

## THE INTERMITTENT SOVEREIGN

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It is impossible to escape from Austin, or rather from Aristotle, for the whole history of Western civilization is saturated with the concept of the state or community as composed of one part which gives commands and another which obeys them. Few people have held that all states were in fact so organized or that the existing states were developed in order to effectuate this concept. But most of those who have seriously thought about state organization have thought about it in these terms and a good deal of our state machinery has been formed under the influence of people who were trained to think so.

And again since Aristotle, a favorite way of classifying states has been on a quantitative basis in respect of those who issued commands. This power might be wielded by one person or a few persons or a great many persons and the state was in consequence a monarchy, an oligarchy, or a democracy. Plainly that is not the only way in which classification might be made. Instead of how many wielded this power, we might first of all ask what kind of persons, where they came from, and how they were selected. Or we might have in mind the purposes for which the power was exercised. All these classifications have in fact been used to some extent at different times.

But however classified, the prevailing idea has nearly always been that the state is based on authority, that its essential characteristic is the fact that, somewhere, some place, there are people who give orders and others who obey them. The quality of these persons, that which makes them what they are, was deemed to be well expressed by the term "sovereignty," a word of feudal origin—and still better, perhaps, by the Latin *maiestas* which declares in its obvious etymology what publicists have attempted to set forth in abstract and complicated sentences. Those who have *maiestas* are the mightier ones, they have the greater power; and the chief of state offenses—the only real offense against the sovereign—is an attempt to lessen this power—*minuere maiestatem*.

That there were states in which it was doubtful just who had *maiestas*, states in which it was disputed, states in which *maiestas* alternated—all this was familiar and commonplace. Indeed several centuries of West-European history were taken up with violent and not unsanguinary controversies as to where the ultimate sovereignty, the real *maiestas*, lay. But until

recently no doubt arose as to whether anybody had it at all; nor was it conceivable that sovereignty might sometimes be and sometimes not be. And while joint possession of sovereignty was no difficult concept, simultaneous possession of it by unrelated persons or groups was not merely a difficult, but an apparently self-contradictory and so non-existent notion.

This has of course changed in quite modern times and there are several publicists and jurists who have subjected the idea of sovereignty to a literally exhaustive analysis and have declared that it has not survived. No sovereignty at all, multiple sovereignty, are freely canvassed possibilities and the state as the embodiment of sovereignty has been found to be an epiphenomenon, something supervening upon a completely organized community and in no sense essential to its organization.<sup>1</sup>

It is evident that there is no logical necessity of implying sovereignty in the mere fact of human organization. To the common and ancient assertion, "Some persons must command and some must obey," the modern reply may well be "Why?" It is not a fact observed in nature. In any given territory animals of all kinds live and move about, eating and being eaten, and often doing neither one nor the other, but seeking their food simultaneously and, if there is enough of it, without interference by each other. Nor is there any logical necessity that all elements of a community must be organized on this basis. We do not feel impelled to refer all the points in a limited space to one and only one system of coordinates. We have as many systems as we like and we may have some of such special sorts that many points will escape reference altogether. Outside of a revealed and divine behest establishing earthly sovereignty as the type and example of Divine sovereignty—a behest in which Christian Europe devoutly believed—sovereignty could, one might suppose, be established as a necessary element in a state only by a process of induction, by noting that it was to be found wherever a group of men were discovered in more or less permanent cohabitation.

Aristotle doubtless felt that he had reached his conclusion by some such induction. Our much greater knowledge enables us to

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<sup>1</sup> On so canvassed a topic, it will hardly be necessary to burden the reader with too many notes. Two very recent books will give any one a complete orientation concerning the present state of the issues. One is the little manual of JOAD, *INTRODUCTION TO MODERN POLITICAL THEORY* (1924), in which far the greater stress is laid on what might be called socialistic movements. Mr. Joad does not think that theories which oppose the individual and the state have much of an air of actuality. The other is ELLIOT, *THE PRAGMATIC REVOLT IN POLITICS* (1928), which seeks to demonstrate that the ghosts of T. H. Green and Bosanquet are imperfectly laid even by such powerful exorcists as Duguit and Laski.

assert that his induction, extensive as it was, was quite incomplete. Tribes have often been met with in which, with the best will in the world, we cannot find any person who gives commands and others who obey. And if we save ourselves by declaring that such groups are not states, we have obviously begged the question. No observation has told us this fact but merely a pre-determined principle.

