

SOVEREIGNTY*

We are confronted continually with so many political and governmental problems in America. We hear so many divergent opinions on each and all of them. Hobbes said the axioms of geometry would be disputed were the interests of men concerned in them and it is, therefore, not surprising that men differ in the field of political speculation.

A Vice-President goes to the country for a change in the rules of procedure in the Senate. The Congress submits to the legislatures of the States a proposed amendment of the Constitution of the United States respecting the labor of children. The Senate is considering a treaty which contemplates our participation in a world court. We were recently considering a proposed alliance in the League of Nations. These are some of the questions we are discussing and determining.

It may well be we can answer some of these and other similar questions by thoughtful recurrence to a few fundamental concepts reflected in the Constitution of the United States.

It would seem highly desirable, if not necessary, to proceed to the unknown from the known and to learn whether any American political principle is involved in any great question under discussion, so that we may apply that principle.

We cannot discuss the known unless it is known. We must have some familiarity with the history and nature of our political institutions before we can engage in discussions which may be intelligible and helpful. The torch of knowledge will dispel many of the question marks that beset and darken our pathway. In determining our action on any question we should apply the principle which appeals to us as being true and correct. Should there be those who disagree in principle, the field may be quit, after the battle is lost or won, with dignity, respect and good will, because the contest was impersonal.

There is great necessity to find and keep a firm footing from which to judge the modern tendencies in political thought.

The essential thing to get in a discussion of this nature is a principle that can be used and applied to concrete cases as they arise. The thing that changes in political thought is the circumstance, the occasion. The principle that can be used in settling these remains permanent.

The great need of the present age is to get back to the spirit, the

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principles and the methods of the age in which the Constitution was adopted. What we need today in the United States is to become more familiar with the Constitution of the United States and the fundamental principles it contains. An application of the principles contained there will solve most, if not all, of the diverse and complex problems presented to us today.

It is said that the Constitution of the United States is out of date; that it is an eighteenth century document; that it was written to solve the problems of that narrow and limited world; that we live in a new world today and that the Constitution does not contain the principles we can apply to present day political needs. This is an erroneous impression. The Constitution of the United States is the greatest document ever struck from the hand of man, according to Gladstone. It was the product of perhaps the greatest thinkers in political thought that any age has ever produced. It represents a thousand years of accumulated experience in government.

As an illustration of some of the principles and of the methods used by the framers of the Constitution, let us take the treatment of commerce. The Constitution states very briefly that Congress shall have power to regulate commerce among the several states, with foreign nations and with the Indian tribes. That is the whole of the power granted. There is no attempt to go into detail to explain what commerce is or what it may be or to limit this power. What commerce was in 1787 was entirely different from what it was in 1825, 1860, 1900 or is at the present time or may be a century from now. Yet, whatever content may be given to the term "commerce," Congress will still have the right to control it among the states or with foreign nations or with the Indian tribes. Commerce, at the time the Constitution was adopted, was limited very largely to ocean traffic and to traffic on the rivers. Today commerce includes practically all sorts of relationships, including invisible radio messages, protection of birds and mapping the ways for the passage of airships. The purpose of this illustration is simply to indicate the wisdom of the framers of the Constitution of the United States in producing a document that can be applied to all succeeding contingencies of government, and the thing that is needed today is to get back to the spirit that gave us the Constitution and to lay hold upon certain fundamental principles that can be applied to the rather complex and perplexed conditions of national and international thought.

My subject tonight is Sovereignty. My purpose is to consider its nature and its residence.

A rather clear definition of certain fundamental concepts is essential to clear thinking. A misunderstanding of certain terms that are commonly used leads to a chaotic and confused situation. For instance, the terms "people," "sovereignty," "state," "nation," "government," are continually confused and used interchangeably. Let us define these terms. The most fundamental of these terms, the one that we must start from as a basis, is the term State. What is a State? A State consists in a group of people occupying a definite territory, possessing a political organization called a government, having permanence and possessing sovereignty. Sovereignty is the chief ear-mark of a State.

Sovereignty is to be found in all States and among all peoples who have a society organized as a political body. No State can exist without sovereignty.

The term itself implies ultimate, unlimited power. It does not admit of divisibility—its unity and integrity are ever present.

Sovereignty is not a characteristic of the government. No government is sovereign.

The fallacy of the political thought in the United States previous to the Civil War was largely due to the confusion on that point in that the leading political thinkers were quarreling as to which government was sovereign. Government is the political organization of the State. A State has a government just as we have hands. The government is the machinery of the State. The government is the State organized for work. The government is the State in action. A government derives its power from the State or from the people. It has no power in itself. All just governments derive their power from the consent of those governed. This does not mean that governments have always done this. In ancient times governments derived their power from other sources.

