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### The Doctrine of Sovereignty Under the United States Constitution

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## THE DOCTRINE OF SOVEREIGNTY UNDER THE UNITED STATES CONSTITUTION.

ONE of the doctrines of the United States Constitution is the doctrine of sovereignty. This became a part of the original constitution at the time of its adoption in 1789, or in the first period of our constitutional history, but its scope and meaning were not then clear and well-defined. It has taken long years of constitutional history and profound opinions of the United States Supreme Court to make clear and well-defined what was not so in the beginning, if indeed the years and opinions have attained this success.

The doctrine of sovereignty has engaged the attention of jurists, theologians and philosophers. Many books and innumerable articles have been written upon the subject. The best minds, both of the Anglo-American world and of European countries, have devoted their energies to its explanation. It has interested the ancients as well as the moderns. Yet to-day, in spite of it all, there is neither universal nor concensus of agreement as to its meaning.

Literally the word "sovereign" from the old French "soverain" and Latin "super", means supreme. But it may be doubtful whether the word can be given any universal meaning which would be true either at all times or in all places to-day. Probably it will be agreed that sovereignty may be divided into internal, over its own citizens or subjects, and external, in relation to other sovereignties. But there is no agreement as to whether or not it is proper to classify it as legal and political, as to what is its relation to the personality of the state, how the term should be defined, or who, if anyone, is sovereign.

According to Roman juristic theory the people were supposed, by the fiction of some compact with their rulers, to have surrendered to their keeping and management, entirely and irrevocably, all of their rights, powers, privileges and immunities, except for an escheat in case of vacancy in office.<sup>1</sup>

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<sup>1</sup> WILLOUGHBY, POLITICAL THEORIES OF THE ANCIENT WORLD.

Under the feudal system the feudal contract, which established the relations between lord and vassals, was not fictitious but real. However, the contract was conditional and revocable. A failure on the part of either party to live up to the conditions of the contract legally released the other from his obligations.<sup>2</sup>

Bodin, writing in the time of Henry III of France (1551-1589), developed the theory that sovereignty was an absolute, unlimited power, which established law but was uncontrolled by it, and, in an ideal system, was vested in the king and was possessed by divine right.<sup>3</sup> In the fight in England for regal instead of papal sovereignty this doctrine of sovereignty by divine right was developed at Cambridge, but after the fight had been won regal sovereignty was discarded for Parliamentary sovereignty.<sup>4</sup>

Hooker, in attempting to justify the established church of England, found the source of all authority in the consent of the governed and posited the social compact.<sup>5</sup>

Hobbes assumed, first, that there was a pre-civic state of war, and, second, that each individual contracted with every other to surrender irrevocably to one body of men (or a man) the natural right of each individual to govern himself. Law, according to him, was the creation of the State. The ruler was not a party to this contract and therefore could not break it.<sup>6</sup>

Locke, philosopher of the Revolution of 1688 and of the Declaration of Independence, thought the pre-civic state was equality and freedom, rather than war; and that then individuals were endowed with certain natural rights, but that for the better preservation and enjoyment of these rights every individual entered into a compact with the rest of the group by which he surrendered the exercise of a part of his natural rights for the protection and preservation of his remaining rights by a government to be instituted by the State. But, since the members of the group still retained many of their natural rights, neither the State nor the government instituted by it had an unlimited power over them, and if a government transcended its authority

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<sup>2</sup> MAINE, *ANCIENT LAW* (1861).

<sup>3</sup> BULLOWA, *HISTORY OF THE THEORY OF SOVEREIGNTY*.

<sup>4</sup> MATTERN, *STATE SOVEREIGNTY AND INTERNATIONAL LAW*.

<sup>5</sup> HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY*.

<sup>6</sup> HOBBS, *LEVIATHAN*.

the people regained the whole of their natural liberty, a part of which they had surrendered conditionally, and they (instead of the State) could institute a new government.<sup>7</sup>

Rousseau assumed that each member of the group by a social compact united with every other to form a body politic, giving up his natural liberty to have it returned to him as a member of the State and thus placing a legal, instead of a moral, limitation on governmental power. The individual wills united became the general will and the popular assembly alone represented the sovereign will. Government was a mere executive agent, or intermediary, between the individuals and the sovereign.<sup>8</sup>

Jefferson, Madison, the Declaration of Independence and many of the bills of rights of the various state constitutions adopted the compact hypothesis and the hypothesis of natural rights, as well as the doctrine of popular sovereignty,<sup>9</sup> and the United States Constitution, apparently, was influenced by the doctrine of popular sovereignty.<sup>10</sup>

The French Declaration of the Rights of Man and Citizen and the Constitution of 1791 took the ground of national sovereignty and made king, legislature and judiciary a part of the nation. The constitution of 1793 contemplated Rousseau's popular sovereignty, with no delegation of governing power and with the right of revolution. But the constitution of 1795 posited national rather than popular sovereignty.<sup>11</sup>

Kant agreed with Rousseau in placing sovereign power in the legislature and in recognizing law as the supreme will of the State, and accepted the contract hypothesis, though as a fiction; but he went beyond Rousseau in upholding the sanctity of law. Since it was the supreme will of the State it was divine and holy, and could do no wrong, and the supreme power possessed rights but no duties.<sup>12</sup>

Hegel took the position that the monarch was the holder of the sovereign power of the State, and that there could be no

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<sup>7</sup> LOCKE, TWO TREATISES ON CIVIL GOVERNMENT.

<sup>8</sup> ROUSSEAU, CONTRACT SOCIAL.

<sup>9</sup> WILLOUGHBY, NATURE OF THE STATE.

<sup>10</sup> U. S. CONST., Preamble, and Art. V.

<sup>11</sup> MATTERN, *op. cit. supra* note 4.

<sup>12</sup> KANT, THE PHILOSOPHY OF LAW.

sovereignty of the people without a politically independent State under a supreme government or a sovereign monarch.<sup>13</sup>

Fichte did not recognize a state of nature, nor natural rights, and denied the transfer of sovereignty from the people to the State. All the individual yielded was his claim to the other man's property, and he yielded this to the other man, not to the State. The sovereign state, man's natural condition, was established by a union contract. Government was distinct from the State, and he tried to evolve a notion of a constitutional control of the governing magistracy.<sup>14</sup>

It should be noted that the theories of Fichte, Hegel and Kant, like the theories of Rousseau, Locke, Hobbes and Hooker, were more theories of government than theories of State.<sup>15</sup>

Austin's doctrine of sovereignty was a compromise between Bodin's doctrine that sovereignty was vested in the ruler, and the doctrine of popular sovereignty that sovereignty was vested in the nation or people. Austin defined positive law as a species of command emanating from a political superior, and he posited this superior as the sovereign. This, of course, made government the sovereign, and in Great Britain put the sovereignty in the king, peers and commons; and in the United States, in an oligarchy of the states, which together formed the determinate body which was sovereign; and was the result of identifying the exercise of sovereignty with its possession. He defined a sovereign as "a determinate person who, without a habit of obedience to another, receives habitual obedience from the bulk of a given society."<sup>16</sup>

Brown and Dicey distinguished between the exercise of sovereignty and the possession of it. According to them, the king, peers and commons did not possess sovereignty but merely exercised it; sovereignty was possessed by the State. Brown made political and legal sovereignty two aspects of supreme power, while Dicey made them two parallel forces within the political

<sup>13</sup> HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS.

<sup>14</sup> FICHTE, GRUNDLAGE DES NATURRECHTS, DER GESCHLOSSENE HANDELSSTAAT.

<sup>15</sup> MATTERN, *op. cit. supra* note 4.

<sup>16</sup> AUSTIN, PROVINCE OF JURISPRUDENCE; MAINE, EARLY HISTORY OF INSTITUTIONS, 371-400.

unit. Dicey said: "That body is politically sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State." Brown said: "The location of sovereignty in the State must be accepted as an axiom by legal theory in all highly developed communities. In a multitude of ways the State \* \* \* demands legal recognition. But if the law once recognizes the State as an entity capable of rights and duties, it is also compelled to attribute sovereignty to that entity." Thus both of these authors found that both political and legal sovereignty resided in the community regarded as an organic totality, or political unit, and to this extent they differed from Austin and yet did not accept the doctrine of popular sovereignty.<sup>17</sup>

Willoughby and others who accept the juristic conception of the state are to this extent followers of Brown and Dicey. According to them the state is society politically organized. This politically organized group of individuals they conceive of as constituting an essential entity which may be regarded as a person in the legal sense of the word. As such a personality, it is capable, through organs of its own creation, of formulating and uttering a legal will which is legally supreme. "This supreme legally legitimising will is termed sovereignty," in the words of Willoughby. The idea of sovereignty connotes simply unlimited legal competence, that is, the power to determine legal rights and duties so far as it is concerned, and to fix the territorial limits within which it will not permit the legal rights and duties existing by virtue of another sovereignty, the power to delegate the exercise of sovereignty to the various organs of government, and the power to determine the powers and the liabilities of such governmental agencies. (Kompetenz-Kompetenz.) In other words, a state is competent to determine its own legal competency, except that it "cannot by its own law limit or impair its own sovereignty." "Sovereignty inheres in the State as an attribute flowing from its existence as a political person." The State possesses sovereignty. The various organs of government, including those performing policy forming functions, merely exercise sovereignty. In the field of interna-

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<sup>17</sup> Brown, *Sovereignty* (1906) 18 JURID. REV. 1; DICEY, LAW OF THE CONSTITUTION.

tional relations, where complete individualism seems yet to obtain, Willoughby admits that his constitutional law concept of sovereignty will not work, and he suggests the term "independency" as better suited to the facts of the situation.<sup>18</sup>

Vinogradoff rejects the theory that the State is the source of positive law, on the one hand, and the modern Dutch writer, Krabbe's theory that the source of law is outside of the State, on the other hand, and makes the State and law two aspects of the same thing: law, the regulation of society considered as rules; the State, the organization of society, considered as the personal agency. He takes this position apparently because he finds it necessary to find a basis upon which to subject the State to duties as well as rights. Whether in doing so he has avoided a confusion of State and government is not clear. Willoughby does not deny rights and duties to the various governmental organs and officials.<sup>19</sup>

The modern Austrian school, positing a *civitas maxima*, or universal State (which of course some day may be a reality instead of an hypothesis), makes this universal State alone sovereign and all individual states derive their competency from its sovereignty, and gives primacy to the law of the society of nations so that constitutional and international law are but varying forms of one law and the expression of the supreme will of the universal State.<sup>20</sup>

In recent times there have arisen men who have denied the whole doctrine of sovereignty. Among the most notable of these are Duguit and Laski.

