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## Theory of Popular Sovereignty

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## THE THEORY OF POPULAR SOVEREIGNTY

### I

ALEXIS de Tocqueville has wisely insisted upon the natural tendency of men to confound institutions that are necessary with institutions to which they have grown accustomed.<sup>1</sup> It is a truth more general in its application than he perhaps imagined. Certainly the student of political and legal ideas will in each age be compelled to examine theories which are called essential even when their original substance has, under pressure of new circumstance, passed into some allotropic form. Anyone, for instance, who analyses the modern theory of consideration will be convinced that, while judges do homage to an ancient content, they do not hesitate to invest it with new meaning. The social contract is no longer in high place; but those who bow the knee to the fashionable hypothesis of social solidarity half-consciously offers it its old-time worship.<sup>2</sup>

Of the general theory of sovereignty a similar truth may be asserted. It has fallen from its high estate. Distinguished lawyers have emphasised the unsatisfactory character of that bare statement we associate, perhaps wrongly, with the great name of Austin.<sup>3</sup> When we examine the historic perspective of sovereignty, it becomes sufficiently obvious that its association with the modern state is no more than the expression of a particular environment which is already passing away.<sup>4</sup> Sovereignty, after all, is no more than the name we give to a certain special will that can count upon unwonted strength for its purposes. There is nothing sacred or mysterious about it; and, if its sense is to be at all meaning, it can secure obedience only within limits. We cannot, indeed, with any certainty predict or define them, though we can indicate political unwisdom

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<sup>1</sup> *Souvenirs d'Alexis de Tocqueville*, pp. 111-2.

<sup>2</sup> I owe this conception to my friend Dean Pound.

<sup>3</sup> Cf. Prof. Dewey in the *Political Science Quarterly* for 1893.

<sup>4</sup> Cf. Laski, *Authority in the Modern State*, Chapter I.

deep enough to traverse their boundaries. In the modern democratic community, it has become customary to associate that sovereignty with the people as a whole. The theorist insists that only the state—the people, so he will say,<sup>5</sup> viewed as a political unit—can exercise supreme power. The conception is not new; nor is it, so far as rigid accuracy is concerned, more useful than when it was first suggested. For supreme power in any full sense, or as more than a merely transient thing, it is clear enough no state possesses. Irresponsibility is politically non-existent, for the simple reason that our acts entail consequences. Policy is embarked upon at our peril; and if the courts use noble words about an infallible crown or a state that refuses responsibility, there are other means of reversing their judgments. It was to a sovereign parliament that the Declaration of Independence was issued; and the Dred Scott decision did not survive the Civil War it in part entailed.

Nor is this all. A state must, as a general rule, act by agents and ministers to whom the exercise of power is entrusted. The power so confided may, as in America, be limited, or plenary, as in Great Britain. But in neither case is it in actual fact more than a permission to perform such acts as are likely to secure public approval. Nor does the issue of legality at all nearly concern us. The judiciary looks not to the inherent nature of acts so much as to their source; and it may well approve what is condemned by the common opinion of men. That is important only insofar as it sets in motion sanctions which well may overawe the majority into silence. It is not evidence of moral judgment, though the character in which it is clothed may well arrest the impulse to resistance. But it is not without importance that the experience of mankind has, at every period of public excitement, denied the equation of law with morals.

This theory of popular sovereignty has had amazing influence; nor should the novelty of the democratic state blind us to its antiquity. 'It is a distinctive trait of medieval doctrines,' says Gierke,<sup>6</sup> 'that within every human group it decisively recognises an aboriginal and active right of the group taken as a whole.' There is a sense, indeed, in which the theory may be said to be coeval with the very birth of political doctrine; though it was not until the middle ages that its full significance began in any adequate fashion to be perceived. Certainly no reader of Aquinas<sup>7</sup> or Marsiglio<sup>8</sup> can complain of the thoroughness with which the implications of popular control were, at least in theory, demonstrated; but it was not until the Reforma-

<sup>5</sup> Esmein, *Elements de Droit Constitutionnel* (6 ed.), p. 1.

<sup>6</sup> *Political Theories of the Middle Ages* (ed. Maitland), p. 37.