The great contributions we have made to political experience and thought have been largely in two things, if we view the subject broadly. We have demonstrated in practice that a government deriving its power from the State or the people is the only free government that can be established. Until the Eighteenth Century governments always justified their existence and were always organized on the theory that they derived their power from some other source. Our great experiment in government has revolutionized that thought. Walter Hines Page, after serving eight years as our Ambassador at the Court of St. James, having been frequently accused of being pro-English and un-American, and after spending many years in other countries of Europe made the

significant statement at the close of his career that real democracy is enjoyed in just a few places in the world, namely, in the United States and a few of the self-governing colonies of Great Britain, such as Australia, New Zealand and Canada; that in this country we have the spirit of democracy.

In England they have a theoretical democracy and their system is honeycombed and shot through and through with survivals of aristocracy and of monarchy. If you go into a railroad office in America to buy a ticket you line up according to time, every man taking his place. That is the spirit in America. In England you line up according to class at a railroad ticket office or in a barber shop or at a theater and Lords and Dukes and Earls of certain classes rank you—they step ahead of you in line and people tolerate and accept it. In other words, the spirit of democracy has not become a practical thing in England or in France or in Germany. It is still an ideal that has not been worked out in practical institutions. In the spirit of democracy there is the feeling of equality which in turn but reflects the consciousness of Sovereignty. That is the first great contribution—we have worked out in America a practical democracy.

The second great contribution we have made to political thought consists in our solution of the conflict that has always existed between the individual and his inalienable or natural rights on the one hand and the powers of government on the other. Ancient society is replete with examples of powerful national governments, such as the great empires of the Tigris and the Euphrates and of the Nile valley and in modern times the Roman Empire. These great governments were established at the expense of individual liberty in the local community. The Roman citizen in order to exercise his right as a Roman citizen had to travel to Rome to exercise that right. The empire was so centralized in its power, whether that citizen lived on the Thames in England or on the Tigris or the Euphrates or at Jerusalem, he must appeal to Caesar at Rome. On the other hand, we find examples in ancient and in medieval times of local governments in which the rights of individuals were secured locally, but always at the expense of the national government or with no national government at all, as was the case with the Greeks. The Greeks worked out an excellent system of local government, but they never had at the same time a national government. When the Greek cities finally got together under Alexander and established a strong, powerful union their local liberty disappeared. Briefly that is the history of civilization. In the United States we have established a national government that is internationally just

as powerful as the Roman government, just as much respected abroad as the Roman government was. At the same time the commonwealths solve local problems in our State governments without any or but little consciousness of the existence of a government at Washington, or the municipal or city government solves its local problems scarcely conscious of the existence of the national government. The individual citizen has reserved to him in our scheme of government a sphere of activity that neither city, commonwealth or national government can intrude upon or interfere with. That is America's second great contribution to political thought.

A State has certain characteristics. A State consists in a people occupying a definite territory. Second, it consists in a political organization that we call the government, and in the third place it consists in permanence—relative permanence—that is, the State is more permanent than the government. The government changes—the State continues. The only excuse for a government is that it may protect the individual, that it may safeguard individual rights, that it may promote the general welfare. A government is a means to an end always—that is the modern conception. The ancient conception was that the government was the end and the individual was the means to serve the government. The ancient conception and even the early modern conception was that an individual exists for the government. Our conception is the government exists for the individual. Let us now discuss this idea of "people."

The most fundamental thing, the basic thing, is a "State." A State must consist in people who have a political organization we call a government. The people must occupy a definite territory and must possess sovereignty. In a rather broad, loose way we refer to the people as including all the inhabitants of the territory that belongs to the State. In that sense the people represent the location of sovereignty. Sovereignty is located in the people—that is, "the people," used in that broad sense, is the source of sovereignty. That is our theory of government. Sovereignty is not to be found in a King, it is not to be found in a government, but in the people. Sovereignty springs from the people. The government is the organization these people have. People, wherever we find them, however primitive they may be, have an organization. They may have numerous organizations, but they always have an organization that we call a government which is political in its nature.

Sovereignty is unlimited, indivisible power. There is no danger in power. The danger is in the *control* of power. Liberty cannot exist

without power. There are two conceptions of liberty—one negative, the other positive. The negative conception of liberty, the one first appreciated and first achieved, consisted in getting away from restraints. Men were not free in the Eighteenth Century. They desired liberty—that is, they desired to get away from certain restraints, certain inhibitions, that they might do the things they desired to do. That is a negative conception of liberty. Liberty is also constructive—it is positive—and the essence of constructive liberty is control of power. John Dewey says an engineer is free to the extent that he can control his engine. A surgeon is free to the extent that he understands human anatomy and the technique of operations and the effects of operations. Therefore, liberty and power are not inconsistent at all. In the Eighteenth Century, because a man had always been a slave or a serf or hemmed in and hedged in on every turn, he commenced to break these bonds and to achieve negative liberty. He rather unconsciously and ignorantly attributed his past condition to power. Therefore, prejudice developed among some political thinkers of the Eighteenth Century against a powerful government. It was said that government is best that governs least. The Articles of Confederation reflected that conception of liberty—a weak national government. A government that could do nothing was essential to liberty, according to that philosophy. The German confederation which required a unanimous vote of all the states in order to check power was in harmony with that negative conception of liberty. Fear of power dominated the political thought at the close of the Eighteenth Century because of the misuse of power by arbitrary and tyrannical governments of Europe.

