. Moreover, he broke with the classical liberals over the doctrine of laissez-faire.[33] Green viewed the state as a positive good rather than as a necessary evil, as did the classical liberals, and he saw justification in positive state action to aid the individual. The purpose of the state is to promote the self-realization of the individual, and this entails not just

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31. Ibid., p. 454.

32. Ibid., p. 456.

33. Green, "Liberal Legislation and Freedom of Contract," Works, III, 372.

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negative restraints on man's behavior, but removal of restrictions in the way of this realization. This means, for example, that the once sacred right of contract must give way to the common good if necessary, conditions of labor can be proscribed by the state, and other steps can be taken by the political authority to improve the living conditions of men. This regulation is not in itself good, Green concludes, but is merely a means to realize a justifiable goal—the betterment of mankind.

Green particularly set out to revise liberalism, or at least the utilitarian version of that body of thought, so that there would be a sense of community embodied in its doctrines. He viewed utilitarian liberalism as hedonistic and unresponsive to the needs of a modern world. Instead of the "negative freedom" of classical liberalism he substituted a "positive freedom," and this manifests itself in a view of the state that justifies a great deal more intervention in economic affairs. Indeed, this view of the state allows the state a far greater range of activity generally than classical liberalism. Green posits no inherent rights that man has prior to the state and which the state is bound to preserve and protect, but rather he finds rights to be a product of the state, something man receives from the society in which he lives. The state protects rights because it is in the common interest to do so. When it is in the common interest to restrict certain rights, as for example, the right to freely contract, the state can morally do so. Instead of being absolute rights become relative, that is, relative to man's capacity of self-realization. Whatever is necessary for this personal self-realization is a right which the individual possesses.

The extent to which Willoughby subscribes to this idealism of the Green school will be seen in detail in the chapters following, but it is not out of place here to anticipate this material by indicating that he agrees with

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Green's objections to the contract theory, the theory of natural law and rights, and subscribes to a concept of the Kulturstaat as opposed to the classical liberal Polizeistaat. Willoughby allows the state a much broader role in private affairs than, say, Locke did; or, perhaps putting the matter more exactly, his concept of what constitutes private affairs is restricted and his concept of what constitutes public affairs is expanded. Indeed, in his juristic thinking Willoughby's state assumes dimensions that even Green did not contemplate. Legally the state is omnipotent, says Willoughby. He did not derive this concept from Green, for Green could not accept sovereignty as unlimited legal authority.

It was to Austin principally that Willoughby looked for inspiration for his juristic thinking, and was undoubtedly one of the last of the analytical jurists in America. John Austin[34] was born in 1790 and died in 1859. He was the eldest son of a well-to-do Suffolk miller. After serving in the army he studied law, and was called to the Bar in 1818, after which he practiced law without great relish for seven years. In 1819 he married Sarah Taylor, and lived in London.

Austin was appointed Professor of Jurisprudence in the new University of London in 1826, after which appointment he prepared his lectures in Germany over a period of two years. He studied principally at Bonn, delving into the recently discovered Institutes of Gaius, the Pandects, and the works of Hugo, Thibaut, and Savigny. His lectures, which began in 1828, were well-received, being attended by some of the leading lights of the "Benthamite Circle," including John Stuart Mill. However, Austin resigned

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34. The biographical material is from H. L. A. Hart, "Introduction," Noonday Press edition of John Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, New York, 1954, pp. vii-xviii.

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in 1832 in bitter disappointment when the initial enthusiasm waned. In 1834 Austin repeated these lectures at the Inner Temple without notable success. Fortunately his friends were able to procure for him a few government posts: In 1833 he was appointed to the Criminal Law Commission, and in 1836 to the commission to advise on legal and constitutional reform in Malta. Austin lived abroad from 1838 to 1848 in Germany and France, supported largely by his wife who worked as a writer and translator. Returning to England in 1848 the Austins lived in Weybridge until his death in 1859.

Austin's published works include: The Province of Jurisprudence Determined (1832), A Plea for the Constitution (1859), and Lectures on Jurisprudence or the Philosophy of Positive Law (1863). The last one was actually a second edition of The Province plus supplementary lecture notes, assembled and reconstructed by his widow.

Austin achieved no lasting fame during his lifetime, and only upon the revival of interest in jurisprudence in England, occasioned by the publications of Sir Henry Maine, was Austin's work recognized. His general philosophy is that of the Benthamite utilitarians, although he departed from the strict tenets of that school in later life. For example, in his Plea for the Constitution he advocated government by property owners, distrusting the ability of the common folk to know their best interests—in striking contrast to the utilitarian dogma. His place in the great field of jurisprudence is as the founder of the English School of Analytical Jurisprudence which has had a notable influence upon the teaching of law in American colleges and universities, especially in the latter half of the nineteenth century. Although Willoughby does not depend upon Austin solely, he does lean heavily upon his theories of law and sovereignty, justifying a brief summary of the main tenets of Austin's thought on these subjects.

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T. H. Green remarked, "Austin is considered a master of precise definition."[35] His definition of law came to be commonly accepted by the analytical jurists. It is as follows: First, looked at generally, laws are classified into two groups—those that are commands, or "laws properly so called," and those that are not commands, or "laws improperly so called."[36] Laws that are commands, and properly so called, and laws that are not commands, and improperly so called, Austin divides into four classes: (1) Divine laws—or "laws which are set by God to his human creatures,"[37] (2) positive laws—or "laws which form the appropriate matter of general and particular jurisprudence,"[38] (3) positive morality, and (4) laws metaphorical or figurative. Austin contends that the first two are "laws properly so called," but that laws metaphorical are "laws improperly so called." On the other hand, positive morality or "positive moral rules" are further divided into those that are laws properly so called and laws improperly so called. Of the latter those "set or imposed by opinion" are not really laws, "for they are merely opinions or sentiments held or felt by men in regard to human conduct."[39] Thus, it would seem that at the outset Austin finds under the general term, "law", such classifications as Divine law, positive laws, and _some_ positive moral rules. All others, although they may be called laws, are not laws at all in the proper sense of the term.

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35. Green, _Works_, II, 399.

36. Austin, _The Province of Jurisprudence Determined_, p. 1.

37. _Ibid_.

38. _Ibid_.

39. _Ibid_.

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What is the common characteristic of these "laws" thus enumerated? What, in other words, is the essence of law? Austin says, "A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[40] The "essentials" of a law is that every law is a command, or rather "a species of commands."[41] On this Austin says:

> A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request.[42]

A law, then, according to Austin, is a type of command (not all commands are laws) in which an evil or pain can be inflicted in the event of noncompliance. This Austin calls a sanction, or as he puts it, ". . . the command or the duty is said to be _sanctioned_ or _enforced_ by the chance of incurring the evil."[43] By sanctions Austin says he does not mean rewards. He explains:

> If _you_ expressed a desire that _I_ should render a service, and if you proposed a reward as the motive or inducement to render it, _you_ would scarcely be said to _command_ the service, nor should _I_, in ordinary language, be _obliged_ to render it. In ordinary language, _you_ would _promise_ me a reward, on condition of my rendering the service, whilst _I_ might be _incited_ or _persuaded_ to render it by the hope of obtaining the reward.[44]

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40. _Ibid._, p. 10.

41. _Ibid._, p. 13.

42. _Ibid._, p. 14.

43. _Ibid._, p. 15.

44. _Ibid._, pp. 16-17.

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As to just what makes a particular command a law, Austin asserts:

> Now where it [command] obliges _generally_ to acts or forebearances of a class, a command is a law or rule. But when it obliges to a specific act or forebearance, or to acts or forebearances which it determines _specifically_ or _individually_, a command is occasional or particular . . . .[45]

and are not laws; furthermore, laws properly speaking, "proceed from _superiors_, and . . . bind or oblige _inferiors_."[46] By "superior" and "inferior" Austin says that he does not mean in rank, wealth, or virtue, "but, taken with the meaning wherein I here understand it, the term _superiority_ signifies _might_; the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[47]

The general proposition that laws are commands, Austin says, has three exceptions: (1) Acts on the part of legislatures which explain positive law. These are not commands, for they are merely acts of interpretation.[48] (2) Acts that repeal existing laws are not commands, but rather are revocations of commands.[49] (3) Certain "imperfect laws" such as those that do not have sanctions attached thereto, as for example, a law that declares certain acts a crime, but does not indicate punishment to be meted out in the event of disobedience.[50]

In addition to these three exceptions Austin finds that laws that are based on custom are not "a species of commands." On this he says, "at its origin, a custom is a rule of conduct which the governed observe spontane-

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45. _Ibid._, p. 19.

46. _Ibid._, p. 24.

47. _Ibid._

48. _Ibid._, p. 26.

49. _Ibid._, p. 27.

50. _Ibid._

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ously, as not in pursuance of a law set by a political superior."[51] And he continues, "the custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state."[52] Before such time this custom is merely a rule of positive morality.

What then is Austin's view of the proper province of jurisprudence—the science of law? As pointed out above "law" includes only Divine law, positive law, and some positive rules of morality, and the three classes of laws that are not commands. Yet, Austin holds that jurisprudence, the science of law, is concerned only with positive law. It does not concern itsself with Divine law or with positive morality. The science of jurisprudence is concerned only with those rules of conduct that are set by a political superior to an inferior, and are in the form of commands. The only exception to this is the three classes of laws that are not commands, and these, Austin feels, are relatively unimportant to the science of jurisprudence, and are the exceptions rather than the rule. But why not include within the science of jurisprudence the study of all law? Why single out only the positive law for systematic study? Why not include within the province of jurisprudence Divine law? After all, Austin grants that "Divine laws . . . are the ultimate test of human laws."[53] Moreover, they are issued by a superior to an inferior, for God is superior to man. They are commands which men must obey, or be subject to the visitation of evil; therefore, they are characterized by sanctions. In answer, Austin sets out to differentiate between "laws set by men to men" and "Divine laws." He says:

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51. *Ibid.*, p. 31 52. *Ibid.* 53. *Ibid.*, p. 34.

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(1) As distinguished from duties imposed by human laws, duties imposed by Divine laws may be called religious duties.
(2) As distinguished from violations of duties imposed by human laws, violations of religious duties are called sins.
(3) As distinguished from sanctions annexed to human laws, the sanctions annexed to the Divine laws may be called religious sanctions. They consist of evils, or pains, which we may suffer here or hereafter, by the immediate appointment of God, and as consequences of breaking his commandments.[54]

Moreover, Austin points out, "The science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness."[55] As this position is basic to the analytical jurist's theories of law it will be well to quote Austin at length here:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or not be conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume. Sir William Blackstone, for example, says in his 'Commentaries,' that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original . . . . Now to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals . . . . If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain.[56]

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54. Ibid., p. 34.

55. Ibid., p. 126.

56. Ibid., pp. 184-86.

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Jurisprudence, then, concerns itself with positive law and no other, the laws of God being excluded as too uncertain. Just what is this positive law that is the proper and the only subject of the science of jurisprudence? Austin says, positive law is "put or set by its individual or collective author, or it exists by the position or institution of its individual or collective author."[57] Positive laws eminate from a political superior to a political inferior, and the force of the law is the sanction tied thereto. Sanction is the evil or harm that can be meted out for failure to comply with the order. A law, then, is legal if it conforms to this test. A law is not a law because it meets the test of rightness, goodness, or an innate sense of justice; it need not meet the test of a higher moral standard to be binding. Yet, previously Austin said that the Divine law is the test of human law. How does this square with his statement that force or might is the basis of positive law? How does one consult Divine law to see if positive law is good or bad, right or wrong, for the good of society or detrimental to the best interests of society? Here, Austin uses the "theory of utility." He says:

> God designs the happiness of all his sentient creatures. Some human actions forward that benovolent purpose, or their tendencies are beneovlent or useful. Other human actions are adverse to that purpose, or their tendencies are mischievous or pernicious. The former, as promoting his purpose, God has enjoined. The latter, as opposed to his purpose, God has forbidden. He has given us the faculty of observing; of remembering; of reasoning; and, by duly applying these faculties, we may collect the tendencies of our actions. Knowing the tendencies of our actions, and knowing his benovolent purpose, we know his tacit commands.[58]

He continues:

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57. Ibid., p. 124.

58. Ibid., p. 37.

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> In so far as the laws of God are clearly and indisputably revealed, we are bound to guide our conduct by the plain meaning of their terms. In so far as they are not revealed, we must resort to another guide: namely, the probable effect of our conduct on that general happiness or good which is the object of the Divine Lawgiver in all his laws and commandments.[59]

Closely associated with Austin's definition of law, as being, as far as the science of jurisprudence is concerned, positive law, or law as it actually exists, is his definition of sovereignty which gained general acceptance among analytical jurists. He asserts:

> The essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.[60]

Sovereignty he defines in this manner:

> If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign, and the society (including the superior) is a society political and independent.[61]

This is the celebrated definition of sovereignty which entered into the literature of analytical jurisprudence, and which had such a remarkable effect upon juristic thinking in the latter half of the nineteenth century and the early twentieth century.

Sovereignty is supreme legal authority. It is the authority of a determinate human superior, the other members of the society being inferior

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59. *Ibid.*, pp. 43-44.

60. *Ibid.*, p. 193.

61. *Ibid.*, p. 194.

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and thus subject. The people are not sovereign, but rather a small portion thereof are thus to be so designated. Either sovereignty resides in a "single member of the whole" or in a limited number of persons, and, indeed, even in those societies whose governments are "popular" only a very few persons are actually sovereign. Sovereignty cannot be legally limited, for as Austin says, "supreme power limited by positive law, is a flat contradiction in terms."[62] There are no exceptions to this, he points out. However, he is willing to admit that "there are principles or maxims which the sovereign habitually observes, and which the bulk of society, or the bulk of its influential members, regard with feelings of approbation."[63] But these maxims sometimes are expressly adopted by the sovereign and thence become law, or more commonly, "they are not expressly adopted, but are simply imposed by opinions prevalent in the community. In either case the sovereign is bound to observe them by merely moral sanctions."[64] The sovereign has not been <u>legally</u> limited in either event.

Because sovereignty is incapable of legal limitation liberty or human rights are those matters which are "left or granted by a sovereign government to any of its own subjects; and, . . . since the power of the government is incapable of legal limitation, the government is legally free to abridge their political liberty, at its own pleasure or discretion."[65] However, says Austin, a government may be forced to observe certain liberties and rights because of the hindrance of positive morality, and "it is

62. <u>Ibid</u>., p. 254.

63. <u>Ibid</u>., p. 257.

64. <u>Ibid</u>.

65. <u>Ibid</u>., p. 268.

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bound by the laws of God, as known through the principle of utility, not to load them with legal duties which general utility condemns."[66]

This somewhat lengthy treatment of the theories of Green and Austin is justified, of course, only to the degree that Willoughby subscribes to them. It is clear that Willoughby does accept, with some refinement, Austin's theory of law and sovereignty. As we shall see later Willoughby, too, regards positive law as being the only "law" worthy of analysis by the scientific jurist. He, too, sees sovereignty as legally unlimited power over subjects. He, too, draws a line between law and morals as Bentham and Austin did early in the nineteenth century. The jurist, as jurist, does not concern himself with moral law, for, by definition, it is not positive law.

In his second major work on ethical political thought, Social Justice, (1900), Willoughby indicates in the preface that the ideas contained in the work are largely those of T. H. Green and the Oxford School of Idealism.[67] A few key quotations from this work will indicate that Willoughby accepted this idealism as his own: "The realization of one's ethical self is the general categorical imperative addressed to every one."[68] "The highest good . . . is a social one."[69] ". . . the individual is able to find his best self-realization only when he seeks his own good in the good of others and of society at large."[70] Like Green, Willoughby sees the individual as essentially a moral being whose rights (and he has rights only as a member of the state) derive from the state and not from a state of nature. Also like Green, Willoughby regards the state as a necessary good and not a nec-

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66. Ibid., p. 268. The italics are Austin's.

67. Willoughby, Social Justice, New York, 1900, p. viii.

68. Ibid., p. 21. 69. Ibid., p. 31. 70. Ibid.

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essary evil.

Can one accept the thoughts of Green and Austin without being inconsistent? The point at which conflict between these two theories is most likely, of course, is that of sovereignty. Although Green elevated the state from a necessary evil where it had been relegated by the classical liberals to a positive good, he was not willing to attribute to it unlimited legal competence as were the analytical jurists. On Austin's definition of sovereignty Green says—

> . . . the Austinians, having found their sovereign, are apt to regard it as a much more important institution than—if it is to be identified with a determinate person or persons—it really is; they are apt to suppose that the sovereign, with the coercive power (i. e. the power of operating on the fears of the subjects) which it exercises, is the real determinate of the habitual obedience of the people, at any rate of their habitual obedience in respect of those acts and forebearances which are prescribed by law. But, as we have seen, this is not the case. It then needs to be pointed out that if the sovereign power is to be understood in this fuller, less abstract sense, if we mean by it the real determinate of the habitual obedience of the people, we must look for its sources much more widely and deeply than the 'analytical jurists' do; that it can no longer be said to reside in a determinate person or persons, but in that impalpable congeries of the hopes and fears of a people, bound together by common interests and sympathy, which we call the general will.[71]

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71. Green, Works, II, 404.

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Chapter IV

THE ORIGIN AND NATURE OF THE STATE

Willoughby considers the origin of the state to be an important topic of study for political scientists. He deals with it at length in his An Examination of the Nature of the State (1896), and touches on the subject in The Political Theories of the Ancient World (1903), and The Fundamental Concepts of Public Law (1924). The search for the origin of the state is important to Willoughby not merely because "a study of origins is always an attractive one . . ."[1] but, more to the point, political scientists, he says, must consider ". . . the way in which it may reasonably be supposed to have been created, in order that it may be justified in the exercise of the authority that it wields."[2] The search for the origin of the state, then, is both an historical and a moral study. In thus dividing the study Willoughby accepts the method of J. K. Bluntschli, who in his The Theory of

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1. Willoughby, The Nature of the State, p. 18.

2. Ibid., p. 30.

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the State, treats of the origin of the state in terms of the "historical" and the "speculative or philosophical."[3]

Concerning the historical origin of the state, Willoughby, in his earliest work, finds the evidence too scanty to draw any definite conclusions. On this he says, "The fact is, that the first subjection of man to public authority, of some sort or other, was practically and necessarily coeval with the beginning of his social life, and this carries us back to periods of human development anterior to those that furnish historical records."[4] Despite this lack of evidence, however, Willoughby does give some consideration to the historical origin of the state and singles out the patriarchal theory for special attention. As advocated by Sir Henry Maine,[5] this theory holds that the state has "its origin in separate families, held together by the authority and protection of the eldest valid male ascendant."[6] The only political authority in this primitive state of man's existence was the patria potestas, and the only social unit was the family. With the growth of population, however, the families grew into clans, the clans into tribes, and, as a result of conquest and alliances, the tribes merged into nations. Correspondingly, political power shifted from the patria to the chief of the clan and from him to the king of the tribe or nation.[7] This

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3. J. K. Bluntschli, The Theory of the State, p. 259.

4. Willoughby, The Nature of the State, p. 19.

5. Actually, this theory antedates the writings of Maine, finding classical expression in Sir Robert Filmer's Observations Concerning the Originall of Government (1652), in which he utilizes the patriarchical theory to aid in his justification of the royal power.

6. Quoted in The Nature of the State, p. 19. In his earlier work Willoughby attributes this theory to Maine, but in his The Fundamental Concepts of Public Law, he points to both Maine and Herbert Spencer as supporters of the theory.

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theory of the historical origin of the state had gained rather wide acceptance, according to Willoughby, because of its "simplicity and apparent reasonableness,"[8] but he finds it unacceptable on two counts. First, the family and the state are fundamentally different institutions, and secondly, the functions of the two are necessarily different. He is willing to concede the importance of the family in primitive societies, that the family out of necessity "dictated to a very great extent political action, . . ." that ". . . the father's authority was utilized for the enforcement of most of the then rules of conduct, . . ." and that ". . . such authority of the father and the family organization suggested the establishment and manner of organization of the primitive State."[9] Conceding all this, Willoughby still does not find that it proves that the state arises out of the family, for he says, "In the family the location of authority is natural (i. e. in the father). In the State it is one of choice. Subordination is the principle of the family; equality that of the State."[10] Arguing that the functions of the state and the family are essentially different, Willoughby says:

> It is only by the necessarily primitive character of the patriarchal authority, and the extent to which the State in its early period of development recognized this power of the father, and utilized his authority for the obtaining of many of its aims, that countenance is given to the idea that the State developed from the family. So dissimiliar are the aims of the two institutions, that one could not have owed its origin to the other. The family never was and never can become a subject of public law. Its interests

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7. Willoughby, The Fundamental Concepts of Public Law, New York, 1924, p. 152.

8. Ibid.

9. Willoughby, The Nature of the State, p. 20.

10. Ibid.

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are necessarily private.[11]

Although in his The Nature of the State Willoughby concludes that the empirical evidence is too scanty for any definite conclusions as to the historical origin of the state, in his The Political Theories of the Ancient World and in his more recent The Fundamental Concepts of Public Law he finds that political authority did, indeed, originate in the tribe. On this he asserts:

> As regards the genesis of political as distinct from social authority over men, it would seem to be clear that its beginning is to be traced to the tribe, or to the clan in those cases in which the tribe was a product of the growth of a clan or of the union of two or more clans.[12]

Willoughby presents no empirical evidence that this is true, but arrives at this conclusion by reasoning in this fashion: Political authority could not have arisen out of the family, for the early family exhibited purely social characteristics, and not political ones. Membership was limited to specific determinate individuals; the "bond of union" was essentially temporary; and the members were not citizens but were "virtual slaves or chattels of the family's head, ..."[13] On the other hand, the tribe exhibited purely political characteristics. The chief ruled by right, that is, ". . . from the actual agreement or acquiescence of his subjects."[14] There were no absolute limits to the membership of the tribe; there were no limi-

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11. Ibid., pp. 20-21.
12. Willoughby, The Fundamental Concepts of Public Law, p. 156.
13. Ibid., p. 156.
14. Ibid., pp. 156-57.

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tations upon the duration of its existence. All citizens were equal; the tribe was "sovereign and self-sufficient."[15] Beginning with the simplest of governmental forms the tribe grew into the modern complex state:

> Beginning with a jurisdiction that extended little beyond that of direction in times of war, and judgment in a comparatively few matters in times of peace, the tribe had but to stretch out gradually its control, first by way of increase of its executive and judicial functions, and then, finally, by the exercise of direct legislative authority, in order to develop into the sovereign body-politic of today which practically monopolizes the legal right to employ physical coercion.[16]

Political philosophy need not concern itself so much with the history of the rise of states as with "the origin of the State from the rational standpoint."[17] The important question the political theorist is called upon to answer is not how, in fact, the state originated, but rather how the state might be thought to have originated so that the ethics of its commands can be justified. This is why, to Willoughby, the origin of the state is a moral question to be answered by the political theorist rather than the historian of political institutions. Therefore, he dismisses the subject of the historical origin of the state after only slight consideration, and passes on to a consideration of various ethical theories that have been advanced to explain the origin of the state. After a critical examination of several such theories, Willoughby then presents what he feels to be the "true origin of the State."[18]

First, he examines the natural or instinctive theory of the origin of

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15. Ibid., p. 157.

16. Ibid.

17. Willoughby, The Nature of the State, p. 30.

18. Ibid., pp. 119-41.

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the state. He points particularly to Aristotle and Bluntschli as supporters of this theory. Aristotle proclaimed man to be by nature a political animal, and "considered political authority almost as a metaphysical necessity arising from the social life of man, as existing in and of and for itself, and as determined by 'the very nature of things'."[19] Willoughby says further:

> It scarcely needs to be said that Aristotle makes this statement, not as a premise, but as a conclusion. As is well known, he holds that the real nature of a being is to be determined by the possible perfection to which that being can be brought. When, then, Aristotle says that man is, by nature, a political being, he means that his metaphysical and ethical speculations have led him to form an estimate of man's *summum bonumm* of his ideally best life, which, as a practical proposition, it is impossible for him to realize except in social and political association with others of his kind.[20]

As stated by Bluntschli this theory holds that the common cause of the rise of states is found ". . . in human nature, which besides its individual diversity has in it the tendencies of community and unity."[21] These tendencies are "the inward impulse to Society (Statstrieb)."[22] This social impulse is at first subconscious, but eventually and gradually reveals itself, and there is formed "a consciousness and a will of the State" first among the leaders, and then among the higher and then among the lower classes.[23]

Willoughby agrees with Aristotle that man is by nature political, but,

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19. *Ibid.*, p. 33.

20. Willoughby, *The Ethical Basis of Political Authority*, New York, 1930, p. 25.

21. Bluntschli, *The Theory of the State*, p. 300.

22. *Ibid.*

23. *Ibid.*, pp. 300-301.

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he asserts, though this be true it is not sufficient for the political theorist. Indeed, he says, this really evades rather than solves the problem. The state is natural "in the sense that everything that exists is natural."[24] However, the important point that is overlooked in this type of thinking, in Willoughby's view, is that human beings exercise political authority. Political theorists must take into consideration the empirical manifestations of political power and "the manner in which its control over the individual may be harmonized with the latter's natural freedom."[25] This "natural freedom" signifies that man is "naturally gifted with powers of self-determination of action."[26] Indeed, Willoughby says, it is this "will" which distinguishes man, making him a person rather than a thing.

Willoughby is willing to accept Bluntschli's explanation as the <u>cause</u> of the state, but not as the <u>origin</u> of the state. He says:

> Here we have indeed the <u>cause</u> of the State, that is to say, the natural elements in human nature that urge its establishment and maintenance. But this is not that for which we are seeking. What we wish to discover is the justification of political authority as humanly exercised, and to harmonize it with predicated personal freedom.[27]

Furthermore, Willoughby asserts, "to speak of the State as 'naturally' created, makes of it an entity independent of man, uncreated by him, and, as such, not requiring justification in his eyes."[28] On the natural or instinctive theory Willoughby concludes:

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24. Willoughby, <u>The Nature of the State</u>, p. 34.

25. <u>Ibid.</u>

26. <u>Ibid.</u>, p. 32.

27. <u>Ibid.</u>, p. 33.

28. <u>Ibid.</u>

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While it is undoubtedly true that the communal life of man does necessarily give rise to mutual interests, which require for their realization the recognition of mutual rights and obligations, yet this does not of itself create a magistry nor organize a governmental machinery such as is necessary for the creation of a State. The establishment of these instruments, together with the determination of the contents of their powers, requires conscious human action.[29]

Willoughby gives brief attention to the theory that conceives of the state as a natural organism and sees it as closely allied to the natural or instinctive theory. He identifies this theory with Herbert Spencer and with Bluntschli. Willoughby finds that Spencer comes quite close to holding that political society is a biological organism.[30] Spencer's summation of reasons for regarding society as an organism are:

It undergoes continous growth. As it grows, its parts become unlike: it exhibits increase of structure. The unlike parts simultaneously assume activities of unlike kinds. These activities are not simply different, but their differences are so related as to make one another possible. The reciprocal aid thus given causes mutual dependence of the parts. And the mutually-dependent parts, living by and for one another, form an aggregate constituted on the same general principle as is an individual organism . . . every organism of appreciable size is a society; . . . the lives of the units continue for some time if the life of the aggregate is suddenly arrested, while if the aggregate is not destroyed by violence, its life greatly exceeds in duration the lives of its units. Though the two are contrasted as respectively discrete and concrete, and though there results a difference in the ends subserved by the organization; the required mutual influences of the parts, not transmissible in a direct way, being, in a society, transmitted in an indirect way.[31]

Despite the fact that Spencer goes on in subsequent chapters to point out the similiarities between organisms and society, as for example when he says, "Organs in animals and organs in societies have internal arrangements

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29. Ibid., p. 34.

30. Willoughby, The Ethical Basis of Political Authority, p. 27.

31. Herbert Spencer, The Principles of Sociology, New York, 1876, I, 462.

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framed on the same principle,"[32] and proceeds to prove this with various data, Willoughby insists that Spencer is not identifying biological and social organisms, but is merely pointing out that they are analogous.

Bluntschli, on the other hand, denies that the state is a biological organism. He says, "The State indeed is not a product of nature, and therefore it is not a natural organism; it is indirectly the work of man . . . . In calling the State an organism we are not thinking of the activities by which plants and animals seek, consume and assimilate nourishment, and reproduce their species."[33] He denies that the state stands on the same grade with "lower organisms of plants and animals, but is of a higher kind."[34] The state is a moral and spiritual organism, says Bluntschli, ". . . a great body which is capable of taking up into itself the feelings and thoughts of the nation, of uttering them in laws, and realizing them in acts; . . . ."[35] The state has ". . . a personality which, having spirit and body, possesses and manifests a will of its own."[36] Despite Bluntschli's denial that the state is a natural organism Willoughby finds he does indeed ascribe to the state such a character when he pronounces the state to be masculine and the church feminine.[37]

Willoughby's chief concern with Spencer and Bluntschli at this point is not whether Spencer in fact identifies natural organisms with societal

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32. Ibid., p. 477.

33. Bluntschli, The Theory of the State, p. 19.

34. Ibid., p. 22.

35. Ibid.

36. Ibid.

37. Willoughby, The Ethical Basis of Political Authority, p. 29.

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organisms or whether Bluntschli in fact sees the state as a natural organism (though this conclusion can easily be drawn from their statements), but rather with denying that the state is an organism. He admits that the analogy is striking, but that "identity cannot be affirmed."[38] Willoughby's bases for this denial are: In a natural organism "the living being is an aggregate whose parts exist solely to support and continue the life of the whole,"[39] while in a state the individual has a "continually increasing sphere of free undetermined action."[40] Also, "all natural organisms derive their life from pre-existing living beings; while . . . the State does not, and cannot, obtain its vitality from other political powers."[41] Most important, "is the fact that in the [natural] organism, the laws of development, though acting from within, are blindly and intuitively followed; while the growth of the State, though also from within, is, to a considerable extent at least, consciously felt, and the form of its organization self-directed."[42] Finally, "the State, strictly considered, is essentially psychic rather than physical. It represents a will rather than a physical being; and thus, considered apart from the governmental machinery through which it acts, and the individuals organized under it, only psychological qualities are attributable to it."[43]

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38. Willoughby, The Nature of the State, p. 35.

39. Ibid., p. 36.

40. Ibid.

41. Ibid., pp. 36-37.

42. Ibid., p. 37.

43. Ibid., p. 38.

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Despite Willoughby's denial that the state is an organism he finds that there is a "striking analogy" between them, both as to structure and manner of development. The will of the state is different from the wills of its "constituent units."[44] There is a likeness between the growth of natural and political societies. He says, "In both there appear an increasing differentiation of parts, and growth in variety of their needs. As the higher forms are assumed, the organism becomes more definitely and delicately constructed; its activities become increasingly self-directive, until finally the self-conscious individual appears."[45] Indeed, for some purposes, at least, Willoughby finds that "the term 'State' as used in Political Science . . . ." can be likened ". . . to the term 'living being' as employed in Biological Science."[46] The particular purpose for which this likeness is legitimate is that of demonstrating that the term "State" can be used to describe the early types of political life. Just as the biologist attributes "living being" to the lowest forms of biological life, the political scientist can correctly describe the lowest and most primitive forms of political life by the term "State."[47]

Willoughby briefly mentions the utilitarian theory of the origin of the state, saying, "When considered from the standpoint from which we are viewing it, the obvious utility of the State is not of itself a justification."[48] Oddly enough, he does not describe the theory, nor does he men-

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44. Ibid., p. 35.

45. Ibid., pp. 28-29.

46. Ibid., p. 28.

47. Ibid.

48. Ibid., p. 38.

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tion the principle propounders of the theory. To him, apparently, it was self-evident that this greatest happiness principle (with happiness being defined as sensual pleasure) can never account for the origin of something so majestic as the state.

Likewise, he only briefly mentions the force theory in his The Nature of the State, but does, in another connection, consider it more thoroughly in The Ethical Basis of Political Authority. In the earlier work Willoughby identifies the force theory as being one in which "might per se is a warrant for coercion . . . ."[49] He does not attribute it to any particular individuals who have supported it. He says it "scarcely needs refutation . . ." for it "is a futile attempt to avoid the question . . ."[50] of the justification of political authority. He adds, "what causal connection can there be between 'might' and 'right'? Morality has reference only to a subject with powers of free self-determination of action."[51] In his later work, however, Willoughby elaborates on the force theory, pointing out that "there have been ethical or political speculators who have held, either that might makes right, or at least, that the exercise of force by those capable of exercising it, is not subject to moral reprobation."[52] Willoughby points out that the question of whether force makes right was raised by the Sophists in the fifth century, B. C. Indeed, the issue was of such importance that Plato in Book I of his Republic, speaking through Thrasymachus of Chalcedon, dwells on it at length. Thrasymachus' position

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49. Ibid., p. 41.

50. Ibid.

51. Ibid.

52. Willoughby, The Ethical Basis of Political Authority, p. 34.

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is that justice is the interest of the strongest, that there is no such thing as natural right or justice and that right is simply that which is enforced by the strongest power in accordance with the interests of the wielder of that power. Willoughby says, "when stated in this bold form, the Force Theory, it scarcely needs to be pointed out, is a denial that there is any such thing as moral obligation."[53] He quotes approvingly from the Social Contract in which Rousseau concludes, "let us admit then that force does not create right, and that we are obligated to obey only legitimate powers."[54] Willoughby also identifies the extreme egoism of Max Stirner[55] with the force theory. Stirner, says Willoughby, if he does not declare that might makes right, at least declares that the exercise of effective force or compulsion in whatever form by any individual so circumstanced as to be able to exercise it, cannot be stigmatized as ethically wrong."[56] Stirner's views on political authority are summarized by Willoughby as follows:

> There is nothing sacrosanct about political authority, nothing that serves to give to it a right of control beyond the desire of those who happen to occupy the seats of political power to seek their own several interests by any means available to them. Therefore, there is no obligation upon anyone to heed the commands of those claiming political authority over him. If one has the power or desire to disobey these orders he is ethically justified in doing so, or, at least, it is not unethical that he should do so.[57]

Nietzsche, according to Willoughby, supports the force theory. He

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53. Ibid., p. 35.

54. Ibid., p. 36.

55. This is the pen name of Caspar Schmidt who wrote in 1844 Der Einzige und sein Eigentum, from which Willoughby draws this material.

56. Willoughby, The Ethical Basis of Political Authority, p. 36.

57. Ibid., p. 38.

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says of Nietzsche:

> He looks with satisfaction upon the overriding, and even the extermination, of the weaker units of humanity, and hails with his highest approval the appearance of strong men who, conscious of their own strength, will use it ruthlessly, undeterred or unrestrained by any mawkish feelings of sympathy or justice or of religious scruples for the wishes of others.[58]

Willoughby rules out such theorists as Hobbes, Spinoza, and Machiavelli as advocating the force theory, since "these writers by no means identify might and right, but insist upon the necessity of a moral justification for political authority, and emphasize the moral tasks which States are called upon to perform."[59]

Willoughby next turns to a consideration of the divine theory of the origin of the state. He traces the theory from the "ancient empires of the East" to modern times. In the former the sacred writings furnished the ultimate sanction of law, based upon the theory that the state was of direct divine creation. He points out, "In all of the vast Asiatic monarchies of the early days the rulers claimed a divine right to control the affairs of the State, and this was submitted to by the people with but little question."[60] Indeed, the divine theory was carried further by the Shemitic races in holding that God directly oversees and participates in the control of public affairs.[61] Furthermore, Willoughby sees the Greek theory of the state as embodying the divine theory. He says, "Among the Greeks . . . the State was considered as an institution existing in itself and of itself and

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58. Ibid., p. 39.

59. Ibid., p. 33-34.

60. Willoughby, The Nature of the State, pp. 42-43.

61. Ibid., p. 43.

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as determined by the very nature of things. As such, it had a divine origin as did all things in the phenomenal world."[62] The Romans accepted Greek philosophy, in so far as they engaged in philosophical speculation, according to Willoughby, but they did begin to perceive a clear distinction between divine and political authority, resting the latter upon the people. However, it was not until the rise of the temporal power of the Church, with the attendant struggle between Pope and Emperor that the divine theory received great attention. At first, during the early history of the Church, there was no claim made by the Church to authority in temporal matters, but as the power of the Papacy grew, Willoughby points out, the Church began to assert authority that was essentially civil in nature; as for example, it claimed the right to preserve the peace and settle quarrels between princes. Willoughby says, "Thus, by degrees, the temporal power of the Church increased until it became itself a civic organization, promulgating laws and enforcing obedience thereto by military coercion, and contesting with the temporal rulers of Europe the right of supreme control."[63] All parties to the controversy, however, during the struggle between papal and temporal power, says Willoughby, were united on one basic point: "That this dualism of Church and State found an ultimate union in a divine order."[64] Unfortunately, however, for the political scientist, the literature of this conflict reveals no "systematic treatises" as to the origin and nature of the state. Willoughby says, "Thus in all these writings we find political philosophy confused with religious dogma, and its results largely vitiated by

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62. Ibid.

63. Ibid., p. 46.

64. Ibid.

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the extent to which the minds of men were dominated by theological beliefs."[65]

The Protestant Reformation, Willoughby points out, instead of clarifying the domains of political and divine authority, actually increased the confusion. Protestant leaders pointed to the divine origin of political authority and admonished obedience to the commands of the political authority. On the other hand the Reformation's opponents, the Jesuits and the Dominicans, pointed to the higher position of divine authority to that of political authority. The divine theory, though revived in the counter-revolutionary period after 1815, "for all purposes of political philosophy . . . received its _coup de grace_ on the continent, from the writings of Hugo Grotius, and in England from those of Hobbes and Locke."[66]

According to Willoughby, the divine theory of the origin of the state has had two roles: To justify political authority generally, and to legitimize political authority "in particular hands by viewing _de facto_ rulers as either direct agents of the Almighty, or as wielding a power indirectly delegated."[67] Either way, Willoughby says, the theory is "devoid of value." His objections are similiar to his objections to the natural theory, for he says, ". . . even though . . . the tendency to political life is implanted by Nature or by God in human nature, the realization of this political tendency . . . has been left to human agencies for which we are seeking."[68]

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65. _Ibid._, p. 47.

66. _Ibid._, p. 50. In a later work Willoughby sees recent manifestations of this theory in modern Japan, China, and Germany. _The Ethical Basis of Political Authority_, pp. 91-103.

