The sovereignty surplus

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This Foreword aims to rescue the sovereignty concept from the conflicted centre of irresolvable debates about the resilience and value of the state form. The idea of a ‘sovereignty surplus’ shifts the focus of inquiry towards sovereignty as a deep frame of legal and political thought and action. It evokes how sovereigntist thinking, in tandem with the techniques of modern constitutionalism, spills over beyond its threshold modern achievement of imagining and securing the paramount authority of the state system. The sovereignty surplus manifests itself in part as a ‘surfeit’ of sovereignty – an overabundance of new sovereignty claims emerging in new sub-state and supra-state contexts, but it also captures sovereignty’s augmented reworking in existing contexts. The sovereignty frame, then, while resilient in its general form and settled in its statist locus, is capable of and susceptible to adjustment and redeployment in the face of new internal and external pressures. It harbours an excess that allows its component elements to be fleshed out, modified and diversified so as both to absorb and reshape shifting sources and assertions of political authority. These movements are captured by examining the contemporary interaction amongst the five “R’s – the recomposition, raising, rationing, reinforcement and reduction of sovereignty.

The Sovereignty Surplus

Neil Walker*

1. Introduction: the boomerang concept

In this Foreword I intend to show why and how the idea of sovereignty remains indispensable in making sense of our contemporary global legal and political configuration. I am conscious in undertaking that task of treading very familiar ground, and in so doing of facing a twofold challenge; both to find a new route to explore, and to do so without falling into some well-known traps. As to novelty, my central thesis is that it is through the accrual of what might be called, in its various and interconnected aspects, the sovereignty surplus, that sovereignty continues to play such a vital role today. As to the dangers, and as a way of clearing the distinctive path of my argument, I begin by addressing at some length some formidable objections to granting sovereignty a central place in any project with global explanatory ambition.
Sovereignty has not disappeared from the lexicon of contemporary legal and political analysis. Far from it. Rather, the sovereignty concept stands out as ‘the ‘boomerang’ of modern Western legal and political thought’. For every effort to discard sovereignty, and such efforts are legion, there is a countermove that brings it back to the centre of discussion. But what lies behind the tenacious impulse to reject sovereignty, or at least banish it to the outfield, on the one hand, and the equally insistent pushback of its defenders on the other? The matters typically claimed to be at stake by those who disagree over sovereignty are both empirical and normative, sometimes in combination. They concern, on the one hand, the continuing vigour and relevance of certain key state-centred legal and political institutions and capacities typically viewed as indicators of sovereignty, and, on the other, the desirability of certain values and outcomes that tend to be associated with these averred indicators of sovereignty. Yet it often seems that sovereignty’s headline presence hinders rather than helps meaningful debate over these very stakes. For the sovereignty concept, with its long history of deployment across a wide variety of institutional and cultural contexts in the front line of political contestation, comes marked by its very different case histories and also laden with heavy ideological baggage. It invites highly diverse but also deeply resonant associations, in so doing fostering a culture of debate marked by loosely sketched yet strongly helf oppositional postures that can distract from or frustrate serious inquiry into the condition and desirability of contemporary governance arrangements.

Unpacking this further, we see how the combination of sketchiness and contentiousness colours the academic treatment of sovereignty in a number of different ways and at a number

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2 Including some of the leading thinkers of the 20th century, such as Hans Kelsen, Hannah Arendt and Michel Foucault. For discussion, see Andreas Kalyvas, *Popular Sovereignty, Democracy and the Constituent Power*, 12 CONSTELLATIONS 223, 224 (2005).
of different levels, with certain cumulative consequences. Most basically, the diversity of starting points contributes to a general lack of clearly defined and delineated common conceptual ground capable of generating shared explanatory and normative purchase over the issues at stake, which in turn can lead, in a self-fulfilling fashion, to the drawing of stubbornly different conclusions. It follows that while many commentators continue to endorse sovereignty - in many cases implicitly so, just through their exposure to and participation in a persistent pattern of taken-for-granted usage of a concept that retains a significant everyday currency - as a ‘natural’ window on the world of law and politics, others whose position on the spectrum of conceptions of sovereignty makes them dismissive or sceptical of its continued traction or value may be minded on that basis to retire the concept itself. And it further follows that experience or awareness of the confusion, drift, division and lack of meaningful engagement and exchange around sovereignty can feed a broader second-order scepticism about the continued utility of such a reputationally tarnished idea. It is this multi-layered fracturing that produces the sovereign concept’s boomerang effect.

2. From Claim to Frame

But if that is the case, why would we nevertheless want to persevere with the deployment of sovereignty concept as a key analytical device? And how, if at all, might it be possible to do so without becoming ensnared in these traps – or, to revert to the flight metaphor, without our own efforts becoming caught up in the boomerang’s slipstream? To address these questions, we must first explain in more detail just why and how it is that invocation of the ‘s’ word can detract from rather than enhance productive discussion of the large empirical and

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4 Kalyvas, supra note 2. See also Hent Kalmo & Quentin Skinner, *A Concept in Fragments*, in SOVEREIGNTY IN FRAGMENTS 1-25 (Hent Kalmo & Quentin Skinner eds. 2010)

5 See e.g. JOAN COCKS, *ON SOVEREIGNTY AND OTHER POLITICAL DELUSIONS* (2014). This is no new complaint. Writing before the Second World War, Jacques Maritain observed that ‘in order to think in a consistent manner in political philosophy we have to discard the concept of sovereignty’; Jacques Maritian, *The Concept of Sovereignty*, in IN DEFENCE OF SOVEREIGNTY 41,61 (Wladyslaw Stankiewicz, ed. 1969)
normative questions typically raised under its sign. We then seek to show how there is another important set of questions for which sovereignty remains crucial. These are questions that are, in brief, concerned not with the claims made about sovereignty in legal and political practice, and in debate concerning that practice, but with the underlying frame within which that practice and associated debate takes place.  

(a) Sovereignty’s Unanswerable Questions

Let us begin with a capsule definition, one that stands prior to any and all more detailed conceptual differences and disputes. In the mature understanding of the term associated with the age of political modernity – and we will say more about its pre-modern roots in due course, sovereignty refers to an ultimate authority that supplies unity and order to a political community. So broadly conceived, sovereignty is closely bound up with the idea of statehood, the dominant political form of modernity. For the very possibility of the modern state, in which the elements of defined territory, permanent population and general system of government coincide, presupposes this conception of sovereignty, just as it is through the realisation of the modern state that sovereignty acquires shape and finds its familiar exemplifications. It is the state, therefore, that is widely understood to supply the paradigm case of the political community - or polity – to which the idea of sovereignty attaches.

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7 GEORG JELLINEK, ALLGEMEINE STAATSLEHRE [General Theory of the State] 1900
Ultimate authority on the scale of the state polity can, however, only be a rare distinction, one that requires mutually supportive legal and political elements. In its legal register, sovereignty involves an assertion of a paramount right to rule and issue directives \((potentia)\). From a political perspective, it refers to the actual power to govern \((potestas)\), through ‘drawing people together in a common undertaking’.\(^8\) Sovereignty can also be divided into internal and external aspects. Internally, it designates effective legal and political authority over a determinate polity and its inhabitants. From an external perspective, sovereignty refer to the idea that the polity, as the locus of internal sovereignty, also has exclusive title to pursue relations with other entities, including other polities, without deference to or interference from any external authority.\(^9\)

At its core, therefore, sovereignty is a spare and empirically detached idea, but also one, given the sheer variety of state formations, whose appearance as a concrete set of arrangements and practices reveals a versatile range of possibilities. Jean Bodin, the key foundational theorists of modern sovereignty, famously spoke of the ‘marks of sovereignty.’\(^10\) He did so to convey the idea that sovereignty possesses no singular phenomenal form, but is instead made visible or perceptible to us through diverse manifestations. In identifying the marks of sovereignty Bodin was primarily concerned with particular capacities; in particular the power of law-making, the power to make peace and declare war, the power to establish offices of state, the right of judgment, the power of pardon and the right to tax. But in considering the

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\(^9\) For a fuller taxonomy of the types of sovereignty, with ‘domestic’ sovereignty contrasted to three external types, - not only ‘international legal sovereignty’ (concerned with exclusive legal title in external relations), but also ‘Westphalian sovereignty’ (based on exclusion of external actors from authority structures within a given territory) and ‘interdependence sovereignty’ (referring to the de facto ability of public authorities to regulate the flow of people, good, capital, information etc., across their borders) see STEPHEN KRASNER, SOVEREIGNTY: ORGANISED HYPOCRISY (1999) 3-4.

‘apparition’\textsuperscript{11} of sovereignty more generally, we need also look to the presence of key institutions such as parliaments, executive offices, apex courts and central banks. The ‘conjuring’\textsuperscript{12} and maintenance of an ordered unity out of the disordered manifold of political life, therefore, involves the construction and reception of an image, and common sense, of the polity as exhibiting just that intangible ordering quality by reference to its many tangible but ‘scattered signs.’\textsuperscript{13}

This is no mechanical process – no simple matter of ‘marking off’ the marks of sovereignty, so to speak. The fashioning of a dominant image of the polity that indicates both that it is a site of ultimate authority and what particular form this site takes, is an achievement that is always both precarious and partial. And however settled that dominance may seem at any particular point, the realization of ultimate authority, if measured against some absolute output standard of internal control and external independence, is bound to be found wanting. ‘Power to’ – the bottom-line, dispositional aspect of power, is always dependent on some measure on ‘power over’ – its relational aspect.\textsuperscript{14} And in a world in which legal and political ‘powers over’ - the levers of sovereignty - are routinely subject to negotiation and moderation in their implementation, and in which important media of social and economic steering and influence operate in addition to those of law and politics, sovereignty’s ultimate ‘power to’ can only be a matter of degree. Sovereignty, then, cannot refer to, still less correspond to, some gold standard of unqualified ascendancy.

\textsuperscript{11} Dennis Baranger, \textit{The Apparition of Sovereignty} in SOVEREIGNTY IN FRAGMENTS 47-63 (Kalmo and Skinner (eds., 2010).


\textsuperscript{13} Baranger, supra note 11., 53.

A more general point can be drawn from the necessarily imperfect and only approximate realisation of sovereign dominion; namely that it is a ‘descriptive fallacy’\textsuperscript{15} to conceive of sovereignty, as consisting in an independent reality for which the image of sovereignty merely provides the mirror. Rather, sovereignty is formed and sustained along a two-way causal nexus between the ‘hard’ environment of institutions and capacities on the one hand, and the representation of that environment to the subjects and wider audience of sovereignty on the other.

If we view matters, first, from the side of representation, we grasp a crucial point about the relationship of ‘sovereignty-talk’ to sovereignty. In a nutshell, the image of the polity as a site of ultimate authority, and the way that image both draws upon and draws together features of the political landscape, supplies the vehicle for the conveyance of a more or less successful, more or less contested, and more or less resilient claim to sovereignty by various actors on behalf of the polity as a whole or of its key seats of authority. Sovereignty is delivered, in other words, through an unending sequence of more or less explicit ‘speech acts’.\textsuperscript{16} Such ‘power over’ communications have real and variable effects on social and political practice. Often they will involve reflections, reminders and reaffirmations of the received order of legal and political authority. And the claims embedded in these speech acts will typically be met, occasionally modified, and in exceptional circumstances eclipsed by counterclaims; by efforts to persuade, threat, inspire or otherwise reshape attitudes towards and expectations of authority through a more or less significant recasting of the dominant image of the polity’s sovereign character.


\textsuperscript{16} \textit{Ibid} 287.
If, switching focus, we now view matters from the side of the environment, we can identify an equally important feature of the phenomenology of sovereignty. That we cannot talk of sovereignty in terms of an objective, self-standing reality does not mean that place and context – the locally distinctive features of the environment - are not vital considerations. The shape and success of any image-based claim to ultimate authority is inseparable from the history of a bespoke set of sovereign marks and arrangements, and from the constellation of meanings associated with that history. The British idea of the Queen-in-Parliament, the historical French attachment to the dual notions of national sovereignty and popular sovereignty,¹⁷ and the importance of the residual ‘sovereign' powers of the states as consecrated in the 10th Amendment of the American Constitution, for example, all refer to quite different incidents of sovereignty which only make sense - and are only made sense of - in their own particular context. Yet each speaks as if to the distribution of an underlying unity of sovereign power, and each shows sovereignty at the symbolic level to be of a deeply ideological character – an image crafted to produce, and typically though not invariably, to reproduce a certain pattern of power.

A similar picture emerges if we look to the external dimension of sovereignty. Here the particular marks of sovereignty, understood as the independent capacity to pursue relations with other polities and international entities, are more likely to draw upon a shared reservoir of international legal and political resources - for example, the idea of ‘sovereign equality’ under the UN Charter, rules of representation in the General Assembly, veto rights in the Security Council, or the capacity of sovereign states to secede from regional organisations.¹⁸ Yet how these signs are interpreted to feed into an image of a polity in possession of a plausible claim to be more or less autonomous in its external relations, and with what degree of

¹⁷ See e.g. Justine Lacroix, The ‘National Sovereignty’ Movement in France and the UK, 9 REVUE INTERNATIONALE DE POLITIQUE COMPAREE 391-408 (2002/3).
¹⁸ See further, infra section 4(c).
contestation from internal and external sources, will again differ depending on the time and place, and the institutional and legal-discursive traditions associated with the local environment.19

In summary, the empirical open-endedness of the abstract idea of sovereignty, in combination with both the scarcity value and contingent quality of the form of power it embodies, informs a number of its important characteristics. Any particular articulation of sovereignty may be precarious and controversial, and is always only a partial and approximate achievement – lacking any objectively verifiable standard of attainment to measure up to – or even to measure against. The importance of the sovereignty prize, and the emphasis on marks and other appearances in bidding for that prize, also accounts for the salience of its symbolic dimension, and, more specifically, for its ideological character as a claim attendant upon a particular image of authority that serves one particular configuration of power, and the balance of interests served by that configuration, over others. And the diversity of sovereign settings in combination with the range of sovereign signs also explains the high context-specific variability of the possible manifestations of power drawn upon in the making of that claim.

