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The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?

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Abstract
This article sets out to chart the evolving institutional structure of the EU, in the context of theories about forms of state. 'Forms of state' are taken to be conceptually possible expressions of political authority organized at the national and transnational levels, here dealt with as emphases and qualities to be accented rather than phenomena to be sorted into categories. The EU is examined in the light of three stylized state forms - the Westphalian state, the regulatory state and the post-modern state. Each of these captures important elements of the evolution of the EU, and provides support for analysis of its development as a form of 'international state'. Such an analysis implies attention not only to forms of state, but also to related concepts such as government and governance which give leverage on the exploration of 'international state forms'. Conclusions are drawn about the power of the three 'metaphors' used, and the relationship to possible empirical studies.

I. Introduction
Since the passing of the Single European Act (SEA) in 1986, the European Union (EU) has been marked by acceleration in both its legislative activity and its institutional developments. At a minimum the approaching Intergovernmental
Conference in 1996 holds forth the promise of intensive discussion of institutional issues. Issues of representation, voting rules, proper jurisdictions of governments at different levels, and the efficiency of European institutions may all be taken up. Nevertheless, viewed from a long-term perspective, the 1996 conference is likely to be but one punctuation mark in a long, meandering, often messy process of political change.

The observation that European integration charts an incoherent path, is disjointed, moves forward (and backward) in fits and starts, and generates intense disagreement over the nature of EU institutions will surprise few people familiar with the EU or the historical process of state-building with which it is often compared. The work of Bulmer (1994), Skowronek (1982), and Deudney (1995), all serve as useful contemporary reminders that the American state, at least between 1789 and the end of the Civil War, had similar characteristics. The acquisition by the Supreme Court of the powers of judicial review, the right of the federal government to regulate inter-state commerce, and the growth of extensive police powers at the federal level came gradually. In addition, even today, the constitutional right of citizens to bear arms contradicts the monopoly of legitimate violence which we usually take as the hallmark of the Weberian state (Deudney, 1995, p. 208)

My main task in this article is to analyse the evolving institutional structure of the EU. This effort requires some preliminary comments. During the 1960s and 1970s, scholars of European integration spent considerable effort in classifying and creating taxonomies of integration as process and outcome. The EU was treated as a supranational state, a confederation, an emerging federal union, a concordance system, and a multi-level polity, among other things. This helped to focus our attention on important relationships (e.g. the categories federal-confederal pointed to the balance of powers between central institutions and the Member States) and to identify classes of cases which could be grouped together. Today, the study of European integration is moving into a post-ontological stage; scholars are less concerned with how to categorize than how to explain process and outcome, paying less attention to 'the nature of the beast' (see Risse-Kappen, pp. 53-80 this volume). Indeed, in some literature, the EU is simply assumed to be a polity, and analysis of policy-making within specific issue areas proceeds much as it would within domestic polities (Hix, 1994).

In this article, I maintain a focus on macro institutions and ask how best to describe the EU. I argue that the concept 'forms of state' provides useful leverage. In what follows, I attempt to clarify what I mean by 'forms of state'. I then link this concept to governance and government and explore three highly stylized state forms - the Westphalian state, the regulatory state, and the post-modern state. One aim of an exercise of this type is to understand better if we are on the right track. By probing the theoretical properties of these three ideal types
in light of European integration experience, I hope to illuminate to some extent the question of whether integration theory has placed the important problems at the centre of analysis. The spirit of this article is very much that of a comparative exploration of three metaphors rather than a test of three theories.

II. Forms of State

To guide analysis of emerging European institutions, I rely on the concept 'forms of state' as developed by Robert Cox (1983, 1986; see also Rupert, 1995, pp. 39-42). 'Forms of state' is an umbrella concept that encompasses many historically specific state structures, e.g. the pluralist state, night-watchman state, predatory state and welfare state. Each of these forms is a conceptually possible expression of political authority organized at the national and transnational levels. In my analysis, I treat each state form less as a discrete category and more as an emphasis, something to be accented rather than something to sort into a category.

The idea 'forms of state' suggests that there is no such thing as 'a state,' or even a 'modern state' or 'nation-state,' with trans-historical and cross-societal significance. Our simplified concept of the modern state is based on a very selective reading of the histories of a few countries (France, England, Germany), histories with differences as important as the similarities. At best, we can speak of different state forms, thought of as clusters of institutions embedded in specific social formations which are in turn embedded within distinctive historical periods. These state structures should not be reified and thought of as eternal fixtures of politics.

A related advantage of the concept 'forms of state' is that it points us more directly to the necessary auxiliary concepts, in particular government and society. This focus leads us to emphasize the differences in the social constituencies of state structures. Particular state forms are emanations of social formations that rest on specific clusters of social interests, e.g. labour and capital, different interest and professional groups, and different portions (organized or not) of the mass public.

III. Government, Governance and the International State

In 'Governance, Order, and Change in World Politics' (1992), James Rosenau raises an interesting question. How can a decentralized system of political authority, one in which governments reside in the constituent units, govern the relations between them? Decentralization does not imply the absence of interdependence and conflict among the units (states). Yet, without Hobbe's Leviathan and Durkheim's conscience collectif, the usual mechanisms of conflict resolution and social control are wanting. There is only so much that Smith's 'unseen
hand' can do. Even a simple international division of labour depends upon secure property rights (for goods in transit, foreign investment), an agreeable system of payments, secure and respected credit institutions, etc. Both the Single European Act and attempts to create markets in the former Soviet Union demonstrate that markets are not self-instituting.

Rosenau's answer is roughly that international government, thought of as public agents holding positions of political authority, making and administering laws at the international level, is the usual but not necessary condition for governance - thought of as collective problem-solving capacities among states. In this formulation, international governance becomes possible by recreating a hierarchy at the international level in the image of domestic politics. It is possible that presently constituted nation-states could, without creating an international hierarchy of political authority mirroring domestic governments, nevertheless manage their relations to solve common problems.

This discussion calls for distinctions between governance, government and the state. Governance refers to collective problem-solving in the public realm. It directs attention to the problems to be solved and to the processes associated with solving them, rather than to the relevant agents or to the nature of the political institutions associated with these processes. Government, by contrast, refers us to the institutions and to the agents (personnel) who occupy key institutional roles and positions. In the EU, key elements of the government structure include the Commission, the Council of Ministers, the European Council, the Committee of Permanent Representatives, the European Court of Justice and the European Parliament. Each is an institution which survives the tenure of any office-holder. But each institution also defines a location occupied by specific government agents, who can act.

The third term, the state, hopefully clarifies the significance of the prior two concepts. The state refers, a la Benjamin and Duvall, to ‘... the enduring structure of governance and rule in society' (1985, p. 25). The term 'structure' implies an ongoing, reproductive set of processes, the patterns of which are stable across different agents. The state considered as a political structure includes not just formal rules guiding inter-state interactions (e.g. voting rules, agenda-setting rules) but also norms, understandings, standard operating procedures, and accepted, ongoing 'ways of doing things,' that may or may not result from formal legislation. In the EU, 'soft law' (Wellens and Borchardt, 1989), acceptance of national methods of achieving Community objectives, and informal networks of interest groups, policy experts, national bureaucrats and Commission experts, all point to important political structures that are not captured by the label 'government'.

The significance of this view of the state is best captured in contrast to its conceptualization in neorealist theory. In the neorealist formulation, the state (or
nation-state) is a pure agent, an actor with the ultimate right to decide within a given territory. Reading its security interest directly off its position within the international structure, it sends diplomats, mobilizes troops, decides on defence budgets, etc. At issue here is not the unitary character of the state, but whether the meaning of statehood is exhausted by focusing on public agents and their activities. By contrast, Duvall and Wendt conceptualize the state as ‘... a structure of political authority in which governmental agents are embedded’ (1987, p. 32). Rethinking the relationships between government, governance and state has a consequence of immediate significance for this article. Focusing on the EU, it is easy to obscure the distinction between absence of international government and absence of an international state. There is no shortage of scholars who argue that the EU lacks an international government, in the sense of a centralized, hierarchical political structure, independent of the governments of the Member States, and capable of acting (authoritatively) on a broad range of issues. But this argument, even if true, is not ipso facto a denial of an international structure of governance, i.e. an international state. One thesis of this article is that the EU already has, indeed has had for some time, an international structure of governance based on the extrusion of certain political activities of its constituent units. In short, the EU, or more accurately the ongoing economic and political relations between the Member States mediated by the institutions of the EU, is already an international state.

Recognition of the regional international state is obscured by our habit of looking for discrete islands of hierarchy, centralization, autonomy and authority at the international level, created in the mould of domestic structures, and at the same time partially replacing them. Miniature state-like structures, situated in Brussels, enjoying considerably autonomy from the nation-states, mimicking their functions and competing for political influence, constitute evidence of an emerging regional state. Thus, disproportionate attention is focused on the tug-of-war between Member States and EU institutions, on the assumption that the emergence of European authority structures comes at the expense of national ones.