67. _Ibid._, p. 51.

68. _Ibid._, pp. 51-52.

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He concludes, "Grant all that the divine theory necessarily maintains . . . and we get no nearer to knowing why in any particular case there should exist in a community a definite set of individuals arrogating to themselves the right of exercise of the divine prerogative of rule."[69]

Having considered these various theories of the origin of the state Willoughby passes on to the contract theory. This theory consumes a great deal more of his attention, for, by comparison, he utilizes sixty-four pages in his The Nature of the State to explain and refute the contract theory, whereas he used only thirty-six to explain and refute all the others combined. Perhaps this is to be explained by the fact that the contract theory has occupied such a prominent place in American theory and practice. Willoughby points out, for example, that this theory is to be found in the preamble of the Declaration of Independence, in nearly all of the states' Bills of Rights, and in the writings of Jefferson and Madison.

Willoughby defines the contract theory as "that theory which founds the State upon an original agreement entered into by the individuals of a society, who, prior to that time, have been entirely independent of political control."[70] Historically, there have been two forms in which the contract theory has appeared, says Willoughby; first, the "Governmental Compact," or "an agreement between rulers and subjects, according to which the power of rule is placed in particular hands,"[71] and the "Social Contract," or "an agreement between individuals of a particular community according to which agreement there is no necessary reference to the manner in which, or

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69. Ibid., p. 52.

70. Ibid., p. 54.

71. Ibid., p. 55.

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the persons by whom, the political power is to be exercised."[72] The essential difference between these two is that by the first "the legitimacy of existing governments is determined, and the validity of the titles of their rulers established;"[73] and by the second, "the origin of the State, that is, of the political power itself, is explained."[74]

Willoughby briefly traces the "Governmental Compact" in history. He says:

> As for historical instances in which a governmental compact appears or is alleged to have been entered into, we have that of King David making a covenant with the Elders before the Lord: the formula used by the nobles in the election of the King of Aragon, . . . and Locke quotes the words of even King James himself, contained in a speech to Parliament, in 1609, in which the Contract Theory is plainly expressed. The idea was also prominent in the contests over investitures; and numerous historical instances abounded in German history in which political compacts had been made between the several Estates.[75]

Moreover, Willoughby contends that "the whole feudal system was saturated with ideas of the contract."[76] During the period of absolute monarchy, both the absolutists and their opponents held to a contract theory of government, merely disagreeing as to the nature of the compact.[77]

To Willoughby the "Governmental Compact" is not as important a subject for political science as the "Social Contract,"[78] or as he prefers to

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72. Ibid., pp. 55-56.

73. Ibid., p. 56.

74. Ibid.

75. Ibid., p. 57.

76. Ibid.

77. Ibid., p. 58.

78. Ibid., p. 61. Willoughby explains that though some writers dif-

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term it, the "Political Contract." This is so because the political contract stands in time and importance before the governmental contract. He explains it this way:

> In accepting the contractual origin of governments, even the absolutists had to concede an original sovereign power of the people; for the people must of course, have first had that which they were conceived as granting away. But this surrender of power could only be imagined as being performed by a community acting as a single body in a corporate capacity. That is to say, it was necessary that it should first assume the character of a legal subject. Hence, it was early agreed that a given aggregate of men must first constitute a single social or political body, as distinguished from a mere horde or arithmetical sum of persons, before they could contract with the particular rulers to whom the political power was to be given. It thus becomes necessary to account for the manner in which this transition from a sum of individuals to a united community was effected.[79]

Willoughby examines at some length the three greatest advocates of the contract theory: Hobbes, Locke, and Rousseau. Hobbes based the state on a contract between individuals by which safety for all was attained by each individual giving up his natural liberty, and from this contract Hobbes concluded that absolute monarchy resulted. The monarchy, or sovereign, possesses unlimited power over his subjects, and there is no right to revolt, for this would be a return to anarchy or the state of nature which was characterized by _bellum omnium contra omnes._ It was to escape from this war-like state of nature that individuals contracted in the first instance. Though the sovereign is not a party to the contract, sovereignty "springs into being of necessity by the very act of union, and he to whom this authority is then given, is henceforth the sovereign."[80] Locke, too, based the state on a contract, but it is created not so much for safety, as in Hobbes' case,

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ferentiate between compact and contract, he makes no such distinction.

79. _Ibid._

80. _Ibid._, p. 71.

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but to protect rights which the individual possessed in the state of nature. The individual voluntarily gives up only certain rights and powers when he contracts, retaining others. Willoughby points out that here is a major difference between the theory of Hobbes and Locke, in that the latter provides for the retention of certain fundamental rights in the hands of the individual, and these rights have the same binding force as they did in the non-civic state.[81] Therefore, unlike Hobbes' state, that of Locke's is not absolute. The governing authority is limited by these rights. Furthermore, if this authority abuses its power it may be revoked by the people. Rousseau, also, presupposes a state of nature in which the individual is free. A contract is entered into between individuals, "according to which each person 'gives in common his person and all his power under the supreme direction of the General Will, and receives again each member as indivisible parts of the whole'."[82] Though the contract creates the state the government is not so created. The government rules not by contract, but by commission. The people are as free in the state as they were before the contract, owing obedience to the government only so long as it pleases them to do so. The sovereign is the totality of the citizenry, its powers being necessarily unlimited, "for the original contract which is the 'foundation of all rights' is entered into by and between the whole people, who as the sovereign cannot enter into a contract with itself."[83] On this Willoughby quotes Rousseau: "As nature gives to man absolute power over its members; and it is this same power which, directed by the General Will, bears, as I

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81. Ibid., p. 74.

82. Ibid., p. 80.

83. Ibid., pp. 81-82.

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have said, the name of Sovereignty."[84] This absolutism is not oppressive to the individual because, to quote Rousseau, "the constant will of all the members of the State is the General Will."[85]

Comparing and contrasting these three theories of contract Willoughby finds that there is a similiarity between Hobbes and Rousseau in that both hold sovereignty to be absolute, but the former locates sovereignty "in the hands of one, the few, or all, but once conferred, such sovereign power cannot be recalled by the people into their own hands."[86] Rousseau, says Willoughby, "considers the exercise of this power [absolute sovereignty] possible only by the whole community, ..."[87] Willoughby finds that Hobbes makes no distinction between government and state, which he views as a serious limitation of the value of Hobbes' contribution. Willoughby also sees that Hobbes and Locke differ concerning the necessary implications of a change in government, the former (making no distinction between state and government) holding that political society is necessarily dissolved, whereas Locke merely sees in it the people exercising their sovereign right to choose their own officials. Both Locke and Rousseau see a government of only limited authority, but in different ways; the former holding that governmental acts that violate individual rights do not receive legal validity, while Rousseau holds that only those laws are valid that receive the full participation of the people in their formulation and expression.[88] Wil-

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84. Ibid., quoting from The Social Contract.

85. Ibid., p. 82.

86. Ibid., p. 84.

87. Ibid.

88. Ibid., p. 85.

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loughby says on this, "Thus, that sovereign power which Locke considered as held in reserve by the people, and only to be exercised in extreme cases, Rousseau held to be in continual and constant exercise by the people."[89]

Willoughby finds that he cannot accept the contract theory of the origin of the state, and he concentrates his criticism[90] on what he feels is the common denominator of all of them, indeed, a "necessary postulate," which is an "original, pre-civic, non-political condition of mankind."[91] There is, in other words, a "state of nature" governed by "natural laws" at the base of all these theories of contract. It is at this point that the contract theory seems most vulnerable to Willoughby, and he concentrates his attack, therefore, on the validity of this "natural law."

Natural law has three possible meanings, according to Willoughby; first, to "indicate mere sequences of cause and effect in the phenomenal world,"[92] secondly, to "indicate the instinctive conduct of living beings men and animals alike,"[93] and thirdly, "hypothetical commands, guiding human conduct, which commands are supposed to derive their validity from divine intention, or from universal nature itself."[94] The first natural law need not concern the political scientist, for, as Willoughby states, "there is here no element of a command addressed to rational beings, and in fact no possibility of an infraction of the principles stated."[95] Likewise,

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89. Ibid.

90. Ibid., Chapter V, pp. 89-118.

91. Ibid., p. 89.

92. Ibid., p. 91.

93. Ibid., p. 92.

94. Ibid., p. 95.

95. Ibid., p. 91.

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the second natural law can be ignored because there is no command involved, as they are, ". . . the 'natural' or instinctive effort of all living beings to preserve their own existence, and to satisfy the desires to which their own nature gives rise."[96] It is the third natural law that Willoughby sees as furnishing the basis of theories of contract. Because they are thought of as deriving their validity from divine intention or from universal nature itself, they are independent of human enactment, and thus of absolute and universal validity, "binding at all times, in all places, and over all peoples."[97]

In his The Nature of the State Willoughby pronounces as false the proposition that the civilized life of man is in any sense "non-natural" or "unnatural." He does not make the point absolutely clear, but apparently he refers to the implication that if the pre-civic life of man is natural then civic life is necessarily unnatural. He does not attribute this view to either Locke or Hobbes, but does to Rousseau. Willoughby finds man very much, indeed, a part of nature, and "his actions, whatever they may be, are necessarily 'natural'."[98] In fact, he asserts that whatever is, that is whatever exists, is natural. Furthermore, it is an impossible position to hold that natural law furnishes absolute rules of conduct, for they are of necessity relative. This is so because they depend upon man's interpretation. He says, "what this interpretation will be, obviously depends upon the given data from which men reason; and these in turn, are only supplied

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96. Ibid., p. 92.

97. Ibid., p. 95.

98. Ibid., pp. 103-04.

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by objective conditions of social, economic, and political life."[99] Also, there exists no means of coercing those individuals who would disobey the commands of the law of nature. He points out, "hence their actual binding force can only be upon the conscience. That is, Natural Laws, from their inherent nature, must necessarily be moral laws, and moral laws only. They may serve to represent what _should be_, but not what _is_."[100] When, indeed, the commands of natural law become accepted by the political authority they lose even their moral character and become _ipso facto_ civil or positive laws. What Willoughby seems to be saying here is that to qualify as law, natural law must be in the form of a command, indeed a command that is enforceable, that is, if disobeyed punishment is meted out. Natural law does not qualify as law because it is binding only upon the human conscience, and hence, is mere moral law, unenforceable unless incorporated into the civil code. Moreover, the laws of nature that are said to govern men in a state of nature cannot be held to be even of moral validity, says Willoughby, for in a state of nature men are motivated solely by passion and momentary inclination because an "unmitigated and pitiless struggle for existence must prevail."[101] In other words, even if one were to grant _ex hypothesi_ that a state of nature did exist, laws of morality could not possibly exist there. In such a state, Willoughby points out, there would not be human association or concerted action, but only war. How, Willoughby asks, could men conceive of "rights" in such a state? He agrees with T. H. Green who says in his lectures on the _Principles of Political Obligation_ that "there

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99. _Ibid._, p. 104.

100. _Ibid._, p. 105.

101. _Ibid._, p. 107.

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can be no right without a consciousness of common interest on the part of members of a society."[102] There might, indeed, be powers in such a state, but not rights. Willoughby concludes on this: "In the absence, then, of 'rights' as distinct from 'powers', the term 'morality' can have no application to a State of Nature as above considered. For morality, in at least its social aspect, has no other basis than the recognition and respect of others' rights."[103]

In his The Ethical Basis of Political Authority Willoughby finds three additional reasons for rejecting the contract theory. First, even if one grants for purpose of argument that an original contract created the state, an agreement of each individual with all the rest, how can later generations of men be held bound by the agreement to which they did not give their personal consent?[104] Secondly, under a contract, whence comes the right of a majority or other dominant group to determine what the state shall do, and to compel obedience to such determinations upon the part of individuals who do not approve of them?[105] Finally, Willoughby asks, what are the rights and obligations of those individuals who, because they are minors or who are defective mentally, cannot be said to have a reasoning power sufficient to enable them to appreciate the need or the nature and consequences of a mutual agreement to establish and maintain a political society?[106]

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102. Ibid., pp. 107-08.

103. Ibid., p. 109.

104. Willoughby, The Ethical Basis of Political Authority, p. 224.

105. Ibid.

106. Ibid., p. 225.

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None of these theories, then, adequately accounts for the origin of the state. The patriarchal, the natural, the utilitarian, the force, the divine, and the contract theories all fall short of a true explanation. After reaching this conclusion Willoughby then sets out to provide a more adequate explanation of the "true origin of the State."[107] The essence of the state, to Willoughby, is not to be found in its physical characteristics, but rather in its psychological attributes. On this he quotes approvingly from Georg Jellinek's Die Lehre von den Staatenverbindungen: "The inner ground of the origin of the State is the fact that an aggregate of persons has a conscious feeling of unity, and gives expression to this unity by organizing itself as a collective personality, and constituting itself as a volitional and active subject."[108] The origin of the state, then, is found in the subjective feeling of unity in the minds of the people. On this Willoughby says—

> . . . in the State, in the body politic, we have a unity created out of the mere sum of individuals by means of a sentiment of community or feeling and mutuality of interest, and this sentiment finds expression in the creation of a political power, and the subjection of the community to its authority.[109]

The state, to Willoughby, is not something that comes into existence as a result of the objective reasoning of individuals, who as a result of their ability to reason, see the need for the state and proceed to bring it into being. It is not a rational action that creates the state. The essence of the state is the psychological element in man's nature which must

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107. Chapter VI in his The Nature of the State, pp. 119-41.

108. Ibid., p. 119.

109. Ibid.

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first exist in the minds of a people before a state can arise. This psychological element becomes objective only when laws are passed and political institutions are created. Yet, Willoughby asserts, even though this subjective feeling of unity is the essence of the state, it is not sufficient alone to constitute a state.[110] On this he says, "the body politic cannot be said to be created until the desires that this feeling engenders have become outwardly realized by the erection of a common governing authority."[111]

Willoughby asserts that the contract writers erred in conceiving of the creation of the state as an act of individuals. The truth is, he says, that the state is originated by a people rather than by individuals. Furthermore, he finds that "the existence of a common or 'General Will' must be predicated, and the creation of the State held to be due to its volition."[112] Rousseau's general will, Willoughby indicates, is not entirely acceptable, however, for Rousseau erred when he attempted to "create or conceive of a General Will superior to the individual will by simply joining together these wills."[113] If carried to its logical conclusion Rousseau's theory of the general will is destructive of all true political authority, because, Willoughby points out, "it openly refuses to governmental agencies any volitional power, and explicitly declares the validity of all legislative acts to be dependent upon an absolutely popular consent."[114]

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110. _Ibid._, pp. 119-20.

111. _Ibid._, p. 120.

112. _Ibid._, p. 123.

113. _Ibid._, p. 124.

114. _Ibid._, p. 125.

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Although it is not altogether clear, apparently what the general will means to Willoughby is this: Each individual may be considered in a double aspect for the purposes of political society. First, he may be considered as an independent individual, free to determine his own actions; and secondly, as a member of the body politic, a citizen. In this second capacity the individual is related to the state, for he must be considered as an integral and inseparable part of the whole. As such, his will can never be separated from the general will, and the individual helps to contribute to the formulation of this general will. The authority of the state is exercised upon the individual in this same capacity, and not as a free individual. In this regard Willoughby says, "He is coerced by the Law, not as a free autonomous person, but as a constituent of the authority that coerces him. He is an integral and inseparable part of the political body, and his will cannot be separated from its will."[115]

How can a people create a state when it is held that an aggregate of men become a people only when politically organized? In answer to this Willoughby states that a state and a people are created at the same time, and that it would be more precise to say that ". . . a State is created by a community of men, which, by reason of a sentiment of unity, is potentially a people, and that this community becomes actually such when the State is established."[116]

No formal act creates the state, according to Willoughby, and consequently, the adoption of a formal constitution cannot be considered as a creative act. Instead, the adoption of a constitution is, "but the act

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115. Ibid., p. 126.

116. Ibid., p. 129.

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through which that which has formerly existed in a more or less undefined and vague state, is brought into definite and positive statement."[117] The state is not a conscious creation of the individuals who make up the state, and indeed, the development of political sentiment necessary to the existence of a state is so natural that it is not until the state's rise into actual being that the process becomes a conscious one to the individuals embraced within it. On this point Willoughby elaborates:

> The State is born when the common consciousness of a community reaches a certain degree of preciseness; but since the fact of this point having been reached is only recognizable by the actual manifestations to which it leads, and which are necessarily subsequent to it, it is no more possible for a community to fix the instant of its creation as a body politic than it is for the individual to determine by memory the moment at which he became conscious of his own identity and personality.[118]

From the beginning of his long career as a political scientist Willoughby was careful to distinguish between the "State" and "Government." He defines the state in this manner: ". . . whenever there can be discovered in any community of men a supreme authority exercising a control over the social actions of individuals and groups of individuals, and itself subject to no such regulation . . ." then there exists a state.[119] The state is not a physical entity. It is not identical with the organs of government through which it exercises its powers. The state exists only in men's minds, for the "State is essentially psychic rather than physical."[120] Government, on the other hand, is merely the machinery through which the

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117. Ibid., p. 130.

118. Ibid., p. 133.

119. Ibid., p. 8.

120. Ibid., p. 38.

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state's purposes are formulated and executed.[121] The subject of the state is abstract, and in dealing with it one uses the tools of political theory; while the subject of the government is concrete and one must use the tools of descriptive political science when dealing with it.

Willoughby asserts that the state is not artificial, nor is it a mechanism. He says, "the feelings that unite men into social and political units are as natural to them as are any of their individualistic impulses."[122] On the other hand government is mechanical and artificial, for, as he points out, "it is the artificial means consciously created for formulating and executing the will of the State."[123] The state has a will of its own, its actions being self-determined; whereas, government possesses no innate life either in its parts or in the whole.

The state is a juristic person, says Willoughby, and as such, has a personality. It is a "person" because it has a will of its own, and this will is recognized in the national consciousness "in a manner very similiar to that by which the feelings of an individual organism are recognized by the animal consciousness."[124] On this he continues:

> Psychology shows us that the will of a conscious being is in all cases the result of the action and inter-action of numerous forces, of physical and psychical tendencies, of objective influences, of habits, —and that the simplest acts of volition are thus found to be, when analyzed, of a most complicated nature. So it is with the will of the State, resulting as it does, from the operation of innumerable forces, from motives selfish and unselfish, moral and unmoral, from material conditions, from tendencies, customs, inherited usages, racial characteristics, and intellectual impulses.[125]

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121. Ibid., p. 8.

122. Ibid., pp. 131-32.

123. Ibid., p. 132.

124. Ibid., p. 8.

125. Ibid., pp. 134-35.

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Apparently, Willoughby derived the theory of the personality of the state from Georg Jellinek and J. K. Bluntschli.[126] He quotes a long passage from the former's Gesetz und Verordnung in which Jellinek points out that the personality of the state exists just as does the personality of any other person. "Personality," says Jellinek, "signifies the capacity for unified, continous, reasoning volition."[127] What gives the state its personality (just as an individual can be said to possess a personality) is its unity of purpose. Indeed, Willoughby points out, it is this aspect as a person that distinguishes the state from the individuals subject to it. The state is something more than the sum of its parts, even though it is necessarily composed of the individuals united under it. Moreover, the state has an ideal existence apart from the individuals that compose it. This is so, Willoughby says, ". . . in exactly the same sense that the human individual is something more than a determinate amount of water, carbon, and a few other elements."[128]

Willoughby indicates that this concept of the state as a personality is a juristic conception, and, he says that it ". . . is to be distinguished from the same term as ordinarily applied to man as a moral being."[129] Elaborating on this thought Willoughby continues—

. . . in so far as a human being is recognized by the State as having 'rights' that it will enforce and protect, his individual personality is

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126. Bluntschli ascribes to the state a personality in his The Theory of the State, pp. 22-23.

127. Quoted in The Nature of the State, p. 135.

128. Willoughby, The Nature of the State, p. 136.

129. Ibid., p. 138.

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> of a character precisely similiar to that enjoyed by the State. Thus the individual is a person in the juristic sense because he has legal rights, and does not have legal rights because he is a person.[130]

He concludes on this point:

> When, however, we come to apply the attribute of personality to man as a moral being; that is to him considered as not only responsible for outward acts but for inward intentions and motives, we have, of course, a different conception. Man is then conceived as an independent individual, apart from the body politic, and as setting himself the standard to which his actions shall conform. His personality is then an ethical conception. Thus, while in the State we have simply a legal personality, we have in the human being a double personality; first, as an individual endowed with rights and obligations as regards his relations to other individuals and to the political community in which he lives; and, secondly, as an individual endowed with reason and volitional power, and recognizing a duty to strive disinterestedly to make his life conform to the highest moral and ethical ideals.[131]

A further distinction between the state as a juristic person from the individual person is that the state's personality is not embodied in a concrete physical frame as is the individual's. For the state to attain its ends, therefore, it is necessary for it to speak through certain individuals as agents. Furthermore, Willoughby says, "when so officiating, these persons give expression and execution to no will of their own, but purely and simply to the will of the state."[132] These governmental agents are mere agents of the government to express the state's will. However, defects in the governmental organization and the "intermediation of selfish and corrupt influences, prevent, in all States, the formulation of a <u>general</u> will free from the admixture of <u>particular</u> elements; and hinder the

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130. <u>Ibid</u>.

131. <u>Ibid</u>., pp. 138-39.

132. <u>Ibid</u>., p. 139.

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exact performance of that will when formulated."[133] There will always be a disparity between the real or general will of a political community and the "actual utterances of the State as contained in its law."[134] Therefore, Willoughby asserts, "the test of good government is the facility it affords for the formulation of an enlightened and intelligent General Will, and the nearness with which its action harmonizes with such Will when formulated."[135]

Willoughby's concept of the "state" as distinguished from "government" has been considered. The state is an abstract term; government is concrete. Government exists to carry out the will of the state; indeed, the state can carry out its will only through its government. From this Willoughby concludes that "the State is wholly organized in its Government."[136] But what about the relationship between the state and the nation, the state and a people, the state and society? Answers to these questions will perhaps throw additional light upon Willoughby's theory of the nature of the state. First of all, Willoughby asserts that the "state" must be differentiated from "nation" and "people." The state is "the political person or entity which possesses the law making right."[137] People is defined as "an aggregate of men living under a single political control."[138] The nation is a "collection of individuals united by ethnic or other bonds, irrespective of

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133. Ibid., p. 140.

134. Ibid.

135. Ibid.

136. Willoughby, The Fundamental Concepts of Public Law, pp. 49-50.

137. Ibid., p. 49.

138. Willoughby, The Nature of the State, p. 11.

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political combination."[139] In these definitions Willoughby says he follows the German usage, and by so doing obtains "a more definite and precise nomenclature."[140] Moreover, "society" is defined by Willoughby as "an aggregate of men living together and united by mutual interests and relationship."[141] Now, when this society becomes politically organized there occurs the state, and the individuals under this state's authority constitute a people. This people may or may not constitute a nation, because, as Willoughby points out, "that which wields a body of individuals into a national unity is no rigid political control, but ethnic and other factors largely sentimental or psychological in character."[142] This national unity, or nationality, is created by "community of race, language, historical tradition, mutuality of economic interests, and like degree of civilization."[143] Though it is true that "the natural tendency of the feeling of Nationality is to find expression in political unity [the state],"[144] the creation of a state because of the "feeling of nationality" is not guaranteed. Indeed, it may be mere "political expediency" which creates the state, as for example, self defense. For example, Willoughby argues that there was a strong feeling of common nationality between the American colonies and the mother country, but that an independent political organization was demanded and obtained.[145] However, as a general principle, Willoughby finds that the sentiment of feeling that lies at the basis of the nation is similiar to

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139. Ibid., p. 9.

140. Ibid., p. 11.

141. Ibid., p. 2.

142. Ibid., p. 11.

143. Ibid.

144. Ibid., p. 121.

145. Ibid.

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that which is the base of the state, though they are not identical. They are not identical, he says, for "it is possible . . . to have present a well-developed feeling of Nationality but with slight desire for political unity."[146]

Thus far, it would seem that the essential ingredients of a state, in Willoughby's view, are a people politically organized, and this necessarily entails a feeling of unity; a government to carry out the will of the state; and a "body of rules or maxims" to guide the officials who act in the name of the state.[147] At first, Willoughby found it unnecessary to include territory as a necessary element in the state, but in his later writing, The Fundamental Concepts of Public Law, he was inclined to include it, saying, "The author is now convinced . . . the existence . . . of a State is dependent upon the claim upon the part of the State to a territory of its own."[148]

Although it is the purpose of the writer to describe and analyze Willoughby's concept of sovereignty and law in a later chapter, it may be useful to indicate here that he held the chief "attribute" of the state to be its sovereignty. It is the highest power of the state, and the most important subject of political science.[149] When Willoughby speaks of the state as being sovereign he means that it possesses "omnipotent rulership over all matters that arise between the individuals themselves."[150] The state's authority is superior to all other authorities established by man, and this sovereignty belongs to the state as a person, and represents the

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146. Ibid.

147. Ibid., p. 4.

148. Willoughby, The Fundamental Concepts of Public Law, pp. 63-64.

149. Willoughby, The Nature of the State, p. 192.

150. Ibid.

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supremacy of its will. He asserts:

> Sovereignty is thus independent of its particular powers, in the same way that the self-conscious power of volition and determination of the individual human being is distinguished from his various faculties or the aggregate of them. It is the very possession of this sovereign will that gives personality to a politically organized community.[151]

Willoughby sees the state, then, as originating not as a result of any creative act by individuals, but rather, as a result of a psychological feeling of unity of a whole people. One knows that a state exists because of the institutional manifestations to which the state gives rise, but one cannot pinpoint the time of its creation, for a state and a people arise simultaneously. The American national state existed prior to the formal ratification of the Constitution, for example, for the feeling of unity was present before that act.[152] The state is an entity, it has a will of its own, a will that is not the same as the sum of all the individual wills of its citizens. The state is neither artificial nor mechanical, but is natural in the sense that man is a political animal. The state has a personality, just as an individual has a personality. It has a personality because it possesses a will, and the state expresses its will through laws. The state is sovereign, and this sovereignty is absolute and indivisible. Individual citizens do not have rights as against the state, but instead, they have rights as defined by the state in its laws.

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151. Ibid., p. 195.

152. This concept is taken up in the chapter on Willoughby as an interpreter of the American constitutional system.

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Chapter V

THE ETHICAL BASIS OF POLITICAL AUTHORITY

Willoughby's interest in ethical political thought dates from the very beginning of his teaching career, an interest that is sustained throughout his career, as evidenced by the courses he taught and the books and articles he wrote during these forty years.[1] Indeed, his first lecture courses at

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1. His articles include: "The Right of the State to Be," International Journal of Ethics, IX (1899), 467-82; "The Value of Political Philosophy," Political Science Quarterly, XV (1900), 75-95; "The Ethics of the Competitive Process," American Journal of Sociology, VI (1900), 145-76; "Political Philosophy," South Atlantic Quarterly, V (1906), 161-75; "The Political Theories of John W. Burgess," Yale Review, (old series), XVII (1908), 59-84; "Punitive Justice," Journal of Criminal Law and Criminology, I (1910), 354-77; "The Individual and the State," The American Political Science Review, VIII (1914), 1-13; "The Prussian Theory of Monarchy," The American Political Science Review, XI (1917), 621-42; "The Prussian Theory of the State," American Journal of International Law, XII (1918), 251-65; "The Prussian Theory of Government," American Journal of International Law, XII (1918), 266-82; "Japan's Political Ethics," Asia, XIX (1919), 898-902; "Political Philosophy," Congress of Arts and Science, Universal Exposition, St. Louis, 1904, VII, 309-25; "Allied Versus Prussian Political Ideals," Publications of the Society for the Study of International Relations, Peking, China, War Lecture Series, N. 2, Peking, 1918; "The Relation of the Individual to the State," Problems of Adjustment After the War, New York, 1915, pp. 98-128; and "The Underlying Concepts of Democracy," Democracy in Reconstruction, edited by Frederick A. Cleveland and Joseph Schafer, 1919, pp. 48-66.

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Stanford and Johns Hopkins were the "Philosophy of the State" and the "Theory of the State" respectively, and during his professorship at the latter institution he offered twelve courses on ethical political theory. His first book that deals with this subject is The Nature of the State (1896), and this was followed in 1900 by a companion volume, Social Justice. In 1903 he published what was to be the first volume of a series on the history of political theories, but unfortunately only the first volume appeared. The Political Theories of the Ancient World is properly included in the list of his works on ethical political theory because it is more than a history of political ideas. It contains, to some degree at least, elements of his own political philosophy. Willoughby, unlike some of his contemporaries, felt that a political theorist must be something more than a chronicler of the history of political ideas. He said, for example, that before the student of political theory "attempts the preparation of a history of such ideas, he should first have formulated, in outline at least, what to himself would seem to be a valid philosophy of the subject with which he is to deal."[2] Before one is qualified to write on political philosophy, Willoughby would say, he must be a political philosopher. For, "not until one has himself those ideas as to what is true or what is false, is he qualified adequately to describe or intelligently to criticize the theories of others."[3] This in marked contrast to the position of William A. Dunning, whose three-volume work on the history of political theories displays a remarkable degree of detachment.[4]

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2. Willoughby, The Political Theories of the Ancient World, New York, 1903, p. vii.

3. Ibid., pp. vii-viii.

4. A History of Political Theories, Ancient and Mediaeval, 1902; Poli-

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Much of the time between 1903 and 1918 (when Willoughby's next book on political theory appeared) was taken up with research and writing on United States constitutional law, and no works on theory were forthcoming. In 1918 he published his *Prussian Political Philosophy*, a work of lesser stature than his other contributions in this field. Finally, in 1930 appeared his *The Ethical Basis of Political Authority* which contains his most thorough and his final treatment of ethical political philosophy.

Willoughby's ideas on the ethical basis of political authority, which to him is the essence of political theory, are best expressed in *Social Justice* and *The Ethical Basis of Political Authority*. As he refers repeatedly to the *ethical basis* of political authority it is relevant to determine just what he means by the term, for it is basic to an understanding of his theory. First of all, he sees a general philosophical system as logically divisible into: (1) Metaphysics, (2) ethical philosophy, and (3) political philosophy. Metaphysics, he points out, is employed to determine the nature and essential attributes of men as rational, moral beings; and therefore, determines the nature of human freedom. Ethics establishes the principles by which human freedom should be regulated. Political philosophy, on the other hand, ascertains certain of the means through which these principles can receive recognition and enforcement. He says:

> Without ethics and politics, metaphysics is reduced to useless imaginings; with metaphysics, ethics is largely deprived of its premises; and without politics, is largely denied the means of securing a realization of the aims which it declares desirable. Without metaphysics and ethics, politics is unable either to determine the relative ethical values of different possible lines of public policy, or to establish grounds upon which po-

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tical Theories, from Luther to Montesquieu, 1905; and *Political Theories, from Rousseau to Spencer*, 1920.

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litical obedience may rightly be demanded.[5]

Willoughby is unwilling to accept what he conceives as the Aristotelian concept of ethics. His interpretation is that Aristotle conceived of ethics as a part of politics, and the reason for this fundamental error, says Willoughby, is that he failed to distinguish between "society" and the "state." Aristotle, Willoughby points out, conceived of the state as being an all-comprehensive agency through which man's highest good may be realized, but this definition more properly belongs to "society," Willoughby feels. The state is only that part of social life "in which the individuals composing the social group are viewed as composed of two classes of persons, the rulers and the ruled, and with more or less definitely determined organs and laws through which this rulership is exercised . . . ."[6] "Ethics," says Willoughby, "has to deal with the moral aspects of all the acts of men, political as well as non-political, and, therefore, Political Ethics may very properly be regarded as but one of the subdivisions of the general science of Ethics."[7]

The moral philosopher has the special task of determining "the absolute value of social institutions, and the statement in as definite a form as possible of the principles which should govern men in their efforts to adjust their lives to the highest ideals of right and justice."[8] Ethics,

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5. Willoughby, The Ethical Basis of Political Authority, pp. 10-11.

6. Ibid., p. 4.

7. Ibid. This interpretation of Aristotle is a mistaken one, for, contrary to Willoughby's assertation, Aristotle regards ethics as the larger science of which politics is a part. This is taken up in more detail in the concluding chapter.

8. Willoughby, Social Justice, p. vii.

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Willoughby says, divides logically into the "theoretical" and the "practical." The former is concerned with the nature of man and the moral order of the universe, being therefore metaphysical in character. On the other hand, practical ethics is a social science, having for its purpose the "determination of just rules for the guidance of men in their dealings with one another."[9] It is with practical ethics that politics is most closely united. Willoughby says:

> The solitary individual may be, in fact, a moral being, but, until he is brought into association with others of his kind, there can occur to him few, if any, obligations of a moral nature. In other words, though the feeling of moral obligation may be an original datum of consciousness, and man, as a partaker in a divine or absolute reason, may be regarded as potentially a moral being, the possibility of his coming to a self-realization of this fact, as well as the opportunity of realizing it in practice, is rendered possible only in a state of society. The concrete facts which condition the formation and exercise of ethical ideals are thus preponderantly political in character.[10]

In his Social Justice Willoughby says that he subscribes to the ethical theories of T. H. Green and the Oxford School of idealists who find man's ethical goal to be self-perfection, and the state exists to aid him in that endeavor. The state's role, then, is an ethical one, and the justification of its authority is an ethical inquiry. Tracing the history of modern ethics before Green, Willoughby finds it based essentially upon the concepts enunciated by Kant. "The effect of Kant's writings was to inaugurate an epoch in ethical speculation,"[11] Willoughby says, and it was he and his followers who gave "to the conception of natural rights a changed and more nearly perfect signification."[12] Willoughby continues:

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9. Willoughby, The Ethical Basis of Political Authority, p. 5.

10. Ibid.

11. Willoughby, Social Justice, pp. 19-20.

12. Ibid., p. 20.

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> All ethical obligation being posited upon that feeling of oughtness which is given to the individual as an original datum of consciousness when the rightness of a given line of conduct is recognized, and all rules of moral obligation being thus considered as having their source in the legislative power of the human mind to set to itself principles of conduct, the idea of natural right necessarily becomes synonymous with those claims which the individual, as a rational moral being, may claim from others as rational moral beings. As thus conceived, the only rights which may be claimed as natural, in the sense of being innate or essential, are those which are necessary for the realization of one's highest ethical self.[13]

Thus Willoughby conceives of man as a moral creature whose goal is self-realization or self-perfection. His decisions on moral matters are guided by his reason, and are not subject to natural law in the traditional sense, but rather to an autonomous reason in the Kantian sense. It is not arbitrary reason, Willoughby cautions, but reason based upon moral law. This moral law is Kant's catagorical imperative. Willoughby says, ". . . in reaching its judgments our reason is, by its very nature, governed by the principle that only that can be right which accords with a principle which we can wish to be a universal one. 'Act on a maxim,' he [Kant] declares, 'which thou canst will to be a universal law'."[14] "The realization of one's ethical self," Willoughby asserts, "is the general categorical imperative addressed to every one."[15]

Willoughby takes up the question of the ethical basis of political authority in his Social Justice under the title, "The Right of Coercion."[16] Coercion is restraint of individual action, being necessary because of the

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13. Ibid.

14. Ibid., p. 19.

15. Ibid., p. 21.

16. Chapter VIII, pp. 215-68.

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clash of individual interests. This friction results from the fact that individuals have free will or freedom to choose. A perfectly harmonized society, Willoughby points out, would require no coercion of any type, but the world is not perfectly harmonized so it becomes necessary.

There are two ways, Willoughby points out, in which coercion may be justified--utilitarian and transcendental. Both of these schools, the first represented by Comte, Mill, and Spencer, and the second by Hegel, Green, "and their idealistic followers," agree that "individual reason, must, in the last resort, be the absolute judge of the rightfulness of a given control which is exercised over him."[17] However, Willoughby points out, they disagree "as to the character and as to the origin of the motives which should control that judgment."[18] According to the first school, says Willoughby, morality is a product of society, whereas, the latter holds man to be by nature moral, society providing merely the means for its practical application. The motive force to the former is utilitarian, while to the latter it is self-realization, something that is innate in man's nature.

The utilitarian justification of political coercion, according to Willoughby, is as follows: Freedom is preferable to coercion, for coercion is evil. It is evil because it is painful. It keeps one from doing what he otherwise would have been able to do. Admitting this, however, Willoughby says, the question arises as to whether pain is the greatest evil or the only evil. The utilitarians answer that it is. The utilitarian justification of the state, then, is that political power lessens coercion by a greater amount than it increases it because lawless coercion exists in a

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17. Ibid., p. 235.

18. Ibid.

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non-civic state, and lawful coercion exists in a civic state. This means, Willoughby points out, that the state must be considered a necessary evil, and its activities must be kept to the barest minimum. He says, "for if the State's coercion is tolerated only because it prevents a greater private coercion, then anything that goes beyond this purely negative function will add to, rather than subtract from, the aggregate of coercion to which the citizen is subjected."[19] Willoughby, as has been shown, does not regard the state as a necessary evil, but rather as a necessary good, for only in and through it can an individual hope to achieve, or even partially achieve, his ethical self-perfection. Furthermore, Willoughby doubts the utilitarian contention that the individual is the only one who is absolutely qualified to determine what action will produce the greatest happiness. He says, ". . . that he can determine what, remote as well as proximate consequences being considered, will be the relative happiness-producing powers of different modes of life, we know to be false, as our conduct, for instance, in relation to children and the weak-minded constantly proves."[20]

The most telling objection to the utilitarian justification of the state, Willoughby asserts, is that it is "absolutely destructive of all individual liberty."[21] Furthermore, it is "incapable of affording any vital ethical foundation whatever for the subordination of the welfare of self to that of the whole."[22] As to the former, viewed from the social point of view, says Willoughby, "there is justified any interference, however arbi-

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19. Ibid., p. 237.

