CHAPTER V

Sovereignty and the Federal Amending Clause

A. DEFINITION AND CHARACTERISTICS OF SOVEREIGNTY

It has frequently been asserted that the most important and at the same time the most controverted topic of political science is that of sovereignty. It is significant in constitutional law and in international law only in a somewhat lesser degree. In fact, in its first development it seems to have been a juristic conception. Its first modern exponent, Jean Bodin, was a French lawyer. Its chief theorist of the common law was John Austin, another jurist. The problem is of peculiar importance in a federal state such as the United States, since its location is not an obvious fact as it is in a unitary state. The Civil War was fought largely over conflicting conceptions of sovereignty and its location. Even today the question of states' rights is not a merely speculative matter. The in-

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1 For the history of the concept of sovereignty, see Emerson, State and Sovereignty in Modern Germany (1928); Holdsworth, Some Lessons from Our Legal History (1928) 112–141; Ward, Sovereignty (1928) 1–48; Eastwood and Keeton, The Austinian Theories of Law and Sovereignty (1929) 38–61; Cohen, Recent Theories of Sovereignty (1937) 7–128; McIlwain, “A Fragment on Sovereignty,” (1933) 48 Pol. Sci. Q. 94.

2 For the view that Bodin was not such an absolutist after all, but that he supposed the sovereign to be subject to natural law, international law, and the constitutional laws of monarchy, see Shepard, “Sovereignty at the Cross Roads: A Study of Bodin,” (1930) 45 Pol. Sci. Q. 580. Accord: McIlwain, “A Fragment on Sovereignty,” (1933) 48 Pol. Sci. Q. 94. For the more usual view of Bodin, see Hearnshaw, “Bodin and the Genesis of the Doctrine of Sovereignty,” Tudor Studies (1924) 109 at 124–125.


4 “For this question of loyalty to a sovereign is one which, more than any other, has divided men in their political, social, and even domestic relations.” Hurd, The Theory of Our National Existence (1881) 537.
creased activities of the federal government have revived the controversy over sovereignty, if in truth it may be assumed that the issue had ever become obsolete. The 1939 cases treating certain phases of the amending process as political questions may further revive the question. The problem in the United States seemingly may be regarded as perennial. Hence efforts at its reanalysis can never be regarded as superfluous or futile.

The problem of sovereignty may be approached from the viewpoints of law, of political science, and of philosophy. It is one of the chief technical terms of each of these fields of knowledge. Each has given the term a meaning with a content different from that of the other sciences. In fact, the same science has at different periods of time defined the word in a varying manner. In the words of Bryce:

"As the borderland between two kingdoms used in unsettled states of society to be the region where disorder and confusion most prevailed, and in which turbulent men found refuge from justice, so fallacies and confusions of thought and language have most frequently survived and longest escaped detection in those territories where the limits of conterminous sciences or branches of learning have not been exactly drawn. The frontier districts, if one may call them so, of Ethics, of Law, and of Political Science have been thus infested by a number of vague or ambiguous terms which have produced many barren discussions and caused much needless trouble to students. . . .

"No offender of this kind has given more trouble than the so-called 'Doctrine of Sovereignty.'" 

Before plunging into one of the most fiercely controverted subjects of both legal and political theory, it becomes necessary to make clear the purpose of this discussion and the attitude of the writer towards the concept of sovereignty. The writer has no new definition of the term to offer. Nor does

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6 See Chapter II, supra.
7 Bryce, Studies in History and Jurisprudence (1901) 503-504.
he subscribe to the views of any particular publicist or school of legal philosophy. He does not believe that there is any one specific, precise conception which undebatably deserves the appellation of sovereignty. This discussion will accept as the definition of sovereignty and as the list of its chief characteristics those which most authorities at the present time appear to adopt. The writer thoroughly agrees with Dean Edwin D. Dickinson, who says: "Probably nowhere in law, private or public, is there to be found a more tyrannical phrase than 'the sovereignty of the state.'" 7 This discussion is not intended to give new emphasis to the importance of sovereignty. But the subject has been so constantly discussed that a treatment of the federal amending process would be incomplete without it. In the words of Professor McIlwain:

"It requires considerable courage, or presumption, as some might prefer to style it, to ask a reader's attention once more to so well-worn a topic as sovereignty. Few political conceptions have been the subject of so much discussion amongst us in the last hundred years. But this very fact is proof of its vital importance in our modern world; and the wide variety of the views held concerning its essence, as well as the conflicting conclusions to which these views still lead, may furnish sufficient excuse for another attempt to clarify some of our ideas touching this central formula under which we try to rationalize the complicated facts of our modern political life." 8

One is confronted also with Professor McIlwain's challenge: "Our theory, such as it is, has been mainly a theory of lawyers who were usually content to accept their explanation of government as secondhand from later English legal sources such as the Commentaries of Sir William Blackstone. . . ." 9

9 Ibid. at 105.
It is the purpose of this discussion to deal with sovereignty from the point of view of law. It therefore becomes necessary to distinguish between what have been respectively called legal sovereignty and political sovereignty. A person or body is said to have legal sovereignty when he or it has unlimited law-making power, and when there is no person or body legally superior to him or it. Perhaps it would be correct to say that the possession of unlimited law-making power is enough, for it is difficult to see how there can be any superior to a group which can make laws on all subjects since that group could pass a law abolishing the powers of the supposed superior. In other words, sovereignty is legal absolutism. By the political sovereign, on the other hand, is meant the group within a state which in actual fact determines the bent of governmental action. Legal sovereignty is consciously exercised; political sovereignty generally is not. In a normally peaceful state the legal sovereign and the political sovereign will generally be coincident. But in time of disturbance political sovereignty may rest in the army, or in the Church, or in labor unions, or in other groups. The proper relation of the

20 "It should, however, be carefully noted that the term 'sovereignty,' as long as it is accurately employed in the sense in which Austin sometimes uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit." Dicey, Law of the Constitution, 8th ed. (1915) 70. See also, 1 Austin, Jurisprudence, 4th ed. (1873) 226; Brown, The Austinian Theory of Law (1906) §§ 539, 545; Bryce, Studies in History and Jurisprudence (1901) 505, 509; Dickinson, "A Working Theory of Sovereignty: I," (1927) 42 Pol. Sci. Q. 524 at 532; Harrison, "The English School of Jurisprudence," (1878) 30 Fortnightly Rev. 475 at 493; Lewis, Remarks on the Use and Abuse of Some Political Terms (1832) 40; Markey, Elements of Law, 6th ed. (1905) § 311; Merriam, History of the Theory of Sovereignty Since Rousseau (1900) 155, 218; Pollock, A First Book of Jurisprudence, 6th ed. (1929) 272; Ritchie, "On the Conception of Sovereignty," (1891) 1 Am. Acad. Pol. Sci. Annals 385 at 392; Willoughby, The Nature of the State (1928) 291; McIlwain, "Sovereignty Again," (1926) 6 Economica 253 at 256; Cohen, Recent Theories of Sovereignty (1937) 36, 84; Eastwood and Keeton, The Austrian Theories of Law and Sovereignty (1929) 62, 67; Emerson, State and Sovereignty in Modern Germany (1928) 255, 259; Chafee, Book Review, (1919) 32 Harv. L. Rev. 979 at 980.
legal and the political sovereigns is one of the chief problems of a sound legal system and of good government.

Much confusion might have been avoided if the term sovereignty had been treated as an exclusively legal conception. It was first developed in the law. It has a genuine and, in most modern governments, an indispensable utility in describing the legal system of the state. It meets the need for certainty and precision as to the authoritative source of rules of law. Its use in political science has no particular value. The term "public opinion" or some similar phrase would be fully as descriptive, and would enable the student to grasp the meaning of the word without the careful reading of the context which is now necessary.

Sovereignty as a legal conception has sometimes been viewed as having two aspects: one external and one internal. The external sovereignty is the independence of the state in relation to other nations. The internal sovereignty is the relation of the sovereign within the state to the individuals and associations within the state. The purpose of this discussion is to consider the latter type of sovereignty. As a matter of strict legal theory it seems hard to regard a mere internal or external sovereignty as a full sovereignty. From the point of view of constitutional law, the so-called internal sovereign has unlimited law-making power. Hence as a question of municipal law, the lawyer will concern himself only with the rules laid down by the internal sovereign irrespective of their compliance with international law. Only in a case before an international tribunal would the lawyer look to the limitations on the so-called internal sovereignty laid down by international law. Viewed as a question of constitutional law, the internal sovereign would be regarded as supreme both externally and internally by the English and American lawyers. As Jellinek says, the so-called external sovereignty is
merely a reflex of the internal sovereignty. Thus from the point of view of constitutional law an amendment relating to territory outside of the nation would be valid.