The question of who has the power (resources, autonomy, legitimacy, the 'right' to decide) is of course critically important, but power issues are normally pitched at the level of agents and, as a result, attention is deflected from the EU’s more strictly performative activities, those off the agenda, because they are 'solved', bureaucratized, unproblematic, or co-ordinated quietly by the actions of public and private actors in an 'apolitical' fashion. In sum, a focus on agents turns us to government and governmental machinery. A focus on the ongoing structure of political authority and governance turns us toward the international state.
In the rest of the article, I focus on three particular forms of state: the Westphalian state, the regulatory state and the post-modern state. Each concept is an ideal type. The result of my analysis will not be that the EU belongs in one of these three categories. I chose these three state forms because I think that each captures certain tendencies represented in the EU. The Westphalian state is the Weberian ideal in which monopolies of legitimate violence, rational bureaucracies and centralized policy-making authority correspond to territorially exclusive political orders. The regulatory state corresponds to the transnational political structures associated with attempts to control imperfections of international economic exchange, including failures of exchange to occur. It owes much to neoclassical economics, especially the theory of externalities and public goods. The post-modern state corresponds to emerging forms of governance that are fractured, decentred, and often lacking in clear spatial (geographical) as well as functional (issue area) lines of authority. As will become clear, the regulatory state owes more to Ronald Coase than to Bodin or Hobbes; the post-modern state more to Frederic Jameson and David Harvey than to Machiavelli or Weber.

IV. The Westphalian State as Conceptual Template

An idealized model of the Westphalian state has dominated our thinking about possibilities for institutional change in the EU. This model has been important even when it is being rejected since for the most part it has provided the terms of reference for the debate. Thus, even when attention is directed to the shortcomings of the model, as for example when it is pointed out that real states often have multiple competing centres of authority (Tilly, 1975), fractious populations (Jackson and Rosberg, 1982), and alternate purveyors of violence (Thomson, 1994), these facts only emphasize the extent to which the ideal model is not realized in practice. This is very different from identifying alternative ways to conceptualize the organization of political authority.

In this section I advance two points which, together, are paradoxical. The first is that, in many ways, the Westphalian model of the state leads us astray. But if this were all there were to it, we could simply direct our attention elsewhere, and not look for theoretical inspiration from this form of state. The second point is that, in other ways, we (political scientists - not legal scholars) have failed to exploit fully the power of the Westphalian model. In what follows, clarification is needed regarding the 'misleading' and 'relevant' (but under-exploited) aspects of this model.

What is the Westphalian system and what consequences does it have for understanding regional integration in western Europe? The Westphalian system refers to the organization of the world into territorially exclusive, sovereign nation-states, each with an internal monopoly of legitimate violence. Its defining
properties include political institutions with (1) a monopoly of legitimate violence; (2) a continuous centralized staff capable of extracting taxes and administering; and (3) authoritative institutions and personnel who make policy over a range of issues. States have varied historically in numerous ways but they are alike in that they are juridical equals and are sovereign over their territories.

Sovereignty needs precise definition. It has been used almost interchangeably with autonomy and control. But few states would qualify as sovereign using these criteria. At the bottom line, sovereignty is a right, a socially recognized capacity to decide on matters within a state's domestic jurisdiction. As Thomson puts it, '[s]overeignty is the recognition by internal and external actors that the state has the exclusive authority to intervene coercively in activities within its territory' (Thomson, 1995, p. 219). There is no legal superior to the state in its internal or external affairs. Internally sovereignty implies non-intervention by 'outside' powers, non-interference in domestic affairs. Externally the interactions of multiple sovereignties imply anarchy.

If the Westphalian state system is composed of sovereign states within anarchy, the EU can integrate politically only by transcending the sovereignties of individual states, by cajoling them into accepting the status of subordinate units, and by reconstituting state sovereignty at a higher level. This requires that we see the EU as an embryonic political structure in the process of acquiring its distinctive sovereign status and surreptitiously draining these 'powers' from the Member States. Though some have escaped this tendency (Wessels, 1992; Marks, 1994; Leibfried and Pierson, 1995), the polarities with which we work - interstate system v. federal state, intergovernmentalism v. supranationalism - suggest that the state system, and its alternatives, are defined by reference to the Westphalian model.

The model of the Westphalian state system has a double significance. It fosters a divide between domestic and international politics and at the same time provides the exclusive terms of reference for bridging this divide. Change in the international system is conceived as movement in the direction of domestic politics, as the taming of anarchy; as the progressive replacement of power-based methods of conflict-resolution with rule and norm-based methods. Regional integration results in the reconstituting of state functions at a 'higher' level; it involves the domestification of interstate relations. The accretion of rules, formal laws, fragments of authority, habits, norms and political institutions, all makes the international system a bit less like an anarchy, a bit more like a constitution-alized domestic polity.

The Westphalian model encourages us to see regional integration centring on the EU as a re-enactment of the traditional processes of state-building from the seventeenth through to the twentieth centuries. Yet huge differences exist. Wars, religious conflict and taxation were critical for the construction of nation-states,
much less so for the EU. Class conflict was important in the emergence of nation-states and continues to be important in international integration, though in strikingly different ways. The emerging capitalist class from the sixteenth through to the nineteenth centuries hired armies and privateers to do its bidding. Capitalism today secures its ends through its flexibility, ease of movement, and ability to outmanoeuvre labour. Similarly, the expansion of citizenship, growth of state powers in the provision of welfare, and spread of democracy were all thought of as state achievements in the sense that they all gravitated toward a single place\(^1\) a national executive, legislature, political party, or symbolic document, such as a constitution. By contrast, European integration is polycentric and lacking in a single, centralized, political location. This is not fertile ground in which political responsibility and legitimacy can take root.

If the Westphalian model encourages us to see the EU in terms of the same historical project as nation-building and state-building, the consequence has been predictable. The portfolio of functions performed by France, Germany and England is not duplicated by the evolving EU. Similarly, the historical processes which led to the accumulation of state power are substantially different from those occurring in Europe today. These discrepancies have been interpreted as a shortfall (the EU is not a 'real' state), rather than as a qualitative difference in state-building patterns.

The appropriation of the Westphalian model by political science emphasizes the ways in which historical state and nation-building processes correspond to or differ from integration in Europe today. The analogy has not proven fruitful - not just because the EU falls short, but because activities go off in directions not captured by the Westphalian state. Yet I indicated previously that the Westphalian model had some unrealized potential.

Moving from political science to legal studies provides a different prism though which to view regional integration. In part, this is because lawyers have a different vocabulary and analytical toolkit; in part because their focus is on law and legal integration - not on economic transactions and patterns of political decision-making per se. But should not legal and political integration move together? If law codifies and gives direction to political behaviour, should not the two proceed (forwards or backwards) in step?

Joseph Weiler (1982) has cautioned us against making such an assumption. Because the process of integration is multidimensional, we should not infer that all the parts move together. The components of the integration process may themselves not be integrated. Simon Bulmer has noted the disjunction between

\(^1\) By 'place', I do not mean an exact location, a geographical headquarters where central authority resides. But the establishment and development of the democratic state brought along with it the idea that political authority, no matter how diffuse it was geographically (among territorial governments) or functionally (among branches of government), was nevertheless 'located' somewhere (in a constitution, set of shared understandings, etc.). This idea seems central to the related notions of accountability and responsibility.
Legal analysts have tended to see the process of European integration in rule-like terms, as a system of evolving rules and norms, not qualitatively different from the domestic polity. Explanations of political behaviour have tended to be rule-bound, appealing to obligations, norms, and legal sanctions, rather than based on power and interest (though these variables are far from irrelevant).

In pressing their agenda legal scholars have relied without apology on 'the domestic analogy', especially the concepts of federalism and constitutionalization. The concept of federalism has deep roots in political and legal analysis. It refers to both a specific type of polity (federal) in which power is legally distributed between central and local entities, and to a general organizing principle for governing relations among spatially differentiated units (Elazar, 1987, pp. 11-12).

Constitutionalization is a less familiar concept. The ending of this lengthy word suggests a process, in this case a process of change from a state where countries are governed by treaties into one in which they are bound by constitutional principles, more akin to municipal than international law. Federalism and constitutionalization have affinities for one another but they are not identical, as the discussion below shows.

In "The Community System: The Dual Character of Supranationalism", Joseph Weiler shows that there is still life in the concept of legal federalism. Weiler argues that there have been important changes in the EU since 1958, changes involving the relationship between the Community centre and the Member States, as well as changes in the way international treaties and laws affect citizens within these states.

These changes have come about through a series of landmark decisions that established direct effect (Van Gend en Loos), supremacy of EU law (Costa v. Enel), and pre-emption (for relevant cases, see Weiler, 1982, p. 277). The Van Gend case established the direct applicability of Community law (including the Treaties and Regulations) on individuals, without mediation by national governments. The Costa case established the supremacy of EU law when conflicts with national laws exist. And the pre-emption principle established that where the European Court of Justice has legal competence, Member States are pre-empted from taking action (Weiler, 1982, p. 277). There are powerful decisions that parallel in importance the establishment of judicial review (1803), federal supremacy (1819), and federal regulation of interstate commerce (1824) by the Supreme Court of the United States.
The importance of the Court's jurisprudence is not limited to a rearrangement of powers and competences among courts in a federal system. The centralization of powers at the federal (Community) level at the expense of the component parts (Member States) is only part of the story. The Treaty of Rome and now the Treaty on European Union have been constitutionalized, i.e. converted from an agreement among sovereign states into a set of rules binding those states and at the same time conferring on EU citizens rights that are enforceable in national courts (Stone, 1994, p. 4).

The mechanism by which bindingness and enforceability are accomplished is even more telling. In principle, two routes are possible: the first relies on centralized enforcement by the ECJ, while the second relies on decentralized enforcement. It is the second mechanism that has become dominant. As Stone puts it:

When a case before a national court turns on a question of interpretation of a Community norm, national courts may - and supreme courts must - refer the question to the ECJ. The reference suspends the proceedings at the national level, pending a decision by the ECJ. Once rendered, the ECJ's ruling is then applied by the national court to settle the case before it. The system is considered to be far more effective than direct action before the ECJ since national governments regularly obey their own national courts. (Stone, 1994, p. 3)

Legal scholarship has breathed new life into the study of European integration. Scholars working within a federalism paradigm have usefully explored the changing relationships between different levels of government, supranational, national, and subnational (Weiler, 1982, 1991; Shapiro, 1992). Others (e.g. Burley and Mattli, 1993; Stone, 1994) have not limited their focus to intergovernmental relations, but have examined the growing links between law and citizens, links that are not mediated in the traditional way by national governments.

