Frank J. Goodnow. *Politics and Administration*. New York: Macmillan, 1900; reprint, New Brunswick, NJ: Transaction, 2003.

[1] CHAPTER I
THE PRIMARY FUNCTIONS OF THE STATE

The tendency of most writers on governmental subjects has been to confine their study to the more striking facts which become apparent as a result of considering alone the formal governmental organization. Thus, most writers on American government begin and end their work with the Constitution. Some, it is true, endeavor to treat of the history of the Constitution as well as its present form, but few have attempted to get back of the formal governmental organization and examine the real political life of the people. The cause of this method of treating our political institutions is unquestionably to be found in the fact that most of the writers who have left their impress on American political science have been lawyers, and are therefore not accustomed to look beyond the provisions of positive law.

No method of treatment, however, is more likely **[2]** to mislead the student in the formation of his judgment of a nation's real political life; for the character of a governmental system is determined just as much by extra-legal as by legal institutions. Indeed, it is not infrequently the case that extra-legal institutions have more influence in giving its character to a political system than the mere legal form in which it may be framed. Thus, Rome became an empire, preserving for a long time the outward forms of a republic. Thus, again, the public law of England makes provision for a Crown, a Privy Council, and a Parliament. But every one who knows anything about the English government knows that none of these institutions is to the real political life of the English people what the Cabinet is, — a body absolutely unknown to the English law.

Burgess, in commenting upon the distinction of sovereignty from government, which he has done so much to make clear, says: The "change from the old form to the new one, when it works itself out gradually and impliedly, so to speak, does not mark off the boundary sharply and exactly between the old and the new systems. Naturally the old state [sovereign] does not perceive the change at all, or at least not for a long time and not until after suffering many bitter experiences. It still expresses itself in the language of sovereignty. **[3]** It still struts about in the purple, unconscious that the garment is now borrowed. On the other hand, the new sovereignty comes very slowly to its organization."[1] What is here so forcibly said about sovereignty may be said with even greater truth about government, and particularly about a government which is based on a written constitution. No sooner is such an instrument adopted than political forces begin at once to interpret it and amend it until the actual political system becomes, almost without the knowledge of the people, quite different from the system as outlined in the constitution itself. In course of time, the changes actually made in the system will without doubt come to the knowledge of the people, and, it may be, will be incorporated in the formal constitution. But the actual system of government may be changed long before the formal government is changed.

No better example of this fact can be found than the method of electing the President of the United States. Although as provided by the Constitution, the President is formally elected indirectly by the people of the states, that is, by presidential electors who are elected by the people, hardly any one who votes for a presidential elector **[4]** gives a thought as to his character. Every one is thinking of the presidential candidates put in nomination by the political parties. The party system has thus come to supplement—we may say indeed to amend — the Constitution, and no discussion of the constitutional method of electing the President would give a fair idea of the actual method of his election, which did not treat of the attitude of the political parties toward this matter.

Where the governmental system is not based on a written constitution, it is more probable that extralegal institutions will be given a place in any theoretical discussion of the governmental system. For the constitution itself in such a country is largely a matter of custom. Custom must therefore be examined in order to set forth the constitution. It is not possible for the investigator altogether to the consideration of extra-legal institutions. For outside of them he may not have anything upon which to base his conclusions. It is for this reason that the modern treatment of the English governmental system is perhaps more satisfactory than that of the governmental system of the United States. By this is meant that a more exact and accurate account is ordinarily given of the operation and working of political forces. It is significant that the best description of the actual political system obtaining in the United States is given us **[5]** by an Englishman, Mr. Bryce, who, accustomed in his own country to look behind the positive law to find its political system, and applying the methods to which he is accustomed to our system, has given us an admirable description of American political institutions.

Not only does the student of governmental subjects ordinarily fail to lay due stress on extra-legal institutions. He also is too apt to confine himself to constitutional questions, perhaps not considering at all the administrative system. The administrative system has, however, as great influence in giving its tone to the general governmental system as has the form of government set forth in the constitution.

