(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 1*, 1885 – 1886 Oct 3, '85 to May 29, '86) The original is very badly faded.

Socialism And Democracy

It is not at the first glance apparent that philosophy and politics have any connection, and if we confine our view to municipal politics, it is painfully true that those who deal with them are blind, with the blindness of those who will not see, to any such relation. We may, without being accused of libel, extend the scope of this remark to our state politics. What member of the Legislature, when he introduces a bill, thinks how it accords with any political theory? Is it not on the other hand an objection to any measure in the eyes of those who make our laws that it is not consistent with any theory of politics? Is not all legislative action just as empirical as the medical practice of one of the Indian doctors, whose diplomas consist of their long hair and swarthy complexions? But too many of the numbers of our Legislatures, under the impression that the business of the legislatures to legislate, seek to cure evils visible to their vision by remedies which they advise without the knowledge which would inform them that the same remedies when tried elsewhere have produced evils worse than those they were meant to cure, or have proved inimical to the constitution of the patient. Of such legislation we have had too much in Ohio, though perhaps less than in other states.

My subject, however, is the connection of politics and philosophy, and more particularly the opposing theories of political philosophy, not the mischief which grows out of the utter disregard of any theory of philosophy or politics in our daily life. Before entering, however, upon the discussion of these theories, it may perhaps not be out of place to demonstrate very briefly that political practice is capable of philosophic exposition. No one will be disposed to deny that the relations of men to each other are capable of explanation, and of such an explanation as shall bring them all within the scope of a set of rules, few compared with the vast variety of human transactions, yet embracing every detail of the life of the race. There is nothing mysterious about politics which makes it any less comprehensible than it would be if it were called that part of the theory of the relation of men to each other which has reference to their relation to that organ of their collective desires which is called the state. To be sure, the problem which this sets before us is difficult, yet it is not a problem to be solved by the use of magic formulae, but by the ordinary methods of study.

To begin with, not merely is philosophy the true guide through the crooked and entangled paths of political affairs, but religion is much more closely connected with politics than is usually thought. A little reflection will convince you that no government can be carried on for a day which does not make some assumptions about religious doctrine. The subject of marriage, divorce, and inheritance are all matters about which any government that pretends to the name must legislate, yet they are closely involved with religious belief. Who can doubt that legislation on these subjects would be different as the legislator might believe either that Joseph Smith and Brigham Young were prophets inspired of God, or that Leo XIII is the vicar of God upon earth, and that his utterances in the matter of faith are infallible, or that any religious belief whatever is a degrading superstition. We need not seek far for examples of every one of these views. I leave to the imagination the state of the law in Utah, if the Mormons were left to themselves, but it may not be so familiar to many of the members of this Club that the difference between the methods of disposing of a man's personal and real property after his death has grown out of the fact that the English law of the Middle Ages regarded a man's movable property as being, in the first instance, a fund to provide masses for his soul, of which of course, the church had charge. In France, within the last hundred years we have seen a government which acted upon the assumption that any religious belief was a degrading superstition, though it did not last long enough to leave its stamp, to any great extent, upon the national law. Our present American system makes the tacit assumption that no religious belief is wholly true, and, as to Mormonism at least, that some parts of some are false. This is essentially a compromise growing out of the fact that the people are so divided that no religious belief is held by a sufficient majority to enforce their beliefs on the rest.

These illustrations by no means exhaust the fields of the law which are bound up with religious belief. Wherever adoption is found as a natural growth in the law of a nation, it appears to have grown from the worship of deceased ancestors as a religious institution. The Jewish Institution of the levirate which is familiar to most of us seems to have had the same origin. Our modern law of trusts and more particularly that of charitable trusts owes its origin to the ingenuity of the clergy in the Middle Ages. – I have thus briefly noted the influence on social and even legal institutions of the beliefs, which men hold about their relations to the unseen world, but their views about the proper sphere of law and of government exerts an even greater

influence on law and customs.