If the term 'constitutionalization' is foreign, the general process of which it is part should not be. International relations scholars often speak of the domestification of international politics. If the international system is a competitive anarchy, an arena in which states interact on the basis of power and interest, then domestification describes the process by which that system becomes less anarchic and more rule-governed. Studies of the development of European law help to provide the legal foundations for the broader tradition that attempts to bridge domestic and international politics.
V. The Regulatory State

Students of European integration, especially during the early stage, could perhaps be forgiven for expecting the EU to take shape along the same lines as national governments. While the EU was seen as falling short of a mature state, reflecting its early stages of development, its basic template was the same as that of the nation-state. In the face of this approach, students of the EU confront a striking empirical fact. The EU's institutions and policies are systematically different from those of national governments, not only in the areas mentioned, but also in the basic profile of activities and competences. The EU's portfolio of functions and responsibilities differs radically, and is not explicable by its less advanced position on the continuum of development. According to this view, the EU is not a primitive national political system waiting to blossom.

The EU is weak in terms of the traditional tax and spend functions of government. The extractive capacity of EU institutions is nearly zero, reflecting a stalemate going back to Hallstein's failed 'own resources' initiative in 1965, one of the factors precipitating the 'empty chair crisis'. The Union spends about 1.3 per cent of the combined Gross Domestic Product (GDP) of its Member States and accounts for about 4 per cent of government spending (Majone, 1994b, p. 35). The Commission, Europe's chief administrative and regulatory apparatus, is modestly staffed by approximately 20,000 people of whom about one-third are translators. Despite occasional pre-dawn raids by the Commission, the EU is hardly a well-heeled Leviathan.

Yet the EU is generally recognized as an important institution. Why? One answer to the paradox of 'marginal spending cum recognized importance' lies in conceiving the EU as a regulatory state. The regulatory state is (in this case) essentially an international and arguably supranational state specializing in the control and management of international externalities. Because this state does not engage substantially in the redistributive, stabilization and symbolic functions of government, and because it relies on the administrative structures of states already in place to carry out its own policies, rather than on independent ones created at the supranational level, the international state can 'get by' with a very small revenue base.

Theorization of the EU as a regulatory state owes a great debt to the work of Giandomenico Majone (Majone, 1992, 1993, 1994a, b, c, d, 1996). Majone's starting point is the empirical observation that the EU shows little progress in some areas (social policy, labour policy, energy policy and foreign security policy), while substantial advances in others (single market, competition, technical standards and environment). Understanding this differential progress implies examining the microeconomic incentives associated with the sector in question. Redistributive policies are by definition costly and are therefore
electorally divisive. Of course, policies dealing with externalities and public goods can have distributional implications too, but these distributional effects are of a different order, taking place against a backdrop of common benefits. The first-order problem is to find the Pareto frontier, the second-order problem concerns distribution of benefits and costs. There are no such Pareto-efficient implications for distributional policies. There may be more or less efficient ways of achieving a redistributinal outcome, but clear winners and losers cannot be avoided.

Majone's analysis of the emergence of the EU regulatory state rests on both supply and demand-side analysis. The Commission is modelled as a bureaucracy that wishes to expand its powers, defined for the most part as the scope of its competences. Revenues and fiscal powers are treated as constraints, as givens. While this assumption may conflict with the early Commission of Hallstein, especially with his attempt to provide an independent budgetary base for the Community, it serves as a useful approximation of the Commission's activities today.

Given this assumption, the Commission specializes in that which it is permitted to do: the elaboration of its regulatory powers and the policies and structures that go along with these powers. It should be emphasized, as Majone does, that '... the costs of regulation are borne directly by the firms and individuals who have to comply with them. Compared with these costs, the resources needed to produce the regulations are negligible' (Majone, 1994a, p. 8). In other words, the regulatory framework created by EU institutions creates costs related to rule-making per se - not to the administration of these rules.

The demand side is also important. The mere existence of low costs does not imply EU regulations, for two reasons. Aside from the obvious point that some sort of problem must exist (even if socially constructed) before rules are devised, regulatory policies could easily be formulated within the domestic political arena. Indeed, for institutional and power-political reasons, formally implied by the subsidiarity principle, the domestic 'solution' should provide the presumption to be rebutted. This is especially the case if the externalities are local, i.e. do not cause substantial transborder effects. In this case, we expect the scope of the regulations to be coterminous with the scope of the externalities.

A second reason that European regulatory policy is not an automatic response to a transborder problem is that externalities do not necessarily imply the need for regulation. Self-interested agents (state leaders) may be able to co-ordinate their policies, or bargain over the conflicts, in such a way as to control these externalities 'privately'. This is the pure intergovernmental solution, fully implied by Coase's theorem, that private agents can reach efficient agreements without third-party intervention (Coase, 1960). When state-to-state co-ordination fails to provide a response, Majone speaks of regulatory failure. When such
failures involve international problems, an international political response is called for. As he argues:

... international regulatory failure, rather than market failure, explains the willingness of Member States to delegate regulatory powers to the EC. (Majone, 1994c, p. 37)

The above analysis leaves open the determinants of international regulatory failure. When do we expect such regulatory failures to occur? Among the reasons offered by Majone are strategic use of regulatory policy, lack of information and credibility. Each condition implies a perverse incentive structure. Firms in one country have an incentive to design domestic regulations so as to disadvantage firms in other countries. The possibilities for opportunism with respect to self-serving regulations regarding everything from labelling of food goods, control of hazardous substances, special requirements for making pasta and brewing beer are too real to be only suggestive. Informational problems arise when regulators do not have adequate knowledge of the behaviour of those being monitored. Credibility problems are associated with the possibility that agreements among countries will not be enforced, or that national regulation will be lax in enforcement. Strict enforcement by national authorities may disadvantage a national firm operating in a competitive international environment. Once again, the incentives are not 'right'. To regulate faithfully in compliance with national standards may drive national firms out of existence. Only an international regulatory body can overcome these unco-operative incentives, partly by being removed and hence more insulated from pressure groups, partly by applying the same regulatory standards to firms in all countries.

Acceptance of the regulatory state as a useful description of the EU has broad implications. The first implication is that we should not expect the EU to look like a traditional nation-state at all, nor its future development to follow the beaten path from intergovernmental relations to confederation to federation. Instead we should expect a political division of labour between Member States, focusing on social and redistributitional policy, and the EU, focusing on regulatory policy. From this angle, it would be theoretically misplaced to judge the development of the EU in terms of the growth of its taxing and spending powers. Its weakness in terms of extraction and broad spending powers is not due to an 'early stage of development', nor are these functions likely to be supplied by the dynamics of functional linkages (spillover). The regulatory state is not the Westphalian state, the extractive state, or the social democratic state. Its future contours are not likely to resemble these state forms more than at present.

A second implication relates to the connection between regulatory structures and democracy, an issue all the more salient because of the debate over the democratic deficit. Given the weakness of European parties, the strength of
specialized interest groups, the under-representation of large unconcentrated
groups, the secrecy of the Council, and the unpopular nature of the Commission
and the Court, we should ask what effect the increase of international regulatory
structures will have.

In the US, regulatory structures were created in part to avoid the swings of
public opinion, and to insulate agencies from factions. Agencies were even
placed outside the hierarchy of presidential control (Majone, 1994a, p. 17). The
proliferation of agencies in the US has been attacked on the grounds that agencies
constitute a non-representative fourth branch of government, undermining the
separation of powers, and placing government further beyond the reach of
private citizens. While Majone's work attempts to reconcile independence and
accountability - as they can be in principle - I believe he understates the anti-
democratic possibilities of independent regulatory agencies. Even Majone,
whose treatment of regulation policy is sympathetic, sees dangers resulting from
a lack of transparency in regulatory structures (1994c, p. 41).

While provisions of transparency would be a step in the right direction, they
would have only a limited effect. A deeper problem is that the EU is only a partial,
one might even say 'truncated' political system. It lacks a broad, representative
parliament with real capacity for law-making. It lacks a European dimension to
its party system, with the result that group interests are not assembled into broad
and coherent programmes. The consequence is a weakening of public discussion
and a failure of the EU to take on popular meaning in terms of our most significant
ideological dimensions (left-right, populist-elitist, activist-limited role for
state). If the EU is a limited, market-perfection project, this would seem to be
borne out by limited mass public engagement in European issues.

Majone's work helps us to understand 'why [there is] so little progress on
social policy' in the EU. His microeconomic orientation, and finely-honed
instincts for relative incentives, provide explanatory leverage in responding to
the question of where integration is most likely to occur. Functionalism also had
a theory about where integration would commence. Functionalism got part of the
answer right by pointing to the technical nature of some sectors, their inherent
complexity, and the difference between 'high' and 'low' politics. Only because
of the limited (and accidental) congruence between these sectors and the ones
specified by Majone as having the right incentives (e.g. they yield joint gains,
they respond to market-correction attempts), did functionalism make accurate
predictions. And neither orientation explains agriculture very well.