Gneist was almost the first student of note to call attention to the importance of administrative institutions. He became convinced that the parliamentary system of government, originating in England and thence transplanted to the Continent, was not accomplishing there what it had accomplished in England. He therefore set to work to make a thorough study of English institutions, not merely what is known as the English Constitution, but the entire English system of government and particularly its administrative system. He arose from his study with the belief that English parliamentary government could not be understood **[6]** apart from the English administrative system, and that the reason for the comparative failure of parliamentary government on the Continent was that an English superstructure had been raised on a Continental foundation. Such was the case, in Gneist's opinion, because the English system had been explained to Continental Europe by French writers like Montesquieu, De Lolme, and Benjamin Constant, who were acquainted merely with the relations of the English Crown to the English Parliament, and knew nothing of the English administrative system on which the English parliamentary system was based.[2] The rest of Gneist's life was successfully devoted to advocating such changes in the German administrative system as would make a proper foundation on which a system of parliamentary government similar to that developed in England might be built up.

If it be borne in mind that the political institutions of a people are to be found without, as well as within, the law, and that the Constitution cannot be understood without a knowledge of the administrative system, it is believed that the political institutions of different peoples will show a much greater similarity than would be thought to exist were the consideration confined to the formal provisions of the constitutional law.

[7] The political life of man is largely conditioned by the fact of his humanity, the fact that he is man. Of course his degree of intelligence, his ideas of right and wrong, at different periods of his development, are by no means the same, and the form of government adopted at one stage of his development may have an important effect upon his later condition. But it is believed that the real political institutions of different peoples at the same stage of intelligence and morality will show a great similarity, even where the external forms of government appear very different. This similarity is due, as has been said, to the fact that after all man is man everywhere and at all times and that all political organizations of men must therefore have ultimately the same ends, and must adopt in a general way the same methods for their satisfaction. Sometimes it may be that these political organizations will be adequately reflected in

the formal governmental organization. At other times, and indeed most frequently, they will not be. The whole political life must be considered.

It is because of this similarity of the real political systems of different states that it is possible to conceive of the state as an abstraction. Just as we would be unable to conceive of a horse in the abstract, if concrete horses did not resemble each other, so would we be unable to think of the state **[8]** apart from the concrete examples of the states we know, were there not great similarity between these concrete states. This abstract conception of the state is not only possible, but as a matter of fact would seem to have been grasped by almost all writers on theoretical political science. This conception is further the conception of a thing endowed with life and capable of action. The state abstractly considered is usually likened to an organism. This analogy between the state and an organism has been seen by many writers on politics. Hobbes, in his *Leviathan*, would seem to have foreshadowed the idea which has of recent years been so commonly accepted. Some writers even go so far as to claim not so much that there is an analogy between the state and an organism, but that the state is actually an organism.[3] Others, however, while believing that the biological analogy is a dangerous one to emphasize, still speak of a social mind and a social will, as if the action of political organizations were the result of the exercise of a real will by a person capable of willing. Thus Giddings says:[4] "The primary result of association is an evolution of the individual mind. The secondary result is an evolution of the social mind." Again he says,[5] "Sociology is the science of men**[9]**tal phenomena in their higher complications and reactions, and of the constructive evolution of the social medium through which the adaptations of life and its environment become reciprocal."

Whatever may be the truth or error in this conception of the state, it is still true that political functions group themselves naturally under two heads, which are equally applicable to the mental operations and the actions of self-conscious personalities. That is, the action of the state as a political entity consists either in operations necessary to the expression of its will, or in operations necessary to the execution of that will. The will of the state or sovereign must be made up and formulated before political action can be had. The will of the state or sovereign must be executed, after it has been formulated, if that will is to result in governmental action. All the actions of the state or its organs, further, are undertaken with the object, either of facilitating the expression of this will or of aiding in its execution. This would seem to be the case whatever may be the formal character of the governmental system.

