By the terms of this contract, each individual surrenders his rights to one person (physical or moral) who thenceforth becomes the bearer of the personality of all the contracting individuals. As the agreement reads: “Every one to own and acknowledge himself to be the author of whatsoever he that beareth their person, shall act or cause to be acted, in those things which concern the common peace and safety, and therein to submit their wills, every one to his will, and their judgments to his judg- ment.”56 This person so endowed is the sovereign, and all others in the community are subjects.57 The characteristic feature of Hobbes’ con- tract is, however, that the agreement is made among the future subjects, while the future sovereign remains outside the contract. The agreement is one among incipient subjects, not between incipient sovereign and incipient subject. There is no possibility of a reserved sovereignty, for the supreme power comes into existence only with the creation of the governmental person who is its bearer. Sovereignty and its subjects are created simultaneously. Sovereignty is not delegated or alienated by the people, for they were not a people until the sovereignty was created; in other words, the people never possessed the supreme power, and conse- quently had no right to dispose of it. Thus the authority of the ruler was protected at the point against which the Monarchomachs had directed their most effective assaults. There is an original state of nature, a con- tract, a sovereign as its creature, but the sovereign is the Leviathan, or mortal god, armed with the power and entrusted with the judgment of all his subjects — “bearing their person.” The extent of the sovereign power so derived is far-reaching. Hobbes asserts that, as a result of the contract made, the subjects can enter into no new agreement or covenant, not even with God; the sovereign can himself commit no breach of covenant, and hence cannot forfeit his right to the people; the sovereign can do no injustice (though he may commit iniquity); the sovereign cannot be punished; he is judge of the means necessary for the defcnce of the state; has the right to decide what doctrines shall be taught among the subjects; the law-making power; the judicial power; the right to carry on war; the right to appoint officers; the rewarding and punishing power. And all these rights are, as Hobbes

says, “incommunicable and inseparable.”58 Further, the unity of the sov- ereign power is unconditionally asserted. Within the commonwealth there can be but one supreme authority. All rights are transferred by the terms of the contract to the sovereign, and there can be no room remaining for another independent authority. Even the church must be regarded as subordinate to the sovereign, since he is the vicegerent of God, and determines the validity of doctrine, even the authenticity of inspiration.59 Sovereignty appears, then, with Hobbes as far more absosolute than in the theory of Bodin. There is no limitation in the law of God or of nature; for of these the sovereign is the final judge, while the limitations in the form of the “leges imperii” do not appear. In the language of Hobbes, “The sovereign power, whether placed as in monarchy, or in one assembly of men, as in popular and aristocratical

commonwealths, is as great as possibly men can be imagined to make it." And further, "he who considers it too great and will seek to make it less, must subject himself to a power that can limit it, that is to a greater."60 Regarding the sovereignty as absolute, unified, inalienable, based upon a voluntary but irrevocable contract, the theory of Hobbes was so closely articulated that even the keenest weapon found difficulty in pen- etrating it. The logic was cruelly complete, and granting the necessary premises, the conclusions he drew were difficult to escape. Hobbes had designed the theory as a solvent for the political difficulties in England, and had hoped for the establishment of a strong monarchical govern- ment on the basis of the principles he laid down. But by providing for the subordination of the ecclesiastical to the political authority, he alarmed even the loyalist clergy, and hence his arguments found little support and had little influence on contemporary conditions. Theoretically, how- ever, the work of Hobbes exercised a decided influence on the develop- ment of later political science.61 The first half of the 17th century saw the completion of the theory of the Monarchomachs; the middle of the century was marked by the Naturrecht absolutism of Hobbes; it remained for the close of the cen- tury to state the doctrine which dominated Germany to the French Revo- lution and that which in England constituted the justification of the over- throw of the Stuarts. The German theory was formulated by Samuel Pufendorf; the English by John Locke. The theory of Pufendorf was developed under the influence of Hobbes on the one side and Grotius on the other, and combined in a remarkable way the compromising theory of the one with the absoluteness of the