Nevertheless, despite the success of the regulatory state framework, I believe
that it does not adequately understand the politics of redistribution in the EU.
This is not because Majone does not understand the nature of redistributive and
regulatory policy-making. This distinction runs throughout his entire work (see,
e.g., 1996, p. 3). His economic approach to policy-making is not argued in the
abstract, but is interpreted via concrete legislation and treaty provisions. With only partial overstatement, one can say that Majone comes closer than anyone else to doing for the Treaty of Rome, the Single European Act, and the Maastricht Treaty what Charles Beard did for the US Constitution in *An Economic Interpretation of the Constitution of the United States* (1935), namely, to link provisions of this constitution to the interests of particular groups and classes. Needless to say, the ideological perspectives are very different. Yet, Majone identifies the pervasive economic liberalism (1993, p. 156) of the three treaties and argues that these provisions, backed by the ongoing preferences of state actors, provide the main reason behind the efficiency orientation of the EU.

While I do not disagree with this analysis, there are two shortcomings. The first is due to the failure to ask the *cui bono* question. The second shortcoming results from limiting political analysis to policy-making, i.e. to politics within the state. Regarding *cui bono*, the failure to highlight this issue perhaps stems from the efficiency orientation. To the extent that policy-making is the search for a Pareto frontier, it involves striving either for a first-order social optimum (in which there are no losers) or a second-order optimum (where losers are compensated out of the joint gains). All gains and losses can be respecified as second-order effects by tying them to a larger 'game'. Yet, even within Majone's neoclassical framework, there are conceptual opportunities for a broader understanding of distributional questions.

Take for example the work of Stigler (1971), an economist working in the field of regulation. Stigler has strongly emphasized the distributional consequences of regulation. Regulation requires policy-making, and this in turn implies pressure group activity subject to the normal Olsonian biases in favour of large producer interests as opposed to consumer interests (Olson, 1965). To self-seeking agents in society or the state, aggregate societal welfare does not matter, at least not directly. What counts is the size (absolute) of the pay-off, and this can be affected by redistributional struggle (rent-seeking), as well as by wealth-creation efforts. And the 'principle' that guides politicians is almost certainly not Pareto efficiency but the provision of a *politically* optimal distribution of rents across groups seeking to influence government policy. If the economic theory of regulation is read with a liberal dose of capture theory, Olsonian interest-group theory, and Schattschneider's emphasis on the partial (and highly biased) nature of interest-group politics (1960), it is easier to see why large, concentrated, well-organized and well-financed groups will usually win out in carving up the pie.

Finally, since Majone's research is based on a typology of policy-making, it is by its nature limited to analysis of politics within the state, and between the state and relevant societal sectors. This discourages an appreciation of the larger shifts in European society, particularly the opening and widening of a space for
capital. The lessening of capital controls during the 1980s and the freeing-up of markets for both industrial and financial capital, advantaged capital more than labour. If capitalists do not like their regulatory environment, they are able to exit more readily. This of course increases their bargaining power in relation to labour. Even if workers enjoy the right to move from country to country, they can not exercise it as freely as capital (which, as a more abstract factor of production, can move without as great a human cost as labour).

The informational and organizational costs confronting labour are high and simple numbers work to their disadvantage. In addition, labour and labour power cannot be separated the way capital and capitalist can. Compared to the sluggishness of labour, capital is quicksilver. It moves fluidly across borders, often accompanied by a highly mobile transnational capitalist class (Cowles, 1995). If an international capital regime is a 'cooperation non-problem' (Duvall and Wendt, 1987), because leaders of central banks, finance ministers and chief executive officers of corporations meet regularly, without the guidance of a central institution, a labour regime did not make much progress for quite different reasons. Interests are diverse, collective action problems daunting and prospects of winning not encouraging.

In short, the regionalization of the European economy, guided by the EU, is not a politically innocent process. Manageable national markets, capital controls, national control over monetary policy, inflation, interest rates and centralized wage bargaining (typified by corporatism) were important underpinnings of labour strength. The importance of the EU is only partially captured by a typology of policy-making. Relations between the state (both domestic and international) and the economy have changed to the advantage of capital.

V. The European Union as Post-Modern State

In 'Territoriality and Beyond' (1993), John Ruggie reminds us of our epistemological predicament. To think about the state in novel ways requires us to shed, or at least modify, the social episteme in which we have been steeped. Our foundational assumptions, and the 'inarticulate major premises' from which nearly all thinking about the state proceeds, are shaped by the vocabulary of the nation-state system. It is telling that most definitions of statehood stress properties such as citizenship, sovereignty and monopoly of legitimate violence, thus bypassing the territorial principle on which nation-states rest. Ruggie's definition, in contrast, is as follows:

... politics is about rule. And, the distinctive feature of the modern system of rule is that it has differentiated its subject collectivity into territorially defined, fixed, and mutually exclusive enclaves of legitimate dominion. (1993, p. 151)
Ruggie's thoughts are valuable not because he identifies a precise alternative to the Westphalian state, but because he makes us dissatisfied with the current repertoire of conceptual grids. As such, he urges us to break loose from conventional ways of viewing territoriality. The nation-state system is not just the modern expression of a universal political form organized at the national level. It is a distinctive form of organization based on carving up the world into territorially exclusive enclaves. Sovereignty, in its modern form, is the right to exclude - people, capital, ideas, foreign powers, and so on.

The difficulty scholars have in grappling with the state at the European level is that the reconstitution of political authority in the EU has not conformed to classical lines. As Sbragia puts it, ‘... [t]he European Community is a political entity that does not fit into any accepted category of government’ (1993, p. 24). From this, some have concluded that no European state exists, that Europe is only an arena, a site where intergovernmental politics is transacted. Others, working within the same basic conceptual framework, disagree with the conclusion but subscribe to the same rules of inference. For them, a European state exists to the degree that EU political structures have policy-making competence, express or recognized authority, autonomy from national political institutions, and so on.

The post-modern state contrasts most strongly with the Westphalian state. It is abstract, disjointed, increasingly fragmented, not based on stable and coherent coalitions of issues or constituencies, and lacking in a clear public space within which competitive visions of the good life and pursuit of self-interested legislation are discussed and debated. Elements of all of the above can be found in domestic politics too, but a significant difference of degree exists.

As suggested, the European post-modern polity is not easy to describe. Elements of politics and governance occupy different sites (Basle, Brussels, the national capitals, Luxembourg, bilateral meetings among economic and finance ministries), and these sites can change. Process and activity become more important than structure and fixed institutions. The state becomes not so much a thing (which it is not even in domestic contexts) as a set of spatially detached activities, diffused across the Member States but reflecting no principled - let alone constitutional - considerations.

Three aspects of the post-modern polity can be emphasized in the EU. The first is that it has a weak core. That is, the central political institutions of the EU are thin in comparison to domestic institutions, and possess limited autonomy. The EU does not yet play a significant role in security and foreign policy, welfare policy, social policy in general, citizenship rights, and police and international security.2 True, the EU is ‘young’, but earlier remarks about the different

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2 However, see Leibfried and Pierson (1995) and Pierson (1995) for an argument that the importance of the EU in social and welfare policy is increasing.

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templates compared to the building of nation-states still stand. The EU may never perform the functions currently performed by states.

Do the EU's institutions and practices add up to some constitutionally recognized form? Does it have a constitution at all? International lawyers and legal scholars have given a resounding 'yes' to this question (Mancini, 1991; Weiler, 1991; Stone, 1994; Shapiro and Stone, 1994), arguing that the jurisprudence of the European Court of Justice (ECJ) has in effect 'constitutionalized' the Treaty of Rome. However, Mann's argument runs in the opposite direction:

> Europe does not in effect possess a constitution, clearly regulating these complex institutional relations. The major encroachments on national sovereignty are not really constitutional - the replacement of one sovereignty by another. Instead, they are the practical, surreptitious, and delayed implementations of decisions taken by the Council of Ministers, whose decision making processes reflect partly consensus and partly the geopolitical influence of the various member powers. The encroachments are routinized, constraining practices like the dense web of product regulation or the narrow band of currency fluctuations permitted by the EMU. (1993, pp. 127-8)

The relative weakness of the core is best illustrated by social policy, an area where by general consensus the EU has made only modest inroads. But as Leibfried and Pierson (1995) point out, the conclusion that EU social policy is weak has more to do with our analytical focus on central political initiatives of the EU and less with the substantive development of social policy. Preoccupation with efforts by the Commission '... to foist an activist "social dimension" on a reluctant Council has been a mistake' (1995, p. 4). Social policy has in fact developed substantially but less as a result of conscious, centrally directed policy, more as a consequence of practical problems stemming from market integration.

The relative weakness of the core does not imply a weak state. A second characteristic of the state form in Europe is that it has many spatial locations. Gary Marks and his collaborators (Marks, 1993,1994; Marks et al., 1993,1994) have picked up on the dispersed nature of the state with their concept of multi-level polity. Marks et al. see two separate logics operating in the EU - the logic of state executive bargaining in the Council of Ministers and the European Council, and the logic of multi-level governance operating through the Court, Parliament and the Commission (Marks et al., 1993, p. 4).

According to the multi-level framework, regional integration is not a zero-sum process. Nation-states are simultaneously 'throwing out' functions to the supranational level and devolving responsibilities to subnational regions. Dense policy networks exist among Member States, supranational institutions and subnational institutions. Analysts should not have to choose between intergov-
ernmentalism and international forms of political activity. Both logics operate in the European polity.