In a purely monarchic system the operations necessary to the expression of the state will arc naturally much less complex than in a popular or democratic government. But they are in both cases of essentially the same nature. The same is **[10]** true to an even greater degree of the execution of the state will. The form of government has little influence upon these conditions with the single exception that the less popular the government, the less is the function of executing the will of the state differentiated from the function of expressing that will. For the tendency of all monarchic governments is to concentrate governmental powers in the hands of the same authority. At the same time, the necessity for the division of labor makes it necessary, even in monarchic governments, to distinguish between these two functions.

The distinction between these two functions, further, is made necessary by psychological causes. In the case of a single person, who naturally both formulates and executes his will himself, it is necessary that this will be formulated before it is executed. In the case of political action it is necessary not only that the will of the sovereign be formulated or expressed before it can be executed, but also that the execution of that will be intrusted in a large measure to a different organ from that which expresses it. The great complexity of political conditions makes it practically impossible for the same governmental organ to be intrusted in equal degree with the discharge of both functions.

[11] The fact is, therefore, that not merely may these two functions be distinguished in all kinds of governments, but that in every government more or less differentiated organs are

established. Each of these organs, while not perhaps confined exclusively to the discharge of one of these functions, is still characterized by the fact that its action consists largely or mainly in the discharge of one or the other. This is the solution of the problem of government which the human race has generally adopted. It is a solution, further, which is inevitable both because of psychological necessity and for reasons of economic expediency.

It is upon this fundamental distinction of governmental functions that Montesquieu's famous theory of the separation of powers is based. In his *Esprit des Lois* (Book XI., Chap. VI.) he distinguished three powers of government which he called respectively the legislative, executive, and judicial. This differentiation of three rather than two governmental functions was probably due to the fact that Montesquieu's theory was derived very largely from a study of English institutions. England was almost the only country of the civilized world which, at the time he wrote, made a clear distinction in its governmental organization between the executive and judicial authorities. This was made, it will be remembered, by the Act **[12]** of Settlement passed in 1701, which prevented the Crown from removing the judges without the concurrent action of Parliament. It was only natural that Montesquieu should find, in the independence of the judiciary, the recognition of a judicial power separate from and independent of the executive power.

If, however, Montesquieu had carried his researches further, he would have seen that the existence of this third function of government, i.e. the judicial function, could not be predicated from the mere fact of the independence of the judges. A study of the powers of the judges of the higher courts, and particularly of the powers of the justices of the peace, would have shown conclusively that English political ideas were not reconcilable with the existence of three powers of government. Parliament, it is true, made the law, but so did the courts in their power of deciding concrete cases. The laws also were enforced by authorities which at the same time administered justice.

Montesquieu's theory of the existence of three powers of government is not, finally, accepted by the modern political philosophy of his own country. As one of the great writers on French administrative law, M. Ducrocq, says: "The mind can conceive of but two powers: that which makes the law, and that which executes it. There is no place there**[13]**fore for a third power by the side of the first two."[6]

Montesquieu's theory involved, however, not merely the recognition of separate powers of functions of government, but also the existence of separate governmental authorities, to each of which one of the powers of government was to be intrusted. This part of his theory has had an enormous influence on the governmental organizations which have been established since Montesquieu wrote his Esprit des Lois.

This theory was, as to this point, carried much further than its author would have considered proper, and in its extreme form has been proven to be incapable of application to any concrete political organization. American experience is conclusive on this point.[7]

At the time our early constitutions, including the national Constitution, were framed, this principle of the separation of powers with its corollary, the separation of authorities, was universally accepted in this country. It was therefore with its corollary **[14]** made the basis of these instruments. Judge Miller of the United States Supreme Court says:[8] "It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative, and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants; and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system that the persons intrusted with power in any one of these branches shall not be permitted to encroach

upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no others."

This principle of the separation of powers and authorities has proven, however, to be unworkable as a legal principle. The courts have made many exceptions to it, all in the direction of recognizing what one of them calls "'a common because of vicinage' bordering on the domains of each" authority, in the occupancy of which each authority must **[15]** tolerate the others.[9] The principle of the separation of authorities, notwithstanding constitutional provisions and judicial decisions and dicta on the general subject, must therefore be regarded as existent in our constitutional law only in an attenuated form.