20. Ibid., p. 240.

21. Ibid., p. 242.

22. Ibid.

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trary or gross, with the freedom of the particular individual, if the effect of such interference is to increase the happiness of those not coerced."[23] With reference to the latter, from the individual's point of view, Willoughby points out:

> For him, . . . if happiness be the test, the ideal of political order is that he shall be protected against others, but left free himself to do as his desires dictate. The consequence of this is that, as to any individual citizen, it is impossible, upon a utilitarian basis, to erect a social or political control of a morally binding character . . . . Since the feeling of pain and pleasure can be felt and measured as to their amount only by the individuals experiencing them, and as these feelings are the sole criteria of rightness, what the utilitarians call justice is logically reduced to a purely individualistic basis. Upon such a basis it is absolutely hopeless to attempt the erection of a valid system of social or political right. The supreme good must be conceived as an aggregate of individual pleasures, and society must thus appear as nothing more than an aggregate of self-seeking beings, each of whom is morally entitled to subordinate the good of others or of the whole to his own good.[24]

The idealist or transcendental view, as opposed to the utilitarian, according to Willoughby, sees self-realization as man's goal, and not mere happiness. He says, "The supreme end is ever the realization of a self which is conceived as rational and universal—as a partaker in that Divine Reason which is one and indivisible, but which manifests itself in manifold forms."[25] Willoughby continues:

> The central concept of modern ethics is thus the moral personality of man. This implies that each individual is able, and in fact is irresistibly impelled, to formulate for himself an ideal of perfection toward the attainment of which he is conscious of a moral obligation to strive. This consciousness of obligation which takes the form of a categorical imperative posited by his own reason, carries with it the logical assumptions; First, of a freedom of the will, for without this there would not be even

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23. Ibid.

24. Ibid., p. 243.

25. Ibid., p. 244.

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the capacity to obey the obligation which is felt; and secondly, of an inherent right to be allowed by others to realize in fact, so far as is compatible with their reciprocal rights, those conditions of life which are implied in the ideal of personal development which each frames for himself. These principles are summed up by Kant in the two canons: "Be a person and respect others as persons," and "Act externally in such a manner that the free exercise of thy will may be able to coexist with the freedom of others according to a universal law."[26]

Idealistic ethics, Willoughby points out, differentiates between the lower and higher desires of man. There are desires which are simple or material, on the one hand, and--

. . . those desires which are the outcome of a craving to secure the moral perfection which the reason presents . . . the outcome of the developed reason of an individual who is conscious that he is a moral being, who is able to see his life as a whole, to conceive of a possible perfection, and thus to adapt means to its attainment.[27]

When one applies these idealistic principles to individual rights, Willoughby says, one finds that they are not the same for everyone, but are dependent upon the individual's capacity and disposition to use them for a desirable end. When one applies them to the subject of political coercion one finds that a state is justified to the extent that it assists individuals in achieving the goal of self-realization. This, Willoughby cautions, is not in reality the utilitarian doctrine. Idealism establishes right conduct upon "eternal principles of morality flowing from the essential character of the Divine Reason."[28] Utilitarianism, on the other hand, puts ethical conduct on a far lower plane, "never [rising] to a higher character than that of far seeing prudence."[29]

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26. Ibid., pp. 244-45.

27. Ibid., p. 245.

28. Ibid., p. 247.

29. Ibid.

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Getting now to the heart of the question of the ethical right of political coercion, Willoughby asserts that assuming the "self-legislative" nature of man in the field of morals, guided by the idea of self-perfection "it is possible to harmonize absolutely the ideas of freedom and control, of liberty and law."[30] As long as the individual conceives of the commands of a social and political power as being necessary for his self-realization, and this includes the good of others as well, then "such commands no longer appear to him as orders from an external power limiting his freedom, but as imperatives addressed to himself by his own reason."[31] Furthermore, in obeying them "he obeys, in fact, himself."[32] If not in fact, at least in theory, says Willoughby, it is then possible to imagine a society so perfectly ordered, so perfectly harmonized, that the individual in giving obedience to laws is at the same time absolutely free because he is required to do only those things that his reason dictates.

Does this mean that the individual should feel compelled to obey only those commands of society that appear to him as reasonable? What about those laws that are clearly unreasonable? Is disobedience ever justified? Being a reasonable creature man recognizes that the laws of the state and conventions of society are an integral part of a general "system of rights," and that a violation of this system threatens the whole structure of law and order. "He must therefore consider," Willoughby points out, "before he resists, whether he may not be able to secure an annulment of the objection-

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30. Ibid., p. 248.

31. Ibid., p. 249.

32. Ibid.

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able rule in some better manner, or, if this be not possible, whether it will not be preferable to suffer the evil rather than to bring about the harm which a resistance to it will produce."[33]

The individual in "modern political ethics" subordinates himself to society, but does so in such a way that his freedom is not "abated one whit," for "this subordination is, in essence, not the subordination of his will to a higher social will, but the identification by the individual of the social will with his own will, so that, in obeying the social or political will, the individual obeys his own will purified from selfishness."[34] To clarify this concept of "obedience without subordination" Willoughby traces the history of political thought on the relation of the individual to the state and finds that there have been essentially four phases: The Oriental, the Hellenic, the Individualistic, and the Modern.[35]

In the Oriental world, says Willoughby, the prevailing political concept was one of total subjection of the individual to the state. This subordination was felt to be obedience to an "external power" over which the individual had no control, and against which he had no appeal. Greek thought, by way of contrast, saw subordination not as obedience to an external power but as "a yielding to a higher self."[36] Willoughby says, "What in the Oriental world was subjection, became in the Greek world self-sur-

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33. Ibid., p. 250.

34. Ibid., p. 251.

35. Ibid. This also appears in Willoughby's presidential address before the American Political Science Association in December, 1913. It was published in the February number of The American Political Science Review, VIII (1914), 1-13.

36. Willoughby, Social Justice, pp. 252-53.

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render."[37] On Greek political thought Willoughby elaborates:

Paradoxical as it may seem, the Hellenes were able to recognize in their political philosophy the independent value of human personality, and at the same time to subject the citizen to the absolute control of the state. According to the Hellenic conception, man was by his very nature a social being. Hence his life in a state of society, with its social conventions and demands, meant, not an interference with an original independence, but a condition of life necessary to the very existence of men as independent rational beings. To the Greeks, in other words, society and state were as immediately products of great nature as was man himself. The State had, indeed, in their eyes a higher and more perfect individuality and personality than did its citizens, for it was from its personality and from its life that the citizen was supposed to derive all that was valuable to him as a man.[38]

The third or individualistic stage of thought on the individual and the state characterized the thinking of the seventeenth and eighteenth centuries, having been born in the Protestant Reformation. The central idea of the Reformation, according to Willoughby, was the independence of the individual in passing final judgment on the meaning of the law.[39] As far as political theory is concerned this individualism reached its logical culmination in the writings of the French philosophical school of the latter eighteenth century, and indeed, reached its culmination "in political fact" in the anarchy of the period of the French Revolution. "This freedom," Willoughby asserts—

. . . when not controlled and tempered by a proper comprehension of the rational limitations under which it should be exercised, led, as is well known, to a gradual denial of the right of all political authority not founded on the assent—explicit or implied—of the individuals subject to it. The movement, in effect, assumed the form of a simple negation of the

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37. Ibid., p. 253.

38. Ibid., pp. 251-52.

39. Willoughby does not clearly indicate what "law" he is referring to.

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Oriental idea of subjection, and, as all pure negations are apt to be, was carried over into the opposite extreme, anarchy.[40]

Modern political ethics, Willoughby finds, revives the old Greek idea of subordination, but instead of an unthinking and instinctive obedience[41] it is made to be a conscious, deliberate and chosen subordination. Modern ethics harmonizes the ideas of absolute freedom and subjection.[42] The philosophers responsible for this modern ethics, according to Willoughby, are Jean Jacques Rousseau, Immanuel Kant, and George Hegel. Individualism in its extreme form reduced man to a mere animal, a pawn of sensations and appetites, a being not capable of either religion or of morality.[43] Modern ethics, on the other hand, distinguishes between a higher and a lower self and the attendant struggle between them for supremacy. Strangely enough, Willoughby says, it was Rousseau who first attempted to assert this modern concept in his differentiation between the real and the apparent will of the individual. Willoughby says:

> In his earlier essays, to be sure, Rousseau exalts the "natural man," but in his Social Contract there is clearly apparent the idea of a true human liberty that is higher and better than the licence of the savage, and in his volonté générale we have the conception of a will more real than that expressed by the momentary or selfish inclination of the individual.[44]

Rousseau erred, however, says Willoughby, when he asserted that it is pos-

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40. Social Justice, pp. 253-54.

41. Once again, Willoughby has misunderstood and misinterpreted Greek ethical thought, for they did not believe in an unthinking and instinctive obedience.

42. "Individual and the State," The American Political Science Review, VIII (1914), 6.

43. Social Justice, p. 256.

44. Ibid., p. 257.

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sible to determine what this general will is by the use of a mechanical devise, the plebiscite. The general will and the will of all can be differentiated by setting off individual differences against one another, and the general will derived from the will of all, says Rousseau.[45] Kant avoids this mechanical pitfall, Willoughby asserts, and presents a "truer conception of a real will as dependent upon the reason of men when purified from all desire."[46] Kant's real will is determined by the maxim that all individuals should be treated as persons and that all acts should be subject to the rational law that they should be such as can be rationally made a universal law for all men. Despite this improvement over Rousseau, Kant did not free his ethics from the individualistic philosophy of the eighteenth century. Willoughby says:

> He did not grasp the fundamental truth that the individual can, by recognizing the justice of the will of another power, make that will his very own, and thus, though obeying it, be not coerced by it. He thus, in fact, ever regards the control of the law as necessarily an interference with freedom, and justifiable only when employed to prevent coercion from other sources. He develops, therefore, the pure conception of a Rechtsstaat,—a State whose sole legitimate function is to prevent the violations of those principles of rights which the reason lays down as fundamental. The State is dragged in, as it were, as a *deus ex machina* to secure to men that freedom to which they are rationally entitled, but which without the State they could not obtain.[47]

It remained for Hegel, Willoughby says, to give to modern ethics its truest content, for "while recognizing the two necessary elements of self and notself, of liberty and law, [he] yet harmonizes them in a higher unity

45. *Ibid.*, pp. 258-59.

46. *Ibid.*, p. 259.

47. *Ibid.*, pp. 259-60.

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without destroying them."[48] With Hegel the old Greek idea of subordination is revived, but is given a truer nature in that it becomes "a conscious, deliberately chosen subordination."[49] Modern ethics, Willoughby says, harmonizes the two ideas of absolute freedom and authority, and he continues—

> . . . thus, while still retaining the central conception of the "good will," the abstract and impossible Kantian formulism of that will is denied. In its place there is given us the conception of a self that finds its realization in the outer world, in utilizing objective forces and institutions as means for securing that development and perfection which the reason declares. The existence of the State thus, as comprehending most important of all those forces and facts which are necessary for man's highest life, receives the highest possible sanction. Thus Hegel speaks of the State as the "actualization of freedom," and as the "embodiment of concrete freedom."[50]

Because the state has a moral role to play, in that it is charged with the task of aiding individuals in achieving self-perfection, its commands are ethically justified to the extent that it fulfills that function. Thus, coercion in a general way is justified because of the nature of the state, and of the individual. More specifically, Willoughby attempts to assess the proper sphere of political control, saying—

> . . . if, as we have shown, there are properly speaking no abstract rights in the individual which are by their very nature withdrawn from rightful control, it follows that utility—interpreted, of course, in its highest ethical sense—should determine when coercion should be applied.[51]

He suggests that the following "conditions" must be satisfied before coercion in any form is justified: That the object aimed at be desirable, that

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48. Ibid., p. 260.

49. Ibid., p. 261.

50. Ibid.

51. Ibid., p. 263.

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the means employed be calculated to obtain it, and that the expense be not too great.[52]

To illustrate how these conditions might be applied in practical affairs Willoughby uses two examples: Religion and colonialism. On the former he asserts:

> If we are firmly convinced . . . that the failure to accept a certain doctrine will doom the recusant to an eternity of awful torment, and if we are equally sure that coercion will be able to secure the saving acceptance, and without causing an amount of suffering anywhere near as great as that from which the coerced one is to be rescued, can we hesitate to declare that such coercion should be applied? Have we not, in fact, abandoned intolerance, where we have abandoned it, either because we have changed our minds either as to the desirability of the end sought, or our faith in the efficiency of compulsion to reach it, or to reach it at a not disproportionate expense?[53]

However, Willoughby cautions, because coercion is of necessity painful, the one exercising it must "first convince himself that the conditions that we have mentioned are certainly present."[54] Furthermore, he must take into consideration all the immediate and remote consequences of this exercise of coercion. Then, he says, "when such conditions are strictly observed it will be found, we think, that the doctrine will secure a considerably greater tolerance, individual, social, and political, than now actually obtains in any modern society."[55]

Applying this "formula" to colonialism Willoughby points out that just as it is the moral duty of the parent to educate his child, using compul-

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52. Willoughby does not, however, explain what he means by "desirable" that is, by whom this desirability is to be determined, or by what standards these objects are to be determined as desirable ones.

53. Willoughby, Social Justice, pp. 264-65.

54. Ibid., p. 265.

55. Ibid.

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sion is necessary, it is right and proper for superior nations to compel less civilized nations "to enter into that better social and political life the advantages of which their own ignorance either prevents them from seeing, or securing if seen."[56] Colonialism is thus justified, but Willoughby asserts only if the following conditions are met: The motive of the superior nation must be a disinterested one, the superior nation must be absolutely certain that the coercion will result in the betterment of the inferior race, and it must be clear that the desired result can be better obtained by coercion than by any other means available.[57]

Thirty years elapsed between the publishing of Social Justice and The Ethical Basis of Political Authority. In this latter work Willoughby's theories on coercion are treated at greater length, being the product of a more mature scholar. By 1930 world-shaking events had occurred—World War I, the Russian Revolution, and the rise of fascism. It will be informative to see to what extent these events influenced Willoughby's later political thinking.

In dealing with the question of the ethical basis of political authority Willoughby employs the same methodology that he used in discussing the origin of the state in The Nature of the State. That method, briefly put, is to scrutinize the various theories that have been advanced, and then after each has been criticized and rejected, present what he calls a "true" theory.

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56. Ibid., p. 266.

57. Ibid. With these qualifications Willoughby quotes with approval a long passage from John W. Burgess' Political Science and Comparative Constitutional Law to the effect that not only is it the right of the "Teutonic" nations to colonize, but it is their duty to so do to raise the political standards of the world.

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He divides his inquiry into four distinct but related problems: (1) The abstract question of the right of the state to exist. By this he means an inquiry into "the ethical legitimacy of political coercion in any form or under any conditions."[58] (2) The justification of the existence and maintenance of particular forms of governmental organization. (3) The principles in accordance with which the right of particular persons to occupy the seats of political power may be determined. (4) The criteria for estimating the ethical character of political policies. Of these Willoughby sees the first as the most fundamental since answers to the last three will flow more freely from a correct answer to the first.

He first turns his attention to those theories which he says either evade or deny the reality of the problem of ethical justification of political authority. The first, in his estimation, is the historical theory which asserts that the state is the result of historical growth, and is justified by this fact. Some of the persons who subscribe, or at least come close to subscribing, to this theory are Bossuet, Hegel, and John W. Burgess. Bossuet,[59] according to Willoughby, advanced a theory which held that history justified the state because of a divine providence that directs the destinies of men, including the political. Political institutions are to be regarded as receiving the divine sanction of this divine will.[60]

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58. Willoughby, The Ethical Basis of Political Authority, p. 19.

59. Jacques Bossuet (1627-1704) was appointed by Louis XIV to educate the Dauphin, and for the use of his pupil he wrote La Politique tirée des propres paroles de l'Écriture Sainte, which was written about 1670 and first published in 1709. In it Bossuet presents a divine right of kings theory, buttressing his assertions with copius reference from Scripture.

60. Willoughby says little about Bossuet's theory beyond that related above. He does say, however, that it is but a ruder application of the divine right theory. The reason for including it in the discussion of the historical theories apparently is that he frequently cites Biblical history.

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Although Hegel's theories on the state are treated more fully by Willoughby under the "mystical or transcendental" category, they are briefly mentioned in connection with the historical theory. Hegel, says Willoughby—

> . . . see [s] in human history the gradual and progressive realization of certain eternal and metaphysically determinate principles of right. Thus, though, at any one time, the State or any other human institution, is not wholly rational, it is justified as representing one of the phases of human development and as one of the means whereby humanity is progressing toward that goal which is metaphysically marked out for it.[61]

Hegel, says Willoughby, sees the ideal toward which mankind is progressing as being that of perfect realization of the freedom of the will, and though he does not go so far as to say that whatever is, is right, he does maintain that the rational is real and that the real is rational.

It is with the historical theory of Professor John W. Burgess that Willoughby is chiefly concerned. Burgess sees the state as the product of history, and this means "that it is the gradual and continous development of human society, out of a grossly imperfect beginning, through crude but improving forms of manifestation, towards a perfect and universal organization of mankind."[62] Instead of viewing the historical development of mankind as progressing toward the perfect realization of the freedom of will, as Hegel does, Burgess sees the end of history as the realization of a world state.

Willoughby next turns to a brief treatment of the natural or instinctive theory. As this has been related in the previous chapter there is no

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61. Willoughby, The Ethical Basis of Political Authority, p. 20.

62. Burgess, Political Science and Comparative Constitutional Law, I, 59.

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need to repeat it here. It is instructive to note, however, once again that in his The Ethical Basis of Political Authority Willoughby continues to regard Aristotelian political theory as positing unthinking and instinctive obedience to the state. In addition, he considers the organismic theory of Spencer and Bluntschli and the force theory, but, as these have also been previously considered, they need not be repeated.

All these theories, the historical, the natural or instinctive, the organismic, and the force, Willoughby asserts, either evade or deny the reality of the problem of ethical justification of political authority. Because they do he feels justified in treating them in a rather cursory manner, particularly the natural theory.[63] From these theories Willoughby turns to those that have been advanced in an effort to deny that political authority can ever be justified.

Under the general heading of "theories of anarchy" Willoughby considers the theories of William Godwin, Pierre Joseph Proudhon, Prince Peter Kropotkin, Herbert Spencer, and with brief references to Leo Tolstoi and Mahatma Gandhi.[64] Although anarchists disagree as to the means of establishing anarchy they do agree that political coercion can never be ethically justified because it interferes with the right of the individual to be free from all external coercion. Arguing that man is by nature good, Godwin sees human happiness blocked by arbitrary impediments, among which government is one of the principal ones. He says, "Each man should be wise

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63. He devotes only a little more than a page to this theory.

64. For his treatment of these theories Willoughby draws on the following works: William Godwin, An Inquiry Concerning Political Justice and Its Influence on General Virtue and Happiness, first published in 1793; Pierre Joseph Proudhon, "The Coming Anarchy," The Nineteenth Century, August, 1887, and Modern Science and Anarchism, 1903; Herbert Spencer, Social Statics, 1850.

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enough to govern himself, without the intervention of any compulsory restraint; and since government, even in its best estate, is an evil, . . . we should have as little of it as the general peace of human society will permit."[65] Also of an utopian bent Proudhon proclaimed man to be essentially good by nature and believed that if enlightened and relieved from coercion (the worst form of which is government) he would conduct himself according to the highest principles and by voluntary cooperation bring about a harmonious social life. Both Godwin and Proudhon objected to the institution of private property, the latter referring to it as theft, and both advocating its elimination. Kropotkin felt that the coming of anarchy is inescapable, resulting inevitably from the evolutionary process. All three of these writers were anti-capitalistic, holding that capitalism and political coercion are so united as to preclude destruction of the one without the other.

Willoughby's answer to the anarchists is that they are logically obligated to demonstrate that—

> . . . human individuals are, by their very nature, endowed with an inalienable and indefeasible ethical right to live their own lives according to their own unrestrained several wills; and also to assert that there is a quality in the control exercised through political agencies that distinguishes it, *in genere*, from all other forms of social control . . . .[66]

Moreover, he feels that the doctrine of evolution that Kropotkin advances as something that will inevitably lead to human happiness is false. He says, "Confidence in this can be had only if one also believes that there

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65. Godwin, *An Inquiry Concerning Political Justice and Its Influence on General Virtue and Happiness*, I, 246.

66. Willoughby, *The Ethical Basis of Political Authority*, p. 58.

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is some sort of overruling Providence which determines the destiny of humanity and sees to it that men so act that, ultimately at least, this destiny will be realized."[67]

Willoughby next turns to the Marxian theory of the state. Marx's central thesis, says Willoughby, is that economic interests dominate men's actions and that human history is but a record of this fact. Politics is but a reflection of the dominant economic conditions prevailing at any given time, and there has always been a class struggle between economic classes for mastery of the state. The state has always been an instrument for the advancing of the interest of the most powerful economic class for the promotion of its own economic interests. This, says Willoughby, is what Marx meant by the economic interpretation of history.[68] Advancing a "scientific socialism," Marx pointed to the inevitability of capitalism's rise and also its fall, using the dynamics of Hegel's dialectic. Also, by the use of the concept of surplus value Marx asserted that it was of the very nature of capitalism to be exploitive of the worker. Says Willoughby:

> As for their political theory, it is evident that they hold that the present political state has no firm ethical basis. When society is placed upon its proper operating basis, there will, according to them, be no practical need for the continued existence of the state. Until now, they say, the State has had for its raison d' etre and as its actual effect, nothing more than the maintenance in power of the capitalists, and the protection of their economic interests.[69]

Under communism, as fully developed, there will be no state. But, Willough-

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67. _Ibid._

68. _Ibid._, p. 66.

69. _Ibid._, p. 79.

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by feels, if one granted for the sake of argument that the state will disappear, this "will be true only if we so limit the term 'State' as to make it inapplicable to the form of social organization which the Communists expect will take its place."[70] He adds that the Communists are quite vague as to the exact nature of the structure of their society after the state has disappeared, and that it would, as he puts it, "levy a high tax upon the optimist of the most optimistic" to assume that something very nearly like a state would not be necessary to direct the functions that the Communists see as essential in their new civilization.[71]

Willoughby next considers the divine right theories, but as they are substantially those of the previous chapter they will be here omitted.

Examining next the "transcendental" theories of the state Willoughby finds that their spokesmen hold the state to be above the rules of morality which apply to ordinary individuals, and what the state declares in its name to be right must be accepted by its citizens as right and must be obeyed at any sacrifice. Willoughby identifies this theory with the German school of idealistic metaphysics of the nineteenth century, specifically such writers as Kant, Hegel, Treitschke, and "an interesting reflection" of this thought in the writings of Elisha Mulford, an American. Kant prepared the way for this thought in his Rechtslehre (1796) in which he suggests a concept of the state which places it beyond human reason when he says, "the origin of the supreme [political] power, from the practical point of view, is inscrutable by the people who are under its authority." And that "the subject should not reason too curiously as to its origin, as if the right of

70. Ibid.

71. Ibid., p. 81.

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obedience due it were to be doubted."[72] From this and other statements Willoughby concludes that Kant, when speaking of the state as an abstract entity "used language which implied that it has transcendental qualities."[73]

The transcendental theory "appeared in full light" in the philosophy of Hegel who saw the state as morally superior to individual human beings. In his Philosophy of Right (1821) Hegel states, "This substantive unity [of the state] is its own motive and absolute end. This end has the highest right over the individual, whose highest duty in turn is to be a member of the State." Indeed, says Hegel, "The State is indeed the reality of the moral idea."[74] Summing up his interpretation of Hegel's political philosophy, Willoughby says:

> Man's highest aim and destiny is to be free; men are free when they are required to do only what their reason recommends; therefore, freedom is not secured by civil processes which aim to adjust or compromise, and, if necessary, to protect, by police power, the particularistic interests of individuals as suggested by their several subjective wills; therefore, transcending individual human beings, there is needed some entity or being whose will will be universal (in a philosophic sense) and acceptable to individuals as the voice of reason itself, so that, in yielding obedience to it, they will not feel themselves coerced to do other than what their own individual reason approves. Such a being is the State. The State thus becomes, in Hegel's view, a wholly abstract being . . . . The State is that higher and more abstract entity which lives or operates through governmental organs and public magistrates, but, in its own self, it is a Spirit or Idea, which, abstract in character, finds realization and objectification, or concreteness, in laws, and their enforcement. Thus, having a will of its own, it may properly be viewed as a person.[75]

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72. Quoted in Ibid., p. 116.

73. Willoughby, The Ethical Basis of Political Authority, p. 117. In fairness to Kant, Willoughby points out, elsewhere in his works his thought is more "utilitarian" even to the point of accepting the contract theory and doctrine of popular sovereignty.

74. Quoted in Ibid., p. 118.

75. Willoughby, The Ethical Basis of Political Authority, p. 114.

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It is instructive to note that Willoughby's earlier favorable view of Kantian and Hegelian ethics had by 1930 given way to criticism. This change was undoubtedly brought on by World War I, and is evidenced by a small volume, Prussian Political Philosophy (1918), in which Willoughby severely criticizes the political theories of the Empire. He says:

> Not withstanding the candor with which they have been avowed, and the consistency with which they have been applied, so atrocious are they in character, so shocking to the fundamental ideas of justice, truth and humanity, that many of us have found it almost impossible to believe that any intellectually enlightened and christianized people could sincerely hold them. That the Prussian people do accept these doctrines is, however, certain, and the purpose of the present volume is to explain how this has come about.[76]

It "came about," according to Willoughby, as a result of Hegel's tremendous prestige in Germany, the German predeliction to abstract, idealistic, and universalistic interpretations of history, and the German belief that their culture is superior and must be spread to other peoples, by force if necessary, necessitating a strong political state.[77] The State to the Prussian had more than political significance. "It exists," says Willoughby, "not merely to control, but to create. By its very nature its influence is regarded as rightfully extending not only over material matters, but to spiritual and religious interests as well."[78] Moreover, Hegel's doctrines have had a detrimental influence on German thinking and action in this way:

> Here we find a deliberate purpose, not simply to prove that the Germans are the standard bearers of civilization, but the development of a system

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76. Willoughby, Prussian Political Philosophy, pp. vii-viii.

77. Willoughby, The Ethical Basis of Political Authority, pp. 126-27.

78. Willoughby, Prussian Political Philosophy, pp. 52-53.

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of political thought which culminates in a practical deification of the State as manifested in its Prussian form of monarchical organization. Thus, in the philosophy of Hegel, not only are the German people declared to have been selected by Providence as the one people destined to lead the human race towards the goal of perfection which reason points out, but that they have, ready-made in their national State, as then monarchically organized, an examplar of a politically perfect form of state organization, and an instrument by means of which the true conceptions of right and reason may be spread, by force if necessary, among other peoples who may be so intellectually benighted, or so obstinately minded as to refuse to receive them.[79]

Willoughby sees four corollaries flowing from this transcendental concept of the state: (1) It denies a popular base for government, (2) It denies to nations the use of rules of morality applicable in other fields of human conduct, because of the freedom of the state to act, (3) The state is regarded as a Kulturstaat rather than a Polizeistaat, thus widening the proper sphere of the state's authority, and (4) It changes the concept of human liberty, to the point of emphasizing order rather than individual liberty.[80] On the last of these, Willoughby says, "what Hegel and his followers understood by freedom, was moral or intellectual freedom, --the freedom of man's reason and spirit from the restraints of dogma, tradition and external authority. It did not mean political liberty."[81]

If not transcendental in themselves, at least, says Willoughby, fascist political theories approximate the position taken by transcendentalists. Also he finds strong strains of organismic and divine right theories in fascist thought. For his source Willoughby utilizes the works of those writers

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79. Ibid., p. 47-48.

80. Willoughby, The Ethical Basis of Political Authority, pp. 128-29.

81. Ibid., p. 129.

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who have received official or semi-official authentication.[82] Fascists view the state as an entity, as something more than the sum total of the individuals who are its members, and in so doing repudiate "modern liberalism." Moreover, an organismic approach to society is taken by Alfredo Rocco and Carrando Gini who view societal and political groups of individuals as having organic existence with ends of their own to pursue. Gini asserts, for example, "The Nationalist /Fascist/ theory . . . views society as a true and distinct organism of a rank superior to that of individuals who compose it, an organism endowed with a life of its own and with interests of its own."[83] Also Willoughby sees the influence of Hegel in fascist theory in that the state is held to be an end in itself with a life that transcends those individual members and which outlives particular men.[84]

Fascism denies popular sovereignty, individuals having no inherent right to determine the form of government, this being the prerogative of those in power at the time. In the field of international law and relations, Willoughby points out, fascist theory denies the duty and responsibility of one state to other states or to humanity because of the exaltation of states into self-seeking entities.

By way of an evaluation of this body of thought Willoughby finds that it cannot be flatly denied that the fascist state provides a more efficient administration. Surprisingly, however, he also says that "teleological political theory" cannot ascertain whether the fascist assertion that it pro-

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82. By this he means those writers who have had Mussolini's endorsement or held official government posts in the Italian government. For example, Alfred Rocco, The Political Doctrines of Fascism; and Carrando Gini, The Scientific Basis of Fascism, respectively.

83. Quoted in The Ethical Basis of Political Authority, p. 135.

84. Willoughby, The Ethical Basis of Political Authority, p. 137.

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vides for the adoption of wiser public policies is true or false. He finds this to be, indeed, a matter of opinion.[85] Willoughby agrees with the fascist position that individuals do not have inherent rights as against the state, and also that the doctrine of popular sovereignty is a false one, "if," he adds, "by that be meant the inherent ethical right of every citizen to participate actively in the administration of the government of their State or in the determination of its policies."[86] He finds, however, the transcendental element in fascist thought to be false. He says:

> The one essential vice in the Fascist theory . . . is the doctrine that the nation or State has an existence and ends of its own to subserve which are independent of the existence and the ends of its citizens. It is, in short, the transcendental character which it ascribes to the State which is the erroneus and vicious element in the theory.[87]

The most formidable theory of the state thus far advanced, in Willoughby's estimation, is the contract theory, and he devotes almost one-hundred pages in his _The Ethical Basis of Political Authority_ to its consideration. However, since it is essentially a repetition of his treatment of the theory in his _The Nature of the State_, which has been summarized in the previous chapter, there is little need to do more here than merely summarize his main conclusions. As in his earlier work Willoughby sees the contract theory as inadequate. It is based on a doctrine of natural law, a doctrine which he cannot accept. It is notable, however, that in 1930 Willoughby held that there is _truth_ as well as error in the contract theory, a position he did not take in 1896. The truth in the contract theory is that it contains the

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85. _Ibid._, p. 146.

86. _Ibid._

87. _Ibid._

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idea of individual consent, an idea which "must be accepted in ethical validation of the control which the state exercises over its citizens or subjects."[88]

After having utilized approximately one-half of the Ethical Basis considering theories that evade, deny, or wrongly answer the question of ethical political justification, Willoughby then turns to a consideration of what he calls the "true" basis of the right of political coercion. He does this by asking and answering four questions: (1) Does the individual have moral rights wholly apart from his status as a member of a social group? (2) Are there essential differences between social (non-legal) coercion on the one hand and political (as exercised by the state) on the other? (3) Are there absolute principles which govern the legitimate exercise of political coercion as to its manner or purposes? (4) Must the character of government through which the state is to exercise its functions be ethically justified?

The first question is by far the most important, for, as Willoughby says—

> . . . if morality itself has no application except when men live in social relations with each other, then one can start with Society and need not consider how may be resolved the apparent antithesis between the complete individualism of a State of Nature and that subordination of the individual to the authority of others which is the outcome of social life.[89]

In answer, Willoughby asserts that the term "morality" "has no meaning apart from the idea of human society."[90] Once again, he denies the validity of a

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88. Ibid., p. 221.

89. Ibid., pp. 236-37.

90. Ibid., p. 256.

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natural law under which an individual can be said to possess natural rights. Man, as man, says Willoughby, has no inherent rights. Indeed, in a state of nature rights are impossible, for the very nature of a right is that the claim of one individual to rights implies a reciprocal obligation upon the part of others to respect them. This, says Willoughby, necessitates a social condition, something more than a purely individualistic regime that characterizes the state of nature. Locke and Spinoza were wrong, he points out, for—

> . . . views such as these imply a naive confidence in the human reason as a human faculty which, if allowed to operate free from corrupting influences, would lead all men to exactly the same conclusions; that is, in the moral field, to the discovery of what acts are, in themselves, that is, abstractly considered, absolutely right, and those that are absolutely wrong.[91]

Once again, Willoughby denies that there are such things as natural rights that belong to the individual. First of all, the idea of a civilized life of man being in any way unnatural or non-natural is absurd. He says, "man is himself a part of Nature, and his actions, whatever they may be, are necessarily 'natural'."[92] Furthermore, the idea of deriving from natural law definite, absolute rules of conduct is erroneous because, as he puts it, "its rules are necessarily dependent upon the particular interpretation of Nature's will obtained through man's reason. What this interpretation will be obviously depends upon the given data from which men reason; and these, in turn, are only supplied by objective conditions of social, economic, and political life."[93] On this question of whether rights are "nat-

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91. *Ibid.*, p. 238.

92. *Ibid.*, p. 244.

93. *Ibid.*

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ural" Willoughby agrees with T. H. Green, who says:

They (rights) are "innate" or "natural" in the same sense in which according to Aristotle the state is natural; not in the sense that they actually exist when a man is born, and that they have actually existed as long as the human race, but that they arise out of, and are necessary for the fulfillment of, a moral capacity without which a man would not be a man.[94]

Because of the importance of the question of human rights Willoughby devotes a great deal of time and effort to it at this point. He maintains that modern ethics takes a midway position between the utilitarianism of Bentham and the idealism of Kant, with reference to man's motive or "good will." Bentham held that no moral value could be attached to the motive, saying, "if motives are good or bad, it is only on account of their effects."[95] Kant, on the other hand, denied that the results of the act have any determining force, saying, "pure reason is practical of itself and gives to man a universal law which we call the Moral law . . . ."[96] Drawing these together, Willoughby concludes, "It is now generally accepted that, to the individual, the ethical character of his acts is dependent upon the motive or 'good will' with which they are done, and that this is determined by the results that follow, or reasonably may be expected to follow, from the commission of specific acts."[97]

Willoughby summarizes his ethics in the following passage:

The central concept of modern ethics is the moral personality of man. This implies that each individual is able, and, in fact, is irresistably impelled, to formulate for himself an ideal of perfection toward the attain-

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94. Quoted in Ibid., p. 245.

95. Quoted in Ibid., pp. 24-41.

96. Quoted in Ibid., p. 241.

97. Willoughby, The Ethical Basis of Political Authority, p. 240.

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ment of which he is conscious of a moral obligation to strive. This consciousness of obligation, which takes the form of a categorical imperative posited by his own reason, carries with it the logical assumptions; first, of a freedom of the will, for without this there cannot be even the capacity to obey the obligation which is felt; and secondly, of an inherent right to be allowed by others to realize in fact, as far as it is compatible with their reciprocal rights, those conditions of life which are implied in the ideal of personal development which each frames for himself.[98]

Willoughby asserts, then, that the realization of one's highest self is the general categorical imperative addressed to everyone. When one individual puts forward the claim of a freedom of action there is implied at the same time the recognition of a duty of this same individual. This duty is that he will use this freedom to attain the end for which it is granted, and that alone. Also, when an individual makes a claim for a given freedom there is logically implied the assertion by the individual that he has both the disposition and the ability to use his freedom properly.[99] It follows from this that not all rights which individuals claim are necessarily the same. Willoughby says, "The rights which different individuals may properly claim must vary according to their several ethical dispositions and capacities."[100] This means that there are no absolute rights or freedom, no "definite natural rights."

Moreover, there cannot be absolute rights, Willoughby says, because the granting of rights depends on "all the concomitant circumstances which determine whether or not the special aim sought to be realized by the employment of the rights claimed is the most desirable end which, under the given conditions, should be sought."[101] Instead of being absolute, rights are

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98. Ibid., pp. 242-43.

99. Ibid., p. 245.

100. Ibid., pp. 245-46.

101. Ibid., p. 248.

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relative, Willoughby asserts. Once again, he quotes with approval from Green's work, "every one . . . of the duties which the law of the State or the law of opinion recognizes must in some way be relative to particular circumstances . . . ."[102]

Rights, says Willoughby, are social, in that the idea of moral right on the part of one individual implies the reciprocal obligation upon the part of others to respect them, and this in turn means that there is some kind of common bond which unites those who have rights and those who are to respect them. This means, Willoughby says, "a social condition is implied, something more than a purely individualistic regime."[103] Once again he draws on the thought of Green:

> There can be no right without a consciousness of common interest on the part of members of a society. Without this there might be certain powers on the part of individuals, but no recognition of these powers by others as powers of which they allow the exercise, nor any claim to such recognition, and without this recognition or claim to recognition there can be no right.[104]

Having established that morality has no meaning apart from society, and that the individual has no rights apart from society, Willoughby then turns to the second question: What difference, if any, exists between political and non-political coercion? His purpose here is to see if it is necessary to found the ethical right of political authority upon grounds essentially different from those which support other forms of social control. His answer is that only a matter of expediency differentiates social

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102. Quoted in Ibid. p. 249.

103. Willoughby, The Ethical Basis of Political Authority, p. 252.

104. Quoted in Ibid., p. 252.

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and political coercion. If men were "perfectly moralized" no form of coercion, political or social, would be necessary, for their interests would not be in conflict. But men are not morally perfect, and their interests are commonly in conflict, and coercion therefore becomes essential to civilized life. To be sure, this imperfect man will practice certain mutual forebearances, at least to the extent that there is a harmony of interests because he will realize that they will redound to his advantage.

Willoughby at this point seems to agree with Hobbes that the prime function of the state is to keep peace between individuals. He finds, however, that a monopoly of coercive power need not necessarily be given the state. He says, "It may be, that, with reference to many matters, it will be preferable to have individuals controlled by 'social' as distinguished from 'political' forces, or even left free to secure what they are able to obtain in unrestricted competitive struggle with their fellow individuals."[105] No fundamental ethical principles determine what kind of coercion will be employed, however, from physical force directly applied to social disapprobation; nor do fundamental principles exist which can determine just who shall exercise coercion. Willoughby concludes on this point, "from the standpoint of ethics as well as of expediency it /political coercion/ is justified just to the extent that it provides a more efficient and less oppressive form of control than would exist without it."[106]

Turning to the third question; that is, what absolute principles, if any, determine the manner in which, or the circumstances under which, or the purpose for which, political coercion may be legitimately exercised, Wil-

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105. Willoughby, The Ethical Basis of Political Authority, p. 259.