The multilevel polity is based on the idea of interconnectedness rather than nestedness. 'Nestedness' implies the traditional federal (territorial) principle by which smaller units (counties, states, provinces, cantons) are situated within larger units. Constitutional responsibilities are more or less clearly delineated, which is not to say that blurring of boundaries does not occur. Elazar's notion is applicable here: federalism is best conceived as a 'marble cake' in which actors within federal systems interpenetrate in their performance and sometimes in their formal competences, rather than as a neat 'layer cake'. Interconnectedness is a less formal principle, implying ongoing interactions among different levels above and below the nation-state. It is these networks of interaction - more sociology than constitutional principle - that Marks et al. refer to as 'multi-level polity' (1993, p. 8).

It would be surprising if the reconstitution of political authority took place in an economic vacuum. Whatever the meaning for viability of nation-states, consensus exists that economic interdependence has increased greatly over the past four decades. Yet one of the most significant factors affecting politics at the EU level is not merchandise trade, trade in services, or capital movements per se, so much as a change in the relationships between capital and labour. One literature providing insight into changed economic relations belongs to yet another discourse, the Marxian analysis of transnationalization of capital. According to this viewpoint, the making of a European state, the fragmented nature of political power, the absence of strong party and legislative institutions, are not politically innocent. The EU, especially since the passage of the SEA in 1986, amounts to a reconfiguration of power relations between labour and capital.

For most of the post-war period, labour and capital have been negotiators at the same bargaining table. Goods and services have moved freely across borders, but capital has been restrained. With the liberalization of factor markets, capital has gained the upper hand. The decision to go ahead with the Single European Act while leaving 'Social Europe' for another day is only partly responsible for capital's upper hand. It would be difficult - some would say impossible - to reconstitute corporate bargaining power at the supranational level. Capital has not escaped the state. Rather the state has created new transnational spaces for capital, those where the opposed forces of organized labour are not prevalent.

The historic compromises lying behind European welfare states have been based on a rough equality of bargaining power between labour and capital. The distribution of bargaining power is affected by voice (votes, political organization) and exit (ability to leave). Perfection of the market has resulted in capital's differential ability to exit national boundaries while still preserving the political
structure of a decentralized state system. Capital also has increased its ability to alter its form from fixed capital with large sunk costs, to smaller and more flexible forms of capital. In short, the sectoral and geographic mobility of capital has increased.

By contrast, labour is weak, disorganized and still largely confined to national economies. This is less and less true for legal reasons (labour may move too) but it remains the case for personal and sociological reasons. Capital is separable from the capitalist. It can circulate geographically without physical accompaniment by the capitalist. No such separation is possible for the labourer and his or her labour power. This fundamental asymmetry between the two factors of production implies changes in their bargaining power when integration occurs.

The weakening of national political institutions has both resulted from and caused changes in bargaining power between labour and capital. While national welfare states have been more resilient than many expected (Pierson, 1994), they have been on the defensive. National corporatism, defined as centralized bargaining between capital and labour, has also deteriorated. At the same time, as John Lambert notes, capitalism has ‘… organized world wide [and] it escapes those checks and balances built up over the years in the nation-state framework, by workers’ movements and parties of the left’ (Lambert, 1990, p. 1).

Those who worry about the democratic deficit have identified an important problem, one that is given a different twist by theorists of the Left. From this standpoint, the deficit is not just an across-the-board shortfall of democratic participation and control, to be corrected by extending citizenship rights, broadening participation, and increasing legislative oversight and control. More importantly, the uneven political power of labour and capital resulting from the ‘freeing up’ of the European market needs to be brought into balance at the EU level. A restructured political framework is needed to compensate for the increasing irrelevance of national political institutions such as centralized wage bargaining, trade unions and political parties which play a role in class-based politics (Streeck and Schmitter, 1991).

VI. Conclusion

The purpose of this article has been to explore the potential of three metaphors, broadly captured by the labels Westphalian, regulatory and post-modern. No attempt was made to decide which category proved to be most relevant and no unplanned success occurred along these lines. The Westphalian model illuminates the ways in which the European state both resembles and differs from the traditional (domestic) state. Legal scholars have provided surprising mileage out of notions of federalism that were once dormant. The newer concept of constitutionalization not only provides a lever for understanding transformations in
state-society relations; it also weakens one of realism's objections to the importance of international law, namely that it has no enforcement mechanism and relies upon the voluntary compliance of states whose interests may be to defect.

Yet, legal scholars are open to the criticism that progress in policy-making, and the ECJ’s jurisprudence, are limited to market-perfection exercises and regulation of the self-disorganizing aspects of market capitalism (e.g. monopolies). The Court's jurisprudence revolves heavily around questions of competition, free movement and the elimination of barriers to trade.

The regulatory state model captures an important part of the internationalization of the European state. While the EU lacks an overall political architecture specifying relations between citizens and representative institutions, it provides abundant evidence of islands of political authority centring on regulation of economic activity (civil aviation, pharmaceuticals). While policy-making is authoritative in these areas (regulatory agencies rely on delegated powers from Member States), there are nevertheless problems. Majone's work highlights problems of accountability, explores the tensions between independence and accountability, and identifies ways in which the two can coexist. But is accountability the main problem? Special purpose authorities fragment power, rely heavily upon expertise, and utilize power and knowledge within narrow decision-making contexts that lack transparency and general popular interest. To the extent that the *res publica* of the EU are preoccupied by the details of civil aviation, regulation of pharmaceuticals, and the labelling of food goods, genuine popular engagement is unlikely to be forthcoming.

The post-modern state model dovetails in some surprising ways with the regulatory approach. Both stress the fragmentation of political power, the decentring of authority, and the lack of overall coherence in the integration process (this last point also made by legal scholars). To a federalist, the fragmented political structure of the EU is vertical, arranged along a territorial axis. Other cleavages (e.g. between sectors) are attributed to the EU’s incomplete development. To the post-modernist, the polymorphic structure of the EU is simply the reflection of the post-modern condition, and quite likely permanent.

Let me return to a point made at the start: that the study of European integration is in its post-ontological phase is a refreshing development. Endless debate about 'what the EU is' cannot be productive unless tied to detailed, though theoretically informed, empirical studies. Similarly, these empirical studies are unlikely to acquire their full significance unless integrated with broader conceptions of the nature and significance of the evolving European Union. Hopefully, the decade ahead will harmonize these up till now somewhat unconnected projects.
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On Power
The Natural History of Its Growth

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Foreword by D. W. Brogan
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II.

*Theories of Sovereignty*

The theories which have, in the course of time, had the most vogue in Western society and exercised there the most influence are those which explain and justify political authority by its efficient cause. These theories are those of sovereignty.

Obedience, it is said, becomes a duty because of the undeniable existence "of an ultimate right of command in Society," called sovereignty, a right which extends "to controlling the actions of Society's members with, in the background, power to coerce them, a right to which all private individuals have to submit without possibility of resistance."¹

Power makes use of this right even though in the general view it does not belong to it. It is denied that this absolute and unbounded right, transcending all private rights, can possibly belong to one man or to one group of men. Only to the most august incumbent, to God, or to society as a whole, will we commit, with no thought of bargaining reserve, the entire conduct of our lives.

As we shall see, theories like those of Divine Right and Popular Sovereignty, which pass for opposites, stem in reality from the same trunk, the idea of sovereignty—the idea, that is, that somewhere there is a right which all other rights must yield. It is not hard to discover behind this juridical concept a metaphysical one. A supreme Will, it runs, rules and imposes human societies, a Will which, being naturally good, it would

be wrong to resist: this Will is either the "Divine Will" or the "general will."

Power in being must be the emanation of this supreme sovereign, be it God or society; it must be the incarnation of this will. And its legitimacy is proportionate to its satisfaction of these conditions. Whether as delegate or mandatory, it can then exercise the right to rule. It is at this point that the two theories, in addition to their divergent conceptions as to the nature of the sovereign, become much differentiated. As to how, for instance, and to whom, and, above all, to what extent the right to rule is given. Who will watch over its exercise and in what manner, so that the mandatory does not fail the purpose of the sovereign? When can it be said, and by what signs can it be known, that Power, by betraying its trust, has lost its legitimacy, and, having now become no more than an observable fact, can no longer claim a right transcendent?

We must for the time leave these important details aside. Our present concern is with the psychological influence of these doctrines, and the way in which they have affected human beliefs in regard to Power and, through them, man's attitude of mind towards it; that in its turn has determined Power's extent. Have they acted on Power as a discipline, by forcing it to own allegiance to a beneficent being? Or have they canalized it, by creating checks which can bind it to keep faith? Or have they limited it, by restricting the share of sovereign right allowed it?

Many writers on theories of sovereignty have worked out one or the other of these restrictive devices. But in the end every single such theory has, sooner or later, lost its original purpose, and come to act merely as a springboard to Power, by providing it with the powerful aid of an invisible sovereign with whom it could in time successfully identify itself. The theory of a divine sovereignty led to absolute monarchy; the theory of a popular sovereignty led at first to parliamentary supremacy, and finally to plebiscitary absolutism.

1. Divine Sovereignty

The idea that Power is of God buttressed, so it is said, a monarchy that was both arbitrary and unlimited right through the Dark Ages. This grossly inaccurate conception of the Middle Ages is deeply embedded in the unlettered, whom it serves as a convenient starting-point from which to unroll the history of a political evolution to the winning-post, which is liberty.