As a matter of fact, it is sometimes confusing to admit the use of the term sovereignty in international law. Etymologically the word means "superiority." Historically it is descriptive of the relation existing between a state and its subjects. "Properly interpreted, sovereignty is a term of constitutional law and political science and not of international law, and it implies nothing more than the legal right of the state to determine its own internal life, regulate its own purely domestic affairs and make laws for its own subjects within its own territory."12

11 Die Lehre von den Staatenverbindungen (1882) 23-24. Oppenheim says: "Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country."

1 Oppenheim, International Law, 4th ed. (1928) § 64.

As to the relation between municipal law and international law, most Anglo-American writers assert the ultimate supremacy of the former as viewed from the standpoint of constitutional law. Picciotto, The Relation of International Law to the Law of England and the United States of America (1915); Wright, The Enforcement of International Law Through Municipal Law in the United States (1916). The Continental writers are divided. See Anzilotti, Il Diritto Internazionale nei Giudizi Interni (1905); Kaufmann, Die Rechtsskraft des Internationalen Rechts und das Verhaltnitte der Staatsgesetzgebungen (1899); Kelsen, Das Problem der Souveranität und die Theorie des Völkerrechts (1928) 120 ff.; Krabbe, The Modern Idea of the State, translation (1922) 233 ff.; Triepel, Droit international et droit interne (1920) 132-152. A decade ago the German, Austrian, and Estonian constitutions provided that international law should form a part of the national law. See also Mattern, Concepts of State, Sovereignty and International Law (1928) 71; Cohen, Recent Theories of Sovereignty (1937) 57-92.

12 Garner, "Limitations on National Sovereignty in International Relations," (1925) 19 Am. Pol. Sci. Rev. 1 at 6; Willoughby, "The Juristic Conception of the State," (1918) 12 Am. Pol. Sci. Rev. 192 at 202, takes the same view. Clark points out that "as a matter of juristic literature, independence ab extra has often been confused under the same title with the notion of a permanent internal superior, probably because of the practical indispensability of the latter, which I have previously pointed out, to any lasting external relations whatever." Clark, Practical Jurisprudence (1883) 173-174. "As a substantive, sovereignty is a term expressing the relation between part of a given political society, or state, and the remainder. . . ." Ibid. 174. "Indeed, the term sovereignty altogether, as used to express external independence of a state, is going out of use." Ibid. 175. Unfortunately, almost fifty years after the above statements were
Legal sovereignty, or simply sovereignty, as it will hereafter be designated, it seems to the writer, has perhaps five leading characteristics. In the first place, it is a matter of fact, or of fact and law (although admittedly this tends to confuse the distinction from political sovereignty). The law of a state may expressly or impliedly recognize the sovereign as such, but such recognition is not essential. The sovereign of a state exists as such as a matter of fact, although in the long run it also exists as a matter of law. For example, in England Parliament is sovereign, although there is no law to that effect. To say that sovereignty rests on law would be inconsistent, since the sovereign is the creator of law.

A second characteristic ascribed to the sovereign by many writers is that it is absolute. It can pass a law on any subject it chooses, and such a law will be regarded as valid, in the sense that the courts of the state will enforce it. From the point of view of the lawyer, qua lawyer, it is sufficient that the sovereign has passed the law, and he will look no further as to its authority. If the body thought to be sovereign can legislate only on a limited range of subjects, it is not sovereign. In fact, the chief content of sovereignty is that its scope is unlimited. That is, the sovereign is distinguished from any other legislative body in that it determines the limits of its own competence. If there is any other superior body or group written the term is still much used in international relations, as shown for example in the objections raised in the Senate to the League of Nations and the Permanent Court.

From the point of view of international law, an internal limitation on the legal capacity of the state or its organ does not impair its independence in relation to other states. But from the point of view of constitutional law, there would seem to be a real limitation on sovereignty if the limitation is regarded as enforceable. As Salmond says, "all questions as to civil and supreme power are questions as to what is possible within, not without, the limits of the constitution." SALMOND, JURISPRUDENCE, 7th ed. (1924) 531.

"The theory of sovereignty says nothing about the content of the command. The only question is whether it issues from a proper source; an imperative issuing from an authoritative source is law." KRABBE, THE MODERN IDEA OF THE STATE (1922), p. xlvi of the Introduction by Sabine and Shepard.
which can repeal or modify the laws it passes, or which can take away or even alter the limits of its competence, it is not sovereign, even though the superior group seldom acts. The mere potentiality of its action is enough to strip the inferior body of its claim to sovereign powers. Sovereignty is defined as unlimited legislative power. If power is given to another group to legislate with respect to certain topics, the original sovereign no longer has absolute law-making powers. It can legislate only in the fields which it did not give up, and this violates the essence of sovereignty, that the extent of its action has no limits as to subject matter. It may be that the first group and the latter group each has a range of powers which the other cannot disturb. But that alone is insufficient. What each group has is simply governmental power, and not sovereign power. Otherwise it would be proper in certain cases to speak of municipal corporations as being sovereigns, when the Constitution provides for "Home Rule," as in some state constitutions in the United States.

In the third place, sovereignty is generally asserted to be indivisible. There is no inherent reason why this should be the case. It is a unit merely by definition. Sovereignty is an abstract conception and not a universal found in all countries at all times.

The fourth characteristic of sovereignty is that from the point of view of the lawyer the law passed by the sovereign need not be enforced, in particular cases at least. Looked at from a strictly juristic standpoint, the promulgation of a rule by the sovereign is enough to make the rule good law. Austin seems to have made obedience a prime factor in his definition of sovereignty: "If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obed-

\[24\] Willoughby seems to have underestimated the distinction between governmental and constituent power when he says that they are "two classes of functions that differ not as to kind, but only as to the subject matter with which they deal." WILLOUGHBY, THE NATURE OF THE STATE (1928) 206. Yet he later admits that "the amending clauses may fairly be said to be the most important clauses of any constitution." Ibid. 401.
ence from the *bulk* of a given society, that determinate superi
or is sovereign in that society, and the society (including
the superior) is a society political and independent." But jurists since Austin seem to have given less emphasis to en
forcement, and regard it as a problem outside of the law. It is indeed the chief distinguishing mark of the political sov
ereign, but only a postulate of the legal sovereign. In the long run, the legal sovereign must receive obedience to be such, but isolated violations of its laws do not detract from its char
acter as sovereign.

The fifth characteristic attributed to the sovereign by most writers is that it is determinate. Who the political sovereign is, is generally not determinate, since public opinion is a force which operates indirectly and circuitously. But unless the alleged legal sovereign can be ascertained, it must be concluded that there is no such sovereign. To Austin must go the credit for having made determinateness a requisite of the sovereign. The Anglo-American lawyer is accustomed to viewing law as something commanded or permitted by the

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15 1 AUSTIN, *JURISPRUDENCE*, 4th ed. (1873) 226.
16 "Sovereignty is authority, not might." Mcilwain, "Sovereignty Again," (1926) 6 *ECONOMICA* 253 at 256.
17 "But Austin not only serves us by presenting in a typical form one theory of sovereignty, with its logical consequences worked out; he also, as it seems to me, points in the right direction in his emphasis upon determinateness." Dewey, "Austin's Theory of Sovereignty," (1894) 9 *POL. SCI. Q.* 31 at 51. "Except as sovereignty secures for itself definite and definable modes of expression, sovereignty is unrealized and inchoate. Constitutional development has consisted precisely in creating definite ways in which sovereignty should exercise its powers." Ibid. 52.
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sovereign. Unless this sovereign can be isolated, one cannot be sure that a law is valid, since it may turn out that it was not prescribed by the sovereign. In the words of Frederic Harrison:

"But there are no limits to the absolute power of the sovereign within the range of municipal law; or, in other words, to the lawyer, there are none. . . . Law, for the purposes of the lawyer, is a species of command issued by such a political supreme authority, to its political inferiors or subjects habitually obeying it. Nothing that is not a command is law; and nothing commanded by anything but the supreme authority, as already defined, is law."18

Sovereignty and law are thus inseparably linked. The sovereign having been located, the lawyer simply accepts his orders as law, without further consideration. This makes for simplicity and certainty in the law, and reduces sovereignty to a comparatively simple proposition as it relates to the problem of law.