<sup>7</sup> *Summa Theolog.*, II. 1. q. 90. a. 3. q. 105. a. 1.

<sup>8</sup> Marsiglio: *Defensor Pacis*, I, ch. 9-15.

tion provided some signal instances of successful rebellion that it became a working-part of the theory of the state. Even then it was but partially operative; for it was an inevitable result of the Counter-Reformation that bureaucratic absolutism should, in general, extend its triumphs to the secular sphere. Nor is England a complete exception to the rule. John Lilburne's eager gestures did not make effective headway against the stern disapproval of Cromwell and Ireton;<sup>9</sup> and the parliamentary system which the Revolution of 1688 made permanent was but partially, at best, an application of national sovereign power. Neither the House of Commons nor the electorate could claim in any real sense to be representative of the people at large. Catholic and Dissenter alike still groaned, like Lambard's justice, under stacks of burdensome statutes. The real impetus to a more direct expression of popular will comes from French speculation in the eighteenth century, on the one hand, and from the American Revolution on the other.

It is hardly worth while to examine in curious detail whether the appeal to more liberal doctrine meant exactly what it said. The sceptical might urge that the early Federalists were prone to emphasise rather the dangers of democracy than its merits; and the greatest of them, Hamilton, seems, in the just perspective of a century, to take his stand by Burke as an apostle of generous conservatism. Montesquieu and Voltaire were subtle dissolvers of a despotic system; but neither embraced with any ardour the prospect of a popular government.<sup>10</sup> The active source of innovation is Rousseau; and the theory he consecrated for his disciples in the Revolution certainly requires a somewhat more critical examination than it has received. In its classical conception, whether in France or in America, it is open to a variety of interpretations; nor is it obvious that, for the practical purposes of government, it possesses the merits of clearness and utility. That is not to allege its lack of influence. On the contrary, it is matter of record that it has, again and again, been the basis of popular action; and it is still, for most, the theoretic basis of popular government. Certainly it is undeniable that when Rousseau declared sovereignty to be in the people as a whole, he gave birth to a plethora of constitutions of which some, at least, were intended to give partial substance to his ideas. Nor did the Revolutions of 1848 have a very dissimilar objective.

But, in the technical sense of full administrative application, it is seriously questionable whether the theory of Rousseau is in fact a

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<sup>9</sup> Cf. Pease, *The Leveller Movement* (1916).

<sup>10</sup> Cf. the useful essay of M. Ameline. *L'Idée de la Souveraineté d'après les écrivains français du XVIII<sup>e</sup> siècle*. Paris, 1904.

working hypothesis. What he emphasised was the distinction between state and government, and it was to the former alone that he gave unlimited power.<sup>11</sup> It is, however, obvious that no system of politics is workable which involves so frequent an elicitation of the sovereign's will. The business of the modern state is too complex to be conducted by perpetual referenda; and, in actual practice, governments which can obtain the necessary support are able to act as they on occasion deem warranted. Rousseau's doctrine, in any case, will mean no more than majority rule. We shall not easily surrender the convenience that has been administratively secured by the transition from the impossible medieval system of unanimous judgments. But the hypothesis of majority rule herein implied is itself too simple to cover the facts. What, in fact, Rousseau's system, like any other, does is to leave power in the hands of that minority which is able most effectively to manipulate the will of the inert mass of the population.

It is clear, in brief, that popular sovereignty, if it means that the whole people is, in all but executive detail, to govern itself, is an impossible fiction. There are, indeed, occasions when it may have been operative; at least it was theoretically possible for the citizen-body of Athens to make its sovereign decisions as a unity. But once we turn to the modern state, with its absence of the numerical limits within which the Greek cities were confined, it is obvious that, for the general purposes of daily life, popular sovereignty is non-existent. We cannot avoid, that is to say, the device of representation. The scale of our social life involves specialization of function. Political business has to be confined to a small group of men whose decisions, generally speaking, are accepted by the vast majority. We still make, indeed, Rousseau's distinction between state and government. We still, that is to say, vaguely realize that there is no necessary coincidence between the wills of each; and, if they conflict, it is the former alone which possesses the ultimate power to get its will obeyed.<sup>12</sup> Government, if it is to be secure, must so act as to obtain at least the passive consent of the major portion of the community. But so long as that border remains uncrossed, so long, that is to say, as the policy of government is normally sagacious, it is possible to assert that whatever is necessary for complete political effectiveness is no longer the exclusive and jealously-guarded possession of the state.