Supporters of sovereignty might grant all this and still maintain their chief point. Even if sovereignty is not an inherent element in the concept of the state, they might hold that it has been such an element in those states which in historical times were developed around the Mediterranean basin—especially the East-Mediterranean, and their lineal descendants. The states which most concern us, those in which we live, are among these descendants and wherever and however sovereignty developed it has, it might be urged, continuously appeared in all forms of the state with which we are familiar. It would be legitimate, in fact, to use the term "state," *civitas, polis*—a term developed within this group of historical communities—solely to describe them, and to say of the communities organized on different schemes, that whatever they were, they were not states. We should run little practical danger in doing so, because the present members of the communities descended from the Mediterranean state are much the most successful peoples of today, and their form of organization is quite sure to be imitated by the most energetic of non-Mediterranean nations.

But as a matter of fact, the defenders of sovereignty are disinclined to rest their theory on mere history. The question is not whether certain important communities have been so organized but whether all communities can be readily analyzed into this bipartite scheme of sovereign and subject, and if they can be, whether it serves any purpose so to analyze them. This purpose, for Austinians and quasi-Austinians, is to have a definite and clear source of law in the strict sense of that expression, law thus being what the sovereign commands or tolerates or at any rate does not forbid. It is hard to see what institution or activity in any society can escape being in some one of the three groups mentioned.

Those who have opposed Austin have done so by stressing the term "command," as they were quite justified in doing by Austin's own practice. Evidently there are thousands of activities and thousands of rules of conduct which have never been actually commanded by any discernible human being and are not now commanded in any rational use of that word. If Austin meant command as a continuing fiat, it would be idle to include in it our semi-instinctive social habits most of which, in the rare cases in which they must be legally described, turn out

to be lawful. We do not do these lawful things because they have been commanded since usually we never knew they had been commanded and for thousands of them we cannot discover when and under what circumstances they were first commanded.

If we assert that what the sovereign does not forbid he commands, that is obviously a strained use of the term. We should not so use the word in other associations. In the related field of morals we find it hard to say that all that is not good is evil. It is convenient to have a neutral ground, a place for indifferent things which will neither accelerate nor retard our salvation but which may in fact occupy a great deal of our time. Even the Stoics with their inhuman paradox of the equality of all sins had a no-man's land where a sage might safely, even if not philosophically, breathe an atmosphere of *adiaphora*.

And we run the risk of making the sovereign look rather foolish. It is a characteristic of weak executives that they hasten to take credit for what they could not prevent, and in the vast range of activities which the Austinian sovereign has commanded because he has not forbidden them we wonder how many of them he has not dared to forbid. Certainly there has never been a really absolute monarch in the history of the world, not even the mythical "oriental despot," on whom western publicists depend so largely for purposes of illustration. We may be sure, to use Maine's example, that when Runjeet Singh founded the Sikh Empire, and did not change a single local custom, it was not only because he did not care to, but because he knew it was far beyond his power.<sup>2</sup> Many a king has decreed with the words—*car tel est nôtre bon plaisir*—that his subjects should continue to do what he has vainly tried to make them stop doing.

But, above all, the ordinary purpose of demanding a sovereign's existence is somewhat frustrated by turning his tolerance or his impotence into his commands. That ordinary purpose was, by hypothesis, that we might have a source of law, but if the rules of action which he has failed to check are law as well as those which he has instituted, the source of the former is still to be sought. Their beginning is anterior to his permission because his attention cannot be called to them until after their full development, and their obligatory force cannot depend on the mere negative condition that nothing has been done about it. Our sovereign has therefore not served the purpose for which he was called into being and we may let M. Duguit and Mr. Laski dissolve him into political protoplasm without a pang.<sup>3</sup>

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<sup>2</sup> MAINE, EARLY HISTORY OF INSTITUTIONS (1875) 381-382.

<sup>3</sup> For Mr. Laski's views in which M. Duguit's are fully presented, cf.

Where our rules of action, our habits of conduct, and our sense of obligation in our action come from, we need not now stop to consider, so long as we cannot in any useful fashion assign them to the sovereign's command. But a great many commands are certainly given by a great many people. There are commands which are obeyed habitually by those to whom they are directed and many of which will be enforced by certain special agencies that loom large in popular imagination—police-men, courts, commissions, governors, sheriffs and the like. Commands are formulated by various religious bodies something like codes. So Catholics may not eat meat on Friday, nor may orthodox Jews work on Saturday, nor Baptists baptize their children in infancy, nor Methodists of a past generation smoke tobacco. Parents give their children orders and employers issue them to their employees. City aldermen decree rates of automobile speed, social clubs post house rules, colleges prescribe entrance requirements. The Constitution of the United States forbids the levying of export duties, the legislature of Texas has forbidden cohabitation between whites and negroes, and street car conductors order their passengers to step lively. These commands are sometimes couched in as peremptory tones as the "Thou shalt not" of the Decalogue, and are often obeyed to the same degree.