The meaning of determinateness is not to be too narrowly circumscribed. It may mean a single person or a group of persons. Austin himself attributed sovereignty to a specific person, or a specific group; or to the person or group which comes within a certain class. Thus in England sovereignty rests in the King in Parliament, that is in those persons who at the time happen to be the King, the members of the House of Lords, and the members of the House of Commons. Where the sovereign is a single person, it is easier to understand the

18 Harrison, "The English School of Jurisprudence," (1878) 30 FORTNIGHTLY REV. 475 at 484. Laski, "The Theory of Popular Sovereignty," (1919) 17 MICH. L. REV. 201 at 214, says: "For the lawyer, all that is immediately necessary, is a knowledge of the authorities that are legally competent to deal with the problems that arise. For him, then, the idea of sovereignty has a particular and definite meaning. It does not matter that an act is socially harmful or unpopular or morally wrong; if it issues from the authority competent to act, and is issued in due form, he has, from the legal stand-point, no further problems." See also, Ritchie, "On the Conception of Sovereignty," (1891) 1 AM. ACAD. POL. SCI. ANNALS 385; WILLOUGHBY, THE NATURE OF THE STATE (1928) 293-294.
fact of his being sovereign. But a group, as long as it is definitely ascertainable, no matter how numerous, may also be sovereign according to the writers. Although it is combined for action according to artificial rules, it nevertheless is sovereign. When the group acts, it acts corporately. This would seem to answer the objection of Dewey, who asks: "Admit, however, that sovereignty can be thus latent, then is every individual who composes this possible electorate a sharer in sovereignty?"\(^{19}\) The sovereign may regulate the individual members of the group at will, and still be sovereign, as each person when acting does not exercise an individual bit of sovereignty but the corporate sovereignty which belongs to the whole group.

It has been seen that by sovereignty is meant unlimited law-making power. There have been many who have asserted that such a power must reside somewhere within every state.\(^{20}\) Instead of being an abstract conception, applicable only to certain types of modern states, it has been thought to be a universal. Sovereignty has been placed in the King or Emperor. In England it is asserted to be in Parliament. In France (up to 1940 at any rate) it has been thought of as being in the Constituent Convention. In the United States it is con-


\(^{20}\) "However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the jura summa imperii, or the rights of sovereignty, reside." Blackstone, Commentaries (1756) 49. See also Ritchie, "On the Conception of Sovereignty," (1891) 1 Am. Acad. Pol. Sci. Annals 385; Willoughby, The Nature of the State (1928) 183, 195, 206.

John Dickinson rests sovereignty not on an imperative theory of law, but "on the need for a single source of authoritative formulation." Dickinson, "A Working Theory of Sovereignty," (1927) 42 Pol. Sci. Q. 524 at 525, note. "Sovereignty in the legal sense is after all nothing more or less than a logical postulate or presupposition of any system according to law." Ibid. 525. See also, Markby, Elements of Law, 6th ed. (1905) § 36; Emerson, State and Sovereignty in Modern Germany (1928) 272; Cohen, Recent Theories of Sovereignty (1937) 145.
stantly reiterated that it is in the people of the United States. A group of French publicists of the early nineteenth century, Cousin, Guizot, and Constant, asserted the sovereignty of reason. 21

Closer analysis reveals, however, that there is no inherent necessity that a sovereign exist within a state. A study of early civilization reveals that many states have existed where there was no unlimited law-making power, and where custom or religion furnished the chief sources of the law. The kings and emperors of the Middle Ages regarded themselves as subject to the Law of God and the Law of Nature. With the establishment of the modern independent states of Europe, however, there came to be a real sovereign within each state. But the federal or composite state still presented the possibility of there being no sovereign in the state. If the framers of the Constitution had omitted any provision for amendment, as they might have done, it is difficult to see that there would be any sovereign in the United States. 22 Possibly an implied power to make amendments in the same manner that the Constitution was adopted would be inferred. But even this possibility might have been anticipated by an express provision of the original Constitution that there should never be any amendments. Under this state of affairs the federal government would be confined to the powers granted to it, and the states to all other powers except those expressly denied to the states or those reserved to the people. Thus there could

21 MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU (1900) 75-79. Bliss would eliminate the concept of sovereignty altogether. BLISS, OF SOVEREIGNTY (1885) 57, 173, 175. Edwin D. Dickinson says that sovereignty "has been an excuse for vanity, a subterfuge for selfish ambition, and a screen for ignorance in international relations. Rarely if ever has it expressed a legal principle or standard unmistakably relevant to the substance of the particular problem or controversy." Dickinson, "New Avenues to Freedom," (1931) 25 Mich L. Rev. 622 at 625.

be no redistribution of powers among the states and the federal government and the people. Inasmuch as the essence of sovereignty according to the usual definition consists in the ability to fix the sovereign's own competence, and that of the inferior groups, there would demonstrably be no sovereign.

B. LOCATION OF SOVEREIGNTY IN THE UNITED STATES

It is conceivable that there might be no sovereign in the United States. But if there be one, it is a matter of the first importance to the lawyer to locate it, since it lies within the theoretical power of that sovereign to alter every rule which he is accustomed to regard as law. In the United States, powers are first divided between the federal government and the states. These powers in turn are subdivided between the executive, legislative, and judicial departments of each government. Outside of all these are the powers forbidden to the federal government, or to the state governments, and the powers reserved to the people. Apart even from these is the amending capacity itself, which can only be exercised by the federal government and the states jointly.

A theory which seems to have been the prevalent one during the period immediately after the Constitutional Convention was that sovereignty was divided between the states and the nation. But sovereignty by definition is indivisible. The states and the federal government simply had plenary powers

23 Story, Commentaries on the Constitution of the United States, 3d ed. (1858) §§ 207, 208; Cooley, "Sovereignty in the United States," (1892) 1 Mich. L. J. 81. Willoughby refers to all the legislative organs of the state, as well as the amending body, as exercising sovereign powers. He says that "all organs through which are expressed the volitions of the State, be they parliaments, courts, constitutional assemblies or electorates, are to be considered as exercising sovereign power, and as constituting in the aggregate the depository in which the State's Sovereignty is located." Willoughby, The Nature of the State (1928) 307. See also Bryce, Studies in History and Jurisprudence (1901) 507. It would seem more accurate, however, to say that ordinary legislative bodies merely exercise powers which have been delegated to them by the sovereign.
as to specific matters, and neither party could interfere with the powers of the other. Neither could determine its own legal competence. Both were subject to the amending body. Both the states and the federal government began later to claim exclusive sovereignty, and in the end all the disputants came to agree that sovereignty was a unit and indivisible.

A second theory, made popular chiefly through the efforts of John Calhoun, was that sovereignty resides in the states. So firmly was the theory held that it largely brought on the Civil War. But when the tests of sovereignty described above are applied, it becomes evident that the view has no sound basis. The clauses of the original Constitution itself show the limitations which were placed on the so-called sovereignty of the states. Article One, section 10, forbids the states to make treaties, coin money, emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, to lay duties on imports or exports, to lay tonnage duties, to keep troops or warships in time of peace, to enter into any agreement with another state, or with a foreign power, or to engage in war unless actually invaded. The Civil War Amendments and the recent amendments stripped them of further powers. A single state cannot amend the Constitution. The amending body is superior to it, and the state is bound by an amendment even though it does not ratify it. It has frequently been pointed out that the subjection of the states to the amending power makes the United States a nation, instead of a confederacy. State ex rel. McCready v. Hunt, (1834) 2 Hill L. (S. C.) 1 at 171, 172, 179 (argument of Blanding); Madison in the debates of the Virginia Convention ratifying the Constitution, 3 Elliot, Debates on the Adoption of the Federal Constitution (1937 reprint of 1836 2d ed.) 93-97; 1 Curtis, Constitutional History of the United States (1899) 613; 2 ibid. 19, note; 9 Dane, A General Abridgment and Digest of American Law (1829), Appendix 38; 1 Burgess, Political Science and Comparative Constitutional Law (1891) 144; Hart, Introduction to the Study of Federal Government (1891) 18; Jameson, Constitutional Conventions, 4th ed. (1887) §§ 38, 57; Pomeroy, Constitutional Law, 10th ed. (1888) § 111; Willoughby, The Nature of the State (1928) 263. The same argument was made as to the status of the states in Germany. Emerson, State and Sovereignty in Modern Germany (1928) 99.
The state therefore fails as to both tests of sovereignty: it has no unlimited law-making power, and it is subject to a superior, the amending body.

