

LAW AND SOVEREIGNTY

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Bodin defined sovereignty as the ‘absolute and perpetual power of a commonwealth’.¹ Bodin thought that the power of the state had to be embodied in the prince or other appointed leader and had to be single, unlimited and absolute. Most legal and political philosophers now agree that this theory of sovereignty, as well as the similar theories we find in Grotius or Blackstone among others, are all failures. They are certainly descriptive failures, in that they fail to capture the fluidity and elusiveness of political power, which was as true in the early modern period as it is today. The classic theories of sovereignty are also and perhaps more vividly normative failures. They fail to give any good reasons why we should be at the mercy of the sovereign prince. Modern political theories, in their own plural and contested ways, believe instead that all citizens ought to share equal rights and responsibilities and that the people appointed to offices of power are bound to respect the same rights.

Some of the problems with the concept of sovereignty were known from the start. Blackstone admitted that ‘a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand’. Nevertheless, such a view would encourage the ‘mass of mankind to grow insolent and refractory’. He concluded that the law:

ascribes to the king, in his high political character, not only great powers and emoluments which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to

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¹ Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, edited and trans. by Julian H. Franklin (Cambridge: Cambridge University Press, 1992) 1.

consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government.²

As a result the king is said to enjoy ‘sovereignty’ and ‘imperial dignity’ and a clear pre-eminence over the courts, which is essential if there is not to be ‘an end to the constitution’. So for Blackstone public law and private law have radically different structures, in that public law is law in a special sense only: it cannot be enforced upon the king.³ This legal treatment of sovereignty expresses also a political requirement. If sovereignty is not unlimited and uncompromised, it cannot achieve its aims. This theory led Blackstone to say, however, some very strange things, such that the king ‘is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness’.⁴

Nevertheless, in spite of these problems of plausibility and attractiveness, the idea of sovereignty continues to inform at least parts of the theory of law. Lawyers still use expressions such as ‘popular sovereignty’, ‘parliamentary sovereignty’ and ‘national sovereignty’. These terms are central to constitutional law in many jurisdictions (they are not peculiar to international law and institutions, where sovereignty has always meant something different, namely ordinary and equal ‘statehood’).⁵ Sovereignty still seems to mark something like the unlimited power of a parliament, a people or a nation, an idea which is distinct from other, more ordinary, manifestations of power, such as the powers of a local authority or a magistrate.

Nowhere is this usage better embedded in constitutional practice than in the ideal of popular sovereignty. Jeremy Waldron writes, for example, almost in passing and without giving an extensive justification that ‘the principle of popular sovereignty – basic to liberal thought – requires that the people should have whatever constitution, whatever

² William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765) vol. I, ch.7, p. 234.

³ The same view is taken by Bodin: ‘As to the way of law, the subject has no right of jurisdiction over his prince, on whom all power and authority to command depends; he not only can revoke all the power of his magistrates, but in his presence, all the power and jurisdiction of all magistrates, guilds and corporations, Estates and communities, cease...’ (Bodin, *On Sovereignty* 115).

⁴ Blackstone, *Commentaries*. I, ch.7, p. 239.

⁵ See for example Benedict Kingsbury, ‘Sovereignty and Inequality’ 9 *European Journal of International Law* (1998) 599-625 and Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999) ch. 8.

form of government they want'.⁶ Jürgen Habermas also writes that 'the source of all legitimacy lies in the democratic lawmaking process, and this in turn calls on the principle of popular sovereignty'.⁷ In the United States these ideas were already present with the founders. Alexander Hamilton famously wrote that: 'The fabric of American empire ought to rest on the solid basis of *the consent of the people*. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority'.⁸ And a prominent American constitutional lawyer concludes that the 'corollaries of popular sovereignty - the people's right to alter or abolish, and popular majority rule in making and changing constitutions - were bedrock principles in the Founding, Antebellum, and Civil War eras' of the US constitution.⁹ Sovereignty is here part of a constitutional philosophy of democratic representation and remains a central category of modern constitutional theory, a 'bedrock principle'.

But how can constitutional government coexist with sovereignty at all? Sovereignty, when taken seriously, is the denial of the rule of law and the affirmation of uncompromised absolutism. It signifies, as all the classical authors of sovereignty knew, the unlimited power to be free of any legal restriction, contrary to any doctrine of constitutional government. Is this the same sense of sovereignty that we find in modern constitutional theorists, or does the modern sense have a special, weakened, meaning?

Here is then a neglected question for the philosophy of law: is such a new meaning possible? In other words, can lawyers transfer the idea of sovereignty from the imperial dignity of kings to the voting booths where ordinary men and women exercise their own sacred but shared prerogatives? The processes seem vastly different and wholly dissimilar. By what intellectual device or trickery can this discredited old idea help us account for modern and successful structures of constitutionalism and the rule of law? The survival of sovereignty in the age of equal rights calls for deeper reflection on these questions. The suggestion I wish to explore here is this: the survival of sovereignty is

⁶ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) 255.

⁷ Jürgen Habermas, *Between Facts and Norms*, trans. by William Rehg (Cambridge: Polity Press, 1996) 89.

⁸ James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, edited by Isaac Kramnick (London: Penguin, XXII, p. 184).

⁹ Akhil Reed Amar, 'The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denomination Problem' 65 *Colorado Law Review* (1994) 749. See also Akhil Reed Amar, 'The Consent of the Governed: Constitutional Amendment Outside Article V' 94 *Columbia Law Review* (1994) 457.

what it appears to be, namely a mistake. It is the result of some kind of absent-mindedness on the part of our constitutional lawyers. When taken seriously, sovereignty cannot be successfully adjusted and refined to fit the age or rights and constitutions. Philosophically speaking, sovereignty is and has always been incompatible with the idea of law. It is, in a way, unlawful.

I. SOVEREIGNTY AS FACT

The classic theories create a presumption in favour of process. If the law is made by a sovereign, then there can be no challenge to its validity. This is true whatever the content of the new law. This can be a legal as much as a moral argument: for society to continue to function, Blackstone said above, we need to recognise the special stature of the king as law-maker. The dispute about what is valid law ought to end somewhere and a process of law-making is as good a place as any. This procedural presumption is transferred from the king to the people by the theorists of popular sovereignty. In this sense law and sovereignty are effectively merged: the sovereign makes the law and that is the end of it. The link of sovereignty with the determinacy of law is explicit in the classic theories. Bodin relates sovereignty and law so that ‘this same power of making and repealing law includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it’.¹⁰

Bodin’s account of law is a familiar command theory for he says that ‘law is the command of the sovereign affecting all the subjects in general’.¹¹ But where does this power to command come from? Is it a political reality or a moral title? There is a great difference between the two. Bodin’s views on this are difficult to pin down. On the one hand he says: ‘Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins call *maiestas*; the Greeks *akra exousia*, *kurion arche*, and *kurion politeuma*; and the Italians *segnioria*, a word they use for private persons as well as for those who have full control of the state, while the Hebrews call it *tomech shevet* – that is,

¹⁰ Bodin, 58.

¹¹ Bodin, 51.

the highest power of command'.¹² This seems to point to the reality of power. At other times, however, he seems to imply that sovereignty is an office of government under a right to govern in the name of the political society, a right that rightfully belongs to the people composing that society. He observes, for example, that whenever absolute power is given to someone for a fixed period of time, then that person (even though he is currently all-powerful) is not a sovereign but a lieutenant of the people who retain sovereignty.¹³ This is typical of Bodin's method. He approaches abstract questions with a mixture of analysis and historical narrative. His views on a subject are not always clear nor do they always cohere.