Duguit repudiates the doctrine of popular sovereignty because he contends that there never was a state of natural independence, but that man has always lived in communities, and that, therefore, there is no room for a social contract. He disposes of governmental sovereignty, as he partly disposes of state sovereignty, by showing that law is a rule of conduct not because it is a command of a superior to an inferior and sanc-

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<sup>18</sup> Willoughby, *The Juristic Conception of the State* (1918) 12 AM. POL. SC. REV. 192; HOLDSWORTH, *SOME LESSONS FROM OUR LEGAL HISTORY*, 112-141.

<sup>19</sup> Vinogradoff, *The Juridical Nature of the State* (1924) 23 MICH. L. REV. 138.

<sup>20</sup> Mattern, *op. cit. supra* note 4.

tioned by force, but because of the single fact that men group themselves together for the purpose of attaining the group's social aims; and that it contains its sanction within itself — a psychological coercion—and needs no physical coercion; and is therefore independent of the State. He discards the doctrine of state sovereignty, first, because he argues that the State is not a personality and if sovereignty is only an attribute of personality, as some of its proponents contend, the doctrine of sovereignty will have to go with the doctrine of personality; and, second, because it does not explain the existence of duties. In attempting to destroy the doctrine of personality of the State he asserts that individuals only have personality and that the state is not a collective person but a community composed of men with duties. The realities of social life, according to him, are self-conscious human beings who think, will (to lessen suffering) and act with an object in view (unite in groups). There is no quest for common happiness but a quest in common for happiness. There is no collective will, but men with identical thoughts and desires collect to get less suffering and a better life, because the suffering of one affects all and the happiness of one profits all. Consciousness is individual; the will is thought which seeks external expression; and action is the will expressing itself externally. These are the elements of personality. Individuals have them. The State does not. Hence, Duguit concludes that the State is not a personality. In attempting to show that the existence of duties in the State is inconsistent with the doctrine of sovereignty he assumes, on the one hand, the existence of such duties as an admitted fact, and shows, on the other hand, how if the State creates law it cannot be limited by it except by a self-limitation which still leaves the absolutism of the State. Hence, in place of sovereignty he posits social solidarity as the sole force binding the individual; makes law the end of social solidarity, so that rules of morals become rules of law when understood more clearly by more individuals; and, because power means only ability to act, substitutes the notion of public service in State and government for the notion of a sovereign which commands. It looks as though Duguit sometimes confuses State and government, and even if it should be agreed that he has disproved certain doctrines of sovereignty it might



be urged that he has done this only to establish the sovereignty of society organized according to his principles of social solidarity (if such an organization can be imagined to hold together). His argument in regard to the personality of the State will be discussed later.<sup>21</sup>

Laski undertakes to overthrow the doctrine of sovereignty by attacking various implications of sovereignty. He of course agrees with Duguit that the theory that the State is a person is a fiction. But even if the State were a personality, he contends that sovereignty could not be its will because "The State does not represent in dominant and exclusive fashion the will of society as a whole," but merely the will of the dominant class,—at the present time those who hold the economic power; and not the will of others who refuse to give their consent to the acts of such dominant class. If the power to compel obedience is the test of sovereignty, he tries to disprove this power by showing that the State is but one of the groups to which the individual belongs, and that he owes no unified allegiance to the State but as great or superior allegiance to other groups, like the church, the family and labor organizations, so that the State, for example, does not have the power to prevent a strike of laborers, or revise a decree of excommunication (as was proven by the experience of the State with the Scottish church, with the Catholic church, and with the anti-Volsteaders). Actually, he says that the State is sovereign in this sense only when the conscience is not stirred and the State is accomplishing its political purposes. The State is supreme, not when it commands or uses force, but when it is fused good-will. It takes its pre-eminence not by force, but wins it by consent. That State is strongest which binds its members to it by the strength of moral purpose. The object of the State is the good life. Government does not stand above the moral code. Sovereignty means ability to secure assent. Therefore, for the mystic monism of the State he substitutes a pluralistic theory of society; he makes the function of the State that of a public service corporation, which should be no more freed from liability for its injurious acts than any other corporation or individual; and he

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<sup>21</sup> DUGUIT, *Theory of Objective Law Anterior to the State*, MODERN FRENCH LEGAL PHILOSOPHY (The Modern Legal Philosophy Series).

repudiates the doctrine of sovereignty. By showing that the State may be divided instead of indivisible, responsible instead of irresponsible, can make people bound only by consent instead of by its power to compel obedience, is subject to a moral order instead of above it, is operated only by a few instead of by all and that sovereignty is denied even to this few, he thinks that he has entirely demolished and overthrown the entire doctrine of sovereignty.<sup>22</sup>

Who, if any, of these thinkers are right? What is the nature of the State? Is it a person? Is it sovereign? What is meant by sovereignty? Is there any such thing? If there is, who, under the United States Constitution, possesses it?

There does not seem to be any serious dispute over the definition of the State. The State is society politically organized as a unit for the protection of social interests. Vinogradoff briefly defines it as "organized society."<sup>23</sup> However, it should be remembered that it is one thing to define, and another thing to apply the definition, as we shall learn later.

Is the State a person? Yes, in just the same way that a corporation is a person. But, it may be said, that corporate personality is a fiction and if the personality of the state is no more, *it* is a fiction. The idea of corporate personality is of ecclesiastical court, not Roman law, origin, and is traceable to Pope Innocent IV. He took the position that a corporation had rights but no duties, because it could not sin, and until corporations and states could sin he refused to admit that they could be real persons. Savigny gave immortality and proprietary rights to corporations, on the guardianship, not the agency, analogy; but denied them natural rights, personified them for the purposes of property law, made them a piece of the State's mechanism and a part of private law. Then Lord Coke<sup>24</sup> integrated this fic-

<sup>22</sup> LASKI, *THE PROBLEM OF SOVEREIGNTY; AUTHORITY IN THE MODERN STATE*.

<sup>23</sup> Vinogradoff, *loc. cit. supra* note 19; WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES*; Willoughby, *loc. cit. supra* note 18; POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* (1923) 6-7; *Chisholm v. Georgia*, 2 Dall. 419, 471 (1793). Cf. Borchard, *Government Responsibility in Tort* (1927) 36 *YALE L. J.* 757, 767.

Of course there is no excuse for confusing the state with government, and yet as great a man as Woodrow Wilson wrote a book on government which he called "The State."

<sup>24</sup> *Case of Sutton's Hospital*, 10 Co. Rep. 1, 32, 77 Eng. Rep. 937, 972 (1576).

tion concept in the common law and John Marshall immortalized it in his opinion in the *Dartmouth College* case.<sup>25</sup> Meanwhile there had grown up in England, the partnership; in France, the *société*; in Germany, the *gesellschaft* (like the Roman *societas*), which were thought of as aspects of contract law instead of species of group-units. Rousseau, Pothier and others borrowed this contract concept instead of the more appropriate corporation concept. Then, because of their manifest similarities, it was necessary either to lower the corporation to the status of the partnership, or to raise the partnership to the status of the corporation. Ihring and most Americans seem to prefer to dispel the corporate fiction and leave nothing but contract bound men, but there are some relations which cannot be forced into the contract container. As Maitland<sup>26</sup> says, "A contract cannot digest a joint stock company." The same is true of manors, village communities, churches, universities, townships, counties, boroughs, guilds, Inns of Court, English "companies", one man companies, and the Anglo-American trusts. One reason why Anglo-Americans have not made more progress in rationalizing the question of whether a corporation is a real or an artificial personality is found in the great use of the law of trusts. Yet trusts are organized bodies which act as units, in spite of the fact that they do not have fictionness breathed into them by the State and bodiliness created by state fiat. This ought to have been enough to teach Anglo-Americans the reality of corporations and other group units, but it remained for Gierke<sup>27</sup> to teach this. He makes the German fellowship (*Genossenschaft*) a real person, a living organism, not a collective name for individuals, a group person with a group will. With him sovereignty is an attribute of the whole organized community. Maitland<sup>28</sup> and other realists, who agree with Gierke, find a real person in a group person, and declare that he "stands the wear and tear of forensic and commercial life." According to them the State makes corporations in no other sense than it makes marriages. With

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<sup>25</sup> 4 Wheat. 518 (U. S. 1819). See also, *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841 (1912).

<sup>26</sup> MAITLAND, INTRODUCTION TO POLITICAL THEORIES OF THE MIDDLE AGES.

<sup>27</sup> GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES.

<sup>28</sup> MAITLAND, *op. cit.* *supra* note 26.

the general incorporation laws of the United States, Americans ought to have realized this long ago.