other. In his massive work, The Law of Nature and of Nations (De Jure Naturae et Gentium, 1672),62 Pufendorf accepts the contract principle as the basis of the State, but requires two stages in the process, namely an agreement to form a civil society, the "Pactum Unionis," followed by a farther contract between the people so formed and the Government, "Pactum Subjectionis." The sovereignty so created is the supreme power in the State.63 None of his acts may be rendered void by any other organ in the society; he is responsible to no other power, free from the restraint of all human law;64 and this power is essentially one and indivisible.65 But on the other hand, a distinction is drawn between sovereign power and absolute power.66 Absolute power gives one complete freedom to use his rights as he will, but by a supreme power is meant only that, in the same order of beings, there is none superior. Sovereignty, properly understood, Pufendorf declares, signifies not absoluteness, but merely supremacy. Again, it is frankly admitted that owing to the unfortunate frailty common to all men, there not only may conceivably, but should actually be, certain limitations placed upon the sovereign.67 In the grant of power to the ruler, definite restrictions should be placed upon him of a character calculated to restrain his tendency to usurp all authority. With Grotius, Pufendorf maintains that the sovereignty may be held either with "full right" or in a manner more or less limited, but though limited, remains none the less truly sovereign.68

The elective or limited monarch is, therefore, contra Hobbes, a genu- ine sovereign, and not a mere agent of the constituting power. To Pufendorf it does not seem essential that the sovereign should have all power, but it is sufficient if he have the highest power; that is to say, he must be supreme, but need not be absolute. In the same conciliatory spirit, Pufendorf repudiates the misinterpeted declaration of Hobbes that the sovereign can commit no injustice, but admits that in matters per- taining to the general welfare Hobbes' proposition would be true; and this holds even though the sovereign's measures may, as a matter of fact, be contrary to the common weal.69 Cutting away the superfluous verbiage, it would seem that the sovereign is free to follow the course he chooses, although to such a statement Pufendorf would have been un- willing to assent. Yet, notwithstanding its somewhat contradictory character, or one might say even because of it, the theory of Pufendorf became widely influential. It reconciled to a certain extent the benevolent despotism of the German states with the spirit of individual liberty, by conceding

supremacy to the one, but not excluding the other from a degree of control. With some modifications his doctrine was followed by the great German expounders of political science in the eighteenth century, such as Christian Wolff,70 A. Boehmer,71 and Christian Thomasius,72 and continued to be the dominant: theory down to the time of Kant. Locke73 appeared on the political field as the Whig champion of the English Revolution of 1688. His theory was the accepted justification for the overthrow of the Stuarts; it later found expression in the Ameri- can Revolution against England, and still remains the popular theory of sovereignty among English-speaking peoples. Locke starts with a state of nature, which is not, however, as with Hobbes, a state of war, but rather a condition where individual rights are imperfectly secured. In order that a guarantee may be obtained, there is established a civil or political society and then a government.74 To this end every man surrenders irrevocably to the community his natural rights in so far as is necessary for the common good — and no farther.75 The political society so constituted establishes by a fundamental law the Legislature. which is the supreme governmental power. This body is then the source of law,76 the representative of the will of the society, the "soul that gives life, form and unity to the Commonwealth."77 It is the highest governmental representative of the political society which has given it life. The Legislature is, however, a power to protect and pre- serve, not to destroy; hence "it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people."78 Where the Legislature is not always in session and the Executive power is vested in a single person who has also a share in the Legisla- ture, there, according to Locke, that single person "in a very tolerable sense, may also be called supreme."79 So long as within the limits of the law he may be looked upon "as the image, phantom or representative of the Commonwealth." As the lowest term, then, in the series of sover- eigns stands the king as the formal or legal sovereign, supreme while within the limits of the law.

Next in order comes the legislative body, the sovereign among the governmental powers, and so far absolute, or as we might say, the governmental sovereign. The Legislature is, however, only a “fiduciary body,” entrusted with certain powers, and hence is in a sense subordinate. Back of the Legislature stands another body, which is ultimately the true sovereign. This is the civil or political society which has instituted the Legislature, and might be called the political sover- eign.