There is herein implied a second and vaguer sense in which the notion of popular sovereignty has become accepted. Historically, it

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<sup>11</sup> The Social Contract. Bk. III, ch. I.

<sup>12</sup> The Social Contract. Bk. III, Ch. XVIII.

perhaps goes back to the teleology of Aristotle's *Politics*, at least in the sense in which it is given ethical justification. For its practical bearing, the sense insisted upon by Hume when he urged<sup>13</sup> the paramountcy of public opinion is a sufficient expression of its meaning. No one will deny that any government can, often enough, secure obedience from an unwilling people; but no one will deny either that the ultimate power in any state belongs to the majority and that the latter, if it be roused, will get itself obeyed. But this is too abstract a sense for any practical value to be attached to it. For there is, as Sidgwick pointed out,<sup>14</sup> a 'fundamental distinction between power that is unconsciously possessed—and therefore cannot be exercised at all—and power consciously possessed.' Certainly deliberate organisation is necessary if opinion is to flow into channels where it can be effective. The majority of men, moreover, is so habituated to obedience that, normally speaking, the sanction of penalties is hardly necessary to obtain it. In a democratic state, at least, it is rarely necessary for government to act upon the supposition that disobedience is contingent. Its possibility, doubtless, is a factor in restraining the selfish exercise of governmental power. But it is essentially a reserve weapon the use of which belongs rather to the realm of prophecy than of analysis.

Here, indeed, we verge upon the teleological factor by which Aristotle justified the existence of the state. Its object, he said, is to secure the good life; and popular sovereignty is therefore in turn justified by the argument that government should not proceed against the will of the governed. The cause of such hesitation is variously explained. Most usually it is the assumption of a certain popular instinct for right of which Aristotle himself seems to have accepted the reality.<sup>15</sup> At the moment, it is sufficient to remark that the argument raises more difficulties than it solves. It in reality asks what degree of opposition ought to deter a government from proceeding with its policy; or, more positively, it asks what concessions should be made to a strong popular desire. We cannot answer these questions. To them, indeed, Royer-Collard made the response that the only sovereign is right conduct and that the action of government will move as it compels.<sup>16</sup> But, for most, the definition of right conduct would appear less easy than he seemed to make it. We enter here into the realm of the impalpable. It is sufficient to indicate the immense difficulty that is involved in seeking

<sup>13</sup> *Essays* (World's Classics ed.) p. 24.

<sup>14</sup> *The Elements of Politics*, p. 630.

<sup>15</sup> *Pol. Bk. III, C. XI, 1281b.*

<sup>16</sup> Cf. Laski, *Authority in the Modern State*. Ch. IV.

not merely the justification, but even the very sources, of political power.

A corollary that has been deduced from this attitude is worthy of some notice. The authors of the *Federalist* were compelled, of course, to accept the dogma wholeheartedly, though it is interesting, in view of Hamilton's attitude to democracy, to note that they nowhere attempted any analysis of its meaning. What, with them, it seemed to imply was the necessity of a careful limitation of the power to be entrusted to the various branches of government; and they were urgent, with historic precedent immediately behind them, in insisting upon the reserve power of revolution. 'If the representatives of the people,' said Hamilton,<sup>17</sup> 'betray their constituents, there is then no resource left but in the exertion of that original right of self-defence which is paramount to all positive forms of government'; and he even conceived of the constituent states as an organized security against national usurpation. The American constitution, indeed, once the power of judicial review began to be exercised, was perhaps the first attempt at the protection of this vaguely ultimate popular opinion by something like definite safeguards. The power of rebellion, as the Civil War was to show, of course remained; but it was postponed by an intermediate defence. Yet it will be remarked that the only distinction between this view and that which merely emphasises the ultimate control of public opinion, is the more serious attempt of the American constitution to make public opinion effective. It gives it instruments of which to make use; but it does not organise it to use them.