There is not a word of truth in all this. Let us remember, without at the moment stressing it, that Power in medieval times was shared (with the Curia Regis2), limited (by other authorities which were, in their own sphere, autonomous), and that, above all, it was not sovereign.3 The distinguishing characteristics of a Power which is sovereign are: its possession of a legislative authority; its capacity to alter as it pleases its subjects' rules of behaviour, while recasting at its own convenience the rules which determine its own; and, while it legislates for others, to be itself above the laws, legibus solutus, absolute. Now Power in medieval times was very different: it was tied down, not only in theory but in practice, by the Lex Terrae (the customs of the country), which was thought of as a thing immutable. And when the English Barons uttered their Nolumus leges Angliae mutari4 they were only giving vent to the general feeling of the time.5

In fact, so far from having been a cause of greatness in Power, the conception of divine sovereignty was for many centuries the companion of its weakness. No doubt some fine phrases can be brought up. James I of England said to the heir to his throne: "God has made of you a little god, to sit on your throne and rule men."6 Louis XIV's instructions to the Dauphin were in very similar terms: "He who gave the world kings
wished that they should be honoured as His representatives, by reserving to Himself alone the right to judge their actions. He who is born a subject must obey without complaining: that is God's will. Even Bossuet, when preaching at the Louvre, apostrophized his royal house as follows: 
"You are gods even though you are mortal, and your authority is immortal." 

It is beyond question that if God, the Father and protector of human society, has Himself designated certain men to govern it, has called them His anointed, has made them His regents, and has armed them with a sword for the administration of justice—Bossuet again—then the king, strong in such a majesty, can be for his subjects nothing less than their absolute master. But phrases of this sort, in this acceptance of them, are only met with in the seventeenth century; in relation to the medieval theory of divine sovereignty they are the greatest heterodoxy. And here we come across a striking instance of the perversion of a theory of Power to the advantage of Power in being—a perversion which is, as we have already said and as will appear later, a very general phenomenon.

The same idea, that Power is of God, has, in the course of more than fifteen centuries, been used by its prophets for a great variety of purposes. St. Paul, it is clear, was anxious to combat in the Christian community at Rome its tendencies to civil disobedience, which would, he feared, not only precipitate persecutions but also divert the community's activities from their true purpose, which was the winning of souls. Gregory the Great, writing at a time when the West was a military anarchy, the East a prey to political instability, and the Roman way of life in imminent danger of destruction, felt under the necessity of shoring up Power. The canonists of the ninth century strove to prop up the toppling imperial authority after the Church had, in the general interest, re-established it. As many periods and as many requirements, so many meanings. But it is not the case that the doctrine of Divine Law was dominant at any time before the Middle Ages: it was ideas derived from Roman law which formed the intellectual climate of those days. And if we take up the theory of divine sovereignty in the time of its blossoming, that is to say from

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8. Palm Sunday, 1662.
10. St. Gregory, Regulæ Pastorales, III, 4. [Gregory the Great, Pope from 590 to 604. The first monk to become a Pope.]
11. Cf. in particular Hincmar de Reims, De fide Caroli Kegi servanda, XXIII.
mainly on the Bible and St. Paul’s Epistle to the Romans); but more often, and to more purpose, they have recourse to the tradition of the Roman jurists which ascribes sovereignty not to God, but—to the people!

It is for this reason that Marsilius of Padua—an adventurer who was pushing the claims of the then uncrowned Emperor, Louis of Bavaria—and many other champions of Power besides, supplanted the postulate of divine sovereignty with that of popular sovereignty: “The supreme legislator of the human race,” he asserts, “is none other than the Totality of mankind, to whom the sanctions of Law fall to be applied. . . .” The reliance of Power on this idea to render itself absolute is very significant.

The idea would in time emancipate Power from the control of the Church. But there had first to be a revolution in religious ideas before Power, after arguing from the people’s brief against God, could take up that of God against the people—a piece of tergiversation which was a necessary step in the build-up of absolutism.

The revolution needed was the crisis caused in European society by the Reformation, and the violent pleadings of Luther and his successors for a temporal Power which should be freed from papal tutelage and so enabled to adopt and legalize the reformers’ doctrines. Such was the gift brought by the doctors of the Reformation to the reformed princes. The Hohenzollern who, in his capacity of Grand Master of the Order of Teutonic Knights, was then ruling Prussia, acting on Luther’s advice, declared himself the owner of the estates which he held as administrator; the princes, breaking with the Church of Rome, took the opportunity of converting into a freehold the right of sovereignty, which had, until then, I only been accorded to them as a limited mandate. Divine right, which had in the past been on the debit side of Power’s account, was becoming an asset. Nor did that happen in those countries only which had adopted the Reformation, but in the others as well, for the Church, being now reduced to soliciting the support of the princes, was in no position to lay on them its time-honoured ban.15 There lies the explanation of the “divine right of kings,” as we see it in the seventeenth century; it is a fragment taken from the context of a doctrine which had made of kings the representatives of God as regards their subjects, only to subject them at the same time to the law of God and to the control of the Church.

2. Popular Sovereignty

So far from its being the case that theology gave absolutism any justification for itself, we find the Stuart and Bourbon kings, at the time that they were raising their claims, having the political treatises of Jesuit doctors burnt by the common hangman.16 These doctors not only prayed in aid the supremacy of the Pontiff: “The Pope can depose kings and put others in their place, as he has done already,”17 but also constructed a theory of authority which shelved completely the idea of a direct mandate entrusted to kings by the heavenly Sovereign.

In their view, while it is true that Power is of God, it was not true that God had selected the beneficiary. Power is an emanation of His will because He has given man a social nature,18 and has, therefore, caused him to live in a community: of this community civil government is a necessary feature.19 But He has not Himself organized this government. That is the business of the people of this community, who must, for reasons of practical necessity, bestow it on some person or persons. These holders of Power manage something which is of God, and are therefore subjected to His law. But, in addition, it is the community which has entrusted them with this something, and on conditions laid down by itself. That makes them accountable to the community.

It is for the will of the people [says Bellarmin] to set up a king, consuls or other magistrates. And if good cause comes, the people may exchange monarchy for aristocracy or democracy, and vice versa; history tells us that it happened so at Rome.20

It is easy to imagine with what fury a man of James F’s arrogance read statements like these: it was then that he wrote his “Apology for the oath

16. For instance, the De rege et regis institutione of Mariana and the Tractatus de potestate summi pontificis in temporalibus of Bellarmin were burnt at Paris in 1610, followed by the Defensio fidei of Suarez in 1614. The same thing happened in London.
17. Vittoria, De indicis, I, 7.
18. “The nature of man is such that he has to be a political and social animal and live among his fellows,” as St. Thomas has said. De regimine principum, I, 1.
20. Bellarmin, De Luticis, Book III.
of allegiance." Suarez's refutation of it, written to the order of Pope Paul V, was publicly burnt in front of St. Paul's in London.

James I had claimed that, confronted by an unjust royal command, "the people may do no other than flee unresistingly from the anger of its king: its tears and sighs are the only answer to him allowed it, and it may summon none but God to its aid." To this Bellarmin replied, "No people ever delegated its authority without reservation, by which it may in appropriate cases resume it in act."

According to this Jesuit doctrine, it is the community which, by the act of forming itself, establishes Power. The city-state or republic is formed of a species of political union, which could not have taken shape without a sort of convention, expressed or implied, by which families and individuals subject themselves to a superior authority or social administrator, the aforesaid convention being the condition on which the community exists.

In this formula of his, Suarez has anticipated the theory of the social contract. Society is formed and Power established by the will and consent of the multitude. To the extent that the people invests its rulers with the right to rule them, there is a factum subjections. The object of this reconstruction was, it is clear, to bar Power's road to absolutism. But it was soon distorted, as we shall see, in such a way that it served to justify absolutism. How was it possible to do that? Merely by taking away from the three following expressions the first one—God the author of Power, the people who confer Power, the rulers who receive it and exercise it. It is affirmed, after this abstraction, that Power belongs to society in full fee simple and is then conferred by it alone on its rulers. That is the theory of popular sovereignty.

It may be objected that, more surely than any other, this theory bars the road to absolutism. That, as we shall see, is the great illusion.

21. [The tide of this treatise (1613) was Defensio catholicae fidei contra anglicanae sectae errores.]
24. Rousseau's new idea was merely to divide this original proceeding into two successive parts. In the first the city is formed and in the second it designates its government. In theory the subordination of Power is increased by this process. But his was only an enlargement of the Jesuit idea.

The medieval champions of Power conducted their case clumsily enough. Marsilius of Padua, for instance, after postulating that the "supreme legislator" was the "totality of mankind," goes on to the proposition that this authority has been conferred on the Roman people; and he reaches this triumphant conclusion: "Finally, if the Roman people had conferred legislative power on its prince, then there is no escaping the conclusion that this power belongs to the prince of the Romans"—to, in other words, Marsilius's client, Louis of Bavaria. The argument makes no attempt to conceal its lack of disinterestedness. The point of it is, as any child could see, that the multitude has been endowed with this majestic authority merely that it may pass it on, stage by stage, to a despot. In course of time, however, the same dialectic will find more plausible guise in which to present itself.

Here, for instance, is Hobbes, who, right in the middle of the seventeenth century, which was the heyday of the divine right of kings, wanted to undertake the defence of absolute monarchy. Notice how he avoids using the Biblical arguments which will be the stock-in-trade of Bishop Filmer a generation later—only to go down before the arrows of Locke.

Hobbes does not infer the unlimited right of Power from the sovereignty of God: he infers it from the sovereignty of the People. He assumes that men were, in the natural state, free, but he defines this primitive freedom, in terms more appropriate to a doctor than to a jurist, as the absence of every external compulsion. This freedom of action continues to the point at which it comes up against someone else's freedom, when the conflict is resolved according to the forces at the disposal of each. "Each individual," as Spinoza put it, "has a sovereign right over whatever is in his power; in other words, the right of each extends to the precise limit of the power which each has." There is, therefore, no other effective right than that of tigers to eat men.