The most rigorous and most influential account of sovereignty in law we find not in Bodin but in Bentham and John Austin, whose conception is the more developed.¹⁴ Here the origin of sovereignty is simply fact. A person gives commands and is obeyed by everyone. There are no orders that he feels compelled to obey. That person is the sovereign and is for this reason the only law-giver. He is the sovereign as a matter of fact, not a matter of law. He is illimitable by definition: he wouldn't be sovereign if he had to obey anyone else. Nothing he requires others to do can be unlawful. The sovereign is the determinate common superior (or determinate body of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other body or person.¹⁵ All the elements of Austin's legal theory are made of the same raw materials: the sovereign gives commands and obeys none; the subject obeys commands; the law consists in only those commands that directly or indirectly emanate from the sovereign. The raw material is power, differently packaged in each case. There is a lightness and elegance in this theory, even if its guiding idea is the fact of brute force. Sovereignty, for Austin, is the fact that makes law possible.

Austin's sovereignty is unlimited and therefore unique: it cannot be shared among two or more persons. If I obey my co-sovereign, I am not a sovereign. Nor is he, if he

¹² Bodin, 1.

¹³ Bodin, 6-7

¹⁴ Jeremy Bentham, *Of Laws in General*, edited by H. L. A. Hart (London: Athlone Press, 1970) pp. 18-30; John Austin, *Province of Jurisprudence Determined*, ed. W. E. Rumble (Cambridge: Cambridge University Press, 1995).

¹⁵ Austin, *Province* 166. Bentham wrote that: 'by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference the will of any other person'; *Of Laws in General*, 18.

comes to obey me. In this sense Austin's sovereignty is not 'subordinate', in that it is not conferred by law, nor can it be revoked by law.¹⁶ The person of the sovereign is the key to legal doctrine because it defines the boundaries of law and the legal system in the following way: 'The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors'.¹⁷ Laws are commands of the sovereign: 'Every law or rule (taken with the largest signification which can be given to the term properly) is a command. Or, rather, laws or rules properly so called are a species of commands'.¹⁸ This theory turns legal duty into a purely factual relation of force and power:

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. ... Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it... Command and duty are, therefore, correlative terms'.¹⁹

Austin presents law as a simple pattern of conduct, not a pattern of beliefs or a type of concept. Bodin agrees with Austin: '... we must assume that the term 'law', used without qualification, signifies the just command of the person or persons who have full power over everyone else without excepting anybody, and no matter whether the command affects subjects collectively or as individuals, and excepting only the person or persons who made the law'.²⁰ If law is a command, it does not have the moral or practical content that Hart and other 'normativist' legal theories take it to have. It is just how things turn out to be. It is the same with sovereignty. The fact of sovereignty organises

¹⁶ Joseph Raz, *The Concept of a Legal System*, second edition (Oxford: Clarendon Press, 1980) 8.

¹⁷ Austin, *Province* 18.

¹⁸ Austin, *Province* 21.

¹⁹ Austin, *Province* 21-22.

²⁰ Bodin, 51.

laws as members of the same legal system through a certain procedure that happens to dominate. What laws have in common is therefore their factual origin or authorship: only commands that can be actually traced to the actual sovereign are laws. No other show of force or claim to authority creates law. Austin's final account is this: 'The bulk of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons... That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior'.²¹

There are many well known problems with Austin's theory. Detailed attacks by Raz and Hart have shown how implausible and self-contradictory the theory is as a theory of law.²² These arguments show that Austin's sovereign is very strange. Austin's theory of sovereignty as a complex fact cannot accommodate the idea that law-making follows certain pre-existing criteria. There are two specific manifestations of this, the problem of the legislative procedure and the problem of continuity. I will offer here only a brief account of the two problems, since they have been well explored by others.

The first problem is that of procedure. Austin's sovereign legislates by issuing commands. Yet it is very unclear what this amounts to. What is it to issue a command? Perhaps a few words may be enough. The sovereign may say: 'I want you A to do x'. But some times the sovereign's displeasure would be manifest through his silence. S says nothing to his second in command and good friend A. They often communicate without saying much to each other, as old friends do. Would the implied displeasure of S, communicated in this way to A amount to an implicit command to anyone who knows the sovereign? The possibilities are endless because Austin does not distinguish between the real desires of the sovereign, implicit or explicit, and the issuing of a law.²³

²¹ Austin, *Province* 166.

²² Raz, *Concept* 27-43, H. L. A. Hart, *The Concept of Law*, second edition (Oxford: Oxford University Press, 1994) chs. 1-4.

²³ The problem of having procedure for making law is highlighted by Raz (Raz, *The Concept of a Legal System* 38) as follows:

it is usually the case, even in states where sovereignty is in the hands of a single person, that laws are created only when the sovereign follows a certain accepted procedure of legislation. But according to Austin every expression of the sovereign's desire which is a command is law, so he does not allow for the fact that sovereign can command in ways which differ from the accepted procedure, in which case his command is not a law.

If sovereignty is only a matter of fact, then the sovereign's inner thoughts or future thoughts or presumed desires, must be authority-generating (and this is what Blackstone must have had in mind when he said that even the intentions of the sovereign are beyond the reach of the courts). Anything that he or she wants, is the law. But this eliminates the idea of an office or constitutional function of the sovereign. The person, or his will, or mind, is the source in all its material unpredictability and contingency. As Austin clearly saw, sovereignty in this sense leaves no room for constitutional government. The result is an unbearable absolutism, whose description is best left to literature, not to political philosophy.

The problem is similar when the sovereign is taken to be a body. Here we need a procedure by definition. Without a procedure we cannot distinguish between the actions of the body and the actions of its members. But here we certainly need more than a procedure. For a body to exist there must be constitutional rules that determine, first, who is a member and, second, when and if the various actions of the members of the group do constitute an act properly imputed to the body. When I say there must be such rules, I mean of course from the point of view of the coherence and completeness of the general framework. If the theory tells us that the source of all law is the sovereign as a body and then fails to account for the body in non-legal terms, it contradicts itself, because it tells us that something is and is not the ultimate source of law. So Austin's theory cannot truly accommodate the idea of a sovereign body (even though Austin spends a number of very confusing pages discussing sovereign bodies).

A body only exists and acts according to rules of procedure and composition. Such rules cannot (to begin with) be the result of actions of that same sovereign body. Such rules would be begging the question of their creation. What counts as a law-making or constitution-making collective body must, therefore, be laid out in rules that pre-date the setting up of the body. If this is the case, then both in the case of persons and in the case of bodies, the rules of procedure or composition will be determining the status of the sovereign. The identity and powers of the sovereign cannot therefore be fully a matter of fact, but must be determined by some framework of thought, which would then be the

source of ultimate law. The fact, when it happens, generates law because it complies with the fundamental laws of law-making, i.e. the formalities of a proclamation or the procedures of a legislative body. The facts make law because of law. If this is the case, then Austin's legal theory of sovereignty as fact alone can accommodate neither the idea of a law-making procedure nor the idea of a legally constituted sovereign body.