The frequent exceptions made to the theory of the separation of authorities are due, however, not merely to the decisions of the courts. They are due as well to the constitutions themselves. This is true both of American and of European constitutions. No political organization, based on the general theory of a differentiation of governmental functions, has ever been established which assigns the function of expressing the will of the state exclusively to any one of the organs for which it makes provision.

Thus, the organ of government whose main function is the execution of the will of the state is often, and indeed usually, intrusted with the expression of that will in its details. These details, however, when expressed, must conform with the general principles laid down by the organ whose main duty is that of expression. That is, the authority called executive has, in almost all cases, considerable ordinance or legislative power.

On the other hand, the organ whose main duty **[16]** is to express the will of the state, i.e. the legislature, has usually the power to control in one way or another the execution of the state will by that organ to which such execution is in the main in. trusted. That is, while the two primary functions of government are susceptible of differentiation, the organs of government to which the discharge of these functions is intrusted cannot be clearly defined.

It is impossible to assign each of these functions to a separate authority, not merely because the exercise of governmental power cannot be clearly apportioned, but also because, as political systems develop, these two primary functions of government tend to be differentiated into minor and secondary functions. The discharge of each of these minor functions is intrusted to somewhat separate and independent governmental organs. These organs have each its own name and place in the governmental system.

Thus, for example, the will of the state as to different matters may be expressed by different state organs. This is a characteristic feature of the American political system, in which the constitution-making authority, that is, the people, expresses the will of the state as to the form of governmental organization and the fundamental rights of the individual; while the legislature, **[17]** another governmental organ, expresses the will of the state in most cases where it has not been expressed in the constitution. Again, as a result, either of the provisions of the constitution or of the delegation of the power by the legislature, the chief executive or subordinate executive authorities may, through the issue of ordinances, express the will of the state as to details where it is inconvenient for the legislature to act.

The same is true of the execution of the will of the state. If we analyze the organization of any concrete government, we shall find that there are three kinds of authorities which are engaged in the execution of the state will. These are, in the first place, the authorities which apply the law in concrete cases where controversies arise owing to the failure of private individuals or public authorities to observe the rights of others. Such authorities are known as judicial authorities. They are, in the second place, the authorities which have the general supervision of the execution of the state will, and which are commonly referred to as executive authorities. They are, finally, the authorities which are attending to the scientific, technical, and, so to speak, commercial activities of the government, and which are in all countries, where such activities have attained prominence, known as administrative authorities. **[18]** As government

becomes more complex these three authorities, all of which are engaged in the execution of the will of the state, tend to become more and more differentiated. The first to become so differentiated are the judicial authorities. Not only is this differentiation of the judicial authorities first in point of time, it is also the clearest. Indeed, it is so clear in some instances as to lead many students, as has been pointed out, to mark off the activity of the judicial authorities as a separate power or function of government.

Enough has been said, it is believed, to show that there are two distinct functions of government, and that their differentiation results in a differentiation, though less complete, of the organs of government provided by the formal governmental system. These two functions of government may for purposes of convenience be designated respectively as Politics and Administration. Politics has to do with policies or expressions of the state will. Administration has to do with the execution of these policies.

It is of course true that the meaning which is here given to the word "politics" is not the meaning which has been attributed to that word by most political writers. At the same time it is submitted that the sense in which politics is here used is the sense in which it is used by most **[19]** people in ordinary affairs. Thus the Century Dictionary defines "politics": "In the narrower and more usual sense, the act or vocation of guiding or influencing the policy of a government through the organization of a party among its citizens—including, therefore, not only the ethics of government, but more especially, and often to the exclusion of ethical principles, "the art of influencing public opinion, "attracting and marshalling voters, and obtaining and distributing public patronage, so far as the possession of offices may depend upon the political opinions or political services of individuals."