106. Ibid.

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loughby asserts, first of all, that conceivably there are five ends which political authority should seek: (1) The welfare of the state itself as an independent or transcendental being. (2) The welfare of those in control of the government. (3) The welfare of some particular class or classes of the citizenry. (4) The welfare of the whole body of citizens alike. (5) The welfare of all peoples, that is, of humanity, future as well as present.[107] Willoughby can only accept the proposition that governments exist to advance the interests of the governed, that is, the whole body of the citizenry. Assuming this, he finds it necessary to examine the question with whom the final judgment lies as to the ethical propriety of a political command. He examines this question from three standpoints: (1) That of the individual whose conduct is controlled, (2) That of the government, (3) That of a disinterested third party viewing the situation.[108]

From the point of view of the individual Willoughby finds that the rights that an individual possesses depend upon his capacity and disposition to use them to attain some desirable end, and the existence of the state is justified, he says, "In so far, and only in so far, as it tends by its activities to assist in developing the best self of that individual.[109] The individual "at times" has the moral right to refuse obedience to laws which he deems to be unjust or immoral. Much caution must be applied, however, Willoughby indicates, for the individual must take into consideration at the same time that by so doing he may weaken the reverence for law in

107. Ibid., p. 270.

108. Ibid., pp. 272-73.

109. Ibid., p. 273.

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general, and may weaken the social and political bonds "which in the aggregate promote the realization of the morality as a whole."[110] The right of resistance, and indeed, of revolution, cannot be denied, but, he says, "it is a right only to be justified by a consideration of all the consequences, proximate and ultimate, individual and social, which attend its exercise."[111]

The individual confronted with a decision between obedience and disobedience, however, must have some standard, some guide. What law or authority does this individual consult to judge the rightness or wrongness of a command? As has been seen, Willoughby denies the existence of a natural law which might serve this purpose. The individual must decide, however, and in considering whether to obey or disobey a command of the state he must consult not his conscience, but his reason. Willoughby agrees with L. T. Hobhouse who asserts in his Metaphysical Theory of the State, that the conscience is not to be trusted because of its subjective nature. Regarding conscience as the voice of God in each man, Hobhouse finds that they differ in individuals, and the word of God, even if taken to be an inspired document, is manifestly liable to the greatest diversity of interpretation. On the other hand, apparently, human reason can be trusted, and must be consulted when the rightness and wrongness of a political command is to be considered.

Looking at the question from the standpoint not of the individual concerned, but from the position of those wielding the power of the state, Willoughby finds that they are equally under moral obligations. Because morality can apply only to human individuals, the state, when viewed as a person

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110. Ibid., p. 274.

111. Ibid.

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or as an abstract entity, cannot be held responsible for its acts. However, the state, morally speaking, is not a person. It does not have a will of its own. He says, "It cannot feel, have emotions, form motives, or exercise reason. It cannot, therefore, be said to have a conscience."[112] The moral purposes and duties of the state are not formulated by itself, but by the individuals who compose the body politic, and it is upon them that, in the final analysis, rests the obligation to see to it that the moral ends of the state are attained, or sought to be attained.[113]

The same rules, then Willoughby would say, apply to the state as apply to individuals in considering moral obligations and rights. The state is equally under moral obligation. Those who wield the power of the state are morally obligated not to seek their own welfare, but the welfare of the governed. Where there is a difference of opinion between themselves as governors and some or all of those whom they govern, it is imperative that they should reach their decisions with an absolutely open and disinterested mind. However, Willoughby says—

> . . . the final judgment must be theirs exactly in the same manner that a parent determines for his children, or the director of a business corporation determines for his stockholders, or those in authority in a church or in a social organization, determine what, for the best interests of all concerned, shall be done.[114]

Still considering question three, Willoughby asks if there are general principles which determine the extent to which a state can exercise its

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112. Ibid., p. 277.

113. Ibid., p. 278.

114. Ibid., p. 280.

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powers. He finds, in answering, first of all, that there are certain "inherent limitations" on its authority because of the very type of coercion the state is able to apply. That is, the state can control only external acts. It cannot control "the operation of man's judgment," or what man conceives to be right and wrong. On this Willoughby says, "The determination by the individual whether or not a given act, all things considered, should or should not be performed, and his final decision as to whether in fact he will or will not perform it, must always lie with himself."[115] On the other hand, Willoughby asserts, there are no absolute limitations on the exercise of the state's possible control as far as ethical principles are concerned. He explains this, saying, "The doctrine which has already been established that the State has for its general purpose the promotion of the welfare of its citizens carries with it the corollary that whatever State action will tend to secure this end is ethically justified."[116] Once again he utilizes the "formula" for determining when the coercion of the individual is justified: When the object aimed at is desirable; when the means employed are calculated to attain that purpose; and when the expense is not too great. Also, once again (in his _The Ethical Basis of Political Authority_) his example of how this doctrine might work is that of religious belief, but he does not include this time the example of the justification of colonization.

Willoughby finds nothing in the nature of political rule to make ethically illegitimate the extension of its control beyond certain defined limits. Indeed, he feels that the older concept of what the Germans call a _Polizeistaat_ must be abandoned, and in its place the newer concept of the

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115. _Ibid._, p. 282.

116. _Ibid._, p. 283.

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Kulturstaat must be substituted. In this Kulturstaat Willoughby envisions "a State that may legitimately exercise its controlling power for the rendering of whatever affirmative aid it can for the advancement of welfare of its citizens."[117] He feels, however, that there is much truth in the proposition that as a practical matter it is unwise to substitute public control or operation for private initiative and energy, because of the natural or instinctive motives that universally motivate men; but he does hold that the individualistic doctrines derived from this fact are not ethically sound when pushed to an absolute form. For example, the contention that each individual in the long run knows what is his own best interest, and in the absence of arbitrary restraints is reasonably sure to seek them is not necessarily so, in Willoughby's estimation. In such matters as compulsory education, sanitation, and the like, it is the very persons upon whom coercion is most needed who are least qualified to judge the value of the conduct which such compulsion demands. Likewise, Willoughby finds, the contention that free competition can and does exist in the absence of political restraint is in error, for it is true that genuine competition can exist only where the contesting parties possess comparatively equal strength or intelligence, and this requires the interference of the state.[118]

Willoughby's fourth and final question is the extent to which the grounds upon which political authority is ethically justified determine the character of the government through which the state is to exercise its functions. Willoughby draws a distinction between the ethical legitimacy of political authority as an abstract or general proposition, and the ethical

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117. Ibid., p. 296.

118. Ibid., pp. 294-95.

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right of a particular government to exist. Although he would insist that the inquiry into the former throws light on the question of the location of the right to determine the particular form of government, he, nonetheless, contends that the form of government and the policies which it pursues are matters of expediency. Government is merely a means to an end, and its form depends upon specific conditions and the practical problems which it has to meet. He concludes that that type of government is justified which will most effectively execute the policies that are required in order that the legitimate ends of the state may be secured.[119]

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119. *Ibid.*, p. 305.

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Chapter VI

WILLOUGHBY'S JURISTIC THEORIES

A recent writer has referred to Willoughby's treatment of the state from the juristic point of view as the "best American statement" of the subject.[1] Another has said that his The Fundamental Concepts of Public Law (1924) represents "what is perhaps the last of the great efforts to interpret the state in terms of a juristic theory of the state personality endowed with a sovereign will."[2] Other writers of recent decades have not been so favorably impressed with this approach to a study of the state. One dismisses Willoughby's juristic theories as "somewhat sterile and unoriginal."[3] Another asserts that though his Fundamental Concepts is a clear exposition

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1. Rupert Emerson, State and Sovereignty in Modern Germany, New Haven, 1928, p. 51, n. 4.

2. Francis Wilson, The American Political Mind, New York, 1949, p. 415.

3. Edward R. Lewis, A History of American Political Theory From The Civil War to the World War, New York, 1937, p. 190.

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of the state, it leaves much to be desired.[4] Other criticism of this approach are to be found in political science literature of a few decades ago.[5]

Perhaps one of the reasons for the modern criticism of this narrow legalistic theory of the state is the theory's obsolescence if not obsoleteness by the 1920's. Indeed, it is questionable whether analytical jurisprudence served American political science as well as did other schools of jurisprudence, such as the historical, the philosophic, or the sociological. To go further, although useful in its native England and Germany, this theory found relatively fewer adherents in the United States, unlike other imported concepts, as for example, natural law. Analytical jurisprudence is a peculiar product of early nineteenth century England, and later in the century it found many supporters in Bismarck's Germany. It served different needs in these two countries, however, being the vehicle of utilitarian reform in the former and an instrument of law unification in the latter.[6]

Nineteenth century concepts of law were in the main radically different from those of the previous century. The eighteen century view of law was dominated by natural law theories which had at least a superficial resem-

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4. Harold J. Laski, "Review of Willoughby's The Fundamental Concepts of Public Law," Political Science Quarterly, XL (1925), 618-21.

5. George H. Sabine, "Political Science and the Juristic Point of View," The American Political Science Review, XXII (1928), 553-75. Sabine questions the sharp and unnatural division between ethical and juristic theories which Willoughby posits. One of Willoughby's students, Robert T. Crane, somewhat more mildly criticizes Willoughby's theory in "The Juristic Concept of the State," The American Political Science Review, XII (1918) 209-14.

6. Emerson, op. cit., pp. 47-49, finds three reasons for the growth of the analytical school in Germany: Bismarck's political break with the past called for a similiar change in legal thinking; the inability of the historical and philosophical schools to cast light on present problems of empire; and the scientific theories of Carl von Gerber seemed to fulfill this need.

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blance to the natural law of antiquity. Cicero gave to natural law its classic definition as "right reason in agreement with nature." Its origin, however, is found in the political theories of Plato and Aristotle, and it found its way into Roman law via the Stoics, Panaetius and Polybius. Cicero improved upon natural law, and it entered into mediaeval thought through Seneca and the Church Fathers, persisting throughout the Middle Ages, finding expression in the theories of John of Salisbury and St. Thomas Aquinas, among others. Continuing into the modern era in the theories of Bodin, Grotius, Hooker, Locke, and others, it was throughout these twenty-two centuries an attempt to provide a standard of right and justice that transcended personal bias and social convention—an attempt to assert that law is a part of ethics. The best American expression of the theory of natural law is in the Declaration of Independence and in the Revolutionary writings of such men as James Otis, James Wilson, and Alexander Hamilton.

In this era law was felt to be based on reason, and as Dean Pound puts it:

> Jurists [of the seventeenth and eighteenth centuries] believed that a complete and perfect system of legal precepts could be built up upon principles of natural law discoverable by reason and derived from the ideal of the abstract man. Thus the seventeenth and eighteenth centuries are in many respects comparable to the classical era of Roman law.[7]

There was, to be sure, some common ground of agreement from Plato to Jefferson on natural law, but significant alterations in the substance of the law had been made in the seventeenth and eighteenth centuries. Stressing rights rather than duties seventeenth and eighteenth century advocates of natural

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7. Roscoe Pound, "Jurisprudence," Encyclopaedia of the Social Sciences, VIII, 480.

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law took as their starting point an individualistic "state of nature" — something not found in ancient and mediaeval thought. Heinrich Rommen has recently emphasized this aspect of modern natural law, saying:

> Thinkers did not set out, as in the earlier period, from the essentially social nature of man in which the entire order of social institutions (marriage, family, state, international community) and the basic norms of these exist potentially in such a way that the essence if fulfilled only in the completion and hierarchical ordering of social forms through the various 'imperfect' societies up to the 'perfect' society. The point of departure was empirical nature discovered by means of abstraction, from whose psychological motive force, viewed as fundamental, the system of ethics and of natural law was deduced in a rationalistic manner . . . .[8]

Traditional natural law was weakened by Duns Scotus and William of Occam, but it was Thomas Hobbes who first broke definitely with its teachings, holding that once the state is created all law becomes positive law. This in effect destroyed the very purpose of natural law as traditionally conceived, for its function was, as Rommen says—

> . . . to serve as a moral basis for positive law; to give men a standard and critical norm for the justice of positive law; to represent the eternal ideal for which the historical state, as lawgiver and protector of justice, ought to strive.[9]

Owing to this significant break with traditional natural law there arose in the seventeenth and eighteenth centuries many schools of natural law; indeed, Rommen says, as many "as there were chairs and professors of natural and internatural law."[10] "Whoever," he continues, "was desirous of representing something as good and worth while had now to make of it a requirement of the natural law, and to show that it is a conclusion of reason

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8. Heinrich A. Rommen, The Natural Law: A Study in Legal and Social History and Philosophy, St. Louis, 1948, p. 77.

9. Ibid., p. 86.

10. Ibid., p. 106.

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and that it existed in the state of nature."[11] This resulted inevitably in the weakening of the theory, for it could hardly be legitimately utilized to support every political goal conceivable by man. It is important that it was the individualistic natural law rather than traditional natural law that was attacked and overturned by nineteenth century writers.

There were three well-defined schools of law in the nineteenth century: The Historical, the Metaphysical, and the Analytical. Theories of natural law continued feebly in the Metaphysical school, but were effectively excluded by the other two. Of the three, historical jurisprudence prevailed on the Continent and in the United States, in the latter case, at least, in the last third of the century.[12] Historical jurisprudence had one thing in common with the natural law school of an earlier day, and that was the concept of law as being found and not consciously made. The analytical jurists on the other hand, says Dean Pound, "regarded law . . . as something made consciously by lawmakers and held that rules of law derived their authority from the force and constraint behind them."[13]

The analytical school was founded by John Austin, but the groundwork was prepared by others. As long as theories of natural law dominated, the analytical approach was impossible, for it assumed a division of law and morals that the former could not tolerate. To be sure, there have always been theorists who deny that laws derive their validity from ethics, as for example, the Sophists, Machiavelli, and Hobbes; but it was not until Kant

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11. Ibid., p. 107.

12. Pound, "Jurisprudence," p. 480.

13. Ibid., p. 481.

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that this became more than a dissenting view.[14] While studying in Germany Austin came under the influence of Kantian theories, including the concept that stresses a distinction between law and morals. Also, Austin was a disciple of Bentham, whose evaluation of natural law can be ascertained from his A Fragment on Government (1776). In answer to Blackstone, who in his Commentaries asserts that no human law should be given validity that transgresses natural law or revealed law, Bentham asserts that natural law, which is "nothing but a phrase," would lead to anarchy. "It is," he says, "the principle of utility accurately apprehended and steadily applied, that affords the only clue to guide a man through these straits."[15]

Austin, like Bentham, did not see law as reason, but as will. Law is the command of a political superior to a political inferior, and its essence is the sanction or punishment to be meted out in the event of disobedience. Furthermore, the "law" that Austin refers to is positive law, or law that "exists by the position or institution of its individual or collective author."[16] Laws of God, of nature, or of morality are excluded from jurisprudence. It is this aspect that Dean Pound refers to especially when he points out: "In the nineteenth century jurisprudence became a separate study, usually termed the 'science of law'." A "narrowly limited legal science, indifferent to and even intolerant of light from without," it "reached its high-water mark in the English and American analytical jurisprudence of the immediate followers of Austin."[17]

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14. Pound, Interpretations of Legal History, New York, 1923, p. 98.

15. Jeremy Bentham, "A Fragment on Government," Readings in Recent Political Philosophy. Edited by Margaret Spahr, New York, 1948, p. 95.

16. John Austin, The Province of Jurisprudence Determined, p. 124.

17. Pound, Interpretations of Legal History, pp. 45-46.

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It is primarily from Austin that Willoughby derives his juristic thought. He accepts the Austinian theory of law and of sovereignty, the latter with some minor modifications. Nonetheless, Willoughby seems to have been influenced also by the German school, particularly Georg Jellinek and Paul Laband. Despite the differences among analytical jurists they all agreed that the law they were talking about is positive law, the law that is to be found by a scientific inquiry into existing legal systems, and, as Dean Pound says, they "held that morals are a matter for the legislator and law a matter for the jurist."[18]

Willoughby's juristic theories are found in his The Fundamental Concepts of Public Law (1924), in his Nature of the State (1896), and in a few articles.[19] Finally, appended to his Ethical Basis of Political Authority (1930) is his answer to the pluralistic attacks on the analytical approach.

Central to Willoughby's juristic theories are his views on sovereignty and law, but before consideration is given those subjects it will serve a useful purpose to indicate what he considers an "analytical" approach to a study of the state to be. As was seen previously Willoughby divides the field of political theory into two parts, the one ethical and the other juristic. The analytical jurist is concerned with the state "simply as an instrument for the creation and enforcement of law."[20] He is not concerned with the historical origin of the state, the historical circumstances sur-

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18. Pound, "Jurisprudence," p. 487.

19. Among the latter are: "The Juristic Conception of the State," The American Political Science Review, XII (1918), 209-14; "The Study of the Law," Virginia Law Review, VI (1920), 461-81; "The Value of Juristic Political Philosophy," The Calcutta Review, (third series), X (1924), 87-96; and "The Scientific Method as Applied to the Study of Politics," Ibid., IX (1923), 339-50.

20. Willoughby, "The Juristic Concept of the State," p. 192.

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rounding the origin of any particular sovereignty, the ethical right of the state to exist, the ethically legitimate sphere of the state's authority, the purpose of government, the elements which cause the increase or decrease in the strength and importance of a given state, nor with the relative merits of different forms of government or of administrative systems.[21] The analytical jurist takes political institutions as he finds them, viewing them narrowly as legal institutions, and seeks to ascertain the essential qualities displayed by them.[22] Willoughby says, "The point from which the analytical political philosopher starts is that a politically organized group of individuals may be conceived of as constituting an essential unity, and that the entity thus created may be regarded as a person in the legal sense of the word . . . ."[23] All the analytical jurist needs by way of a point of departure is a community that has a definite political organization governed by rules that are logically related to one another.

Thus, the difference between ethical political theory and juristic political theory is that the former seeks to discover the essential nature of the state and the ethically legitimate claims that it can make upon the individual, while the analytical jurist is concerned only with the nature of the state as the creator and enforcer of positive law. The task of the latter is formalistic in character. He takes political institutions as he finds them, not as he might like them to be. He looks at political institutions narrowly as legal institutions.

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21. Willoughby, The Fundamental Concepts of Public Law, p. 11.

22. Ibid.

23. Willoughby, "Juristic Concept of the State," p. 194.

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What is the value of such an inquiry into the state? If the jurist, as jurist, has no criteria of just laws or unjust laws, why utilize this method of inquiry? Willoughby declares:

> Its task is not to seek substantive truth, but to provide conceptions, and to furnish an apparatus of thought, by the employment of which public law thinking may be systematized and its various propositions brought, if possible, into logical harmony with one another. By the methods which it employs, a given constitutional system may be analyzed and the fundamental conceptions, upon which it is based, revealed. Or, working in the other direction, those fundamental conceptions being given, the constitutional doctrines which are logically deducible from them may be stated.[24]

More specifically, Willoughby says, "what has to be done is to fix upon those primary legal conceptions of the State, of law and sovereignty (if such can be found), which will serve to give unity and logical support to systems of constitutional and international jurisprudence as we now find them."[25] What he expects analytical jurisprudence to accomplish, then, is the reduction of a body of legal principles to a systematic and scientific whole.[26] This is necessary for the wise codification of the law, whether it be a branch of the law or the whole body. He also feels that analytical jurisprudence is needed in an interpretation of American constitutional law and international law, and he sees the latter need magnified by the creation of the League of Nations. The understanding of such terms as sovereignty and law depends upon the scientific inquiries of the analytical jurist. It is quite unfortunate, Willoughby thinks, that political science does not have a more exact terminology and it is the task of analytical jurisprudence

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24. Willoughby, _The Fundamental Concepts of Public Law_, pp. 11-12.

25. _Ibid._, p. 15.

26. Willoughby, "The Study of the Law," p. 462.

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to provide that terminology, in so far as it is possible.

Analytical jurisprudence, then, does not, in Willoughby's estimation attempt to state metaphysically correct propositions. But this does not mean, he points out, "that the original postulates of the analytical political philosopher should be arbitrarily selected."[27] Instead, these "original postulates" must have to do with principles actually recognized at the present time by existing states.[28] He says, "if analytical political philosophy is to have any practical value, and is not to remain a mere exercise of speculative subtlety, it must explain and reduce to logical order the propositions of international and constitutional jurisprudence that are found in existing systems of public law."[29] Though Willoughby asserts that the "original postulates" of the jurist are not to be arbitrarily selected, but must be selected from those actually recognized by existing states, he ventures no criteria at this point as to which postulates are to be selected for study. Indeed, he recognizes that:

> This task might be thought an impossible one for the reason that the specific principles of public law which now prevail have been adopted from time to time in order to meet current political needs, and, therefore, cannot be expected to be logically inter-consistent and uniformly in harmony with fixed underlying principles.[30]

He maintains, however, that there has been "remarkable consistency" in the acceptance of the fundamental principles of public law, both constitutional and international.

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27. Willoughby, <u>The Fundamental Concepts of Public Law</u>, p. 14.

28. <u>Ibid</u>.

29. <u>Ibid</u>., p. 15.

30. <u>Ibid</u>.

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Central to the thought of analytical jurisprudence, according to Willoughby, is the concept of the state as a person. Willoughby admits that much confusion results from the necessity of using the word "person" in a legal sense. When speaking of the state as a person the analytical jurist means the same thing that he does when speaking of the ordinary corporation as a person. Willoughby says, "both are collectives, both are regarded as the subjects of legal powers, that is, entities which possess and have the legal right to exercise these powers."[31] The legal personality of the state is particularly apparent in its public law, as distinguished from its private law. Public laws are, to use Willoughby's words, "those that concern either the organization of the State and the allocation and delimitation of the powers of government, or the direct relations between the State and the individual."[32] Private laws, on the other hand, are "rules of conduct that authoritatively obtain in a political community [that] are devoted to the regulation of interests between individuals as such, [creating] only private rights and obligations, . . . the State [appearing] only as their enunciator, and, if need be, their enforcer."[33]

When Willoughby posits the legal personality of the state he does not mean that the state is, in fact, a real person. Indeed, he is quite critical of those who, in his opinion, do so. He particularly singles out Otto von Gierke and F. W. Maitland for criticism, saying, "the question . . . whether or not groups of individuals which are united by common sentiments

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31. Ibid., p. 36.

32. Ibid., p. 37.

33. Ibid.

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or material interests possess, by that very fact, a real personality in other than a juristic sense, is one that may be left to the metaphysicians."[34] Although a state, in Willoughby's opinion, is not a real person, it is a juristic person, and is viewed as such by the analytical political philosopher. As a juristic person the state has a will, and this will is termed its sovereignty.

When a juristic person, such as a corporation or a state, exercises a legal right, Willoughby points out, it is spoken of as expressing its will. If an individual human being, who is also a legal person, expresses his will it will probably be his will in a psychological sense, as well as in a legal sense. However, when talking of corporations or of a group of individuals organized as a state, their wills must be expressed through agents. The legal wills of individuals in a state is expressed through their legislature or other policy-forming agencies of the state. When these agents or officials act they act for the state, and their acts are said to be acts of the state. Because human beings must exercise the will of the state they are said to have two distinct personalities: As legal persons possessing rights and obligations in their personalities, and as agents of the state when acting in their official capacities.[35]

Willoughby asserts that the supreme will of the state is called its sovereignty, and sovereignty finds expression in legally binding commands. As thus conceived, Willoughby finds sovereignty to be an abstract term. He says:

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34. Ibid., p. 46.

35. Ibid., p. 39.

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> It implies the conception of the State as a volitional entity or political person, and designates that faculty which this political person possesses of determining, by its fiat, what are to be the legal rights and legal duties which it will recognize and, if necessary, enforce; what persons it will consider subject to its authority; and over what territory it will claim exclusive jurisdiction.[36]

Willoughby inserts a word of caution at this point, however, saying, "It is, of course, to be understood that when we speak of the State as willing this or that, and describe laws as being the formulated expressions of these volitions of the State, this is but a juristic mode of speaking."[37] He elaborates:

> The State, not being a person in a biological sense, cannot possess or exercise a will of its own in the sense that a human individual is able to do. The substance of what is actually willed is determined by those individual persons who have control of the government and these, of course, are more or less influenced in their determination by the wishes of the people generally. Juristically viewed, then, though regarded as expressions of the will of the State, laws, in their substantive provisions, declare the will of human individuals.[38]

Juristically speaking, then, Willoughby finds the state to be a person; it expresses its personality through its will; and its supreme will is called sovereignty. Sovereignty is a unity, for, as Willoughby says:

> It is the name ascribed to the will of a legally supreme person. It is the plenary faculty which that entity is assumed to possess to express its will in the form of commands legally binding upon all persons over whom it sees fit to claim jurisdiction and with respect to any matters which it may select.[39]

Sovereignty is power, but it is more than the sum total of those legal powers of taxation, eminent domain, and police authority, which Willoughby

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36. Ibid., p. 71

37. Ibid., p. 72.

38. Ibid.

39. Ibid.

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says, are commonly associated with the term. "Strictly speaking," he says, "all legal or jurisdictional powers involve the exercise of sovereignty inasmuch as they find their ultimate source in the sovereign will of the State."[40]

Not only is sovereignty a unity, it is unlimited. On this Willoughby asserts, "Sovereignty as a State attribute is not only a unity, but one that, by its very nature and definition, connotes absolute legal authority. To place a legal limit upon it is, therefore, to destroy it."[41] In this regard Willoughby agrees with Austin who says, "Supreme power limited by positive law is a flat contradiction of terms."[42]

The test that is to be used to determine if sovereignty, indeed, does exist "in the last instance" is: Which political entity or person has the legal power to determine its own competency as well as that of others? "For the essential criterion of the sovereign State," Willoughby asserts, "is that it is supreme, not only as giving the ultimate validity to all law, but as itself determining the scope of its own powers, and itself deciding what interests shall be subject to its regulation."[43] He quotes Jellinek on this: "The rights and duties of individuals receive their potency and authority from grounds set forth in objective law. The State finds the grounds for its own rights and duties in itself."[44]

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40. _Ibid._

41. _Ibid._, p. 76.

42. _Ibid._ This quote is taken from Austin's _Province of Jurisprudence Determined_.

43. _Ibid._

44. _Ibid._ This quote is taken from Jellinek's _Getsetz Und Verordnung_, p. 196.

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Sovereignty cannot be limited legally, and the state is not the subject of legal rights and obligations. This is true, Willoughby feels, because "the State, being regarded as itself the source of a law, cannot be regarded as bound by the obligations which that law creates; and even as to rights, the ascription of them to the State is meaningless, since their continuance as well as their creation and their content, are wholly subject to the State's will."[45] This sounds remarkably like Jellinek's "autolimitation," which, though it posits a limitation on sovereignty, this limitation is found to be one imposed by the state itself. That is to say, Jellinek, unlike Willoughby, asserts that there is a limitation on sovereignty; but upon examination, it is found that this limitation is one that is self-imposed by the state. The form that this limitation takes for Jellinek is that the state can only express itself through laws. This is the limitation then: The State can express its will only in the form of laws. He says:

> Sovereignty is not state omnipetence. It is lawful power and therefore bound by law . . . . The State can set itself free from every self imposed limitation, but only in the form of law and the creation of new limitations . . . . As little as the absolutely restricted state exists so little does the state which is absolutely without restrictions.[46]

Willoughby, unlike Jellinek, from the outset admits that, legally speaking, there is no limitation on the sovereignty of the state; but, as was seen, they both arrive at the same conclusion in effect. Furthermore, Willoughby contends, sovereignty is not limited by international obligations, for these limitations are not legal in the sense that analytical jurists use

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45. Ibid., p. 77.

46. Jellinek, Allegemeine Staatslehre, Berlin, 1900, pp. 438-39.

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the term.[47]

Indeed, the one thing that differentiates the state from all other human institutions of a political or juristic character is the state's legally unlimited competency, or Kompetenz Kompetenz, as the "German jurists" call it.[48] On this Willoughby says:

> The State is supreme, not only as giving the ultimate validity to all the laws which are to fix the rights and obligations of those over whom it chooses to claim jurisdiction, but as itself determining the scope of the legal powers of its own governmental agencies and the manner of their exercise. Thus, at any one time, the domain of the legal and political liberties of the individual is simply that field of interests which the State has willed shall be protected from violation, whether by private persons or by public officials. From the possible control of the State itself, however, —from the very source of all law—there can be no possible legal guarantee of immunity, except in the formal sense that, from its very nature, a State must express and execute its will in the form of law.[49]

Whereas Jellinek asserts that law limits the state, Willoughby points out that the state is not limited by law, but it must, indeed, operate through law. On this he says:

> Being itself, when viewed as a legally omnicompetent person, wholly a product of juristic reason, it is, by its very nature, a legal entity, that is, one that necessarily operates exclusively through legal processes. Law, in other words, constitutes the medium of space, if a dimensional term may for the purpose of illustration be employed, in which it lives and moves and has its being. No act of a Sovereign State can, therefore, be illegal; and no illegal act can be an act of the State.[50]

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47. Willoughby, The Fundamental Concepts of Public Law, p. 82. This concept will be taken up in more detail in the chapter on Willoughby on international law.

48. Though Willoughby does not at this point identify these German jurists he apparently has in mind such writers as Georg Meyer, Paul Laband, C. F. von Gerber, and George Jellinek. This Kompetenz Kompetenz theory, in short, stated—". . . since, formally, the state could not be bound by a higher power than itself, it must possess the ultimate and absolute right to determine its own competence or jurisdiction." Rupert Emerson, op. cit., p. 58.

49. Willoughby, The Fundamental Concepts of Public Law, p. 82.

50. Ibid., p. 97.

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Sovereignty is exercised by the state through its governmental organs. This is not to say that these organs of government are themselves sovereign, for only the state merits that attribute. As has been seen in a previous chapter, Willoughby, along with Burgess and others, differentiates between the state and government. The state is society politically organized, while the government is the agency through which the state makes its will known. Government exercises the sovereignty of the state, but does not possess it. Willoughby says, "The Government as a whole must be deemed to possess the right to exercise all the powers of sovereignty. This is so because the State is deemed to be wholly organized in its Government."[51] Though the sovereignty of the state is legally unlimited except in the sense that it must express its will through laws, this does not mean that government has unlimited legal power. Willoughby says on this, ". . . the particular organs of a Government may be of limited legal competence because of the restraints placed upon them by constitutional law, but the State itself, as the source of all the law which it recognizes, is, and must be, itself legally omnipotent."[52] Sovereignty, Willoughby explains, as juristically viewed, has no connection with material or physical power, nor does it mean that the State possesses unlimited physical power. He says, ". . . the attribute of omnicompetence which is ascribed to the sovereign State in no way implies that the actual power of the State has no limits, or that those who influence or control the policies of the State may disregard the obligations which ethical justice and right impose."[53] However, it is to be

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51. Willoughby, The Ethical Basis of Political Authority, p. 382.

52. Ibid.

53. Willoughby, The Fundamental Concepts of Public Law, p. vi.

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noted that when the political scientist refers to the state as having only a limited competence, being bound to observe certain moral laws, he is no longer speaking as an analytical jurist, but as an ethical political theorist.

Willoughby sees sovereignty as an attribute of the smallest and the weakest of states, just as it is of the "mightiest Empire." He says:

> It carries with it no implication that there exists in a State the ability actually to enforce those expressions of its will which, ex hypothesi, it has the juristic competence to utter. For the Sovereign State knows no limit, whether territorial or personal, to its legislative authority, whereas, of course, every State is in fact limited in the extent of its power not only by the existence of other States, but by the temper and disposition of its own subjects. At any one time a State actually exercises through its governmental organization only those powers which it has seen fit to draw to itself. The residue belongs to it only in a potential aspect, and at any one time the amount of this power and the manner in which it is, or may be, actually exercised, depends, of course, upon the character and disposition of its citizens; that is to say, upon their willingness to submit to such exercise without insurrection. As a matter of power, every government depends, as Hume long ago pointed out, upon public opinion, but this ultimate might of the people is not juristic in character except as it has received formal recognition in law.[54]

Sovereignty, then, is a juristic concept, and that only. When the analytical jurist theorizes on the nature of the state he sees sovereignty as the essential attribute of the state. He sees it as a unity. The fact that sovereignty can be exercised through a variety of governmental organs does not alter the nature of sovereignty as a unity. Willoughby says, "In every political organization there must be one and only one source whence all authority ultimately springs."[55] And, as was said, sovereignty is unlimited except that it must find expression through, and only through, laws.

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54. Willoughby, The Ethical Basis of Political Authority, p. 383.

55. Willoughby, The Nature of the State, p. 195.

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With this much of the nature of sovereignty established, Willoughby then turns to a consideration of its location. Where, he asks, in the body politic is the situs of this particular attribute of the state? By way of a general answer Willoughby says, "By whomsoever, or whatever body . . . the will of the State is expressed, and the law created, there we have Sovereignty exercised."[56] In another place he makes the observation that the sovereignty of the state is manifested when laws are enacted which, "determine what the various organs of government shall be legally competent to do."[57] It would seem, then, that Willoughby locates sovereignty in the law-making body of the state. On this he says further, "If we distinguish between the executive, judicial, and legislative departments of the State, it is in this last-named department that the exercise of Sovereignty rests."[58] However, he cautions the reader at this point that "legislative" must not be constued so narrowly as to indicate only those agencies that make formal statutory enactments. He says:

> Insofar as the chief executive of the State has the ordinance power, he may express the sovereign will and therefore exercise Sovereignty . . . . Again, constitutional conventions, insofar as they have the direct power of creating constitutional law, exercise this sovereign power, finally, insofar as courts are the organs of the State for the creation of law, they express the will of the State and hence exercise Sovereignty.[59]

Furthermore, if one recalls Willoughby's statement that sovereignty is located in the law-making bodies and couples that statement with his definition of "law" as being "those rules of conduct that courts of justice apply in the exercise of their jurisdictions,"[60] one might conclude that he real-

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56. Willoughby, The Fundamental Concepts of Public Law, p. 119.

57. Ibid., p. 118.

58. Ibid., p. 119.

59. Ibid., p. 120.

60. Ibid., p. 143.

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ly locates sovereignty in the courts.

It must be remembered, however, that Willoughby distinguishes between the possession of sovereignty and the exercise of sovereignty. Furthermore, he insists that the exercise of sovereignty can be delegated, and indeed is delegated, by the state to its governmental organs.[61] It would seem that in the above statements Willoughby is speaking of the exercise of sovereignty rather than the possession of sovereignty. It is the exercise of sovereignty that rests with the law-making agencies. But even after saying all this one still does not know where sovereignty is located. Willoughby emphatically denies that sovereignty resides in the people, for, regarding the people as a corporate body, two alternatives are possible, both of which are unacceptable. The first alternative is to regard the people as including every man, woman, and child—the educated as well as the uneducated, the feeble minded as well as the intelligent—each of them being conceived of as possessing a right to participate in law making, "a result," he says, "so obviously absurd, from a practical point of view, that no politically organized body of individuals has ever attempted it; . . . ."[62] The second alternative is to regard the people as something less than the total number of citizens, or the "active citizens." Willoughby says:

> If the step is once taken of conceding that a portion of the governed, less than the whole, may arrogate to itself the legal right to act for the whole people and to claim obedience to its commands upon the part of those citizens who are excluded from this "active citizenship," there is no logical limit to the process. Such a small portion of the whole citizen body may claim the right to act for the whole that, instead of being what is ordinarily known as democratic or popular in character, the Government becomes highly aristocratic or oligarchic. It may even assume a monarchic

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61. Ibid., pp. 74-75.

62. Ibid., p. 107.

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form with extensive discretionary powers vested in the ruler, provided only that it is understood that this monarch rules not by reason of any inherent personal right of his own but as an agent of the body of active citizens, small or large as that body may chance to be.[63]

Recapitulating Willoughby's thoughts on the location of sovereignty in the body politic, one finds that he sees the state as sovereign rather than the government. However, the law-making agencies of the government by virtue of the delegatability of sovereignty exercise sovereignty, but do not possess it. Neither do the people possess sovereignty. This, in effect, locates sovereignty nowhere except vaguely in the state. He disagrees with Austin who locates sovereignty in the Kings, Lords, and Commons in Great Britain, and in the state electorate in the United States. On the latter Austin says:

I believe that the Sovereignty of each of the States, and also of the larger State arising from the federal union, resides in the State's government, not its ordinary legislature, but the body of its citizens which appoint its ordinary legislature, and which the union apart, is properly sovereign therein.[64]

Commenting on this and Austin's view that "Commons" in the British government does not mean the lower branch of Parliament but the electorate, Willoughby says:

The same criticism is here valid that was applied to Austin's location of sovereignty in the English electorate. His doctrines are unsatisfactory, not only to the jurist, but to those who, when they speak of sovereignty, refer to the ultimate force of Public Opinion, for those who take this latter view make the electorate but an organ of the whole body of citizens, by whom it is influenced and in many ways controlled.[65]

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63. Ibid., p. 107.

64. Quoted in Ibid., p. 124. This is from Austin's Province of Jurisprudence Determined.

65. Ibid., p. 124.

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It is probably true, in view of the above discussion of the location of sovereignty, as one recent commentator put it, that Willoughby in reality gave up on the question of the situs of sovereignty.[66]

If Willoughby is vague on the location of sovereignty he is quite certain that because the state is sovereign, and because sovereignty is legal omnicompetence, the state is the sole source of law in a "positive or strictly juristic sense."[67] The analytical jurist, says Willoughby, is interested only in positive law. Law, as positive law, is defined as expressing "a rule of human action, and indicating a principle of conduct which shall govern the actions of men for the attainment of certain ends."[68] In another place Willoughby defines law as "a rule or principle for the governance of human action."[69] But the analytical jurist is not concerned with those "rules of action" that are "rules of morality," for the analytical jurist, as such, is not concerned with morality. Thus, as has been seen previously, Willoughby accepts Austin's definition of law as being positive law. Willoughby says that the analytical jurist is concerned only with those rules "which are issued by men who claim a political superiority over those men whose actions are to be controlled by them."[70] By "political superiority" the analytical jurist means, in the final analysis, physical power, for the essence of positive law is sanction and not its moral rightness or wrongness. To be sure, Willoughby does say:

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66. Edward R. Lewis, op. cit., p. 191.

67. Willoughby, The Fundamental Basis of Public Law, p. 129.

68. Willoughby, The Nature of the State, p. 161.

69. Willoughby, The Fundamental Concepts of Public Law, p. 129.

70. Ibid., p. 130.

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> While force is and always must be an incident of Sovereignty, the highest ideal of statesmanship is to render the actual exercise of such force as seldom necessary as possible, and the extent to which this aim is attained will depend largely upon the degree in which State action corresponds with the desires of Public Opinion or the General Will.[71]

But this exercise of the highest ideal of statesmanship is not something that can legally be compelled by the governed. Legally, it is up to the official to determine the extent to which he shall use physical force to compel obedience.