A similar problem arises out of the question of continuity. Hart noted that Austin could not accommodate the idea of the succession of the sovereign. When Rex I dies there will have to be an unbridgeable gap in the legal system. There cannot be a legal system until Rex II establishes his authority through a pattern of obedience – the relevant fact. Once the sovereign is dead whatever commands he had issued with regard to his own succession are already obsolete. So Austin cannot accommodate succession, for which is required a framework of rules and standards encompassing both Rex I and Rex II. Some framework for continuity is also needed when the present legal system applies the laws that were created by previous sovereigns. According to Austin's framework, such laws are also without any ground. How can they be valid, once their sovereign has gone? But it is common experience that all legal systems recognise such laws. Raz notes, for example, that 'customs and laws of previous sovereigns present a further problem, since their apparent direct legislator cannot be regarded as the sovereign's agent'.²⁴

Such problems of procedure and continuity are created by the curious idea that the law and the legal system as a whole can be the result of the expressions of a single will. Austin's view of the legal system takes the well-known concept of legislation, which has always been one among many available grounds or sources of law, and applies it to the totality of the legal order to the exclusion of all other grounds. In addition, the origin of such legislation is not a complex set of institutions, which is the case for all constitutional states, but a single personified will. In Austin's legal system everything is being legislated by the single will of the present sovereign.

The more one thinks about it, the more implausible this picture becomes. First of all, no single person can know everything about the legal system as a whole or legislate about it or even formulate a complete system of delegation (and no citizen could form such a mental picture of his or her sovereign). Second, not everything about the legal

²⁴ Raz, *The Concept of a Legal System* 39.

system is present. A great deal of it, perhaps most of it, derives from the past in the form of custom, scholarship or earlier legislated law. Finally, not everything about the law is a matter of political power. Much of the law is the result of reasoning outside politics or the state, such as its techniques of reasoning and argument, that are always a matter of knowledge and skill. No one's will or desire or political power makes these techniques of legal reasoning true. They develop through practice and become essential components of our picture of the law.

Hart has shown that the model of legislation cannot apply to the legal system as a whole, at least in the way we have come to understand the legal system in modern jurisdictions. Whatever legislation we have needs to be understood *qua* legislation, as something with authority or normative salience *in law*, with the support of and against a general and abstract framework, which Hart called the union of primary and secondary rules. The most important of these rules was the rule of recognition. This framework, within which we understand the actions of constitution-making or law-making of the sovereign (or the body that is recognised as the author of the constitution or the law) cannot be a matter of conduct or fact. It is a set of rules, standards and procedures. In other contemporary theories of law the idea of a rule of recognition has been replaced by the idea of a constitutional and interpretive framework,²⁵ but the main point remains the same that law is to be understood under a framework of concepts and standards, suitably interpreted. Austin's account of sovereignty obscures this complexity at the heart of the legal order, which relies on some distinction between constitutional and ordinary rules. Hart tells us that 'normally' we consider laws to be grounds of criticism from an 'internal point of view'. Hart meant, I think, that Austin's model was unfamiliar because it could only be true of a lawless autocracy, where law was determined by force and not by a complex set of higher standards and principles. In this sense, the theory was not the 'normal' way we see the law.

All modern legal theorists accept the majority of Hart's points and reject Austin's account of sovereignty and law. They all now rely on the idea of the rule or rules of recognition or a suitably organised institutional framework appropriate for constitutional

²⁵ See Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), N. E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

government, within which law is understood by means of an elaborate conceptual scheme. Austin repeatedly says that the sovereign must be a ‘determinate’ person. Modern legal theorists seem to be replying to Austin that the determinacy is not given as a matter of brute fact but on account of some prior framework outlining procedures and offices of law-making. The conceptual apparatus defines the sovereign and not the other way round.²⁶ If this is the case, the sovereign is not the foundation of the legal system, but its creation. And if sovereignty is created by law, it is then just a political office, like any other. And if it is an ordinary office like any other, then there is no sovereign. There is only a legislator defined and limited by higher law. Bodin, as we saw, briefly entertained the thought that sovereignty is not a fact but a creation of law and its doctrine - and so did Blackstone. It is this position to which we must now turn.

II. CONSTITUTIONAL SOVEREIGNTY

This perhaps should have been the end of the matter. There is little to say about Austin’s sovereignty, other than that it is an obsolete way of describing the legislator. Nevertheless, the story continues. Modern constitutional law has deployed sovereignty not as the fact that makes law possible but as a *sui generis* office or political function. Here sovereignty is a constitutional requirement, a result of a general framework of constitutional rules.²⁷ It means that there is a rule of recognition or an equivalent constitutional structure of rules and reasoning that requires that someone or somebody *ought to* be a sovereign. To be sovereign in this sense does not mean that you command obedience as a matter of fact. It means that you enjoy more or less exclusive, ultimate and comprehensive powers of law-making, under some fundamental legal framework. This is ‘sovereign’ power and not ordinary law-making power, precisely because it should be ultimate and irresistible as a matter of law. This position is taken, for example, by British constitutional lawyers and Hart himself, for whom the sovereignty of

²⁶ This also seems to be the view of Thomas Hobbes, hence the distinction I draw here between Bodin, Blackstone, Bentham and Austin on the one hand and Hobbes on the other. See David Dyzenhaus, ‘Hobbes and the Legitimacy of Law’ 20 *Law and Philosophy* (2001) 461.

²⁷ This seems to me also to be the best reading of Bodin’s concept of sovereignty, but this makes his overall argument even less convincing.

parliament is requirement of the constitution and the rule of recognition.²⁸ But it could also be adopted by any constitution that speaks of the popular sovereignty underlying the authority of the existing constitution (in the manner perhaps of Waldron and Habermas as we saw above). In legal orders that celebrate popular sovereignty the idea of sovereignty is central, playing a pivotal role as a politically powerful justification.

Sovereignty here has been drastically modified. It does not seem to be Austin's idea, for it is based on law and not fact. And this coincides with our experience of the constitution. In the era of elections and parliaments, the single sovereign person has disappeared. Neither the Prime Minister nor the Queen not even the US President is today an Austinian sovereign – nor, of course, the General Chief of Staff. Austin himself spent numerous pages trying to locate the sovereign in the United Kingdom. Nevertheless, because of his idea that sovereign is established in fact, his results were uncharacteristically crude. He came to the thought that the sovereign was the electorate. This view required what it had earlier ruled out, namely that voters were both sovereigns and subjects (so there was confusion between submission and command). Hart showed that making sense of the United Kingdom's legal order required a different framework. At the foundation of a common sense legal order lies not a sovereign, but secondary rules of recognition and adjudication according to which laws are made and applied.²⁹ So the main idea is that of a body that is sovereign under a framework of this body's constitutive rules. Sovereignty is now defined as something intellectually subordinate, as a constitutional office.

Hart seems to allow that a sovereign of some kind may still exist under a system of supreme authoritative rules defining law and law-giving. A rule of recognition gives rise to sovereignty. This is a departure from Austin's legal theory, for whom the source of sovereignty is just the fact that it exists, but it may lead to the same system of government. This is indeed a constitutionally organised sovereignty of one person or one body. The idea of a *title* to sovereignty or the office of the sovereign appears to solve the

²⁸ For the general principle see Anthony Bradley, 'The Sovereignty of Parliament – Form or Substance?' in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution* (Oxford: Oxford University Press, 2007) 24-58. See also Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999).