Men hold in various degrees of purity, two views of this sphere. The most appropriate names for these two views are the paternal and the individual. Few hold either view in logical completeness, though in modern society the individual view governs the larger field of governmental action. I do not mean by paternal to brand it with what Bentham calls a question-begging epithet, but to describe the view that the morals of the family relation are to be introduced into public affairs. In this view the state stands toward his young children, and must protect them, not merely against the invasion of their rights by others, but against the evil consequences of their own passions and vices. That view justifies every invasion of privacy that may be brought for the benefit, not merely of all in common, but for that of those attacked. The theory is that the state can manage my business better than I can myself. Leaving aside the question of the working of the theory, were the ruler perfectly wise, perfectly informed, and perfectly benevolent man, let us consider its operation where the source of governmental authority is the majority of the adult male inhabitants of a country or state. As a stream can not rise higher than its source, so in such a state of society the collective wisdom as shown in the government can not be greater than the average wisdom of the citizens who govern, and, unless in very rare contingencies it is unlikely to be less. Which of us would like to be told by the people of Ohio what he should eat or wherewithal he should be clothed? I do not say, what he should drink, for it is the effort to say what that is at present, the most marked manifestation of the very sentiment I am talking about. This effort has led to the revival in this country of every one of the abuses against which our fathers rebelled from the accession of King John to the Declaration of Independence. In Iowa we have had the procedure of the Star Chamber revived under the name of injunctions against maintaining a nuisance whereby a man may be compelled to criminate himself upon interrogatories, may be imprisoned and fined at the pleasure of a single judge, for refusing to do so, and may be punished by ruinous fine or arbitrary imprisonment for an indictable crime without the intervention of grand or petit jury, and without even the knowledge of the prosecutor appointed to represent the public. In Kansas, we have a statute which deprives every devout Protestant of the rights for which John Huss and Jerome of Prague died at the stake, which enacts that every church in which the cup is given to the laity in the sacrament, may be closed as a public nuisance, and which practically prohibits the free exercise of any form of Christianity except the Roman Catholic. In Vermont we have a law which

exposes any person who may be suspected by an evil disposed neighbor of having intoxicating liquor in his possession whether with or without the intention to sell it to the risk of having his house searched at any hour of the day or night, his property destroyed, and himself arrested.

Neither is this the sole form in which this doctrine appears. A distinguished senator of the United States has for years sought to induce the government to purchase the telegraphs, thereby giving us a slightly cheaper and much worse service than we have at present, and it is now proposed that the post office department shall set itself up as a savings bank in every nook and corner of the country; to the destruction of the building associations and other voluntary institutions by which thrift and industry have been encouraged all over the country without destroying the spirit of self-reliance which, once gone is so hard to replace, whether in the citizen or in the state. Those who advocate government telegraphy are ignorant that in England it has hindered every advance in telegraphic methods, and has greatly delayed the introduction of the telephone, and still deprives it of its full usefulness. In the neighboring state a good telephone service has been broken up and disabled by law, and the rights granted by the patent laws of the United States have been sought to be confiscated without any compensation to those affected thereby. In New Hampshire the law has practically deprived every citizen of the state of the power to ensure his property against loss by fire, while intending merely to make contracts for them. The object of this law could have been obtained by a provision that in every action of contract the successful party should recover in addition to his costs and damages a reasonable attorney's fee to be fixed by the court, having regard to the amount involved, and the services performed but the state, having thought fit to violate its prime duty by making justice dear, has now punished its citizens for its own default.

We find politicians advocating state ownership of the railways, in entire ignorance of the fact that though repeatedly tried in this country, it has always ended in failure, alike in Pennsylvania, Massachusetts, and Georgia: none of these advocates seem to be aware that in Italy, where the experiment was tried for some years, it has been abandoned and the railways have been leased as promising better accommodations for the public, and relieving the state from a serious financial burden. In France, where the railways are to revert to the government, the whole country is hampered, the building of new lines discouraged, and the service made decidedly worse and more expensive than it is in either England or this country, by the fear lest