It is just this combination of features - precious, precarious, controversial, indeterminate, highly variegated in its manifest forms and effects, and, most importantly, dependent on its presentation and articulation as a plausible claim within the everyday flow of political discourse - that explains why sovereignty is such a conflicted concept, and so can become a distraction from or unreliable aid to the assessment and measurement of the continuing vigour and relevance of our key legal and political institutions and capacities today.

19 On the diverse national cultures of international law, see ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017)
There is an irony here. That sovereignty retains such vital discursive currency in the real world of political cut and thrust - and so remains a significant part of our first order 'object-language' - is a key reason why it has been and continues to be taken so seriously by many seeking tools that are appropriate to make sense of that world – and so also retains a resilient presence in our second order, explanatory 'meta-language'. Yet that vitality also brings volatility, and, in the perspective of sovereignty sceptics, a lack of the critical distance, context-independence, shared terms of reference or analytical precision required for sovereignty to bear a general explanatory burden.

The volatility of sovereignty as an object-language of claims tied to the raw particularity of various state-centred political imaginaries is, however, only the first part of the story of the perils of its analytical deployment. For the sovereignty concept is often lifted beyond the peculiarities of its 'apparition' in different national contexts, and beyond the partiality and particularity of its supporting or dissenting claims, by reference to a stylized set of broader understandings. Once again, this approach finds its source in the deeper legacy of meanings associated with modern sovereignty, but in this case the source is not specific to particular states. For the plausibility and performative significance of any sovereignty claim is influenced not only by the history of a distinctive set of marks and arrangements, but also by a more general and transnationally resonant set of presumptions about the conditions and implications of sovereignty. And it is these presumptions that, as well as figuring as an additional element in sovereignty claims made at the object-level of political practice and discourse, tend to inhabit the foreground of more concerted efforts to move sovereignty from the object-level to the meta-level of inquiry.

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20 Walker, supra note 3, 10.
21 See e.g. Bert Van Roermund, Sovereignty; Popular And Unpopular, in SOVEREIGNTY IN TRANSITION 33, 35-41 (Neil Walker ed., 2003).
To begin with, we have already noted that the paradigm case of a polity possessing the attributes of sovereignty in political modernity is undoubtedly that of the state, but many actors and commentators across the range of state traditions would go further and view the state as the only conceivable type of sovereign polity. What is more, the idea that the sovereign state should be considered as a unity is often taken to imply a monolithic conception of state authority. As we develop in the next Section, sovereignty under conditions of modernity may no longer inhere in the figure of the monarch, as was true of the mediaeval conception of the personal rule of the dynastic sovereign, and may instead speak to an abstraction such as the state or the people. Yet a narrowly focused picture of how sovereignty operates has lingered. For one of the more stubborn ‘shibboleths’ of sovereignty equates the idea of ultimate authority with centralized government power, with a strong administrative arm typically to the fore. Additionally, there remains a widespread view that modern sovereignty in its full form is the preserve not of the territorial state in general, but of the nation state in particular. That is to say, it is assumed that the key sovereignty ingredient of potestas – of engaging the people in a common undertaking, can only be present when the people conceive of themselves as a single national group. Again this draws upon a particular historical legacy, in this case the development of politically successful nation-building projects in many emerging or consolidating states of 19th century Europe.

A final deep presumption equates sovereignty with the idea of a largely self-contained legal and political order. Whereas few would reduce state sovereignty to an autarchic caricature of autocratic command and pure self-sufficiency – that would be the most egregious example of the objectivist descriptive fallacy – there is nevertheless a resilient tendency to view

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22 See e.g. Martin Loughlin, In Defence of Staatslehre, 48 DER STAAT, 1. (2009)


24 See e.g., Van Roermund, supra note 21, 36.
sovereignty in its external dimension not just as the right in the final analysis to choose the general terms of one’s external relations but as synonymous with the retention of a high level of autonomous control over the ongoing conduct of these relations. Inasmuch as continuing freedom of state action is subject to quotidian constraint by external forces, whether membership of international organisations or implication in other transnational rule-based orders, whose political capacity or jurisdictional claims intersect, overlap or otherwise interfere with those of the host sovereign, to that extent sovereignty may be seen to be diminished or compromised. Once more, this tendency has deep historical roots. The idea of modern sovereignty as a single, self-contained authority arose as a counter to the mediaeval notion of a complex entanglement of partial authorities – king, lord, church, city, guild – claiming particular forms of jurisdiction over overlapping constituencies and matters. In turn, this has bequeathed a tenacious sense of sovereignty as involving a commitment to a high level of freedom from such entanglement, and, more generally, as implying an arms-length contractual approach to international relations.25

We are now in a position to appreciate why sovereignty appears ill-equipped to answer the large empirical and normative questions that are often raised under its name. To recall, the empirical questions concern the continuing vigour and relevance of certain key legal and political institutions and capacities typically viewed as indicators of sovereignty. On the one hand, sovereignty’s record as a committed, aspirational, contentious, highly variegated first order concept – a key speech act in the theatre of the political – casts a long shadow over efforts to redeem it as an analytical tool. Sovereignty is claimed, and in turn denied, of entities with very different ‘signs’ in terms both of levels and range of effective capacity and of their institutional manifestations. On the other hand, attempts to thicken our shared understanding

of sovereignty tend to take what we might call a historically conservative form. For they consist of stylized generalities that owe much to the conditions of emergence of modern sovereignty and to certain continuities and contrasts with its mediaeval predecessor. And the notion that sovereignty be exclusive to states, that it involve a centralisation of executive and administrative power, that it typically be the preserve of mononational communities, and that it retain a high level of autonomy from international direction, remains analytically unhelpful for a number of reasons.

To begin with, this fleshing out of the terms of sovereignty seems to be the product of a very particular, and partial, perspective. It involves drawing upon certain contingent features of modern political authority that hark back to the conditions of its emergence. No compelling case is made as to why these particular thick descriptions are any more faithful to the analytical core of the sovereignty concept than other possible candidates. It might be argued, nonetheless, that thickening still be of some value in offering a fuller stipulative definition of sovereignty. At least that provides us with a common benchmark, one that draws upon a familiar baseline, attracting a level of general recognition and acknowledgment, against which to assess the state of our political institutions and capacities. Yet thickening of the sort attempted does not and cannot supply the kind of precision that would allow us to engage in close or consistent measurement. The various indices offered, apart from the idea that sovereignty be exclusive to states, are both indeterminate and scalar. They speak to very general standards — centralization, national ‘we-feeling’, self-containment, that may be interpreted in many ways and be might be met by many different forms of evidence, and whose achievement in any case is always a matter of degree.

What is more, to the extent that these thicker standards do nevertheless indicate broad criteria against which empirical trends can be assessed, they push quite strongly in one
direction. For just because they paint a historically conservative picture they tend to support
an assessment that would see contemporary sovereignty as being in decline, perhaps terminally
so. If sovereignty is seen as a state monopoly, but as inconsistent with government
decentralization, multinational states or robust international institutions and transnational
jurisdictions, then today, through changing configurations of private and public power, the
development of novel forms of constitutional and transnational legal technique, the
denationalization of economic power structures and the growth of new conceptions of the
relationship between political and other forms of identity, the arc of contemporary history
undoubtedly bends beyond sovereignty.26 The growth of federalism, consociationalism and
other forms of devolution and dispersal of authority and rights, the emergence of conceptions
of public belonging to rival or moderate strong forms of nationalism, and the exponential
growth of non-state based legal and political settlements and forms of material interest
alignment after the global conflicts of the first half of the 20th century, all militate against the
continuing traction of an image of sovereignty so tied to the conditions of its modern
emergence.

Yet to reduce this complex and multi-faceted set of changes to a proposition about the
erosion of sovereignty is hardly conducive to a better understanding of what this world-
historical trend mean for an overall assessment of the condition of our key legal and political
institutions today. Here the sovereignty concept simply operates as an arbitrary line in the
sand, drawn according to an analytical process whose underlying premises tend to
predetermine its conclusions. This not only ignores clear counter trends to the decline thesis
that a less conservative conception of sovereignty, even if it were remain firmly state-centred,
would pick up – notably the exponential growth since 1945 in the number of states making

26 The literature is vast. For an eloquent and still influential statement, see NEIL MACCORMICK,
QUESTIONING SOVEREIGNTY (1999).
more or less effective claims to sovereignty under international law and practice – but does so in a way that feeds into the tendency to make sovereignty a magnet for sterile conceptual disputation.

Similar arguments apply when we come to consider the normative stakes commonly associated with the sovereignty concept. Again, we are faced with a general problem of underdetermination. Just as the concept of sovereignty, stripped to its uncontentious core, is too thin to sustain many of the more detailed empirical claims made in or against its name, it is also too slender to justify many of the categorical normative claims with which its supporters or detractors seek to associate it. Both the defence and the critique of sovereignty as a normative concept inevitably become tied up with much broader arguments about how power ought to be organised and allocated in the world. And just as there is much slippage between object-level claims and meta-level analysis over the empirical questions of the vitality and relevance of sovereignty, so too there can be slippage from the specific to the general over the question of sovereignty’s merits. Arguments made in justification of or criticism of particular and quite different type of sovereignty-asserting projects with quite different institutional marks, say, for example, about ‘parliamentary sovereignty’ as against ‘judicial sovereignty’ - claims about claims, so to speak – tend to be presented as more general arguments about the political morality of sovereignty, despite their carrying quite different normative messages - in this case about where internal sovereign power should properly be concentrated.

27 The United Nations had 51 founding members, and has 193 today. The development of forms of governance above the state is better seen not as a counter-trend to the increase in the number and the spread of influence of sovereign states, but as one consequence of that increase, even if these new forms of governance may come to challenge some of the traditional prerogatives of the sovereign state.; see e.g., PATRICK GLENN, THE COSMOPOLITAN STATE (2013); see further, infra section 4(d).

Again too, where attempts are made to thicken our common understanding of what is entailed by sovereignty, the close historically conservative link that tends to be made between sovereignty and modern statehood becomes embedded in in the discursive framework of evaluative debate. Pro- and anti-sovereign positions can easily become shorthand for pro- and anti-state, and for a state-centred or de-centred view of the globe. The sovereign pro-statist will tend to extol the continuing virtues of a world of territorially concentrated self-determining peoples all pursuing their own way, according to their own conception of democracy, across the widest range of public policy, each substantially free from external interference, and all respecting the equivalent right to sovereign autonomy of all others. The anti-sovereigntist (sometimes called ‘post-sovereign’ in recognition of the fact that empirical claim to redundancy and normative critique often run together) will tend to begin from a cosmopolitan perspective that recognizes the equal moral status of all individuals, regardless of their national, ethnic, religious or cultural affiliations. The anti-sovereigntist too will focus on internal and external domains, but will argue that, by contrast, it is the loosening grip of the sovereign state that promises dividends in both cases; internally, it invites a more pluralist understanding of domestic politics, with dialogue, persuasion, consensus and compromise favoured over the dogmatic certainties of unitary sovereign order, while externally it may bring about a world in which transnational collective goods are guaranteed by robust transnational political institutions rather than frustrated by the uncompromising partiality of national interests.

29 See e.g. MACCORMICK, supra note 26; MICHAEL KEATING, PLURINATIONAL DEMOCRACY (2001).

30 For a balanced recent discussion of the respective merits of ‘statism’ and ‘cosmopolitanism’ and of various ‘cosmopolitan statist’ and ‘statist cosmopolitan’ positions in between, see RICHARD BELLAMY, A REPUBLICAN EUROPE OF STATES (2019) 27-52.

31 See e.g. NICO KRISCH, BEYOND CONSTITUTIONALISM; THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010).
Yet both positions claim too much, as can be appreciated when we consider the critique that each offers of the other. Strong sovereign states without internal checks can become authoritarian rather than democratic, and fearful and intolerant of internal difference rather than secure and collectively self-nourishing in their identification and pursuit of a localised common good. They can also be myopically concerned to defend their own self-interest rather than reciprocally respectful of the autonomous self-interest of others or sensitive to the overall global good; and their introversion may even lead them to deny how their enlightened self-interest is best served by external co-operation in areas of intersecting interests. Conversely, an architecture of governance strongly informed by cosmopolitan values can become the slave rather than the enabler of internal diversity and lack the steering mechanisms necessary to ensure effectively integrated local democratic performance. It can also lead to government by rootless transnational mechanisms working with detached and functionally fragmented agendas rather than by an institutional framework capable of reconciling or democratically transcending merely local conceptions of the good.

That the sovereign statist vision neither guarantees the goods typically proclaimed by its supporters nor the ills typically proclaimed by its detractors, and, equally, that the cosmopolitan vision neither guarantees the goods typically proclaimed by its supporters nor the ills typically proclaimed by its detractors, speaks to the unhelpfully binary quality of this opposition. Each position underdetermines the moral outcomes associated with it, and can in differing scenarios be plausibly associated with either good or bad versions of these outcomes, or, more likely, some mix of the two. What is more, the crudeness of the opposition is reinforced by the stylized quality of the empirical debate considered above. Our understanding of the relationship between the characterization of a particular state of affairs in sovereigntist terms and its moral assessment is distorted by a tendency for that characterization to be made in black and white colours – as announcing either the presence or of the absence, or at least
the severe diminution of sovereignty, rather than identifying a shifting position somewhere on the complex continuum between these possibilities.

None of this makes it meaningless to have moral arguments over the principle of sovereignty. It does mean, however, that such arguments have to be carefully qualified by an awareness that the goods associated with a position are not guaranteed, that they may not be exclusive to that position, and that they may also vary in force or likelihood depending on where on a more graduated spectrum of sovereignty they can be located. Yet the structure of sovereignty debate, with its thin conceptual framework, its strong linkage to the making of claims in first order political debate, the historical conservatism of its thicker presentations, and its tendency to reduce positions to binary opposites, often resists nuance. Instead, as in the case of the empirical debate, it tends to reinforce existing lines of disagreement and barriers to mutual understanding. In both cases, sovereignty seems poorly equipped to answer the very questions its invocation is intended to raise, more likely to reaffirms preconceptions that polarise debate than to promote common understanding.

