

(editor's note: This paper was transcribed from a handwritten cursive copy with various difficulties. For a perfect rendition, the reader might wish to consult the original, itself a copy, in the volume entitled *Literary Club Papers I*, 1885 – 1886 Oct 3, '85 to May 29, '86) The original is very badly faded.

Budget – Hinkle editor  
April 24, 1886

### Maine's "Popular Government"

The study of constitutional government proceeds apace on both sides of the Atlantic. The latest book on the subject is Maine's *Popular Government*. Lawyers familiar with his great work on *Ancient Law* need not be told that any subject undertaken by this author will be made interesting and suggestive in a high degree. The scope of his studies, the breadth of his view, the keenness of his insight, the boldness of his generalization, and the beauty of his style, give him a hold upon the reader such as few writers obtain. All these qualities are as manifest in this volume as in those that preceded. Yet I think many readers will arise from its perusal with a feeling of disappointment. When one places himself under the tuition of so great a master, he naturally expects to be led up to the mountain-tops, and shown how the kingdoms of this world should be governed. Instead of that, we have only a discussion and critical consideration of popular government from a moderately conservative English stand-point. The author recurs to and adopts the ancient classification into governments by the "Many" democracy, by the "Few" oligarchy, and by the "One" autocracy, and we are indirectly given to understand that he prefers government by the few. He quotes with approval a remark by Strauss that "history is a thorough aristocrat" meaning that the experience of mankind is favorable to the oligarchic form of government. Throughout the book the author only asserts conclusions, offering very little in the way of proof. Thus the saying of Strauss would, I submit, be more accurate if modified into something like this: "History is an autocrat with democratic surroundings and tendencies;" for as Maine elsewhere remarks those governments have been most successful which contained a large popular element, and probably should have added that the era of greatest popular power has generally been the era of greatest energy, achievement, and glory. Such are the conclusions to be drawn from an elaborate review of the popular features of various European governments, ancient and modern, by Sir Frederick May in a recent work called *Democracy in Europe*.

John Stuart Mill has made a remark somewhere, similar to that of Strauss,

but with an important modification. He says: “the governments which have been remarkable in history for sustained mental ability and vigor in the conduct of affairs, have generally been aristocracies; but they have been, without any exception aristocracies of public functionaries.” I take it that by aristocracy of public functionaries he refers to men who have obtained control through official position rather than because of hereditary right. With these two modifications, we are not far from a representative republic. Given the select governing body, and popular cooperation, all that remains to convert such a government into a republic is that the choice of the governing body shall, in some manner, directly or indirectly, be made by the people.

Maine uses the word Democracy to describe a form of government, the government of “the many,” above mentioned, and he asserts that democracies have generally been turbulent and short-lived. If he means to include governments of the representative soil, which in one sense are governments of the many, his assertion seems open to question. It is doubtful whether a careful examination of historical facts will show that representative governments have been short-lived. Representative, or quasi-representative government was actually practiced long before any theory respecting it was formulated. By quasi-representative governments I refer to those wherein rulers have been chosen by some sort of popular selection not avowedly upon any theory of representation, yet to a greater or less degree actually representing the popular will. Such were many other republics, and free cities of the middle ages. The proper place to look for the origin of this sort of government is among the local governments of medieval times, especially those of towns and cities. Ever since the time of Ed. the city of London has had a Board of Aldermen and a Council, the latter chosen by a limited popular suffrage. A similar form of municipal government was common in France and other South European countries at an earlier date. As the custom of granting written charters of rights and privileges to towns and cities seems to have suggested the Great Charter, so the success of this form of local government probably had much to do with the development of the two legislative bodies known to the British Constitution. In connection with the latter it seems pertinent to observe that the representative portion of that government has for centuries past been its most efficient part, and seems likely to survive all the rest.

In view of the foregoing facts and others of a similar sort, which might be adverted to, it will not due (sic) to assert that representative government has been wholly or even mainly unsuccessful. May it not be that the two

elements which both Maine and Mill agree are necessary to a highly successful government i.e. a select body with popular assistance and cooperation may best be secured by a representative system more or less modified. The part of Maine's book most interesting to Americans is naturally that in which he discusses the Constitution of the United States. It is singular, and a little amusing to find that the portion of our legislative practice which has recently been sharply criticized by Mr. Woodrow Wilson, and others, finds much favor with this author, and reversing the American critics, he disparages the British system of originating legislation by a single great committee called the Government, and commends the Committee system of our Congress. The tone of this part of the book is sufficiently laudatory to satisfy the most exacting American. The author appears to have been especially impressed by the shrewdness and skill displayed by "the fathers" in erecting dykes against popular floods. He dwells on the great difference between the British and American systems in the manner of affecting constitutional changes, and views with evident regret the fact that in his own country such changes can be made by a simple act of Parliament. He points out that such a change in the elective franchise as was recently made in England, could only have been accomplished in the United States by the concurrence of at least sixty distinct legislative bodies the two houses of Congress, and the two houses of the legislatures of each of 29 states. On this point I venture the suggestion that while the British system may be too pliable, ours is perhaps too rigid. It is noteworthy that the only amendments to the Constitution of the United States since the time of Jefferson were placed in it at the point of the bayonet. The system so conservative as to require a civil war to effect a structural change, cannot be said to be perfect. Each new state added to the union increases the difficulty of amending the Constitution. To a large extent, the trouble which might have arisen from the fixed character of the instrument have been avoided by liberality of construction. Here the work of that peculiarly American institution the Supreme Court, has been of the greatest value. Building on the foundation laid by Marshall and his compeers, the court has slowly erected a safe and substantial structure worthy of admiration. Our author has only words of praise for the Supreme Court, and he regards their position and function in connection with our government as something like a brilliant political invention. He points out the fact that while the Court may continue the Constitution, and deny the validity of any act of Congress conflicting therewith; it can only be done in a case involving an actual controversy between citizens, and that in this way the decisions of the Court are much less likely to be affected by party feeling than if they were given in response

to questions propounded by other branches of the government. The position of the Supreme Court is unique, but I think its origin can be traced. Nearly all the colonies had charters from the Crown which were to them the organic law. No act of a Colonial legislature could stand as against the charter; and in case such act were challenged as contracting (sic) the charter, it was the duty of the Colonial Court to investigate and determine the point when a case involving it came before them. The existence of the charters and the practice with respect to them tended to familiarize the colonists with the idea of a written law superior to ordinary legislation, and with judicial interpretation of such law. After the separation, the People in theory took the place of the King, the Constitution of the charter, and the Supreme Court succeeded to the duty of interpretation. So we find that the Constitutional functions of the Supreme Court were not invented, but grew up naturally from the circumstances of the time as do nearly all political institutions of any value. No man ever invented a practical government or any large part of one, and the wisdom of the fathers is in no manner more strikingly shown than by their avoidance of temptation to attempt anything of the sort. As shown by Maine in commenting on the Federalist, they ransacked history for practical example, and nearly every provision adopted had been previously justified by experience. Maine's book is a subtle and powerful argument against a purely democratic form of government; yet such are the limitations and admissions that one may accept it almost entire, and not despair of a Republic.

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