something may be done to decrease their value when they fall in. The first class fare from Geneva to Paris, a distance of 390 miles or thereabouts is 78 francs, or about $15 with 26 francs extra, or about $5 for a birth. The first-class fare from New York to Buffalo, at least 40 miles farther, is less than $9 with $2 extra for sleeping accommodation. If the tariff on grain from Chicago to New York were based on local rates, or approach them in any way, as it probably would've the government managed the railways, we should be driven out of the European grain markets by Indian, Russian, and Australian competition, or our farmers would be forced to sell their grain for less than it costs to raise it. Which would be the result we can easily imagine. Fortunately for the prosperity and credit of Cincinnati we have never tried railway management through the municipality, and our experience in railway building, and in floating loans for that purpose is not such as to encourage any thing of the sort, though any theory that would justify either would justify both. In England we find the government undertaking the business that is done here by the express companies under the name of parcels post, and adding to the army of functionaries that swarm in every country of Europe; we find a licensing system that makes the Brewers and public-house keepers a power in elections, used always for mischief, we find sober politicians talking about moral duties which the possession of property based upon its owner as ransom, and proposing to exact it to give the undeserving luxuries they have not earned; we find municipal governments investing in houses for the undeserving poor out of taxes levied on the deserving poor; we hear it said people are no longer afraid of communism. In France, we find a herd of petty offices including every tobacconist, every news dealer, and every peddler used to corrupt elections; even while in this country we find every one whose necessities compel him to borrow money treated as an infant who has not sense enough to determine the average rate of interest, but must be protected against himself and made unable to borrow, if the risk be great, for if it be true that high interest means bad security, it is nonetheless true that bad security involves high interest.

These are instances of what the paternal theory of government has accomplished; but when we come to what is proposed, we find that in Germany it is proposed that the government should become the sole dealer and spirits, both wholesale and retail, and that the increase of drunkards should be made to the advantage of the treasury; that the government should become the sole life and accident insurance company, and should compel every laboring man to become insured, and, following the example of France and Austria, that the government should become the sole dealer in tobacco,

wholesale and retail. The results of the last measure can be best imagined by those of us who have been unfortunate enough to be compelled to smoke French government cigars or to use French government matches. Even in this country we find it proposed to prevent the willing from working more than eight hours a day, but punishing anyone who employs them; we find the right to employment positively asserted, and we find a lot of professional workingmen visiting the mayors of our cities, and claiming that labor-unions have a right to prevent willing men from working, and, encouraged in that sort of talk by the newspapers which, while interested on the right to violate the laws of the state themselves, are very tender of the feelings of other law-breakers, if they only have votes. We find further, extravagant public works advocated to afford employment for political strikers whom no private citizen in his senses would employ, and whose chief work lies round saloon doors, and at the primaries.

These are examples of the paternal theory of government but they are merely partial examples of what it is. The world has seen but two consistent and complete paternal governments in the whole course of its history,–the government of the Incas of Peru, and that of the Jesuit Missions in the Valley of the Madeira in Bolivia. Let us however suppose that one of our modern elective governments should at last reach the Paradise of paternalism which is longed for by our modern social reformers, that every adult male or female resident had a vote, that every means of production, transportation, communication, and distribution belongs to the government, that the right to live is fully recognized, and that every such resident is provided as such right requires, with sufficient food, drink, clothing, shelter, and fire, – how then is any one to be induced to work? By public spirit? – perhaps, when the world is peopled with Angels. By compulsion? – that involves a tyranny of which we have no conception. How long, too, would it be before the right to bring into the world others to be fostered, educated, and then by all would have to be restrained by law, or regulated almost so strictly as it was by the Jesuit fathers in their missions in Paraguay? When this point was reached, and reached it inevitably would be, we should have a people of slaves whose sole right would be to choose their own masters. How long they would be able to keep that right if they once elected an able, vigorous, unscrupulous master, I shall not stop to discuss.

All this has grown from the belief that the authority of the state is unlimited, that the state owns its citizens, that the state is any thing but the agent of its citizens to do for them some things that they can not do for themselves. It is

the old doctrine of the divine right of kings turned upside down, but nonetheless growing out of the tendency of mankind to make a fetish of something. This has been expressed in the saying that Parliament can do anything but make a man a woman.

As a maxim of law strictly "Quod principi placuit legis habet vigorem" if the word princeps be read ultimate political authority is perfectly true, that is the judge and the lawyers must enforce the commands of the ultimate political authority or cease to be judges and lawyers. The question of the policy or legitimacy, to use a much abused phrase, of the command is not for them except so far as it may be a guide in the construction of a doubtful law. The question of the scope of government however, is not at all a legal question, and it is from treating it as being in any sense a legal question that Hobbes, Bentham, and Austin have been led astray. Because a government can do anything it does not follow that it has a right to do so, yet every one of these people and everyone confining his view strictly to legal right and wrong would say that it had. It may very well be the legal duty of a judge or other officer of the law to do that which is his duty as a man rather to die than to do. The relation between the man and the state is not a question of law, and nothing but error can result from the attempt to treat it as such; it is a question of morals, pure and simple.