Some way out of this "state of nature," where each takes what he can and holds as best he can what he has taken, had to be found. For this

25. [Marsilius of Padua (1270-1342), Italian medieval scholar, publisher in 1324 in conjunction with Jean de Jandun of a famous controversial work, the Defensor Pacts. The purpose of this work was to sustain Louis of Bavaria, King of the Romans, in his struggle with Pope John XXII, and its purport to prove the supremacy of the Empire, its independence of the Holy See, and the emptiness of the prerogatives "usurped" by the sovereign pontiffs.]
27. T. Huxley, Natural and Political Rights, in Method and Results (London: 1893).
wild sort of liberty made both security and civilization equally impossible. Had not men, therefore, to come to the point of making a mutual surrender of their rights for the sake of peace and order? Hobbes goes to the length of giving the formula on which the social pact was concluded:

I surrender my right to rule myself to this man or to this assembly on condition that you make a like surrender of yours. In this way the multitude has become a single person which goes by the name of a city or a republic. Such is the origin of this Leviathan or terrestrial deity, to whom we owe all peace and all safety.\(^{28}\)

The man or assembly on whom the hitherto unlimited individual rights have now been unreservedly conferred is the possessor of an unlimited collective right. Thenceforward, the English philosopher asserts:

Each subject having been made, by the establishment of the Republic, the author of all the actions and judgments of the sovereign established, the sovereign, whatever he does, does no wrong to any of his subjects, and can never be accused of injustice by any of them. For, acting as he does only on a mandate, what right could those who have given him this mandate have to complain of him?

By this establishment of the Republic, each individual is the author of whatever the sovereign does: consequently, anyone who claims that the sovereign is wronging him is objecting to acts of which he is himself the author, and has only himself to accuse.\(^{29}\)

Surely this is all very extravagant. But Spinoza, though in less striking language, affirms no less the unlimited right of Power:

Whether the supreme Power belongs to one man, or is shared among several, or is common to all, it is certain that to whoever it belongs also the sovereign right of giving any order he pleases—the subject is bound to an absolute obedience as long as the king, or the nobles, or the people, retain the sovereign power which the conveyance of rights has conferred on them.

He too asserts: "The sovereign, to whom all is of right allowed, cannot violate the rights of the subjects."\(^{30}\)

Here then we have two illustrious philosophers inferring the most complete despotism from the principle of popular sovereignty. Whoever has the sovereign power can do whatever he likes, and the subject who is wronged must regard himself as the actual author of the unjust act. "We are bound to execute to the limit whatever orders the sovereign gives us, even though they should be the silliest imaginable," pontificates Spinoza.\(^{31}\)

How different is the language held by St. Augustine: "... but, inasmuch as we believe in God and have been summoned to His kingdom, we have been subjected to no man who should seek to destroy the gift of eternal life which God has given us."\(^{32}\)

What a contrast is here between a Power which is held to the execution of the divine law and one which, after subsuming every individual right, has become a law to itself!

3. Democratic Popular Sovereignty

Given that there was at first a state of nature in which men were bound by no laws, and rights (so called) were no more than the measure of each man's strength, and on the hypothesis that they formed a society by commissioning a sovereign to establish order among them, then it follows that this sovereign received from them all their own rights, and that in consequence the individual has none in reserve wherewith to oppose him.

Spinoza has put the point very clearly:

Everyone has had, whether by an express or an implied agreement, to confer on the sovereign their entire stock of means of self-preservation—in other words, all their natural right. Had they wished to keep back for themselves any part of this right, they must at the same time have taken defensive measures for their own safety; as they have not done that and must,

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29. Hobbes, *Leviathan*, 2nd part, chap. xviii. This proposition is fundamental to Hobbes' entire position. Thus, in the case of an executive act affecting an individual, done by the sovereign-representative of the people: "Whatever the sovereign-representative does to a subject, and for whatever reason, it cannot be called an injustice or a hurt; for each subject is the author of each of the sovereign's acts." *Lbid.*, chap. xxi. In die case of a law: "... no law can be unjust. Laws have been made by the sovereign authority and all that it does is agreed (in advance) by each subject, and what each has willed can be called unjust by none." *Lbid.*, chap. xxx.
30. *Spinoza*, *op. tit.*, xvi.
32. St. Augustine, *Commentary on the Epistle to the Romans.*
had diey done it, have divided and in the end destroyed all rule, they have in fact subjected themselves to die will, however it operates, of the sovereign power.

To this it was no answer to suppose, as Locke did, that all individual rights were not put in the common stock and that some were kept back by the contracting parties. This hypothesis, though destined to bear fruit politically, holds no water logically. Rousseau will be found at a later date pouring scorn on Locke’s reasoning: the alienation of individual rights is made unreservedly and none of the partners can henceforward claim back anything; for, if there were still any rights in private hands, then, as there would be no superior in common to pronounce between them and die public right, the result would be that each man, finding himself his own judge in something, would soon claim to be it in everything.33

“Will it perhaps seem to someone,” asks a troubled Spinoza, "that by this principle we are making men slaves?" His answer is that what makes a man a slave is not obedience but obedience in the interest of a master. If the orders given are in the interests of the man who obeys, then he is not a slave but a subject.

But this raises the problem of how to ensure that the sovereign never considers the interest of the ruler but only the interest of the ruled. The solution of confronting him with an overseer, a "defender of the people," is ruled out in advance, because he is himself the people, and the individual has no rights left to him wherewith to arm against the whole any check or counter-weight. Hobbes admits that "the state of subjects who are exposed to all the irregular passions of the man or men who own such an unlimited authority, may be one of great misery."34

The people's only hope is in the personal excellence of the man or men whom they obey. Who is it to be?

In Hobbes’ view, men had bound themselves by their original contract to obey either a monarch or an assembly—his own marked preference was for a monarch. In Spinoza’s view, they had bound themselves to obey either a king, or a nobility, or a people, and he stressed the advantages of the last of these solutions. In Rousseau’s view, no choice was conceivable: men could bind themselves to obey nothing but their totality. Whereas Hobbes made his man concluding the social pact say, "I surrender my right to rule myself to this man or to these men," Rousseau, when drafting a constitution for the Corsicans, made each contracting party say, ". . . with my body, my goods, my will and my entire strength I join myself to the Corsican nation, to whom I now belong in fee simple, I and my dependents."

Once there is postulated a right of command which has no limits and against which the private person has no rights—and that is the logical result of the hypothesis of the social pact—then it is much less terrible to conceive of this right as belonging collectively to all than as belonging to one man only or to a few.

Rousseau, like his predecessors, held that what constitutes sovereignty is the surrender without reservation of individual rights; these then go to form a collective right, the sovereign’s, which is absolute. On this point all the theories of popular sovereignty are in agreement. In Hobbes’ view, however, a surrender of rights presupposed someone, whether a man or an assembly, to whom to surrender them: the will of this someone, in whom is vested the collective right, would thereafter pass for, and stand legally as, the will of all. Spinoza, and others too, conceded that the collective right might be vested in the will either of one man, or of several men, or of a majority. Hence the three traditional forms of government: monarchy, aristocracy, and democracy. According to this line of thought the originating act by which a society and a sovereignty were created set up ipso facto the government which is the sovereign. And to many thinkers of note it seemed unthinkable that, once the fundamental hypothesis was accepted, any other course of events was possible.35

In Rousseau’s view, however, the process has two stages: first, individuals turn themselves into a people; next, they give themselves a government. The result is that, whereas in previous systems the people gave the collective right (the sovereignty) in the act of creating it, in his they create it without giving it—in fact they never part with it. Rousseau allowed in principle all the three forms of government and considered democracy appropriate to small states, aristocracy appropriate to those of moderate size, and monarchy appropriate to large ones.36

4. A Dynamic of Power

In any case, the government is not the sovereign. Rousseau calls the government the prince or the magistrate, names which may signify a

collection of men: thus a senate may be the prince, and in a perfect democracy the people itself is the magistrate. It is true that this prince or magistrate is the ruler. But his title to rule is not sovereign, does not derive from that limitless imperium which is the essence of sovereignty—all he does is to exercise such powers as have been conferred on him.

Only, when once the idea of an absolute sovereignty has even been conceived and its existence asserted to rest in the body of society, great is the temptation, and great also are the opportunities, for the ruling body to seize it. Although Rousseau was, in our opinion, quite wrong in supposing that so overpowering a right existed at all, his theory has the merit of accounting for the growth of Power, and brings into play a political dynamic. Rousseau saw very clearly that the agents of Power form a corps, that this corps houses a corps mind, and that its aim is to usurp sovereignty:

The more they redouble their efforts, the more the constitution changes; and, in the absence of any other corps mind to resist the prince's [Power's] and thus bring it into equilibrium, the time must come sooner or later when the prince [Power] ends by oppressing the sovereign [the people] and thereby breaks the Social Contract. This is the inherent and inevitable weakness which, from the day that the body politic is born, tends ceaselessly to destroy it, even as old age and death destroy at last the physical body.

This theory of Power marks a great advance on those so far examined by us. The others explained Power by the possession of an unlimited right of command, whether that right emanated from God or from the social totality. But none of them gave any clue to the reason why, as one Power succeeded another or one period in the life of the same Power succeeded another, the area over which command and obedience operated should show such variations.

37. “That the 'Government corps' may have a being and a life of its own distinguishing it from the nation as a whole, that all its members may act in unison and serve its specific purpose, it must have its personal ego, an esprit de corps in which all its members share, a strength of its own and a will to its own survival. This personal life presupposes assemblies, councils, the capacity to deliberate and decide, rights, tides and privileges, all of which are the exclusive property of the prince.” (Rousseau meant by "prince" the totality of the components of government; it is what in this book I have called Power.) Du Contrat social, Book III, chap. ii.