²⁹ Hart, *The Concept of Law* 149.

problems we identified in Austin's theory.³⁰ Sovereignty stops being the foundation of the legal system as a whole but remains the most important constitutional office. Hart therefore describes the British constitution as a system of 'continuing sovereignty, so that Parliament cannot protect its statutes from repeal'.³¹ But for Hart this is not a logical necessity (inferred by the logic of obedience and command to the sovereign in fact) but 'only one arrangement among others, equally conceivable, which has come to be accepted with us as the criterion of legal validity', which is 'only one interpretation of the of the ambiguous idea of legal omnipotence'.³² This is then adjusted or constitutional sovereignty. It is a power or set of powers under the rule of recognition. Parliament is the ultimate legislator, under a higher law.

What do we gain by calling the parliament sovereign? Why not say that he or she is just the legislator? Because we want to retain the idea that he is supreme and limitless. We retain the idea of an irresistible or ultimate power. But here the power is legally constructed and is not the result of a fact that the sovereign is in fact the strongest. So we could put Austin's original framework for a sovereign S as follows:

The Sovereign S

- S is obeyed by everyone (a fact)
- S does not obey anyone (a fact)

Under this scheme the sovereign is supreme, unique and unlimited because he is the strongest as a matter of fact.

If we follow Hart's adjustment, by contrast, we stop talking of obedience and command and we say that sovereignty is constituted by a set of relevant foundational rules. We thus put it in terms of pre-existing primary and secondary rules. We say that the

³⁰ Neil MacCormick explicitly endorses this view of sovereignty: 'Sovereign power is that which is enjoyed, legally, by the holder of a constitutional power to make law, so long as the constitution places no restrictions on the exercise of that power...'; Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999) 127. Nevertheless, MacCormick concludes that 'sovereignty is neither necessary to the existence of law and state nor even desirable' (p. 129).

³¹ Hart, *The Concept of Law*, 150

³² Hart, *The Concept of Law* 149.

sovereign S_1 combines the following legal positions, put in terms of Hart's secondary rules under a rule of recognition (RR):

The Sovereign S_1

- S_1 has all the powers of law-making (a rule under the RR)
- S_1 has no disabilities in law-making (a rule under the RR)

Conceived in this sense the sovereignty of S_1 has similarities and differences with S. He is unique, just as S. But he is subordinate to the rule of recognition. His powers are limited by at least one condition set by the RR, that his ultimate powers to legislate comply with a legislative procedure. This means that not all of the decisions or desires imputed to S_1 would be sufficient to create a law. There will be decisions or desires that are not made into laws for lack of the appropriate procedure. Only those that become legislative in nature via the legislative procedure have legal recognition and effects. In the United Kingdom, for example, only Acts of Parliament are supreme sources of law. Is this condition a step too far? Can we call the resulting power sovereign? I think not.

Hart's adjustment create a constitutional sovereign that rules according to law. This brings the idea of sovereign closer to the framework of modern law, because it allows that this ultimate power be exercised according to a pre-existing framework of rules and standards. Is this still sovereignty? It appears that the main features of sovereignty are intact. Its range is still not a matter of degree. It is not greater power than other power. It appears to be qualitatively different because S_1 has all the powers of law making and none of the possible disabilities. His supremacy is simple in that S_1 alone has that legislative power, therefore this power is not shared. Either S_1 operates under the constitution as a legislator and legislates or he does not. When S_1 legislates, he is not burdened by any disabilities – or so the theory demands.

But this picture is false. The second sentence of S_1 contradicts a typical requirement of the rule of recognition. We cannot say that a sovereign body under the rule of recognition has no disabilities in law-making. The existence of a rule of constitutional framework entails such disabilities. We can see this through an example. If

parliament passed a simple resolution trying to amend an Act of Parliament, it would fail. Its wishes would not have produced a law. Under the constitutional framework of the United Kingdom a mere resolution does not affect Acts of Parliament and is therefore ineffective. So any such expression of the will of parliament will have to be rejected in favour of the old Act of Parliament (which had at an earlier point in time complied with the conditions of law-making laid out in the then existing rule of recognition). So the will of the present parliament, to the extent that this present will is accurately reflected in the resolution it has passed, must be legally frustrated. But this is exactly what a disability is, the opposite of a power. If this is true, then the present parliament is bound by at least one disability, the disability to make laws outside the existing procedural framework.

This means that if the rule of recognition has any content, parliament is not the holder of powers alone but is also the bearer of some disabilities as to law-making, in that there are some things that it cannot do (in the example, it cannot amend an Act by means of a resolution). It is evident that the Hartian sovereign must be, thus, quite distinct from the Austinian sovereign. In Austin's thought, sovereignty is all there is to say about how law is made, because it is a brute fact. The will of the sovereign makes laws, in whatever form that will is found. But if we subsume sovereignty to a higher law or constitution, as Hart seeks to do, then we have a sovereign whose will alone, his desires, his thoughts or his words or the equivalent actions of the legislative body, are not enough to make laws, because that will or desire alone does not change the law according to the rule of recognition or similar constitutional framework. Under Hart's scheme there cannot be any law-maker that is free from disabilities.³³

So S_1 both fails to describe the UK constitution, where parliament is under such ordinary disabilities and fails to convey the full effect of the constitutional framework or rule of recognition. We may try to amend it to make it consistent with the idea of a constitutional framework, as follows:

³³ MacCormick correctly notes that 'necessarily, the constitution must define what counts as a valid exercise of the [sovereign] power, and judges must have to satisfy themselves in problem cases that the validity-conditions have been satisfied, and this may involve problematic interpretation of the constitutional validity-conditions' (*Questioning Sovereignty*, 127). Yet, he does not draw the conclusion that these 'conditions of validity' are disabilities on parliament. But this conclusion follows from the fact that the body can act in ways that are recognisable expression of its own will without at the same time creating valid laws.

The Sovereign S₂

- S₂ has powers of law-making (a rule under the RR)
- S₂ has procedural disabilities in law-making (a rule under the RR)

This formulation accommodates the usual content of fundamental constitutional laws in that it shows that the legislative body cannot legislate in any way it sees fit. This means that as a body, the legislature will be burdened by disabilities. This appears to me to be Hart's own view regarding the 'continuing' sovereignty of the United Kingdom Parliament: the sovereignty is 'continuing' because parliament has a disability in not being able to alter it.

But if it is so burdened, what is the difference between the UK parliament and the US Congress? Neither is all-powerful, in the sense that it may possess all the powers of law-making. Neither can legislate by virtue of its will alone, but must proceed under the existing constitutional framework or procedure. So both legislative assemblies operate under certain disabilities. The difference is of course great in the nature of the disabilities, in that the American court is expected to look at the substance of the Acts. Here is the US Congress, conceived as S₃:

The Sovereign S₃

- S₃ has powers of law-making (a rule under the constitution)
- S₃ has disabilities in law-making, including those defined by the Bill of Rights (a rule under the constitution)

But how different are S₂ (the UK parliament) and S₃ (the US Congress) when it comes to sovereignty? Can we say that the UK parliament is sovereign but the US Congress is not (which is what we normally say)? The difference is, however, only a matter of degree. They are both under *some* disabilities. In the case of the US Congress the disabilities are wider in scope because they are not just procedural. Nevertheless, even in the United Kingdom case it is sometimes hard to distinguish between procedural and substantive

constraints. The Human Rights Act 1998 and the impact of European Union law have rendered the distinction between procedural and substantive disabilities highly ambiguous. In any event, given these similarities, if the US congress lacks sovereignty, then most likely UK parliament also lacks it and vice versa.