(b) The Sovereignty Frame

Yet it is possible to recognise what is unhelpful in the debate over sovereignty and the provocations and conflicts it give rise to while maintaining a productive engagement with the concept. That the sovereignty concept is ill-equipped to answer either the large empirical questions of political science or legal institutional analysis about patterns and shifts in how we are governed or the equally large evaluative questions of normative political theory about how we ought to be governed, does not mean that it is not equipped to deepen our understanding of contemporary law and politics in other important ways. Indeed, we can go further and propose

32 For a good recent example, see George Duke, Sovereignty and the common good, 17 INT’L J. Const. L. 66 (2019).
that the very feature that makes sovereignty an unreliable resource for some kinds of inquiry, and which encourages the kind of contentiousness that has powered the boomerang, also points to its value as a resource for another kind of inquiry. The feature in question is the open texture of the sovereignty concept - the indeterminate inclusiveness of its denotation of an ultimate authority that supplies unity and order to a political community. It is this quality that, as we have seen, permits such protean diversity in the realization of sovereignty as a claim that articulates and sustains a certain vision of the power of the polity and the structure of inter-polity relations, and which, therefore, make the concept so elusively resistant to measurement and assessment of the sort that would provide generally persuasive answers to the large empirical and normative questions. Yet, as we shall shortly explain, the same open-textured quality is indicative of the tenacious and widely ramified significance of sovereignty at a more profound level of social influence.

What we are concerned to explore here is the manner in which the idea of sovereignty has inhabited the silent (and relatively still) depths as well as the vocal (and quite volatile) surfaces of legal and political thought and action. We are interested, in other words, in how, as well as supplying the discursive form of a claim variously and often contentiously made in respect of an established or prospective polity or of its various legal and political marks, sovereignty has also provided a resilient frame - an everyday, often taken-for-granted structure of thought through which the legal and political world as a whole is apprehended and shaped. Something like this framing function is sometimes alluded to in efforts to comprehend sovereignty, and it goes by different names in different theoretical traditions and vocabularies. We have been invited to think of sovereignty in terms of a ‘a basic element of the grammar of
politics,’33 or the deep structure of juridical relations,34 or as an aspect of the social and political imaginary,35 or as an ingrained disposition or habitus that reflects and reproduces relations of social and political power.36 But more important than the particular language used to depict the framing function is an appreciation, incompletely developed even in these theoretically more expansive treatments, of the sheer weight, breadth and resilience of influence the frame possesses.

To return to the open texture of the concept of sovereignty, this speaks, then, not only to a sparseness and quality of detachment from the particular that greatly underdetermines the range of its empirical instantiations, but, crucially, also to its potential to exercise formative power over these various particulars. That is to say, sovereignty offers more than just a thin taxonomical category – a remote and passive generalization that seeks to capture an unwieldy range of objects or events united only by certain similarities coded at a high level of abstraction. Nor, to recall our earlier discussion, is sovereignty simply an extended exercise in symbology, an inference to be drawn and an image to be constructed from its ‘scattered signs.’37 In addition, sovereignty as frame supplies an active, generative principle, a core orientation from which grows and evolves a wide range of ways of viewing and acting upon the world. Yet each of these visions nevertheless retains in common some form of investment in all or most of the basic components of that core orientation. These vital components, of

35 See e.g. OKLOPIC, supra note 12; Paul Blokker, The Imaginary Constitution of Constitutions’, 3 SOCIAL IMAGINARIES 167 (2017).
36 See e.g. Rebecca Adler-Nissen, Introduction: Bourdieu and International Relations theory, in BOURDIEU IN INTERNATIONAL RELATIONS: RETHINKING KEY CONCEPTS 1( Rebecca Adler-Nissen ed. 2012).
37 Baranger, supra note 11, 53.
which much more shortly, are **finality, supremacy, comprehensiveness, abstract unity** and **self-creation**. Yet investment in these components also exposes certain tensions in their interaction, which not only have to be reconciled within each vision but which also colour the relationship between different visions.

The sovereignty frame, then, should not be viewed as an *a posteriori* category for classifying sovereignty claims, but an *a priori* mechanism of thought without which these claims could not be produced, pursued, recognized or, indeed, resisted in the first place. In what follows, we explore how wide ranging the ramifications of the sovereignty frame continue to be today. This is not intended as a way of re-addressing the large empirical question of the continuing vigour and relevance of the paradigmatically state-centred legal and political institutions and practices historically associated with sovereignty, or the supplementary normative question of the justifiability of these state-centred institutions and practices – questions to which, I have argued, a consideration of the myriad claims associated with sovereignty can offer little by way of answers. These are questions that instead require suitably detailed inquiry into the adaptability of the levers of state influence, however rhetorically articulated and pursued, to a changing global ‘geography of power’[^38], and a close evaluation of the consequences for key values of political morality of such adaptation as may be charted.

An emphasis on sovereignty as frame rather than sovereignty as claim addresses a different question and has a different purpose, only indirectly related to these wholesale questions about the standing and value of the state. That purpose is to reveal how the sovereigntist mindset continues to inform the way in which we think about legal and political

power generally, both within and beyond the context of the state. It remains relevant in the context of movements in state power, in that how the different components of the sovereigntist orientation are grasped and the relationship between them is approached at state level may shift in response to certain tensions internal to the idea of sovereignty. The treatment of these tensions might lead to the sustenance or extension of state power, but also to its diminution or jeopardy. But the various component parts of the sovereigntist frame also, and increasingly, become relevant to the imagination and development of sites of legal and political power other than the state in ways that might dispute or displace state power. The influence of the sovereigntist frame, in short, by no means varies directly with the power of the state. Rather, it has a range of different effects on the overall configuration of legal and political power, some of which may enhance state power and others of which may challenge state power, both internally and externally.

The idea of a **sovereignty surplus** seeks to capture this wider ‘radiation effect’ of the sovereignty concept. It is intended to evoke how sovereigntist thinking, in tandem with the language and techniques of modern constitutional thought, and reaching the surface of political expression through various sovereignty claims, spills over and expands beyond its threshold modern achievement of imagining and securing the paramount authority of the modern state system. The sovereignty surplus manifests itself in part as a **surfeit** of sovereignty – an overabundance of new sovereignty claims emerging in new contexts, but as well as extension it is also about intensification, about sovereignty’s augmented reworking in existing contexts. The sovereignty frame, then, while resilient in its general form and contours and settled in its statist locus, is also capable of and susceptible to adjustment and redeployment in the face of new internal and external pressures. It harbours an excess that allows its component elements to be fleshed out, modified and diversified so as both to absorb and reshape shifting sources and assertions of political authority.
In examining the accrual of a sovereignty surplus, the aim is not to provide an exhaustive historical account of the development of the sovereignty frame across political modernity to the present date. Rather, it is to focus on certain recent movements, understood as the cumulative consequences of certain secular tendencies and the tensions these exhibit. In particular, we will concentrate on the contemporary sovereignty surplus produced by what may be termed the five ‘R’s, and by the relationship between these. These are the recomposition, raising, rationing, reinforcement and reduction of sovereignty. But first let us examine the basic components central to the development and maturation of the modern sovereignty frame and assess how these, and the tensions their development and interaction has given rise to, have set the scene for the delivery of the sovereignty surplus.

3. Sovereignty in Political Modernity

(a) Elements of the frame

(i) Finality

Whoever possesses sovereignty must have the final word. This is the etymologically primitive understanding of sovereignty as a political concept, or rather, of souveraineté, originating as it did in 13th century France, just prior to the 300 year gestation of the modern state. Finality remains an essential component of the modern understanding of sovereignty, but its implications were initially quite different. Final decision-making authority in the mediaeval age was not concentrated in a single source, but was dispersed amongst manifold authorities. It always attached to a concrete position, feudal or canonical, its command personal to the

39 Infra, section 4.
holder of that position. Each was sovereign in respect of a particular type of decision and over a particular constituency, and many of what we would today consider as private powers as well as public powers were included within the overall purview of sovereignty. Yet, as another feature of its inherently limited quality, the domain of divided sovereign power was largely confined to executive acts, since the ultimate legislative and ordering power was viewed as a matter of divine authority.

(ii) Supremacy

In a narrow sense, mediaeval sovereignty qua finality also implied supremacy on the part of the holder, for the final decision making authority would also by definition be the highest command in that particular domain. Some go further and argue that, such was their growing economic, administrative and political influence, the mediaeval monarchs of England and France had already come to acquire a broader supremacy by the 14th century.41 But while the monarch might be considered the ‘primary sovereign’ in the sense of possessing more powers than other feudal Lords and final decision-makers, that relative ascendancy did not amount to overall authority within a unified hierarchical structure.

(iii) Comprehensiveness

The modern conception of sovereignty required a formula that would join the various final and supreme powers into one. Responding to the post-Reformation religious wars of the 16th century and also to the gradual extension of the territorial authority of Kings, it was Jean Bodin who first articulated such a formula. As authority could no longer rest on the universalism of the Respublica Christiana, under the Emperor and Pope, combined with a complex local feudal structure of rights and obligations between Lord and Vassal, order could only be secured by the concentration of power in a newly integrated secular authority. This, indeed, signalled

41 Ibid 15.
42 Ibid 14.
the birth of the very idea of ‘the political’ as a general domain of authority, now including legislative authority - and also as a general locus of contestation of that authority – autonomous from and superior to particular private or ecclesiastical claims to power. It also signalled the birth of the modern state as the entity in which this consolidated sovereign authority rested.

Bodin called this power ‘absolute’, but that did not imply it was entirely without limit. Rather it implied a comprehensive final authority over matters of government. It was also a final authority that, absent any moderating effect that the erstwhile division of sovereign powers might have provided, began to be understood more clearly than any previous expression of royal power as contained in and by a specifically legal register. Sovereignty *qua* comprehensive authority should be exercised in conformity with the general rules regarding its exercise, and within the jurisdictional limits specified for its exercise – namely, the domain of public rather than private interests and concerns.

*(iv) Abstract Unity*

For Bodin, and those who followed his direction of thought, the ‘absolute’ sovereign power should also be ‘perpetual’ and ‘undivided’. It should, therefore, possess the quality of ‘oneness’ in two perspectives. Looking beyond itself, its comprehensiveness implied that it was a singular and exclusive power in its own expansive domain. Looking inwards, sovereignty must still be conceived of as a unity, notwithstanding its unprecedented range and ambition. That is to say, it must be an authority that combined an integrated structure with an unprecedented extension over space, time and subject-matter. For this newly complex and capacious unity to be achieved, however, required that sovereignty be depersonalised and deconcretized. Indeed, a capsule way of conceiving of the overall process of transition from mediaeval to modern sovereignty is one of progressive abstraction from the personal, dynastic
and singular to the impersonal, corporate and internally differentiated.\textsuperscript{43} The command function of the absolute, perpetual and unitary sovereign remained, but was now attached to an abstract rather than a concrete entity.

In fact, even the representation of the figure of the mediaeval sovereign had involved some level of abstraction - the King coming to possess a 'politic body or capacity' in addition to his 'natural body'.\textsuperscript{44} Gradually, as governing grew more extensive and consolidated, the abstract quality of the sovereign office, and of the relationship that constitutes sovereign authority, became more pronounced. Both the ruler and the ruled, became more formalized and detached categories, supplying a symmetry of abstract unities.\textsuperscript{45} On the one hand, however complexly institutionalized and internally differentiated the expression of sovereign power might be, for it to remain formally undivided entailed that it be sourced in a singular ruling authority. On the other hand, the comprehensiveness and perpetual horizon of sovereign power presupposed a stable object over which a monopolistic authority could be effectively and indefinitely exercised, an object that was supplied by the category of the people of a clearly territorially delineated entity.

As we saw earlier, this creation of 'a unity [out] of a manifold'\textsuperscript{46} had a symbolic significance, involving the drawing of a persuasive picture of sovereignty from its scattered marks and signs. But it also had a practical import, necessitating for a first time a firm distinction between sovereign power and government – between the underlying authority and the mechanisms through which it was represented and exercised.\textsuperscript{47} Underscoring the growing reliance on the impersonal authority of legal rules, the treatment of that newly vital distinction

\textsuperscript{43} See e.g. MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW (2010) ch.7.
\textsuperscript{44} Calvin's case (1608) 7 Co Rep 1 10a, per Coke CJ.
\textsuperscript{45} On the idea of the modern sovereign state’s ‘double abstraction’ from the interests of the particular ruler and the particular ruled, see Quentin Skinner, The State, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE: IDEAS IN CONTEXT 90, 112-116 (Terence Ball, James Farr & Russel Hanson eds. 1989).
\textsuperscript{46} Hans Lindahl, Sovereignty and Symbolization, 28 RECHTSTHEORIE 347, 348 (1997).
was the catalyst for the emergence of modern constitutional method. For it was through constitutional method that the increasingly complex design of the political, elaborating the terms of the sovereignty/government interface and specifying the detailed form of the governmental apparatus, would be given distinct legal form and privileged standing.

(v) **Self-creation**

The final and in many ways most distinctive piece of the jigsaw of modern sovereignty consists of the idea of self-creation. The working through of that idea finds expression at the level of political morality in the notion of popular sovereignty – that the ruled should also be the rulers. But behind the formation of that ethos of self-rule lies a deep if gradual shift in the social imaginary. This involved an emergent sense of the social world as something constructed through the instrumentalities of law and politics by its inhabitants, now conceived of as free and equal agents engaged in a process of individual and collective self-realization, rather than as the expression of an innate order of things in which all have a set place and to which all should conform. This sense of politics as a secular activity guided by the interests and interest-serving purposes of human agents required the claim to rule no longer to be justified according to pregiven dynastic prerogative or timeless transcendental values, but instead to be validated according to the adequacy of these purposes and their implementation. And that validation would be bound to take increased account of the perspective of the governed and their interests.

If the declining weight of religiously or other metaphysically sourced claims to absolute truth lies behind the growth in the sense of the self-shaping capacities and responsibilities of individual and collective human agency, the crystallisation of the notion of popular sovereignty also owed much to the broader reordering of the supporting architecture.

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of sovereignty that was taking place. The distinction between sovereignty and government may have allowed sovereignty itself be conceived of in more abstract terms, but it remained difficult for those who had first drawn that distinction to imagine the holder of the abstract office of sovereign as any other than the hereditary sovereign. With Hobbes in 17th century England however, we begin to find a serious exploration of an idea whose possibilities and challenges were to become a central thread in the story of sovereignty across the modern age; that, rather in the manner of the King’s two bodies — physical and noumenal - the people, as well as supplying a concrete multitude, could also be conceived of as a singular sovereign abstraction.