38. Book III, chap. x.

39. Ibid.

In Rousseau's powerful reconstruction, on the other hand, we do find an attempt at explanation. If Power's extent varies from one society to another, the reason is that the body social, in which alone sovereignty resides, has made larger or smaller grants of its exercise. Above all, if the same Power's extent varies in the course of that Power's life, the reason is that it tends unceasingly to usurp sovereignty and can, in the measure of its success, dispose of the people and their resources more completely and more uninhibitedly. The result is that, the greater the element of usurpation in a government, so much the wider is the range of its authority.

What, however, is not explained is the source from which Power draws the strength necessary to effect this usurpation. For, if it owes its strength to the mass of the people and to the fact that it is the incarnation of the general will, then it must, with its every deviation from that general will, lose strength, and its authority must tend to disappear to the extent to which it separates itself from the popular desire. Rousseau's view was that government, by a natural slant, tends to move from many men to few or from democracy to aristocracy—he instances the case of Venice—and in the end to monarchy, regarded by him as the final form of society; and monarchy, by becoming despotic, causes in the end the death of the body social. But there is nothing in history to show that such a serial movement is inevitable. Nor is any light thrown on the question from what source one man gets strength enough to have executed a will which is cut off ever more completely from the general will.

The weakness of the theory lies in its heterogeneity. It has the merit of treating Power as a separate entity—a body which houses strength—but it still thinks of sovereignty, in the medieval manner, as a right. In this mix-up Power's strength remains quite unexplained, and there is no clue to the social forces which are able to moderate or check it.

All the same, what an advance this is on the earlier theories! And, on the essential points, what foresight!

5. How Sovereignty Can Control Power

The theory of popular sovereignty, as Rousseau left it, offers a rather striking parallel to the medieval theory of divine sovereignty. Both allow a right of command which, though it is unlimited, is not inherent in the governors. The right belongs to a superior power—whether it be God or the people—which cannot by its nature exercise the right itself. Therefore
they have to confer a mandate on a Power which can exercise it. Both state more or less explicitly that the mandatories will be tied by rules: in other words, Power's behaviour is subject to either the Divine Will or the general will. But will these mandatories necessarily be faithful to their trust? Or will they tend to usurp the command which they at present exercise only by delegation? Will they remember at all points the end for which they have been established, which is the common good, and the condition to which they have been subjected, which is the execution of the law, whether God's or the people's? Will they, in short, keep their hands off the sovereignty? They will not; and they will in the end give themselves out as resuming in their own persons the Divine Will or the general will, as the case may be; Louis XIV, for instance, claimed the rights of God, and Napoleon those of the people.

Is there any way of stopping this, except by the exercise of control by the sovereign over the Power? The sovereign's nature, unfortunately, makes it as impossible for him to control as to govern. Hence came the idea of having a body which would keep watch in the name of the sovereign over the actual Power, prescribe as occasion demanded the rules by which it must act, and, in case of need, pronounce the forfeiture of its functions and make provision for a successor.

Under the system of divine sovereignty this body could only be the Church. Under the system of popular sovereignty it will be Parliament. As a result of this, however, sovereignty becomes a house divided, and the Powers in human exercise show two faces. These are either a temporal Power and a spiritual Power exercising a temporal jurisdiction, or, in the other case, an executive and a legislature. The whole metaphysic of sovereignty leads to this division—and yet abominates it. Empiricists may find in it a safeguard for liberty, but it must surely be an offence to all who believe in a sovereignty which is in essence one and indivisible. As though sovereignty could be shared between two sets of agents! If two wills clash, both cannot be the divine or popular, as the case may be. It follows that of the two bodies one only can be the true reflex of the sovereign; the will opposing is, in that case, a rebel will to be subdued. These results follow logically if the basis of Power is one will which must be obeyed. One of the bodies, therefore, had to win. At the close of the Middle Ages the winner was the monarchy.

In modern times it is either the executive or the legislature, according to which stands closer to the sovereign people. The chief executive does so when, as in the case of Louis Napoleon or Roosevelt, there is direct election of him by the people; the parliament does so when, as in the France of the Third Republic, the chief executive is at a distance from the source of authority.

So far as the controllers of Power are concerned, one of two things results: either they are finally eliminated, or else, acting in the name of the sovereign, they subdue his agents and usurp the sovereignty. In this connection it is worth noting that Rousseau, while cutting down as far as was possible the authority of the rulers, had a deep distrust for "representatives," who were, in his time, greatly relied on for keeping Power within the bounds of its office. He saw no other "method of preventing usurpations of government" than that of holding periodic popular assemblies, to pronounce on the use which had been made of Power and to decide whether it would not be a good thing to change the form and the personnel of the government. As he fully admitted that his method was quite impracticable, the obstinacy with which he urged it can only be ascribed to the invincible repugnance which the method of control at that time operating in England inspired in him—the method of parliamentary control, which Montesquieu had praised to the skies. So distasteful to him is the very idea that he inveighs against it with a sort of passion:

40. We must always remember that, when Rousseau talks of the people being the only law-making authority, he is thinking only of quite general directives, and not of all die particular and detailed provisions which modern constitutional practice comprises under the name of legislation.

41. He always took care to found his authority on the sovereignty of the people. As for instance in this declaration: "The Revolution is over; its principles have come to rest in my person. The present government is the representative of the sovereign people; there can be no revolution against the sovereign."

Mole observes: "Everything spoken or written by him bore the same character, was bound up with the same system and was directed to the same end, that of propagating the principle of the sovereignty of the people—a principle which he thought completely erroneous and certain to have disastrous consequences. . . ." Mathieu Mole, Souvenirs d'un Témoin (Geneva: 1943) p. 222.

42. I must not be supposed to be saying that in medieval society the Church was the only organism actually engaged in the control and check of Power. I am not now recording events but analysing theories.

43. "Whenever," remarks Sismondi, "the view is taken that all authority proceeds from the people by process of election, then those who derive their power from the people most immediately and have the largest number of constituents come to regard their authority as the most legitimate." Sismondi, Études sur les Constitutions des Peuples modernes (Paris: 1836) p. 305.
Sovereignty cannot be represented. . . . Therefore the deputies of the people are not and cannot be its representatives. . . . This new-fangled idea of representatives comes down to us from feudal government, from that iniquitous and ridiculous form of government which made degenerates of the human species and caused the name of man to sink in the nostrils. 44

His attack is against the representative system as it was operating in the very country of which Montesquieu had made a model of excellence:

The English think they are free but they are quite wrong; they are only free when Parliamentary elections come round; once the members have been elected, they are slaves and things of naught. They deserve to lose Liberty by reason of the use which they make of their brief intervals of Liberty. 45

Why all this spleen? With a sovereignty on this great scale, Rousseau felt that, once the possibility of the sovereign being represented was admitted, it would be impossible to stop the representative laying claim to the sovereignty. 46 And indeed every tyranny which has since appeared has justified its aggressions on individual rights by its usurped claim to represent the people. More especially, he foresaw what seems to have escaped Montesquieu, that the authority of Parliament, though for the time being it would grow at the expense of the executive and so act as a brake on Power, would come in the end first to dominate the executive and then to fuse it with itself, thus reconstituting a Power which could lay claim to sovereignty.

6. The Theories of Sovereignty Considered in Their Effects

If we now take a bird's-eye view of the theories whose natures we have just examined, we note that all of them tend to render subjects obedient by revealing to them a transcendent principle behind the Power they see; this principle, whether God or the people, is armed with an absolute authority. At the same time they all tend also to subordinate Power in effect to this principle, whichever it is. Therefore their disciplinary effect is twofold: they discipline the subject, they also discipline Power.

By disciplining the subject they reinforce the Power in being. But by straitly tying this Power down, they compensate for this reinforcement—always provided that they can find some practical method of keeping the Power down. That is the difficulty. The more unlimited the conception of the sovereign authority which there is danger of Power's usurping, the more important become the practical methods employed to keep Power in leading-strings.

• But the sovereign cannot make the whole of his presence felt to keep his regents to their duty. Therefore he needs a controlling body: this body, whether its place is above the government or at its side, will in time try to seize it, thus joining in one the two capacities of regent and overseer and thereby securing for itself unlimited authority of command.

This danger leads to a multiplication of precautions; the Power and its controller are, by a division of functions or a rapid succession of office-holders, crumbled up into small pieces—a cause of weakness and disorder in the administration of society's business. Then, inevitably, the disorder and weakness, becoming at length intolerable, bring together again the crumbled pieces of sovereignty—and there is Power, armed now with a despotic authority.

The wider the conception held, in the time when monopoly of it seemed a vain imagining, of the right of sovereignty, the harsher will be the despotism. If the view is that a community's laws admit of no modification whatever, the laws will contain the despot. Or if the view is that something of these laws, corresponding to the ordinances of God, is immutable, that part at least will remain fast.

And now we begin to see that popular sovereignty may give birth to a more formidable despotism than divine sovereignty. For a tyrant, whether he be one or many, who has, by hypothesis, successfully usurped one or the other sovereignty, cannot avail himself of the Divine Will, which shows itself to men under the forms of a Law Eternal, to command whatever he pleases. Whereas the popular will has no natural stability but is changeable; so far from being tied to a law, its voice may be heard in laws which change and succeed each other. So that a usurping Power has, in such a case, more elbow-room; it enjoys more liberty, and its liberty is the name of arbitrary power.