The similarities between the UK and US legislators point to another point of great significance. When we describe the legislator in the way we have done in S_2 and S_3 it is very hard to distinguish them from the ordinary legislator L:

The Legislator L

- L has powers of law-making (under the constitution)
- L has disabilities in law-making (under the constitution)

This legislator may be supreme (it may have the last word on what counts as law) but it is not unlimited. Once we admit that S_1 is a mistake and that the legislator does not have *all* the powers of law-making but is sharing them with the earlier law-makers and earlier or current constitution-makers, then there is no point in calling him sovereign. For such law-making body is no different to the ordinary legislator with some powers and some disabilities, according to S_3 . It is certainly not the holder of ‘absolute and perpetual power of a commonwealth’.

The conclusion to be drawn is therefore this. If S_1 is inconsistent with a constitutional framework and S_2 and S_3 are indistinguishable from L, then the only real options are S and L. In other words, either we side with Austin’s original idea of sovereignty as a fact of brute strength that grounds an unfamiliar hierarchy or we conclude that law-making is subject to a constitutional framework and its modes of reasoning and argument. Of course, S is no real option for constitutional law, since it denies its very essence and function. So we are left with L. If this argument is correct, in a modern legal system that operates under a constitutional framework there can be no constitutional sovereign.

III POPULAR SOVEREIGNTY

We come now to the idea of popular sovereignty. An important line of thought in modern constitutional law suggests that law-making and constitution-making have significant differences, which I have not yet discussed. The difference is first of all formal, in that constitution is higher law and statutes are ordinary law. But the difference is also substantive. The process of making a new constitution normally involves popular sovereignty as *pouvoir constituant* or ‘constitutive power’. Popular sovereignty, in this sense, entails that ‘the people’ has all the powers of S to make a constitution and enjoys the legitimacy of democratic politics.

Here is the position cast in Austinian terms:

The Popular Sovereign PS

- PS is obeyed by everyone (a fact)
- PS does not obey anyone (a fact)

This is effectively the position endorsed by Austin himself.

We could also put the same position in terms of a Hartian constitutional framework as follows:

The Constitutional Sovereign CS₁

- CS₁ has all the powers of constitution-making (under a constitutional foundation of popular sovereignty)
- CS₁ has no disabilities in constitution-making (under the constitutional framework)

But this position is evidently false, for it repeats the errors of S₁. We know it is not true, because the body can only exercise its functions under the rules of its composition and procedure, which entails some disabilities. So we must resort to

The Constitutional Sovereign CS₂

- CS₂ has all the powers of constitution-making (under a constitutional framework endorsing popular sovereignty)
- CS₂ has some disabilities in constitution-making (under the constitutional framework)

This is a paradoxical position. It combines what we earlier called S₁ and S₂. Here we say both that CS₁ has all the powers of law and constitution-making and that it does not have them.

But we may combine the Austinian and Hartian elements, but the resulting position is even more problematic:

The Constitutional Sovereign CS₃

- CS₃ has all the powers of constitution-making (the fact of popular sovereignty)
- CS₃ has disabilities in constitution-making (under the constitutional framework)

In this version we have yet another inconsistency. CS₃ is both empowered by a fact of (popular) sovereignty and is under disabilities under a constitutional framework. Here we don't have a paradox, but we do have a major inconsistency, for we have two different and inconsistent frameworks about law and the constitution. So none of these three formulations of popular sovereignty make sense as legal or philosophical doctrines.

How about L? It is not really open to the theorists of popular sovereignty to apply the model corresponding to L. Because if they did, they wouldn't be speaking of sovereignty at all, since we know that this model accepts that the holder of powers is also burdened by disabilities. Here is what the position would look like:

The Constitutional Legislator CL

- CL has powers of constitution-making (under a constitutional framework defined by law)

- CL has disabilities in constitution-making (under a constitutional framework defined by law)

In other words, this position makes the constitutive power one more power of the legal institutional framework. It is a fully organised and limited office, according to rules and procedures. So there is no sense in calling this office ‘sovereign’, even though it may end up producing the highest law. It is supreme but not unlimited. It is subject to law-making disabilities just like the ordinary legislature: it can only produce its results if it follows the rules of composition and procedure laid out in advance. So the theorists of popular sovereignty are caught in a dilemma. Either they follow the Austinian PS or they brave the inconsistencies of CS₁, CS₂ and CS₃. All options are in different ways impossible.

Perhaps the least self-defeating option is to come up with a new Austinian theory of law based on popular sovereignty. Now, such an Austinian view is conceivable but not popular. Such a ‘voluntarist majoritarianism’ is not a common position among legal and constitutional theorists today.³⁴ The origins of the idea are thought to be in book three of Rousseau’s *The Social Contract*, where he writes, for example: ‘The moment the people is legitimately assembled as a sovereign body, the jurisdiction of the government wholly lapses, the executive power is suspended, and the person of the meanest citizen is as sacred and inviolable as that of the first magistrate; for in the presence of the person represented, representatives no longer exist’.³⁵ Nevertheless, Rousseau himself rejects the idea that the people are sovereign in the Austinian sense:

We have seen that the legislative power belongs to the people, and can belong to it alone. It may, on the other hand, readily be seen, from the principles laid down above, that the executive power cannot belong to the generality as legislature or Sovereign, because it consists wholly of particular acts which fall outside the

³⁴ I follow here the terminology of Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: Chicago University Press, 1995) 274. Holmes rejects such a reading of democracy.

³⁵ Jean Jacques Rousseau, *The Social Contract*, trans. by G. D. H. Cole, (London: Everyman, 1973) Bk. III, ch. 14, p. 264.

competency of the law, and consequently of the Sovereign, whose acts must always be laws.³⁶

In other words, there is a constitutional framework of some kind, the separation of powers under the terms of the social contract, which defines the powers of the legislative assembly and the other institutions of the state. So Rousseau's social contract adopts the position of a Hartian or in any event anti-Austinian fundamental laws. It seems that his view is closer to CL than to any of the other options.

Interestingly, neither Waldron nor Habermas, who believe in popular sovereignty, as we saw above, endorse the strong view that the people should be taken to be sovereign in the direct Austinian sense. Waldron, for example, argues for a conception of democracy according to which rights (including the 'right to participate in the making of the laws', or 'the right of rights') are its essential components so that democracy involves 'respect for individual moral agency' which may be opposed, occasionally at least, to decisions of the majority.³⁷ Similarly, Habermas writes of popular sovereignty as a constitutional mechanism mediated by law: 'The idea of self-legislation must be realised in the medium of law itself'.³⁸ This means that the idea of a people is itself a legal construction³⁹ and that a democratic legitimation of law is not exhausted by the authentic expression of a people's will but presupposes and privileges 'the procedural conditions of democratic opinion-and will-formation as the sole course of legitimation'.⁴⁰ In conclusion, the idea of popular sovereignty does not have an agent or subject to exercise it.⁴¹ So both Waldron and Habermas take, more or less, the CL view. The people, whatever they are, are at most a constitutional legislator, not a sovereign.

³⁶ Rousseau, *The Social Contract*, Bk. III, ch. 1, p. 229.

³⁷ Waldron, *Law and Disagreement* 283. Waldron, however, believes that this does not justify a system of judicial review by courts.