There is no inconsistency between power and liberty. A man has his individual rights because of sovereignty. He can have no individual rights without sovereignty. Sovereignty, this thing that we call underived, unlimited, indivisible power, therefore is not to be feared by the citizen—it is to be welcomed, because in it he finds his liberty, he finds his individual rights, provided sovereignty is properly located. Therefore, the location of sovereignty forms the very basis of a free government, and the liberty of the world politically is due to the fact at the present time that in this country we have properly located sovereignty.

What is the location of sovereignty according to our scheme of government? Sovereignty resides in the people. There is no danger of power so long as it resides there. Individual rights find their basis in sovereignty, cannot exist without it, and an individual had no rights

until sovereignty was properly located. The people do not delegate this sovereignty at all—they always keep it—they only delegate power to the government.

We say that the source of sovereignty is in the people. Perhaps we will avoid considerable confusion if we simply say that what is spoken of as legal sovereignty is exercised in our government by the electorate, that is, by that part of the people who vote. Technically speaking, the term "people" in the United States is limited to the electorate, and this electorate exercises sovereignty. The source of sovereignty, however, is in the people as a whole. Legal sovereignty is exercised, is made manifest, by the electorate. This electorate is continually changing. Men die. Men move away. But it is continually restored from this storehouse—that is, a boy at five will ultimately vote, a girl at five will ultimately vote. The electorate derive their power to exercise sovereignty from the whole mass of inhabitants that we call the people. The electorate is representative of the whole group of citizens that occupy the given territory that we call a state. A voter, therefore, votes not only for himself, but for all others whom he represents in the state. How necessary then that the great privilege of everyone to vote shall be maintained and safeguarded!

In the early days of the country the writers and statesmen, even practical statesmen, were greatly confused as to where sovereignty was located in a government such as ours, because the government was new and different from any that had ever existed before. The old conception was that sovereignty was located in a king, or in an oligarchy or an aristocracy. We could not accept such a theory. That was about the only thing that we were certain about at the time the Constitution was adopted. But just where under our scheme of government sovereignty was to be located was not clear, nor made clear. The result was great confusion and many views expressed in regard to that question. The Supreme Court seemed to accept the view, because the Court had to face the problem in a practical way, and the easiest way out seemed to be a conception of division of sovereignty between the state and the commonwealths, and that theory was accepted by many political thinkers. John C. Calhoun, who was perhaps the most profound and logical thinker of his time, advocated correctly the theory that sovereignty in its very nature is indivisible, therefore, the Supreme Court was in error in its interpretation of the nature of sovereignty, but Calhoun was mistaken not in the nature of sovereignty, but in the location of sovereignty, in that he insisted that sovereignty resided in the state government or in the people of the commonwealth.

After the Civil War things commenced to clarify somewhat, and gradually we have had developed a conception of sovereignty, and that conception is that sovereignty is located or has its source and resides in the people of the United States without any reference to state boundaries whatsoever. The thing that caused the difficulty in the early days of the country was the confusion between a state and a government. Government has derived powers, government has enumerated powers, government has limited powers. That is true with the national government and that is true with the state governments. The state is the organism, the government is the organ. The state is the principal, the government is the agent. Therefore, the Supreme Court was confusing the powers that belong to a government with sovereignty.

One of our great contributions internationally is that we made the thing work in this country, that is, we developed a government deriving its power from the people, and we have made it work to such an extent that the people have, under that government, secured their individual rights, their liberty. It is spreading to all parts of the world.

The old notion of what a law is must be restated to be in harmony with this conception of sovereignty. Many years ago the Court of Appeals of New York said that a law is a rule of conduct prescribed by a superior which the inferior must obey. That definition was borrowed from England. All the lawyers in the United States have used that definition for generations. It is taught in our law schools. It is the answer expected in Bar examinations to the question, "What is a law?" It contemplates a superior and an inferior. It confuses government with sovereignty. It is not essential to law that inferiority should be implied in the obligation to obey. Laws must fulfill a need that is felt by the people. There are volumes of so-called blue laws, which are long since forgotten, and to which no attention is ever paid. We may observe a statute for years, and until it has been declared unconstitutional by the Supreme Court, which means that it never was a law. A Governor may approve a law against the tipping of waiters and proceed immediately to give the waiter a tip for courteous service. We know that as a matter of fact and experience a law is a rule of conduct which is obeyed. A criticism has been made that we are a country of lawbreakers and have no respect for the law. Perhaps in some instances that criticism may be merited, but we know also that many laws will be ignored because they do not appeal to the best thought of a majority of the people at a given time. Public opinion, when well matured, should be the guide to the legislator, and the

legislator must rise to the dignity and intelligence of those for whom he acts.