During and immediately after the Civil War, the theory of sovereignty veered to the other extreme, and it was alleged that sovereignty was in the nation or in the federal government. Assuming that there is such a thing as external sovereignty, it is perhaps substantially correct to say that it is vested in the federal government. Yet the treaty-making power is subject to limitations, so that the government does not have even a complete external sovereignty. As to internal powers, the federal government has only the powers expressly or impliedly conferred on it, and all other powers not prohibited to the states are reserved to the states or to the people. Thus from one point of view the federal government has even less power than the states. Moreover, the federal government, like the states, cannot amend the Constitution, and is itself subject to the amending body. It should be noted, however, that the recent decisions on the child labor amendment look in the direction of making Congress in effect the sovereign by an application of the doctrine of political questions.25

The doctrine of the Supreme Court and of many of the leading commentators on constitutional law has been, and still seems to be, that sovereignty is located in the people.26 This doctrine is ambiguous, perhaps conveniently so. As someone has pithily remarked, its “only force lies in the reputation of its advocates.” Savigny has pointed out that in gen-

26 “... the people, in their collective and national capacity, established the present constitution. It is remarkable, that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity ‘We, the people of the United States, do ordain and establish this Constitution.’ Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution by which it was their will, that the state governments should
eral "people" may have at least four meanings. It may in its broadest sense include all the persons living within the state during the whole time of the existence of the state. Obviously it is difficult to view a legal rule as proceeding from such a group. In the second place, it may mean the sum of all the individuals as an organized group living within the state be bound, and to which the state constitutions should be made to conform. Jay, C. J., in Chisholm v. Georgia, (1793) 2 Dall. (2 U. S.) 419 at 470-471. See also the opinion of Wilson, J., at 454.

"The people of the United States, as one great political community, have willed that a certain portion of the government . . . should be deposited in and exercised by a national government; and that all matters of merely local interest should be deposited in and exercised by the state governments." Jay, C. J., dissenting in Keith v. Clark, (1878) 97 U. S. 454 at 476.

"The sovereignty of a state does not reside in the persons who fill the different departments of its government, but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent." Spooner v. McConnell, (C. C. Ohio 1838) 1 McLean 337 at 347, F. Cas. No. 13245.

"But in the last analysis the people are the sovereigns, and both the states and the United States are only serving instrumentalities. Whatever limitations are on such sovereignty are self-imposed." Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 191.


If sovereignty be dropped as a legal term and viewed solely as a term of political science and philosophy, the views of the Supreme Court and the writers are doubtless correct. It has been asserted that state sovereignty "is primarily not a legal, but a philosophical conception." Brierly, "The Shortcomings of International Law," BRITISH YEAR BOOK (1924) 4 at 12. Pittman B. Potter says that it was a doctrine "which political scientists invented." Potter, "Political Science in the International Field," (1923) 17 AM. POL. SCI. REV. 381 at 385. Walter Thompson states that "it is doubtful if sovereignty can be retained as a purely legal concept." Book Review, (1938) 32 AM. POL. SCI. REV. 128 at 129.

27 1 SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840) § 10; see also Briggs, "Sovereignty and the Consent of the Governed," (1901) 35 AM. L. REV. 49.
at the same time. The third view is that it means the latter individuals with the exception of the government. In the fourth place, it may mean in republican states that particular organized assembly of individuals in which, according to the Constitution, the highest power really exists. Possibly this is what the Supreme Court has meant when it referred to the people as being sovereign. But its language has been altogether too indefinite to make this clear.

With particular reference to the United States, by people may be meant either the people of the United States or the people of the individual states. The view of the Supreme Court has been that it means the former. Even accepting the former as being correct, it is not clear whether that means simply the electorate, or all citizens of the United States, or the people as a politically organized mass, or the people as an inorganic mass.

The Constitution nowhere expressly refers to the people as sovereign. The assertions in the Declaration of Independence of the inalienable rights of the people to liberty and the pursuit of happiness and the right to alter and abolish the government are nowhere repeated. Virtually the only mention of the people is in the Preamble and in the Ninth and Tenth Amendments. According to the Preamble the people of the

28 "In the United States, indeed, the 'people' are the one original source of law, but it is the people in their entirely definite, aggregate, political, that is constitutional organization that is meant here." 2 Von Holst, Constitutional History of the United States (1879) 75.

29 "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we call familiarly the 'sovereign people' and every citizen is one of this people, and a constituent member of this sovereignty." Dred Scott v. Sanford, (1856) 19 How. (60 U. S.) 393 at 404.

30 "But who are the people? In the true sense of the term, it means the political society considered as a unit, comprising in one organization the entire population of the state, of all ages, sexes, and conditions." Jameson, Constitutional Conventions, 4th ed. (1887) § 568.
United States ordain and establish the Constitution. But it is a remarkable fact that the Preamble as originally drawn named each of the thirteen states individually and that a change was made only because it was not known which states would ratify the Constitution. Moreover the Preamble has no legal force. Even if the people were sovereign when they drew up the Constitution, they must be regarded as having given up their sovereignty when they provided for amendment by others than themselves. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Neither amendment confers any affirmative powers on the people, nor clarifies the meaning of the word. Sovereignty or the power to amend can scarcely be derived from them. The Supreme Court has recently denied the right of popular referendum on amendments.

It would seem clear that sovereignty does not lie in the corporate mass of the people of the United States, or in the organized citizenry. They have not the power to amend the Constitution. They do not even participate in the election of those who do have the amending power. The only sovereignty which they can be said to have is of a strictly non-legal character, that of the force of public opinion and physical force. If such a test is adopted, there is no state now, and there has been no time in history when the people were not sovereign.

It is, to be sure, somewhat closer to the truth to speak of the electorate as sovereign. But even that group does not meet the test of sovereignty. It cannot determine its own competence,

1 Elliot, Debates (1836) 376.
2 Hawke v. Smith, (1920) 253 U. S. 221, 40 S. Ct. 495.
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and it is subject to a superior power. It simply elects those who do exercise the amending capacity. But election does not take place by a simple majority of the nation, or by a three-fourths majority. The election occurs within the limits of each state, and it is three-fourths of the states and not of the aggregate people that adopt amendments. The amending body is not the agent or the trustee of the electorate. Once elected, the members of Congress and the state legislatures are free to adopt what amendments they will. They are ultimately politically accountable to the people, but not legally so. The mere act of voting for those who exercise the amending capacity is not the passing of a law. It is a mere ministerial act at the most and does not bring into being a rule of law. Even the exercise of the voting capacity occurs in most cases biennially. In the event of the proposal of amendments by a national convention or ratification by state conventions, the electorate would as a matter of fact exercise considerable influence on particular constitutional changes, since election would be on the basis of the candidate's attitude towards the proposed amendments. But when proposal is by Congress and ratification by the legislatures, so many issues are involved in the election that the candidate's attitude concerning proposed amendments is likely to be overlooked or ignored. Only in the event that Article Five was amended so that the


34 "How can a people be sovereign when, e. g., they may pass upon public matters only once in four years, or may have their legislative acts revoked by juristic review?" Ward, Sovereignty (1928) 32.
electorate actually voted on a proposed amendment could it be said that the electorate was sovereign; and if each state were counted as a unit, as it is now, sovereignty would be regarded as in the electorates of the states and not of the nation. Even then it would be necessary to say that sovereignty is in the electorate together with the body which proposed the amendment. Not until the electorate is given both the initiative and the referendum on amendments will it be strictly accurate to speak of it as sovereign. Even then, if the other modes of proposal and ratification are retained, there will remain the possibility of the exercise of sovereignty by other groups besides the people.

The people of the United States as an aggregate mass may perhaps be regarded as having been truly sovereign at only one time. This was when they adopted the Constitution. This act of sovereignty was, however, a revolution and had no legal basis. Under the Articles of Confederation sovereignty was located in each state, and amendment of the Articles was valid only when every state concurred through ratification by its legislature after proposal by Congress. The Constitution was proposed by a Convention, was ratified by conventions, and was considered as established between the ratifying states when nine states had ratified. The people of the United States may be regarded as having acted in a sovereign capacity by having ignored the Articles of Confederation and perhaps their own state constitutions. When critically

35 "The legal assumption that sovereignty is ultimately vested in the people affords no legal basis for the direct exercise of any sovereign power whose direct exercise by them has not been expressly or impliedly reserved. Thus the people possess the power of legislating directly only if their constitution so provides." Rottschaefer, Constitutional Law (1939) 8.