³⁸ Habermas, *Between Facts and Norms* 126

³⁹ Habermas, *Between Facts and Norms* 80.

⁴⁰ Habermas, *Between Facts and Norms* 450. See also the Appendix 'Popular Sovereignty as Procedure' in *Between Facts and Norms* 463 ff.

⁴¹ Habermas concludes: 'The public sphere thus reproduces itself *self-referentially*, and in doing so reveals the place to which the expectation of a sovereign self-organization of society has withdrawn. The idea of popular sovereignty is thereby desubstantialized... This fully dispersed sovereignty is not even embodied in the heads of the associated members. ... Subjectless and anonymous, an intersubjectively dissolved popular sovereignty withdraws into democratic procedures and demanding communicative presuppositions of their implementation'; *Between Facts and Norms* 486.

In fact, modern constitutional law generally takes this broad view (which, in its broadness, tells us very little about the key questions of constitutional law). This is also the view of Kelsen, Hart and Raz, and of course of Dworkin and Rawls. Making this same point, Neil MacCormick concludes his study of sovereignty by saying that ‘there is no single sovereign internal to the state, neither a legal nor a political sovereign’ and that ‘sovereignty is neither necessary to the existence of law and state nor even desirable’.⁴² This argument does away with all mention of sovereignty and highlights the fact that at the constitution is a framework of rules and standards

The only political theorist of note that takes a contrary view is Carl Schmitt. Schmitt’s position is that the idea of all-powerful popular sovereignty is inherent in the very theory of constitutional law and that it thereby renders constitutional law, in that sense, paradoxical. This is a theory where the idea of popular sovereignty is taken to its extreme implications. In his *Verfassungslehre* Schmitt seeks the validity or authority of a constitution in a particular social fact as follows:

The fact is a constitution is valid because it derives from a constitution-making capacity ... and is established by the will of this constitution-making power. In contrast to mere norms, the word ‘will’ denotes an actually existing power as the origin of a command. The will is existentially present; its power or authority lies in its being. A norm can be valid because it is correct. The logical conclusion reached systematically, is natural law, not the positive constitution. The alternative is that a norm is valid because it is positively established, in other words, by virtue of an existing will.⁴³

It is clear that the sense of sovereignty here is Austin’s S, namely a sovereign that creates the legal order single-handedly through his will. It is not the Hartian view of a legislator under the rule of recognition. It is an Austinian view of constitutional law and the legal order created fully by S in an extra-legal act.

⁴² MacCormick, ‘Questioning Sovereignty’ 129.

⁴³ Carl Schmitt, *Constitutional Theory*, trans. and edited by Jeffrey Seitzer (Durham: Duke University Press, 2008) 64.

Interestingly, Schmitt's view as to the bearer of sovereignty is the same as Austin's. It is the people itself:

The people are *anterior* to and *above* the constitution. Under democracy, the people are the subject of the constitution-making power. The democratic understanding sees every constitution, even the *Rechtstaat* component, as resting on the concrete political decision of the people capable of political action. Every democratic constitution presupposes such a people capable of action.⁴⁴

It is clear that the argument is not just a sociological one about how law is created. It is an argument internal to constitutional law and to its theory of democratic legitimacy. Democracy entails the primacy of the people. So Schmitt continues: 'under the democratic theory of the people's constitution-making power, the people stands as the bearer of the constitution-making power outside of and above any constitutional norm'.⁴⁵ This position makes Schmitt, surprisingly perhaps, critical of the modern methods of secret ballots. Instead Schmitt takes democracy to be 'the rule of public opinion'.⁴⁶ Of course, public opinion is disorganised and vague. Nevertheless, Schmitt takes the principle even further in concluding that the democratic concept of law requires that the will of the majority ought to prevail:

The democratic concept of law is a political, not a *Rechtstaat*-based concept of law. It stems from the *potestas* of the people and means that law is everything that the people intends: *lex est quod populus jussit*... There are no limitations on this will stemming from democratic principles. Injustices and even inequalities are possible... for this the absolute democracy the will of the people is sovereign and not only highest law; it is also the highest judicial decision or act of the highest administrative officials etc.⁴⁷

⁴⁴ Schmitt, *Constitutional Theory* 268.

⁴⁵ Schmitt, *Constitutional Theory* 271.

⁴⁶ Schmitt, *Constitutional Theory* 275.

⁴⁷ Schmitt, *Constitutional Theory* 286.

Schmitt's view is based on very crude view of democracy which never addresses the question of how the people or 'public opinion' may be constituted and expressed in law.⁴⁸ Nevertheless, his argument shows that if we endorse an Austinian view of popular sovereignty and pursue its theoretical implications to the full, we will again reach a view of constitutional law that is deeply unfamiliar. It appears that all institutions of government are now subject to the rule of the people or, alternatively, of public opinion. By concentrating sovereignty in the people and putting popular sovereignty at the heart of the constitution, Schmitt undermines the very idea of law. The reason is in his very definition of sovereignty, which is very close to Austin's. In his general theoretical discussion of sovereignty in *Political Theology* Schmitt argues that 'every legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic-norm and decision. Like every other order, the legal order rests on a decision and not on a norm'.⁴⁹ So it seems that he takes the view that the legal order is based on some kind of fact about power. To that extent, it is open to the same arguments that beset the command theory of law.

The first question is the same as with Austin: who is the sovereign? From our earlier discussion we know that there are two options:

PS: a sovereign people is a body determined by facts alone

CS₁: the people are sovereign under a constitutional principle of democracy

It is evident that PS is incoherent (for the same reason that S could not both be a composite body and a matter of fact). Unlike Austin's personal sovereign, who is sovereign because of the facts of his strength, Schmitt's people is sovereign as a body on account of complex normative presuppositions following a particular conception of

⁴⁸ Schmitt also never explains why on the one hand the people have this exalted moral standing guiding our thoughts on democracy, while on the other all theories of 'natural law' are vehemently rejected. And within the same book Schmitt takes two inconsistent positions, namely the views we have just examined about law (that the only source of law is the will of the people) and the parallel view that in some constitutions the only source of law is to be found in the constitutional texts and relevant statutes (e.g. in pp. 148-151).

⁴⁹ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. with an introduction by George Schwab (Chicago: Chicago University Press, 2005) 10.

democracy. It is not a sociological fact that makes the people 'sovereign' but a legal and constitutional doctrine. Whatever facts support our construction of a given people (the German, the Italian, the British 'people', however defined) in any given political society (Germany, Italy, the United Kingdom, however defined), they are found relevant under a constitutional theory of democracy. There is a text or series of texts, a constitutional framework of some kind, that teach us why and how a people can be sovereign. This is the Hartian constitutional sovereignty, not the Austin's idea of the personal sovereign, S. So the idea of PS is self-contradictory.

So we are driven to CS₁, the constitutional model of sovereignty. But if this is the case, Schmitt is relying on some implicit rule of recognition, just like Hart. If so, then his view of popular sovereignty is self-contradictory, because at the basis of law lies is not a decision but a rule, namely the rule that tells when and how the people act. In fact, Schmitt has described that rule in detail. It is his controversial understanding or theory of democracy as the rule of 'public opinion'. But who is the author of that theory as a legal principle? It appears that legal sovereignty is now defined by this theory, which serves as the foundation of the legal order. And if the 'people' act contrary to the theory of democracy, perhaps they fail to legislate, so they do have disabilities after all. Here again we have the problem of sliding from S₁ to S₃ and from that to L. If we do not stay with S (and its parallel for the case of the people, PS) we are left with the constitutional legislator as the creation of an abstract framework of rules and procedures outlining bundles of powers and disabilities. The idea of sovereignty is out of place in such a scheme.