A more subtle interpretation of Rousseau's formula has been attempted by Dr. Bosanquet. He sees that ultimate power must reside in the community as a whole; but he insists that the conception is meaningless unless the power finds some determinate expression. He places sovereignty, therefore, in the state, and he defines the state as 'the entire hierarchy of institutions by which life is determined.'<sup>18</sup> Sovereignty, in his view, really belongs to the general will, to the acts, that is to say, of the state's best self. But this, surely, does no more than move the enquiry back to a further stage. The state must find organs for the expression of its selfhood; and Dr. Bosanquet gives us no criterion by which to recognise the expression. The sovereignty of the general will, indeed, is very like the assertion that right and truth must prevail; but it does not tell us how certainly to discover the presence of right and truth. It is, moreover, questionable whether the identification of the commun-

<sup>17</sup> The *Federalist*, No. 28.

<sup>18</sup> The *Philosophical Theory of the State* (2nd edition), p. 150.

ity as a whole with the state is adequate. It is, perhaps, less untrue for the ancient world, by the views of which Dr. Bosanquet has been profoundly influenced, than for our own day; but a state which comprises, to take a single example, the Roman Catholic church and the Secularist Societies seems almost wilfully to have taken steps to obscure any knowledge of its purposes.

This, indeed, Dr. Bosanquet would deny. 'If, for example,' he writes,<sup>19</sup> 'we speak of the "sovereignty of the people" in a sense opposed to the sovereignty of the state—as if there were any such thing as "the people" over and above the organised means of expressing and adjusting the will of the community—we are saying what is, strictly speaking, meaningless.' It is difficult to see why that should be the case. Even if we admitted the justice of regarding the state as identical with society we still should have no means of knowing when an act was sovereign. For social obligations conflict; and unless, for practical purposes, we take as paramount the duty of obedience to government, we have no rule of conduct herein. Nor is it useful to accept such a criterion; for churches, to take only a single example, refuse to accept as final a governmental decision which, as they conceive, violates their own ethos.<sup>20</sup> The fact is that Dr. Bosanquet is so concerned with the discovery of a unity inherent in the social fabric that he slurs over the presence of disharmonies. Unity of purpose, in a broad sense, society well may possess; but the methods by which its constituent parts propose to achieve that purpose are not only various, but, often enough, mutually destructive. So long as the size of the modern state renders it necessary to entrust power to a small group of selected persons, it is difficult to see how controversy can be avoided where the acts of those persons arouse differences of opinion that are fundamental. Dr. Bosanquet, like Rousseau, makes government simply an instrument for effecting the will of the sovereign state; but he gives us no means of knowing when that will has received expression.

At this point an interpretation emerges which has all the merit of simplicity and clearness. The people, it is admitted, cannot directly govern itself; but it can directly delegate, through the device of universal suffrage, the business of government. The national assembly, whether Congress or Parliament, then in fact becomes the people, and it derives the right therefrom to exercise completely sovereign powers. Popular sovereignty, that is to say, implies representative government. Some institution, or set of institutions, has to be

<sup>19</sup> *Ibid.* p. 282.

<sup>20</sup> Cf. my *Problem of Sovereignty*, Chs. II-V for a full analysis of this question.

erected in which the will of the people as a whole may find expression. The most eminent of Rousseau's disciples did not hesitate to accept this view. 'The nation,' said the Constitution of 1791,<sup>21</sup> 'from which alone all powers derive, can exercise them only by delegation. The French constitution is representative; its representatives are the legislative body and the King.' The Belgian constitution expresses a similar idea. 'All powers,' it asserts, 'emanate from the nation; they are exercised in the manner established by the Constitution.'<sup>22</sup> The sovereignty of the King in Parliament has a basis in nowise different; and it has been given classically emphatic expression in Burke's insistence that the private member ideally represents the nation as a whole.<sup>23</sup> Statesmen of distinction, indeed, have not hesitated to affirm that resistance to the representative assembly is resistance to the state itself. M. Briand, for example, based his opposition to the demands of the French civil service on the ground that they could not secure the support of the Chamber. 'The civil servants,' he said,<sup>24</sup> 'are confronted by the national representatives, that is to say by the nation itself.' 'Against whom,' asked M. Barthou,<sup>25</sup> 'are the postal workers on strike? . . . it is against you, gentlemen, against the whole nation . . . The question is whether we are to abandon general interests, we who represent the national sovereignty.' 'The system of representation,' said Brougham in his famous speech upon the Reform Bill of 1832,<sup>26</sup> 'consists altogether in the perfect delegation by the people of their rights and the care of their interests to those who are to deliberate and to act for them.'