36 "The people themselves in their natural, inherent sovereignty, but rarely interpose and decide,—never but in making or altering a constitution." 9 DANE, A General Abridgment and Digest of American Law (1829), Appendix 65. It has been asserted that the true sovereign has acted only three times in the United States: when it adopted the Declaration of Independence, the Articles of Confederation, and the Constitution. Radin, "The Intermittent Sovereign," (1930) 39 Yale L. J. 514 at 525.
examined, however, their alleged acts of sovereignty dwindle in scope. The electorate which participated in the elections of the state ratifying conventions was perhaps about a twentieth of the entire population. Moreover, Congress and the state legislatures gave their stamp of approval to the Constitution. Thus the sole revolutionary act was ratification by less than a unanimous vote. Even the effect of this violation was considerably mitigated by providing that the Constitution should be binding only on those states which ratified it. It should also be noted that the members of the Constitutional Convention were elected by states and voted by states during its session. Ratification also occurred by states, and not by an aggregate popular vote or by a national convention of the people of the United States.

If the people of the United States ever had sovereignty, they must be regarded as having surrendered it by the adoption of Article Five. All future changes were to be made not by the people but by the amending body. The original sover-

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37 Beard, An Economic Interpretation of the Constitution of the United States (1935) 250. 1 Austin, Jurisprudence, 4th ed. (1873) 329-330, says: "In a few societies political and independent (as, for example, in the Anglo-American States), the sovereign political government has been determined at once, and agreeably to a scheme or plan. But, even in these societies, the parties who determined the constitution (either as scheming or planning, or as simply voting or adopting it) were merely a slender portion of the whole of the independent community, and were virtually sovereign therein before the constitution was determined; insomuch that the constitution was not constructed by the whole of an inchoate community, but rather was constructed by a fraction of a community already consummate or complete." See also Brown, The Austinian Theory of Law (1906) § 417.

38 The Constitution "is supreme over the people of the United States, aggregate and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them. . . ." Dodge v. Woolsey, (1855) 18 How. (59 U. S.) 331 at 348. When the people adopted the Constitution, "they delegated the power of amendment to their representatives, designating them and prescribing the function of each. . . . This delegated power the people have never retaken. Having so delegated the power of amendment, it cannot be executed in any way other than prescribed, nor by any instrumentality other than there designated." Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 199.
eign created a minor sovereign, the amending body, somewhat lesser than itself. This amending body was subjected to three limitations, two of which have expired, so that today the only limitation on the power is the equal suffrage clause. On the view that the power which may impose such a limitation is sovereign, the people may be regarded as the sovereign and the amending body as the agent of the original people. But even this limitation may be destroyed by a unanimous vote of the states, and in the case of the deprivation of a particular state of equality in the Senate by the consent of that state. Perhaps even this would not be necessary if the doctrine of political question were applied. Thus it is difficult to see how a body so powerful as the amending body can be regarded as the legal agent of the people. Even on the assumption that it can be regarded as the agent of the people, this can only mean the agent of the original people, and as they are all dead, the agency can have no practical importance. The present amending body, which theoretically can strip the people of any of the rights which they have, political, property, or personal, must be regarded as an independent body, and the people as mere subjects in strict legal theory.

It has sometimes been thought that sovereignty resides in the Supreme Court of the United States. There is no question that, except in the case of political questions, the acts of the other branches of the federal government and of all branches of the state governments are subject to ultimate review by it when such acts are in conflict with the Constitution. The Supreme Court has been called the master of the Constitution. It exercises a power not included within the jurisdiction of the English courts, that of reviewing the acts of the legislature. But the alleged difference between the Supreme Court and the courts of other nations is not so great as at first blush appears. Congress is not sovereign; Parliament is. If an act

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of Congress violates a clause in the Constitution, the Supreme Court may declare it invalid when a case is brought before it. But when the amending body changes a clause in the Constitution, the Supreme Court has no power in the matter. True enough, the amendment must have been adopted according to the proper procedure. But where the proper procedure has not been followed, it cannot be said that the sovereign has acted. An alleged act of Parliament would not be regarded as law by an English court unless Parliament actually adopted it in its regular mode. The Supreme Court may also ascertain the conformity of the amendment to the equal suffrage clause, but this is probably its only power as to the content of the amendment. It would not even have this power where every state ratified, or when the state deprived of its equal suffrage ratified the amendment so depriving it.

The amending body may nullify a decision of the Supreme Court. Such was the effect of the Eleventh and the Sixteenth Amendments. Such would be the effect of the child labor amendment. It might even abolish the Supreme Court itself. John Dickinson asserts:

"Should the Supreme Court declare a law unconstitutional, it remains open to the amending power to reverse this result by so changing the Constitution as to bring the law into conformity therewith. But even in case this is done, the last word remains with the Court through its power to establish authoritatively the validity and meaning of the amendment." 40

Perhaps this is true in actual practice. But as a matter of legal theory it is not. The justices of the Supreme Court take an oath to support the Constitution. The court is a mere agent of the United States like the President and Congress. It derives its being from the Constitution, and hence must con-

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form its action to the terms of the instrument. An amendment adopted according to the proper procedure and not in violation of the equality clause is as much a part of the Constitution as any other clause in the original document. An amendment in unequivocal terms abolishing the Supreme Court would be as binding on it as any other amendment. It would seem to be a case of clear usurpation should the court regard as invalid an amendment which clearly came within the scope of the amending power. The members of the Supreme Court are subject to impeachment. The membership of the court may be increased by Congress. Its decisions may be reversed by a later court. It has greatly limited its own jurisdiction by laying down the doctrine of "political questions." In fact, it has recently done so as to certain phases of the amending process in the child labor amendment cases. As a matter of fact, though not of law, the Supreme Court would be very chary in running counter to the will of the amending body. As yet it has never set up its view as against that of the amending body.

The tremendous prestige enjoyed by the Constitution may lead some to think that the document itself must be regarded as sovereign. Harrington's aphorism about "government of laws and not of men" is almost a banality in the law of Great Britain and the United States. But sovereignty, by definition, must be vested in a person or in a group. Consequently, to say that sovereignty is in the Constitution is equivalent to saying that no sovereignty exists. The Constitution was not handed down on a mountain top like the Ten Commandments. A determinate group adopted it, and they must at the time, at least, have been its superior and the then sovereign. The death of its makers did not leave the Constitution sovereign, because

it at once became subject to alteration by the amending body. The Constitution itself cannot redistribute the powers of the federal and the state governments, and being subject to a superior power, fails in all respects to meet the tests of sovereignty. The Constitution by itself is incapable of action. Just as the so-called unwritten constitution of Great Britain is subject to change by Parliament, so the written Constitution of the United States may be reviewed or abolished by the amending body. Thus, in one sense, it is as proper to speak of the Constitution of the United States as having only the force of morality as it is to speak thus of the constitutional law of Great Britain.

The development of the theory of the corporate personality of the state has resulted in the location by some of sovereignty in the state. W. Jethro Brown says:

“The possibility of the location of the sovereignty in the State itself is implicitly recognized in all modern theories which state legal limitations upon the power which ranks highest in the hierarchy of State institutions. The sovereign is the source of all law, and so cannot be limited by law; where a legal limitation is held to exist upon a power claimed to be sovereign, we are compelled to infer that legal theory looks beyond the pretended sovereign to the State itself as true sovereign and ultimate source of law.”

But this theory does not seem to be especially helpful. In the first place it necessitates a definition of a state. A bog of controversy must be waded through before agreement can be reached on its juristic meaning. Austin says:

“The state is usually synonymous with ‘the sovereign.’ It denotes the individual person, or the body of individual per-

sons, which bears the supreme powers in an independent po-

tical society.”

The state is thus made identical with the sovereign. But to
say that the state is the sovereign manifestly does not help
in the search for the sovereign, and merely begs the question.