In time, this idea was filled out by those with a more committed approach to the idea of the people as the ultimate holder of political authority; in the mid 18th century by Rousseau with his notion of the volonté générale; and then by Emmanuel Sieyès, one of the chief political theorist of the French Revolution, who characterized the distinction between sovereignty and government in terms of a division between the constituent power of the people (pouvoir constituant), and the duly constituted power (pouvoir constitué) according to whose terms and institutional arrangements the people bound themselves to be governed. The idea of constituent power, indeed, signalled a profound change not only in the source but also in the direction of political authority. Whereas for Bodin the newly integrated and comprehensive sovereignty involved a reference back to the source of ‘the highest power of command’, for Sieyès it was literally a ‘constituting’ authority, a forward-facing power to found and to

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50 Hugo Grotius, however, already understood the sovereignty part of the sovereignty/government duality as a broader abstraction, as referring to the comprehensive relationship of supremacy and subordination between rulership (whatever its organs or offices) and subjects, See HUGO GROTIIUS, DE JURE BELLII AC PACIS LIBRI [On the Law of War and Peace] (1625, Francis W. Kelsey trans., 1925) 259; For discussion, see Nehal Bhuta, The State Theory of Grotius (unpublished paper, 2020); Annabel Brett, The Subject of Sovereignty: Law, Politics and Moral Reasoning in Hugo Grotius, 17 MODERN INTELLECTUAL HISTORY, forthcoming (2020).


52 On the earlier Roman law roots of popular sovereignty, see DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT, (2016).

53 JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1772) ( H J Tozer trans., 1889)

54 EMMANUEL SIEYÈS, POLITICAL WRITINGS 136 (M. Sonenscher trans., 2003).

Reflecting the growing influence of the idea of collective self-creation, finality would gradually give way to originality as sovereignty's basic impulse.

In addition, with the reception of Sieyès' vision, and, more concretely, with the first successful case of state formation and government by authorization of 'We The People' initiated at Philadelphia in 1787, the idea of a canonical set of constitutional rules, typically showcased in a formal constitutional document, assumed an ever more prominent role. It did so as the vehicle for the expression of popular sovereignty, as the conformation of its realization, and as the promise of its adaptable resilience. Sovereignty in the modern age, all the more so in its increasingly dominant popular variant, had, in short, come to require a constitutional form for its articulation.

(b) Tendencies and Tensions

Just as each successive building block of the modern sovereigntist frame can be seen as emerging in extension of tendencies or in response to tensions present in the existing structure, so too the completion of the overall frame invites new tendencies and tensions. To begin with, and most fundamentally, the modern sovereigntist frame exhibits a powerful monopolizing tendency. Indeed, an authority that is supreme, unitary, comprehensive and perpetual is monopolistic in a double sense. First, no claim to sovereignty other than that of the existing sovereign, or at least one whose pedigree is traceable to the first sovereign, can speak authoritatively within the domain of that claim to sovereignty. The message conveyed is that other aspiring authorities over the whole or even any insular or overlapping part of the jurisdiction in question can have no legitimate claim to the necessarily singular title of sovereign, and so need not apply. Certainly, a claim deemed illegitimate by the existing sovereign might, exceptionally, still succeed. But despite being portrayed as ‘revolutionary’

56 See e.g., Kalyvas, supra note 2, 225.
in conventional parlance, and also in legal and constitutional theory, any such rupture remains structurally conservative, as it simply involve a new sovereign arrogating to itself the same monopolistic authority as the old.

Secondly, the sense of exclusivity of title that favours the existing sovereign extends to a deeper level. For not only does the settlement bias exclude or at least strongly oppose the legitimacy of the claims of other putative sovereigns, it simply does not allow the basis and basic efficacy of political authority and power to be conceived of other than in and through the singularity of the sovereign. The elevation of the monopolistic figure of the sovereign, all the more so in its abstract and institutionally expansive constitutionalized form – not only rules out rivals for any part of that sovereign’s authority, but also precludes any kind of political ontology other than that centred upon sovereignty. For in the modern sovereign vision, the very idea of authority is holistically conceived, implying not only ultimate decision-making authority but exclusivity over the expansive and only self-limiting range of that authority. From such a perspective, sovereignty is the means by which the political sphere is rendered both comprehensive and self-contained, leaving no space for the countenance of deep authority configured other than in sovereign form. The sovereign way of seeing, in other words, is non-pluralistic, unable to recognize any entity as a proper source and site of authority except other sovereigns.

As we have already discussed, defenders of the modern constitutionalized version of sovereignty would nevertheless consider its monopoly a good thing. Certainly, this version of sovereignty claims some advantages over its predecessors. Unlike these predecessors, modern constitutionalism’s default is not to defer to its normative past in the form of ‘the sanctity of

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57 For a recent reinvigoration of revolutionary analysis, see BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS; CHARISMATIC LEADERSHIP AND THE RULE OF LAW (2019); see also RICHARD ALBERT (ED) REVOLUTIONARY CONSTITUTIONALISM: LAW, LEGITIMACY, POWER (2020).
immemorial traditions' associated with a personal dynasty, or through conformity to the dictates of some higher pre-positive law, or often some combination of the two. Instead of reifying its pre-constitutional heritage, modern constitutionalism, with its belief in the self-shaping capacity of the political collectivity, looks back primarily in order to look forward. It attempts to use the constitution’s founding commitments, and the legacy of community that both enabled that founding commitment and is revalorised by it, as a platform for a project of self-government. Equally, unlike its predecessors, modern constitutionalised sovereignty is not tied to a particular and parochial vision of political authority, one shaped to local circumstances (though owing little to the input of its subjects). Instead, its project seeks to marry a distinctive proto-democratic expression of this popular sovereign to a framework of general rule-based public reason born of a broader humanistic commitment to the idea of free and equal membership a political community, and so to popular sovereignty understood as a universal good – a universalism that is fed by precedent and example, and so gradually legitimates interest in a growing bank of transnationally circulated comparative techniques of constitutional self-government.

The new emphasis on individual agency as the basic component of collective self-rule also steers modern constitutionalism away from a previously one-sided stress on governmental capacity, or gubernaculum, as an expression and consolidation of dynastic privilege. Rather, it treats an increasingly expansive and, socially ambitious form of governmental authority and the principled, rule-based, limitation of government in the name of its free and equal subjects – its iurisdictio – as two sides of the same enterprise. Moreover, as well as recognizing the place of both the individual and the collective as beneficiaries of the project of self-government,

58 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY [1922], (1978) 215.
59 On historical origins, see e.g. DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY (2007); on contemporary trends, see e.g. GREGORY SHAFFER, TOM GINSBURG & TERENCE C. HALLIDAY (EDS) CONSTITUTION-MAKING AND TRANSNATIONAL ORDER (2019).
60 See e.g. CHARLES MACILWAIN, CONSTITUTIONALISM; ANCIENT AND MODERN [1940] (1947).
modern constitutional sovereignty also develops the capacity to recognise ‘in between’ group entities; not as co-existing final authorities, as in the mediaeval vision of multiple sovereignty, but as objects and beneficiaries of a government apparatus that, now understood as conceptually separate from the underlying unitary sovereign, can take a more diversely representative form.61

We may observe, therefore, how, with this more open horizon, modern constitutionalized sovereignty is bound to confront and negotiate various antinomies that are distinctive to the enterprise of collective self-rule. Even though the constitution is in principle forward-looking, there remains a basic trade-off in emphasis between a conception of authority that, on the one hand, though no longer prior to the People, is fixed by the foundational compact, and, on the other, a conception of authority that invokes that foundational compact as a justificatory and motivational platform for an aspirational and adjustable project of collective self-rule. That trade-off, moreover, is bound up with a tension between the affirmation, central to the modern constitutional method, of abstract understandings of the people as a whole, and the recurrence of more concrete understandings of the people as a sociological entity. And at a further point on the scale of abstraction, we also see a tension between the distinctive aspirations of a particular people, whether abstractly or concretely understood, and certain standards seen as common to all free and equal persons, and so as universal prerogatives of popular sovereignty and collective ‘peoplehood’. Equally, we may observe antinomies between the general governmental capacity demanded to pursue the collective good and the particular constraints required to secure individual rights, as well as between the unity of the popular sovereign and the plurality of the group identities from which the popular sovereign is composed in both cases again linked to differences on the

61 See e.g. MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT; SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY (2010)
abstract/concrete continuum.\textsuperscript{62}

The dominant state-centred paradigm of constitutionalized sovereignty inevitably struggles to accommodate these various competing goods. The appeal to the abstract normative text as the mature expression of popular sovereignty, complemented and corroborated by certain universal standards, carefully balancing governmental authority and constraint, reconciling the need for a unitary structure of governance with the accommodation of group differences, and all sustained by a narrative that treats the documentary or other fundamental source as a more or less collectively adjustable framework of development, has always been a fragile accomplishment. In particular, the emphasis on an abstract normative framework that incorporates a mechanism for waking the normally ‘sleeping sovereign’\textsuperscript{63} to consider an occasional amendment of its collective project, all under the supervision of an apex court, may have become the routine method of recognizing popular sovereignty as extensive over time, yet that method may foster other tensions and produce further dilemmas. If unduly deferential to the strict terms and close constraints of a canonical text, this can lead to a deracinated political culture in which popular sovereignty is either side-lined or its achievements fossilized. Alternatively, in the name of the greater immediacy of collective purpose, sometimes understood as requiring the flexible recomposition of the sovereign power and at other times couched in the form of ‘constitutional populism’ – of both of which tendencies which we will have more to say later\textsuperscript{64} – insufficient attention may be paid to the textually abstract, and so either to the gravity and resilient significance of foundational commitments or the more universally resonant and jurisdictionally constraining aspects of the constitutional settlement. In one case, the fear is of capture of the constitutional high ground by narrow interests presenting themselves in universal terms; or of a political system gripped by inter-institutional

\textsuperscript{62} Neil Walker, \textit{The Antinomies of Constitutional Authority} in \textsc{Authority in Transnational Legal Theory} 125 (Maks Del Mar and Roger Cotterrell eds., 2016).
\textsuperscript{63} \textsc{Tuck}, \textit{supra} note 47.
\textsuperscript{64} \textsc{See} sections 4( e) and( f) below
gridlock and locked in to the commitments of a different age. In the other case, the danger is that the constitution becomes the vehicle for an unstable ‘presentism’\(^65\) or a narrow and chauvinistic nativism.

These tendencies towards elite capture or stasis, or towards shifting presentism or parochial nationalism, may be more or less pronounced, and more or less combined. No mature constitutional system can escape the attendant tensions. Even in the most robust and most widely affirmed constitutional settlements, and perhaps even particularly in these cases, there is enduring debate over a whole catalogue of issues that reflect these underlying tensions; not only over fidelity to the foundational text and rigidity of constitutional amendment – which pits Originalists and Living Constitutionalists against each other\(^66\) - but also the merits of strong constitutional review of legislation, the range and depth of inter-institutional checks and balances, the justification of national constitutional exceptionalism, and, more generally, over whether constitutionalism is better understood as the governing legal code of the collective project of self-creation or as its instrument.\(^67\) But often constitutional failure, and even state failure, ensues where the contradictions attendant upon our constitutional antinomies become too pronounced.\(^68\) This returns us to the deeper burden of state-centred constitutional sovereignty. For precisely because its approach is monopolistic - the ‘only game in town’, this both intensifies the competition to influence its terms of application, and amplifies the consequences of its failure.

The monopolizing trend, with its attendant strengths and weaknesses, is reinforced by the global systemic effects of sovereignty’s frame. The world of constitutionalized sovereignty

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\(^66\) See e.g. David Singh Grewal & Jedediah Purdy, The Original Theory of Constitutionalism 127 YALE LAW JOURNAL 664 (2018);


\(^68\) ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009) chs.6-8.
is one in which individual sovereignties are sustained by the overall framework of relations
between sovereigns. As the only polity form generally recognised as sovereign, the state offers
a universal template – one that treats sovereignty as a comprehensive title to internal authority.
These two features of universality of form and comprehensiveness of authority complement,
and are complemented by, the relational principle of mutual exclusivity of sovereign claims.
Otherwise put, the principle of mutual exclusivity of sovereign claims considered together is
both cause and consequence of the exclusivity of each formal identical sovereign claim
considered independently.69

The monopolizing tendency, therefore, as well as emphasizing the vulnerabilities of the
state constitutionalist template as the dominant vehicle for framing and resolving underlying
antinomies, also discriminates against approaches to political authority and community that do
not fit its self-reinforcing systemic logic. Take the question of empire and its legacy. The
relationship between constitutionalism, sovereignty, and the history of modern imperialism is
complex. Even with the advent of the age of constitutionalized sovereignty, in a world of few
generally recognized sovereign powers, all sourced in the imperial centres of the West, the
stabilizing symmetry of mutual exclusivity lacked global application. This long permitted a
kind of constitutional ‘double think’ in which the disciplines of self-government did not extend
to the government of others beyond the home territory, resulting in the unchecked power of
colonialism.71 Moreover, even as the process of decolonization has gradually unfolded, one
protracted consequence of the growing dominance of the state-centred constitutional form has
been the imposition of ‘low intensity’72 constitutional democratization on indigenous and other
non-Western peoples with insufficient regard either to their initial political consent or to their

69 See e.g. Neil Walker. Sovereignty and Beyond: The Double Edge of External Constitutionalism 57 VIRGINIA
71 See e.g. JENNIFER PITTS, BOUNDARIES OF THE INTERNATIONAL: LAW AND EMPIRE (2018).
72 James Tully, The Imperialism of Modern Constitutional Democracy, in THE PARADOX OF
ongoing participation.