Can we select from these commands some which are so different from the rest that the person or persons who issue them cannot possibly be ranked with the others? If we can, and if we can place these commanders in a position superior to the others, we might well enough call them sovereign or sovereigns in their respective states.

Evidently that selection cannot be made on the basis of how far the commands are obeyed. An employer's order to his employee has a very great chance of being obeyed, while a great many statutes of states are only slightly obeyed. We are not likely to say that the employer is sovereign but the legislature is not. Nor is it the severity of the punishment that will help us. A father's orders to his son can be enforced by corporal punishment which is certainly severer than the punishment meted out to Congress for levying an export duty. And yet the framers of the Constitution are not less sovereign than the father of a minor unemancipated son. The fact of obedience and the reality of the sanction must be excluded as tests of any sort.

Let us take a special case. A band of highwaymen seize a district, successfully defy the police, the sheriffs, the posses of

their neighbors, take a toll from all the inhabitants, and maintain themselves by terror for a considerable time. They may do so without any other harm to their victims than a regular and systematic imposition of tribute. This is not merely a fanciful and imaginary picture but has frequently enough occurred on the fringes of civilized society. Ultimately the bandits are rounded up and their power destroyed. As between their control and the regulation which succeeds them, we have no hesitation in saying that the former was unlawful and the latter lawful, yet it may well be a fact that the ordinary routine of life is not changed very much by the supersession of the unlawful control and that the demands on the property of the inhabitants are not appreciably lessened.

What makes the bandit rule wrong and the other right? I suppose we should say that the second proceeds from the sovereign—at any rate, ultimately—while the first does not. But the ease of determining whether or not this is so varies precisely in proportion to the degree in which we approach the ultimate source of either rule. We may return to our hypothetical highwaymen. Suppose they had never been put down but had become permanent. We should then be able to trace their career from open brigandage—which is unlawful—to organized domination of a district—which is even more obviously unlawful—to permanent dispossession of constituted government—which is most clearly unlawful of all, and which somehow by success becomes completely lawful. Something like this happens in every revolution. The Fascist government is the lawful government of Italy at the present moment. It was certainly not so in the year 1921, when Fascist organized groups in many parts of Italy gave orders which were obeyed and demanded contributions which were paid. If “lawful” means proceeding from the sovereign, how did the source of these commands become sovereign?

I think that despite the apparent paradox we must reverse the process. The commands which are lawful are not those which come from the sovereign, but one of the reasons for calling the issuer of the commands sovereign is that his commands are lawful. That is to say, there is a test of lawfulness which is independent of a sovereign, and we may then if we like apply that word to the source of these commands which have fulfilled this test.

What that test is can scarcely be doubtful. Our alternatives are really either that they conform to some innate notion of lawfulness or that they are generally considered lawful. If we recall our illustrations, it must surely be the latter which we shall adopt. The point at which a revolutionary movement ceases to be brigandage, riot, or rebellion must be the point at which

the movement is accepted by the apparent agreement of the mass of the members of the community. Lawfulness then comes in these instances from this consensus, and the fact that the commands are now lawful makes a sovereign out of a rebel.

But that will not carry us all the way. We have seen how many commands and how many different kinds are issued, all of which could be called lawful as far as a general determination to obey them is concerned. Now, most of them are also lawful by the test just used, that is, there is a general agreement that they are lawful. Yet they are issued by very different persons who cannot all be sovereign. Can we make a hierarchy of the commands? Are some better, stronger, more obligatory than others?

I think the common-sense fashion of doing this will serve our purposes best. We cannot after all tell which of two contestants is the stronger until they are in conflict. Now if we go through the casual and miscellaneous list drawn up above, we can see well enough what would happen in case of conflict. Orders issued by a father to a son are in most cases lawful orders. But if they contradicted the Constitution or the legislative decree, they would not be. The statutory command might be unjustifiable morally but, wicked or not, it would be lawful and the other unlawful. So when the laws of England forbade the performance of Catholic rites and made Catholics ineligible to Parliament, conscience might compel a Catholic to violate them but he would knowingly be doing an unlawful act.