To the analytical jurist law is not positive law until it is accepted by the state and enforced by its might. Law, then, is nothing more nor less than a product of the will of the state. Willoughby admits that this is perhaps the most difficult of all the assertions of analytical jurisprudence to understand. He attempts to make clear this concept by saying that the analytical jurist is interested only in that "law" that the state issues in the form of commands. He admits that the term "law" has a much broader meaning to the metaphysician. To some law means the command of God, and to others it may mean social custom. But these, Willoughby points out, becomes law in the positive sense only when incorportated into the body of the law issued by the state, and only then become of interest to the analytical jurist.

Law has its origin in the command of the state. The state is the creator of law. Those, like Locke, in Willoughby's opinion, who posit a natural law as being above the state are not speaking of positive law at all. Granting all that is claimed by such persons, the only result, Willoughby holds, is to show that as an ethical proposition, those in possession of

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71. Ibid., p. 113.

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political power should be guided by certain fundamental and absolute principles of justice and moral right when determining the positive laws which they cause to be enforced by the political authorities. Natural laws are moral only, and have no coercive force, says Willoughby. Indeed, should these natural laws be incorporated into the positive law by legislation or judicial action they would no longer be natural laws, but positive ones.

Likewise the criticisms of the historical school of jurisprudence, led by Sir Henry Maine,[72] come under Willoughby's fire. According to this school, law has its origin not in the command of the state, but in the customs of the people. Formal statutes are able to secure recognition and enforcement only in so far as they conform to this "spirit" of the people. In answer to this criticism Willoughby asserts that the analytical jurist does not deny that custom is in a very large measure the source of law, but that customs do not become law, strictly speaking, until they are accepted by the political authority. Willoughby asserts further that the historical evidences used by Maine are applicable solely to the question of the origin of principles embodied in the law—a question which the analytical jurist does not find pertinent.

The final test to be applied in an inquiry as to what the laws of a given state are at a given time, Willoughby says, is to ascertain what laws the courts of the land are enforcing. On this he says, "If, in a given State, one wishes to determine concretely what are the laws of that State, it is certainly correct to say that they are the rules or principles which

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72. Maine (1822-88) wrote Ancient Law (1861), Village Communities (1871), Dissertations on Early Law and Custom (1883), Popular Government (1885), but the work from which Willoughby draws here is his Early History of Institutions (1875).

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the judicial tribunals of the State will apply in the cases adjudicated by them."[73] Law to the analytical jurist, then is "those rules of conduct that courts of justice apply in the exercise of their jurisdictions."[74] An essential element in the law, as the analytical jurist views it, is sanction, or the "penalty or evil threatened to be inflicted upon those legal inferiors who fail to obey the commands of their legal superiors."[75]

The theories of the analytical jurists have not gone unchallenged. In Willoughby's day the analytical position was under attack by Professor Leon Duguit of the University of Bordeaux, Professor Hugo Krabbe of the University of Leyden, and by Professor Harold J. Laski, when he was writing in defense of "pluralism."

Duguit[76] attacks the position of the analytical jurists on three fronts: He denies that the state has a personality; he objects to the concept of sovereignty; and he holds that law is not the creation of the state, but rather that law is above the state. Central to his political theory is his concept of "social solidarity." Social solidarity is, in Duguit's words—

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73. Willoughby, The Fundamental Concepts of Public Law, p. 132.

74. Ibid., p. 143.

75. Ibid., p. 146.

76. Duguit's works include: L' État, two volumes, 1901, 1903; Les Transformations du Droit Public, 1913; Le Droit Social, et le Droit Individuel, et la Transformation de L' État, (2nd edition), 1911; Traite de Droit Constitutionnel, five volumes, 1921-25; Manuel de Droit Constitutionnel, (3rd edition), 1918; and Souveraineté et Liberté, 1922. Willoughby uses primarily Duguit's L' État, portions of which have been translated under the English title of Modern French Legal Philosophy which is volume VII of the Modern Legal Philosophy Series. Willoughby also utilizes Duguit's "Objective Law," a series of four articles in the Columbia Law Review, XX, (1920-21), 87, and XXI, 17, 126, 242.

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> . . . a rule of fact, a rule which men possess not by virtue of any higher principle whatever—good, interest, or happiness-but by virtue and perforce of facts, because they live in society and can live only in society. In a sense it is the law of social life. This rule does not admonish the individual 'Do this because it is good, because it is useful, because your happiness depends on it'; it says, "Do this because this is." It depends not on a higher principle, but solely on reality. It came into being as soon as men began to live in society, and it will exist as long as society continues unchangeable in its basis, variable in its application. It is the law of the social man, because the facts are what they are.[77]

This social solidarity results from the very nature of man; it arises both from the similiarity of human needs and their diversity. The first compels men to live in common, and the latter compels cooperation i. e., rendering reciprocal services and necessitating the existence of a division of labor. The state is not a personality but is rather "the group of men who in fact in a society are materially stronger than the others."[78] On law Duguit says—

> . . . we think the law exists without a sovereign, and above the sovereign . . . . We firmly believe that there is a rule of law above the individual and the State, above the rulers and the ruled; a rule which is compulsory on the one and on the other; and we hold that if there is such a thing as sovereignty of the State, it is juridically limited by this rule of law. Law, if it is anything, limits individual wills, and that which is termed the will of the State is at bottom but the will of a certain number of individuals. This limitation of the State is both positive and negative. Some things the State is obliged to do, other things it cannot do. To determine the principle of this double limitation is the province of legal science; to express it in words and to provide it with a practical sanction is that of legal art.[79]

The foundation of law is the "fact" of social solidarity. Social solidarity is not a goal that men strive for because it is morally superior to other

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77. Quoted in Willoughby, The Ethical Basis of Political Authority, p. 392. This is from Duguit's Modern French Legal Philosophy, p. 251.

78. Quoted in Ibid., p. 390.

79. Willoughby, The Ethical Basis of Political Authority, pp. 391-92.

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goals, but because they cannot help themselves, that is, it is their nature to do so; it is the "law of the social man." This sounds very much like a physical and/or biological law, but Duguit denies this holding it to be a social law with a purpose directed to conscious beings, whereas the latter are merely relations of cause and effect.[80] Laws, then, to Duguit, are those rules of conduct which "actually" control men in society. Laws are binding not because they are commanded, nor because they are ethically or morally right, but because they are psychologically necessary to organized life, and therefore to any meaningful life. Men recognize the necessity for law because of self-interest by either sensing it instinctively or by learning from experience.

Willoughby's criticism of Duguit's position is, in short, that he misunderstands the arguments of the analytical jurists. Duguit, Willoughby says, "expends his energies in tilting at mere windmills."[81] He says further, "Whatever value they [Duguit's theories] may have to the sociologist or to the moralists, they have, in the judgment of the writer of this volume, little worth to the analytical jurist."[82] More specifically, Willoughby asserts—

> . . . Duguit appears unable to appreciate that the predication by the jurist of legal omnicompetence to the sovereign State carries with it no implication whatever either of unlimited actual powers of coercion on the part of those who control the activities of the State or of an ethical right to exercise an arbitrary will as to what commands shall be uttered by the State. Similiarly he draws from the ascription of juristic personality to the State the wholly unwarranted conclusion that thereby the State is clothed with mystical and transcendental attributes. But, most fundamental of all, is

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80. Ibid., p. 393.

81. Ibid., p. 405.

82. Ibid., p. 404.

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his failure to appreciate the juristic quality of a positive law as determined by its legislative or political source, and its ethical or utilitarian value as determined by its contents or specific provisions. Thus, one may grant all that Duguit has to say regarding Social Solidarity, and agree with him as to the conduct required of individuals, whether rulers or ruled in order that the claims of this Solidarity may be realized, and yet insist that only those rules of conduct should be termed laws, in a positive or analytical sense, which can be shown to express the will of some sovereign political power, and which are at least promised enforcement by that power.[83]

Another critic of analytical jurisprudence whom Willoughby feels should be answered is Professor Hugo Krabbe.[84] Krabbe agrees with Duguit that law is above the state, and that the state is not a law-creating agency. He sees the state as "a community of persons unified by the general agreement of its members as to the valuation of public and private interests, and possessing organized instrumentalities for clarifying and formulating these common convictions, and, when necessary, enforcing them."[85] To Krabbe the source of law is not the command of the state, but rather a common conviction of the rightness of the principles embodied in the law held by the people. On this Krabbe says, "Thus, not the will of the sovereign who exists only in the imagination, but the legal conviction of the people, lends binding force to positive law; positive law is valid, therefore, only by virtue of the fact that it incorporates principles of right."[86] A statute that is not supported by the conviction that it is right is not law, and it is the

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83. Ibid., p. 405.

84. Krabbe's works are Die Lehre der Rechtssouveranität, 1906, and Die Moderne Staatsidee, 1919. The latter was translated by George H. Sabine and Walter J. Shepard as The Modern Idea of the State, 1922.

85. Willoughby, The Ethical Basis of Political Authority, p. 410.

86. Quoted in Ibid., p. 411. This is taken from Krabbe's The Modern Idea of the State, p. 7.

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substantive content of the law rather than its form that is important.[87] Krabbe does not say that a person to whom a command of the state is directed, and which because of its content is not a law, is entitled or duty bound to disobey it; but rather he infers that the courts and the executive would be justified in not giving enforcement to statutes or commands, that are not in accord with the popular convictions of right.[88] It is to be noticed, however, that Krabbe's standard of rightness is not one dictated by adherence to immutable standards of justice, as for example, natural law in its traditional meaning, but rather, what at the time and place is considered right and just by the people. Krabbe, thus, locates sovereignty in the governed rather than in the monarch, or the rulers, or in the abstract state. Government exists to carry out the popular will. But individuals disagree as to the rightness of laws, and when this happens the majority should govern. The minority will have to console themselves by reasoning that without "a single rule" the community is impossible, and the purposes for which it is established will not be realized. Furthermore, the fact that a majority accepts a rule indicates that it is of a higher value than any dissent.

Willoughby sees Krabbe's position as essentially that of the ethicist, rather than the jurist, and that his "essential errors" would seem to be his failure to distinguish between the moralist's conception of law and the jurist's conception of law. When the jurist examines positive law, Willoughby says, he is not concerned with the substantive content, and there-

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87. Willoughby, "The Juristic Theories of Krabbe," The American Political Science Review, XX (1926), 519.

88. Willoughby, The Ethical Basis of Political Authority, pp. 412-13.

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fore, makes no inquiry as to its moral rightness or wrongness. The jurist, says Willoughby, is not an ethicist in disguise, in that he seeks to set up his own convictions as a substitute for that of the moralist.[89] Nor does the jurist seek to avoid the ethical problem involved in the inquiry into the law. He says:

> The jurist does not claim that his doctrine of legality is an alternative to that of the moralist; it has a wholly different purpose, and, therefore, it is not an attempt to avoid the problem as to the ethical justification of law in general or of special laws in particular. It simply leaves that question unconsidered, and, accordingly, one which the moralist may freely solve as seems to him right.[90]

Another critic of the position taken by the analytical jurist, according to Willoughby, is Professor Harold J. Laski.[91] Laski denies the state a monopoly of legal authority, but unlike Duguit, does not deny a real personality to the state, though he does maintain that other groups and associations, such as trade unions, churches, employer's associations, professional organizations, and the like, also have real personalities. He defines the monistic theory of sovereignty as being "a legally determinate superior whose will is certain of acceptance,"[92] and proceeds to criticize the theory as thus defined. He fails to find this sovereignty in existence anywhere in the world, saying, "The will of the State obtains pre-eminence over

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89. Ibid., p. 426.

90. Ibid.

91. Willoughby cites two of Laski's earlier works, The Problem of Sovereignty, 1917, and his Authority in the Modern State, 1919. In these works, in contrast to later writings, Laski advances a pluralistic theory of the state.

92. Quoted in The Ethical Basis of Political Authority, p. 432, from Laski's Problem of Sovereignty, p. 12.

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the wills of other groups exactly to the point that it is interpreted with sufficient wisdom to obtain general acceptance, and no further."[93] He continues:

> There is no sanction for law other than the consent of the human mind . . . . We have only to look at the realities of social existence to see quite clearly that the State does not enjoy any necessary preeminence for its demands. That must depend entirely upon the nature of the demand it makes. I shall find again and again that my allegiance is divided between the different groups to which I belong.[94]

In Professor Laski's review of Willoughby's The Fundamental Concepts of Public Law he directs five criticisms at the analytical approach to the state: Historically, he says, the approach is strictly dated. It can claim no validity with reference to the Middle Ages, and, he points out, "It is also probable that as the nation-state ceases to be the ultimate unit of social organization it will cease to have contemporary applicability. Is it worthwhile to make a passing set of conditions the basis of a timeless and universal system of jurisprudence?"[95] Secondly, Laski observes that, practically speaking, there are many states in the world that are going concerns that would cease to be states if Willoughby's definitions were the criteria. Thirdly, the analytical jurist's theory is not realistic because it is too far removed from practical life. He says, "Is it not better frankly to admit that, on the contrary, a scientific jurisprudence must, if it is to be truly scientific, be written in terms of the total social environment it

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93. Quoted in Ibid., p. 432.

94. Quoted in Ibid.

95. Harold J. Laski, "Review of Willoughby's The Fundamental Concepts of Public Law," Political Science Quarterly, XL (1925), 619.

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will encounter?" Fourthly, Laski says that Willoughby deprives jurisprudence of any contact with life, for he reduces jurisprudence to a "mere anatomy" whereas it should be a "physiology" to be creative. Finally, Laski points out that though Willoughby denies that the analytical jurist's theory of sovereignty assigns to the state any moral preeminence, it results in the "tacit assumption of moral superiority."[97]

Willoughby's chief criticism of Laski is that he does not understand the analytical jurist's conception of sovereignty. No analytical jurist, including Austin, says Willoughby, posits "certainty of acceptance" as a necessary ingredient of sovereignty. Starting with this definition, Willoughby says, it is easy to see why Laski could find that in no state does sovereignty really exist.[98] The state, says Willoughby, is only _legally_ omnicompetent; it is not _morally_ or _practically_ so. Legal competence is not physical power. Willoughby concludes that Laski, like Duguit and Krabbe, does not consider sovereignty and law juristically, but from an ethical point of view, a position that the analytical jurist, for the purposes of juristic inquiries, at least, refuses to take.

It is probably true that modern analytical jurisprudence looks philosophically to Hobbes for inspiration, for he thought of law as something commanded and of sovereignty as legally absolute. It was, however, Austin who is primarily responsible for the systemization of analytical thought on law. He conceived of law as a command of a political superior to a politi-

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96. _Ibid._, p. 620.

97. _Ibid._

98. Willoughby, _The Ethical Basis of Political Authority_, p. 432.

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cal inferior. He said, "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."[99] Further on he says:

> If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.[100]

Willoughby sees law as the command of the state, and sovereignty as legal omnipotence. Both Austin and Willoughby assert that sovereignty cannot be limited legally, but also assert quite vigorously that they are not speaking of physical power when they use the term sovereignty. Both are concerned only with the law that is, the law as enacted by a person or a body of persons legally competent to do so. In this respect both Austin and Willoughby stand in the line of the Sophists, the Cynics, Hobbes, and others who see law as command or will. Opposed to this stand Socrates, Cicero, Suarez, and Locke, who see law as derived from reason. Only those commands that are in accord with reason are to be dignified by the term "law." These two traditional ways of looking at law, as convention or as nature, are apparently to be found in any era, the nineteenth and early twentieth centuries not excepted.[101]

Apparently what Willoughby sought in his legalistic theorizing was an

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99. John Austin, The Province of Jurisprudence Determined, p. 193.

100. Ibid., p. 194.

101. Roscoe Pound, "American Juristic Thinking," in A Century of Social Thought, Durham, 1939, pp. 143-72.

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internally consistent, scientifically self-sufficient body of thought on the legal order, and if one accepts his premises his system holds up remarkably well as a logical system. It was his premises, however, that were most open to attack, and they did not survive the attacks of the jurists of the post World War I era.

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Chapter VII

WILLOUGHBY AS AN INTERPRETER OF THE AMERICAN CONSTITUTIONAL SYSTEM

Of all the branches of political science to which Willoughby made significant contributions, and there were many, his writings in the field of constitutional law are undoubtedly the most outstanding. This is the opinion of many of his students and colleagues, and is the conclusion one reaches after an examination of all his works. He has been called the successor to Kent and Story as a commentator on the United States Constitution, and he will probably be remembered most for his work in this field. His interest in constitutional law is contemporaneous with his professional career. His first work in this field was his doctoral dissertation, _The Supreme Court of the United States_,[1] published in 1890, and in 1904 there appeared

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1. The full title is _The Supreme Court of the United States; Its History and Influence on Our Constitutional System_. It was published in 1890 as extra volume VII of The Johns Hopkins University Studies in Historical and Political Science.

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his The American Constitutional System.[2] In 1910 there was published his The Constitutional Law of the United States, a two-volume commentary which was revised and enlarged to three volumes as the second edition in 1929. In 1930 he published the Principles of the Constitutional Law of the United States.[3] His The Constitutional Law of the United States, particularly the second edition, is undoubtedly his magnum opus.

Willoughby considered constitutional law to be one of the more important divisions of political science. In addition to his voluminous writing on the subject he periodically taught constitutional law at Johns Hopkins.[4] He sees constitutional law as part of the broader field of public law, which includes, in addition to constitutional law, administrative law and international law. "In the broadest sense of the term," he says, "every politically organized society possesses a constitution."[5] In this broad sense Willoughby defines constitutional law as "a body of rules or principles which determine the form of government which shall exist, and allot to its various departments or officials their respective powers."[6] In another place he gives a somewhat different definition, saying, constitutional laws

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2. This work is the first of eight volumes in The American State Series, edited by Willoughby, and published by the Century Company, 1904.

3. This is essentially a condensation of his larger work on the United States Constitution.

4. 1898-99, 1900-01, 1903-04, 1906-07, 1907-08, 1909-10, 1910-11, 1911-12, 1913-14, 1914-15, 1915-16, 1927-28. In addition he taught American constitutional theory in 1919-20, and comparative constitutional law in 1897-98. During and after the War, President Goodnow offered the U. S. constitutional law course with the exception of 1927-28.

5. Willoughby, Principles of the Constitutional Law of the United States, New York, 1930, p. 9.

6. Ibid.

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are "those laws which relate directly to the form of government that is to exist, and to the allotment of powers to, and the imposition of limitations upon, the several governmental organs and functionaries."[7] Referring to his first definition he continues, "when these rules are fairly definite, are recognized by those in authority as controlling, and are supported by a public opinion sufficient in force to offer a considerable guarantee that they will be obeyed, the State is said to have a constitutional government."[8]

Most modern states, Willoughby points out, have reduced such rules to writing so that they may be better and more exactly known. However, to qualify as a constitution these rules need not be written, as is clearly demonstrated by Great Britain's Constitution. Furthermore, he says, the existence of a written constitution does not preclude the growth along-side it of bodies of unwritten constitutional law, for "however comprehensive these fundamental documents may be, there inevitably grows up a considerable body of unwritten constitutional practices as fixed and, for all practical purposes, as obligatory as those provided for in the written instruments."[9]

For the purposes of political theory, Willoughby says, this broad definition of constitutional law is sufficient, but not so for the jurist who interprets American constitutional law. In the United States the courts are given the task of finally interpreting written constitutions, and this, he says, "obliges them, in cases of conflict between these written constitu-

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7. Willoughby, The Fundamental Concepts of Public Law, p. 84. No significance can be given here to the fact that the second definition inserts the concept of limitations imposed by a constitution, for, as shall be shown, in either case Willoughby views a constitution as limiting government but not the state.

8. Willoughby, Principles of Constitutional Law, p. 9.

9. Ibid., p. 10.

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tional provisions and ordinary statutory laws, to give precedence to the former."[10] Therefore, he points out, "under this system constitutional law must be said to embrace all law that, irrespective of its substance, is contained within the four corners of written instruments of government denominated Constitutions."[11] He explains:

> Were these constitutions wholly devoted to the creation of governmental machinery and the allotment of powers to its constituent parts, the law embraced within this formal definition would substantially coincide with that included within the definition stated above as satisfactory to the political theorist. But, in fact, many of our State Constitutions go far beyond this and include provisions which, viewed with regard to the matters to which they relate, properly belong within the field of private law.[12]

Furthermore, he points out, one cannot distinguish between constitutional and statutory law by referring to the former as being legally superior to the latter. He explains this by saying:

> Because our constitutions set limits to the legal powers of our legislatures, laws enacted by them transcending such limits are not recognized by the courts as valid. But, when so doing, the courts do not thereby declare that there has been a conflict between two laws of differing degrees of legal force, the lower having to give way to the higher. That which they do is simply to say that the statutes in question, though enacted in the usual form, are not laws at all, and never were laws, because their subject matter did not lie within the legal competence of the legislature enacting them.[13]

As Willoughby's concept of the domain of constitutional law derives from his theories of the society, state, and government, it would do well to review briefly some of the main tenets of these theories. Summarizing

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10. Ibid.

11. Ibid., pp. 10-11.

12. Ibid., p. 11.

13. Willoughby, The Fundamental Concepts of Public Law, pp. 85-86.

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them himself, he says:

> An aggregate of men living together in a single community, and united by mutual interests and relationships, we term a society. When there is created a supreme authority to which all the individuals of this society yield a general obedience, a State is said to exist. The social body becomes, in other words, a body politic. The instrumentalities through which this superior authority formulates its will and secures its enforcement is termed a government; the commands it issues are designated laws; the persons that administer them, public officials, or, collectively, a Magistracy; the whole body of individuals, viewed as a political unit, is called a People; and finally, the aggregate of rules or maxims, whether written or unwritten, that define the scope and fix the manner of exercise of the powers of the State, is known as the Constitution. The State itself, then, is neither the People, the Government, the Magistracy, nor the Constitution. Nor is it, indeed, the territory over which its authority extends. It is the given community of individuals viewed in a certain aspect—namely, as a political unity.[14]

The one distinguishing feature of the state, according to Willoughby, is its possession of sovereignty, or the "complete freedom from the legal control of any other power whatsoever," and the "absolute and exclusive control over the legal rights and obligations of its citizens."[15] He states further, "The State is thus supreme not only as giving the ultimate validity to all laws, but as _itself determining the scope of its own legal powers and the manner of their exercise_."[16] He elaborates further:

> In every politically organized community that is entitled to be termed a State, there must exist, then, an authority to which, from the legal standpoint, all interests are potentially subject. In the entire body of laws of a State are summed up the power of that state as actually exercised. In the constitutional laws are declared the powers legally exercisable by the ordinary governmental organs. Thus at any one time the domain of the legal and political liberties of the individual is simply that which neither pub-

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14. Willoughby, _The American Constitutional System_, New York, 1904, pp. 3-4.

15. _Ibid._, p. 4.

16. _Ibid._ The underscoring is Willoughby's.

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lic officials nor private persons may legally enter. From possible control by the State, however, through the enactment of new constitutional or statutory laws, these liberties are not and cannot be removed.[17]

By virtue of the fact that Willoughby distinguishes between "State" and "Government" there is little doubt that he views government, but not the state, as the creature of a constitution. The constitution places limits on the powers of government, but does not place limits on the will of the state for that will created the constitution in the first instance. As has been explained in a previous chapter, Willoughby sees the state as a legal person, having rights and duties, and possessing a "supreme will which it expresses through its law-making organs in authoritative commands."[18] This supreme will is its sovereignty, and sovereignty is of necessity a unity, and therefore, cannot be divided, as "there cannot be in the same being two wills, each supreme."[19] Despite this fact, says Willoughby, sovereignty can be delegated; that is, it can "find expression through several legislative mouthpieces, and the executing of its commands may be delegated to a variety of governmental organs."[20] There is no theoretical limit, indeed, to the extent to which sovereignty can be delegated; furthermore, the state can delegate the exercise of its powers not only to governmental organs of its own creation, but even to those of other states. In this event the governmental organs would be acting as mere agents of the state, the state having the legal right to retrieve its delegated authority at any time.

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17. Ibid., pp. 4-5.

18. Ibid., p. 5.

19. Ibid.

20. Ibid.

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In view of Willoughby's definition of a state it is not surprising that he concludes that it cannot be created by an agreement between or among states. A state rests on a sentiment of unity among individuals, and this must come first, and when it is strong enough it "finds objective manifestation in the creation of a political organization."[21]

A state, in Willoughby's estimation, is not created by the formal adoption of a written constitution. Indeed, he says—

> . . . the acceptance by a people of such an instrument is necessarily the political act of a community already transformed into a body politic, and its provisions derive force as law from this fact. In fine, the Constitution is but the law which definitely determines the organs through which the State, already in existence, is henceforth to exercise its powers.[22]

Willoughby concludes, "written Constitutions are . . . of comparatively recent origin, and their _raison d' être_ goes no deeper than political expediency."[23]

In his commentaries on the United States Constitution Willoughby follows the example set by Marshall, Story, and Webster, rather than that of the "strict constructionists." He subscribes to the broader interpretation of implied powers enunciated by Webster and Marshall rather than to the narrower interpretation advanced by Jefferson and Madison. Like Marshall and Webster, he is a nationalist, unwilling to follow the lead of Jefferson and Calhoun in support of a states' rights doctrine. Nor does he view the doctrine of _stare decisis_ as one that should be rigidly applied in constitutional law. On the latter he points out:

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21. _Ibid._, p. 7.

22. _Ibid._

23. _Ibid._

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In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of stare decisis. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution, and particularly the Federal Constitution, may be changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the court's repudiating or modifying its former decision.[24]

One of the topics of constitutional law that absorbed a great deal of Willoughty's attention was the nature of the American federal system. Conceiving of a state as possessing sovereignty, and sovereignty as being indivisible his view of the American federal system is, by his own admission, not that of the Founding Fathers. He says, "no State can obtain its sovereignty by a simple transfer of authority from other States. A new State can take its origin only after the entire withdrawal of a People from the civic bonds in which they have before been living."[25] A people, Willoughby repeats, "cannot live under two sovereign powers at the same time."[26] Applying these conclusions, Willoughby asserts that a "so-called Federal State [cannot] be based on an agreement or compact between pre-existing States."[27] Indeed, Willoughby finds the term "Federal State" to be an improper one. A government may be federal in form, but never can a state be so, "for a State is by its very nature a unity in that its essential attribute, its sovereignty, is necessarily a unity. There cannot be, therefore,

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24. Willoughby, The Constitutional Law of the United States, New York, 1929, I, 74-75.

25. Willoughby, The American Constitutional System, p. 7.

26. Ibid.

27. Ibid., p. 9.

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any such thing as a State composed of States."[28] He continues, "strictly speaking, therefore, the only correct manner in which the term, 'Federal State' may be employed is to designate a State in which a very considerable degree of administrative autonomy is given to the several districts into which the State's territory is divided."[29]

The real difference, Willoughby points out, between a national state with a federal form of government and a confederacy of sovereign states is determined by an answer to the question: "What authority has, in the last instance, the legal power of fixing its own legal competence, and, as a result, that of the others?"[30] In the sovereign state with the federal form the rights of secession and nullification are excluded because, he asserts, "from the strictly juristic standpoint, the Commonwealths derive their existence from the will of the national State. They have, therefore, no control over their own political status."[31]

A number of theories have been advanced, Willoughby notes, to explain the nature of the American state. The first of these that he considers is what he calls the States' Rights School[32] which, Willoughby says, if one were to grant their major premise, presents quite logical arguments. According to the theory of this school the United States Constitution is the creation of the several states acting as individual and sovereign entities.

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28. Ibid.

29. Ibid.

30. Ibid., p. 10.

31. Ibid.

32. Willoughby does not identify this "School" in more explicit terms than to ascribe it to the writers of the "Kentucky and Virginia Resolutions," which, of course, would be Jefferson and Madison, and to Calhoun.

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Also this school contends that all agreements between sovereign states are of a contractual nature, and therefore, a union of such states cannot be other than of a non-legal or conventional nature. The states who are parties to this agreement, then, as Willoughby interprets the argument, "are bound to abide by its provisions or to continue under it, only by practical or moral considerations. They are not, it has been declared, subject to it as to a legal superior, for that would be to make the creature superior to its creators."[33]

Opposed to the States' Rights doctrine a number of theories of national supremacy have been advanced to which Willoughby gives attention. First, there is the theory that declares that the states were severally sovereign at the time the Constitution was framed, and that the states were the parties that established the Constitution, rather than the people, as such. Since the time of the adoption of the Constitution, however, the states have abandoned their sovereignties, and it now resides in the national government and state. That this is so is determined by the records of those who drafted the Constitution, those who were influencial in its ratification, and by virtue of a national interpretation of the Constitution's own words, say the adherents of this theory.[34]

Willoughby finds this theory of national supremacy unsatisfactory on two counts. First, it assumes the impossible; that is, that a state can voluntarily subject itself to the absolute legal control of another power by virtue of an agreement between itself and another sovereign power. Sec-

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33. Willoughby, The American Constitutional System, p. 12.

34. Ibid., p. 13. Willoughby identifies this theory of national supremacy as being that of Roger Foster in his Commentaries on the Constitution of the United States, 1895, I, 15.

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ondly, this theory considers the adoption of a written constitution to be creative of a state. This cannot be true, Willoughby says, because, "a constitution is necessarily the creation of a pre-existent State and is merely the instrument wherein that State provides for its governmental organization and for the distribution of its political power."[35]

A more logical rebuttal to the States' Rights doctrine, says Willoughby, is to argue that either the states of the union were never severally sovereign, or if they were, that they were not so in 1787-89; or, if they were sovereign entities at that time, it was not they, but the people of all the states acting as a single sovereign entity who established the Constitution and the Union. To those[36] who assert that the states were never sovereign, but hold that the national government was sovereign from the time of the severance of the colonies from Great Britain Willoughby asks: What was the status of the union during the era when the Articles of Confederation were in force? During this period, Willoughby points out, the central government definitely was not sovereign. He states, "this period is therefore usually spoken of, by those who hold the theory we have just been considering, as one during which the individual States had 'usurped' the legitimate national sovereignty, but nevertheless, underneath, as a submerged but yet existent political entity, the National State still existed."[37] Willoughby declares that this reasoning is "a playing fast and loose with political theory, and a vain attempt to uphold an untenable posi-

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35. Willoughby, The American Constitutional System, p. 13.

36. Willoughby includes in this group Justice Joseph Story, J. N. Pomeroy, H. E. Von Holst, Francis Lieber, and John W. Burgess.

37. Willoughby, The American Constitutional System, p. 15.

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tion."[38] He asks, "How can we speak of a government as a usurping one which has an admittedly _de facto_ position, and was voluntarily established and maintained by the people organized under it?"[39] Furthermore, Willoughby asks, how can a state cease "to exist objectively and still [maintain] a subjective existence, when the two are necessarily but different aspects of the same thing, which can be disassociated in thought only?"[40] Indeed, he says, "we have usually been taught that the adoption of the Articles was a step—albeit an insufficient step—toward union; yet this school of thinkers which we have been considering would have us believe that the adoption of that instrument was a step backward—the objective destruction of a union which had pre-existed."[41]

Willoughby willingly grants that the individual states were severally sovereign in 1789. But, he asserts, the question then must be answered: "How, if at all, is the national character of our present Constitution to be maintained?"[42] He finds the "best-known" answer to be that of Webster, who said that though the states existed in 1789 as thirteen sovereign bodies politic, and though the Constitution was formally ratified by the people acting through conventions convened for that purpose in and by each of such states, yet the act of adopting the Constitution was, after all, not the act of the several states, but of the whole people united into a political unity by the subjective feeling of nationality which is the ultimate foundation of

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38. _Ibid._, p. 16.

39. _Ibid._

40. _Ibid._

41. _Ibid._, p. 17.

42. _Ibid._, p. 18.

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every sovereign state. On this Willoughby declares:

> In other words, this theory is that at this time the National State existed subjectively in the minds of the people and was made objectively manifest in the creation of a National Government; and that existing state organs and political machinery were used merely for convenience for the realization of that object. This view, it will be seen, differs from the one which holds that the individual States were not at that time sovereign, in that it makes the adoption of the Constitution a revolutionary act as regards the then de facto state governments.[43]

Willoughby finds this theory unacceptable, for it places the controversy "upon a plane where absolute demonstration either for or against, is rendered impossible."[44] He points out that it is impossible to know for certain just what the people of the time had in mind concerning the character of the constitutional act which they were performing. He continues:

> Had there but been a substantial agreement of opinions at the time, or had the people been skilled in logical and legal distinctions in political philosophy, and gifted with a foresight as to the necessity of rendering the character of their acts perfectly explicit, and, lastly, had their intentions, as finally contained in the instrument of government which was adopted, been so unequivocably stated as to admit of but one construction, then, and only then, such evidence might possibly be so exhaustively collected as to afford ground for a satisfactory, if not absolutely certain, decision on the matter.[45]

"But," he concludes—

> . . . it is scarcely necessary to say that such conditions did not exist. So long, therefore, as the argument is conducted along these lines, both sides are abundantly able to cite facts as well as expressions of opinion favorable to their views, without either of them ever able conclusively to satisfy their opponents or the impartial student.[46]

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43. Ibid., pp. 18-19.

44. Ibid., p. 19.

45. Ibid., p. 20.

46. Ibid.

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Another theory that has been advanced to solve (actually, Willoughby feels that "avoid" is the correct word) the problem of sovereignty in the American state is that of A. W. Small and Francis A. Walker[47] which asserts that the founding fathers were well aware of the logical dilemma that they had propounded. This dilemma is that in any federal system sovereignty, when traced to its ultimate source, must reside either in the central government or in the constituent states. The framers of the Constitution purposely avoided giving an explicit statement in the Constitution "as to which horn of the dilemma they accepted."[48] Willoughby finds this theory to have no historical backing; indeed, he feels that if this had been the case some news of it would have leaked out in private letters, or in some other fashion. There is little liklihood, he says, that the framers of the Constitution purposely left unsettled such a fundamental question as this.[49]

Willoughby concludes that none of these theories fully explains the nature of the American federal state, neither the states' rights doctrine nor any of the theories of national supremacy here described. There is, however, a more satisfactory answer to the problem, and Willoughby proceeds to provide it by outlining his own theory of the nature of the American union.

Both the people generally and the chief public men of the time of the framing of the Constitution, says Willoughby, viewed that instrument as a

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47. A. W. Small, The Beginning of the American Nationality, and Francis A. Walker, "The Growth of American Nationality." With reference to the latter work, Willoughby does not further identify it or disclose the journal in which it appeared.

48. Willoughby, The American Constitutional System, p. 20.

49. Ibid., p. 21.

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compact between the states. Madison felt this to be the case, for he wrote in the Thirty-Ninth "Federalist," "This assent and ratification is to be given by the people not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."[50] Furthermore, Willoughby points out, "The Constitution itself plainly says that the ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution _between the States so ratifying the same_."[51] Willoughby asserts:

> More unequivocal language than this is difficult to imagine. In the light of this express statement in the instrument itself and of numerous and unrepudiated contemporaneous expressions to the same effect, the fact would seem to be uncontestable that the basis of the new National State was conceived by those establishing it to rest upon an agreement between the several ratifying States.[52]

On the other hand, Willoughby points out:

> There is equally positive proof that the people of the time intended to establish, and believed that they were establishing, not simply a central governmental power that was to act as the common agent in certain matters for a league or confederation of sovereign States, but a National State under which no right, either of nullification of federal law, or withdrawal from the Union was to be reserved to or by the States.[53]

Willoughby grants that these two views of the American state are contradictory. If sovereignty is a unity, and Willoughby so views it, the central authority and the states cannot _both_ be sovereign. But the American

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50. Quoted in _Ibid._, p. 22.

51. Willoughby, _The American Constitutional System_, p. 22. The underscoring is Willoughby's.

52. _Ibid._, p. 23.

53. _Ibid._

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people, he points out, were not "political logicians" in this period, and indeed, had they been, they would not have been able to accept both these views. What Willoughby apparently means by this is that had the American people been schooled in analytical jurisprudence they would have seen the logical inconsistency of their views on the Constitution, that is, that divided sovereignty is logically and legally impossible. Willoughby concludes however that "this does not militate against the fact that, in truth, they did accept them both."[54] There is nothing strange about this, says Willoughby, for Americans were old hands at accepting two logically and legally contradictory concepts. The political thought of the era made it easy for them to do so, and this included the doctrines of natural rights, popular sovereignty, and the idea that political authority becomes legitimate by mutual agreement among the governed or between them and their rulers. He asserts that it is but an easy step from the idea that "a public will could be created by a union of individual wills" to the idea that "a national sovereignty [could] be created through the mutual agreement of thirteen sovereign political personalities. The reasoning which supported the one view would be equally strong to sustain the other."[55]

The American people, then, according to Willoughby, felt that they were establishing a national government rather than a league or a confederacy, but at the same time, also felt that the states were sovereign. The "two strongest proofs" that it was the intention to establish a national government, says Willoughby, are these: (1) Most of the people, if not all, felt that to establish a confederacy or a league such as was established

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54. Ibid.

55. Ibid., p. 24.

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under the Articles of Confederation it was necessary only to get the consent of the existing state governments. On the other hand, for the establishment of a constitution, "the creation of a new political sovereignty," it was commonly regarded that a legitimate basis could be found only in the popular sovereignty which was regarded as the basis of all political authority.[56] (2) "Nowhere in the debates in the Federal Convention, nor in the state-ratifying conventions, nor in the pamphlets which were put forth on both sides upon the question of ratification did there occur a single assertion of the right of secession."[57] Indeed, Willoughby continues, "not only were there no assertions at this time of a right of secession, but there were specific declarations to the contrary."[58]

Actually, Willoughby states, the people of the period saw nothing wrong with creating a genuine national state that would be truly sovereign within its limited sphere, and at the same time preserve the individual states as sovereign and independent states within their respective spheres. "In other words," Willoughby declares, "to the theorists of 1789 there seems no difficulty whatever in a divided sovereignty, and therefore, in the existence of a sovereign National State composed of constituent sovereign States."[59] Thus, it can be seen, Willoughby points out, that the founding fathers did not really answer the question of the final location of sovereignty in America, but instead, "they merely pushed the problem one step

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56. _Ibid._, p. 25.

57. _Ibid._, p. 26.

58. _Ibid._, p. 27.