A corporation cannot marry, or vote, but neither can certain minors. It will not be allowed, as a dummy, or as an agent for another corporation or for natural persons, to enable them to commit frauds, evade existing obligations,<sup>29</sup> circumvent statutes,<sup>30</sup> or violate the general principles of the common law;<sup>31</sup> but neither will natural persons. Yet it can own property, contract in its own name, be guilty of personal crimes, and sue and be sued in its own name. It has a reality distinct and apart from that of its shareholders or shareholder, even where one man buys up and owns all the stock,<sup>32</sup> or where it is a subsidiary.<sup>33</sup> It may have a citizenship in one country though all its shareholders are citizens of other countries.<sup>34</sup> It, and not its shareholders, is liable for the torts of its servants<sup>35</sup> and for breaches of contracts.<sup>36</sup> Marshall himself began to see the fallacy of the fiction notion when he came to consider the federal courts' jurisdiction over corporations.<sup>37</sup> The next step was to indulge in another legal fiction that for this purpose the individuals composing the corporation must arbitrarily be held to be citizens of the state chartering the corporation.<sup>38</sup> Now the corporation is regarded by the United States courts as a citizen of the state fathering it.<sup>39</sup> It has not as yet been held to be a citizen of a state under the "privileges and immunities" clause of the United States Constitution, but it has been held to be a person so far as concerns its property under the "due process" clause,<sup>40</sup> and so far as concerns the "equality" clause both for purposes of

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<sup>29</sup> Booth v. Bunce, 33 N. Y. 139 (1865).

<sup>30</sup> United States v. Lehigh Valley R. R., 220 U. S. 257 (1911)

<sup>31</sup> Moore & Handley Hard. Co. v. Towers Hard. Co., 87 Ala. 206, 6 So. 41 (1889).

<sup>32</sup> Button v. Hoffman, 61 Wis. 20, 20 N. W. 667 (1884).

<sup>33</sup> Berkey v. Third Ave. Ry., 244 N. Y. 84, 155 N. E. 58 (1926).

<sup>34</sup> Queen v. Arnaud, 9 Q. B. 806, 115 Eng. Rep. 1485 (1846).

<sup>35</sup> Werner v. Hearst, 177 N. Y. 63, 69 N. E. 221 (1903).

<sup>36</sup> New York Air Brake Co. v. International Steam Pump Co., 64 Misc. 347, 120 N. Y. Supp. 683 (1909).

<sup>37</sup> Bank of United States v. Deveaux, 9 Cranch 61 (U. S. 1809).

<sup>38</sup> Marshall v. Balt. & Ohio R. R., 16 How. 314 (U. S. 1853).

<sup>39</sup> Louisville R. R. v. Letson, 2 How. 497 (U. S. 1844).

<sup>40</sup> Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578 (1896).

taxation<sup>41</sup> within its own state and for the purpose of suing within another state,<sup>42</sup> and a citizen of the United States for the privilege of suing in the federal courts.<sup>42a</sup> There is no escape from the conclusion that the notion that a corporation is a fiction must go. It is a reality. It is an entity and a personality. It is not a natural person but an artificial person, but with just as real an entity as a natural person. Why? Because it has legal capacities and legal liabilities separate and distinct from those of its individual members (rather than, because it is a "group person with a group will"). It does not need to drink and sneeze and chew gum in order to be a real entity and a real personality. It "can level mountains, fill up valleys, lay down iron tracks and run railway cars on them."<sup>43</sup> That kind of a being is not "invisible, intangible and existing only in contemplation of law."<sup>44</sup>

In the same way that the corporation is a person the State is a person. When it is once realized that the thing which gives a corporation personality is not the act of incorporation so much as the other facts incident to its existence, it is easy to realize that other group-units, including the State, may have a personality. The "personification of the State before the law is as real and tangible as that of the corporation." Both the State and the corporation are organizations of individuals with mutual aims, and they are both organized for the realization of such aims. Both the State and the corporation are the unitary aspect of their individual members. The will of a corporation as a legal person is not expressed through its individual members but through its officers. The will of the State is expressed not through its citizens but through its governing agents. As the officers of a corporation are governed by its charter or statute, so the governing agents of the State are governed by its written constitution, or other legal norm. As a corporation re-

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<sup>41</sup> *Quaker v. Commonwealth*, 48 Sup. Ct. 553 (U. S. 1928).

<sup>42</sup> *Kentucky Finance Corp. v. Paramount Exch. Corp.*, 262 U. S. 544 (1923).

<sup>42a</sup> *Teurol v. Burke Constr. Co.*, 257 U. S. 529 (1922).

<sup>43</sup> *N. Y. Central R. R. v. United States*, 212 U. S. 481 (1908).

<sup>44</sup> *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (C. C., Wis. 1905). But see WORMSER, *DISREGARD OF THE CORPORATION FICTION AND OTHER CORPORATE PROBLEMS*; Machan, *Corporate Personality* (1911) 24 HARV. L. REV. 253, 347; POLLOCK, *op. cit. supra* note 23, at 116; and authorities cited *supra* note 25.

mains the same though its shareholders change, so the State remains the same though its citizens change. Of course in origin the corporation seems to be a creature of the State, while the state exists by its own right; and the corporation has legal duties imposed upon it from the outside, while the State has duties only as they are self-imposed—unless the view is accepted that they are imposed by international law<sup>45</sup> (when the existence of the super-state would be unexplained); yet apparently in all other respects, both those named above, and such respects as the legal capacity to own property,<sup>46</sup> to contract,<sup>47</sup> to sue and be sued,<sup>48</sup> liability for acts of servants<sup>49</sup> and recognition as a legal entity by the Constitution and the Supreme Court,<sup>50</sup> it is recognized and treated as a person as much as a corporation is so recognized and treated;<sup>51</sup> and we shall discover later that even its existence and duties may have another explanation.

Hence, so far as concerns the personality of the State, we must conclude that Duguit is wrong and Vinogradoff, Willoughby, Brown, Dicey and others who champion the personality of the State are right (though not as the basis of sovereignty). We must agree with Vinogradoff that Hooker, Hobbes, Locke, Rousseau and others, who made the State the result of a contract, instead of a corporation with a real existence, were mistaken. Yet in their day the corporation was not regarded as a real entity but a fiction, and so long as the fiction notion obtained it was impossible to get the duty idea. The contract notion did give the duty idea, better than the fiction notion could, but not as well as the personality notion

<sup>45</sup> Beale, *Jurisdiction of a Sovereign State* (1923) 36 HARV. L. REV. 241.

<sup>46</sup> *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1917); POLLOCK, *op. cit. supra* note 23, at 100.

<sup>47</sup> *St. Cloud Pub. Ser. Co. v. St. Cloud*, 265 U. S. 352 (1924); Frankfurter and Landis, *A Study in Interstate Adjustments* (1925) 34 YALE L. J. 685.

<sup>48</sup> *Virginia v. West Virginia*, 206 U. S. 290 (1907); *South Dakota v. North Carolina*, 192 U. S. 286 (1904).

<sup>49</sup> *Grove v. Fort Wayne*, 45 Ind. 429 (1874); *Thayer v. Boston*, 19 Pick. 511 (Mass. 1837).

<sup>50</sup> U. S. CONST., Art. I, §§ 9, 10; *ibid.* Art. IV; *ibid.* Amendments, IV, XV, XIX; authorities cited *supra* note 48

<sup>51</sup> MATTERN, *op. cit. supra* note 4, c. XII.

would. Now that the fiction notion has been exploded and the notion that both the corporation and the State are artificial but real persons is coming to be accepted, there is no reason for the non-liability of either for torts and crimes, and the law ought to change and it is changing. Corporations are being held liable for torts and crimes, even purely personal crimes,<sup>52</sup> and the exceptions to the State's non-liability for torts are becoming so numerous that the exceptions are about to become the rule for which Borchard has so eloquently contended.<sup>53</sup> The trouble with Duguit's position is that if it proves anything it proves too much. It would prove that there can be no group entities. This is something which cannot be done. Instead, it can be proven that there are group entities. When this is done it would seem that there is little left to Duguit's position.<sup>54</sup>

Kocourek takes the position that corporations and other aggregates of human beings have legal personateness (to use his expression) to just the same extent and in the same way that human beings as individuals have, because they have legal capacities, etc.; but he takes the view that in each case the personateness is conceptual. However, he regards this conceptual personateness (with its resulting legal personality) as a legal fact, though not a physical fact. This would seem to reach the same result, though by a slightly different route.<sup>54a</sup>

Is the State sovereign? Showing that the State is a person does not show that the State is sovereign, any more than showing that it is not a person would show that it is not sovereign. In order to answer this question we must first determine what is sovereignty and second who, if anyone, is sovereign.

Is there such a thing as sovereignty? This depends upon the definition of sovereignty. What is meant by sovereignty?

<sup>52</sup> *United States v. New York Herald Co.*, 159 Fed. 296 (C. C., N. Y. 1907); *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823 (C. C., N. Y. 1906); Edgerton, *Corporate Criminal Responsibility* (1927) 36 *YALE L. J.* 827.

<sup>53</sup> Borchard, *Government Responsibility in Tort* (1928) 28 *COL. L. REV.* 577, 734; Borchard, *op. cit. supra* note 23, at 1, 757, 1039; Borchard, *Government Liability in Tort* (1924) 34 *YALE L. J.* 1, 129.

<sup>54</sup> GIERKE, *op. cit. supra* note 27; Vinogradoff, *op. cit. supra* note 19; POLLOCK, *op. cit. supra* note 23, at 121; Willoughby, *op. cit. supra* note 18; Butler, *Sovereignty and the Modern State* (1905) 39 *AM. L. REV.* 380.

<sup>54a</sup> KOCOUREK, *JURAL RELATIONS*, 76n, 227n, 228n, 291-304.