IV. POLITICAL DOMINION AND THE CIVIL CONDITION

The argument so far shows that sovereignty has been a source of numerous confusions and inconsistencies. We have concluded that most coherent version of sovereignty has been the Austinian version, for which a sovereign emerges as a matter of fact and enforces his or her will on all others as a matter of strength. For this view, the sovereign will creates the legal order and continues to define it. Nevertheless, under any such theory the state of the law and the method by which we reach its conclusions remains

precarious. For Austin as well as for Schmitt, whose ‘decisionism’ is really a form of Austinian jurisprudence, sovereignty continuously unsettles the content of the law and certainly undermines the possibility of constitutional government. The theory tells us that law is a matter of violent imposition on the part of a person or a body and that there can be no legal limit or control to this power. No institution can prevail over the sovereign. In fact, law is not a matter of institutions at all. And this is both implausible and unattractive. It contradicts our experience of modern law and disappoints our expectations from constitutional government.

The alternative view of sovereignty we have examined is Hart’s notion of constitutional sovereignty according to which a law-maker or a constitution-maker operates under a general framework of rules and standards, which Hart called the ‘rule of recognition’ and which others prefer to see as constitutional framework of rules and of legal reasoning and argument. This second view, however, entails both powers and disabilities for the purported sovereign body or person and which makes it therefore indistinguishable from that of an ordinary legislator or an ordinary constitution-maker. In other words, constitutional sovereignty is not sovereignty at all. We saw that from S_1 we are gradually drawn to L. Such a constitutional or ordinary legislator is a creature of the law, very much like any other office of government. So the idea of sovereignty in law is either implausible or self-contradictory. We are left with the idea of constitutional and ordinary legislator under some general constitutional framework. But does this not beg the question? The constitution is based on the constitution.

This is our conclusion: in Austin’s theory of sovereignty we have sovereignty without law, whereas in Hart’s version we have law without sovereignty. But these arguments against sovereignty and its implications have still not answered the question that Austin and Schmitt wanted to answer in the first place. How is it that the fundamental law is made and held to be valid? Hart, as we know did not believe in a foundational moment, but thought that the rule of recognition is established over time as a matter of fact. I think he would also agree that in this sense there is no ‘author’ of the constitution and that the drafters of the constitution in the United States and elsewhere were only retrospectively held to be ‘founding fathers’ by a combination of opinion and

practice over many years. But then where did these practitioners and other officials base their own judgments and how are we to assess this derivation ourselves? And if there is no founding moment, what holds the legal system together as a single united system, if not a source of power from above? The constitutional framework must come from somewhere. But who or what determines that framework?

The answer given by Hart and most of modern legal theory is: no one. There is no author of the constitution. Or rather, no one legislates such a framework. This is one part of the legal edifice that cannot be legislated. It is always a construction of reason on the basis of existing legal materials. The precise nature of this construction is disputed. Hart believes it's a matter of practice and opinion of officials. Kelsen thought that it was a 'presupposition' of 'legal science'. Dworkin tells us it is a matter of interpretive construction. Finnis and Simmonds write that it's a moral idea extrapolated from the legal materials. In other words, for all such theories the basis of the constitution proceeds from the particular to the general and not the other way round. We start from the existing laws and trace our way up. Such laws are to be made sense of against the present holders of political power. So in addition to legal powers to legislate we assume duties to follow the old laws (even though the original law-makers and the original law-making frameworks may now be obsolete) and disabilities in relation to the existing allocation of offices. These are the rules of continuity that are required to ensure the smooth transition from one law-maker to the next.⁵⁰

This means that there cannot be a single constitutional author. The very point of constitutional government is the creation of offices (and the separation of powers) that ensure the continuity between different office holders. In that sense there is no sovereign and no single founder of the constitution or agent of legislation. Even parliament is a composite body owing its existence to prior rules of composition and procedure. So in all constitutional government we have basic principles of a constitutional order that emerge in the process of doctrinal interpretation of the already existing law. These principles are mutually supporting and yield results through a process of practical deliberation. In short,

⁵⁰ For this point see John Finnis, 'Revolutions and Continuity of Law' in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series* (Oxford: Oxford University Press, 1973) 58. The same point is made by Joseph Raz in 'The Functions of Law' in Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) 163-179, at 178.

the intellectual construction of a constitution proceeds the other way round than Austin or Schmitt suggest. It moves from the particular to the general. For the particular cases will tell us how the rules of procedure and composition fit together in a general scheme. Even when a written text of a constitution is available, its understanding and application is the result of deliberation that uses all the available materials of the legal order in order to make sense of its most abstract organising principles. It is a construction that starts from the legal materials and gradually builds answers to the questions of competence and function. The constitutional text alone is incapable of answering all of these questions by itself. The point has been well developed by Ronald Dworkin, who observed that any claim ‘about the place the Constitution occupies in our legal structure must ... be based on an interpretation of legal practice in general, not of the Constitution in some way isolated from that general practice’.⁵¹ If the constitution is thus the interpretive construction of the law, it is also partly a construction of the political morality that sustains and justifies the main institutions of the state. The process of legal deliberation in constitutional law proceeds through the working out of such principles.

Nevertheless, even though this leaves no room for a constitutional author or sovereign, it does leave room for final or supreme authority. This does not belong to any person or body within the political society. It belongs to the construction as a whole. The ultimate power that is associated with sovereignty is not the pre-eminence of any particular person or body. It is the dominion of the commonwealth or political society, through legal and political institutions that merge into the practices of law. This is not a theory of sovereignty. It is a theory of political society because it tells us that what is pre-eminent and legally and politically ultimate is just the set of rules and procedures that organise our society into a civil condition. The tradition of political philosophy calls this the social contract and the name correctly conveys the point that the work is done by abstract principles very much akin to the terms of a contract. John Rawls thus reminds us that we need to make a crucial distinction between ‘the idea of a person Sovereign or agency whom all obey and who in turn obeys no one (Bentham’s definition of the

⁵¹ Ronald Dworkin, ‘The Forum of Principle’ in Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1986) 33, at 37.

Sovereign) and the idea of a legal system defined by a scheme of rules that specify a constitutional regime'.⁵²

This also leaves room for something that comes close to the essential content of popular sovereignty. If we remove the term sovereignty, we have the idea that whenever political decisions are to be taken, they must be taken with the active participation, consultation and decision of the majority of all citizens under a framework of equal respect and equal dignity. The people may thus be politically supreme, even though their powers are not quite unlimited. In this view, democracy and the rule of law are not in competition with each other.

Interestingly, such a view of sovereignty was not unknown to the classic political philosophers. Although his views on this seem to me ambiguous, Hobbes seems to occasionally from the views of sovereignty of Bodin or Schmitt, when he writes that it is the commonwealth as a whole that is sovereign, meaning of course that it is the set of rules and practices that organise the commonwealth into a political society that are to be both comprehensive and coercive:

For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS), which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which the sovereignty is an artificial soul, as giving life and motion to the whole body; the magistrates and other officers of judicature and execution, artificial joints; reward and punishment (by which fastened to the seat of the sovereignty, every joint and member is moved to perform his duty) are the nerves, that do the same in the body natural; the wealth and riches of all the particular members are the strength; *salus populi* (the people's safety) its business; counsellors, by whom all things needful for it to know are suggested unto it, are the memory; equity and laws, an artificial reason and will; concord, health; sedition, sickness; and civil war, death.⁵³

⁵² John Rawls, *Lectures in the History of Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2007) 86.