59. _Ibid._, p. 29.

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further back and there left it as undetermined as before."[60] This was not a conscious, deliberate evasion of the problem by the framers of the Constitution, says Willoughby, but rather "it was clear self-deception, —a self-deception from which Americans were very slowly released . . . ."[61]

It was not until the time of the Calhoun-Hayne-Webster debate that the indivisibility of sovereignty was definitely advanced for consideration, and it was not until the Civil War that the question of the location of sovereignty was definitely settled. Indeed, Willoughby feels that it was quite fortunate that this issue was not clearly recognized in 1787-89, for had the people of America been presented with a clear-cut question of the location of sovereignty they would have refused to ratify the new constitution. In this regard Willoughby poses the question: "If the fact had been clearly presented to the people that sovereignty cannot be divided, and that, therefore, they must choose between National Sovereignty and absolute State Sovereignty, which would they have selected?"[62] He feels that a definite answer is not available, but that in all probability the Constitution would have failed of adoption.

Now, Willoughby concedes that his position on this question seems to support the position of the states' rights school. He has said that the states were severally sovereign in 1787-89, and that because sovereignty is of necessity a unity and cannot be divided, the national state was not sovereign at that time. Though it is true that the framers of the Consti-

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60. Ibid.

61. Ibid.

62. Ibid., p. 31.

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tution and the people generally felt they were dividing sovereignty between the two authorities, Willoughby says that logically speaking this was "self-deception." He holds, however, that his position does not coincide with that of the states' rights school for this reason:

> Recurring to our analysis of the nature of sovereignty, we remember that though we say that the force that creates a State, and therefore its sovereignty, is the General Will of a people demanding political unity, the State itself cannot be said really to exist until this will has become objectively manifested, that is, has found expression in the creation of some sort of governmental organization through which its desires may be satisfied.
>
> So also, reasoning in the other direction, we say that so soon as a People ceases to yield general obedience to the commands of a given political organization, and thus in deed and fact no longer recognizes its sovereignty, and, indeed, renders obedience to the laws of another political power, the old sovereignty is destroyed and a new one has taken its place.[63]

Willoughby concludes:

> In fine, sovereignty, though itself the source of all law, is not itself founded upon law. It is based wholly upon fact, and its existence had to be demonstrated as such. Bearing in mind, then, this fact, and granting that the Constitution at the time of its adoption, created, and was intended to create, a Confederacy, it may properly be argued that there soon came into being a national feeling which created a national sovereignty that was objectively realized both in explicit declaration and in fact.[64]

Willoughby next points to historical evidence following the inauguration of the new national government demonstrating that, although the states were sovereign in 1787-89, a national sentiment arose in the early years of the republic to transfer that sovereignty to the national state. He indicates that from the very beginning of the existence of the new constitutional system legislation was passed and events occurred which tended to

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63. Ibid., p. 32.

64. Ibid., pp. 32-33.

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impress upon the people the advantages of having an effective central government. The Impost and Navigation Acts, the re-enactment of the Northwest Ordinance, the assumption of state debts, the establishment of a national bank, and the suppression of the "Whiskey Rebellion" can all be cited in support of this contention. To be sure, Willoughby says, these acts of the central government were harbingers of a future development rather than "an explicit assumption of a federal authority necessarily inconsistent with the continued existence of the Sovereignty of the individual States."[65]

More pertinent to the creation of a national sentiment of unity were certain decisions of the United States Supreme Court in the early years of the republic. For one thing, Willoughby says, it is to be noted that a majority of the justices were nationalist in sentiment, and their decisions were soon to give "to the federal power such an interpretation as clearly to demonstrate that henceforth sovereignty in the American State was to reside in the Union."[66] The three clauses of the Constitution that were utilized for this purpose were Article VI, Section 2 (the "Supreme Law of the Land" clause); Article III, Sections 1 and 2 (the statement of the judicial power); and Article I, Section 8 (the "Necessary and Proper" clause). In _Chisholm_ v. _Georgia_,[67] Willoughby points out, the Supreme Court assumed jurisdiction to try a case brought against a state by a citizen of another state. This case aroused such opposition that a constitutional amendment was passed denying the Supreme Court this jurisdiction. Nonetheless, Willoughby says, "from this dispute the Federal Government emerged clearly the

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65. _Ibid._, p. 34.

66. _Ibid._, p. 35.

67. 2 Dallas 419 (1793).

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winner, it being established that only by an express constitutional amendment were the States to be released from being dragged unwillingly to the bar of a federal tribunal."[68] In 1803 the famous case, Marbury v. Madison,[69] was decided, and according to Willoughby:

> The great significance of the decision consisted not simply in that it upheld the power of the federal judiciary as opposed to that of the federal legislature, but that it pointed out that the tribunal to which resort should be had for an authoritative and final decision in the case of a federal enactment of doubtful constitutionality was not to the member States of the Union but to the federal Supreme Court.[70]

Only a few years after the Marbury case the Supreme Court in United States v. Peters[71] ruled against the state of Pennsylvania and for the United States. The case grew out of an action taken by Pennsylvania in 1777. In that year a ship, the Active, was condemned and sold as a prize by the state admiralty court. The Committee of Appeals of the Continental Congress overruled the state decision and forbade the turning over of the proceeds to the state. However, in violation of this ruling by the United States the money was paid over to the state treasurer. In 1803, the United States sued in a federal district court to recover the money, and judgment was obtained. In retaliation the legislature of Pennsylvania passed an act denying jurisdiction to the federal court, and directed the state executive to use force if necessary to prevent execution of the federal decree. The United States Supreme Court then issued a writ of mandamus to compel the

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68. Willoughby, The American Constitutional System, p. 38.

69. 1 Cranch 137 (1803).

70. Willoughby, The American Constitutional System, p. 39.

71. 5 Cranch 115 (1809).

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district judge to enforce his judgment, and after a show of force by a United States Marshall and his posse comitatus the state relented and paid over the money; and indeed, the United States secured the conviction of those state militiamen who attempted to block the enforcement of the federal decree. Willoughby says on this decision, "The facts of this famous case, together with the explicit utterances of the Supreme Court, certainly went far toward demonstrating that already sovereignty lay in the United States."[72]

He goes on to produce additional evidence (later cases) that early in the history of the republic the location of sovereignty shifted from the several states to the union. He cites, for example, such cases as Fletcher v. Peck,[73] McCulloch v. Maryland,[74] Martin v. Hunter's Lessee,[75] Cohens v. Virginia,[76] and Gibbons v. Ogden,[77] among others, to substantiate his position. In summary, he says:

> We may stop now for a moment to summarize the light that forty years of actual experience has thrown upon the question as to the character of the General Government established in 1789. Certainly it must be granted that the officially declared views and the realized facts had demonstrated the absolute sovereignty of the federal power so conclusively as properly to place that question outside the sphere of debatable political theory. Not only had the supremacy of the General Government in the exercise of its express and implied powers been stated and enforced in the most unqualified manner, but more important still, and in itself practically decisive of the question as to the location of sovereignty in our federal system, the prin-

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72. Willoughby, The American Constitutional System, p. 44. Underscoring is the present writer's.

73. 6 Cranch 87 (1810).

74. 4 Wheaton 316 (1819).

75. 1 Wheaton 304 (1816).

76. 6 Wheaton 264 (1821).

77. 9 Wheaton 1 (1824).

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ciple had been authoritatively asserted and maintained that the settlement of all disputes as to the relative competences of the state and federal governments, whether originating in the state or federal courts, was placed finally and absolutely in the hands of the supreme judicial organ of the federal power.[78]

Willoughby concludes, then, that the union was sovereign and not the states, not in the beginning, but sovereignty somehow did transfer in the early years from the states to the union. However, he does not seem to be sure just when this transfer of sovereignty took place; at one place he seems to indicate that the _United States_ v. _Peters_ decision in 1809 marks the change. On the other hand, in another place he says that there was doubt about this point in the minds of many Americans, particularly in the South; but that the result of the Civil War left no doubt at all and "no room for subsequent disagreement."[79]

There is no doubt in Willoughby's mind that the union has been sovereign since the Civil War. Indeed, at one point he goes so far as to say that the states of the union "constitute simply governmental or administrative districts of the United States."[80] At the same time, however, he recognizes that the United States Constitution reserves to the states a sphere of autonomy, the degree of which he endeavors to delineate. The method used is an examination of the extent of federal control over the form of state governments and the extent to which the federal government may go in supervising the states' reserved powers.

As to the first Willoughby has reference to the guaranty clause of the Constitution, and he points out that the only time that the federal govern-

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78. Willoughby, _The American Constitutional System_, pp. 52-53.

79. _Ibid._, p. 111.

80. _Ibid._

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ment was called upon to interpret this clause was in the famous case of Luther v. Borden,[81] in which the Supreme Court declined to say which government in Rhode Island was the legally constituted one. The Court held that such a question must be answered by the political branches of the federal government. Later, however, in the Reconstruction era, Congress, "acting under the authority assumed to be given it by the guaranty clause,"[82] took over virtually complete control of the reconstruction of southern states. However, by so doing, Willoughby believes, the federal government gave to that clause "an interpretation . . . which is very difficult, upon strict principles of construction, to justify."[83] Instead, Willoughby contends, "a fair interpretation of this clause would have given to the Federal Government at the most nothing more than the right to assist the citizens of the several States in establishing and maintaining governments republican in form and loyal to the Union."[84]

As to the second point Willoughby says that the federal system in the United States is virtually unique in the world in that the two distinct and separate and virtually independent sets of governmental machinery are provided for, one for the central government, and one each for the state. However, it is to be noted, he says, that—

> . . . though every effort is made to keep the governments of the States and of the Union as free as possible from the interference of the one by the other, the two governments do not stand upon exactly the same plane of authority; for whereas a State may not, even in the direct and ingenuous exercise of one of its constitutional powers, interfere indirectly with a fed-

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81. 7 Howard 1 (1845).

82. Willoughby, The American Constitutional System, p. 119.

83. Ibid., p. 120.

84. Ibid.

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eral officer or organ, the Federal Government may interfere directly with a state agency if by so doing the efficient exercise of one of its own constitutional powers be advanced.[85]

Continuing to examine the nature of the American federal system under the Constitution, Willoughby next looks at the division of powers between the union and the states. He points out that the national government has delegated powers and the states have reserved powers, but this does not mean that the federal government has only those expressly enumerated, but in addition it has those powers necessary and proper for carrying into execution those granted. Willoughby points to United States v. Fisher[86] and McCulloch v. Maryland[87] for the liberal construction of these implied powers, and notes that "a power when employed as incidental to the exercise of an express power may be used free from a constitutional limitation under which it would rest if exercised as an express power."[88] He cites as evidence to support this contention two cases: Veazie Bank v. Fenno[89] and the Head Money Cases.[90]

Despite a definite bias in favor of an interpretation of the Constitution that holds the central authority to be sovereign, Willoughby does not approve of the interpretation of the "welfare clause" that would grant to

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85. Ibid., p. 129.

86. 2 Cranch 358 (1804).

87. 4 Wheaton 316 (1819).

88. Willoughby, The American Constitutional System, p. 143.

89. 8 Wallace 533 (1869).

90. 112 U. S. 580 (1884).

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the central government additional powers. He contends that this clause does not grant to the federal government power of taxation, and _in addition_, power to provide for the common defense and the general welfare. He says, "Were this view to be accepted the government of the United States would at once cease to be one of enumerated powers, for it would then be possible to justify the exercise of any authority whatsoever upon the ground that the general welfare would thereby be advanced."[91]

Likewise, Willoughby regards as "most dangerous" that argument that would assert that the federal government has additional power by virtue of its sovereignty. This view, he points out, had been propounded during the Spanish-American War era. He cites particularly the statement of Senator Thomas C. Platt before the Senate on December 19, 1898, in which he said that the United States "possesses every sovereign power not reserved in its Constitution to the States or to the People; that the right to acquire territory is not reserved, and is, therefore an _inherent sovereign right_; that is a right upon which there is no limitation and with regard to which there is no qualification; . . . ."[92] Another example of this type of thinking was the statement of Senator Joseph B. Foraker of Ohio in the Senate on July 1, 1898, to the same effect. In answer to these positions Willoughby says:

> There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory advanced in the foregoing quotations. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limit-

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91. Willoughby, _The American Constitutional System_, p. 145. Willoughby takes this same position in his _The Constitutional Law of the United States_, I, 97-98.

92. Quoted in Willoughby, _The American Constitutional System_, p. 146.

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ed, enumerated powers.[93]

Willoughby, indeed, is quite critical of the United States Supreme Court for not always being careful to deny the validity of inherent sovereign rights. Though he grants that the Court has never explicitly justified an exercise of a power by the federal government on this ground, it has on the other hand, in _obiter dicta_ "several times used language suggesting its validity."[94] As evidence Willoughby cites a number of cases, including: _Knox v. Lee_,[95] _Mormon Church v. United States_,[96] and _Jones v. United States_.[97]

Though critical of the Supreme Court on this issue Willoughby's more characteristic view of the Court is that of respect, admiration, and a general satisfaction with the great bulk of its decisions over the years. His dissertation, as has been mentioned earlier, was on the Supreme Court and its place in the American constitutional system, the first dissertation to be written on this subject.[98] Looking back to the origins of this branch of government Willoughby takes exception to the contention that the Supreme

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93. Willoughby, _The American Constitutional System_, p. 147.

94. _Ibid._, p. 148.

95. 12 Wallace 557 (1871).

96. 136 U. S. 1 (1890).

97. 137 U. S. 202 (1890).

98. The subject matter of this work is divided as follows: Chapters I through IV deal with the historical development of the United States Supreme Court; chapter V deals with the Court and Congress, chapter VI deals with the Court and the state legislatures and courts; chapter VII deals with the Court and the Executive; chapter VIII deals with the Court and politics; chapter IX deals with "Present Conditions and Needs of the Supreme Court;" and chapter X is Willoughby's conclusion.

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Court owes its origin largely to the inventive genius of the Founding Fathers. Instead, the first one-third of his dissertation is given over largely to showing "the extent to which the judiciary then established was the recognition of already existing courts and powers of adjudication, rather than the creation of a new tribunal with novel powers."[99] He admits that the "method of restraining legislative action by a separate judicial tribunal"[100] is unique to America, for no European country at that time practiced judicial review. However, he finds that judicial review is a part of the judicial experience of Colonial America. He says, "decided evidences of the exercise of this power by colonial courts prior to the assembling of the constitutional convention may be found, and that though we cannot, therefore, claim for the framers of our constitution the honor of entire originality in this case, we can claim it for the American people."[101] He explains:

> To the Anglo-Saxon race in America belongs the honor of having developed government by written constitutions. The idea of a written constitution, as sanctioned by and emanating from the people, though early hinted at and partially developed by such writers as Sidney, Vane, and Locke was an untried experiment, until adoption by the American colonies. Now, with the establishment of a written constitution, the existence of safeguards against unconstitutional legislation is necessary. There are two methods which may be employed. Unconstitutional legislation may be opposed; first, by the force of public opinion and moral sanction or sentiment; or, second, by the erection of courts with power to decide as to the constitutionality of such laws as may be brought into question. In the organization of our government we chose the latter method, but in so doing so followed numerous precedents set up by the colonial courts in the construction of their several constitutions.[102]

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99. Willoughby, The Supreme Court of the United States, p. 32.

100. Ibid., p. 27.

101. Ibid., p. 28.

102. Ibid., p. 29.

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Willoughby cites as evidence of this a number of state cases, such as Holmes v. Walton in New York and Trevitt v. Weeden in Rhode Island, a statement of the Chief Justice of Virginia[103] to Edmund Randolph, and a letter from J. B. Cutting to Thomas Jefferson, and a statement of the Chief Justice of New Jersey.[104] On this Willoughby concludes:

> In the light of these cases, which have been cited, I think it can be maintained that the idea of control of the legislature by judicial authority had been developed before the assembling of the convention of 1787. It had been specifically asserted in at least as many as five colonies, and had been the subject of considerable popular discussion. When the American republics solved for the world the problem of federal union, the supreme judiciary, which they had erected, was taken from their own state governments, powers being given it commensurate with its new and enlarged duties. Everywhere but in America its powers are unique.[105]

Throughout this dissertation and in other works dealing with the American judiciary Willoughby shows a great admiration for the judiciary, especially the United States Supreme Court. He remarks, for example, that it "has proved probably the best working branch of our government."[106] In another place he says, "The elevation of the judiciary into a branch of government not only separate from the executive and legislative branches, but coordinate with them in power, has undoubtedly been one of the great successes of our political system."[107] Again, he remarks:

> The most powerful of these checks in retaining, not only the proper relation between the state and federal power, but between the departments of the federal government, has undoubtedly been the Supreme Court. It has been

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103. Willoughby does not further identify him, but the Chief Justice was undoubtedly Spencer Roane.

104. Willoughby does not further identify him.

105. Willoughby, The Supreme Court of the United States, p. 32.

106. Ibid., p. 16.

107. Ibid., p. 27.

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the balance wheel of the republic. The constitution as supreme over all these powers, has set to them a limit--the Supreme Court, as interpreter of the constitution, has been the instrument for rendering operative these limitations.[108]

Willoughby feels that the "supreme value" of this independent judiciary which the Founding Fathers created in 1787 has been its functions as a check upon Congress. In this connection he says, "The establishment of a sovereign legislature is inconsistent with the very aim of federalism, namely, the maintenance of a division of powers between the national and state governments. To have made Congress the authorized interpreter of its own acts, would evidently have left unobstructed the road to rapid absorption of state duties in national governmental activity."[109]

Willoughby finds that the Supreme Court has performed its functions well. It has served as a check upon the legislature, a fact which not only preserves the federal system, but also protects the independence of the three branches of government over the states without destroying the supremacy of the states within their realm of powers. Also, says Willoughby, the Court has wisely refrained from undue interference with the office of President. He states, "The powers of the President are almost entirely of a political nature and consequently can rarely be brought within the scope of a judicial examination. His only responsibility is to the people; his only check is liability to impeachment."[110]

Furthermore, to the Supreme Court's credit, it has wisely refrained

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108. Ibid.

109. Ibid., p. 35.

110. Ibid., p. 81.

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from engaging in partisan political struggles. Though there have been, he points out, noticeable trends in interpretation, as for example, the loose construction of the Constitution for nearly one-half century of the nation's earliest history, then a period of stricter construction for nearly twenty-five years during the chief justiceship of Roger Taney, and then from the outbreak of the Civil War to 1890 there was a period of "rather loose" interpretation of the Constitution. This does not mean, he says, that justices decide cases in a partisan manner, but rather, "these changes in the tenor of the court's decisions have flowed from the changes in the composition of its bench, and in no case is it strongly maintained that the justices have decided in any other but a conscientious manner."[111] He concludes on this, "The investigation of the part the Supreme Court has played in politics gives us few, if any, very disagreeable results, but tends to heighten our admiration and reverence for this institution."[112]

Because Willoughby has little but admiration for the Supreme Court and the federal judiciary generally it is not surprising that he would have few suggestions for reform. He did find in 1890, however, that the work of the Court was rapidly becoming too voluminous, and therefore, he proposed that Congress establish courts of appeals in each of the circuits intermediate between the Supreme Court and the Circuit Courts, these new courts to have final jurisdiction in all cases of a specified character.[113]

In the concluding chapter of his dissertation Willoughby asserts that

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111. Ibid., pp. 102-103.

112. Ibid., p. 104.

113. Ibid., p. 109.

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the claim that the Supreme Court's power to declare acts of Congress dangerous is unfounded. He says:

> The judiciary, from the very nature of its functions, is the department to be least feared, lest it should assume unwarranted powers, or, having assumed them, be able to carry them into operation. The Constitution, by its separation of powers, necessarily withdraws from the judicial branch all powers except those of a strictly judicial nature.[114]

He continues:

> The very form of the Supreme Court, and all of its appellate jurisdiction rests upon the legislative enactments. With no executive force at its back, and without the means of extending its influence either by patronage or command of the public revenues, it relies, for the execution of its decrees, upon the legal spirit, and reverence for law of the people, and upon their confidence of its justices, and their faith in its wisdom.
>
> This, then, is the check upon the Supreme Court. Relying for strength, as it does, upon the good will of the people, the court is obliged to use every means possible to deserve and keep this confidence, by declining to give judgments of a political nature, and in other ways using every means possible to exclude from its bench all taint of partisan bias.[115]

The concluding remarks of his dissertation are:

> That which should be a matter of especial congratulation to us in reviewing the history of the federal judiciary, is that of all our great institutions, the Supreme Court is most distinctly the product of American genius, and that its success is a direct testimony to the high political ability of our American people.[116]

Though in 1890 Willoughby felt that there were no grounds for fearing the power of judicial review, in 1930 in his Principles of the Constitutional Law of the United States, he injects a word of caution, saying, "The ex-

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114. Ibid., pp. 111-112.

115. Ibid., p. 112.

116. Ibid., p. 115.

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pediency of giving this power to the courts is, of course, open to discussion."[117] Indeed, he points out that "there is danger . . . that the judges, not being in close touch with or responsible to public opinion, will assume an unnecessarily strict or biased attitude towards the constitutional powers of the legislature, and especially towards those relating to what is known as the police powers of the State."[118] Nonetheless, he concludes, "In general, however, it is to be said that the courts have, by the rules which they have laid down for themselves with reference to the validity of legislative acts, kept their authority within just and expedient limits."[119]

As to whether the Supreme Court in exercising its power of judicial review in effect thwarts the will of the people Willoughby says definitely not. He asserts that the exercise of the power of judicial review does not thwart the "real will" of the people, and his reasoning is as follows:

> The people, acting solemnly and deliberately in their solemn capacity, declare that certain matters shall be determined in a certain way. These matters, because of their great and fundamental importance, they reduce to definite written form, and declare they shall not be changed except in a particular manner. In addition to this they go on to say, in substance, that so decided is their will, and so maturely formed in their judgment, upon these matters, any act of their own representatives in legislature inconsistent therewith, is not to be taken as expressing acts inconsistent with constitutional provisions, the judges are giving effect to the real will of the people as they have previously solemnly declared it.[120]

Continuing, he says:

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117. Willoughby, _Principles of the Constitutional Law of the United States_, pp. 12-13.

118. _Ibid._, p. 13.

119. _Ibid._

120. Willoughby, _The Constitutional Law of the United States_, I, 9.

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It may indeed be true that particular laws which are held unconstitutional by the courts express, as detached propositions, the wishes of the people. But, viewed in connection with the entire constitutional scheme of government, they do not; for the very existence of the Constitution is founded upon the conviction that, as a general proposition, it is better that the government should be restrained by established constitutional provisions, even though, in particular circumstances, the instant wishes of the people are defeated.[121]

Willoughby's most ambitious work on constitutional law, is, as has been said, his three-volume treatise.[122] Though there have been many volumes written in this field both before and since Willoughby's time it is probably the best of its kind even today, though it undoubtedly suffers now from being out of date. Willoughby's successor as the outstanding commentator on United States constitutional law, Professor Edward S. Corwin, had this to say of the second edition of _Willoughby on the Constitution of the United States_:[123]

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121. _Ibid._, p. 9.

122. _The Constitutional Law of the United States_, published in 1910, with a second and enlarged edition in 1929. For convenience's sake the subject matter of this work can be divided into some eighteen main headings: Two chapters on the principles of constitutional law; fourteen chapters on the nature of the American federal system; five chapters on aliens, citizenship, and Indians; one chapter on the admission of new states; ten chapters on the territories; four chapters on the treaty power; one chapter on the amending power; three chapters on Congress; two chapters on taxation; nineteen chapters on interstate and foreign commerce; three chapters on bankruptcy, coinage, weights and measures, postal powers, patents, and copyrights; one chapter on constitutional limits on federal criminal law; four chapters on individual rights; eleven chapters on the federal judiciary; one chapter on impeachment; four chapters on the presidency; three chapters on separation of powers; thirteen chapters on due process of law; and two chapters on equal protection of the laws. Comparing it with the first edition one finds these among the differences: First edition, sixty-five chapters, 1,390 pages, 1,350 cases cited. Second edition, 106 chapters, over 2,100 pages, over 3,100 cases cited. The enlargement of the second edition is due largely to the greater treatment given to the commerce and due process clauses. Professor Corwin refers to Willoughby's treatment of due process and equal protection as "systematic" and "excellent." See citation below.

123. This is the title of Willoughby's three-volume work as it appears on the cover binding.

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It would be difficult to overpraise this admirable work. Its one conspicuous defect is its apparently arbitrary arrangement of topics, a defect that is satisfactorily repaired by the excellent table of contents and the index. It can be confidently predicted that Willoughby On the Constitution will in its renewed youth more than repeat its earlier success.[124]

It is not the purpose of the writer to attempt to summarize this tremendous work on United States constitutional law. It must be noted, however, that this is no mere compiliation of cases and statutes, but rather is a commentary, an interpretative analysis of the principles embodied in the Constitution as they have evolved in cases and statutes. Willoughby always saw a close connection between United States constitutional law and political theory. In another work he said, referring to the value of political philosophy:

All of his [Marshall's] chief opinions are almost wholly essays in political theory. This is evident from the fact that in them very rarely is a legal authority or precedent cited to sustain the reasoning employed or the conclusions reached.

Since Marshall's time, though references to previously decided cases abound in its written opinions, the ratio decidendi of the decisions of the United States Supreme Court has, in many of the more important cases been derived from principles established by pure political theory.[125]

With this in mind it might be well to indicate some of Willoughby's commentary on the Constitution, starting with the principles of constitutional construction employed by the Supreme Court.

After considering what might be called the more mechanical aspects of constitutional construction, as for example, the presumption in favor of

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124. Edward S. Corwin, "Review of Willoughby's The Constitutional Law of the United States," The American Journal of International Law, XXIII (1929), 909.

125. Willoughby, The Fundamental Concepts of Public Law, p. 27.

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the constitutionality of statutes, technical terms, the use of various outside sources such as The Federalist, the meaning of "we, the people," etc., Willoughby gives some attention to the force of "natural laws." On natural laws he says, "The utmost that can be said for them is that where the language of the Constitution admits of doubt, it is to be presumed that authority is not given for the violation of acknowledged principles of justice and liberty."[126] In view of Willoughby's repeated denial of the validity of natural law in his works on political theory, this is quite an admission if what is meant here is that behind the constitution stands a theory of natural law, waiting to be called into service in the event that the wording of the Constitution is not abundantly clear. In view of Willoughby's previous refutation of theories of natural law, however, it might be safer to assume that he does not see natural law as the foundation of constitutional law.

Likewise Willoughby denies that the "spirit" of the Constitution, or as Willoughby sees it, "the abstract principles deducible from . . ." the fact that "the fundamental purpose of the constitutional fathers was the creation of a free republican government, and that, therefore the Constitution should, whatever its express terms may provide, never be construed as to violate . . ."[127] them, is of no force. His reason for opposing an interpretation of the Constitution in the light of its spirit is that it "would render indeterminate what those powers of limitations are."[128] However, he does point out that "the resort to the general nature and purpose

126. Willoughby, Constitutional Law, I, 66.

127. Ibid., pp. 67-68.

128. Ibid., p. 71.

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of the Constitution in order to determine doubts not otherwise resolvable is a legitimate practice, sustainable by general principles governing the construction of written instruments . . . ."[129] On the other hand, he points out—

> . . . the resort to the 'spirit' of the Constitution, in order either to sustain an exercise of governmental power or to impose a limitation upon it which is not provided for by the instrument itself, is not a valid practice, since it stands in essential opposition to the other rules which the court has declared fundamental for determining the power granted to or limitations imposed upon the Federal Government by the Constitution."[130]

Willoughby is willing to grant the line of distinction between these two concepts—the "spirit" of the Constitution and the "general purpose" of the Constitution—is difficult to draw, but he asserts that the "distinction itself is a clear and logical one."[131]

Because the Constitution was intended to last for all time Willoughby asserts that its provisions are to be made applicable to new conditions as they arise in American national life. This does not mean, however, that "these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that powers which are granted shall, if possible, be made applicable to these new conditions."[132] Citing the commerce clause Willoughby points out how new means of travel, unknown at the time of the drafting of the Constitution, have become subject to congressional regulation. "The Constitution," says Willoughby, quoting from _In re Debs_, "has not changed. The power is

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129. _Ibid._

130. _Ibid._

131. _Ibid._

132. _Ibid._

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the same. But it operates today upon modes of interstate commerce then unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."[133] Furthermore, Willoughby sees certain of the provisions of the Constitution assuming a greater or lesser importance as a result of changing conditions, as for example the wide application of the war powers of the President in times of international strife.

Brief reference was made earlier in this chapter to Willoughby as a "liberal constructionist" as opposed to those who in the past have advocated a "strict construction" of the Constitution. Further comment on this is in order here. Speaking of the validity of liberal as opposed to strict construction he says:

> The justification for this has been deduced from the general nature of the Constitution as an instrument of government, and from the character of the end which was sought to be obtained by its establishment. The Federal Government exists, not for the benefit of those who exercise its powers, but to subserve the national interests, —political, industrial, and social, — of the people who framed and adopted it. While, therefore, it is, in essential character, a grant of powers, and is to be construed as such, its terms are to be interpreted in the light of the fact that the people in adopting it desired the establishment and maintenance of an effective National Government, and therefore one endowed with powers commensurate with this end.[134]

He agrees wholeheartedly with Marshall's reasoning in Gibbons v. Ogden[135] to the effect that there is no good and sufficient reason for a strict construction of either those powers expressly or impliedly conferred on the

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133. Quoted in Ibid., p. 72. The citation for the case is 158 U. S. 564 (1895).

134. Willoughby, Constitutional Law, I, 78.

135. 9 Wheaton 1 (1824).

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national government. Strict construction he holds to be a natural corollary of the states' rights doctrine, but one which is not at all required by the nationalistic doctrine.

Willoughby's acceptance of Marshall's theory of "implied powers" does not mean, however, that he subscribes to the theory set forth by James Wilson and Theodore Roosevelt[136] which goes much farther than Marshall's. This theory, Willoughby says, asserts—

> . . . that a subject not originally within the sphere of Federal control, may, by mere change of circumstances, be brought within the Federal field. Thus, to illustrate concretely, it might be argued according to the doctrine of implied powers that as implied in authority expressly granted to Congress might compel all corporations or individuals manufacturing commodities for foreign or interstate commerce to obtain a Federal license, such a license to be granted upon such terms as Congress might see fit to dictate. According to the Wilson-Roosevelt doctrine, however, it could be argued that the control of manufacturing is not expressly denied the Federal Government nor expressly placed within the exclusive control of the States, and that, under existing industrial conditions it being of Federal importance that these manufacturing concerns, or certain of them, should be regulated, and the States being incompetent to furnish the necessary regulation, therefore, the Federal Government has the power.[137]

Fortunately, says Willoughby, the Supreme Court has never accepted this interpretation of constitutional construction, and indeed, expressly repudiated it in _Kansas_ v. _Colorado_.[138]

One of the more interesting of Willoughby's observations on the Constitution is that on the treaty power.[139] He is particularly interested in

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136. Willoughby does not indicate the source of James Wilson's theory but does attribute Roosevelt's to his speech at the dedication of the Pennsylvania capitol at Harrisburg. _Constitutional Law_, I, 81.

137. Willoughby, _Constitutional Law_, I, 81-82.

138. 206 U. S. 46 (1907).

139. In addition to his treatment of this subject in his _Constitution-_

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whether there are constitutional limits to this power. He notes that the Constitution places no express limitations as to the subject matter of treaties, and that treaties are declared by that instrument to be the supreme law of the land, despite what state constitutions and laws may provide. Despite the fact that no treaty has been voided by the Supreme Court that organ has repeatedly indicated in obiter dicta that there are implied constitutional limitations on the subject matter of treaties. More specifically, Willoughby searches into the question of whether the reserved powers of the states pose a limitation upon treaty making powers. He notes that the Court has in "judicial dicta" said that a treaty cannot invade the reserved powers of the state, but on the other hand has upheld treaties that did so. On this, Willoughby says the "true doctrine" is that—

> . . . in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law, or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.
>
> The writer is led to the belief that this will be the position finally and affirmatively taken by our judiciary from a review of the manner in which, in the past, in every instance in which it has been necessary to endow the Federal Government with a power in order that its National Supremacy, and its administrative efficiency, might be preserved, the Supreme Court of the United States had found the means to do so.[140]

Despite this, he feels that there are limitations on the treaty power

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al Law, I, Chapter XXXVI, 561-90, it appears in his "The Constitutional Limits of the Treaty-Making Power of the United States," Proceedings of the American Society of International Law, (1907), pp. 201-11. An abridgment also appeared in The Johns Hopkins University Circular, (1908), No. 3, pp. 2-7.

140. Willoughby, Constitutional Law, I, 569.

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found in the very nature of treaties. He says—

. . . the treaty-making power may not be used to secure a regulation or control of a matter not properly and fairly a matter of international concern. It cannot be employed with reference to a matter not legitimately a subject for international agreement, any more than can the States under the claim of an exercise of their police power regulate a matter not fairly comprehended within the field of police regulation . . . . [This] excludes from the Federal treaty-making power the authority to disregard those prohibitions of the Constitution, express and implied, which are directed not to Congress but to the National Government as a whole.[141]

Looking back to Willoughby's concept of sovereignty as meaning legal omnipotence it is not surprising that his theory of the nature of the American federal system takes the turn that it does. Moreover, if one accepts his definition of sovereignty as valid then his discussion of the nature of that system is not illogical. It is undoubtedly true, as he says, that the Founding Fathers felt they were dividing sovereignty between the nation and the states. It does not augment the stature of analytical jurisprudence, however, to admit, as he does, that the practical application of its basic principle in 1787-89 would have meant disapproval of the Constitution by the people. Had they known that what they were doing was logically and legally impossible they would have voted against ratification, in all probability. This could very well lead one to conclude that it was fortunate for the future well-being of the nation that the public figures and the people generally were ignorant of the principles of analytical jurisprudence.

Willoughby leads his readers to believe that there are only two choices as to the theories of the American federal system; that is, that the states are sovereign or the union is sovereign. This appears inevitable if one ac-

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141. Ibid., p. 570.

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cepts Willoughby's definition and concept of sovereignty. It is not necessary, however, to be in a position of having to accept one extreme or the other, for one can accept either a theory of the divisibility of sovereignty, with one division in the nation and the other in the states; or perhaps more logically, one can accept the theory that sovereignty resides in the people at large, a theory which Chief Justice Marshall seems to advocate in McCulloch v. Maryland, and that at Philadelphia in 1787 this sovereignty was allocated to the nation in part and to the states in part. Moreover, it is quite possible to conceive of sovereignty as residing in the constituent power, that is, the power that has authority to amend the constitution or to call a constitutional convention. Indeed, Austin does this in his analysis of the location of sovereignty in the United States.

Certainly Willoughby's extreme statement that the states are merely sub-divisions of the national government is without merit. Even the most ardent of nationalists of the first half of the nineteenth century would hardly have gone that far. An examination of Willoughby's Constitutional Law, volume I, will show that he feels the states have a sphere of authority which is protected from encroachment by the national authority.

Willoughby's admiration for the Supreme Court and its decisions which was pointed to earlier, as particularly manifested in his doctoral dissertation, is seen also in his Constitutional Law. He finds little to criticize in some of the Court's more controversial cases, decisions that have aroused great storms of criticism in the nation's newspapers, learned journals, etc. These include: Scott v. Sanford,[143] U. S. v. E. C. Knight,[144] Pollock v.

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143. 19 Howard 393 (1857).

144. 146 U. S. 1 (1895). This is the case in which the Supreme Court

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Farmers' Loan and Trust Co.,[145] Hammer v. Dagenhart,[146] Adkins v. Children's Hospital,[147] Bailey v. Drexel Furniture Co.,[148] and Fletcher v. Peck,[149] among others. On the other hand, he is mildly critical of the decision in Lochner v. New York,[150] but does not seem to notice the revolutionary implications for constitutional law embodied in Muller v. Oregon.[151]

Unfortunately, Willoughby had nothing more to say on constitutional law after his work was published in 1929. There is much that he could have said, undoubtedly, in the great judicial upheaval of the 1930's. However, by this time Willoughby had retired, and though still active enough to write

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established the doctrine, since abandoned, that manufacturing succeeds to commerce, but is not a part of it.

145. 158 U. S. 601 (1895). In this case the income tax was declared unconstitutional, it being held to be a direct tax, contrary to earlier decisions.

146. 247 U. S. 251 (1918). In this case a child labor law of 1916 was stricken down.

147. 261 U. S. 525 (1923). This decision invalidated a congressional statute authorizing the establishment of minimum wages in the District of Columbia.

148. 259 U. S. 20 (1922). In this case another federal statute on child labor was invalidated.

149. 6 Cranch 87 (1810).

150. 198 U. S. 45 (1905). In this case Justice Holmes delivered his classic dissent to the effect that the majority were employing antiquated economic theory in striking down a state statute regulating hours of employment of bakers in New York. Willoughby preferred to dissent not on the grounds that laissez-faire was incorrectly used, but that the Court did not give due cognizance to the legislative finding of the fact that there was a direct correlation between long hours of work and the health of the laborers. Constitutional Law, III, 1771.

151. 208 U. S. 412 (1908). Mr. Louis Brandeis, as counsel for Oregon, used two pages of his brief for the usual legal argument and over one-hundred pages for data to prove that long hours of labor are in fact harmful to women.

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on the Far East, was for some reason inactive on the constitutional law front.

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Chapter VIII

WILLOUGHBY ON INTERNATIONAL LAW AND RELATIONS

It was not at all unusual for the first (and even the second) generation of political scientists to write treatises on many if not all of the divisions of political science, as then conceived.[1] As has been indicated before, Willoughby's interests in political science were virtually as broad as the discipline itself. His interest in international law and international affairs was certainly intense, and indeed in his later professional years, was paramount to all others. Despite this interest he did not produce one volume on international law, although he did, particularly in his

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1. Consider, for example, the following works of Paul S. Reinsch: The Common Law in the Early American Colonies (1899), American Legislatures and Legislative Methods (1907), Intellectual Currents in the Far East (1911), International Unions (1911), and Secret Diplomacy (1922); or those of Jesse Macy: Civil Government in Iowa (1881), Our Government (1886), The English Constitution (1897), Political Parties in the United States, 1846-61 (1900), Political Science (1913), and Comparative Free Government (1915); or those of James W. Garner: Introduction to Political Science (1910), American Government (1911), International Law and the World War (1920), Recent Developments in International Law (1925), and American Foreign Politics (1927).