Here again, we see how the modern template of constitutionalized sovereignty may be harmful on account of the limitations inherent in its vision of authority. For the Western view, centred on the very idea of sovereignty as an active, agency-based concept, has shaped and sustained a particular understanding of what counts as polity-generative, one that involves the move from pre-modern to modern to be comprehended in initiative-centred terms. In this perspective, the establishment of modern political community involves an unprecedented act of collective agency, typically ceremonialized - or at least retrospectively portrayed - as a revolutionary break from the pre-modern and pre-industrial past. However doubtful as a self-description of Western political method, this may be even more inappropriate to the more continuous conceptions of consent and more fluid sense of the organisation of self-rule that we find within other political traditions.73

If sovereign self-determination remained a rare prize in the age of empire, monopolized or controlled by the imperial powers themselves, the post-colonial age, particularly since the end of the Second World War and the advent of the United Nations, has been one in which the systemic logic of state sovereignty has been more fully rolled out on a global scale. And yet this formal generalisation and equalisation of sovereign authority has also generated new forms of friction within the system. In becoming more widely available, the privileges of sovereignty are also subject to greater competition from those who want to join the club, or who seek new forms of supervening authority to deal with the ‘anarchy’74 or supplement the fragmented influence of a world of sovereign monads. That leads us to a second and more immediate misfit between the template of constitutionalized state sovereignty and certain deep trends of political authority. This concerns the contemporary tendency, already referred to, towards the

73 See e.g. JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1996).
transnational and subnational extension of political authority, and the accompaniment of this rescaling by new forms of constitutional discourse and treatment.

Palpably, the new horizon of possibility offered by transnationalisation fails to match the systemic logic of state constitutionalism. We noted earlier that one prominent and tenacious cultural accompaniment to monopolistic state constitutionalism contemplates only a thin sense of the transnational, conceived of as the narrowly inter-national – a sphere of limited relations between mutually exclusive and compartmentalized state sovereigns. Yet in a world of ever increasing economic, military and technological externalities that escape the material capacity and political authority of any individual state, and of communities of attachment or function that straddle national boundaries, a narrow insistence on the state as the only primary political form may leave the domain of transnational regulation in some respects, - emphasized in one body of opinion - under-recognised and underpowered, and in others respects – emphasized in another body of opinion - significantly empowered and enabled without appropriately inclusive forms of voice or accountability.75 These concerns – that transnational law is either inadequately or excessively authorised in the face of the ‘fugitive power’76 of new transnational private enterprises and the urgency of new global challenges – crystallise in the ongoing constitutional controversy surrounding the development of social and economic regulatory orders such as the European Union – the thickest global experiment in transnational polity to date – the United Nations, the World Trade Organisation, the World Bank, the global climate change regime and the International Criminal Court. Compounding the controversy,


while the spread of sovereignty has undoubtedly increased the influence of the global South, all such entities were crafted, and continue to be disproportionately influenced by the traditional Western powers.

Alongside these global and transnational tendencies, other disturbances to the authority of the state emanate from below. Ironically, the seeds of this challenge to the modern state system were sown in the foundational American initiative in constitutionalized sovereignty. As well as the first settled modern constitutional state, the United States was also the first mature federation. In bringing together a range of prior political communities – the former British colonies – into one, it generated one of the key antinomies of modern constitutionalism; the opposition between unity and plurality – the people conceived of as a politico-cultural singularity and the peoples understood as a combination of groups, joined in a web of mutual interests. The federal solution gave novel constitutional form to the accommodation of this tension through the idea of territorially distributed power within the polity. That involved a clear division between the two levels of authority and their respective policy spheres, a relatively high degree of ethnic or cultural homogeneity between the different state units, and uniform and symmetrical legal and institutional treatment of these units.77

Contemporary federalisms and quasi-federalisms have gradually departed from that classical norm. Most newer federations, such as Germany, are 'co-operative' rather than 'dual' arrangements,78 involving significant policy overlap and institutional interlocking between central and local levels. Many, such as Canada, Spain or Belgium, as well as the quasi-federal or 'Union state'79 UK, are also multinational or multi-ethnic territorial compacts, with some constituencies aspiring towards stronger forms of constitutional recognition. And these more

77 The classic English language analysis is still KENNETH WHEARE, FEDERAL GOVERNMENT 4th edn. (1964).
78 See e.g. Tanja Borzel, The Federal Republic of Germany as a model of cooperative federalism, In STATES AND REGIONS IN THE EUROPEAN UNION: INSTITUTIONAL ADAPTATION IN GERMANY AND SPAIN, Ch. 4 (Tanja Borzel ed., 2001)
79 See e.g. COLIN KIDD, UNION AND UNIONISMS (2010).
diverse federations tend, in addition, towards uneven or asymmetrical treatment of their provinces. Those with the clearest traditions of distinctiveness, or the strongest claim to national identity, are accorded more ample recognition of cultural goods such as language or religion, greater regional governmental autonomy, or disproportionate influence at the federal centre. All such factors combine to create a more fluid political form, challenging the earlier conception of the federal state as a mere variation of the sovereigntist ideal of a well ordered and permanently settled unity.80

So when considering the overall contemporary challenge to the monopoly of the state sovereigntist template we must look to both flanks – to pressures from the sub-state interior as well as from the transnational beyond. And the two dynamics feed off one another. Claims to sub-state national recognition or protection are sponsored through transnational or global mechanisms for the promotion of individual or collective rights, while supranational institutions such as the EU provide a scale of policy and economic support that makes the ambition of greater regional autonomy within existing states more viable. By the same token, just because existing states have gradually ceded authority and capacity upwards to other territorial or functional institutions, they may become less attractive magnets for sub-state nations and less well equipped to maintain their sovereign integrity.81

Taken together, these shifts, which we discuss in greater detail below, do more than simply challenge the position of individual state sovereigns, or the centrality of the conventional constitutional method through which they act. If the high modern world ushered in by the new constitutionalized sovereignty emphasised universality of form, comprehensiveness of authority, and mutual exclusivity of claims, the late modern world of today disturbs that systemic logic. While the state remains the focus of political organisation,

80 See e.g. KEATING, supra note 29.
81 See e.g. STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM (2005) ch.4.
it is now merely first amongst equals. In place of a universal and uniform template of sovereign statehood we have a highly differentiated mosaic of legal and political capacities. Instead of internal sovereignty as comprehensive, final authority is sometimes partial – distributed between various political sites and levels, states and otherwise. And rather than mutual exclusivity as the default condition of external sovereignty, we have an increasing incidence of overlap, interlock and mutual interference.

4. The Surplus

(a) The Five ‘R’s

Let us, then, introduce five forms of sovereignty reframing, and five contemporary manifestation of the sovereignty surplus, that emerge from these tendencies and tensions. First, the Recomposition of sovereignty refers to a trend in the constitutional treatment of contemporary sovereignty towards resolving a fundamental internal tension between the historical pedigree and contemporary endorsement dimensions of collective self-creation in favour of contemporary endorsement. Second, the Raising and relocation of sovereignty refers to the making of new claims or the resurrection of old claims from below by those who dispute the exclusive and monopolistic pattern of state-based sovereign authority. Third, the Rationing of sovereignty refers to institutional effort across and above states to split and contain the sovereignty atom. Sovereignty from this perspective is understood as something to be shared out in moderation amongst entities that are still final and supreme but no longer

82 For an earlier and much briefer attempt to examine the contemporary reframing of sovereignty, and using a rather different taxonomical scheme, see Neil Walker, *When Sovereigns Stir*, 31, 49-63 SOVEREIGNTY IN ACTION (Bas Leijssenaar & Neil Walker eds., 2019)
comprehensively empowered and mutually exclusive. The fourth and fifth movements can in significant measure be seen as responses to the challenges associated with reassembling, raising and rationing. The Reinforcement of sovereignty speaks to the ways in which constitutional techniques are deployed in the staking and maintaining of boundaries deemed necessary to ensure the continuing basic integrity of the state sovereign unit against encroachments from above and below. Finally, the Reduction of sovereignty refer to the impulse to reduce sovereignty to a pure or more intense form.

(b) Recomposition

To recompose means to form something again or in a different way. Both aspects, iteration and variation, are relevant to the reasons why and to the ways in which sovereignty has come to be more closely linked to current manifestations of the collective will. To locate these reasons, we must delve deeper into a basic tension at the heart of popular sovereignty. 83

The pursuit of the ideal of collective self-creation does not depend not upon the refinement of one single value of self-determination, but upon the joining and reconciliation of two quite distinct principles of political morality; namely ‘popular authorship’ and ‘present consent’. The People must be the source of the overall framework of self-rule, but, beyond the act of original popular self-authorization, or what is represented as such, later iterations and variations of the People deserve an equivalent say over the terms of their self-government. The danger, from the perspective of the ideal of collective self-creation, lies in either principle being given too much weight at the expense of the other. To focus too much on the first settlement, as Originalists are inclined to do, is to sacrifice the will and interests of subsequent generations to the dead hand of history. But to focus too much on a moving target of popular

endorsement, as Living Constitutionalists tend to do, ignores or dilutes the special significance of the founding moment as the point at which the identity of the polity qua constitutional polity was settled, and without which the very idea of a particular People engaged in an ongoing process of self-rule could not have got going in the first place.\textsuperscript{84}

Typically, constitutional amendment rules seek to find a way of respecting these competing imperatives, but the solution struck does not reflect any kind of optimal balancing. There is no supra-contextual working out of an ideal formula for continuous self-rule. Rather, as the wide variety of actual mechanisms and practices of constitutional amendment across different constitutional regimes worldwide makes clear,\textsuperscript{85} each solution is the product of its own highly particular circumstances, shaped by actors who are far from disinterested participants. In the first place, by dint of the very text-centred logic of constitutional rulership those positioned to strike the formal textual balance between popular authorship and the consent of later generations, can only be the original popular authors themselves. There is, therefore, always an in-built structural bias in favour of the original settlement, and of the terms on which it happened to be struck. Secondly, over time the actual practice and prospects of constitutional amendment will be affected by a range of other considerations. These include contingent and changeable features of the political settlement like the size and diversity of the polity, as such factors can influence the range and strength of amendment veto points. They also include the evolving practical attitudes and agendas of later generation actors with their own stake and role in the constitutional present and future – especially the judiciary,\textsuperscript{86} with

\textsuperscript{84} Grewal and Purdy, supra note 66, 691-696.
\textsuperscript{85} See e.g. RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS; MAKING, BREAKING AND CHANGING CONSTITUTIONS (2019).
\textsuperscript{86} But also, to a lesser extent, members of other branches of government -who may, of course, be involved in the selection, jurisdiction and tenure of the judiciary. Such involvement can have abusive consequences. For example, recent attempts to circumvent established constitutional doctrine or practice by populist governments, from Donald Trump in the USA to Viktor Orban in Hungary and, most egregiously, the Law and Justice Party in Poland, have involved openly partisan approaches to the appointment and tenure of constitutional judges or to the restructuring of high appellate courts. See e.g. WOJCIECH SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN (2019). See further, infra Section 4(f).
regard to both the degree and direction of latitude in the interpretation of the unamended constitutional text and the precise meaning and extent of the amendment clause itself.

Eloquently expressed through the unending debate over the adequacy of the Article V amendment clause of the US Constitution – which has delivered only 27 reforms in 240 years – in finding its own point of accommodation of original authorship and popular consent, what is common to all particular constitutional amendment rules and practices, including that of the world’s most enduring constitutional settlement, is the recurrent attraction of controversy. Ever since the American initiative, and today spread across the global range of constitutional polities, we see the emergence and pursuit of lines of disagreement between those endorsing differently nuanced conceptions of the optimally balanced meaning of popular sovereignty over time, and between those possessing different interests in the terms and unfolding outcomes of the constitutional settlement; and also, whatever their underlying motives, amongst those who have greater or lesser capacity to exert real influence over the evolving meaning of that constitutional settlement.87

Behind this wide-ranging empirical variation, and the different preferences it reflects, lies a deeper conceptual puzzle – one that is alive in the contemporary constitutional imagination. For the relationship between popular authorship and present consent, and the difficulty of arriving at any kind of shared understanding of how they should be reconciled, is confounded by the way in which the meaning of the key terms is affected by how they are viewed along the abstract/concrete spectrum. It may be a central achievement of the modern constitutionalized conception to establish a view of popular sovereignty as an abstract unity, but this does not rule out the promotion of more concretized understandings of the People, or somehow render these redundant. Rather, that central achievement goes hand in hand with, and in some ways encourages a proliferation of such understandings, and in doing can deepen

87 See e.g. Grewel and Purdy, supra note 66, 683-705.
rather than overcome contestation along the popular authorship/present consent faultline.

To appreciate this, we should note that in the very process of revolutionary founding the early constitutions of the age of political modernity tended to trade on a basic ambiguity in the idea of the People. On the one hand, the abstract and amorphous idea of the ‘people-as-a-whole’ could now be invoked as the author or narrators\(^\text{88}\) of the constitutional text, and through that \textit{fictio iuris}, they were formally canonized as the perpetual bearer of sovereignty. Yet, on the other hand, the actual transformative impetus behind many new constitutions, and behind the elevation of the People as sovereignty’s master abstraction, came from particular political movements that called upon – and in different ways and degrees also involved - the People as a concrete sociological category. Here we are concerned instead with the ‘people-as-a-part’, whether the entire current \textit{populus} of the polity, or, more typically in a revolutionary context fed by the desire to overturn the privileges and hierarchy of the \textit{ancien regime}, some sub-class of the many - the people as \textit{plebs} or commoners.\(^\text{89}\) In either case, an act of ‘representation’ is still taking place,\(^\text{90}\) but whereas in the case of the ‘people-as-a-whole’ what is being represented by the constitution makers and the active political movement in support of them is itself a noumenal category, with regard to the ‘people-as-a-part’ what is being represented by the active constitutional players is an empirically accessible class or grouping.

In the actual history of constitutional development these different senses of the represented People can become confused and contested. That is why Originalists continue to insist on the importance of the precise historical context of the constitutional initiative and of


\(^{89}\) See Patricia Mindus, \textit{On Population Design: Using Law to dismantle constitutional democratic institutions} (unpublished paper); see also Nadia Urbinati, \textit{Antiestablishment and the substitution of the whole with one of its parts}, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM, 77 (Carlo de la Torre ed. , 2019)

the immediate intent and purposes of the framers, or at least on what reasonable persons living at the time of its adoption would have understood by the ordinary meaning of the framers’ text.91 Here, then, there is a tendency towards the ‘synecdochal appropriation of the whole by the part’.92 The ‘people-as-a-whole’ understood as the popular sovereign over time continue in perpetuity to be treated as coincidental with the actual People of the revolutionary moment. Importantly, this idea also recalls and fits with the theme, inherited from pre-modern and early modern understandings of authority as a concrete personal prerogative, of sovereignty as a fixed framework of command.93 Against this, those Living Constitutionalists who would understand the original document as a ‘founding’ rather than a ‘foundation’94 - as the catalyst and ‘promissory vision’95 of political community rather than its fixed template, will view the same abstract unity of the people-as-a-whole as a means to develop a more reflexive sense of the collective sovereign subject. The sense of abstract unity is here deployed to allow the People to generate and sustain a protean corporate identity over time. They are able, through amendment mechanisms, the indirect agency of judicial interpretation, and other constitutional ‘moments’96 of renewal, to adjust their political world-view to new circumstances, but always aware of the need to understand and justify this as continuous rather than discontinuous - as the adaptation of an existing vision rather than a new beginning.