If sovereignty is defined as Paley defined it as "absolute, omnipotent, uncontrollable, arbitrary, despotic" power, or as Hobbes defined it as "indivisible, unlimited and illimitable" power, there is no such thing as sovereignty. It may be said that each nation is independent of every other and that international law is not a limitation upon any of them because it is self-imposed, but the facts of life limit external sovereignty. War may seem like international lynch law. It sometimes seems that the nations of the earth exist together in a pure state of anarchy.<sup>55</sup> But the world is not an anarchy of sovereigns. The world is too small for over fifty independent unlimited states. So far as there are international law, treaties, conventions, and the League of Nations, all national sovereignty is limited in international relations, and the federal Constitution further limits state and national sovereignty in the United States.<sup>56</sup> If sovereignty were to be defined in terms of independence, it would seem that the Austrian school would be right. Only the universal state could be sovereign. In the same way internal sovereignty has its limits. Both the states and the nation in the United States are limited by bills of rights. If sovereignty must be independent and unlimited there is no such thing as sovereignty. Likewise Hobbes' requirement that sovereignty be indivisible (to justify the Stuart reign in England) was a conception which was destroyed by later English and United States history, but if sovereignty had to be indivisible it is doubtful if there would be any such thing as sovereignty.<sup>57</sup>

If sovereignty is defined as Austin defined it as "the power to compel obedience", again there is no such thing as sovereignty. The pluralists have proven that it is impossible for a State (or any power) to compel obedience by force. Attempts have failed in the past, as witness the Catholic Revival, the Scottish Disruption and the Oxford Movement. They would

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<sup>55</sup> Stevenson, *Nature and Interrelation of Sovereign States* (1904) 38 AM. L. REV. 551; *Underhill v. Hernandez*, 168 U. S. 250 (1897).

<sup>56</sup> Garner, *Limitations on National Sovereignty in International Relations* (1925) 19 AM. POL. SC. REV. 1; Korff, *Problem of Sovereignty* (1923) 17 AM. POL. SC. REV. 404; Lowell, *Limits of Sovereignty* (1888) 2 HARV. L. REV. 70.

<sup>57</sup> LASKI, *GRAMMAR OF POLITICS*, 45.



fail in the future. There are limits to the power of a State, and there are other loyalties than that to the State. What State, for example, could compel all men to kill their wives, or to accept religious doctrine formulated by the State? A State cannot even compel a man to perform his contract. It can issue an order. It can punish for contempt of court. It can direct an officer of the court to act for him. But it cannot compel him to perform. It is true that a State does employ some enforcement of the law, but naked and arbitrary force is not a characteristic of a State. If it were it would guarantee, not law and order, but anarchy.<sup>58</sup> In controversies between the states, the United States Supreme Court does not even undertake to enforce its decrees, but relies wholly upon voluntary obedience and public sentiment. Another proof that force is not a characteristic of sovereignty is found in jurisdiction of the person by imputed consent when there is no possibility of exercising the power of enforcement. But the best proof of this fact is found in declaratory judgments.<sup>58a</sup>

If sovereignty is defined as freedom from liability, still again there is no such thing as sovereignty, because the doctrine of state and governmental immunity is both in process of being abandoned, as it should be, and it is without historical foundation. The dogma arose from the maxim that "the King can do no wrong." The dogma was accepted by the courts in the United States at first without an attempt at justification, in spite of the difficulty of seeing its applicability here, and in spite of the silence of constitutions on the subject, and then *ex post facto* justifications have been attempted on theoretical grounds.<sup>59</sup> There has been advanced the Austinian explanation that law is a command of a superior to an inferior and

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<sup>58</sup> Borchard, *op. cit. supra* note 23, at 760; Elliott, *The Pragmatic Politics of H. J. Laskie* (1924) 18 AM. POL. SC. REV. 251; Sabine, *Pluralism: A Point of View* (1923) 17 AM. POL. SC. REV. 34; Brown, *The Jurisprudence of M. Duguit* (1916) 32 L. Q. REV. 168; Elliott, *The Metaphysics of Duguit's Pragmatic Conception of Law*, 37 POL. SC. QUAR. 639; Mathews, *A Recent Development in Political Theory*, 24 POL. SC. QUAR. 284.

<sup>58a</sup> Dodd, *Jurisdiction in Personal Actions* (1929) 23 ILL. LAW REV. 427.

<sup>59</sup> Watkins, *The State as a Party Litigant*, 45 JOHNS HOPKINS UNIV. STUDIES, No. 1, at 192; *Underhill v. Hernandez*, *supra* note 55.

that of course the superior is not subject to its own commands.<sup>60</sup> But the Austinian definition of law is erroneous. Law in the United States is neither a command nor from a superior, but a scheme of social control imposed by the people as a whole upon themselves as individuals for the protection of certain social interests, so as to prevent any particular individual from doing what the social order cannot permit all to do.<sup>61</sup> The State is not immune. And even though it be said that this is because it has waived its immunity and consented to be sued, the fact that it can waive it shows that this immunity is not an essential characteristic of sovereignty.<sup>62</sup> If the reason why a State is not liable is its sovereignty, proof that it is not sovereign (which we expect to produce later) ought to be enough to make it liable.

If, however, sovereignty is defined not as external but as the internal power to delimit personal liberty by social control, or protect it against social control, there is such a thing as sovereignty. Probably Duguit, Laski and Krabbe have demonstrated that there is no such thing as sovereignty in the historic sense, and that there never will be unless a world state becomes a reality; but that is no reason why the social control we see everywhere in the world should not be defined as sovereignty. That the personal liberty of individuals is limited is a fact. That this occurs by social control is another fact. Everywhere about us we see a scheme of social control which limits the personal liberty of each individual so as to prevent him from committing breaches of contracts, torts, crimes and other legal wrongs (which would otherwise endanger social interests) by giving to other individuals rights, powers, privileges and immunities, and by providing for legal redress for the protection of such legal capacities. We feel near us a something which possesses the so-called sovereign powers of eminent domain, taxation, and police. We even know that there is a power which protects certain forms of personal liberty, like the privilege of freedom of speech and of the press

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<sup>60</sup> *The Western Maid*, 257 U. S. 419 (1922); *The Pesaro*, 277 Fed. 473 (S. D. N. Y. 1921); *Kawananakoa v. Polyblank*, 205 U. S. 349 (1907).

<sup>61</sup> WILLIS, *INTRODUCTION TO ANGLO-AMERICAN LAW*, 7.

<sup>62</sup> *Watkins*, *op. cit. supra* note 59, at 198.

and the immunities against self-crimination and unreasonable searches and seizures, against delimitation by social control. This power, whoever and wherever it is, may rightly be defined as sovereignty.<sup>63</sup> Hence the writer does not disagree with Willoughby's definition of sovereignty, although he prefers to phrase his definition differently. It seems to the writer that Willoughby is right both in his doctrine that the State is a personality and in his definition of sovereignty. Where he differs with Willoughby is in identifying sovereignty with personality.

With the concept of sovereignty defined in this narrow sense, where does sovereignty reside in the United States? Who is sovereign under the United States Constitution?

Is sovereignty found in some natural, or divine, law? This doctrine was promulgated in the Declaration of Independence. Locke was the authority for the Declaration of Independence. Locke, Grotius and the other proponents of natural law found sovereignty therein. Austin and the analytical school rendered a valuable service in exploding this doctrine. Even Thomas Jefferson himself in later life saw and admitted the fallacy of the statement he himself wrote into the Declaration of Independence.<sup>64</sup> Yet in recent times, Stammler has been reviving the notion of natural law with his concept of a natural law with a changing content;<sup>65</sup> and our own Supreme Court, in exercising the power to make law which it has taken unto itself under the due process clause, seems to be vindicating Stammler's position. However, the natural law with a changing content is very different from the old natural law. The latter, if anything, was before and above governmental organs, the former is a creature of an organ of government. The latter was the voice of sovereignty speaking; the former is what is said by some other voice. Sovereignty cannot be found in that kind of natural law. The bills of rights in our federal

<sup>63</sup> *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909); *Donnelly v. Decker*, 58 Wis. 461, 17 N. W. 389 (1883); COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927) 3; Baldwin, *The Vesting of Sovereignty in a League of Nations* (1919) 28 *YALE L. J.* 209.

<sup>64</sup> McAdoo, *Private Rights and Public Authority*, 1 *ADDRESSES INSTITUTE OF PUBLIC AFFAIRS, VIRGINIA*, 103.

<sup>65</sup> STAMMLER, *THE THEORY OF JUSTICE*.

and state constitutions do not purport to embody any such doctrine.

Is the United States Constitution sovereign? It established the framework of our government, prescribed the powers of the various branches of government, set limits to national and state power and guaranteed certain forms of private liberty against public authority: but the Constitution did not make itself, and it can be unmade. If either power is sovereign, it would seem that the power that can both make and unmake constitutions is sovereign rather than the constitutions which it may make.