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early seminars, emphasize that subject, and in his later years wrote many books and articles on China and the Far East. His works on China and the Far East can hardly be termed treatises on international law, however, for they specifically belong to the field of international affairs. Willoughby did write on international law in sections of his theoretical and juristic works and in a few articles. His concepts of international law here to be considered appear in his The Nature of the State, The Fundamental Concepts of Public Law, and in a number of articles.[2]

As was seen in a previous chapter, Willoughby's fundamental juristic views are to a remarkable degree those of Austin. Thus, Willoughby sees law as a command of a political superior to a political inferior, and finds the essence of the law to be its sanction. All other possible rules that guide human conduct are "rules of morality" or those supported by public opinion. The latter do not become positive law (and therefore law to the analytical jurist) until they assume the form of commands emanating from a political superior to a political inferior. What, then, is the status of international law to the analytical jurist? Austin held international law to be in reality rules of positive morality and therefore not law in the positive or proper sense at all. He says—

> . . . international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

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2. Among the articles are: "Citizenship and Allegiance in Constitutional and International Law," American Journal of International Law, I (1907), 914-29; "The Legal Nature of International Law," American Journal of International Law, II (1908), 357-65; "Principles of International Law and Justice Advocated by China at the Washington Conference," Chinese Students' Monthly, XVII (1922), 688-93; and "The Constitutional Limits of the Treaty-Making Power of the United States," Proceedings of the American Society of International Law, (1907), pp. 201-11.

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> And hence it inevitably follows, that the law obtaining between nations is not positive law; for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[3]

It will be the purpose of the first part of the present chapter to ascertain Willoughby's concept of international law. Does he agree with Austin that international law is not "law" properly so called? Must it conform to the rather narrow definition of municipal law which he accepts? Or does the word "law" in the international sense take on a different meaning? Willoughby's first views on international law are found in his The Nature of the State. As has already been said, he posits sovereignty as the essential attribute of the state, and one of the consequences of sovereignty is the absolute independence of states. This independence is not contradicted by the existence of "international regulations" which exist in large volume, and to which all civilized nations adhere.[4] He finds that, "in no wise do the commands of the so-called international law appear as directed by a political superior to a political inferior."[5] As the subjects of international law are sovereign states, he points out, "the validity of their promises to each other rest upon no other coercive force than that of morality and public expedience."[6] When states enter into treaties, he asserts, there is no force created that is superior to that of the states entering into the

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3. John Austin, The Province of Jurisprudence Determined, p. 201.
4. Willoughby, The Nature of the State, p. 198.
5. Ibid.
6. Ibid.

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agreement. He, then, agrees with Georg Jellinek, who said, "Der Staatenvertrag bindet, aber er unterwerft nicht."[7] Willoughby notes that in every treaty there is found, expressly or impliedly, the clause saying that states need not observe treaties as binding when the conditions under which the instruments were concluded have so changed that the evil to be expected from the violation of the treaty is less than the evil to be expected from its observance. He concludes, "It therefore appears that the force, not only of general international regulations, but of those principles specially created by nations by mutual consent and promise, is no greater than that derived from the continued consent and voluntary acceptance of the legal subjects upon whom the regulations are imposed."[8]

Willoughby points out that Austin refused to regard as positive law those rules that control international affairs of states, and he finds that he must agree with Austin's logic. "The term 'law'," he says—

> . . . when applied to the rules and principles that prevail between independent nations, is misleading because such rules depend for their entire validity upon the forebearance and consent of the parties to whom they apply, and are not and cannot be legally enforced by any common superior. In a command there is the necessary idea of superior and inferior, while in international relations the fundamental postulate is that of the theoretical equality of the parties, however much they may differ in actual strength. Finally there exist no tribunals wherein these principles may be interpreted and applied to particular cases. The uniformity with which these principles are followed, and the practical necessity under which at least, the smaller states are to obey them, does not alter the case. The sanction to most of these rules may be, as a matter of fact, very strong and effective, but it is not a legal sanction. Regulations which depend upon the consent of the parties to whom they apply, not only for their interpretation and application, but for their enforcement, certainly partake insufficiently

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7. "A Treaty binds, but does not subjugate." Ibid., quoted from Getsetz und Verordnung, p. 305.

8. Willoughby, The Nature of the State, p. 199.

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of those qualities which would cause them to be designated, in sensu strictiore, laws.[9]

Indeed, Willoughby points out, these "international regulations" are quite similiar to agreements between individuals that occur daily in which moral obligations are incurred. However, it is clear that there is no legal means provided in international law for their enforcement in case of violation. In this category are verbal promises to pay the debt of another, "certain contracts in regard to land not expressed in writing; and, indeed, the countless minor engagements entered into between persons, which cannot be enforced in courts of law, and which yet lay the parties under a moral obligation."[10]

Custom becomes a part of international law in Willoughby's view only after its acceptance by the state, and he cites a "most luminous case," The Queen v. Keyn,[11] to support this contention. In this case Keyn, captain of a foreign vessel, ran his ship into an English ship within two miles of Dover, negligently causing the death of a passenger. He was tried before an English criminal court and convicted of manslaughter. The question of jurisdiction came up when the decision was appealed. Writers on international law had long maintained that by custom the waters for a distance farther from shore than the position where the accident took place belonged to the country whose shores were washed by the water. This doctrine, however, had never been explicitly accepted by the English courts. The question arose in the case as to whether custom was of sufficient legal force

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9. Ibid., p. 200.

10. Ibid., p. 201.

11. L. R. 2 Ex. Div. 63.

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as to permit it to be enforced by the English courts. The majority of the court said that it did not (with this Willoughby agrees). Willoughby notes that Sir Henry Maine disagreed with this decision, seeing custom as the source of international law as well as municipal law. Willoughby also notes that Maine finds support for his stand in Wharton's Digest of the International Law of the United States[12] which states, "the law of the United States ought not, if it be avoidable, so to be construed as to infringe the common principles and usages of nations, and the general doctrines of international law."[13] But Willoughby holds that instead of supporting, this quotation actually refutes Maine's position. "Ought not" indicates only a moral duty, says Willoughby, or duty dictated by political expediency, rather than indicating a law.[14] Willoughby concludes:

> In the absence, then, of a common superior, the only rational view in which States are to be regarded in their relations to each other is that of freedom from all possible legal control; and with their mutual interests subject only to such regulations as the considerations of justice and expediency shall dictate. International 'rights' strictly speaking, do not exist. Nations are, as individuals, in that state of nature in which Hobbes, Locke, and Rousseau, placed primitive man.[15]

This concept of international law is found in Willoughby's The Nature of the State, published in 1896. Almost thirty years later he attempted a more thorough treatment of the subject in his The Fundamental Concepts of Public Law, but before considering this one should give brief attention to

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12. Francis Wharton (1820-89) was commissioned by Congress to undertake this compilation which appeared in 1886 and is a three-volume work.

13. Quoted in Willoughby, The Nature of the State, p. 202.

14. Willoughby, The Nature of the State, p. 203.

15. Ibid.

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an article that appeared in the American Journal of International Law in 1908[16] in which Willoughby sets out to describe the legal nature of international law. This article is by way of an answer to a previous article that appeared in the Journal in 1907 by James Brown Scott.[17] Mr. Scott contends that international law is entitled to be designated "law" in the same sense that national or municipal law is so designated. To support this he quotes the highest courts of the United States and of Great Britain to the effect that when necessary these courts will utilize the generally accepted principles of international law for the adjudication of cases brought before them. Austin and the analytical jurists are his principal targets, and a rather extended quotation from this article will indicate his position:

> International law--to use Bentham's innovation of 1789, which has found favor with the public, instead of the older, more expressive term, law of nations--has been variously denounced and praised as international morality or ethics; international courtesy or convention in the social sense of the word; comity as distinguished from rule of law; or merely and finally as the foreign policy, such as the Monroe Doctrine, which at a particular time happens to catch the fancy of nations. If admitted as law in general or as possessing some of the elements of the ordinary municipal law, the principle that pinches is declared not to be law and to have no binding force whatever, there is no supreme court of nations in which the dispute may be litigated and no sheriff to execute the decree, supposing that one had actually been delivered. But the judgment of a municipal court is not self-executing, as

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16. Willoughby, "The Legal Nature of International Law," American Journal of International Law, II (1908), 357-65.

17. Mr. Scott (1866-1943) had a long and distinguished career in international law and affairs, among other things being Secretary of the Carnegie Endowment for International Peace (1910-40) and Director of the Division of International Law. Also he was President of the American Institute of International Law (1915-42) and Editor in Chief of the American Journal of International Law (1907-24). Among his many works on international law is Law, The State and the International Community, 2 vols., 1939. As has been stated earlier, he lectured for a number of years on international law in the Political Science Department at Johns Hopkins.

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for instance, when President Jackson stamped his foot, saying: 'John Marshall has made the decision; now let him execute it.' The executive officer of the court, the sheriff or marshall, did not enforce it, and that, forsooth, changed the nature of the transaction! Suppose the sheriff meets resistance in performing the mandate of the court, the armed force of the nation may be called upon and in final result the nation is in the field. Now suppose a nation declares that a principle of international law has been violated and the demand for reparation is refused, war ensues, and the field marshall is no less a person than the sheriff. It is submitted that the mere form of the sanction is immaterial, and that the nature of law cannot well depend upon the whim or ability of a sheriff, or the mere success or failure of any army in the field. If the principle is binding at all—that is, if nations admit that a principle binds them—it is of no great moment whether the force is moral, ethical, or physical. It does not make much difference in the end to the criminal, nor to the rest of mankind, whether the offender has his neck broken or is electrocuted, provided death results. It seems, therefore, unscientific, if not positively absurd, to make the essence of a thing depend upon a mere form of punishment.[18]

Willoughby's answer to Mr. Scott is that the American and British courts have not accepted the doctrine that international law is law in the same sense that municipal law is. He says:

It is true that these courts adopt and apply established principles of international law, but in so applying and enforcing them they consider them as having been first impliedly adopted by the British or American State, as the case may be, as a portion of its municipal law. Thus in fact, these principles are recognized and enforced, not as international law, but as municipal laws. In other words, while the principles which international laws embody are the product of international usage and agreement, their legal force as rules controlling the administration of justice between litigants is derived from the sanction of the state whose justice the courts administer, and by whose laws the courts themselves are created.[19]

In his The Fundamental Concepts of Public Law Willoughby says that in international law the state is regarded as a "person," that is, it is an entity, possessing a will, and is the subject of rights and obligations. This personality of the state in international law is "similiar in its con-

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18. Scott, "The Legal Nature of International Law," American Journal of International Law, I (1907), 831-32.

19. Willoughby, "The Legal Nature of International Law," p. 357.

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ceptual character to that of the State in municipal law . . . ."[20] Despite these similiarities, however, says Willoughby, there are vital differences between the two. He points out, "The rights and obligations which are connoted by international personality are different, both in essential nature and in content, from those which spring from municipal personality, and they are created, applied and enforced by different means."[21] Because the state is sovereign, as far as municipal law is concerned, there are no limits to its will. In municipal law the state, says Willoughby, is not the creature of law, for, at the same time that it is the sole and ultimate source of all law it is, by its very nature, compelled to operate according to the rules thus laid down."[22] In direct contrast to this, Willoughby states, "the State of International Law asserts that it has de facto power or control over a given territory, and that it will not tolerate within its limits the exercise of any political authority save such as it consents to."[23] Of course, Willoughby continues, the state in international law "holds itself responsible to other States for the manner in which, in the exercise of such exclusive jurisdiction, it may affect the rights or interests of other States."[24]

The central concept of international law is the complete independence of sovereign states. Indeed, Willoughby contends, if all states were content with their existing boundaries, and these boundaries were permanent

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20. Willoughby, The Fundamental Concepts of Public Law, p. 278.

21. Ibid.

22. Ibid., p. 279.

23. Ibid.

24. Ibid.

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and undisputed, and if each state were unconcerned with what other states were doing within their several limits, there would be no opportunity for international disagreements and disputes. But in actuality, Willoughby asserts, boundaries are not fixed, states are concerned with what their neighbors are doing internally, citizens of states travel in other lands and a certain amount of guardianship follows them, and furthermore, states enter into international agreements which modify their general international rights and responsibilities. Therefore, international relations have become extremely complicated and many opportunities have arisen for friction among states. To counteract this friction statesmen and publicists have attempted to provide as definite and beneficial a body of rules and principles as possible to guide the nations of the world in determining the rights and duties that arise out of the inter-relations of the states of the world. "The total result," Willoughby says—

> . . . is that, though starting from an essentially individualistic doctrine of State exclusiveness and independence, a great and complicated corpus of technical international principles have come into being. It still remains true, however, that the doctrines of exclusive territorial jurisdiction which have been outlined, and of the State as an international entity or person which is the bearer or 'subject' of certain rights and corresponding duties, are the fundamental concepts, from which, by logical deduction, are explained and justified the special rules which regulate international relations. The more complicated and technical these provisions of international law, the more important it becomes that the basic ideas upon which they rest should be searched out and clarified.[25]

One finds, says Willoughby, upon investigating the field of international law, that the principles that govern the relations between states is as formalistic in character as those that are found in municipal law. Indeed, he says, these principles of international law are "in general, amen-

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25. Ibid., pp. 281-82.

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able to much the same analysis as that applicable to municipal law. Furthermore, the concepts that they connote, such as rights, obligations, and the like, seem much the same."[26] Willoughby cautions, however, that these principles have only a superficial resemblance, saying, "fundamentally, there is a difference between these two fields of jurisprudence which makes necessary the formation of new definitions of law, of legal rights, and of legal obligations, and a new conception of the State as the subject and object of these rights and obligations."[27] He points out, for example, that in international relations there are no "legal superiors" and "legal inferiors." There is no supreme will that is, legally speaking, superior to all other wills, for what one really finds is, legally speaking, " a collection of equal wills, and the conflict, or at least the interplay, of independent powers. This is the fundamental premise of those who attempt the systematic statement of the principles that govern the relations of States to one another."[28] When one examines the origin of international law as compared with municipal law it becomes particularly apparent that differences between the two exist. Municipal law finds its origin, Willoughby indicates, in the "mandatory utterances of supreme wills declaring to inferior persons what for them shall be deemed legally right and legally wrong."[29] On the other hand, international law originates in the acceptance by the states whose actions they regulate, not as superiors and inferiors, as in municipal law, but rather as equals.

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26. _Ibid._, p. 282.

27. _Ibid._

28. _Ibid._

29. _Ibid._, p. 283.

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Sovereignty, as found in constitutional law, Willoughby finds, has no place in international law. On this he elaborates:

> The word is, indeed, generally used in the literature of international jurisprudence, but, when thus employed, it has a meaning which is so different from that which it has in the municipal field that it is most unfortunate that it should ever have obtained this currency. It would have been far better if some such term as Independency had been employed. This word, far better than Sovereignty, would indicate the fact that, regarded from the view of positive law, complete individualism prevails in the international field.[30]

In Willoughby's view, then, the international jurist looks at international life as "atomistic, noncivic, individualistic."[31]

International law cannot be created by municipal law, Willoughby asserts, and by this he means, ". . . no one State can, by its own legislative fiat or judicial decree create international rules that are to bind the actions of other States . . . ."[32] Indeed, if this were so, Willoughby says, international law would be destroyed, "for not only would it thus be within the recognized right of each State to escape from the application of previously acknowledged rules of international law, but that law itself would lose its generality and have a content that would vary for each State."[33] Likewise, international law cannot create municipal law. It is true, says Willoughby, that national courts do adopt and apply the established principles of international law, but, "in so applying and enforcing them, they consider them as having been first impliedly adopted by the State

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30. Ibid., p. 283.

31. Ibid., p. 284.

32. Ibid.

33. Ibid., p. 285.

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as a portion of its own municipal law."[34] "Thus," he continues, "though the principles which international laws embody are the product of international usage and agreement, their legal force, as rules controlling the administration of justice between litigants, is derived from the sanction of the State whose courts administer them, and by whose laws the courts themselves are created."[35]

Is international law law in the positive or analytical sense? Willoughby says no because "it lacks the essential quality of embodying commands by political superiors to political inferiors."[36] Should, then, the term "law" be used when referring to international law? Willoughby finds this acceptable so long as one remembers that it has a different meaning in international law from what it has in municipal law. Willoughby admits that many publicists have held a contrary opinion. For example, Sir Frederick Pollock in his essay, "Methods of Jurisprudence," indicated that international law is a "true branch of jurisprudence," holding that international doctrines are founded on legal ideas, not simply on ethical ones; that they are studied "by the methods appropriate to jurisprudence, and not by those of moral philosophy," and that "framers of state papers" resort not to moral argument but to precedent and the opinions of experts. Finally Pollock says—

> . . . there is actually an international morality, distinct from, and incompatible with international law in the usual sense. As a citizen among citizens, so a nation among nations may do things that are discourteous, high-handed, savoring of sharp practice or otherwise invidious and dis-

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34. Ibid., pp. 285-86.

35. Ibid., p. 286.

36. Ibid., p. 298.

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liked, and yet within its admitted right and giving no formal ground of complaint. There is a margin of discretionary behavior which is the province not of claims and dispatches but of "friendly representations" and "good offices."[37]

In reply to Pollock, Willoughby asserts:

These facts, thus stated by Pollock, may be at once fully admitted, and the conclusions that there is a body of international principles that may fairly be said to constitute a system of jurisprudence as distinguished from one of morality, and that Austin's designation of international law as nothing more than positive morality is therefore misleading, is not absolutely erroneous, but it is none the less true that these juristic principles do not come within the ordinary accepted definition of civil or municipal law. If the two bodies of law are to be brought under a single rubric it is necessary that a broader definition be given to municipal law that is ordinarily given it.[38]

Willoughby admits that in its earliest years international law (he dates the rise of the science of international law from the beginning of the seventeenth century) was closely related to (if not assimilated to) moral or natural law. Indeed, Willoughby points out, it was the goal of Hugo Grotius and other reformers of the time to "escape from the international practices that prevailed by appealing to principles founded in the very nature of reason and morality."[39] Although this is true in the earliest years of international jurisprudence, the tendency since that time, says Willoughby, has been "to substitute the rules manifested in actual practices for abstract principles, and this tendency has been hastened by the increasing habit of nations to provide by treaties conventional rules for the guidance of their international affairs."[40] This has resulted,

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37. Quoted in Ibid., p. 299. The work in which this essay appears is Pollock, Oxford Lectures.

38. Willoughby, The Fundamental Concepts of Public Law, p. 299.

39. Ibid., pp. 300-01. 40. Ibid., p. 301.

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Willoughby says, in the "general will of the international world [becoming] more articulate and legislative."[41] Furthermore, tribunals, "more or less judicial in nature" have been created to help settle international disputes, and some serious discussion has been given the matter of an international executive to compel compliance to the generally recognized principles of international law. However, Willoughby points out, even if that were realized international law would still not be positive law "unless the international judicial tribunals were given a general jurisdiction over international disputes, and unless, also, and what is still more important, the international legislative body, similiar to the Hague Conferences, should have ascribed to them unlimited law-making power, and, of course, its declarations given an immediate and not merely an *ad referendum* character."[42] Willoughby concludes on this, "When, and only when, such conditions are met will it be proper to say that a *civitas maxima* has been extablished with a territorial jurisdiction including the *orbem terrarum* and the utterances of its will to be termed 'positive' laws."[43]

Despite the fact that international law is not positive law, as the analytical jurist views law, there is available to the analytical political philosopher, says Willoughby, sufficient material for a "science of international law" just as there is in the case of the state as municipally viewed. On this Willoughby says:

There exists at the present time, a body of rules regulating international relations which, though supported by the strongest feelings of morality and

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41. *Ibid.*

42. *Ibid.*, p. 302.

43. *Ibid.*

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expediency, find their source no longer in abstract and vague doctrines of natural law, but in precedent and convention; which are sufficiently definite and susceptible of classification and logical arrangement; which for the most part may be referred back to, and supported by fundamental propositions regarding the nature of the State as an international person, and with rights and obligations attaching to it as such; and which international rules are therefore susceptible of being brought together into a systematic and scientific whole.[44]

Just as the state is the starting point of municipal jurisprudence, so it is in international law. The reason for this, Willoughby says, is that "it is from the attributes which are ascribed to the individual political persons who constitute the international group that the most important principles of international law are directly or indirectly deduced."[45] In international law states are envisaged as political persons, as they are in municipal law. However, only if they are members of the "Family of Nations," for if they are members of this family they possess independent wills, and entities, the possessors of vested rights and responsibilities. If states are not members of the family of nations they do not possess these attributes in full. And to qualify as a member a nation must have attained "a certain degree of civilization."[46] Also to qualify, a nation must agree to be bound by rules of international law for its future international conduct, and must be admitted to this select group by the consent of the existing family of nations.

Territorial integrity, Willoughby points out, is the most important of the attributes of the state in international law, and this is, "the autonomous right of each State to exercise control over, and a corresponding re-

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44. Ibid., pp. 302-03.

45. Ibid., p. 307.

46. Ibid.

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sponsibility for what occurs within, a given territory."[47] Furthermore, he says, it has been an accepted fundamental of international jurisprudence "that the recognition of one State by other States is predicated upon the demonstrated power of a given government to exercise effective control over a given area, and that such government may therefore be held internationally responsible for what happens with this area."[48] Only in a very general way does international law determine the conditions under which recognition will be accorded and what government of a state is entitled to recognition by the other governments of the family of nations. Moreover, there is no legal way in international law to compel this recognition, if it is deemed to be withheld unjustly.

In international law, juristically speaking, says Willoughby, there is no distinction between governments *de facto* and governments *de jure*. Therefore, when one state faces the question of whether to accord recognition to another government the important point for consideration is "whether the government which it recognizes is a *de facto* one to the extent that it is able to fulfill the obligations laid, by accepted international law, upon a government which asks international recognition as the power internationally responsible for what takes place within the territory over which it claims primary control."[49]

In international law, also, Willoughby points out, one state is not concerned with the juristic basis of other states, nor is it concerned with the origin of other states. Moreover, one state is not concerned with the

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47. *Ibid.*, p. 309.

48. *Ibid.*, pp. 309-10.

49. *Ibid.*, p. 311.

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form of government of other states, that is, with the constitutional features of other states. What international law requires is this, Willoughby indicates:

> Each State, when it claims recognition as a member of the international society of States, asserts that it not only has the intention but that it possesses the ability, to fulfill all the duties which International Law lays upon it. Under no circumstances, then, is it permitted to plead a constitutional *non possumus* as an excuse for a failure to live up to the full measure of its international responsibilities.[50]

and Willoughby concludes:

> The proposition, then, comes down to this: Peculiarities of constitutional structure of one State are without international significance to other States. Each State, as a member of the international society of States, has an organ or government through which it communicates with and enters into contractual and other relations with other States. Whatever undertakings are entered into by such organs are internationally binding upon the States which they represent.[51]

Independence, Willoughby says, "in considerable measure" plays the same part in international law as Sovereignty does in constitutional law, but not entirely. For example, a colony which has declared independence and established an independent government of its own is looked upon as being sovereign in its constitutional law, but "it does not become a State, internationally speaking, until at least one other State has accorded it recognition as such; and this may not happen for a considerable time."[52]

In international law, just as in constitutional law, a state is viewed as a unity, and this is true whether it be an empire with autonomous colonies or a federal state or a highly centralized confederacy. In any event,

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50. *Ibid.*, pp. 312-13.

51. *Ibid.*, p. 315.

52. *Ibid.*

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Willoughby says, that government which has within its province the conduct of foreign affairs will be held internationally responsible for all matters that are properly within the province of international affairs. He says:

> Thus it is that a political body which, constitutionally viewed, is a State, may not be a State in the eyes of International Law; and, conversely, a State or subject of International Law may not be a State when constitutionally regarded. In a Confederacy (Staatenbund) the member States, constitutionally viewed, are regarded as severally sovereign, and the instrument which unites them, though it may be termed a Constitution is, in juridical fact, of an international contractural character. In either of these cases, however, the protecting and protected State, and the ensemble of confederated States, are deemed to constitute a single international person.[53]

Willoughby, of course, feels that in constitutional law a distinction between state and government must be made, but finds that only to a lesser extent is this vital in international law. Indeed, he says, to a considerable extent this distinction is without significance at all. With reference to this concept he says:

> International relations, it appears, are between governments, irrespective of their constitutional relations to the States back of and supporting them. In another sense, however, International Law may be said to have dealings only with States, for according to its premises, the establishment of a new government in no way operates to invalidate, so far as the interests of other States are concerned, the obligations incurred or treaties entered into by the old governments. The governments succeed to one another but the State remains the same.[54]

In Willoughby's earlier work, as was shown before, he posits a theoretical equality as an essential ingredient of international law. That is, as contrasted to municipal law where legal superiority and inferiority is the ruling principle, in international law it is equality that prevails,

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53. *Ibid.*, p. 316.

54. *Ibid.*, p. 319.

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legally speaking. In his later work Willoughby modified this somewhat. He admits that it is "commonly said" that members of the family of nations have the same international legal rights and duties irrespective of differences in territorial extent, population, economic resources, and military might; but this is not exactly correct. He grants that this legal equality is a noble goal for international law, one to be approached as nearly as possible, but that, as in municipal law, equality applies only to those persons who are of the same juristic condition or status, and that persons "are equally entitled to be protected in the exercise of such rights as the law happens to regard them as invested with."[55] What is true, he concludes, is that states in international law have "an equal capacity for rights."

Because a state is sovereign, in international law there is implied on the part of the state a power to determine its own legal competence. "This means," says Willoughby, "that it is legally qualified to claim either concurrent or exclusive jurisdiction over such persons and portions of the earth's surface, or the space above it as it may see fit."[56] On this point Willoughby continues:

> Each Sovereign State thus has, *ex hypothesi*, the potential legal authority to subject to its legal control the entire surface of the globe and all those who dwell upon it. In other words, it is obligatory upon the judicial and executive officials of every Sovereign State to recognize the validity of, and to the extent of their several actual powers, to give effect to, all declarations of policy of their respective governments, irrespective of what effect the carrying out of these policies may have upon the foreign relations of their respective States. Of course, in many cases there may arise questions as to the legal competence of the particular governmental organs or officials to issue the orders, or to enact or declare the policies involved, but these are matters wholly of constitutional limitations which the

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55. *Ibid.*, p. 323.

56. *Ibid.*, p. 329.

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States have themselves laid upon their own governmental agencies, and do not disturb the postulate that there inheres in sovereign States the legal competence to remove these limitations if they so see fit, and thus to qualify their policy-forming or law-determining organs to assert, in behalf of themselves, whatever character or scope of jurisdiction, personal or territorial, they may deem desirable.

This being the legal situation, it follows that, as long as there are a number of States, each with this unlimited jurisdictional competence, opportunity is provided for inter-State conflicts by reason of two or more States claiming exclusive or conflicting legal control over the same persons or the same areas. The adjustment or prevention of these conflicts is the task of international law, but the fact that the necessities of international life compel each sovereign State to refrain from the exercise, in certain respects of a jurisdiction over persons and territory which it might, if it saw fit, bring within the scope of its legal will, does not in any wise, or to any degree, derogate from that legal omnipotency, which, from the municipal point of view, it possesses.[57]

From this rather brief summary of some of Willoughby's basic concepts of international law it is necessary to turn to a summary and an analysis of his writings in the field of international relations, and most particularly, on China and the Far East. This will be followed by a summary of his thinking on the whole field of international law and relations, and by a comment or two by way of a critique, a prelude, as it were, to a final evaluation of his theories to be found in the concluding chapter.

Willoughby contributed more literature to China and the Far East than to any other single subject of political science. Of course, his appointments as Adviser and Counsellor to the Chinese Government on numerous occasions prompted his interest in this area of the world. Indeed, during his twelve years in retirement his only contributions by way of books and articles were those he wrote on the disturbing conditions in the Far East. His interest in China started with his first appointment as Constitutional Adviser to the Chinese Republic in 1916 and his major work on China was his

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57. Ibid., pp. 329-30.

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Foreign Rights and Interests in China first published in 1920, but revised and enlarged in a 1927 edition. His second important work in this area was China at the Conference, published in 1922, a report of the Washington Conference of 1921-22. Then in 1925 there was published his Opium as an International Problem, a volume which grew out of his work as an Expert to the Chinese Delegation to the Opium Conferences at Geneva. After retirement from teaching in 1933 Willoughby continued to write on the Far East, and in 1935 there appeared his Sino-Japanese Controversy and the League of Nations; and finally in 1940 his last work was published—Japan's Case Examined.

In addition to books, Willoughby wrote numerous articles in journals from 1918 to 1940 on China and the Far East. Some of the more important of these, on which the present analysis depends, are: "Japan and Korea,"[58] "The Question of Securing Abolition of Extraterritoriality in China,"[59] "Principles of International Law and Justice Advocated by China at the Washington Conference,"[60] "Japan and the Natural Resources of Asia,"[61] and "Far Eastern Policies of the United States."[62] For a general consideration of the constitutional background of China in the modern era, Willoughby's small volume Constitutional Government in China[63] is still a useful introduction.

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58. The Unpartizan Review, XIII (1920), 24-42.

59. Chinese Students' Monthly, XV (1920), 23-30.

60. Ibid., XVII (1922), 688-93.

61. North American Review, CCXVIII (1923), 170-78.

62. The American Journal of International Law, XXXIV (1940), 193-207.

63. This little volume was published in 1922 by the Carnegie Endowment for International Peace, Division of International Law. The writer also has borrowed liberally from Kenneth Scott Latourette, A History of Modern China, Baltimore, 1956.

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In the middle of the seventeenth century the Manchus overthrew the Ming Dynasty as rulers of China. These "conquerors of the north" established their own dynasty which governed or misgoverned the Celestial Empire until 1912. Under their guidance China reached its widest extent, adding to China proper either integrated rule of or suzerainty over Manchuria, Mongolia, Sinkiang, and Tibet. True to the pattern of their predecessors, however, the Manchus and China became in the latter years of the nineteenth century corrupt, incompetent, and weak. This weakness led the European great powers, and to a much less degree the United States, between 1840 and 1890, to seek by force or persuasion from China numerous treaty concessions of a commercial, political, missionary, military, and territorial nature.

Japan's defeat of China in 1895 further revealed the weakness of the Manchu regime, and it encouraged the Occidental nations and Japan to seek additional concessions. During the Boxer Rebellion of 1900-01, the government gave covert aid to a native uprising against the foreigner. Armed intervention by the Great Powers humiliated the government and provided occasion for still further impairment of China's sovereignty.

Unable to prevent imperialist encroachment, so open to charges of feudal obscurantism, the Manchus suffered the additional misfortune of having no spokesman capable of retaining the allegiance of the wakening masses of China. Dynasties had fallen before in Chinese history; but this time conditions were different, as Professor Latourette, an eminent modern authority on Chinese history, points out. In previous eras when natural or man-made misfortunes befell the Empire, the Chinese concluded that the monarch had lost his mandate from heaven to rule. The "Cycle of Cathay" then progressed through unrest to civil wars to a new dynasty to a renaissance. Change of ruling houses in this earlier period of Chinese history had modified, but

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had made no drastic changes in the traditional pattern of Chinese life. As the twentieth century dawned, however, it was plain to see that not only was the Manchu Dynasty unable to cope with the problems of the new century, but also that no mere change of dynasty would solve those problems. Foreign victory over and exploitation of China made this realization all the more galling. New approaches outside China's tradition would have to be utilized to cope with such problems as over-population, weakness, misgovernment, incompetence, and luxury amid poverty. Foreign educated and republican minded leaders such as Sun Yat-sen were beginning to demand not only the ousting of the Manchus, but also the replacement of the monarchy with a republican regime on the Western model.[64]

The Revolution of 1911 achieved in 1912 the formal abdication of the dynasty and the establishment of a republic under a provisional constitution. China found almost immediately that overthrow of the monarchy was easier than either the erection of a stable republican government or the maintenance of peaceful and tranquil conditions of life. No sooner was the monarchy overthrown than "war lords" dissipated whatever peace and tranquility there had been in struggles for personal power. Furthermore, by 1913 there had emerged two separate governments which disputed for central authority, one at Peking and one at Canton. This struggle between north and south continued until the mid-1920's when some semblance of unity was restored under the leadership of Chiang Kai-shek. Difficult as these internal problems were, and there is no pretence here that more than a bare outline has been sketched—for a full account would reveal such sordid occurances as numerous dissolutions of Parliament between 1913 and 1917, an

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64. Latourette, A History of Modern China, pp. 110-12.

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attempt to re-establish the dynasty, and only half-hearted attempts to follow the provisions of the constitution--it was undoubtedly the threats to China's sovereignty and territorial and administrative integrity that dominated the history of the period. The encroachments of Japan, stepped up in 1915 with her infamous Twenty-One Demands, China's involvement in World War I, the continuing violations of Chinese sovereignty by foreign powers through such devices as spheres of interests, leased territories, treaty ports, concessions, settlements, legation quarters, foreign troops stationed on Chinese soil, and extraterritoriality, among others, were chiefly responsible for China's dilemma. Some respite was provided, however, after World War I as a result of the agreements with regard to China at the Washington Conference and a return to some semblance of internal order under the leadership of Chiang Kai-shek. The beginning of the end came, however, with the occupation of Manchuria by the Japanese in 1931, and the failure of the League of Nations to take positive action with regard to that aggression. Finally, China proper was invaded by the forces of Japan in 1937.

Beginning in 1913 the Chinese government employed eminent American political scientists as constitutional advisers as part of the movement to make China, to a degree at least, a constitutional republic after the style of the West. The first of these was Frank J. Goodnow, at that time on the staff of the School of Political Science at Columbia University. He served from 1913 to 1914 at which time he was appointed President of The Johns Hopkins University. Then from 1914 to 1915 William F. Willoughby was employed as adviser to the Chinese Government, followed by W. W. Willoughby in 1916. This was the first of many appointments for the latter, for he served as adviser, counsellor, or technical expert on five separate occasions.

In all his many works on China Willoughby speaks as a friend of that

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unfortunate nation, albeit as a friendly critic at times. Although the greater part of most of his volumes are devoted to reports of various conferences that China attended and at which Willoughby was in the employ of that government, he invariably devotes at least a few pages to a commentary. It is because of this latter that his works on China and the Far East are included in the present work, for this commentary embodies some strains of his political and legal philosophy.

The first of his major works on China is his Foreign Rights and Interests in China, which had as its purpose, according to its author—

> . . . to provide a statement of the rights of foreigners and the interests of foreign States in China as they are to be found stated in treaties without relating to China or in other documents of an official or quasi-official character. Viewed from the other side, the account will exhibit the limitations under which the Chinese Government is compelled to act not only with regard to matters of international obligation but as to matters which, in countries more fortunately circumstanced, are of purely domestic concern.[65]

This work, originally intended, in all liklihood, as a "handbook" became in a short time the accepted standard treatise on the subject of foreign rights and interests in China.[66] Willoughby gathered the material for most of the work, apparently, while stationed in Peking in 1916, having become interested in the subject as a result of his duties there, and of course because of his insatiable intellectual curiosity. He found the situation to be com-

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65. Willoughby, Foreign Rights and Interests in China, Baltimore, 1927, I, x.

66. This is the opinion of James W. Garner in "Westel Woodbury Willoughby," Essays in Political Science in Honor of Westel Woodbury Willoughby, p. 25. Professor Garner is eminently qualified to evaluate this work, having written in the field of international law and relations such works as: International Law and the World War, 2 vols., 1920; Recent Developments in International Law, 1925; American Foreign Politics, 1927; and Law of Treaties, 1935, among others.

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plicated in the extreme, for China had allowed over the years, willingly or unwillingly, her sovereignty to be impaired by extraterritorial rights, "spheres of interest," "special interests," war zones, leased territories, treaty ports, concessions, settlements, and legation quarters, not to mention commercial concessions and revenue services under foreign control.

Remembering Willoughby's concept of sovereignty—that in international law it means both territorial integrity and legal equality of states—it is not at all surprising that he looked with misgiving upon these violations. Most particularly, he frowned upon those practices that because they were instituted against China's will, they violated Chinese Sovereignty. Thus, for example, he discusses the "Open Door Doctrine" as being particularly noxious, for China did not give her formal consent to it. He says, "The Open Door Doctrine . . . at least until the signing of the Washington Treaties and Resolutions of 1922, has been a rule of policy adopted by the Treaty Powers as between themselves in their dealings with China."[67] Unsatisfactory to China, but not violative of the established principles of international law and practice was the "Most-Favored-Nation-Clauses" embodied in so many of China's treaties under which the treaty powers automatically were able to receive many special rights which China had been led or forced to grant to particular nations with which she concluded treaties.

Willoughby's Foreign Rights and Interests in China contains no specific recommendations for a solution to China's dilemma, but it is readily apparent that he does not approve of this impairment of her sovereignty. An exception to this is found in his statement on extraterritorial rights.[68]

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67. Willoughby, Foreign Rights and Interests in China, I, 64.

68. Willoughby does not view extraterritoriality as contrary to inter-

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He observes that China may in the future reject _in toto_ all treaty provisions which have created such rights, but he counselled a gradual abolition. His objections to extraterritoriality were many, the most significant being: It is an insult to a great people; it created among the Chinese a hostility to foreigners and foreign nations; it prevents full development of China's economy; it necessitates a confusing array of courts; and it is manifestly unjust to the Chinese, particularly.[69]

Willoughby's second major work on China was prompted by his appointment as Technical Expert to the Chinese Delegation to the Washington Conference (1921-22) on Limitation of Armament and Pacific and Far Eastern Questions. His previous assignment as Adviser and his _Foreign Rights and Interests in China_ undoubtedly made his selection as Expert an obvious one. It is said that this latter work was widely used by the delegates to the Conference as a source of information on China and the Far East.[70] _China at the Conference_ is essentially an account of the proceedings, China's demands for equal treatment with other powers, and the results of the Conference with reference to China and Far Eastern affairs. In this and other works

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national law _per se_, so long as the consent of the state in whose territory the jurisdiction is claimed by another power has been given. Extraterritoriality in China dates well back into the nineteenth century, and, briefly put, refers to the practice of foreign powers being granted by China (under great pressure, of course) the rights to try their own nationals residing in China in their own courts. Normally, the consular officers tried such cases, but in the cases of the United States and Great Britain, special tribunals were established for this purpose. The justification (on the part of the Western powers and Japan) for this extraordinary practice was that Chinese courts and Chinese law did not come up to foreign standards. Willoughby, "Extraterritoriality in China," _Preliminary Papers, Conference on American Relations with China_, Baltimore, September 17 to 20, 1925, p. 1, in Willoughby's "Personalia."