Yet this fuller commitment to the abstract unity of the popular sovereign cannot and does not, in practice, lead to the eradication of concretized claims to sovereignty, To the contrary, the deployment of the abstract category of the People as a flexible signifier allows, indeed invites and enables, an indefinite sequence of re-concretizations. The distinction

91 A difference that maps onto the distinction between ‘original intent’ and ‘original meaning’ theories in the United State context. See e.g. Steven Hayward, Two Kinds of Originalism, NATIONAL AFFAIRS (Winter 2017)
92 Mindus, supra note 89.
93 Kalyvas, supra note 2.
94 See ANGELA MARIA BERNAL, BEYOND ORIGINS; RETHINKING FOUNDATIONS IN A TIME OF CONSTITUTIONAL DEMOCRACY (2017).
95 Ibid 33.
between Originalists and Living Constitutionalists, therefore, as well as supplying a philosophically significant opposition, is here rendered practically consequential as a contest over fixed versus fluid substantiations of the idea of popular sovereignty - and so as a debate about the terms on which the specific recomposition of ultimate authority in a political community may be possible.

With this background in mind, we can begin to account for an increased contemporary preoccupation with the ways in which and the extent to which popular sovereignty should be subject to recomposition over time. In the first place, in recent decades the pull of events has simply become less towards foundations. With the exception of the United Kingdom, New Zealand and Israel, all states in the world today have concluded at least one formal constitution. The salient contemporary questions for such mature constitutional orders are more likely to be about constitutional renewal rather than its inauguration, whether that renewal take the form of the reshaping and reassertion of popular sovereignty, or its introduction, or reintroduction following an authoritarian regime, or following war or the dissolution of empire. In addition, the default image of modern constitutionalized sovereignty has gradually changed. Over time, and with the emergence of a range of prominent cases displaying rather different conditions of origin, the influence of the early revolutionary cases of the United States and France, and of the revolutionary paradigm more generally, with its emphasis on the significance of the original context and the intentions of the founders, has waned somewhat. Originalism undoubtedly remains important as a political ideology and as a method of constitutional interpretation in many jurisdictions, but as modern constitutionalism moves further away from the time and circumstances of its birth there is less concern with the youthful promise of popular sovereignty than with its resilient adaptability.

More broadly, the recomposition of sovereignty responds to secular trends in global attitudes to democratic self-government. In the post-Second World War years, there have been
repeated waves and troughs of democratic initiative and consolidation.\textsuperscript{97} Yet despite many constitutions continuing to be framed in ways that owe little to democratic influence,\textsuperscript{98} a key overall tendency has been towards democracy as a ‘universal commitment’,\textsuperscript{99} and so as the normal template of government. The seeds of this were planted much earlier, however, in the very emergence of modern sovereignty, with its growing humanist emphasis upon the value of individual and collective agency. The proto-democratic impulse in the original endorsement of constitutionalism as an act of collective self-authorship, as expressed in the work of Hobbes and Rousseau, was the precursor of a more general attachment to democratic method in matters of governance. For once the constituent power came to be recognized as the moral prerogative and legal title of the people-as-a-whole, then both the philosophical justification, and, unevenly over time, the practical means for the democratization of the everyday ‘constituted’ powers of government would become more strongly established. And of more immediate relevance to the question of sovereignty, increased commitment to the ethos and methods of democracy would make it harder to justify the argument that the meta-democratic exercise of constituent power itself should be a one-off rather than the equal prerogative of successive generations.

Alongside that trend towards refoundings, and indeed as one of its particular manifestations, the sustaining of political society is today more than ever concerned with the articulation, negotiation and reconciliation of distinctions in self-understanding and worldview between different historically self-identifying groups who exist in physical and practical

\textsuperscript{97} See e.g. Seva Gunitsky, \textit{Democratic waves in historical perspective}, 6 PERSPECTIVES ON POLITICS 634 (2018).

\textsuperscript{98} See e.g. TOM GINSBURG (ED), CONSTITUTIONS IN AUTHORITARIAN REGIMES (2013).

\textsuperscript{99} A. Sen, \textit{Democracy as a Universal Value}, 10 JOURNAL OF DEMOCRACY 3-17 (1999). In 1941 only 13 countries could meet the most basic criteria of democratic self-government, but by the end of the century, when Sen wrote, as many as 119 out of 192 countries could be described as electoral democracies; see Freedom House Report, \textit{Democracy’s Century: A Survey of Global Political Change in the 20th Century} (1999); It is a figure that has stayed fairly constant, but with a recent downward trend; see Freedom House, \textit{Freedom in the World, 2019, Democracy in Retreat} (2019) available at: https://freedomhouse.org/report/freedom-world/2019/democracy-retreat
proximity, and who may have different corporate senses of what their freedom and equality requires. For if the deepening sense of entitlement to the prerogative of democratic self-forming entails that it not be limited to a particular elevated point in history, equally it dictates that it not be limited to the iterative pronouncements of the linear descendants of the political community that came to the fore at that supposedly elevated point in history.

It is these tendencies towards generational renewal and the greater accommodation of variation that have fed concerns over the appropriateness of both the classical means of founding and formulating constitutional authorship and the ways of establishing and maintaining continuing consent, and also over how to accommodate the resilient tension between these values. And it is in response to these concerns that we can see the development of new methods of constitutional initiative and reform that involve some measure of recomposition of sovereignty. At the point of constitutional initiative, a key and closely studied development has been the emergence and growing significance over the past half century of so-called ‘pacted transitions.’ The trend here has been explicitly characterized as one of movement beyond ‘the old antinomy of reform and revolution’ and the devices normally associated with these.

Historically, where a revolutionary rupture in both the legitimacy and the legality of the polity has taken place in the modern age, the Constituent Assembly has typically been favoured, as, for example, in the French Revolutionary period of 1789-95, the Weimar Constitution of 1919, or the Indian Independence Constitution of 1948-50. Where, instead, the general legitimacy of a system of government continues, but there is a rupture in constitutional legality, the self-standing Constitutional Convention has instead been the preferred tool of

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100 See e.g. Simone Chambers, *Democracy, Popular Sovereignty and Democratic Legitimacy*, Constellations 153 (2004).
initiative, as, for example, with the American federal Convention of 1787, the Argentinian Constitution of 1949 or the Russian Constitution of 1993. Under the pacted transition, by contrast with both of these types, the emphasis is upon the establishment of new grounds of legitimacy within a framework of legal continuity. The focal case is one of the recomposition of a corporate sense of peoplehood from varied sources, and often, too, a highly conflicted pre-history marked by the imposition and breakdown of authoritarian rule. Constitution-making in this context no longer presupposes a monolithic people in the fashioning of a new basis of legitimacy. Rather it acknowledges the plurality and diversity of the constituencies – the variety of ‘people-as-parts’ - from which a new or renewed constitutional demos will be constructed.

While there is no single procedural pathway along which pacted transitions travel, we can identify a range of mechanisms that tend to be present. Round table type negotiations between representatives of different constituencies provide a frequent starting point in lieu of the unitarian decision-making structure of the Constituent Assembly or Convention. The development of an interim constitutional settlement by the valedictory Parliament of the existing regime may follow, guided by the round table conclusions. Next in sequence may be free PR-based elections for a new Assembly, which then seeks to develop a final constitutional settlement – whose conformity with the diversity-respecting guiding principles of the interim constitution may be subject to judicial scrutiny and ratification. Post-apartheid South Africa is perhaps the best-known example of the successful achievement of this type of constitutional transition, and post-Franco Spain displays similar attributes. Other recent examples, exhibiting highly variant degrees of success, include Poland, Bulgaria, Czechoslovakia, Hungary, Iraq and Nepal. What these cases have in common, more generally, are an emphasis upon legal

103 Ibid 110
104 Ibid chs 2-3. Arato speaks of the ‘round table paradigm’ rather than ‘pacted transitions’, but the phenomenon he identifies, and of which he offers a useful elaboration, is essentially the same. See esp. at 95
continuity, publicity of proceedings, electoral accountability, the negotiation of a pluralist consensus, and a commitment to constitutional leaning made manifest both in the passage from interim to full constitution and in a preparedness to learn from the experience of similar processes worldwide.105

Indeed, this is one of the areas, for all its emphasis on respect for the diversity of constituent groups, in which the universalist tendency in modern constitution-making106 has come to the fore. The idea that a constitutionalized sovereignty should be the entitlement of all free and equal persons provides a moral foundation, or at least a rhetorical cover, for the emergence of a transnational network of consultants and NGOs that seek to draw on a developing constitutional technology of ‘best practice’ to advise on constitution-making around the world. The interruption and transition of authority that marks the round table type provides a particularly fertile context for international intervention. Indeed, in some cases, the basis of such intervention is one of formal authority rather than expertise, with institutions such as the United Nations and NATO playing a direct role in constitution-making, as in the cases of Kosovo and Bosnia-Herzegovina.107

Just as there is a stress on continuity and accommodation of existing diversity even at the initiative stage, many renewed constitutional arrangements of recent years, in pacted transitions but also more generally, incorporate or come to endorse highly inclusive, public and deliberative procedures for constitutional amendment. Examples range from National Forums and wider digital methods of crowdsourcing108 to deliberative forms of referenda.109 And

105 Ibid esp. 100-108.
106 See supra Section 3 (b).
107 See e.g. Hannah Lerner and David Landau, Introduction to Comparative Constitution Making, in COMPARATIVE CONSTITUTION MAKING 1 (David Landua and Hannah Lerner eds., 2019)
108 See e.g. Silvia Suteu, Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland, 38 BOSTON COLLEGE INTL & COMP. L. REV. 251 (2015).
109 See e.g. STEPHEN TIERNEY CONSTITUTIONAL REFERENDUMS; THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION (2012).
whereas new beginnings are increasingly framed in a relatively non-discontinuous way, it appears that subsequent constitutional reforms are increasingly treated as self-standing events and processes that are held to a high independent standard of legitimacy.\textsuperscript{110} The very distinction between original and ongoing consent, therefore, and so between constituent and constituted power, becomes blurred because of convergent movement from both ends. Initiative is approached \textit{less} as an \textit{ex nihilo} event, while renewal or amendment is treated rather \textit{more} like a founding moment in its own right, with the judiciary often involved to monitor whether the procedural means are adequate to the substance of the change proposed. And so, the old tension between foundational authority and continuing consent, while still present, is increasingly accommodated or monitored by a suite of mechanisms that does not assume they are of radically different import and demand radically different standards of legality and legitimacy.

One of the leading chroniclers of these new methods of constitutional recomposition has explicitly labelled them as ‘post sovereign’ types of initiative.\textsuperscript{111} The stress upon the diversity of the parties to renewed constitutional agreement and upon a surface form of legal continuity stretching back to an increasingly remote original authority feeds the suggestion that this type of activity has somehow escaped the frame of unitary sovereignty. Yet such language overstates what is involved. In terms of a sovereigntist framing, the new forms of composition are better seen as \textit{pre-sovereign}. They are part of an exercise of constitutional construction not intended to move beyond the idea of sovereign authority, but rather to allow the concrete sociological instantiation of that sovereign authority be fashioned or refashioned from more plural and inclusive materials; and through that innovation to add surplus value to sovereignty rather than to detract or divert from it. If these moves are successful, they lead to the

\textsuperscript{110} For new theoretical approaches that challenge the binary distinction between reconstitution and reform, and suggest techniques for recognising and dealing with intermediate cases, see YANIV ROZNAI UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (2017); and RICHARD ALBERT CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING AND CHANGING CONSTITUTIONS (2019)

\textsuperscript{111} Arato, \textit{supra} note 102.
articulation of a new sovereign authority. If unsuccessful, there will be reversion to an old form of sovereign authority, or to a power vacuum which different potential sovereigns will continue to vie to fill. Whichever way, sovereignty, whether present or temporarily absent, remains the dominant frame.

(c) Raising

The trend towards the affirmation of a wider range of political identities is also at the heart of the raising of new sovereign claims below the state. Constitutional engineering has become increasingly adept at developing markers of group recognition within the existing state sovereign framework. These markers include language and other group-based rights, such as education and cultural preservation, sometimes organized around ‘personal’ jurisdiction (e.g., Belgium’s Communities and Language Areas, as distinct from its territorial regions). They also include forms of symbolic acknowledgment, such as the recognition of Catalonia and other historical territories as distinct ‘nationalities’ in the Spanish Constitution. The most common, and most far-reaching form of recognition, however, concerns voice and participation. This includes forms of distinct representation within central institutions, such as weighted representation in federal second chambers, and rights of representation and veto in consociational governing arrangements, as well as the institutions of regional self-government we noted in our earlier discussion of the development of federal and quasi-federal states. Yet the rolling out of these various forms of recognition is far from a universal trend. In some cases the dominance of an integrationist or even an assimilationist approach within domestic

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113 See e.g. John McQuarrie, Brendan O’Leary and Richard Simeon, Integration or Accommodation? The Enduring Debate in Conflict Regulation in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 41 (Sujit Choudhry ed. 2008).
constitutional culture curtails accommodation.\footnote{And as we shall see, the reassertion of a more monocultural approach can sometimes be a conscious reaction against pluralist tendencies; see section 4(f) below.} And even where measures of accommodation are in place, this may not satisfy the constitutional aspirations of those whose collective identities do not map easily onto the prevailing settlement of sovereign constitutional space. It is in these circumstances that we encounter the stirrings of new claims and movements of sovereignty from below.