The writer should treat the power of government and the right of government as synonymous, whether Filmer, Hobbes, or Austin treats as false the theory which, when applied to life under the name of Stoicism, produced the noblest rulers of men the world has ever seen, and, in the Roman Law changed it from a case hardened framework of religious rules to a flexible, scientifically acute garment for the life and business of a great commercial state which was the cause and origin of the first declaration against human slavery that the world ever saw, at a time but a century after St. Paul was bidding slaves be obedient to their masters. This theory, which authors fail to appreciate at its due weight, is the theory that the nature of man is essentially the same at all times. That man is a social animal, that as such animal it can be ascertained by observation – what is best for the harmonious development of his nature, and that as his nature is the same, so what is best for his nature is the same, and that some at least of the rules of social life are so suited to his nature, as that they may fairly be called the natural laws by which human society is governed. Further, & as a necessary consequence, from what has already been said, these rules are ascertainable, and when so ascertained they form, so far as they go, the proper guide for

the legislator — This theory after transforming the Roman Law has been the foundation of modern International Law, for Grotius' famous treatise “De Jure Belli atque Pacis” is nothing but a treatise upon the law of nature, as applied to the dealings of independent states with each other. The theory has transformed International Law as it transformed the Roman Law: for while it will be noticed that Grotius puts the subject of war before that of peace, the modern text writers put peace before war, as though peace were the natural state of things while the laws and practice of war themselves have become milder, largely through the influence of this very theory. The world would shudder now at the practice that prevailed in Grotius' time, of putting to the sword the garrison that defends an indefensible post or of giving up to be sacked every town taken by storm; yet unless this theory be true what wrong is done by either of these acts?

To return for a moment however to the neglect which this theory has been treated by the Masters of the English School of Jurisprudence, and the reasons for it. They are partly at least to be ascribed to their ignorance of the Roman Law, partly to their confining their attention to the legal institutions of nations in an advanced state of civilization, and ignoring the fact that society and its institutions are a growth and that much can be learned from the study of the embryo about the nature of the full-grown organism. The great fault of the method of Rousseau and Sieyes, as well as that of Bentham and Austin is the treatment of society as a machine, not as a living body, and the encouragements of rash experiments on it.

The theory I am now discussing is expounded in a remarkable book recently published which contains one of the finest protests against the assumption of power by government that has ever been published, a work which is as applicable to much of what goes on in this country as to the concrete examples of usurpation which the author cites from abroad. Mr. Spencer's voice, which is raised in his little book The Man Versus the State most emphatically in opposition to taxing the deserving poor to provide homes for the idle and dissolute would be raised just as emphatically were he in this country, against the confiscation of city lots in New York by the elevated railroads, against stealing the savings of the poor by a debased silver coinage, or a legal tender law in which every member of the convention that formed the Constitution of the United States would have denounced as alike impolitic and unconstitutional, but which our Supreme Court in its wisdom has declared to be the exercise of a power incident to sovereignty that the general government does not possess, or the confiscation of the property

than any man who chooses to set up any business that may be deemed of public interest, that is justified by the decision of the same court in Munn vs. Illinois. 94 U.S. I can make but a short extract from that very remarkable opinion, which is as follows: “under such circumstances, it is difficult to see why if the common carrier, or the miller, or the ferryman or the inn-keeper, or the warfinger, or the baker, or the cartman or the hackney-coachman pursues a public employment, and exercises a sort of public calling these plaintiffs in error do not. They stand, (to use again the language of their counsel), “in the very gateway of commerce,” and take toll from all that pass.” Thus treating the right to fix the weight and price of bread as being in an unquestioned right of the government, which justifies the fixing of the charges which any one may take for storing grain.