69. _Ibid._, pp. 2-4.

70. James W. Garner, "Westel Woodbury Willoughby," p. 26.

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~~with reference to China and Far Eastern affairs. In this and other works~~ on the Far East he points to Japan as China's chief enemy. For example, he notes that at the Conference Japan was quite reluctant to discuss Pacific and Far Eastern questions, because, he says, " . . . it [Japan] might be called upon to give justifications of certain of its acts which it would be difficult to give and that from the Conference might result policies or determinations which would not be agreeable to itself."[71] Willoughby looked upon Japan with her strong, centralized, bureaucratic, monarchical government (which he was inclined to compare with the Prussian) "with undisguised imperialistic policies eager to widen Japanese political and economic influence and control if not Japanese sovereignty, and exhibiting little regard for the legal or ethical rights of other peoples whose interests might stand in the way of the realizations of its own ambitions."[72] Willoughby sees Japan's actions, beginning with the Sino-Japanese War of 1895, and with increasing clarity during the Russo-Japanese War of 1905, as indicative of a desire to dominate Asia and possibly the whole Far East. The Conference, then, according to Willoughby, had as its chief problems the restraining of the imperialistic ambitions of Japan.[73]

The Chinese delegation early took the initiative at the Conference and drew up and presented her famous "Ten Points." Apparently, Willoughby was the chief architect of these proposals.[74] The purpose of these Ten Points

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71. Willoughby, China at the Conference, Baltimore, 1922, p. 7.

72. Ibid., p. 15.

73. Ibid., p. 18.

74. This is the opinion of one of Willoughby's students, Dr. Leon Sachs, in an article on Willoughby's retirement in the Baltimore Sun, February 12, 1933.

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was to procure the assurance of the Powers at the Conference that Chinese territorial integrity and her political and administrative independence were to be respected and observed, and that as soon as possible a general reversal of those policies which had done so in the past be initiated.[75]

Willoughby was quite aware that any settlement or a prelude to the settlement of some of the outstanding problems of the Far East depended upon the willingness of all the powers concerned to, as he put it, "exhibit less national selfishness, and [to indicate] a higher regard for principles of pure justice than had previously found play in their international policies."[76] Indeed, unlike the results in later conferences which Willoughby attended, such as the Opium Conferences and the League consideration of the Sino-Japanese controversy, he was quite pleased with the results of this Conference. He saw definite gains for China at the Conference despite the fact that she entered into it with many strikes against her. Her political and military weakness, the division within the country, and her recent default on certain of her foreign loans did not heighten her prestige among the Powers there. Nonetheless, China regained some control over her tariffs, secured abolition of foreign post offices in China, and found the Powers willing to remove or sell to China radio stations established without her permission on her soil, among other things. International peace and justice in the Far East was not secured, however, and would not be, in Willoughby's estimation, until the following three questions were answered satisfactorily:

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75. Willoughby, China at the Conference, pp. 34-35.

76. Ibid., pp. 27-28.

77. Ibid., pp. 339-42.

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1. The extent to which Japan, in reversal of its formal policies, will be guided and controlled by a strict regard for the spirit as well as for the letter of its international engagements, and will sincerely seek, or, at least avoid the placing of obstacles in the way of, the welfare of its great neighbors, China and Russia.

2. The extent to which Great Britain and the United States will cooperate in the Far East.

3. The extent to which China herself will exhibit a power to make use of the opportunity that the Powers have agreed to give her to establish and maintain for herself a strong central government to create efficiently operated public administrative services.[78]

Under the auspices of the League of Nations in 1924 and 1925 two Opium Conferences were held at Geneva. Willoughby served the Chinese Government at these Conferences as Counsellor and Expert, and out of his work emerged his Opium as an International Problem, published in 1925. This work is essentially a report on the Conferences and not a treatise on international law. The purpose, he points out, is—

. . . to incorporate in this volume all the information that is needed for an accurate understanding of the subject. He [Willoughby] hopes, therefore, that it will serve as a guide or handbook to all those who may need to know the situation as it now exists. Especially is it hoped that the volume will be found of value in case other Conferences upon the subject are held.[79]

In it he traces the attempts to control the traffic in opium in the Hague Conferences of 1912, 1913, and 1914, as well as the ones at Geneva in 1924-25.

The use of opium for non-medicinal purposes became a matter of grave concern in China, and indeed in international affairs, beginning in the early nineteenth century. Despite China's prohibition of its importation

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78. Ibid., p. 357.

79. Willoughby, Opium as an International Problem, Baltimore, 1925, p. vi.

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in 1800 great quantities were smuggled into the country, particularly from India from that date on. Attempts by China to eliminate the importation of opium led to a war with England in 1839-42, the so-called "Opium War." Importation continued, and indeed grew in volume, and, to augment the problem, domestic production was instituted on a large scale. Opium smoking in China became a major evil, and in the early part of the twentieth century China attempted to do something about stopping its use. In 1906 the Emperor issued an edict to the effect that within ten years the smoking of opium (both native grown and imported) was to be eradicated. China was able also to get from Great Britain an agreement to reduce the amount imported from India, the largest source, by ten per cent each year for ten years. By 1917, because both governments carried out their parts of the bargain remarkably well, both domestic production and importation from India had virtually come to an end, although smuggling did continue, and therefore the problem was not solved. Largely at the insistence of the United States, who had been one of the powers involved in the Hague Conference dealing with the international problem of opium, the League of Nations invited those powers concerned with the problem to meet at Geneva in 1924 and 1925.

Willoughby was rather disappointed with the results of the Conferences both, he says, with "the substantive contents of the Conventions that were signed . . . [and with] the circumstances that attended their drafting."[80] The United States and China withdrew from the Conferences, and of the forty-one nations that participated in the second Conference only fourteen signed at the end of the Conference.[81] On the American withdrawal Willoughby

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80. Ibid., p. 441.

81. Ibid.

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points out that the delegation had strict instructions given it in the form of a Joint Resolution of Congress to this effect: "That the representatives of the United States shall sign no agreement which does not fulfill the conditions necessary for the suppression of the narcotic drug traffic as set forth in the Preamble."[82] Essentially what was contained in the Preamble[83] was that the production of "raw opium" must be so controlled as to allow no surplus for non-medicinal or non-scientific use. When it became apparent that the Conference was not going to reach an agreement in keeping with the American wishes the American delegation felt constrained to withdraw. Willoughby feels that under the circumstances the delegation had no other choice, but he does take issue with the American insistence on placing upon its delegation a congressional mandate, thus leaving the delegation with no powers of discretion. It is, of course, proper to instruct a delegation such as this, he finds, but it should not have been by Congress, but by the foreign policy making branch of the government.[84] The Chinese delegation withdrew because, to use Willoughby's words, the Conference—

> . . . would not embody in its convention any undertaking whatever regarding measures to be taken to bring to an end that legalized traffic in smoking opium which is inflicting such dire evil upon the millions of the Chinese living in the territories or Far Eastern possessions of Great Britain, France, the Netherlands, Portugal, British India, and Siam.[85]

The Conferences were convened to perform, if possible, three tasks:

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82. Ibid., p. 344.

83. This Preamble is the one contained in the "Suggestions of the United States of America" to the Advisory Committee which met prior to the Conference in 1923. Ibid., pp. 498-511.

84. Ibid., pp. 455-56.

85. Ibid., p. 454.

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(1) To cut back production of opium and other raw materials from which narcotic drugs are produced to no more than is needed for medicinal and scientific purposes, (2) To stop the legalized traffic in prepared opium, and (3) To place controls on the international movement of such drugs.[86] None of these goals was accomplished by the Conferences, largely, according to Willoughby, because of the loss in economic advantages to the colonial authorities.[87]

Willoughby published two books after his retirement in 1933. One of these was his large volume, _The Sino-Japanese Controversy and the League of Nations_, published in 1935. This volume is largely a report of the League's handling of the controversy, but it is also, in Willoughby's words, "composed of chapters dealing with some of the more important questions of international and League Jurisprudence which were involved in the controversy."[88] It is with the second part that the following comments are concerned.

The elements in the Sino-Japanese controversy before the League of Nations were, of course, primarily the Japanese absorption of Manchuria and the Japanese attack upon Shanghai. It will be remembered that the full-scale Japanese invasion of China proper did not occur until 1937, two years after this book was published.

Willoughby undoubtedly sees Japan as the agressor and China the victim in the Manchurian and Shanghai affairs. Indeed, he sees Japan as casting covetous eyes on China as far back as the last decade of the nineteenth cen-

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86. _Ibid._, pp. 441-42. 87. _Ibid._, pp. 477-78.

88. Willoughby, _The Sino-Japanese Controversy and the League of Nations_, Baltimore, 1935, p. vi.

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tury, as manifested in the Sino-Japanese War of 1894-95. He particularly looks upon Japan's Twenty-one Demands of 1915 as indefensible. Nonetheless, despite his admitted bias in favor of China, Willoughby sets out in a scholarly manner to examine the Japanese position. One particularly interesting claim made by Japan is that her actions in China and elsewhere in the Pacific are justified by virtue of a Japanese "Monroe Doctrine" analogous to the American Monroe Doctrine. Willougnby is quite willing to admit that because of territorial propinquity, to use the term of the Lansing-Ishii Notes, Japan had special interests in the Far East, and especially in China. This, however, according to Willoughby, does not entitle Japan to dictate the political policies of China and other nations of the Far East. He points out that a recognition of a right to determine the policies to be carried out in the Far East to maintain the peace of the area would give to Japan what amounted to a "suzerainty over China, the country most concerned."[89] Countering Japan's claim to a Monroe Doctrine in the Far East Willoughby points out that if Japan were to apply the principles embodied in such a doctrine to the Far East she would not be able to interfere with the internal affairs of China or other nations concerned, nor object to the policies of Western powers in China unless her own vital national interests were jeopardized. Furthermore, Willoughby says:

> It gives her no ground for claiming special or preferential commercial or industrial interests in China or elsewhere, and still less does it furnish justification to her for asserting political rights or influence in Asia. Least of all, does it warrant her, even for purposes of urgent national protection, in forcibly annexing or otherwise gaining administrative and political control over territory belonging to another sovereign Power.[90]

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89. Ibid., p. 627.

90. Ibid., pp. 649-50.

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Willoughby is quite disappointed that the League did not bring to an end the Sino-Japanese controversy. He sees as the reason not any essential fault in the League of Nations itself, nor was the failure due to the fact that the problem was particularly complicated, for it was in essence quite a simple case.[91] "The essential reason," he points out, for the League's failure was "the unwillingness to support energetic and affirmative action in the premises on the part of those States upon whom would fall the burden of action should it be directed or recommended by the League. These States, it scarcely needs to be said, were Great Britain and France."[92] He concludes on this:

> Shortly stated, then, the essential fact revealed by the history of the Sino-Japanese controversy before the League was not any unsuspected organic weakness or defect in the League, but the unwillingness of those members of the League, whose voices were controlling, to live up to the obligations assumed by them as members.[93]

However, as to the reasons for this reluctance upon the part of Great Britain and France, Willoughby is silent.

What was to be Willoughby's last book was published in 1940, _Japan's Case Examined_. In some ways this is his most important work on the Far East, for it contains more commentary than the others, and therefore, is more useful to the student concerned with principles of international law, as Willoughby conceives them. "The purpose of this volume," Willoughby says, "is a simple though dual one. It is to present in a comprehensive, yet brief, manner the aims which Japan is pursuing in the Far East, as shown by her

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91. _Ibid._, p. 658.

92. _Ibid._, p. 661.

93. _Ibid._, p. 662.

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own official declaration, and to examine as to their validity the arguments she had advanced in pursuance of these aims."[94] Japanese aims in the Far East are clear, says Willoughby, as revealed in her Twenty-One Demands of 1915—that is, she plans to dominate China politically and economically.

Before Willoughby goes into the validity of Japan's justifications for her actions in China he examines the position taken by a few writers, notably Miss Barbara Wertheim[95] and others who maintain that an assessment of Far Eastern affairs is complicated by the fact that there is a great gap between the "Japanese mind" and the "Western mind," and that the logic of the East is quite different from that of the West. In this connection Miss Wortheim says:

> So completely divorced is the Japanese mental process from the Occidental, so devoid of what Westerners call logic, that the Japanese are able to present a false picture yet sincerely believing them. How this is accomplished it is impossible for a foreigner to understand, much less attempt to explain. That appearances mean more than reality to the Japanese mind is the only clue the writer can provide. A fact, as such, means little to a Japanese; should he be forced to face certain unaccepted facts he will cut them dead, just as we might cut an unwelcome acquaintance on the street.[96]

In answer to this position Willoughby points out that he "cannot accept the premise that the logical processes of the Japanese, or, for that matter, of any other people, can be regarded as fundamentally different to those which operate in the Western World."[97] It is true, he says, that persons may dif-

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94. Willoughby, Japan's Case Examined, Baltimore, 1940, p. v.

95. Barbara Wertheim, "Japan: A Clinical Note," Foreign Affairs, 1936, Willoughby also refers to an article by a Japanese scholar, Tatsuyi Takeuchi, "The Background of the Sino-Japanese Crisis," in "an American Journal." Ibid., p. 17.

96. Quoted in Ibid., p. 18.

97. Willoughby, Japan's Case Examined, p. 19.

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fer as to their fundamental premises from which they reason logically, but "the rules of logic are universal . . . ."[98] Willoughby finds the fundamental difference between Japan's declarations and her actions to be explained by the fact that the Japanese accept certain premises that Occidentals do not accept. One of these is the Japanese concept of superior culture; another is their notion of divine descent, and that because of these the Japanese have rights that other less fortunate peoples do not possess.[99]

Willoughby accepts the Lytton Commission's Report that Japan was not acting in valid self defense in her actions in Manchuria beginning in September, 1931. He asserts that by waging war the Japanese violated international law, for Japan was a signatory of the Paris Peace Pact. Nor could Japan validly claim justification for her invasion of Manchuria in asserting that fear of Russia compelled such action. Willoughby says:

> No principle of international law is more fundamental than that which ascribes to sovereign States exclusive and absolute jurisdiction over their own area. As a direct and necessary corollary from this premise it follows that any attempt by one state to exercise any sort of authority within the area of another state without its consent is viewed by that state as a violation of its territorial sovereignty . . . .[100]

Willoughby sees this doctrine of absolute territorial sovereignty as "the one great doctrine which has served to maintain such peaceful inter-state relations as the modern world has been able to maintain."[101]

Another claim that the Japanese have advanced to justify their inva-

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98. *Ibid.*, p. 19.

99. *Ibid.*, p. 20.

100. *Ibid.*, pp. 31-32.

101. *Ibid.*, p. 33.

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sion of China is that by so doing they rightly defended themselves against communism. Upon examination, however, Willoughby finds no valid grounds to this claim, for under no known principle of international law is one state justified in determining the internal policies of another sovereign state. The one possible exception to this rule is when there is thus precipitated attacks, either actual or immediately threatened, upon Japan's rights as a sovereign state. Willoughby says, " . . . Japan has had no right, under any doctrine known to modern international law, to demand of China that she should expel communism from her body-politic, or, if herself unable to do this, to permit Japan to send her armies into China for that purpose."[102]

In defense of her actions Japan, Willoughby points out, also appealed to the international law doctrine of rebus sic stantibus, or that doctrine that declares that treaties are to be interpreted as containing the provision that they are to be observed only so long as the conditions which prompted their conclusion remain in existence. Willoughby readily admits that there is a liklihood that treaties may become unjust by virtue of the fact that conditions change, and that under such circumstances may, indeed, provoke international strife. However, he feels that this doctrine must be strictly construed. He says:

> It is at once apparent that the force of the fundamental principles of international jurisprudence and morality that interstate agreements are to be respected by the parties to them--pacta sunt servanda--will be greatly weakened unless the doctrine of rebus sic stantibus is confined within strict and narrow limits.[103]

Willoughby concludes his book with an examination of the claim of some Japanese (although not of the Japanese Government) that Japan is justified in

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102. Ibid., p. 47.

103. Ibid., pp. 82-83.

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her actions against China by a doctrine similiar to the American Monroe Doctrine. As this has been examined previously, and as Willoughby's comments are substantially as before, there will be no need of repeating them.

Running throughout Willoughby's writings on the Far East is a fervent desire for a just settlement there so that international peace would be assured. His treatment, of course, is that of the legalist, and not of the historian, philosopher, sociologist, or psychologist. He felt that a strict observance of certain principles of international law would restore peace to the East. His condemnation of Japan for treaty violations, disregard for the territorial sovereignty, administrative integrity, and national independence of China attest to this.

By way of a brief summary and critique, the most striking feature of Willoughby's international law is his view that international life is atomistic, individualistic, and in short, a Hobbesian jungle. This, of course, is the view that the analytical jurist must take, for his conception of law will allow no other. If the analytical jurist views law as something commanded by a state, then, transferring this concept to the international sphere, international law becomes what is indeed commanded by eighty or so states. International law is that municipal law which deals with more than one country. Willoughby asserts that there is no legal standard above nations to which statesmen may appeal, for, as was seen, he rejects the traditional concept of natural law.

Consequently, international law, to Willoughby, is that law actually being practiced and applied at any given time and place. Its motivation is self-interest and not common interest, for there are no common principles of law that are universal and perpetual. There may be common moral principles to which all men and all nations can look for guidance, but these are

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not legal principles.

However, as has been shown, Willoughby does not consistently apply his analytical principles to the field of international relations as he does to the field of international law. Once again one sees the dichotomy between law and morals. When treating of international law principles Willoughby is the analytical jurist, whereas, when he writes of international affairs he is the moralist. International legality is one thing; international morality is another. This, however, leads Willoughby into an awkward position on at least one occasion, and an important one at that. France and England, according to Willoughby, are largely responsible for the League's failure to settle the Sino-Japanese controversy, but in so acting (or refusing to take action) violated no principles of international law. Yet, it would seem that something was violated—that there was something that the two nations should have done that they did not do, or that they did something that they should not have done. International law, as Willoughby sees it, however, has no solution for a problem such as this, for it is a moral problem.

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Chapter IX

CONCLUSION

Westel Woodbury Willoughby was one of the most productive scholars of his era. He authored or collaborated in writing twenty-nine volumes and many scores of articles, chapters in books, contributions to encyclopedias, and book reviews. For the most part his works were well received by the profession, particularly the earlier ones,[1] and some of them required second editions and several printings. The most valuable as contributions to political science literature are his five major works: The Nature of the State, Social Justice, The Fundamental Concepts of Public Law, The Ethical

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1. Willoughby's books were reviewed by outstanding political scientists of the time: W. A. Dunning reviewed The Nature of the State in the Political Science Quarterly, XI (1897), 545-48; Charles E. Merriam reviewed The Political Theories of the Ancient World in The Annals of the American Academy of Political and Social Science, XXIII (January, 1904-June, 1904), 552-53; Eugene Wambaugh reviewed The Fundamental Concepts of Public Law in The American Political Science Review, XIX (1925), 180-82; Robert E. Cushman reviewed The Constitutional Law of the United States in Ibid., XXIV (1930), 746-49; and Francis W. Coker reviewed The Ethical Basis of Political Authority in Ibid., XXV (1931), 443-45.

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Basis of Political Authority, and The Constitutional Law of the United States. His works on China and the Far East are of less interest to the student of political theory, although they remain an important source of information on the Sino-Japanese controversy.

His other important contribution to political theory, The Political Theories of the Ancient World, would have been strengthened had he been able to carry out his original plan of a multi-volume work on the history of political philosophy from Plato to the present. The least valuable of his theoretical writings is his Prussian Political Philosophy, written, in all liklihood, hastily during the feverish times of World War I. In one way, however, it is an important work, for it reveals a change in his thinking about ethical political theory. In this and later works he is less inclined to praise Hegelian theory. Never as prone to glorify the state as his colleague, John W. Burgess (who, incidently, was accused of "Prussianism" during the War for some of the ideas in his Political Science and Comparative Constitutional Law),[2] Willoughby, nonetheless, came closer to doing this in his earlier works than in later ones.

Willoughby, undoubtedly, was one of the most ardent champions of political science in America. As one of the founding fathers of the American Political Science Association, as that Association's first Secretary-Treasurer, as Editor of the Proceedings (1904-13), as Managing Editor of The American Political Science Review for the first ten years of its publication, and as chairman of one of the most productive departments of political science in the nation he was in an excellent position to promote the growth of political science as an academic discipline. In addition to his

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2. John W. Burgess, Reminiscences of An American Scholar, p. 257.

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writings and service to the professional organization Willoughby lives on in the students whom he trained at Johns Hopkins. Many have gone on to become outstanding political scientists. Impressed by his example of disciplined thinking and devotion to scholarship, many have made their mark in the discipline—notably, Charles G. Fenwick, Herbert W. Briggs, John M. Mathews, Lindsay Rogers, E. Pendleton Herring, James Hart, George W. Spicer, and Marshall Dimock.

Although it is true that Willoughby did not establish a "school of political science" the teachings of which his students continue to expound, he did set for them an example of disciplined scholarship. It is true that his students do not follow his ideas, but do follow his example of scholarship and have absorbed his zeal for the study of things political. Political science no longer accepts many of the theories that Willoughby advanced or the assumptions upon which they are based. The Germanic theory of the state which early American political science largely accepted has been abondoned by recent writers. Sovereignty, moreover, is no longer regarded as the central topic of political science to which every scholar must address himself. Law itself has a much broader meaning today than a half-century ago, particularly under the influence of Roscoe Pound and the sociological school of jurisprudence and the more recent revival of theories of natural law. Political science is less restricted today in its outlook, and old questions once looked upon as settled have been reopened.

While the discipline was undergoing these modifications, however, Willoughby remained unconvinced of their necessity. Indeed, as late as 1924 he wrote The Fundamental Concepts of Public Law, which a recent commentator has referred to as "the last of the great efforts to interpret the state in terms of a juristic theory of a state personality endowed with a sover-

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eign will."[3] This approach to political science was widely accepted in the late nineteenth century when the Germanic influence was still strong, but it met with substantial criticism in the twentieth.[4] This demonstrates Willoughby's reluctance to alter his approach to law and the state despite the fact that the discipline as a whole had already done so. In this sense Willoughby's works represent an extension of the older political science into the twentieth century, a political science that was concerned more with abstract political theory than with political practice.

Willoughby's concern for abstractions, such as the "state," the state's "personality," the state's "will," and the state's "sovereignty" which, it will be remembered, was an approach shared largely by Burgess, Woolsey, Garner, and others of that early era, can be understood best by recalling the political science he was refuting. Willoughby and his generation, under the influence of Austin, Green, Hegel, Bluntschli, Jellinek, and other nineteenth century writers, rejected the traditional approach to political science. Central to this traditional political science was the idea that political authority is somehow subject to certain immutable laws discoverable by reason, whether they be the natural laws of antiquity or the secular natural "rights" of modern political theory. All authority of a political nature was felt to arise from this natural law and to be answerable to it. We have seen, however, that Willoughby could not accept natural law as the basis for political authority.

Political authority must be grounded in something, however, and Wil-

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3. Francis Wilson, The American Political Mind, p. 415.

4. Harold Laski, "Review of Willoughby's The Fundamental Concepts of Public Law," Political Science Quarterly, XL (1925), 618-21.

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loughby here brings in the "state" for this purpose. His state is the repository of political authority and to it is ascribed a "personality," a "sovereignty," and a "will." When one attempts to investigate this "state" to ascertain its nature, however, one is confronted with many difficulties. As described by Willoughby it is not identical with "nation," "society," "government," "people," or "territory." Although related to all of these, it is not the same thing as any one of them or a combination of some or all of them. It is something more than all of them. It cannot be measured empirically, for it has no "practical" existence except that it is wholly organized in its government. It has no physical manifestations sufficient to identify its "essence." It is knowable to individuals living under it, for they can see its governmental machinery and can feel the effects of its laws. But this is only the imperfect manifestations of the state, and is not to be identified with the state. This makes the "state" a rather vague product of the imagination.

Because the state in Willoughby's theory is quite vague he is able to ascribe to it properties which are beyond the realm of provability. For example, he ascribes to the state a benevolence which is quite arbitrary on his part, for there is nothing in his description of the attributes of the state necessarily to make it so. One is tempted to believe that this "benevolent" state results not so much from his logic as from the liberal proclivities which were a part of the heritage of his time. His state is benevolent, for he could not conceive of the state as "willing" harmful or destructive policies. It did not occur to him that the state could will the destruction of human liberty or security. There is nothing in his political philosophy, however, to guarantee that such will not result. Nor did it occur to him that the same arguments can be directed against his

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"state" that he directs at natural law. That is, there is no necessary guarantee that individuals will give to the "state" the same interpretation that Willoughby does. Because of his naive belief that the "state" is somehow intrinsically good Willoughby was unable to see how its power might someday be misused, as for example, by those who subscribe to a totalitarian doctrine. Indeed, it is in part because of the rise of modern totalitarianism, which recognizes no limits to state authority, that the "state" in the abstract has been largely abandoned by political scientists. The "state" still finds its way into the literature of political science, but it has been largely divested of its mystical content.

Political scientists no longer speak of the "personality" of the state as though it were analogous to a human personality. Human beings are said to have personalities, but not the state. Nor does political science speak of the "will" of the state as though it were something different and apart from the wills of the people who make up a political society. Individuals have wills, to be sure, but a non-entity such as the state can hardly have a will. Political science no longer speaks of the "general will" of the people as something more than or different from the will of the individuals who live in a particular state. It was Hegel, more than any other, who was responsible for the idea that the state is essentially benevolent and would lead necessarily to greater human freedom. In this connection it is instructive to recall Willoughby's estimate of Hegel at various stages of his career.

In his early works, as has been seen, Willoughby is favorably impressed with Hegel's ethics, feeling that his influence upon "modern ethics" is not only profound but good. Writing in the midst of World War I, however, Willoughby was appalled at what he saw as the logical outcome of the accept-

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ance of Hegelianism by the German Empire. The concept of the state as an end in itself, as transcending the individuals composing it, became suddenly distasteful to him. It will be remembered, however, that in his Social Justice (1900) Willoughby himself subscribed to this "transcendental school." In his The Ethical Basis of Political Authority (1930), on the other hand, he pronounces transcendental political thought undemocratic, irresponsible in international affairs, creative of a Kulturstaat, and as contributing to a restriction of human liberty and an expansion of governmental authority. Indeed, it will also be remembered that it was the transcendental element in fascist theory that prompted his criticism of that body of thought. By criticizing, then, the German theory of the state in 1918 Willoughby also throws doubt upon the theories contained in his earlier works. Indeed, it is not at all certain that his later theoretical works are divested completely of this transcendental frame of mind. By continuing to speak, for example, of the state as a "personality" he has left himself open to some of the same criticism that he directs at the theories of the German Empire.

Willoughby's idealism views man as by nature a political being, and to this extent, at least, revives classical political science. Because man is by nature political there need be no contract to create the state, for man is born into the state and his formal consent to political authority is not needed. Because a state is natural its existence need not be ethically justified. This is not true, however, with reference to its authority. Its power is subject to political philosophy, not because of any inherent rights that the individual has, but because the state is an indispensable means to the end of individual self-perfection. Its authority is justified, then, to the extent that its power is needed to help individuals realize this self-perfection. Those who posit laissez-faire doc-

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trines as absolute limits to state authority are plainly wrong, in Willoughby's view. As a practical matter, he points out, it might be best to leave many things to private initiative but this is a matter of expediency not of principle.

If Willoughby's doctrine of the "state" is rather vague and mystical, his theory of "self-realization" or "self-perfection" is perhaps even more so. For a doctrine of self-perfection to be acceptable as a starting point for a political philosophy it should be grounded in a doctrine of man. This, unfortunately, Willoughby does not provide and for that reason his ethical political theory must be pronounced incomplete. Self-realization can mean most anything, depending upon what one assumes man by nature to be. Hobbes' theory of man, for example, led him to create an absolutist political theory; whereas, Locke's theory of man led him to create a liberal state. The point is that the meaning of self-realization is not inherently self-evident.

Aside from the incompleteness of Willoughby's ethical political theory, there are a number of inconsistencies that need airing. In his criticisms of Aristotle he says that Aristotle places politics above ethics, and that because he fails to separate the concepts of "state" and "government" his theory results in a system in which instinctive and unthinking obedience is given to the laws of the state. Aristotle hardly advocated a political system in which citizens would render the state "instinctive and unthinking" obedience, nor did he conceive of ethics as subordinate to politics.[5] It will be remembered that Aristotle's Politics was in reality a part of his

5. Ernest Barker, for example, says in The Politics of Aristotle, "Aristotle never . . . accepts the proposition that 'political raison d'état' can overbear ethics." p. 355.

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ethical system, continuing where the Nicomachean Ethics leaves off. Furthermore, evidencing Willoughby's lack of understanding of ancient political philosophy, he says in one place in his Political Theories of the Ancient World, "He [Aristotle] is never tempted in his political philosophy to make the good of the social whole an end in itself, and as such, one to which private interests may rightfully be sacrificed."[6] On the other hand, a little later on he says:

> To him [Aristotle], as to all the Ancients, the absolutism of the State is unquestioned. Men are to be made virtuous and happy no matter what degrees of interference in their living on the part of the State this implies. The individual is not conceived as having any rights, or indeed, as being a person at all outside the civil body.[7]

That these two commentaries are inconsistent is readily apparent. Even if the latter statement were true Willoughby can hardly consistently criticize Aristotle on this point, for, at least in his early writings, Willoughby attributes to the State a transcendental character with a will of its own, a will that is different from that of the collective will of the people.

Because of Willoughby's view of the state as a mystical entity his concept of human rights differs substantially from that of the classical liberals. He ascribes no inherent rights that the individual posseses by virtue of his humanity, but in reality holds rights to be, in effect, mere concessions of the state. Rights, to Willoughby, are those areas of life that have not as yet been preempted by the state, and therefore, the individual is free to the extent that the state chooses to leave him alone. To be sure, Willoughby does say that individuals have rights as against

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6. Willoughby, The Political Theories of the Ancient World, p. 162.
7. Ibid., p. 165.

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the government, but as against the state itself individuals have no rights. In this sense, then, the state is unlimited while the government is limited. If the state chooses, for example, to limit governmental authority by a bill of rights in the constitution then the individual is guaranteed certain liberties. On the other hand, should the state choose to eliminate such protections the individual can not complain that any "innate" rights have been abrogated.

Although it is true that Willoughby felt that he was providing adequate protection for individuals in positing limited government, his unlimited state is in a menacing position by virtue of the fact that the state, as he admits, is entirely organized in its government. The government, then, is hardly able to stand between the individual and the state, for the government is at the mercy of the state. Locke, by way of contrast, saw as the government's principal function the protection of rights that individuals inherently possess. Willoughby's government, at least in his theoretical writings, has no such function. This is not to suggest that Willoughby is necessarily insensitive to human rights, but rather it is to suggest that by putting rights at the mercy of the "state" there are no adequate guarantees that they will be observed and protected. Willoughby's faith that the "state" somehow is inherently good has not been borne out by twentieth century history. It must have been inconceivable to him that the state would will the destruction of human dignity and human rights.

If Willoughby's ethical political theory suffers from excessive abstractness and from inconsistency, his juristic political theory suffers from a lack of relevance. It serves no particularly useful purpose to extract from "law" all its substantive content and examine in intricate detail what is essentially its structure or form. In thus taking the very life out of the law one is left merely with an impression of law as com-

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mand. This, in essence, is what the analytical jurists did. Law, says Willoughby, is whatever the law-making and enforcing authorities say it is. To take any other view, he points out, is to engage in meaningless (from the juristic point of view) ethical discussion. To speak of the intrinsic worth of the law may be the province of the moralist, but not of the jurist. Moreover, from the opposite view, for the moralist to criticize the content of the law, as distinguished from its form, is irrelevant to jurisprudence. To Willoughby, then, the jurist lives in one academic world and the moralist in another. Only the analytical jurist, using the proper (i. e., scientific) tools, can properly study positive law. Jurisprudence according to Willoughby, can never tell us more than that a law is either proper or improper in form. Jurisprudence can never assess the substantive content of the law. This, it is suggested here, reduces jurisprudence to virtually useless verbiage.

As one of the outstanding representatives of the older academic political science Willoughby tried to provide the discipline with a set of concepts and definitions which he hoped would guide the scholarly endeavores of political scientists. That he failed in his attempt is owing in part to the excessive abstractness of his thought. The "state" did not firmly take root in the United States, for it was alien both to its theoretical heritage and to its practical politics. It is not insignificant that early American political theorists were public men. Adams, Jefferson, Hamilton, and Madison espoused doctrines that for the most part had proven sound and workable by experience, and it is notable that they did not theorize on the abstract "state." It was this heritage that made the German import, the "state", a brief and not wholly welcome guest. Moreover, long accustomed to thinking in terms of limited political authority, American

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intellectuals for the most part found the Germanic conception of the "state" with its suggestion of unlimited political authority, ill suited to their presuppositions. A recent foreign observer of American political science has suggested that the second generation of American political scientists, for the most part, distrusted all "first principles" because of their seeming undemocratic nature (particularly as found in the writings of Burgess).[8] Tocqueville, of course, saw this distrust earlier in the century when he observed: "Those who cultivate the sciences amongst a democratic people are always afraid of losing their way in visionary speculation. They mistrust systems; they adhere closely to facts, and study facts with their own senses."[9]

Not only was the Germanic "state" unacceptable to the second generation of American political scientists because of its undemocratic implications but also it did not offer any usable criteria for the solutions of the very real political problems of the times. It is significant that American political science came of age in the Progressive Era in which the concensus of learned opinion was that the solution to such problems as bossism, political corruption, irresponsibility in high office, and the like, was the liberal application of more, not less, democracy. The answer to bossism, for example, was felt by many to be greater responsibility, particularly on the municipal and state government level, and this meant the adoption of such devices as the direct primary, new forms of municipal governmental organization, state administrative reorganization, the initia-

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8. Bernard Crick, The American Science of Politics, Berkely, 1959, p. 99.

9. Alexis De Tocqueville, Democracy in America, New York, 1901, I, 47.

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tive, the referendum, and the recall, among other things. All of this entailed the accumulation of data, statistical and otherwise, as to how governments actually work so that the public, upon being informed, would be moved to support reform. Indeed, not a few political scientists participated not only in such research activities but also in actual reform movements, as for example, Merriam in Chicago municipal government, John A. Fairlie in Illinois state government, not to mention Woodrow Wilson in Washington. It is perhaps not insignificant that Burgess and Willoughby did not participate actively in either the political research or the political reform of the Progressive Era. It may also be important that Burgess' and Willoughby's "idealism" was highly nationalistic in character, and much of the reform of the Progressive Era was carried on at the municipal and state governmental levels. This helped to make their political science even more remote from the actual political scene.

Willoughby's political and legal theories did not inspire those political scientists concerned with "actual government" except in a negative way (in that they were repelled by it) because it was not rooted in experience. It was not based upon empirical data and therefore seemed to many to be irrelevant. Because he did not base his theories upon investigations of how, in fact, man does behave in political society his insistence that the state can do anything to increase the self-perfection of individuals becomes too vague to be of practical value to the discipline of political science or to the public. In this connection a comment of one of his students is particularly pertinent—

> . . . I think Dr. Willoughby's work belongs to a conception of Political Science that was vanishing, rather than developing. His work stemmed from a theory of law and of the State which is closely identified with German tradition and by the work of John Austin in England. It was severely legal-

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istic in its approach, and regarded social or psychological aspects of politics with considerable misgiving. In short, while I mean no disparagement by it, I think Dr. Willoughby's work is more related to that of a self-enclosed intellectual system than to the amorphous facts of modern political life.[10]

Willoughby was on solid ground when he accepted the position of classical political science that the state is natural and not conventional. It is in the best tradition of political science to posit that man is by nature a political being and is born into political society. The creation of a state, then, does not, as Willoughby well points out, necessitate a contract or other conventional means. But in denying the validity of the contract Willoughby should not have denied one of the major presuppositions upon which that theory is based—that man withholds some of the areas of his life from political control as a matter of right. The classical liberals made good use of the contract device to emphasize the limited nature of political authority and to show that all legitimate political authority must be grounded in the consent of the governed. While it is true that the classical liberals did not subscribe to a natural theory of the state there is no inherent incompatibility in combining the ideas of the naturalness of the state and the limited nature of the state. This, it is suggested here, is what Willoughby failed effectively to do. It is true that Willoughby sought to limit the state to those functions which it can perform in aiding the individual to realize his self-perfection, but in denying that there are "inherent" limitations upon the state's powers by virtue of inherent rights possessed by individuals he has provided no effective barrier to oppressive state action if the control of the state's govern-

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10. Harold W. Stoke, "written communication" to the writer, February 18, 1958.

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mental machinery should fall into the hands of men who are not devoted to the cause of liberty.

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BIOGRAPHY

The writer was born near Carthage, Missouri, on March 14, 1922. He attended the public schools of Jasper County, graduating from Carthage High School in 1940. After service in the Army of the United States he enrolled in the University of Arkansas in January, 1946, and received the Bachelor of Arts degree in history and political science there in January, 1949. In June of the following year he was awarded the Master of Arts degree in history and political science from that same institution, having finished his work for that degree, however, in August, 1949.

In September, 1949, he was appointed Instructor at Virginia Polytechnic Institute at Blacksburg, and in September, 1953, was promoted to Assistant Professor. During the summers of 1951 and 1952 the writer began his residence work toward his doctorate at Duke University, and in September, 1954, he obtained a leave of absence from V. P. I. for two additional years of residence work. Duke University awarded him an Assistantship in Political Science for the academic year 1954-55 (a grant that was changed to a Fellowship for the second semester of that year) and an Assistantship for the year 1955-56. He returned to his teaching duties at V. P. I. in September, 1956, continuing until September, 1959. On the latter date he became Associate Professor of Political Science at Northeast Missouri State Teachers College at Kirksville, Missouri, where he is at present employed.

In 1948 the writer was named a member of Phi Alpha Theta, a fraternity in history, and in 1952 was made a life member of Alpha Kappa Psi, a business fraternity. In 1959 he was voted by the student body of V. P. I. one of the "ten best teachers" of that institution.

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