Between the government and the political society there is no com- mon judge; in other, words, they are in a perpetual state of nature, the essential characteristic of which is this lack of a common umpire. Hence, when the people of a political society is deprived of civil rights, it has still an original natural right, as Locke declares, “a liberty of appeal to heaven.”80 In other words, the political society has always the right to resume the sovereignly temporarily placed in the hands of the Legisla- ture.81 As Locke explains, “The community may be said in this respect to be always the supreme power, but not as considered under any form of government,”82 because the power of the people remains latent until the government is dissolved.83 Locke’s theory is, then, that the executive (as already qualified), is, while within the law, supreme; that the Legislature is the sovereign gov- ernmental organ so long as the government endures; and that the politi- cal society (or the majority thereof) is the latent, and on the dissolution of the government, becomes the active sovereign.84 As to the content of sovereignty, it is difficult to deduce anything more than the statement that it is not absolute. If the power is used for the general good it would seem to be be almost without limit. Thus Locke declares that a good prince cannot have too much prerogative, “that is, power to do good,”85 “whatsoever cannot but be acknowledged to be of advantage to the society and people in general, upon just and lasting measures, will always, when done, justify itself.”86 Into further refinements of the nature of sovereignty Locke does not enter. The next stage in the development of the theory of sovereignty was the formulation of the doctrine upon which the French Revolution was to rest, In the writings of Jean Jacques Rousseau, the theory of sover- eignty of the people as developed from the basis of it “natural rights” was followed out to the last extreme.87 Again the point of departure is the individual, again the sovereignty arises from the voluntary agreement of independent wills. In the original contract, each surrenders all to all and the product of the process is the body politic, which when passive is called the State, when active is termed the sovereign.88 The abstraction of the element common to the individual wills results in the formation of the general will (volonté générale), which is the soul and spirit, the sovereign in the State. The first characteristic quality of the general will is its inalienabil- ity.89 Power, Rousseau says, may be transferred, but not will. It is im- possible for any organ to exercise the sovereign will save the sovereign

body itself. If the people promise to obey a ruler; the people as such ipso facto is dissolved, the State no longer exists. The State, as a State, can no more alienate its sovereignty than a man can alienate his will and remain a man. Thus Rousseau protects the people against such a loss of supremacy through voluntary act, as deemed possible by Grotius and Hobbes. By the same logic the idea of representative government is shattered, for inasmuch as the sovereign power can never be delegated, the instant a people gives itself representatives it ceases to be free.90 There is but one possible bearer of the sovereignty, the people; but one form of State, the democratic.91 Indivisibility is a further characteristic of the sovereign power. The will, it is held, is one or not at all.92 The emanations from the sover- eignty, as the legislative and executive powers, may be divided, but the general will, the sovereignty itself, is wholly incapable of division.93 In addition to its attributes of inalienability and indivisibility, the sovereign will is declared to be infallible. It is always right and always tends toward the general welfare.94 It is true that the general will may be momentarily deceived, but on the whole, its tendency is toward the right. “Merely because it is, the sovereign is always what it ought to be.”95 And finally, the sovereign will is absolute. Rousseau declares that “as nature gives every man absolute control over all his members, so the social contract gives to the body politic an absolute power over all its members.96 The sovereign has unlimited control over all that affects the general welfare, and the indisputable right to judge as to what falls un- der this category. No rights are reserved to the individual; in fact, no guaranty of rights from sovereign to subject is conclusive.97 It is no more possible for the people to guarantee a right to an individual as its subject, than to surrender a right to an individual as its ruler. The sover- eign cannot bind itself; the will must remain free. Limits are set to the sovereign power, to the extent that it shall always act for the general good, and that it shall not discriminate between various classes of citi- zens,98 but of these restrictions the sovereign is the final judge. The sovereignty as conceived by Rousseau, stands out as absolute, infallible, indivisible, inalienable. It finds its source in an original con- tract and abides permanently in the body politic, the creature of the compact. Rousseau, thus accomplished for the people what Hobbes had done for the ruler. The English writer’s theory absorbed the entire per- sonality of the State in the ruling body, the government, the bearer of the personality of all. Rousseau, by the same logic, absorbed the govern-