We should find, I believe, that only one of the commands issued in our list is of such a nature that if it countermanded another of these lawful commands, it would prevail. That is the constitutional command. We may reserve certain qualifications till later, but so much we may admit to begin with. We have accordingly only to contrast any suggested lawful command with an imagined constitutional prohibition. Can we find one which will maintain itself?

The announced qualifications do not seriously modify our conclusions. We are not concerned with the fact that even the constitutional command may not be widely obeyed. Several thousands of Americans do not obey the Eighteenth Amendment to the Constitution and do enter into liquor agreements which the Constitution forbids them to contract. Whether obeyed in fact or not, it is admitted by all but a very few that the constitutional command is lawful and that the acts it forbids are unlawful. Nor need we consider the second qualification which concerns the supposed limitations of constitutional power. If it is true that there are things which constitutions cannot provide, we should have what we are searching for, a field wherein a command from some other source could not be

countermanded by a constitutional inhibition. Although these limitations have been freely discussed, this discussion has concerned itself principally with a special and technical element of the American system, the limitations on the amending power. Certainly no successful attempt has been made to indicate why a constitution might not originally command or prohibit anything physically possible.

The only limitation therefore is that upon our imagination. It might be difficult to suppose certain rules in conflict with the Constitution simply because of the extreme unlikelihood of such a conflict. If religion commanded marriage ceremonies—as most religions do—we need not trouble ourselves to ask what would happen if the Constitution forbade them. No constitution, we can say with some assurance, will do so, but a revolutionary imagination might do what the staid burgess' fantasy cannot accomplish.

We have, accordingly, a means of discriminating lawful commands from unlawful, and among unlawful commands we have a test which will tell us those which are issued by the sovereign. Can we form some notions about that sovereign?

In all American systems we say that there are sovereign commands and all but sovereign commands. The former are constitutional, the latter statutory. Statutory commands will override all except constitutional ones. In other countries, England, for example, and in most of the historic communities that we can find, there was no such gradation. Constitutional and statutory are distinguished, if at all, only for purposes of study and classification. In such communities it will be easier to examine the sovereign, the person or persons who give commands which if placed against any other commands can make them give way.

The abstract and simple type is that hypothetical "oriental despot" who as a matter of fact never existed. This overworked person could give any commands he liked which were actually possible of accomplishment, and his commands were indubitably lawful and lawfully overrode all other commands; his sovereignty must be undisputed. It would therefore be possible at any moment of time to point out a concrete human being as the sovereign, and his position would normally last as long as his life.

But it must be evident that he would be in a delicate situation, not unlike King Midas of alchemic memory. The hypothetical despot is a man. May he not open his mouth without making a law? He eats, sleeps, and maintains human and social relations with other persons. He gives many commands to slaves, to members of his family, to his friends, to his soldiers. Are they all exercises of sovereignty? Is there no distinction be-

tween an order to his cook and one decreeing, let us say, the introduction of coined money? Evidently such a distinction is created by a conscious intention of making a law which is present in the latter instance and absent in the former. He does not exercise sovereignty twenty-four hours a day but only at intervals. It is literally impossible for it to be otherwise.

And we must remember that this single human unlimited sovereign who alone properly fulfils Austin's requirements is a fiction, an abstraction. There never was such a despot oriental, boreal or hyperborean. Actually where there is some approximation to him, the distinction between a sovereign command and an ordinary one is clear and precise. Not only does the human sovereign act as such only at intervals, but the mode and time of his acting soon become fixed, so that no other mode or time will be the act of a sovereign. He must proclaim his will by heralds, or publish it in a certain place, or announce it with certain ceremonial, or seal his decree in a certain way. He acts as sovereign not merely at intervals but only on the fulfilment of certain conditions.

Is he sovereign in the intervals as well, or when the conditions are not fulfilled? We may reasonably deny it. Sovereignty is not really a situation but an inference. It is an hypostasis of the fact that certain commands are regarded as superior to others, and the sovereign is simply the supposed source of these superior commands. To act as sovereign is therefore to be sovereign. When the sovereign functions he comes into existence and he lapses when he ceases to function. It is not at all certain that at the next occasion for exercising sovereignty, it will be done by the same person who was sovereign before. In the intervals, therefore, and if the conditions are not fulfilled, there is simply no sovereign at all, and there is no reason why there should be.

The quantitative classification of sovereigns, which is due to Aristotle, becomes of first rate importance. The single sovereign—even an occasional, intermittent and conditional sovereign—is and always has been rare and tends to disappear. Sovereignty in historical fact has regularly been the sovereignty of a group—small or large. Now, if a single person can really be called a sovereign only if and while he acts in a determined way, it is obvious that a plural sovereign must act jointly, and since the component persons are not in fact joined to each other, they must meet for the specific purpose and must announce their agreement in a specific form.