Are the organs of government sovereign? One of the most recent champions of the theory that sovereignty resides in the organs of government is Dickinson.<sup>66</sup> He finds sovereignty, not in an abstract state, but in the concrete organs of government. In Great Britain, he thinks, this sovereignty is possessed by the two houses of Parliament; in the United States, by many organs geared together, both federal and state, including the executive, the legislature, the judiciary and the amending machinery. His concept of sovereignty is that it is the function of determining what rules are and what are not law. He thinks that this was the original notion of sovereignty when kings were regarded as sovereign, and that the notions of independency, supremacy, and will not subject to the will of another, added one after another, finally resulted in the doctrine of popular sovereignty, which in turn must give way to the original notion when the circle is completed. Under the feudal system the king was sovereign in fact, but that was the result of the feudal contract. To-day, no contract, as an operative fact, can be found, which places sovereignty in the organs of government, even though they are regarded as occupying a similar place to that of the king; and if they are sovereign other operative facts or tests must be found. No cause of their sovereignty can be found. Are they sovereign in effect? If any organ of government seems sovereign it is the Supreme Court. It has established its supremacy over the other branches of the federal government and over the state govern-

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<sup>66</sup> Dickinson, *A Working Theory of Sovereignty*, 42 *Pol. Sc. QUAR.* 524; 43 *Pol. Sc. QUAR.* 32.

ments by declaring unconstitutional the acts of the legislative and executive branches of government,<sup>67</sup> by making the state courts inferior courts in the federal system<sup>68</sup> and by determining where under the Constitution the line shall be drawn between personal liberty and social control.<sup>69</sup> Yet its powers are limited by the constitutional doctrine of separation of powers; its members can be impeached; it derives all its legal powers from the Constitution, and like the Constitution can be changed or abolished by a power back of both. It would seem, therefore, that though it may exercise many of the powers of sovereignty, it is not sovereign, but is acting as agent for a sovereign power, its principal.<sup>70</sup>

Are the states of the Union sovereign? Some people throughout our history have taken the position that they are. The thirteen colonies were recognized as states by Great Britain in 1783. Jefferson and many other so-called "states' rights" men have held at one time or another that the states were sovereign and that the Nation was not sovereign, because only a league of states instead of a federation.<sup>71</sup> Marshall established the proposition that the nation had as high a status at least as the states, but he seemed to give comfort to the position that both the states and the nation were sovereign, each within its own sphere.<sup>72</sup> This made our government a federation of states, and is known as a dual form of government. More recently the Supreme Court has been taking the position either that the nation is sovereign but that the states are only quasi-sovereign,<sup>73</sup> or that neither is sovereign.<sup>74</sup> The provision in the

<sup>67</sup> *Fletcher v. Peck*, 6 Cranch 87 (U. S. 1810); *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803).

<sup>68</sup> *Cohens v. Virginia*, 6 Wheat. 264 (U. S. 1821).

<sup>69</sup> Willis, *Due Process of Law Under the United States Constitution* (1926). 74 U. PA. L. REV. 331.

<sup>70</sup> *Cherokee Nation v. Southern Kansas R. R.*, 33 Fed. 900 (W. D. Ark. 1888); but see, *People v. Tool*, 35 Colo. 225, 86 Pac. 224 (1905).

<sup>71</sup> 2 BEVERIDGE, *LIFE OF MARSHALL*, 398-413; 3 *ibid.* 148; *Commonwealth v. Algen*, 61 Mass. 53, 81 (1851).

<sup>72</sup> *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824); *McCullough v. Maryland*, 4 Wheat. 316 (U. S. 1819).

<sup>73</sup> *Florida v. Mellon*, 273 U. S. 12 (1927); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Missouri v. Holland*, 252 U. S. 416 (1920); *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907).

<sup>74</sup> *Leser v. Garnett*, 258 U. S. 130 (1922); *National Prohibition Cases*, 253 U. S. 350 (1920).

Constitution "that no state, without its consent, shall be deprived of its equal suffrage in the Senate", and the provision that an amendment legally proposed shall be valid "when ratified by the legislatures of three-fourths of the several states",<sup>75</sup> seem to support the theory that the states are sovereign; but there are other facts which point in the opposite direction. It has already been pointed out that the states have no external sovereignty, either as to other nations or as to other states. There are likewise important limits on their internal sovereignty. Important sovereign powers have been delegated to the federal government and denied the states. Only the United States can punish for treason. The states cannot punish for treason. Yet treason is the one offense against sovereignty. The citizens of the United States owe paramount allegiance to the federal government. The citizens of the Southern states could not justify their secession on the ground of allegiance to their states. Many powers of the states are subject to the judgment of the Supreme Court. The Eighteenth Amendment binds Connecticut and Rhode Island, who did not vote for it, as much as though they had voted for it. It is true that the states exercise the sovereign powers of police, taxation and eminent domain, but public callings exercise the power of eminent domain, and it is not yet thought that public callings are sovereign. It is true that states through their legislatures enact statutory law and through their courts make and apply common law, but so do cities, and no one contends that cities are sovereign. Hence it would seem that as a practical matter, both from the standpoint of authority and from the standpoint of principle the theory that the states are sovereign is no longer tenable.<sup>76</sup>

Austin placed sovereignty in the United States where, as Green says, no ordinary citizen would place it, in an oligarchy of states,—the electorates of the states acting together. Hurd and Richman are solitary supporters of Austin's position.<sup>77</sup>

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<sup>75</sup> U. S. CONST., Art. V.

<sup>76</sup> Willis, *Our Dual Form of Government* (1927) 15 KY. L. J. 175; Willis, *Some Conflicting Decisions of the United States Supreme Court* (1927) 13 VA. L. REV. 155, 278.

<sup>77</sup> Richman, *From John Austin to John C. Hurd* (1901) 14 HARV. L. REV. 353.

According to this theory the states are sovereign as creators and maintainers of the federal government, each an integer in a sovereign corporation. These men claim that under the Articles of Confederation the states were not sovereign separately, but that they gained their independence in union; that the maintenance of their local governments and institutions, as against foreign aggression, depended upon union; that they sent no ambassadors, made no war or peace; that Rhode Island and North Carolina, by refusing to attend the Continental Convention, abjured their political existence; and that sovereignty in the United States is one and indivisible, residing in the states collectively (in union). Under this theory the federal government is an agent of this sovereignty. For support for the theory reliance is placed upon the constitutional provision as to representation in the Senate and upon the power of the states to fix the qualifications for voters. Of course Austin was endeavoring to make sovereignty determinate in order to make it square with his notion of law. But as Dewey points out<sup>78</sup> Austin was right on neither. On his own theory sovereignty in the United States is not determinate, because of the effect of the votes of one-fourth of the states against an amendment. That law is a command and that only persons enumerated can command is a pure assumption, false in fact, as already indicated, and as is shown by customary and judge-made law. The ultimate force of public opinion does not reside in a determinate number of persons. Austin was forced to say that constitutional law was not law in order to bolster up his position. To place sovereignty under the United States Constitution in an oligarchy of states is far-fetched, if not fantastic. If any further argument is necessary to show its untenableness it can be found in the discussion of the next two theories to be considered.

Is the federal government sovereign? Probably Hamilton would like to have seen the federal government alone sovereign, and there are some who think that the Civil War, the Supreme Court and the Republican party have brought this consummation to pass. Under the doctrine of divisible sover-

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<sup>78</sup> Dewey, *Austin's Theory of Sovereignty*, 9 *POT. SC. QUAR.* 31.

eignty, maintained by Marshall, Chase and Miller,<sup>79</sup> of course, both the federal government and the states were sovereign. If it were a choice between the Nation and the states doubtless the nation should be preferred. If either is sovereign it is the nation. The United States can punish for treason while the states cannot. The federal Supreme Court is supreme, not only over the other branches of the federal government, but also over all branches of the state governments.<sup>80</sup> The federal government has more power over interstate commerce than the state governments have over intrastate commerce.<sup>81</sup> Congress can tax instrumentalities of the states as state legislatures cannot tax instrumentalities of the United States.<sup>82</sup> The United States can condemn state property for federal purposes, but the states cannot condemn federal property for state purposes.<sup>83</sup> The federal government, and not the state governments, exercises the postal powers, the treaty powers and the war powers. But the true answer is that neither the states nor the federal government is sovereign. Laws enacted by Congress will be repealed by a subsequent Congress if so displeasing to the people that they elect different representatives to represent them. The Supreme Court, in spite of its supremacy, may have its numbers or its salary reduced by Congress as any of its members no longer continue in office, and it could be abolished or have any of its present constitutional powers taken away from it by the people. Constitutions and other forms of social control antedated both states and nation. The federal government itself could be abolished. The Supreme Court has so held.<sup>84</sup> Under such circumstances it is futile to talk about the sovereignty of the federal government.

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<sup>79</sup> Civil Rights Cases, 109 U. S. 3 (1883); Slaughter-House Cases, 16 Wall. 36 (U. S. 1872); Texas v. White, 7 Wall. 700, 730 (U. S. 1868); Gibbons v. Ogden, *supra* note 72; McCullough v. Maryland, *supra* note 72.

<sup>80</sup> Meyer v. Nebraska, 262 U. S. 390 (1923); Allgeyer v. Louisiana, 165 U. S. 578 (1897); Davidson v. New Orleans, 96 U. S. 97 (1877); Cohens v. Virginia, *supra* note 68; Fletcher v. Peck, *supra* note 67; Marbury v. Madison, *supra* note 67.

<sup>81</sup> Houston & Texas Ry. v. United States, 234 U. S. 342 (1914).

<sup>82</sup> Flaherty v. Hanson, 215 U. S. 515 (1919); South Carolina v. United States, 199 U. S. 437 (1905).

<sup>83</sup> Utah P. & L. Co. v. United States, 243 U. S. 389 (1917); United States v. Gettysburg Elec. Ry. Co., 160 U. S. 668- (1896).

<sup>84</sup> See authorities cited *supra* note 74.



As Dewey says, the forces which determine the government are sovereign. The effective social forces are not the Union, nor the states, nor the oligarchy of states, nor the organs of government, nor the Constitution, nor Natural Law, but those forces which created these organizations and agents and institutions and to whom they are all ultimately responsible. The concept of a sovereign State, separate from and independent of its government on the one hand and of its people on the other, has been a metaphysical juggernaut, whose end apparently has been its own existence; whose purpose, its own preservation and aggrandisement; whose power, without limit or control; and whose destiny, mutual extermination. This concept of sovereignty will have to be dropped, and with it perhaps will go some of its consequences. As applied to the United States we at least feel that the concept has not been the juggernaut that it has when applied to other states, but even as applied to the United States it has had some bad consequences, is false in fact, and should be abandoned.