Sir Henry Maine in the remarkable book which recently had a still more remarkable review in the Cincinnati Commercial Gazette, seems half unconsciously to hold the same view. His phraseology to be sure is largely colored by the ideas of Hobbes and Austin, but his thoughts are full of the law of nature. In fact, it is hard to see how a thoroughgoing utilitarian can, upon principle oppose any exercise of authority by the state, however outrageous it may appear to anyone else. Sir Henry Maine in that book is discussing the danger of Popular Government that springs from its tendency to adopt Rousseau's theory that individuals surrender themselves absolutely to the collective whole which he very justifiably describes as despotism turned upside down.

Herbert Spencer, however, in the little book I have before referred to, has intimated that in his judgment the theory of natural rights is demonstrably true, and that in essentials just those rights which we regard as most precious are recognized in all societies, even before the formation of regular governments.

According to these views, of which the Declaration of Independence is simply a great manifesto, man is by his own nature endowed with certain rights, or, to put it in a more intelligible shape for those who may not be familiar with the forms of speech of the last century, in the process of organic evolution the species has acquired certain habits, under the influence of natural selection, which are necessary for its healthy growth, and for the wealth of the individuals that compose it. The recognition and assertion of certain individual rights is the chief of these habits. These rights include the class of rights that we express by the word property, not merely the right to

enjoy that which I have in my hand, but the rights of landed property, and that even among the most savage tribes. In the hunter state we find the right of the tribe to the exclusive possession of its own hunting-grounds fully recognized, though, as a matter of course such property is incapable of individual ownership. We find, however, even in the earliest state that weapons of war and of the chase are individual property, and that among the horse-owning tribes, every horse is private property. So too is it the rights embraced in the institution of marriage, which though in some backward societies, and under stress of circumstances it has taken strange shapes, we yet find essentially the same in all strong and progressive societies the union of one man one, and occasionally more women. So, too, the law of contract has been well defined as the legal expression of the expectation of good faith that runs through the dealings of men with each other. When then, according to this view, we come to inquire the purpose and just authority of government we find that in essentials it is first of all to substitute for the extra legal force which each man would otherwise use in protecting himself and his from aggression, a legal force which, by its concentration and certainty shall reduce the occasion for its exercise. Here, too, we find room for the idea of vengeance in the criminal law, so earnestly insisted upon by Sir James Stephen in his History of the Criminal Law, for the punishment for wrong must be sufficient, not only to deter other wrong-doers, but to remove from the person injured the temptation to step beyond the law in his turn. It is, then, the chief end of government, and that for which it was formed to protect men in their natural rights, infringing their liberty only so far as is necessary to protect the equal liberty of others, and when this is done, to leave them free to develop themselves as they can.

This theory has found fitting expression in the Declaration of Independence, in which the founders of our national existence said: “we hold these truths to be self manifest, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.” And again, so tainted with the phraseology of Rousseau in the Constitution of Massachusetts of 1780 Part 1 Article 1, where we read “all men are born free and equal, and have certain natural, essential, and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property, in fine, that of seeking and obtaining their safety and happiness.”

These state papers happily expressed the then tendency of all governments over people of English Blood, a tendency shown in England in successive acts repealing the penal laws against Roman Catholics, removing their political disabilities, as well as those of the Jews, abolishing the excessive right of the clergy of the Church of England to perform marriage, reforming the poor law system which had put a premium on female unchastity, and removing all restraint from the sale of landed property whether settled or not. In this country refine the fruits of the same doctrine in the abolition of the State Church in Virginia and New England, and the abolition of human slavery in fifteen states, and in the relief alike in England and the United States of married women from all or most of the disabilities with reference to the holding and management of property, that they formerly labored under.

Many things however still remain in every country which are distinctly in conflict with this theory. In this country we find a city building and owning a railroad and many others holding shares in them. In England we find cities owning docks; we find such difficulties thrown in the way of examining titles that the fee of small tracts of land is made too expensive for any one to buy. In France we find a system of police regulation and inspection of the class of women called unfortunate intended to secure results, of at least doubtful desirability, by methods which have been shown to lead to the grossest abuses. To conclude, we are approaching that period of our natural existence when we shall have to choose our path. Two paths lie before us: one leads through individual self-reliance and character to national prosperity, glory, and life; the other leads through individual helplessness and dependence to national bankruptcy, degeneracy, and death. Which shall we choose?

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