Groups have a marked tendency to crystallize by sheer force of inertia into institutions. A group rarely remains merely an aggregation of individuals, even if it began as such, but it promptly enough differentiates the functions of the individuals,

and differentiates various aspects and functions of the same individual. A group sovereign therefore almost certainly will be found to act as such only under rather complicated conditions which in the nature of things will rarely be fulfilled. Therefore if the oriental despot is sovereign, not for the whole twenty-four hours, but, let us say, only while sitting between the gates between sunrise and noon of each day, in other communities there will be a sovereign only once a week, once a month, perhaps only twice or three times a year.

To take England as an example, the official description of the sovereign is the "King in Parliament." Actually we know it is the Parliament itself. That is to say, it is a group of men selected in a highly complicated fashion, meeting with elaborate ceremonial in one place and one place only for most days of a few months in every year. It is usually asserted that this Parliament is omnipotent—or omnicompetent, as one likes—and if we disregard the historic tradition that this is not true, a tradition which Mr. Plucknett has so fully examined,<sup>4</sup> we still have a sufficiently discontinuous embodiment of sovereignty.

The difficulty of finding a sovereign in the United States will, I think, disappear under these circumstances. The sovereign is the hypothetical source of such commands as will lawfully override any other commands. Evidently it is not the legislative command, because that may be overridden by the state or the Federal Constitution. Nor again for a similar reason is it the Congressional command. It must obviously be the source—whatever it is—of the constitutional command. The temptation is therefore to state that whoever can give a constitutional command is the sovereign of the United States.

On this theory the sovereign of the United States is a series of persons beginning with those who constitute a two-thirds majority of Congress when the amendment is voted and ending with the majority of the legislature of the thirty-sixth state which ratified the amendment. Evidently it is as likely as not that at no given moment of time will the members of this series be co-existent, so that they could at a pinch be brought together within one place. But even in the rare cases in which this would be possible, they would not be sovereign if so brought together, but only if they acted successively in the sequence indicated and no other, and often within an established limit of time. There is no more difficulty in conceiving the sovereign in this fashion than there is in the British Parliament where it is possible that at the moment of receiving the royal assent—or even when the Lords have passed the bill—the persons

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<sup>4</sup> Plucknett, *Bonham's Case and Judicial Review* (1926) 40 HARV. L. REV. 30.

who voted for it in the Commons may not be quite the same, and it is not unlikely that many who voted for it may have changed their minds. Sequence, order, must be observed here as in the other case and the sequence to be observed in the functioning of the American sovereign is only a little more complicated than in that of the British.

Indeed, it is surely only a difference of degree that can be noted between the British sovereign and the sovereignty of, let us say, an oligarchy of five persons. If a sovereign act is proposed it will be effectuated only when in the proper form it has been assented to by the third member of the oligarchy, and that will necessarily be after the first two have expressed their assent. The five may or may not be gathered in one room and the interval between the votes of the oligarchs may or may not be extremely short. These are non-essentials. In all essential respects an act of a plural sovereign is the same whether the organization is complicated or extremely simple.

We can then identify the sovereign even in the United States just as we could in ancient Akkad or Memphis or in modern Britain. He is a flesh and blood gentleman—*un monsieur quelconque*—or rather he is a series of such gentlemen, but he is never these gentlemen as such. Sovereignty is not a quality of their persons, it does not cleave to their bones, as by law their chattels do. It is a character assumed by them, a role they perform and it sometimes takes a long time and many men to perform it completely.

And the difficulty is only slightly increased if we distinguish between the amending and the creating powers. We must as a matter of fact distinguish between two applications of the amending power. One of the constitutional provisions cannot be amended except with the consent of the state affected. As it is almost certain that a state adversely affected will be the very last to consent, if it consents at all, it means that this provision needs unanimous consent of the states. In other words, we must extend the series slightly from the affirmative vote in the thirty-sixth legislature which made a majority there, to such a vote in the forty-eighth legislature.

We must go even further, because the Constitution provides another method of amendment—one which has never been put into practice. The sequence there requires petitions from the legislatures of thirty-two states, the election of a convention, the vote of the convention and its approval by the legislatures of thirty-six states. In other words, the role of sovereign can be enacted in either of two ways for most matters and in still a third way for one single matter.