Who, then, in the United States is sovereign? It is the people. The people, not as Rousseau suggested without determinate forms for the exercise of sovereignty; not as citizens of the United States nor as citizens of the various states: but the whole people as organized in government to express and adjust their will either directly or through representatives. At the present time, the people of the United States are politically organized under constitutions in a dual form of government. This is an accident. But the people are not an accident. They could change or abolish both their dual form of government and their constitutions.<sup>85</sup> Even the clause in Article V, which provides that "No state without its consent shall be deprived of its equal suffrage in the Senate," could probably be amended though some state should not consent. At any rate, while there is no right to revolution, after a revolution has been accomplished it is legal and a new constitution established thereby is legal. This power of revolution substantiates the doctrine that the people are sovereign, and shows that neither the states nor the Con-

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<sup>85</sup> *Leser v. Garnett*, *supra* note 74; *National Prohibition Cases*, *supra* note 74.

stitution is sovereign.<sup>86</sup> At the present time, the sovereign powers of the people are exercised by the various organs of government, through the joint action of the state and federal governments.<sup>87</sup> Again these organs of government are an accident. They are not sovereign. The people could change their Constitution and exercise their sovereignty in some other way, as through the initiative and referendum. The people have made the states and the nation artificial personalities to which the name State is given. They have created no artificial personality to correspond with the people as a whole viewed as a political unit. But this is of no importance. Sovereignty does not depend upon personality any more than personality depends upon sovereignty. Willoughby agrees that governmental organs are not sovereign. By the same argument the states and the nation are not sovereign. Both are like individuals before the law. Otherwise the Constitution would not recognize rights, privileges and immunities of individuals against the states and nation. Just as the colonies were not sovereign, though given almost complete autonomy, because the mother country still had the power of control, so neither the nation nor the states are sovereign because the people have the power of control. By the people is meant the people as a whole, and not the people of the various states, because in the last analysis the people of any particular state may have their social control dictated by the people of other states. This has occurred in the case of Maryland, New York, Rhode Island and some Southern states. If the makers of state constitutions are subject to the makers of the Constitution of the United States, the people within each state are not sovereign even as to those matters not reserved by the Constitution. A part of the people in the Southern states never succeeded in throwing off this sovereignty. That is why they continued to owe allegiance to the government set up by the whole people, rather than allegiance to their separate states or to their Confederacy. Because the people are sovereign, a state cannot abrogate the sovereign powers of police, taxation and eminent domain.<sup>88</sup> Hence the

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<sup>86</sup> Wood's Appeal, 75 Pa. 59 (1874).

<sup>87</sup> Moore v. Smaw, 17 Cal. 199, 218 (1861).

<sup>88</sup> 1 U. PA. L. REV. 153.

phraseology of the Federalist, according to which a portion of sovereignty resides in the individual states, must be given up.<sup>89</sup> Whether the people means the total aggregate of the population or only the qualified voters, that is, those who exercise the elective franchise, is in dispute, but it is one or the other.<sup>89a</sup> However, this term does not at the present time include the citizens of the District of Columbia, or our nationals (subjects) living in unincorporated territory (Porto Ricans and Filipinos). Legislatures, executives and courts, consequently, are simply agents of the people to exercise certain sovereign powers for them, and they are ultimately responsible to the people. The states and the nation are but personalities created by the people, as they have created other artificial personalities, to perfect their political organization, but they are only manifestations of sovereignty and are not superior to their creator. Constitutions are only further parts of the scheme of social control which the people have set up for the guidance and regulation of their agents, and to define and limit the manifestations of sovereignty. But the people of the United States are the effective social forces. All power resides in them. It is they, who through their agents in states and nation delimit personal liberty by social control, and who through their constitutions protect it against social control; but they can make and unmake constitutions, states and agents. They are sovereign.

The people of the colonies, who at first at least in part had been under the feudal sovereignty of the king (whatever was their status after Parliamentary supremacy), simultaneously rejected old political authority, but when they did so they acted as one people, and the subverted sovereignty was acquired by the whole people, not as individuals, but as a community, or society, or group bound together first by the principles of solidarity and then by the political organizations which they adopted.<sup>90</sup> Any prerogatives of the states did not come from the feudal common law which gave prerogatives to the king, but from the sovereign

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<sup>89</sup> Ritchie, *Conception of Sovereignty*, 1 AM. ACAD. POL. & SOC. SC. 385; and authority cited in note 5.

<sup>89a</sup> See *infra* notes 95-102.

<sup>90</sup> Fowler, *A Theory of Sovereignty under the Federal Constitution* (1887) 21 AM. L. REV. 399.

power of the people, and must be found in the grant of powers to the states by the people.<sup>91</sup> So much for history. Philosophically perhaps the sovereignty of the people can best be explained as an original right,<sup>92</sup> or "divine right." It is certainly more appropriate to speak of the people as sovereign by "divine right" than to speak of a king in this way. Yet, as Willoughby has said of the State, we are not so much concerned with how the people became sovereign as with the fact that they are sovereign. Following their achievement of sovereignty, the people promulgated constitutions to limit and define their manifestations of sovereignty, created states and nation as further manifestations of sovereignty, and appointed the organs of government to exercise their sovereign powers. Pursuant to the authority conferred, the organs of government have built up a very complicated scheme of social control, called law, for the protection of the social interests of the people. This scheme of social control, outside of certain administrative activities, depends for its success upon legal capacities and legal redress. It is not a command from a superior, because there is no command and no superior. Though sometimes incidental physical coercion seems to be employed, as Duguit says, it needs no physical coercion, as is proven by the social control exercised by the Supreme Court over the various states of the Union without any attempt to exercise physical coercion. As population has become greater and life more complex social control has increased and new social interests have been discovered. Legal justice is tending in the direction of social justice, it is natural law with a changing content. Yet it is still only an exercise of the sovereignty of the people.<sup>93</sup>

This doctrine is the doctrine of most American political scientists, jurists and philosophers. James Wilson, speaking in the Constitutional Convention, said:

"My position is that the sovereignty resides in the people  
\* \* \* the people at large \* \* \*. They can distribute  
one portion of power to the more contracted circle called the

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<sup>91</sup> *Fidelity and Casualty Co. of New York v. Union Savings Bank Co.*, 28 Ohio App. 137, 162 N. E. 420 (1928).

<sup>92</sup> *Marbury v. Madison*, *supra* note-67.

<sup>93</sup> Willis, *op. cit. supra* note-61, at 7-11.

state governments; they can also furnish another portion to the government of the United States \* \* \*. In our government the supreme, absolute and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to the constitutions."

Dewey says:<sup>94</sup>

"My thesis is, that the institution and development of law as an operation of sovereignty, is consistent only with the theory that government is an organ of sovereignty, not sovereignty itself \* \* \*. The forces which determine the government (the effective social forces) are sovereign \* \* \*. But sovereignty exists as a definite actuality only as it is realized in institutions which act as its effective organs \* \* \*. The great weakness in Rousseau's theory that the general will is sovereign is that it makes its generality exclude all special modes of operation \* \* \*. The ultimate weakness of Austin's theory is that, in identifying sovereignty with a part only of the body politic, he gives (and allows) no reason why this limited body of persons have the authority which they possess."

Every word quoted from Dewey supports the position the writer has taken. Cooley says:<sup>95</sup>

"The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. The people of the Union created a national Constitution and conferred upon it powers of sovereignty over certain subjects, and the people of each state created a State government to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. \* \* \*"

"As a practical fact the sovereignty is vested in those persons who are permitted by the Constitution of the State to exercise the elective franchise."

Cooley's language supports the writer's position in every respect except where he places a part of the sovereignty in the people of a state. Pomeroy says:<sup>96</sup>

"According to the American theory \* \* \* sovereignty does not reside in legislators, or executives, who are chosen,

<sup>94</sup> Dewey, *loc. cit. supra* note 78.

<sup>95</sup> COOLEY, *op. cit. supra* note 63, at 81, 82, 175, 1349.

<sup>96</sup> POMEROY, CONSTITUTIONAL LAW, § 37.

nor in the body of electors who immediately choose, but in the total aggregate of persons who are members of the state, and who by the present constituted order of things are primarily represented by the existing body of electors, and ultimately, by the legislative and executive officers."

Pomeroy's omission of the judiciary is evidently an oversight. Whether sovereignty resides in the body of electors or in the total aggregate of persons, in either event the people as a whole are sovereign. Von Holst disagrees with Pomeroy. Von Holst says:<sup>97</sup>

"The government of a republic does not exist in its own right \* \* \*. The source of all its power is the people \* \* \*. Hence the Constitution represented the right of petition as a right independent of and existing before it \* \* \*. The Constitution did not make the State a republic, but the republican people had given themselves this Constitution, and the right of petition is the only possible means corresponding to that end. \* \* \* The people, indeed, is sovereign; but the people is not the aggregate of all individuals as such, to say nothing of a group of individuals constituted at pleasure, and of any desirable magnitude, but the population in its political organization."

That the people in one or the other of these senses are sovereign is the position taken by still others. Fowler says:<sup>98</sup>

"The states and Federal Government are mere outward manifestations of sovereignty. \* \* \* We must carefully exclude the notion that the sovereign power of the people resides in the \* \* \* Federal Government or \* \* \* the states."

Stevenson says:<sup>99</sup>

"The test of an independent sovereign state, is that the law which governs it originates within it, is declared by a law-giver who constitutes a part of it, and is enforced by its own power—the power of the aggregate population."

Briggs says:<sup>100</sup>

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<sup>97</sup> 2 VON HOLST, CONSTITUTIONAL HISTORY OF THE UNITED STATES, 252; 6 *ibid.* 273-4.

<sup>98</sup> Fowler, *loc. cit. supra* note 90.