But it is, as a distinguished authority has admitted,<sup>27</sup> at least an open question whether the theory of popular sovereignty is compatible with representative government. The element of representation, he says, 'means that, within the limit of the powers conferred upon them, the members are called upon freely and finally, to represent in the name of the people, what is considered to be the will and voice of the latter.' There is herein implied exactly that theory of a restricted mandate which Burke<sup>28</sup> and Mill<sup>29</sup> so emphatically rejected. Rousseau himself, indeed, insisted that sovereignty cannot be represented because that is to admit, what is illogical, the possi-

<sup>21</sup> Constit. of 1791. Tit. II, Art. 2.

<sup>22</sup> Belgian Constitution, Art. 25.

<sup>23</sup> Speech at Bristol Works (World's Classics ed.), II, 165.

<sup>24</sup> Journal Officiel, May 14, 1907.

<sup>25</sup> Ibid.

<sup>26</sup> House of Lords, Oct. 7, 1831. Speeches (Philadelphia, 1841), II, 49.

<sup>27</sup> Esmein, *Elements de Droit Constitutionnel* (6 ed.), p. 391.

<sup>28</sup> Speech at Bristol, cited above.

<sup>29</sup> *Representative Government* (Everyman's ed.), p. 323.

bility of its alienation. To part with paramount power was, in his view already to betray it.<sup>30</sup>

Certainly it must be admitted that the theory of representation contains much that is the merest fiction. It is often difficult to know upon what issues a member has been returned. There are innumerable problems upon which, in any real sense, a public opinion cannot be said to exist. James Mill expended much thought upon the methods by which the interests of the representative assembly could be kept in harmony with those of the electorate,<sup>31</sup> and his greater son emphasised the ease with which the power supposedly delegated by the people may be perverted to sinister ends.<sup>32</sup> Even when the assembly has been elected with enthusiasm, it may cease rapidly to possess popular favor before the expiration of its term of power. 'A prime minister,' says Sir Sidney Low,<sup>33</sup> 'may continue to govern for a period that may even extend over years in defiance of public opinion'; and a remark of M. Clémenceau, who is at least experienced, is to the same effect.<sup>34</sup>

Clearly there is herein the serious problem of being certain that a representative assembly does in fact mirror the opinion it is supposed to reflect. It is useless to call the sovereignty of the people effective if the organs through which it works fail to do justice to popular desire. But what, at bottom, is justice to such desire? What popular desire must be accepted by the statesman? No one would urge that he should deliberately translate each whim as it occurs into the solid form of statute. It then seems true, as de Tocqueville insisted,<sup>35</sup> that our utmost democratic enthusiasm ought not to deny the necessity of safeguards against the tyranny of the majority. Are there, in fact, popular desires to which attention ought not to be paid, because they are wrong? We most of us condemn the continuance of the war with America after 1776; but it seems unquestionable that it was popular.<sup>36</sup> The unjustifiable execution of Admiral Byng was a sacrifice to the rage of the majority. It is, indeed, difficult to avoid the conclusion that, from the very situation by which he is confronted, the legislator will tend to emphasize less the sovereignty of the people than the sovereignty of what his reason and conscience tell him to be right conduct. He will find himself,

<sup>30</sup> *Contrat Social*, Bk. III, Ch. XV.

<sup>31</sup> *Essays upon Government*, p. 27.

<sup>32</sup> *Representative Government*, p. 248, f.

<sup>33</sup> *The Government of England* (1914), p. 113.

<sup>34</sup> Duguit, *Le Droit Social*, p. 132 n.

<sup>35</sup> *Democracy in America*. Part I, Ch. XV; and cf. Mill's comment, *Dissertations and Discussions*, Vol. II, p. 114.