This last fact must give us pause for a moment. Apparently the sovereign acting in either the first or the second fashion is

subject to a prohibition which only the sovereign acting in the third way can remove. That is, the sovereign acting in the third way is somewhat more sovereign than in the others, but as that third way concerns only one single fact and as the sovereign is extremely unlikely to act in that way, we can dismiss it as a practical matter. Still it requires us to concede degrees in sovereignty and to that concession we shall have to recur.

For the present, we had better consider whether the amending power is in fact the creating power. It is at least open to doubt. Can amendments be made which wholly change the character of the thing amended? Could an hereditary monarch be substituted by amendment for the president and Congress abolished? If this cannot be done, we shall have to conclude that the sovereign has acted only three times in our national history, once when the Declaration of Independence was adopted, a second time when the Articles of Confederation were accepted, and a third time when the Constitution was adopted. In each case, the sovereign was composed of thirteen groups of persons selected in various ways and each professing to bind by its action all the people of the thirteen original colonies or states. In the first case, the sovereign act was that of creating a provisional form of government, in the second a permanent one, in the third it was the substitution of this permanent one by another. Only in these three cases have commands been given to which no other commands could claim superiority, and in the second and third cases the new commands deliberately superseded the previous sovereign command and made it impossible for the previous sovereign to repeat his command.

That is to say, a real sovereign, a hundred per cent, simon-pure sovereign, one that can give any command this side of impossibility, can come into existence only by revolution. It exhausts itself by the creation of minor or lesser sovereigns, who can give any commands except a few, or who can give only a few commands. So in the United States, the original sovereign created, by the amending clause of the Constitution, a lesser sovereign almost coextensive in power with itself, and in the governmental organization of each state and of the federal government still smaller sovereigns with considerably less extensive powers, most of them limited not only in range but in territorial jurisdiction. The reduction can go on further and further and the local village constable or sheriff performing his functions is not merely uttering a grandiloquent boast when he speaks "in the name of the People of the State of New York" but is literally and truly a sovereign, albeit in a solution only one half of one per cent strong.

In other words, the capital distinction between the sovereign

and the government on which a great many publicists built so much does not seem of great value. The United States which has from the point of view of the authoritarian state all the vices a form of government can have—federation, democracy, a rigid and written Constitution—has succeeded in splitting up the sovereign more than any other country has done. But it is after all in marginal cases only that scientific theories are treated and if theories of sovereignty will not work here, they are not sound theories.

The ordinary sovereign, the functioning sovereign, the one established by the revolutionary act of a full or complete sovereign, ought to be distinguished in name from the latter. If a phrase like "almost-sovereign" could be used easily, that would serve our purposes, but it is an awkward expression. Perhaps "pro-sovereign" will be better, if we do not take the prefix literally. In the United States the pro-sovereign is the holder of the amending power of the Constitution. It acts rarely and with obvious reluctance. Between it and the half-sovereigns and quarter-sovereigns who exercise governmental and judicial functions, give commands that supersede most other commands, there is a large gap. If we revert to our despot who regularly is also only a pro-sovereign, he may be in practice identical with the government but he separates from it more and more as the country governed becomes larger and the organization of government complex. That is, the despot may retain his ninety per cent sovereignty in his own hands or it may be split up more and more. In any case the difference between the despot and the elaborately fractioned pro-sovereign of the United States is one of degree.

The hundred per cent sovereign is established by revolution. It would be better to say that he makes the revolution. But the revolution need not be the dramatic and catastrophic thing that it is almost certain to be in modern times. Between 1066 and 1929 in England, the almost-sovereign changed from a foreign king sharing power with territorial magnates and a church corporation to an oligarchy of magnates, to a despotism, to an oligarchy of small landholders, to a parliamentary corporation, and only once was the change catastrophic in character. Similarly the pro-sovereign of the Roman state changed in a thousand years from a group of adult male warriors to a selection of that group, to an oligarchy of elderly heads of houses, to a despot with constantly increasing powers until about 300 A. D. that despotism had very nearly reached a practical maximum. And these changes were accomplished by slow accretions or subtractions with only an occasional violent mutation. The revolution may last a day or a hundred years.

Since revolution is the sovereign act par excellence, we may ask

ourselves what the sovereign was like in the postulated period of becoming. If the most important Roman revolution was initiated by Tiberius Gracchus and carried out by Augustus Caesar, that is a period of one hundred years. Each man in the series of men whose joint effort made a sovereign act attempted to be sovereign in his own person. The test of the sovereign is whether he can give lawful commands which will supersede all others, and lawful is what will eventually be so considered by the general mass of citizens. Plainly therefore most commands given by an attempted sovereign are experimental. If they turn out to be lawful, we can reason back and declare that the source was a sovereign one. The sovereign is incipient, inchoate, at the time of his attempt. Since all relating back and dating back are properly fictions, we must admit that the incipient or inchoate sovereign is not a sovereign at all, although he generally makes it possible for the sovereign ultimately to arise. The fact that a sovereign attempts to show himself indicates for the most part that the existing pro-sovereign whom he seeks to displace is suffering a diminution of legal power and therefore of sovereignty.