That the world has evolved from the extended sovereignty of a handful of largely European powers prior to World War I to almost 200 independent sovereign states today would suggest that these movements have yielded much success. Yet the manner in which this has taken place tends, as in the case of the recomposition of sovereignty, to confirm and extend rather than to question the influence of the sovereign frame. Most obviously, this is because these new sub-state entities often seek to join the sovereign club, rather than to question the conditions of membership, still less its value. But there are two other sets of contributory factors, each of which repays close consideration. First, even the conservative ambition to join is subject to systemic checks and constraints that defend the privileges of existing sovereign members. And secondly, there are other institutional developments in this area that have a double-edged significance. The support they offer to sub-state entities in some respects encourage thinking outside the frame of sovereignty. Yet the circumstances surrounding this are such that support also tends to be met, and in some measure frustrated, by the reassertion of a sovereigntist logic.

As regards the first point, we should note the role of two threshold legal concepts, self-determination in international law and secession in constitutional law, in policing the boundaries of membership of the sovereignty club.\footnote{See Neil Walker Beyond Secession? Law In The Framing Of The National Polity in NATIONALISM AND GLOBALIZATION 155 (Stephen Tierney ed., 2015)} Take, first, the concept of self-determination. Originating in its modern form in Woodrow Wilson's Fourteen Points, outlined
in 1918 as the basis for international peace, it did not assume the status of a foundational entitlement of Peoples until a number of seminal post-Second World War instruments. Introduced in Art.(1(2) of the UN Charter, it was elevated from principle to right in the common Art.1(1) of the two global human rights treaties adopted by the UN in 1966, and, in the colonial context, in the General Assembly's Resolution 1541(XV) of 1960 and in its later Declaration on Friendly Relations of 1970. In these and subsequent texts, and also in the jurisprudence of the International Court of Justice, there is clear recognition that self-determination is a cornerstone of the international legal system, allowing us to identify as the only legitimate subjects of international law those collective state actors to whom sovereignty is attributable and whose territorial integrity is to be respected.

Yet there is also recognition of significant substantive limits to that right. The present position tends to reflect an underlying Remedial Right or Just Cause theory. According to that approach, the litmus test is whether some basic injustice stands present and uncorrected, such as a historically unconsented annexation, a continuing lack of protection of the basic rights and security or economic interests of a region, a pattern of systematic group discrimination, or a breach of an existing agreement of autonomous self-government or of the protection of distinct collective rights. Except in such an extreme case, in this dominant view, self-determination does not imply an 'external' right to sovereign statehood, and so to secession from an existing state, but only an entitlement to 'internal self-determination', and the lesser forms of recognition of autonomy within an existing sovereign state form that this implies.

One notable result of this is that it severely limits how self-determination might be achieved.

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116 See e.g. Kosovo Advisory Opinion, 2010: ICJ 141
117 See e.g. ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION (2004); see also WAYNE NORMAN NEGOTIATING NATIONALISM; NATION BUILDING, FEDERALISM AND SECESSION IN THE MULTINATIONAL STATE (2006).
118 See e.g. Susanna Mancini, Secession and Self-Determination, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 481, 483-7 (Michel Rosenfeld and Andreas Sajo eds., 2012); Allen Buchanan, Theories of Secession 27 PHILOSOPHY AND PUBLIC AFFAIRS 31 (1998).
intervene as a form of positive law. It underscores the sense of the self-determination principle as located at the threshold of legal order, functioning largely as a presupposition or confirmation which grounds a system of positive law and helps frame and shape the international system of state sovereignty rather than as itself an actively posited norm capable of consequential intervention in a live legal question. That is to say, its invocation in any particular instance has tended to operate as a signal that it is sovereign status already achieved or (in the colonial context) generally recognised as legitimate, rather than as providing a weighty argument for the realisation of a new status in a contentious case. The work that the concept does within legal discourse, therefore, is often rhetorical rather than instrumental, confirmatory rather than constitutive, declarative rather than argumentative; more a means of proclaiming and preserving the *status quo ante* than of exploring an extended conception of sovereign peoplehood.

Competing philosophies, however, bubble under the doctrinal surface, and today the political morality of such a restrictive approach to international law in a postcolonial and democracy-asserting age is challenged in some quarters by a more generous Primary Right or Choice theory. According to this, any community viewing itself as a distinct national community, and which has a special association with a particular territory, possesses a legitimate claim to sovereign self-determination regardless of whether there is a record of historical injustice. And there is some evidence of a creeping acknowledgment of that alternative position in the relevant jurisprudence. Drawing upon the landmark decision of the Canadian Constitutional Court in *Reference re Secession of Quebec* concerning the duty to

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120 [1998] 2 SCR 217
negotiate in good faith in the event of an unambiguous statement by Quebec of a wish to secede, as well as the recent jurisprudence of the ICJ and the work of the Badinter Commission in helping the European Union formulate its policies towards the dissolution of Yugoslavia, some jurists have begun to reformulate the right to self-determination as something like 'a right to be taken seriously.'

Under that putative right, even though there continues to be no automatic entitlement absent a standing injustice as the Primary Right thesis would insist, the articulation of a desire for independence on the part of a sub-state national group, ideally through the mechanism of referendum, should at least suffice to trigger a requirement on the part of the existing state to negotiate in good faith with the sub-state nation over their aspiration for independence.

But while undoubtedly a trend that has attracted much attention amongst supporters of sub-state autonomy, this does little to overcome the basic structural limitation of self-determination as a legal concept parasitic upon the existing distribution of sovereign power. A right to be taken seriously is, of course, no guarantee that one’s preferred outcome will be forthcoming, but that is the basic restriction of any procedural right. More significantly, given that the procedural context within which a claim to be taken seriously might be made tends, with few exceptions, to remain within the gift of the very actors whose co-operation and procedural engagement is sought, then it risks precisely the same redundancy as the substantive version of the right to secession. The danger is that the right to be taken seriously will only ever be articulated and respected as a right in contexts where the significant actors (in most cases exclusively local actors with a direct stake) are already predisposed to 'take seriously'

121 See in particular, Jan Klabbers, The Right to be Taken Seriously: Self-Determination in International Law, (2006) 28 HUMAN RIGHTS QUARTERLY 186 (2006); see also Christine Bell, What we talk about when we talk about international constitutional law, 5 TRANSNATIONAL LEGAL THEORY 241 (2014).

122 But not always. In Kosovo, for instance, the close attention of the international community and the presence of UNMIK in support of Kosovan autonomy seemed to influence the ICJ to 'take more seriously’ the claim of Kosovo to independence. Kosovo Advisory Opinion, 2010: ICJ 141
- so to speak - such a procedural imperative, so rather limiting its credentials as a generalisable legal entitlement.

If we turn to secession and to its standing in constitutional law, a similar scenario presents itself. Many new states have emerged and continue to emerge from a more or less peaceful or consensual act or process of secession, including, of course, the first modern constitutional state - the United States itself. So secession, too, stands at the threshold of legality, a framing self-assertion that answers one of 'the most fundamental' of constitutional questions. Yet, like self-determination, it carries two opposing implications. It is simultaneously 'the most revolutionary and the most institutionally conservative of political constructs.' As the United States' own history testifies, the ‘right’ to secession is the ladder that a new state may pull up behind it. It may be assumed as the deep background premise of one’s own established constitutional order but be denied to others within the terms of that established constitutional order - thereby placing their claims outside the boundary of any recognised legality. To allow otherwise risks destabilizing the existing state. It also challenges the dominant conception of modern constituent authority as inherent in the ‘people-as-a-whole’, a status vindicated only after the successful fact, rather than remaining latent in various sub-state population.

It is for these reasons that few contemporary state constitutions make explicit provision for secession - only Ethiopia, St Kitts and Nevis, and Liechtenstein - or even indirectly countenance its prospect - only Austria and Singapore. And in all these cases the procedural

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124 Mancini, supra note 118, 481.
125 Texas v White 74 US 700 (1869)
126 Although there have also been some prominent cases in the past. For example, in its 1924, 1936 and 1977 Constitutions, the USSR recognised the right of each of its constituent republics to secede.
route to legitimate secession is formidable. A far greater number of state constitutions adopt
the opposite posture, enshrining ideas, such as state 'indivisibility', 'national unity' and
'territorial integrity', that are more or less emphatically inconsistent with the idea of
secession.\textsuperscript{127} And while both open-ended constitutional amendment procedures,\textsuperscript{128} (or in the
special case of the UK, the absence of \textit{any} formal standard of and constraint upon constitutional
amendment) and the creative interpretive work of constitutional courts\textsuperscript{129} can allow
contemplation of secession where the constitutional text is silent, the possibilities offered here
have mostly remained moot. In practice, with very few exceptions,\textsuperscript{130} where secession does
take place, therefore, it follows an extra-constitutional route, consensual or otherwise. Either it
is a 'voluntary disassociation', as in Bangladesh, Eritrea or Czechoslovakia, where the very fact
that all internal parties, with or without a period of prior conflict, come to agree to separation,
renders the constitutional settlement of the previously unseparated state redundant; or it
involves a non-consensual 'dissolution', as in the case of the former Yugoslavia, where the
strength of disagreement, and its violent expression, reflects and reinforces the failed authority
of the previous constitutional settlement. And so, like the right to self-determination, the right
to secede has a conservatively circular quality, reliant upon the terms of the very constitutional
system from which secession is sought, and so on the very distribution of sovereignty it seeks
to question.

\textsuperscript{127} See e.g. Peter Radan, \textit{Secession in Constitutional Law}, in THE ASHGATE RESEARCH COMPANION TO
SECESSION 333 (Aleksander Pawkovic and Peter Radan eds., 2011)
\textsuperscript{128} The relationship between open-ended constitutional amendment procedures on the one hand and eternity
clauses and other strongly entrenching terms within the same constitutional text on the other, is complex. On the
increased attention of constitutional courts worldwide, in light of this complexity, to the possibility of
'unconstitutional constitutional amendments', see Yaniv Roznai, \textit{supra} note 110.
\textsuperscript{129} See in particular  \textit{Reference re Secession of Quebec} [1998] 2 SCR 217
\textsuperscript{130} Many secessions from the Soviet Union, beginning with the Baltic States, did follow a constitutional path
under the extant Soviet Constitution of 1977. However, as the process gathered pace it assumed more of the
character of an extra-constitutional 'voluntary disassociation'. On matters of categorisation, see Mancini, \textit{supra}
note 118.
Looking beyond these basic doctrines of international and constitutional law and their limited support for the raising of sovereignty claims from below, we should remind ourselves that sub-state entities are offered more substantial nourishment by some of the more specific top-down developments in the global configuration of authority. They gain legal, political and economic support and encouragement from planetary and regional institutions seeking to uphold universal standards of rights protection or to promote locally realizable aspect of global public goods in matters as diverse as language promotion and environmental protection. By acting as checks on state sovereigns and by providing a more favourable context for the pursuit of sub-state rights, an ever-denser framework of global and regional governance can help nurture the ambitions of sub-state national movements to be something more than the contained part of an established sovereign whole.

In the case of the European Union, as the most fully developed supranational polity, the support offered to sub-state national movements is arguably most pronounced. Yet the EU is also the leading example of an institutional arrangement with a double-edged significance for a more localized sovereignty. As discussed in broader terms below, the EU can be persuasively understood as an explicit experiment in the rationing of the sovereignty of its member states. What this means in the particular case of sub-state entities is the carving out of a measure of autonomous space and influence for the sub-state level in which we see the rudiments of a new ‘3D’ quasi-federal arrangement – supranational, state and sub-state.\textsuperscript{131} If federalism is viewed broadly, as ‘that genus of political organization that is marked by the combination of shared rule and self-rule’\textsuperscript{132} of which the statist version is only one- and not the


historical original – species, then multi-level EU can be seen as offering a counterpoint from below to the monopolistic tendencies of state sovereignty.

In part, this is a matter of material benefits and opportunities. A Committee of the Regions exists as a consultative body to the other institutions. Its somewhat marginal early role was improved under the Lisbon Treaty of 2009, which requires it to be consulted on matters concerning local or regional government, and which also allows the Committee to challenge EU laws that may fall foul of the principle of subsidiarity. Parts of states also benefit from their legal recognition as regions through access to European structural funds administered through their member states, and through rights-based and anti-discrimination measures that guarantee linguistic and cultural protection for minority groups. More generally, the economic and political structure of a supranational union can provide avenues of opportunity to regions not available within the solitary state. Regions now have free access to a community-wide market of 500 million people, and these open frontiers can help promote joint economic activity and encourage cultural connections and a network of ‘paradiplomacy’ between localities. Alongside these various forms of institutional, regulatory and economic encouragement, moreover, and just as important as these, the EU’s very existence and self-presentation as a novel form of non-sovereign-state polity may be seen as giving ideological support to a new type of post-national politics in which sub-state entities need not be limited to a sovereign-subordinate role.

133 See Francisco Aldecon & Michael Keating (eds) PARADIPLOMACY IN ACTION: THE FOREIGN RELATIONS OF SUBNATIONAL GOVERNMENTS (1999)

134 These factors have also stimulated new political ties in the vertical structures of European governance, particularly through the European Free Alliance (of nationalist, regionalist and autonomist parties) in the European Parliament and the establishment of the informal Conference of European Regions with Legislative Power.
It is at least in some measure in response to the EU’s unsettling of the systemic logic of state-centred sovereignty that there has been a significant recent shift in the domestic sub-state politics of the EU member states from ‘teleological nationalism’ – the conventional, traditionally sovereigntist form of sub-state nationalism – to ‘reflexive nationalism’.135 This reflexive orientation, which involves a less linear and often less resolute pattern of movement towards full sovereign consciousness, has become prominent in Scotland, Ireland, Catalonia, the Basque Country, Flanders, Brittany and Northern Italy, amongst other venues of sub-state aspiration in Europe, and also beyond.136 Where teleological nationalism typically involves a set menu of goals, the ultimate dish being full sovereignty, reflexive nationalism, by contrast, involves a fluid relationship between a self-defining People and the varied means of projection of its collective voice that are available in a multi-level polity. Here goals are cumulative rather than predetermined, relative rather than absolute. Instead of the pursuit of a predetermined state of affairs by a fixed sociological subject, the project of reflexive nationalism involves a shifting nexus between a putative People whose very membership and territorial extension is revisable and contestable, an adjustable set of political institutions, and a flexible set of objectives. Moreover, the reflexive approach is also sensitive to shifts in the relationship of its national People to other intersubjective constructions of peoplehood - English and British as well as Scottish; Wallonian and Belgian as well as Flemish; Castilian and Spanish as well as Catalan - that attach themselves to overlapping or more widely embracing territorial domains, and also to the political institutions and goals associated with these constructions.