ment in the people. The only true personality is that of the “corps collectif,” as against which the government has not even a delegated power In both cases the bearer in which the supreme power was vested was the product of contract between individuals. Rousseau’s theory became that of the Revolution,99 and found fre- quent expression in the constitutions. In the “Declaration of the rights of man and of the citizen,” 1789, it was asserted (Art. 3), that “the prin- ciple of all sovereignty resides essentially in the nation.” In the constitu- tion of 1791, that “the

sovereignty is one, indivisible, inalienable and imprescriptible" (Tit. III. Art. I); and, with still more alarming empha- sis in the Constitution of 1793, that "every individual who usurps the sovereignty may be at once put to death by freemen" (Act 27, B. of R.); also in Article 35, "When the government violates the rights of the people, insurrection is for the people,100 and for every portion of the people, the most sacred of rights and the most indispensable of duties."101

In conclusion, on the period we have here sketched it may be remarked, in the first place, that the theories of sovereignty considered have a com- mon characteristic, in that all alike admit the contractual basis. There is a general agreement in the postulation of an original contract as the foundation of the sovereign power. Whatever the divergence of opinion respecting the exact terms of this contract, or the effect of the agreement when made, there is a general admission of the formation of a contract at some time or other, in some form or other. The contract might be one between government and people, as with many of the Monarchomachs; or a social contract organizing the people, followed by a further agree- ment between people and government, as with Pufendorf; or, again, the single contract in which the sovereign and the State are created simulta- neously, as with Hobbes and Rousseau. In any event, the tendency was to rest the supreme power upon a basis of popular consent. In the later period, especially after Grotius, the State and sovereignty were con- strued generally from the point of view of the individual, whose natural rights were combined with those of others to form the political right of the ruler. The first tendency was to derive the power of the sovereign from the people as a whole, the later from the units of which the people was composed. One may say, then, that a strongly characteristic feature of the development of the theory of sovereignty during this period was the individualistic-contractualistic tendency. The emphasis on the indi- vidual came from the Reformation, the form of contract from the Ro-

man law. Further, a prevailing tendency of the theory, whether monarchically or democratically designed, was the movement toward the absolutist conception of sovereignty. Constitutional limitations, the laws of God, of nature and of nations must yield to the Leviathan, the mortal god of Hobbes, while with Rousseau the sovereign will of the people emerged, untrammeled by limitations, incapable of contractual restraint. In both theories, the individual, the unit, must surrender absolutely all, so far as the interest of the State requires, and of its needs the sovereign is the judge, from whose decision there is no appeal. The individualistic theory of sovereignty, based upon voluntary agreement, was one of the stron- gest ever constructed, since, to the fear of external force, it added the sanction of internal obligation. As Rousseau said of earlier theories, so his own changed force into right, or as otherwise expressed, "made of virtue a necessity." Again, it is to be observed that an adequate conception of the unity and personality of the State was wanting throughout the period under consideration. As already seen, the movement

in the earlier phases of the development was toward the organization of two public persons in the same State, the people on the one hand, and the Government on the other, with reciprocal rights and duties. Neither the people nor the Gov- ernment constituted the whole State. Later, the State was absorbed ei- ther in people or in Government. With Hobbes, the Government swal- lowed up the State, and became the sole representative of its personal- ity, so that the Government could truly say "L'État c'est moi." Or, with Rousseau, the people became the Government, and the Government was lost in the State. Hobbes saw a particular organ, the special bearer of power, but not the organism. Rousseau saw the organism as a whole, the general bearer, without organs capable of exercising sovereign power. And lastly the idea of personality, whether of the people or a part of the people, was at best of a wholly unreal and artificial character. Except where an individual was sovereign, the ruling body was a person only by the grace of fiction, persona representata, persona ficta — one in the place of many. Person was an abbreviation for a sum of individuals, and the bearer of the sovereignty not a real entity. The only real persons were individuals, all others were fictions. The result of the individualistic development was then, the vesting of the absolute, indivisible and inalienable sovereignty in a body created by a suppositions contract and fictitiously endowed with personality.