<sup>36</sup> Lecky, *History of England in the XVIIIth Century* (Popular ed.), Vol. IV, p. 165, 435.

that is to say, not very distant from the denial of all institutional sovereignty, as with Royer-Collard,<sup>37</sup> or from the belief in the supremacy of reason, as with Benjamin Constant.<sup>38</sup> The danger, in such a position, is, of course, the danger of paternalism. The legislator deals less with the popular will than with the popular need. We must not, indeed, draw too careful a line of demarcation between them; for they become insensibly transfused in the hands of a skilful statesman.

But the kind of difficulty that is involved any observer can see for himself who watches a party in search of an issue. Lord John Russell in 1851 deliberately exploited the dormant anti-Catholic prejudices of Great Britain to secure a popularity that was waning.<sup>39</sup> Mr. Lloyd-George has admitted that the Insurance Act of 1911 was passed in the teeth of popular disapproval;<sup>40</sup> and the Opposition that had blessed it upon its appearance, did not fail to use and stimulate the antagonism that made itself felt. Issues are sometimes deliberately recommended to a party as worthy of exploitation.<sup>41</sup> 'For nearly twenty years,' says Sir Sidney Low,<sup>42</sup> 'the National Union of Conservative Associations had been passing occasional resolutions in favour of "Fair Trade" and Retaliation, without attracting the slightest attention. But a single leading statesman uttered a few sentences . . . and instantly the whole country was in a ferment.' The French system of politics makes the problem even more intricate by the way in which the Chamber of Deputies is constructed. It is impossible for the electorate directly to choose a ministry; and the most popular cabinet may be overturned through the accidental ill-chance of a private intrigue that has resulted in an unlooked-for interpellation.

It is here worthy of notice that the books abound in lamentations upon the breakdown of the representative system. There may be a clear advantage in the simplicity of majority-rule; certainly the psychological strength of a government which can claim effectively to have a majority behind it is enormous.<sup>43</sup> There are yet vast difficulties in its operation. We seem, on the whole, determined that there shall be no restrictions upon the franchise; but not even the enthusiasm of Mill has convinced us that opinions ought to have

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<sup>37</sup> Cf. my *Authority in the Modern State*, Ch. IV.

<sup>38</sup> *Cours de Politique Constitutionnelle*, Vol. I, p. 177f.

<sup>39</sup> Cf. my *Problem of Sovereignty*, p. 142 f.

<sup>40</sup> Cf. the *London Times*, Nov. 24, 1913.

<sup>41</sup> *New York Nation*, Vol. 107, p. 282.

<sup>42</sup> *Governance of England (1914)*, p. 130.

<sup>43</sup> One of the gravest weaknesses of the Bolshevik government in the eyes of the western democracies is the doubt whether it has the support of the majority of the population.

their place in the assembly proportionately to their strength. In the result, there are many opinions that do not get represented at all; and the majority actually exerted by the party in power may be out of all relation to its strength in the country. Yet the evil of proportional representation is the not less grave danger that it may, on the one hand, hinder the effective management of government while, on the other, by leading, as it seems to lead, to the group-system, it may deprive the electors of their choice of leaders.

But even if we could suppose that the representative assembly is an accurate reflex of public opinion, difficulties of an urgent kind remain. In every country in the world the pressure of public business has made the legislative body little more than the creature of the executive; and it is only a rare frankness which, like that of Lord Hugh Cecil,<sup>44</sup> will admit its desirability on the ground that it promotes the efficient conduct of public business. 'The theoretical and practical deductions from this doctrine,' remarks an acute observer,<sup>45</sup> 'are that the House of Commons is to become a mere body for registering the decrees of a secret committee.' In our own day, this prophecy has become so largely fulfilled that deep search has been made by members of Parliament to make the House of Commons once more an adequate vehicle of effective control.<sup>46</sup> Even in America, where the theory of the separation of powers has given an immense safeguard to the legislature, the growth of presidential influence has been immense; and in France, while the group-system makes the French prime minister more humble than his English colleague, his influence has increased by leaps and bounds in the last decade.