<sup>99</sup> Stevenson, *loc. cit. supra* note 55.

<sup>100</sup> BRIGGS, SOVEREIGNTY AND THE CONSENT OF THE GOVERNED (1901) 35 AM. L. REV. 49, 50.

"In the United States the proper subject of sovereignty is the people, taken in the sense of the constitutionally qualified electorate, save in so far as they have delegated certain of these attributes to government, state or national."

Wickersham<sup>101</sup> agrees with Cooley. But probably the truth of popular sovereignty was best expressed by Abraham Lincoln when he called our government "a government of the people, for the people, by the people."<sup>102</sup> This expressed not only the political creed of Abraham Lincoln but of the American people.

The doctrine, thus championed, that the people as politically organized are sovereign, has not been refuted nor overthrown by those political scientists, jurists and philosophers who have championed other theories. Under the Roman and feudal theories, the rulers were sovereign because made so by their people. Bodin's theory, as well as the theory of Hegel, that the king was sovereign by divine right, has been so thoroughly exploded and repudiated that it can be forgotten. Hooker and Hobbes started with the people and got sovereignty in their rulers only on the hypothesis of a social compact. The social compact has been proven false, and that would seem to leave sovereignty with the people. Locke's natural law theory, although false in fact, would so far as it had any effect tend to uphold the sovereignty of the people. Rousseau made sovereignty start and end with the people, but the people without political organization. Kant and Fichte did not differ enough from Rousseau on this point to offer any difficulty. Austin and his followers placed sovereignty in the government, but the fact that they mistook the exercise of sovereignty for the possession of it has been proven so many times that their position is now no cause for worry. Austin and Rousseau however, tended to correct each other, and thereby they both helped the process of obtaining the theory for which we are contending; and the Austinians helped to destroy the doctrine of the sovereignty of the separate states. Brown, Dicey, Willoughby and the other champions of juristic sovereignty have made the State sovereign. They performed a valuable service in distinguishing between the

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<sup>101</sup> Wickersham, *Confused Sovereignty* (1916) 11 ILL. L. REV. 225.

<sup>102</sup> Gettysburg Address; Cooper Union Speech. See also *Blair v. Ridgeley*, 41 Mo. 40, 63 (1867).

exercise of sovereignty and the possession of it, but not so valuable a service in determining who possesses sovereignty. Pollock admits that it is not safe to generalize for the United States from England's experiment. None of the proponents of state sovereignty has disproved that the people as politically organized are sovereign. They simply posited state sovereignty. We think we have both disproved the doctrine of state sovereignty and proved the doctrine that the people politically organized in determinate forms for the exercise of sovereignty are sovereign. Vinogradoff rejected the theory that the State is the source of positive law and made it a personal agency of society, and therefore would seem not essentially to be opposed to the theory advocated herein. The Austrian School may have disproved the wider definition of sovereignty except under a universal state, but it has not disproved the narrower definition of sovereignty as applied to smaller units. Duguit and Laski, if they have accomplished anything in this respect, have disproved state sovereignty. They have not proved that the people as a whole as politically organized in determinate forms of exercise of sovereignty are not sovereign. They have not attempted to do so. Duguit attempted also to show that the State is not a personality. We have attempted and hope that we have succeeded also in showing that he failed in this effort on his part. The problem of how to account for duties on the part of the State is adequately solved. Duguit, of course, was right when he said that if the State creates law it cannot be limited by it; but if the people create law, through the agencies of the State and the organs of the State (also created by the people), of course, the people can limit its agencies and impose duties and liabilities upon them—as they should. The other problems of sovereignty have been eliminated by our definition, but, even if sovereignty were defined to include the extra factor of power to compel obedience, Laski and the other pluralists would have trouble in proving that the people as a whole are not sovereign.

The doctrine of popular sovereignty, not as Rousseau defined it but as above defined and applied, is also the doctrine of the United States Supreme Court. In *Chisholm v. Georgia*,<sup>103</sup> the

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<sup>103</sup> *Supra* note 23. Cf. *Hollingsworth v. Virginia*, 3 Dall. 378 (1798).



Supreme Court held that a state was liable for its wrongful acts and could be sued by a citizen of another state though a private individual. This of course repudiated that notion of sovereignty which makes it include freedom from liability, but it alone did not repudiate the notion of sovereignty in the limited sense, nor the sovereignty of the states. The Eleventh Amendment was passed to change the rule as to the liability of a state to suit by a citizen of another state, not because the states wanted to correct the definition of sovereignty but because they did not want to pay their debts. They were still liable to be sued in the United States Supreme Court by another state. Yet the Court directly repudiated the notion that the states are sovereign. As to who was sovereign, the Court held that it was the people. Chief Justice Jay said that from the Crown, sovereignty and the unappropriated lands of the country passed to the whole people. The people first tried the Confederacy and then the United States Constitution. But the Chief Justice found the residuary sovereignty of a state not in the people as a whole but in the people of that state. Justice Wilson called the State a creature of the people and took the view that the people could make a state liable as they could make a corporation or natural persons liable. In *Penhallow v. Doane*,<sup>104</sup> the Supreme Court held that after the Declaration of Independence (1776) and before the adoption of the Articles of Confederacy (1781), the people were sovereign and Congress exercised for them such sovereign powers as waging war and establishing a prize court. It is true that in *Ware v. Hylton*,<sup>105</sup> the Court held that during this time the states were independent governments, but it also held that a state law of this period providing for the payment into the state treasury of Virginia by a private debtor of a debt due a British subject was nullified by the treaty of peace (1783) so that the debt was revived and a new right of recovery given, which would seem to show that after the Articles of Confederacy at least the states were not sovereign but sovereignty resided in the people as a whole.

This continued to be the doctrine of the Supreme Court while

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<sup>104</sup> 3 Dall. 54, 93 (U. S. 1795).

<sup>105</sup> 3 Dall. 199, 222, 231 (U. S. 1796).

Marshall was Chief Justice. In *Marbury v. Madison*,<sup>106</sup> the Supreme Court held that it could declare unconstitutional both an act of Congress and an act of the President. This clearly held that (at least so far as concerned the nation) sovereignty did not reside either in the legislative or executive branches of the government, but either in the Supreme Court or the people for whom the Supreme Court was acting. The Court meant to say that sovereignty resided in the people, for Marshall said "That the people have an original right to establish, for their future government, such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been created. This original and supreme will organizes the government and assigns to the different branches their respective powers. It may stop here or establish limits not to be transcended." In *Fletcher v. Peck*,<sup>107</sup> the Court declared an act of a state legislature void and in the words of Marshall held that "under the United States Constitution a party to a contract cannot pronounce his own contract invalid though that party be a sovereign state." The only meaning which can be given to this decision is that the state was held not to be sovereign, but sovereignty was in the people as a whole. This meaning, except for a *dictum*, was enunciated again in the case of *McCullough v. Maryland*.<sup>108</sup> In setting aside an act of a state legislature, taxing United States bonds, because in violation of an implied power of the federal government, Marshall said that the United States Constitution emanated from the people and not from sovereign states and that the general government's powers were not delegated to it by the states but by the people; that "it was a government of all, its powers were delegated by all, and it represented all." For proof of his statement he relied upon the fact that the Constitution was adopted by the people and not by the states, though the people happened to assemble in their various states; and upon the fact that state constitutions adopted before the Constitution had no greater validity than those adopted after the Constitution. If the states had been sovereign before the adoption of the Constitution, the

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<sup>106</sup> *Supra* note 67.

<sup>107</sup> *Supra* note 67.

<sup>108</sup> *Supra* note 72.

people as a whole could not have taken their sovereign powers away from them. The fact that they did, showed that the people had been sovereign all of the time. This vindicates Marshall's logic. Marshall held that the powers of sovereignty were divided by the people between the Union and the states, but this was as true of the states formed before the Union as of those formed after it. In the case of taxation both were given the power of taxation but with different limitations. Then Marshall added the *dictum* that each was sovereign. This *dictum* was repeated in the case of *Gibbons v. Ogden*.<sup>109</sup> Thereby he established what has been called the doctrine of our dual form of government, of the states on the one hand and the Union on the other, each sovereign within its sphere. This was an unnecessary departure from his own first position and from the position of his predecessors on the Supreme bench, and after he had announced it he qualified it in the case of *Cohens v. Virginia*,<sup>110</sup> which destroyed the doctrine of state sovereignty, if it had been created, by holding that a private person sued by a state may appeal his case to the United States Supreme Court, because any case arising under the Constitution or laws of the United States is cognizable in the courts of the Union whoever may be a party and because the Supreme Court has appellate jurisdiction over the supreme courts of the states (which are therefore inferior courts in the federal system). This tended either to reinstate the doctrine that the people are sovereign or to establish the doctrine that the federal government is sovereign. The better assumption is that it reinstated the doctrine that the people are sovereign, for Marshall continued that the decision of the Court followed because "We are one people" and because the "people made the Constitution and can unmake it", but then he added "the whole body of the people not any subdivision."

In the period of the Slavery Amendments and the period following it, it is not clear whether the Supreme Court subscribed to the doctrine that the people as a whole are sovereign or to the doctrine of the dual sovereignty of the states and nation. In *Lane County v. Oregon*,<sup>111</sup> the Court, through Chase, after

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<sup>109</sup> *Supra* note 72, at 205.

<sup>110</sup> *Supra* note 68.