⁵³ Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge: Cambridge University Press, 1991; first published 1651) p. 9.

So the sovereignty of this artificial body, i.e. a body created by man for his own purposes, is not the domination of any person or body, but the prevalence and supremacy of the terms of the civil condition as a whole over any citizen. When Hobbes argues that the sovereign is irresistible he need not mean that any particular officer is irresistible, but that political dominion as a whole ought to be irresistible - conceived both as a set of executive decisions and general laws and adjudicative institutions.⁵⁴ Every part of the commonwealth has a claim to be irresistible whenever it exercises the powers of its office. And every office works to check and keep in place the powers of every other. The very construction of political power in a democracy is made to achieve mild government.⁵⁵

All the philosophers of the social contract are in agreement over this supremacy. Kant put the point in similar terms:

Public Right is therefore a system of laws for a people, that is a multitude of men, or for a multitude of peoples, that, because they affect one another, need a rightful condition under a will uniting them, a *constitution (constitutio)*, so that they may enjoy what is laid down as right. This condition of the individuals within a people in relation to one another is called a civil condition (*status civilis*), and the whole of individuals in a rightful condition, in relation to its own members is called a *state (civitas)*.⁵⁶

⁵⁴ ‘A fourth opinion, repugnant to the nature of a Common-wealth, is this, *That he that hath the Sovereign Power, is subject to the Civill Lawes*. It is true, that Sovereigns are all subjects to the Lawes of Nature; because such lawes be Divine, and cannot by any man, or Common-wealth be abrogated. But to those Lawes which the Sovereign himselfe, that is, which the Common-wealth maketh, he is not subject. For to be subject to Lawes, is to be subject to the Commonwealth, that is to the Sovereign Representative, that is, to himselfe; which is not subjection, but freedome from the Lawes. Which error, because it setteth the Lawes above the Sovereign, setteth also a Judge above him, and a Power to punish him; which is to make a new Sovereign; and again for the same reason third, to punish the second; and so continually without end, to the Confusion, and Dissolution of the Common-wealth”. *Leviathan*, chap. 29, p. 224.

⁵⁵ See Hannah Arendt, *On Revolution* (London: Penguin, 1990; first published 1963) 147.

⁵⁶ Immanuel Kant, *Metaphysics of Morals* in Kant, *Practical Philosophy*, trans. by Mary J. Gregor (Cambridge: Cambridge University Press, 1996) 6:311. For an excellent commentary on Kant’s argument for public power and its relevance for law see Arthur Ripstein, ‘Authority and Coercion’ 32 *Philosophy and Public Affairs* (2004) 2 and Arthur Ripstein, ‘Private Order and Public Justice: Kant and Rawls’ 92 *Virginia Law Review* (2006) 1391.

In a society of equals the constitution is not a pact between the ruler and the subjects. It is a bond between the citizens themselves through which they affirm their equal standing and their mutual respect. The legal order as whole protects us from the actions of others by allocating duties and remedies and making sure that such legal relations are enforced by impartial tribunals. The idea of the social contract depends, as Rawls again reminds us, on the idea of social cooperation involving reasonable self-restraint and fairness, as long as others do the same.⁵⁷ The idea of personal sovereignty hides the centrality of this requirement for the success of the civil condition. Or at least this is the social contract argument to which the idea of sovereignty is so drastically opposed.

Agreement over the civil condition or the terms of the social contract does not entail, of course, agreement on any other moral or political issue of substance. But the duty to enter into the civil condition is perhaps the single most important reason why we are not free to reject the constitutional arrangement of our own society solely on the reason that we can think of a better one. The civil condition creates a duty to enter into social contract with others. It is a duty of justice to do so, but that duty is conditional on others doing the same under the same terms. Equality and reciprocity are part of the deal. This is the basis for the moral standing of political dominion of the system of government as a whole. The legitimacy and authority of the constitution are thus based on this practical argument and the very existence of some such arrangement. The idea of higher law organising and making public the terms of the civil condition is thus derived as a moral requirement. There is a duty to enter the civil condition and therefore a duty to respect the public law that makes it possible. The duty is imposed on everyone, whether citizen or official or composite body. This duty (and therefore, the law) does not derive its authority from any superior power or the legitimacy of the authors of the constitution in the sense of a "*pouvoir constituant*". It is the result of legal interpretation and deliberation in light of the moral and political principles that breathe life into our public institutions. The dominion of political society as a whole is justified in principle on these considerations, even if its details, outcomes and specific procedures are still open to interpretation and argument.

⁵⁷ Rawls, *Lectures on the History of Political Philosophy* 87

V. CONCLUSION

The classic and the modern theories of sovereignty are, thus, guilty of the fallacy of equivocation. They fail to distinguish between sovereignty as a special source of ultimate power (which is neither necessary nor desirable) and a scheme of political dominion under the civil condition (which is both). The political argument for the function and authority of constitutions explains why not only the idea of sovereignty but that every idea of single constitutional ‘authorship’ or ‘foundation’ is really mistaken.⁵⁸ The theories of sovereignty also misunderstand the centrality of law to the social contract or the basic structure of society. The constitution as legal doctrine is an element of the civil condition. It is one of its most central components because it is a set of public texts, arguments and standards that members of a political society deploy in their mutual relations in order to organise their collective, coercive and comprehensive, i.e. political, power justly. In that sense the law and the constitution are the opposites of sovereignty, since no person or body can be above the civil condition. Austinian sovereignty, in fact, violates the civil condition and the terms of the social contract.

The theories of sovereignty we examined assumed that political dominion needs to be exercised individually, by a single will, i.e. a sovereign person or a sovereign body. But this is never necessary or true for any legal order based on the higher law of the constitution. It is for this reason that sovereignty has been a confusing idea in legal theory and constitutional law. Political dominion can and should be organised according to institutions both checking and mutually supporting each other. ‘Organised’ here means philosophically and doctrinally organised as a system of arguments and practical reasoning that guide action. All legal conclusions – executive, legislative and judicial – are reached by persons who exercise their will and judgment (and who can get their decisions dramatically wrong). But this does not negate the fact that there is a framework

⁵⁸ See also Frank Michelman, ‘Constitutional Authorship’ in Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 64. Michelman draws a set of distinctions similar to those drawn here. He contrasts ‘decisionism’ (which corresponds to Austinian sovereignty), ‘legal nonvolitionism’ (which corresponds to Hart’s constitutional sovereignty) and ‘rationalism’. Hence: ‘constitutional bindingness-as-law is (a) ‘existential’, a matter of how things are (what I see that we in this country just happen to find ourselves doing); or (b) ‘rational’, a matter of the right (what I see that reason requires that we do); or (c) ‘decisional’, a matter of sovereignty’ 65-66.

of ideas available to guide them. Law in this sense is not a command by anyone, a mandate or a threat, but a text or argument that guides. This is now commonplace among theories of law as diverse as Hart's legal positivism and Dworkin's interpretivism. If this is generally held to be true, then it should also be so held that sovereignty and law are finally incompatible and mutually exclusive.