It is, of course, greatly uncertain whether the sovereign people can in fact fulfil the functions that theory expects from it. Montesquieu, indeed, specifically excluded it from either a control over executive details or a share in legislation. He thought such direct participation the chief vice of ancient states; and he limited its competence to the selection of its rulers.<sup>47</sup> That attitude, in some measure at least, has been in recent times strengthened by our experience of direct legislation. The statistics suggest that an electorate is, roughly, twice as interested in the selection of men as in the determination of measures; and if there is important argument upon the side of direct government, it is the argument of theory rather than

<sup>44</sup> Hansard, 4th series, Vol. 90, p. 915. March 7th, 1901.

<sup>45</sup> Holland, *Inperium et Libertas*, p. 257.

<sup>46</sup> Cf. Hansard, 5th series, Vol. 95, p. 1494. (Sir Godfrey Collins); *Ibid.*, Vol. 96, p. 1552. (Mr. Herbert Samuel); *Ibid.*, Vol. 100, p. 1282. (Mr. Herbert Samuel).

<sup>47</sup> *Esprit des Lois*, Bk. II, Ch. II; and cf. Bk. XI, Ch. VI.

experience.<sup>48</sup> We need not argue, with de Lolme, that nature has given to but few men the capacity to deal with legislation,<sup>49</sup> to admit that neither economic pressure nor education, neither the absence of leisure nor the possession of knowledge, permits the average elector to pass an opinion upon political questions that could be accepted as intellectually final. Nor is this all; for it is obvious enough that the average elector is not greatly interested in the political process. He demands results; but he does not greatly care about the methods by which those results are attained. It is sometimes difficult to doubt that we approach the epoch so greatly feared by de Tocqueville when he predicted that men might one day be willing to exchange power for material comfort.<sup>50</sup> In that event the sovereignty of the people would be no more than an antiquarian memory.

In sober fact, it is difficult to avoid the conclusion that the dogma attempts to give a specious exactitude of form to that principle of consent for which, in some fashion, room must be found in the modern state. But, as a dogma, it is of juristic worth. It is, by its very nature, incapable of translation into terms of some specific authority to whose enactments the courts may look for final reference. The organs from which power is in England today derived are not in appearance different from those in active existence at the Revolution, even though their substance has so vastly changed. Legally, also, the alignment of constitutional power in the United States stands where it did in 1787; practically the absorption of much influence by the executive on the one hand, and voluntary groupings like the trade-unions, on the other, are the facts which most prominently confront the observer. It is, indeed, obvious that the way in which our political institutions function renders it impossible at any moment to ascribe to their true author the roots of any political act. One of the greatest events in English history is the foundation of the Bank of England; but it is impossible to measure the comparative credit which attaches to Paterson and Montague and the original subscribers. It was their influence which made the experiment successful, though the enacting authority was a hesitant House of Commons and a frankly suspicious Upper Chamber.

The truth surely is that we should regard the idea of popular sovereignty as expressive of what is the most real problem in modern politics. In some sort it goes back to Plato; for the institutions of which we make use are an attempt to answer his uncompromising rejection of the democratic system. Plato, in substance, denied the

<sup>48</sup> Lowell. *Public Opinion and Popular Government*, pp. 152-240, esp. pp. 225-7.

<sup>49</sup> *Constitution de l'Angleterre*, Bk. II, Ch. V, where there is a very interesting analysis.

<sup>50</sup> Cf. my *Problem of Administrative Areas*. (Smith College Studies, Vol. IV, No. 1).

value of any general public opinion; and it is at least clear that the philosophic justification of democratic government must begin by showing that his argument is unsound. Even when that is done, there is a second difficulty, of which he was unaware, to be confronted. For, since direct government is, in the modern state, for the most part impossible, it is necessary to show that the organs of the modern state are capable of clothing that opinion with reality. Sovereignty of the people, in fact, means that the interest which is to prevail must be the interest of the mass of men rather than of any special portion of the community; and it is, further, an implicit insistence that this general interest is the criterion of political good. In that regard, it is obviously but little different from the Benthamite criterion, and it may perhaps be usefully observed that the 'greatest happiness principle' is as little exact where practical utility is concerned as its predecessor. For here, as in every political question, the real problem lies not so much in the announcement that the interest of the people as a whole must be the ultimate governing factor, as in the means taken to secure the supremacy of that interest. Practice, in this regard, limps painfully behind the theory it is to sustain.