Gray attacks Austin’s definition, asserting that the sover-
eign is merely an organ of the state. But to view sovereignty
as vested in the abstract conception of the state is, so far as
law is concerned, to make sovereignty an even more meta-
physical conception than it now is. Sovereignty can only be
exercised through concrete organs. Unless there is some organ,
either in being or dormant, which can legally pass a given
measure, it is futile to look to a mere legal fiction to accom-
plish the result. It is not difficult to conceive of a constitution
with so limited an amending capacity that certain measures
can only be passed by revolutionary methods. Doubtless it

43 1 AUSTIN, JURISPRUDENCE, 4th ed. (1873) 249, note. Burgess says that “in
the transition from one form of state to another, the point of sovereignty moves
from one body to another, and the old sovereign body, i. e. the old state, becomes,
in the new system, only the government, or a part of the government.” 1 BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW (1891) 68.

The amending clause has a very important bearing on the juristic theory of
the state from the point of view of constitutional law. It is sometimes maintained
by those who have viewed the state in its internal as distinct from its external
aspect that an essential characteristic of the state is that it have a sovereign.
Willoughby says: “But to speak of a State as not being completely organized in
its government, seems as much an absurdity as to say that a man is not completely
organized in his physical frame.” WILLOUGHBY, THE NATURE OF THE STATE
(1928) 206. “An organized community of men either constitute or do not
constitute a State, according to whether there is or is not to be discovered a
supreme will acting upon all persons or other bodies within its limits.” Ibid. 224.

The existence of the amending capacity thus supplies the sovereignty which is
necessary to the full and perfect existence of the state. As Burgess says: “The
state, however, was not organized in the confederate constitution; i. e., it could
not legally speak the sovereign command.” 1 BURGESS, POLITICAL SCIENCE AND
COMPARATIVE CONSTITUTIONAL LAW (1891) 101.

44 1 Gray, The Nature and Sources of the Law (1909) § 150. Willoughby,
who stresses the juristic status of the state, almost concedes that the state and the
sovereign are identical. “In fact, it is almost correct to say that the sovereign
will is the State, that the State exists only as a supreme controlling will, and that
its life is only displayed in the declaration of binding commands, the enforce-
ment of which is left to mere executive agents.” WILLOUGHBY, THE NATURE OF
THE STATE (1928) 302.
would be convenient to have a body which could legally adopt any proposed measure according to legal forms. But from the point of view of the lawyer this is not at all a necessity. In a federal state such as the United States where it is so difficult to ascertain what the state is, it seems better for the law to ignore the conception of a state and to emphasize the existence of a sovereign in the form of an amending body, which, if need be, may possibly be viewed as the juristic state.

Another theory which once attracted considerable support was the view that sovereignty is in the states united. By this is not meant sovereignty in the states severally, nor sovereignty in the federal government, but sovereignty in the aggregate of the states. This was the view of Austin:

"And, lastly, I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments as forming one aggregate body: meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the union apart, is properly sovereign therein." 45

John C. Hurd has written a bulky volume in support of this view. 46 The theory is, however, subject to two criticisms. It regards the electorates of the states united as sovereign. As has been pointed out, this is a confusion of political sovereignty with legal sovereignty, inasmuch as the voters have no direct voice in the creation of constitutional law. In the second place, it omits Congress from the sovereign power. It is a mistake to regard the states as sovereign simply because amendments are ultimately ratified by them. 47 The power of Congress in

1 Austin, Jurisprudence, 4th ed. (1873) 268.
"2 Hurd, The Theory of Our National Existence (1881), esp. 140, 374. This book is "Dedicated in Homage to the Sovereign: Whoever He, She, or They, May Be." The same view is taken by Brownson, The American Republic (1866) 220-221. See also Richman, "From John Austin to John C. Hurd," (1901) 14 Harv. L. Rev. 353.
3 Dicey omits to include Congress as a part of the Sovereign. Dicey, The Law of the Constitution, 8th ed. (1915) 144-145.
the matter is at least equal to that of the states. An amend­ment is never brought about without prior initiation by Con­gress. Even when a constitutional convention is applied for by the state legislatures, the call must go forth from Congress. Congress, moreover, has the power to select the mode of rati­fication. Looked at from one angle, Congress has a dual ca­pacity in proposing amendments. It actually initiates the amendment, while, at the same time, its vote in favor of it is in a way a vote of ratification, inasmuch as, without it, the amendment cannot even go before the states. It is in Congress that amendments have been buried. The initiatory powers of the state legislatures have never as yet been brought to a suc­cessful fruition. It thus appears that the powers of the federal government with reference to amendments are fully equal to those of the states. A true sovereign must therefore embrace both governments. The states are sovereign neither indi­vidually nor aggregately.

In the last analysis, one is brought to the conclusion that sovereignty in the United States, if it can be said to exist at all, is located in the amending body. The amending body has often been referred to as the sovereign, because it meets the test of the location of sovereignty. As Willoughby has said:

"In all those cases in which, owing to the distribution of governing power, there is doubt as to the political body in
which the Sovereignty rests, the test to be applied is the de-
termination of which authority has, in the last instance, the
legal power to determine its own competence as well as that of
others." 49

In Germany, where the problem of the location of sover-
eignty has also been complicated by the existence of a com-
posite state, the publicists have similarly developed what is
known as the Kompetenz-Kompetenz theory. 50 Hobbes, the
first Englishman with whom the theory of sovereignty is
prominently associated, expressed the same view when he
said that "the legislator is he, not by whose authority the law
was first made, but by whose authority, it continues to be a
law." 51

Applying the criteria of sovereignty which were laid down
at the beginning of this chapter, the amending body is sover-
eign as a matter of both law and fact. Article Five expressly
creates the amending body. Yet in a certain manner of speak-
ing the amending body may be said to exist as a matter of fact
since it could proceed to alter Article Five or any other part
of the Constitution. While it is true that the sovereign cannot
act otherwise than in compliance with law, it is equally true
that it creates the law in accordance with which it is to act.

of sovereignty is incapable of "being usefully applied" to constitutions like that
of the United States; SALMOND, JURISPRUDENCE, 7th ed. (1924) 531, note k; POLOCK, A FIRST BOOK OF JURISPRUDENCE, 6th ed. (1929) 278; SIDGWICK,
THE ELEMENTS OF POLITICS (1891) 17, 602; Williams, "The Popular Mandate
on Constitutional Amendments," (1921) 7 Va. L. Rev. 280 at 293, who asserts
that the implication of Hawke v. Smith, (1920) 253 U. S. 221, 40 S. Ct. 495,
is "that legal sovereignty in the United States rests in those bodies which are
capable of altering or amending the Constitution"; WILLOUGHBY, THE NATURE
OF THE STATE (1928) 260 ff., 304.

* WILLOUGHBY, THE NATURE OF THE STATE (1928) 197. See also Radin,
"The Intermittent Sovereign," (1930) 39 Yale L. J. 514 at 523, 526; Pen- 
Q., No. 4, p. 1 at 15.

** MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU
(1900) 190-196. See also EMERSON, STATE AND SOVEREIGNTY IN MODERN
GERMANY (1928).

*** HOBBES, LEVIATHAN (1651), c. xxvi, par. 9.
And the doctrine of political questions in effect lessens the legal restraints on sovereignty. In practice most sovereigns come into being as a matter of fact. Thus originally the Constitution was adopted as a revolutionary act, and the amending body, resting as it does on a part of the Constitution, was at first a de facto sovereign. The passage of time has made people forget that the Constitution was in its origin anything but legal, so that today the amending body may be viewed as sovereign in law and in fact.

In the second place, the amending body has absolute law-making power, unless factual limitations be also viewed as legal limitations. At any rate it is possible to go as far as Bentham, who says that the sovereign has indefinite law-making power. The amending body may strip the federal government of all its powers, or it may consolidate all the states into a single unitary state. It may place the powers of all three departments of government in a single department. It may legislate, as by passing a prohibition amendment. It may act as a court, as by overruling a decision of the Supreme Court. It may add to or subtract from the powers reserved to the people. It may alter the very amending body itself. It may revise not only the rules of constitutional and criminal law, but those of property and contract. It may strip the individual of personal liberty which he may have regarded as inalienable. That it will attempt to do all or even a small part of these things is unlikely. The outcome doubtless would be a revolution. But that it has an indefinite power to do any particular one of these things cannot be denied. As DeLolme says of Parliament, so it may be said of the amending body, that it "can do everything but make a woman a man, and a man a woman."