Chapter II The Kantian Theory The reaction against the theory of the Revolution proceeded along a number of lines,102 which ran closely parallel to each other. To facilitate the understanding of the discussion over the doctrine of sovereignty, these different courses are here briefly indicated. The first attack was made by the so-called historical school. The revolution emphasized the artificial, the conscious element of the life of states, and asserted the right and power of any given generation to make and unmake political institutions at will. The historical school, on the contrary, emphasized the element of unconscious growth in political forms. Language, morality, law, the State, are all the result not of any single act of men, but of a long and painful process in which many succeeding generations have participated. The State, in particular, is therefore not a contract between individuals, but is a product of tradi- tion, of custom, of historical development. The first great champion of the movement was Edmund Burke in his Reflexions on the Revolution in France (1790),103 the most effective work written against the Revolu-tion. In Germany the movement was widespread, especially among the historical school of jurisprudence, founded by Hugo, whose first impor- tant work was a Manual of Natural Right (1798).104 He was followed by the great apostle of the school, Savigny, On the Vocation of Our Time for Legislation and Jurisprudence105 (1814), and later, the System of the Modern Roman Law (1839). Kant formally accepted the contract theory, but by his distinction between the ideal and the real agreement damaged the revolutionary cause more than if he had directly opposed it. One might say, perhaps, that ideally he was revolutionary, but practically the reverse. Later, even the form of the contract was denied by his followers on the

ground that entrance into the State was not a matter of choice for the individual, but a necessary step. Reason and morality demanded, it was said, that every man should enter into political and social relations. Not human will, but rational and moral necessity is the true basis of the State. So held Jakob Fries in the Philosophical Theory of Law (1803);106 Ancillon, On Sov- ereignty and (State) Constitutions (1815);107 K. S. Zachariä in his Forty Books on the State (1820–32).108 Schleiermacher, On the Idea of the Various Forms of State (1814).109 and the Theory of the State, Schmitthenner in the Principles of Ideal or General Public Law (1845).110

Another direction was taken by the group of thinkers who empha- sized not the will of the individual, but the universal will, as the central point in the construction of a political system. The method was inaugu- rated by Schelling in the System of Transcendental Idealism (1800),111 and the Method of Academic Study (1803). The whole “world-process” was regarded as a progressive reconciliation of necessity and freedom which finds its highest practical expression in the State. This is the realization not of the individual but of the absolute will, “the immediate and visible type of the absolute life” (das unmittelbare und sichtbare Bild des absoluten Lebens). His mystical theory was carried on by John J. Wagner in the System of Ideal Philosophy (1804) and The State (1815).112 The idea found its fullest expression, however, through Hegel, in the Philosophy of Law (1821).113 In this Platonic, pantheistic phi- losophizing over the absolute and its objectification in concrete institu- tions, the individual man and the revolutionary theory dropped out of sight. If the State were a machine, men might hope to mend it a little, but as a “type of the Absolute” it was unapproachable. The State was now not a rational necessity (Vernunftnothwendigkeit), but a natural neces- sity (Naturnothwendigkeit), that is to say it was dictated not by the reason of the individual, as with Kant, but by the so-called “world- reason” as a part of the “world-process.” A parallel path was that taken by the religious school, which de- clared that purely human power was wholly inadequate to produce le- gitimate political institutions, and that the sanction must be sought in God. The State was held to be, not the result of a contract, but of a divine command. So held Nowald, De Maistre, Stahl. (See chapter III) In addition to historical tradition, the Kantian doctrine, transcen- dentalism, and the religious reaction came a revival of the patrimonial theory of the State. The source of authority is here property, not men. The social contract is repudiated and the foundation of political power is laid in the relations that center around the possessions of an indi- vidual or a corporation. The great champion of this anachronism was the Swiss, Ludwig von Haller. These were the principal lines along which the assault upon the eighteenth century political theory was conducted. They all converged at one point, namely the proposition that the state was the result of a contract deliberately made by individuals. They all agree that the State is

something imposed upon the human will, not a pure result of its own decree. The course of history, rational necessity, the world-process and

the Absolute, the will of God, were so many different forms of state- ment for the same fundamental idea.114