I have suggested that the much discussed difference between government and sovereignty is difficult to maintain or analyze. The English Cabinet can give a great many commands of a certain kind which will outweigh all other commands except a statutory command of Parliament. Parliament can give practically any command it desires subject to the qualification that it does not provoke revolution—which is a more serious limitation than we may suppose. But since Parliament does not act in most fields where the Cabinet would like to give commands, the difference is not important. If there were a conflict, the Cabinet would have to yield and therefore Parliament is sovereign and the Cabinet is not, a fact which would be better stated by saying that Parliament is more nearly sovereign than the Cabinet. There is no reason why we should not equally say that the Cabinet is more nearly sovereign than the Viceroy of India or the Deputy Subcontroller of the Tape and Sealing Wax Office.

The reason for distinguishing essentially between sovereign and the sovereign's government has in modern times been somewhat metaphysical. Publicists desired an unchanging centre amid the flux of circumstance, a sort of *Ding-an-Sich* which aspects would not alter. But there was also a practical reason involved. If England under a Tory government made debt settlements with France and Italy, may England under a Labour government repudiate them because the Labour government does not approve of them? Undoubtedly it can do so but would the act be a violation of an obligation? Surely we do not need the

concept of a fixed sovereignty to answer the question. In the first place, the question would not be different if the sovereign undoubtedly changed, as it concededly has in Russia. And in the second place there is no more difficulty in understanding that a successor in interest may be obliged to assume the debts of his predecessor—if that is the result we desire to reach—than in understanding that the sovereign's obligation imposed by the act of his agent cannot be disavowed by the act of another agent. In fact analogy and logic seem to make the first explanation somewhat easier.

But in any case we do not reach a fixed and unchanging "Identical" behind a flux, when we posit a sovereign utterly distinct from a government, because this sovereign too changes at certain intervals. These intervals can be lengthened or shortened, but that can make no essential distinction. If there is any difference to be found between a sovereign and a government it must be in the fact that the commands of the former overrule the latter in the few and rare cases where there happens to be a conflict between them. Now, there is no harm at all in calling the wielder of this higher reserve power the sovereign, and the wielders of the lower and actual power the government, if we know that that is what we are doing and that in a country like the United States the reserve power itself is split and the fractions are of different degrees. The same is true for any protectorate and for countries of "limited sovereignty."

We may summarize by saying that in most countries—especially those organized on the model of the Mediterranean state—there is a pro-sovereign who in normal conditions can issue commands superior to all others. This sovereign is limited by the conditions which created it. In most cases it was the creation of a full-sovereign, a definite person or persons who established it by a revolutionary act and probably could disestablish it by the exercise of a specifically reserved power. But at any rate the fact that the pro-sovereign had been established at a definite time indicates that it could be displaced in some way or other, so that we have to reckon with the possibility that a sovereign—a full sovereign—may at any time come into existence and justify itself by successfully establishing a pro-sovereign. This full sovereign might be an overwhelming majority of the people, or a group of determined and powerful men, or a single person. We can tell whether such a sovereign existed only after the fact. If the establishment of a new pro-sovereign is successful, we know that a full sovereign has been at work. If that sovereign was a single man or a small group, it is likely that the full sovereign and the pro-sovereign will be the same persons—but it is not sure even there—and

where the full sovereign is the people taken almost en masse, it is practically impossible for this to be the case.

Is there any value in considering sovereignty from this point of view? Would it not be just as well to discard the concept altogether, as a number of publicists have done, and simply recognize the power of issuing commands which is possessed by so many different kinds of individuals and groups? Do we need the concept of sovereignty even to recognize a hierarchy of such commands? For example, a teacher may issue a command to his pupil but if the latter is also a minor unemancipated son, that command may be overruled by the boy's father. Other examples of such subordination of lawful orders may easily enough be found.