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52 Bentham, A Fragment on Government, 1st ed. (1776), c. iv, par. xxiii.
From one point of view, the power of the amending body is even more despotic than that of the British Parliament. The common view is that one Parliament is not bound by the laws of a previous Parliament. That is, in actuality, there is an implied limitation on sovereignty with reference to time. But in the United States the amending body might arguably by express provision forbid any future change of a clause in the Constitution. For instance, the Corwin amendment provided that the Constitution should never be amended so as to abolish slavery. However, this, like the equality provision, could probably be repealed by a unanimous vote of the states. The original Constitution forbade any amendment with reference to the slave trade or the imposition of a direct tax without apportionment prior to 1808. The equal suffrage clause is still a limitation on the ordinary amending power. The amending body might amend the amending clause or might arguably abolish itself, so that legally there would be no possibility of amendment. It might provide for an altogether different type of amending body, so that an entirely different kind of sovereign would come into being. Sovereignty, viewed in the broadest sense, may be regarded as the power to make a law on any subject binding for all time in all places. This capacity theoretically exists in the amending body. However inexpedient such an amendment might be, it would seem that that would be the view of many American lawyers. There are not many who assert that the ordinary amending body could abolish the equal suffrage clause. It would seem that under the prevailing legalistic interpretation of the Constitution an absolute prohibition against amendment could be overcome only by revolution.

54 Austin, however, is of the view that the sovereign cannot bind its successor. AUSTIN, JURISPRUDENCE, 5th ed. (1885) 263–264.
55 But Professor Rottschäfer, Constitutional Law (1939) 9–10, states: "There has been found no case in which the power to amend has been employed
From a legal standpoint it is not a necessary concomitant of this absolute law-making power that every amendment be enforceable. The lawyer is interested only in the source of the act, and that source being authoritative, he will ask no more questions. The lack of enforcement of the Fifteenth and Eighteenth Amendments did not detract from their legal character. Of course, if the whole Constitution was ignored over a considerable period, there would probably be a change in the sovereign. But for ordinary purposes, when the amending body has acted, the lawyer accepts its command as law.

The amending body is determinate. It has been pointed out that sovereignty may reside in a group as well as in a person. Moreover, this group need not be a single organized body meeting at one place, but may be composed of several groups viewed as a corporate unit. As John Dickinson says, "sovereignty can be exercised by a system of organs properly geared together no less than by a single organ." Hence it is that sovereignty may be regarded as being in the amending body though that body is composed of both federal and state units meeting at forty-nine different places. All the units are viewed as one single corporate or collegiate body, and each when it acts does not exercise its own sovereignty but exercises the corporate sovereignty. Doubtless the three-fourths majority of the states that combine to adopt one amendment will be di-

to directly or indirectly modify a constitutional provision expressly excepted from that power. The issues that such an attempt would raise could not be settled by any reasoning derived by logical processes from prevailing conceptions of sovereignty, and those based on considerations of convenience and expediency point to the solution that such attempts to limit the power of amendment should be held futile. The necessities of orderly government do not require that one generation should be permitted to permanently fetter all future generations.”

Dickinson, “A Working Theory of Sovereignty,” (1927) 42 Pol. Sci. Q. 524 at 539. This would seem to meet the objection of Bliss, who argues that an amendment requires “the action of the federal State and of the several local States, each in its own sphere. There is no one sovereignty, or one sovereign people, or aggregate of peoples, that can make the change.” Bliss, Of Sovereignty (1885) 114.
vided as to another. But this does not detract from the sovereign character of the amending power any more than in the case of Parliament, which also acts by a majority. Sover­eignty is not in any specific three-fourths of the states, but it is clear that it always is in any three-fourths of them that unite in ratifying an amendment. Similarly it is never clear whether proposal of amendments will be by Congress or by a convention, nor whether ratification will be by the state legislatures or by conventions. Yet when these have acted, it appears that the sovereign has acted. The sovereign is a real sovereign, though one fluctuating in its composition. It is known only after it has acted. The groups in whom the possibility of amending resides are the potential sovereign, and in that sense it may be said that sovereignty resides in the full quota of all possible amending groups. But the exercise of sovereignty, which is of more interest to the lawyer than its residence, is by the actual amending power at a given time. The larger group is merely a container of the smaller, and there is no difference as to the legal effects of their acts. The larger group is merely the political group from which over a long period every state at some time or other will be a part of the amending power.

There is one type of situation where prima facie it seems that a minority is sovereign in the United States. A minority of the states may block an amendment. A single state may defeat the abolition of the equal suffrage clause. But a true sovereign must have no superior and must have affirmative law-making power. A minority is superior only in a negative way. As Gray admits, “this minority cannot be called Sovereign; except as an obstacle to amending the Constitution, it is powerless.”


It is a peculiarity of the American sovereign that who it is can never be known precisely until it has acted. This does not detract from its sovereign character, as it is enough that it is definitely known when it has acted. There are four possible combinations of the amending body in the United States. In every instance except one the power has been made up of Congress and the state legislatures. In the case of the Twenty-First Amendment it was made up of Congress and the state conventions. It may also be made up of two-thirds of the state legislatures applying for a convention, Congress in calling the Convention, the Convention, Congress in selecting the mode of ratification, and the state legislatures in ratifying. A fourth possible combination is of the legislatures in applying for a convention, Congress in calling it, the Convention, Congress in selecting the mode of ratification, and state conventions in ratifying. Congress thus must participate in any amendment, and has the power of selecting which group shall be the ratifying part of the sovereign. The group within the group that acts as part of the sovereign may also fluctuate. The two-thirds of Congress which proposes one amendment will vary from the group which proposes another. Similarly the three-fourths majority of the states which ratifies one amendment will differ from the majority which ratifies another.

The amending body as a corporate unit is responsible to no one. But the groups of which it is composed have no such freedom. The amending body may abolish or strip any of the groups of its powers. The result of abolishing either the federal or the state groups would, however, be to destroy the federal character of the United States. If the state groups were destroyed, the United States would in effect become a unitary state. On the other hand, if the federal group were abolished,

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69 "We come here, as before to an insoluble contradiction; sovereignty is not determinate until after it has been exercised—until the vote has been taken." Dewey, "Austin's Theory of Sovereignty," (1894) 9 Pol. Sci. Q. 31 at 40.
the Union would be on its way to a mere confederation. While it would be legal to change the composition of the sovereign, the suggested changes would mean the destruction of the federal status.

It has sometimes been thought that the sovereign must be constantly in session or must act frequently. From a legal standpoint this is not necessary. A latent potential sovereign is enough. The dissolution of the House of Commons makes Parliament nonetheless the sovereign. An Asiatic despot is sovereign even when asleep. A half a century elapsed between the passage of the Twelfth and the Thirteenth Amendments, so that the amending power was regarded as so dormant a sovereign as not to be worthy of the name. The three Civil War Amendments were adopted within a five-year span. Forty years passed with no further changes. But within the seven-year period from 1913 to 1920, four amendments of outstanding importance were adopted, and a child labor amendment was shortly thereafter proposed to the states. The Twentieth and Twenty-First Amendments were adopted in the early 1930’s. The sovereign has become so vigorous that there are now many who would seek to curb it. The formerly prevalent view as to the weakness of the sovereign has now either swung to the opposite extreme, or maintains that it has just the proper degree of strength. During periods of non-action it may perhaps be said, with some equivocation, that

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60 “Suppose a generation has passed away since any amendment has been passed, or since any legislature has acted upon any amendment proposed by Congress; where is the portion or class constituting the sovereign to be found?” Dewey, ibid. at 39. “Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a federal state a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislature, but a monarch who slumbers and sleeps. . . . But a monarch who slumbers for years is like a monarch who does not exist.” DICEY, THE LAW OF THE CONSTITUTION, 8th ed. (1915) 145. See also BROWN, THE AUSTINIAN THEORY OF LAW (1906) 148, note at 153; BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (1901) 539; WILLOUGHBY, THE NATURE OF THE STATE (1928) 305; EMERSON, STATE AND SOVEREIGNTY IN MODERN GERMANY (1928) 271, note 6; Chafee, Book Review, (1919) 32 HARV. L. REV. 979 at 980.
the sovereign commands what it permits. Legal sovereignty may be in abeyance. The theory of sovereignty does not have the same significance in the United States as it does in England, inasmuch as it is an organization behind that of the regular government and because so large a majority is required for it to act. Under such circumstances it is easily explicable why so little thought is devoted to the alleged sovereign and why so much attention is given to the powers of the organs of government as distributed under the existing Constitution. The events of recent American history are likely to result in the study the subject deserves.