"In England government was based on sovereignty; here it is derived from citizenship. There obedience depended upon subjection; here it depends upon consent. Submission and allegiance was a badge of inferiority; citizenship is the charter of equality." In the United States there are citizens, but no subjects. There is no oath of allegiance other than to support the Constitution and laws. By destroying inequality and applying the doctrine of delegated power we destroyed the old English idea of a sovereign, so far as government is concerned, and established a government republican in form.

We should now consider the term "Nation," which has been so loosely used during the past few years. It is important to remember in this connection that sovereignty is not an attribute of a nation.

The word "Nation" has been confused with the term "sovereignty" and "state" and "government" and "society." A nation is a concept that has changed its content in different stages of development. The word is derived from the Latin word "Nascor," meaning to be born. Therefore, the original idea of the nation was blood relationship; that is, the nation consists of a people bound together by something in common. The thing in common was blood originally, and that is true of all primitive societies so far as we know. But when a society becomes complex and developed, it is not possible to trace relationship or blood, and the group becomes too large to define in that way. Therefore, something else is substituted for blood or is added to blood. Land became a common tie in early society, and we find men bound to the soil. That was true of all Western Europe and in Russia, China and elsewhere in different stages of development. Language is a tie—common language. Religion is a tie. Law becomes a tie; custom, tradition, all of these, so that as society moves on this thing that binds becomes more and more complex.

There is a tendency on the part of some to hold that "Nation" and "State" are interchangeable terms, but such cannot be the case. If it were true, then a nation would have sovereignty. A nation is not a state at all. A nation consists of a people that possess certain things in common. Formerly it was blood relationship, formerly it was language, formerly it was religion, formerly it was common law. Today, perhaps the most accurate statement that can be made is that a nation consists in a group of people who possess a common culture. The word culture includes literature, includes law, includes language, but not necessarily the same language; includes religion, but not necessarily

the same religion. This thing we call culture is the thing that binds in what we call a nation. A nation is a broader term than the term state. The United States is a state. It is composed of people that occupy the territory belonging to the United States. Canada is not a state. It is a territory with actual boundaries. There are people occupying that territory, but those people do not possess sovereignty, which is the earmark of a state. Therefore, Canada is not a state, but the British Empire is a state. The people occupying the territory of the British Empire constitute the people of that state. The people of that territory possess sovereignty. Therefore it is a state. Yet we belong to the same nation as Great Britain. Therefore, the word nation is a much broader term than the word state. We belong to the same nation as the people of Australia. The American soldier in France found many things in common with the soldier from Australia, with the soldier from Canada, more so, perhaps, than they found in the soldier from England. There was that common reaction, that unconscious spiritual feeling that is hard to define, which we call culture. That is a nation. The importance of it in this discussion is that sovereignty does not reside in a nation. Sovereignty resides in a state. Therefore, the word nation must be kept distinct from the word state. Any other view leads to grave difficulties.

The individual citizen, for his own highest development and for the highest welfare of society, should act freely within the sphere of freedom; the impulse to such action is a universal quality of human nature, but sovereignty (the state) is alone able to define the elements of individual liberty, limit its scope and protect its enjoyment. The individual is thus defended *against* the government by the power that makes, maintains and can destroy the government; and by the same power, *through* the government, is defended against encroachments from every other quarter.

This is the only view that can reconcile liberty with law. This presumes liberty and law in proper balance.

Individual liberty consists generally in freedom of the person, equality before the courts, security of private property, freedom of opinion and its expression, and freedom of conscience.

It is the sovereignty back of the government which defines and defends individual liberty, not only against all forces extra-governmental, but against the arbitrary encroachments of government itself. This is where *our* constitutional law is so far in advance of that of any other country.

It is sovereignty that vests our courts with powers to interpret

the Constitution in behalf of our rights and immunities and defends them against the arbitrary acts of legislatures and executives; that creates the duty of the executive to obey the final decisions of the courts and execute the laws; that provides for impeachment on failure of the executive to do so; that gives us the right to amend the Constitution and thus prevent nullification by governmental servants. What better guaranty of individual liberty against government could be devised?

In the great body of the people sovereignty resides. From it flow all the blessings of life, liberty and happiness. Out of it government is projected in all its forms—local, state and federal. In it are reconciled government and freedom—law and liberty. From a study of it we learn anew the meaning of the words: "We, the people of the United States."

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