<sup>111</sup> 7 Wall. 71, 76 (U. S. 1868).

saying that the federal and state governments are different agents and trustees of the people, also said that "without the states there could be no United States" and as a consequence interpreted the Legal Tender Acts not to apply to debts due a state for taxes. In *Texas v. White*,<sup>112</sup> after holding that the states were not sovereign by declaring that Texas, by the ordinance of secession, did not cease to be a state of the Union nor did its citizens cease to be citizens of the United States, and that contracts in aid of the Rebellion were void, the Court again went out of its way to indulge, through Chase, in such *dicta* as "The states were sovereign under the Articles of Confederation," and "The Constitution looks to an indestructible Union of indestructible states." These statements were false from the standpoint both of history and constitutional doctrine, but they became more or less embedded in the legal thinking of the country, since they attracted more attention than the language used in other cases. In *White v. Hart*,<sup>113</sup> an opinion written by Swayne from which Chase dissented, the Supreme Court held that the "United States Constitution created a government of individuals, not a confederacy of states"; that the "states are organisms for the performance of their appropriate functions in the vital system of the larger policy of which \* \* \* they form a part"; and that the "doctrine of secession is the doctrine of treason." The Court even intimated that secession by a state was comparable to secession by a county. It therefore held that the obligation of a contract, found in a note given for a slave in 1859, could no more be impaired by the adoption of a new constitution by a state in the days of reconstruction than it could by the passage of a law. The same thing was held in *Gunn v. Barry*,<sup>114</sup> where the Supreme Court declared unconstitutional an exemption provision in a new state constitution which impaired the obligation of the contract of a creditor who had obtained a lien by judgment under an old exemption law; though the constitution had been approved by Congress; and in *Keith v. Clark*,<sup>115</sup> where the Supreme Court took the position that

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<sup>112</sup> 7 Wall. 724-5 (U. S. 1868).

<sup>113</sup> 13 Wall. 646 (U. S. 1871).

<sup>114</sup> 15 Wall. 610, 623 (U. S. 1872).

<sup>115</sup> 97 U. S. 454 (1878).

Tennessee had the same political organization during the Civil War as before, that all its acts during the Rebellion were valid unless in aid thereof or in conflict with the United States Constitution but that it could not during the Rebellion impair the obligation of the contract of the Bank of Tennessee that its notes should be received in payment of taxes. These last cases use more accurate language than the case of *Texas v. White*. However, the *Slaughter House Cases*<sup>116</sup> and the *Civil Rights Cases*<sup>117</sup> tended to uphold the balance of powers to be exercised by the states on the one hand and the federal government on the other hand, in that the Supreme Court in the first case held that, in saying that "no state shall abridge the privileges and immunities of a citizen of the United States", it was not the purpose of the Fourteenth Amendment to transfer to the federal government the protection of all the civil rights of citizens; and in the second case the Court held that the Thirteenth and Fourteenth Amendments do not give Congress power over matters not slavery and involuntary servitude (like the right to the services of public utilities) and even in the case of slavery and involuntary servitude only by corrective measures. It has been thought that these cases support the doctrine of dual sovereignty of the states and nation, but they just as truly support the doctrine of popular sovereignty.

When, in its development of the United States doctrine of Due Process of Law, the United States Supreme Court finally extended the meaning of this celebrated phrase to include matters of substance in the cases of *Chicago, M. & St. P. Ry. v. Minnesota*,<sup>118</sup> *Reagan v. Farmers' Loan and Trust Co.*,<sup>119</sup> and *Allgeyer v. Louisiana*,<sup>120</sup> even to the protection of the property rights of corporations in *Minneapolis Ry. v. Beckwith*,<sup>121</sup> by bringing to the test of the decision of this Court (which applies no other rule than that of reasonableness) practically all legislative acts, as well as administrative and judicial acts which relate to legal procedure, whether they concern natural persons or corpora-

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<sup>116</sup> *Supra* note 79.

<sup>117</sup> *Supra* note 79.

<sup>118</sup> 134 U. S. 418 (1890).

<sup>119</sup> 154 U. S. 362 (1894).

<sup>120</sup> 165 U. S. 578 (1897).

<sup>121</sup> 129 U. S. 26 (1889).

tions, because it required the consent of the Supreme Court before Congress or the state legislatures could exercise any of the sovereign powers of police, taxation or eminent domain, it began a process of de-sovereignizing the states, as well as the other branches of the federal government (if they were ever sovereign), whose effect has been to make them all subordinated to the Supreme Court, and whose end is not yet. In this way the Supreme Court, in *Lockner v. New York*,<sup>122</sup> forbade the great State of New York to pass a law regulating the hours of labor in bakeries; in *Truax v. Corrigan*,<sup>123</sup> it told the State of Arizona that it could not abolish the remedy of injunction; in *Wolff v. Court of Industrial Relations*,<sup>124</sup> it informed the State of Kansas that it could not determine for itself the test of public calling; in *Meyer v. Nebraska*,<sup>125</sup> it notified Nebraska that it could not require teaching in the English language alone, and in *Jay Burns Baking Co. v. Bryan*,<sup>126</sup> that it could not regulate the size of loaves of bread. This process, if begun under due process, has been continued under the equality clause and the interstate commerce clause, until it now takes a good deal of courage for a state to talk about any such thing as its sovereignty.<sup>127</sup> Then, as though to add insult to injury, the Supreme Court in recent times has got into the habit of speaking of the states as "quasi sovereign" states,<sup>128</sup> and in the case of *Missouri v. Holland*,<sup>129</sup> it held that the treaty power of the federal government is paramount to the "quasi sovereign" power of a state over game birds. This ought legally to settle forever the question of whether or not the states of the union are sovereign.

These cases, however, leave in doubt, whether or not according to the present doctrine of the Supreme Court sovereignty resides in the Supreme Court, the federal government, the United States Constitution, or the people as a whole; but other recent cases have settled this question so clearly and emphatically that

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<sup>122</sup> 198 U. S. 45 (1905).

<sup>123</sup> 257 U. S. 312 (1921).

<sup>124</sup> 262 U. S. 522 (1923), *aff'd* 267 U. S. 552 (1925).

<sup>125</sup> *Supra* note 80.

<sup>126</sup> 264 U. S. 504 (1924).

<sup>127</sup> Willis, *op. cit. supra* note 76, at 160, 163, 287.

<sup>128</sup> See authorities cited *supra* note 73.

<sup>129</sup> *Supra* note 73.

there is no longer any room for debate. In the *National Prohibition Cases*,<sup>130</sup> the Supreme Court held that the Eighteenth Amendment, though a grant of new power to the federal government and though it tended to destroy the states, was within the amending power of Article V of the Constitution. In *Hawke v. Smith*,<sup>131</sup> it held that the function of a state legislature in ratifying a proposed amendment was a federal function derived from the federal Constitution and not from the people of the state. In *Leser v. Garnett*,<sup>132</sup> it held that the Nineteenth Amendment was binding on Maryland, though it had refused to ratify it, as the Eighteenth was binding upon Connecticut and Rhode Island and the Fifteenth upon six other states which had rejected it, because the people as a whole may change the United States Constitution, and thereby a state constitution, against the protest of the state and the people of the state. In *Foster-Fountain Packing Co. v. Haydel*,<sup>133</sup> and in *Geer v. Connecticut*,<sup>134</sup> it held that a state could regulate and control game and fish within the state, not for its own use or as proprietor, but as a representative of the people (as a whole ?) and that "the ownership is that of the people in their united sovereignty." These cases have again placed sovereignty in the people as a whole. Neither the states nor the people of the states as such are sovereign, because, under the amending power, all of the sovereign powers which have been delegated to them could be taken away from them and given to the federal government. The federal government is not sovereign, because, by the same argument, powers given to it could be taken away from it and given to the states. There is no dual sovereignty in this country. We do have a dual form of government at the present time, although there is nothing to prevent the people from changing or abolishing it at any moment, but under this dual form of government the states and nation are not sovereign within their respective spheres but are merely exercising for the time being those sovereign powers which the people have seen fit to delegate to each

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<sup>130</sup> *Supra* note 74.

<sup>131</sup> 253 U. S. 221 (1920).

<sup>132</sup> *Supra* note 74.

<sup>133</sup> 49 Sup. Ct. 1 (U. S. 1928).

<sup>134</sup> 161 U. S. 519, 529 (1896).

of them for exercise. The Supreme Court is only one organ of the federal government and clearly would have no more sovereignty, than the federal government itself. The Constitution is not sovereign because, instead of controlling the people, it is controlled by the people and can be unmade by them as they once made it. This means, then, that throughout our history, except for occasional *dicta* and dubious decisions, the doctrine of the United States Supreme Court has been that in the United States sovereignty has resided in the people as a whole as organized in a changeable and changing government. This also is the doctrine of state and lower federal courts.<sup>135</sup>

It follows, therefore, both by principle and by authority, that under the United States Constitution, the doctrine of sovereignty in the United States is that doctrine which defines sovereignty not as independent, unlimited, indivisible power to compel obedience and freedom from liability, but in the narrow sense of the power to delimit personal liberty by social control or to protect personal liberty against social control; and which makes this power reside not in the organs of government, nor the Constitution, nor Divine Law, nor even in the states or nation (although all of these are juristic personalities), but in the people as a whole as organized at present in our dual form of government.

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<sup>135</sup> Fidelity and Casualty Co. of New York v. Union Savings Bank Co., *supra* note 91; Hackett v. State Licensing Board, 91 Ohio St. 176, 110 N. E. 485 (1915); Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595 (1913); Kennebec Water District v. Waterville, 96 Me. 234, 52 Atl. 774 (1902); State v. Tuffy, 19 Nev. 391, 12 Pac. 835 (1887); Koehler v. Hill, 60 Iowa 617, 15 N. W. 609 (1883); Gibson v. Mason, 5 Nev. 229, 283, 291 (1869); Reynolds v. Baker, 46 Tenn. 184 (1869); Union Bank v. Hill, 43 Tenn. 263 (1866); Spooner v. McConnell, Fed. Cas. No. 13,245 (1838).