An explanation of the word "administration" is not perhaps so necessary, since in scientific parlance it has not as yet acquired so fixed a meaning as has "politics." Block, in his *Dictionnaire de l'administration française*, defines "administration" as: "L'ensemble des services publiques destinés ;' concourir a l'exécution de la pensée du gouvernement et a l'application des lois d'intérêt general." The Century Dictionary speaks of it as: "The duty or duties of the administrator; spccifieally, the executive functions of government, consisting in the exercise of all the powers and duties of government, both general and local, which are neither legislative nor judicial."

These definitions, it will be noticed, both lay **[20]** stress upon the fact that politics has to do with guiding or influencing of governmental policy, while administration has to do with the execution of that policy. It is these two functions which it is here desired to differentiate, and for which the words "politics" and "administration" have been chosen.

The use of the word "administration" in this connection is unfortunately somewhat misleading, the word when accompanied by the definite article is also used to indicate a series of governmental authorities. "The administration" means popularly the most important executive or administrative authorities. "Administration," therefore, when used as indicative of function, is apt to promote the idea that this function of government is to found exclusively in the work of what are commonly referred to as executive or administrative authorities. These in their turn are apt to be regarded as confined to the discharge of the function of administration. Such, however, is rarely the case in any political system, and is particularly not the case in the American governmental system. The American legislature discharges very frequently the function of administration through its power of passing special acts. The American executive has an important influence on the discharge of the function of politics through the exercise of its veto power.

[21] Further, in the United States, the words "administration" and "administrative," as indicative of governmental function, are commonly used by the courts in a very loose way. The attempt was made at the time of the formation of our governmental system, as has been pointed out, to incorporate into it the principle of the separation of powers. What had been a somewhat

nebulous theory of political science thus became a rigid legal doctrine. What had been a somewhat attractive political theory in its nebulous form became at once an unworkable and unapplicable rule of law.

To avoid the inconvenience resulting from the attempt made to apply it logically to our governmental system, the judges of the United States have been accustomed to call "administrative" any power which was not in their eyes exclusively and unqualifiedly legislative, executive, or judicial, and to permit such a power to be exercised by any authority.[10]

While this habit on the part of the judges makes the selection of the word "administration" somewhat unfortunate; at the same time it is indicative of the fact to which attention has been more than once directed, that although the differentiation of two functions of government is clear, **[22]** the assignment of such functions to separate authorities is impossible.

Finally, the different position assigned in different states to the organ to which most of the work of executing the will of the state has been intrusted, has resulted in quite different conceptions in different states of what has been usually called administration. For administration has been conceived of as the function of the executing, that is, the executive authority. Recently, however, writers on administration have seen that, from the point of view both of theoretical speculation and of practical expediency, administration should not be regarded as merely a function of the executive authority, that is, the authority in the government which by the positive law is the executing authority. It has been seen that administration is, on the contrary, the function of executing the will of the state. It may be in some respects greater, and in others less in extent than the function of the executing authority as determined by the positive law.

There are, then, in all governmental systems two primary or ultimate functions of government, viz. the expression of the will of the state and the execution of that will. There are also in all states separate organs, each of which is mainly busied with the discharge of one of these functions. These functions are, respectively, Politics and Administration.

NOTES

1. Burgess, *Political Science and Comparative Constitutional Law*, Vol. I., p. 69.

2. Cf. Gneist, *English Constitutional History*, Preface.

3. See Posada, *Tratado de Derecho Administrativo*.

4. *Principles of Sociology*, p. 132.

5. *Ibid*., p. 26.

6. Montesquieu himself would seem to incline to this idea, when, as M. Ducrocq points out, he speaks of the executive power as "la puissance *exécutrice* des choses qui dependent du droit des gens," and the judicial power as "la puissance exécutrice des choses qui dependent du droit civil." Ducrocq, *Traite du Droit Administratif*, 6th edition, 1881, Vol. I., p. 29.

7. See People *v.* Simon, 176 Ill. 165; 68 Am. State Rep. 175.

8. Kilbourn *v.* Thompson, 103 U. S. 168.

9. Brown *v.* Turner, 70 N. C. 93, 102.

10. Bondy, "Separation of Governmental Powers," *Columbia College Series in History, Economics, and Public Law*, Vol. V, p. 202 *et seq*.