There is, it seems to me, a use for sovereignty. Lawfulness depends on a general recognition and it is usually hard to prove that the recognition is really general. Communities have had to devise a way for testing lawfulness in a relatively easy and simple fashion, and that is by subjecting any command to certain official scrutiny—by courts, by commissions, by legislatures, by executives. But the capacity of these bodies to make this test must depend upon something else than general recognition or else the thing we are seeking, convenience and simplicity in making the test, is gone. There is consequently a fundamental difference between the position of the official bodies in a state and all non-official bodies and there can be no reasonable doubt that all official bodies do derive their powers from a common source.

There can certainly be no question what that source is. The most typical official form of testing lawfulness is a court. In most modern states, the upper courts and the methods of selecting the judges are determined by the constitution and can be changed by the amending power. They were therefore established by the sovereign proper and are subject to commands from the pro-sovereign. Accordingly while a great many commands issued by one private person to another can be shown to have been lawful when a court tests them, and although their lawfulness may be based on an unquestionable general recognition, the court's power to make the test must depend upon the sovereign's granting the court a fraction of sovereignty or pro-sovereignty—a capacity to issue commands which will supersede, within a given field, other commands. Without a sovereign, a quick and infallible test for lawfulness is gone, and it is gone not only for the limited lawfulness of commands but equally for the far wider lawfulness which may involve any relation or situation in which we may find ourselves.

But there is another need for the concept and it is indicated in the nature of the sovereign command. As defined, it is a

lawful command which will, if we suppose it to be counter to another apparently lawful command, overrule the latter. This does not mean that the overruled command is thereby permanently rendered unlawful. On the contrary we assume its lawfulness in all cases in which the sovereign does not choose to intervene. But in an emergency it is obvious that a multiplicity of lawful commands means chaos. If we therefore desire order in an emergency and not chaos, we can have it only if somewhere in reserve there is a possibility of obtaining a paramount command. And that possibility involves the concept of sovereignty.

Of course it does not follow that there must be only one sovereignty in a state. It is perfectly possible to imagine several. A syndicalist state apparently might have several sovereignties, and in the feudal period a number of states can be properly described as having contained two and more. An *imperium in imperio* may be inconvenient but it is very far from being a contradiction in terms. But if we find two independent sovereigns, we simply have to face the possibility of a dead-lock. If two contradictory commands are given by these two sovereigns, nothing at all will happen.

But unless we are careful we shall be assigning too great an importance to our sovereign. That he creates law is true, but only to a slight extent. It is certainly not the most important part of the law which he creates. He can only function by giving commands and commands undoubtedly impose duties and claims. But there are other duties and claims not so imposed and in the great field of powers and privileges the sovereign's command is only dubiously effective. The full sovereign is an inference from a past event and can be recognized only when it is past. The pro-sovereign is occasional, intermittent, and conditional. The body of officials who obtain all their powers from either sovereign and who therefore are sovereign in a limited degree do not, in spite of their number, notably qualify our sense of independently regulating our personal and communal life in a myriad of relations in which the sovereign has had no real share.

A sovereign is needed as soon as emergencies are contemplated. Countries which have stirring and vivid histories—most highly organized countries have had such histories—must perforce contemplate emergencies and cannot therefore dispense with a sovereign. But all the adjectives which publicists on the Continent have attached to the term, that the sovereign must be unique, indivisible, absolute, are purely arbitrary. A sovereign may be unique, undivided, approximately absolute, just as it may consist of one or more persons, just as sovereign commands may be issued in French or in Urdu. But a sovereign may also be

quite different. Most communities have a sovereign because they need one, but communal life is possible without one, even if not satisfactory to people trained as we are.

If it is answered that the sovereign described here is not the sovereign of Kelsen, Jellinek, Willoughby, Carré de Malberg, Laband<sup>5</sup> and the hundreds of others who have busied themselves with him, I fear I should be compelled to join issue. He seems quite the same personage but divested somewhat of his trappings, as Thackeray tried to imagine Louis XIV not in the monstrous wig, high heels, and undulating ermine of Rigaud's portrait, but just as he was when he was about to retire for the night. Sovereigns fill a place in communal life, and they should be kept there.

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<sup>5</sup> This is not meant merely as a list of modern writers, but as a citation of men who with different philosophic prepossessions and for different purposes have made a great deal of the concept of sovereignty. The most recent and most widely discussed of these is the Austrian, Hans Kelsen, who has unfortunately entrenched himself in a metaphysical terminology in which he is well-nigh impregnable. None the less, his presentation is well worth the effort it costs to understand it. Cf. his *ALLGEMEINE STAATSLEHRE* (1925) and *DAS PROBLEME DER SOUVERÄNITÄT, BEITRAG ZU EINER REINEN RECHTSLEHRE* (1920).