Perhaps the leading obstacle to the recognition of sovereignty in the amending body is the limitation imposed by the equal suffrage in the Senate clause. In reply it must be noted that the proviso has no practical significance as to most amendments that might be proposed. Strictly speaking, it is doubtless correct to say that the existence of the clause precludes the ordinary amending body from being regarded as sovereign. But even that clause is not an absolute limitation on the amending power, as has been pointed out in Chapter IV. The two earlier absolute limitations which existed until 1808 are

61 Sidgwick, The Elements of Politics (1891) 602, says: “Suppose that the body which can dismiss the otherwise supreme government does not dismiss it and gives no directions. Is it still supreme?—assuming that its inactivity is not due to fear. I think we must say that the power of dismissal—or any other power of giving orders—is still possessed though it is not exercised; assuming that the inactive organ would be obeyed if it gave orders. . . . I think we must attribute supreme power to any individual or body completely capable of corporate action, which admittedly can withdraw power at will from a government otherwise supreme.” Markby says that though “the ultimate sovereign power was generally dormant, and was only called into active existence on rare and special occasions,” this is “not inconsistent with sovereignty, or with our conception of a political society; but it is a peculiarity.” Markby, Elements of Law, 6th ed. (1905) § 33.

gone, so that today there is no limitation whatever on the amending power when every state is included. The requirement of unanimous consent makes the sovereign no less such. Moreover, possibly the doctrine of "political questions" applies so that even the ordinary amending body could act without restraint. The provisions of Article Five as to procedure are not to be regarded as limitations, since the sovereign cannot be said to be acting when the proper procedure is not followed. Here again the doctrine of "political questions" applies, at least to some phases of the amending procedure.

In conclusion it seems well to consider what should be the attitude of the lawyer to the sovereign in the form of the amending body. First of all, it seems that the lawyer should welcome its definite location, since he as much as anyone should be interested in the body which has in its power the ultimate determination of what shall be the law. At first blush it may seem to hark back to the days of despotism to accept a body with such unlimited power. But if there be such a power it is desirable to know in whom it is vested. When the force of public opinion can be focused on a body with definite powers, it may perhaps be more readily held morally accountable. Moreover, as W. Jethro Brown points out, "one

63 Ritchie, "On the Conception of Sovereignty," (1891) 1 AM. ACAD. POL. SCI. ANNALS 385 at 398, says that "Austin, in his search for determinate persons, must wander about till he finds George Washington, James Madison, and a large number of other persons who (a Scotchman may be permitted, and expected, to remark) are now dead." But the possibility of amendment by all the states avoids the necessity of imputing sovereignty to the makers of the Constitution.

64 "But the fact that it is so formally limited does not mean that the power does not exist, any more than it is claimed that the Polish assembly had not the legislative power because of the existence of the liberum veto." WILLoughby, THE NATURE OF THE STATE (1928) 264.

65 "Even the manner in which, or the determination of the person by whom, the Legal Sovereign is chosen is a matter distinct from the nature and scope of his authority. He is none the less Sovereign in the contemplation of law because he reigns not by his own right but by the choice of others..." BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (1901) 510.

66 "It is much better that the law in all its harshness and its makers in all their legal irresponsibility should stand out clearly before the eyes of those who
of the great advantages of having a legal sovereign is to make a revolution under the forms of law possible.”  

In the second place, there need be no fear of possible tyrannical acts of the sovereign. An extraordinary majority is required for it to act. Both the federal governments and the states are represented in all its acts, and each holds an absolute veto over the other. Moreover, the electorate which chooses Congress and the state legislatures has constantly increased in the ratio of its number to that of the people as a mass. Election takes place so frequently that while those who exercise the amending capacity cannot be held legally responsible, they are held politically accountable.

Finally it must be seen that the status of the amending body has an important bearing on the controversy over the nature and extent of the powers of the federal government and the states, and on the general doctrine of sovereignty. Sovereignty rests in neither the federal government nor in the states, but, if it may be said to reside anywhere, in the amend-

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Willoughby says: “The value of constitutional government is not that it places Sovereignty in the hands of the people, but that it prescribes definite ways in which this sovereign power shall be exercised by the State.” WILLOUGHBY, THE NATURE OF THE STATE (1928) 302.


68 “Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by the legislature. But from the scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination; which is itself limited. If the legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislature must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.” STEPHEN, THE SCIENCE OF ETHICS (1882) 143.
ing body. The amending capacity demonstrates neither the supremacy of the states nor of the federal government. At one time it may operate in favor of the states, and at another in favor of the federal government. That the rights of neither will be impaired is guaranteed by their joint action in the amending process. Both are but agents of the composite states. In the amending body we discover both the sovereign and the state.

The nature of the federal amending process demonstrates the futility of the concept of sovereignty. It has been pointed out that its use in international law is doubtful, and that its use if proper at any time is only so in constitutional law. Its use in constitutional law has resulted in great confusion in the United States. It has been seen that the only body to which the characteristic can logically be attributed is the amending body. The chief time when the question of sovereignty becomes important is when the validity of the substance of an amendment is challenged. It is this fact alone which has induced the extensive discussion of the subject. For other purposes it is sufficient to examine the powers which have been conferred on the federal and state governments and their departments.

The involved explanations made necessary and the metaphysical difficulties encountered in ascribing sovereignty to the amending body show the barren aridity of the term. The equality in the senate clause prevents a strictly correct application of the term to the ordinary amending body. The original limitations expiring in 1808 show that there was no sovereign whatever up to that year, though possibly unanimous action by the states would have sufficed. The excessive majorities required for proposal and adoption of amendments prevent frequent action by the sovereign. During two periods of approximately half a century each no amendments were adopted. Until the amending body acts it can never be known in advance who the sovereign will be. Forty-nine bodies meeting at dif-
ferent places act on the matter, and each of these bodies in turn is divided, except in Nebraska, into a lower and upper house. Unless the procedure of amendment prescribed in Article Five is pursued, the sovereign has not acted at all, and the action of the amending group is mere brutum fulmen. The recent doctrine as to political questions perhaps somewhat alters this, however. Each part of the amending body is subject to law, and may be altered or abolished. The amending body itself may be altered through the amending process, and limitations on the future amending capacity may be imposed. The amending body is an artificial sovereign deriving its being from a law in the form of Article Five. The amending groups hold office for but a short time, and may be supplanted by others in the elections in which an increasingly larger electorate participates. The theory of sovereignty, moreover, presupposes the continued orderly existence of the government. In case of a revolution the commands of the sovereign would be disregarded, and authority could not longer be ascribed to the amending body either in fact or in law. The moral, religious, physical, and other factual limitations on the supposed sovereign are so important that it may perhaps be correct to say that they are also legal limitations, as there comes a time when law and fact shade into one another. Finally, when it is remembered that throughout all history, American as well as European, there never has been a consensus as to the meaning of sovereignty, it seems that the term should be used only with the greatest circumspection.

Saying all this, we should still bear in mind the words of the great English historian, W. S. Holdsworth: "The great achievements of the doctrine of sovereignty were the mastering of the lawlessness of the mediaeval state, and the provision, in the modern territorial state, of an organism which, by keeping the peace, has made social and political progress possible. The measure of its achievement is the contrast between the state of Europe in 1500 and in 1700. We are so accustomed to the efficient manner in which lawlessness and crime are suppressed, that we are apt to forget that this result has been achieved through the ceaseless efforts of the ministers of the state, using powers and machinery which owe their origin and their force to the sovereignty of the
I think that those who go about to deny or minimize this sovereignty have forgotten this fact. They have forgotten that in the smaller matters of government, which concern the daily intercourse of man and man, it is the fact of the state's sovereignty which causes the machinery to run smoothly; and that in a time of crisis they may have reason to be thankful for its existence. As Dicey, writing in 1914, has well said, 'Crises arise from time to time in the history of any great state when, because national existence or national independence is at stake, the mass of a whole people feel that the authority of the nation is one patent and one certain political fact.' At the present day, when some have maintained that the doctrine of sovereignty should be discarded as an outworn doctrine, English law firmly maintains the sovereignty of the king in Parliament.'

Also to be remembered are the words of Rupert Emerson: "That actual highest power may temporarily rest elsewhere than with the normatively defined sovereign is a fact which is too obvious to require statement; but on the other hand there can equally be no doubt that the modern constitutional State has brought about a closer practical coincidence between the legal sovereign and the actual possessor of and wielder of highest power than has ever before been possible. . . . To discard the principle of sovereignty is to accept the contingent threat of chaos that appears whenever two or more formally equal powers stand opposed to each other with no highest power authorized to decide between them."