Nor is the reason difficult of access. It is our fashion to make of political theory the search for that ultimate unity of interest which the ideal purpose of the state suggests may one day be found. It is at least permissible to doubt whether the unity so postulated is more, at least thus far in history, than a fantastic dream. The idealist philosophy may tell us<sup>51</sup> that the 'pure' instance only is important. The difficulty yet is that the variations with which practice must reckon make the 'pure' instance at best of doubtful application. It is unnecessary to regard history, with Lord Acton, as the record of the crimes and follies of mankind to see that there has, thus far, been no state in which an actual identity of interest between rulers and subjects can be admitted. For the fact surely is that those who possess the engines of power will, for the most part, tend to regard their private good as identical with the general good. That is, in fact, contrary to much of the evidence we possess. At the best, it equates the intention to do good with the achievement of good itself. It is yet not enough, as Plato again and again insisted, to will what is right; it is also necessary to know what it is right to will. Whatever theory may say, an analysis of the modern state reveals it as a complex of interests between which there is no necessary or even predominant harmony. The right of employers, for instance, to

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<sup>51</sup> Barker, *Political Thought from Herbert Spencer*, p. 80. There is, in this whole chapter, a very powerful criticism of the view I am here concerned in urging.

engage or discharge their workmen as they please is inconsistent with the latter's interest in security of tenure; and yet, in the immediate conditions of the modern industrial state, it is a right which law will protect. The definition of right and wrong by the courts, in brief, will inevitably reflect, though not in detail, the dominant ideas of the time; and it is not in the least clear that those dominant ideas will necessarily represent an attempt to secure the equal happiness of the members of the state. The social interests which are translated into legal rights are almost always the rights of a limited group of men.

This, indeed, does no more than indicate the general nature of the problem. Perhaps, also, it suggests a method of approach to social questions which, if less metaphysically exact than such analyses as those of Green and Bosanquet, would, if rightly used, lead to results of more practical character. In the analysis of political problems the starting-point of enquiry is the relation between the government of a state and its subjects. For the lawyer, all that is immediately necessary is a knowledge of the authorities that are legally competent to deal with the problems that arise. For him, then, the idea of sovereignty has a particular and definite meaning. It does not matter that an act is socially harmful or unpopular or morally wrong; if it issues from the authority competent to act, and is issued in due form, he has, from the legal stand-point, no further problems.

For political philosophy, on the other hand, legal competence is no more than a contingent index to the facts it needs. The political philosopher is concerned with the discovery of motives, the measure of wills, the balance of interests. It is important for him that an act, in theory the will of Parliament, is in fact the will of a subordinate official in the Colonial office.<sup>52</sup> He cannot neglect the implications of the perversion of a legislature to selfish ends by a criminal adventurer like Tweed. The sovereignty of Parliament will interest him as a legal instrument, but its workings he will have to view in the light of the numerous defeats it has suffered.

He will, in fact, be driven to the perception that, politically, there is no such thing as sovereignty at all. He will find himself, rather, in the presence of different wills, some of which, from their strength, have more importance than others. He will ascribe to none a moral pre-eminence by the mere reason that it claims political priority. He will be satisfied simply with the ascription to these wills of a power which is never constant and rarely capable of prophetic announcement. It is possible that he will discover in the will of government

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<sup>52</sup> Cf. Charles Buller's famous description in *Wakefield, Act of Colonisation* (ed. of 1914) p. 279 f.

something to which, from the nature of social organisation, a special obedience is due. It is possible, also, that he will be driven to insist that the history of politics must make us careful in the erection of safeguards about the exercise of power. He will see that, ultimately, the basis of all power is in the consent offered to action by each individual mind; and he may therefrom induce the conclusion that liberty is the capacity to resist. Certainly the atmosphere of his endeavour will correspond, within its range, to the task of history as Ranke defined it.

Not, of course, that his effort will end there. A political metaphysic must be had, but to be useful it must be grounded in historic experience. Only in this fashion can we avoid the danger noted by de Tocqueville and cease to confound institutions that are ancient with the eternal needs of social organisation. Nothing is easier than to pass from legal right to moral right, but nothing, at the same time, is more fatal. Certainly the history of popular sovereignty will teach its students that the announcement of its desirability in nowise coincides with the attainment of its substance.

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