Reflexive nationalism, in consequence, emphasizes process over substance and output. The nationalist project does not, on this view, imply either a duty to pursue or a right to enjoy

135 See further Neil Walker, Teleological and Reflexive Nationalism in the New Europe, in CHANGING BORDERS IN EUROPE ch.10 (Jacint Jordana, Michael Keating, Axel Marx and Jan Wouters eds., 2018).

136 For example, the Canadian case; see e.g., Sujit Choudhry, Secession and post-sovereign constitution-making after 1989: Catalonia, Kosovo, and Quebec, 17 INT’L J. Const. L. 461 (2019)
any particular outcome. Rather, it involves an entitlement to recognition and consideration of the nationalist claim as a resilient feature of the political landscape and, provided certain conditions of popular support and of respect for other identities are met, as something whose avenue of pursuit should be given procedural form. Crucially, therefore, reflexive nationalism claims a standing ‘right to decide’ – a *sovereignty of choice* rather than teleological nationalism’s one-off *sovereignty of outcome*. In some cases, including the relatively stable democracies of Western Europe, these claims to standing recognition and consideration as a procedural right will have – or at least be asserted by their proponents to have – an internal constitutional pedigree in the host state, however tenuous. Alternatively, in more deeply and resiliently divided societies like Cyprus or Kosovo such claims and their institutional supports may depend entirely on international initiative. Whatever the balance of internal and external support, just as sovereignty-endorsing outcomes favourable to the nationalist cause are not guaranteed, so, too, or at least it is so argued by its proponents, occasional failure or frustration of the nationalist project need not exhaust the underlying standing claim.

As a broad generalization, nationalist parties today are more likely to become relatively stabilized in the EU environment in a way that favours this more reflexive mindset, even as the prospect of a sovereigntist end-game remains remote. As we have seen in the UK, Belgium, and Spain, sub-state movements may become parties of regional government or even coalition

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139 In Cyprus, which joined the EU in 2004, there have been repeated rounds of (so far unsuccessful) talks organised through the offices of the United Nations between the Greek South and the Turkish North since the Turkish occupation in 1974. In Kosovo, the *United Nations Interim Administration Mission in Kosovo* (UNMIK) has been a key player in negotiating the internal and external relations of Kosovo before and after its unilateral declaration of independence from Serbia in 2008. The *European Union Rule of Law Mission in Kosovo* (EULEX) has also been actively involved since 2008 to ensure peace and continued external oversight and to prepare Kosovo for eventual accession to the EU.
national government in the new multi-level configuration, in so doing, seeking to ‘strike a balance between establishing themselves as an effective and competent party of government, whilst at the same time maintaining their commitment to radically overhauling the state’. The EU’s more crowded and complex environment of institutional means and possibilities supplies both constraints and opportunities. Nationalist movements must negotiate more hurdles to achieve higher goals, yet are also able to find more comfortable footholds short of these goals. They tend, therefore, to become focused on achieving a steady platform for the representation of regional interests and enhancement of regional autonomy within a more pragmatic understanding of nationalist aspirations.

Yet support for a distinctively reflexive sovereigntist politics of sub-state nationalism in the European theatre extends only so far. The EU, as we have seen, gives both material and symbolic support to those who would view the political constellation in multi-level and multipolar terms and who seek to protect various projects of collective autonomy and the resilient aspirations associated with these. Yet for both ideological and strategic reasons, the EU cannot be an unequivocal champion of the rights of sub-state nations. Ideologically, while the EU supports a pluralist identity politics, precisely because it can be understood as, and, indeed, projects itself as an experiment in splitting the sovereignty atom and rationing its distribution it is bound to have reservations about any sub-state nationalist project being pursued in explicitly sovereigntist terms – however subtly qualified or deferred.

This point can be put more strongly, and with important institutional implications. Arguably, the aim of the EU should be to render sovereignty struggles between its different internal levels – state and sub-state – quite redundant, dismissed as a gratuitous symbolic

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140 EVE HEPBURN, NEW CHALLENGES FOR STATELESS NATIONALIST AND REGIONALIST PARTIES (2011) 23.
141 See e.g. Anwan Elias, From Euro-enthusiasm to Euro-skepticism? A Re-evaluation of Minority Nationalist Party Attitudes Towards European Integration, 18 REGIONAL AND FEDERAL STUDIES 557 (2008)
indulgence in the face of its new quasi-federal spread and co-ordination of authority, rather than to encourage their fuller articulation. Just as national minorities in existing Member States who presently enjoy extensive forms of individual and collective freedom have no automatic right to secede as a matter of general international law, so, too, the EU in its accession and general membership policy should not be expected to indulge the independence claims of these un-oppressed sub-state nations. To the contrary, the very ethos of integration, reconciliation and continental solidarity that has fed the European project from its post-War beginnings should cause the EU, and those who endorse the best understanding of its foundations, to take a dim view of any separatist, and so necessarily sovereigntist, impulse that seems to betray these founding virtues. From this perspective, therefore, far from having a stronger claim than those external candidates who have benefited from the EU’s extensive post-Cold War Enlargement, as has often been suggested or assumed by supporters of ‘internal enlargement’ over (or at least alongside) external enlargement, those nations already comfortably nested inside the EU’s Western European heartland should be refused a safe supranational haven if they insist on the path to independence.

And strategically, the EU remains, at least in pedigree terms, the creature of its Member States, many of whom are jealous of the sovereigntist claims of their sub-state parts. It is not surprising, therefore, that the EU, despite providing background conditions conducive to the development of sub-state political identities, has been at best neutral and at worst unsupportive in its reaction to concrete manifestations of the sovereign suggestions of reflexive nationalist movements. In the case of the Scottish independence movement, the EU, having borne witness to the unusual flexibility of the unwritten British constitution in allowing a Scottish secession referendum in 2014, remained non-committal on the politically vital question of how

143 See e.g. Walker, supra note 138.
144 See e.g. Carlos Closa, Secession from a Member State and EU Membership; The View from the Union, 12 EUROPEAN CONSTITUTIONAL LAW REVIEW 240 (2016).
easily a sovereign Scotland might re-join the EU.\textsuperscript{145} And as Scottish nationalists, following a ‘no’ vote in the first instance, seek to reassert their ‘sovereign’ right to decide through a second referendum in the face of the changed circumstances brought about by Brexit, the voice of the EU remains muted in its support of the prospect of renewed membership for a sovereign Scotland.\textsuperscript{146} As regards the case of Catalonia,\textsuperscript{147} here the position of the EU is clearer, its implications more profound. Under the terms of its federal constitution the Spanish central government has remained resolutely opposed to the claim of the Catalan people to a right to determine their own sovereign future. And when matters came to a head with the Spanish government’s punitive reaction to a unilateral declaration of independence by the Catalan nationalist government following an unofficial referendum in the autumn of 2017, the EU, while supportive of the continuing political rights of jailed Catalan nationalists in the European Parliament,\textsuperscript{148} has endorsed the default right of the Spanish sovereign to enforce its prior constitutional authority on the referendum question.\textsuperscript{149}

In summary, Europe offers some level of support to the raising of the sovereign banner at the subnational level. And the new politics of reflexive nationalism – including the right to

\textsuperscript{145} See e.g. Walker, \textit{supra} note 115.
\textsuperscript{146} See Antony Salamone, \textit{What would it take for Scotland to rejoin the EU as an independent state? LSE EUROPP BLOG}, (February 3rd, 2020); available at: https://blogs.lse.ac.uk/europpblog/2020/02/05/what-would-it-take-for-scotland-to-rejoin-the-eu-as-an-independent-state/
\textsuperscript{148} See CJEU Judgment of December 2019 in Case C-502/19 Junqueras Vies, where the Court of Justice of the European Union held that Catalan leader Oriol Junqueras, who has been in provisional detention for more than two years, had the right to immunity the moment he was elected as a member of the European Parliament, and that the Spanish authorities had been wrong to deny him the opportunity to take up his seat. In response, however, the Spanish Supreme Court continued to refuse to authorise his temporary release from prison to collect his Parliamentary credentials, see https://www.thelocal.es/20200110/spains-supreme-court-blocks-jailed-catalan-separatists-bid-to-take-seat-as-mep
\textsuperscript{149} See e.g. BBC, October 13 2017; ‘EU Spain: Juncker does not want Catalanian independence’ https://www.bbc.co.uk/news/world-europe-41610863.
decide, or, at least, its close cousin, the right ‘to be taken seriously’ as potential sovereigns also has resonance beyond Europe. Yet the use of a sovereigntist frame to pursue aspirations below the level of the state, even one of the moderated variety associated with reflexive nationalism, also has a downside. It both confines sub-state nationals within a normative framework which, at least in traditional understandings, view the prize in all-or-nothing terms that fail to reflect the more graduated distributions of multi-level governance that the EU has sought to promote. It also provokes - or threatens to provoke - defensive reactions from those state interests who feel their existing sovereign prerogatives to be directly threatened. Once again, as in the case of recomposition, practices that aim to depart from a received understanding of sovereignty can instead create a surplus, leading both to an extension of the sovereigntist frame to new contexts and to its reinforcement in existing contexts.

(d) Rationing

If we approach contemporary global politics from the perspective of regional and planetary institutions, then rather than the surfeit of sovereignty claims – state and sub-state – that we witness from a bottom-up perspective, we may observe instead a movement towards the rationing of sovereignty. Whether it be the United Nations and its various organs concerned with the maintenance of peace and the pursuit of human rights, or the World Trade Organisation in respect of international trade, or the Convention on the Law of the Sea as regards the use of the world’s oceans and the management of marine natural resources, or the jurisdiction of the International Criminal Court over genocide, war crimes and crimes against

150 Klabbers, supra note 121.

151 See e.g., Choudhry, supra note 136.
humanity, or the various regional organisations committed to the creation and regulation of common economic areas, what we discern – at least on first impressions - is a tendency towards the explicit curtailment of the previously comprehensive sovereign authority of the states in the name of a larger collective goal.

The rationing perspective describes a particular stage in legal institutionalization above the state. Gradually emergent from an older conception of the *ius gentium* or the ‘law of nations’ – as a set of maxims and principles that sought grounding in the universal dictates of natural law, the early development of a positive international law in the second half of the 19th century was predominantly ‘transactional’\(^{152}\) in purpose and design. It was mainly\(^{153}\) limited to bilateral agreements between states, now self-conceived as mutually exclusive and self-contained sovereigns. In this perspective international law becomes merely an instrument of the various contracting sovereign powers, a means of protecting or advancing their selfish interests. Gradually, however, the sense of the international as a project of positive law thickens beyond the transactional. International law enters its ‘constitutional’\(^{154}\) phase with the development of first, the League of Nations and then the United Nations as peak institutions interested in the maintenance of global public order, and then, from the second half of the 20th century, a deeper ‘regulatory’ phase in which a growing number of international organisations become involved in a proliferating range of public policy matters.\(^{155}\) In so developing, international law is longer simply the pliable vessel of national interests, although these older deeper layers of its ‘geology’\(^{156}\) remain intact and active.\(^{157}\)


\(^{153}\) But not exclusively; see section 4(e) below

\(^{154}\) See e.g. Weiler, *supra* note 152, 556-9

\(^{155}\) See e.g. Weiler, *supra* note 152, 559-61

\(^{156}\) Weiler, *supra* note 152.

\(^{157}\) For example, today bilateral Treaties remain a significant means of powerful sovereigns asserting their economic and other interests against weaker states; The proliferation of Bilateral Investment Treaties is a vivid
reasserts a standing of its own, an authority rooted in the collective interests of the ‘international community’\textsuperscript{158} or its relevant parts. States are still seen as the ultimate authors of international legislation, but its objectives are no longer entirely reducible to the immediate calculation of the states’ mutual self-interest, although that remains a highly relevant consideration, but are instead also to the level of a commonly avowed good to be pursued and nurtured in an enduring institutional framework.

It is at this point that the idea of rationing gains traction. International agreements and the institutions they give rise to are not just the incidents of the exercise of sovereignty. Rather they enact a planned restrictive redistribution of the scarce resource of sovereignty in order to protect or advance the common state or end valued by the relevant sovereign entities. Sovereign rationing is, then, in the first place, an exercise in restriction, indeed in self-restriction and self-discipline. It stipulates a reduction in the sovereignty of each in the interests of all. The initial net result appears to be one, therefore, of an overall tempering or even depletion of sovereignty. In a landmark case in the early years of European integration, for example, the European Court of Justice famously talked of the ‘permanent limitation of the sovereign rights’\textsuperscript{159} of member states as a step voluntarily undertaken by the Member States themselves. Here, in the world’s foremost supranational organisation, we find a clear statement of the rationing rationale, explicitly couched in terms of an overall reduction of sovereignty.

Yet, importantly, the narrative of sovereign rationing does not end there. What was conceived of as a reduction can mutate into a surplus. For the position of the institutions of the post-transactional age of international law tend to graduate from one in which they are a vehicle for the collective self-restriction of the sovereign powers of the states to one in which

\textsuperscript{158} See e.g. Dino Kritsiotis, \textit{Imagining the International Community} 13 EJIL 961 (2002)

\textsuperscript{159} \textit{Flaminio Costa v ENEL} case 6/64, [1964] ECR 585.
they seek or acquire, or, just as importantly, are seen to seek or acquire, a self-standing title to some elements and some form of sovereign authority; where, so to speak, they are not simply the rationing agency but themselves come to acquire sovereign ‘rations’. To appreciate how this happens, we must look not only to the expansionary logic inherent in the rational institutional design of collective action – to how the credibility of a normative framework of ever deeper collective commitments depends upon and so motivates the deepening of the authoritative resources attached to that normative framework.¹⁶⁰ We must also look to the deeper background, to the basic power dynamic through which sovereignty is generated and maintained, and observe how that this has become implicated in the development of the international order.

To recall, sovereignty involves a symbiosis of the legal and the political, both an assertion of a paramount right to rule (potentia), and the generation of whatever resources may be required, cultural and material, for an actual power to govern (potestas). Historically, therefore, the position of state sovereigns rested not only on the possession of a self-contained juridical order but also on the capacity to ensure the effectiveness of that order, which in its turn depended, inter alia, on a monopoly of the legitimate use of force. In the international arena, that coercive monopoly, and the attendant sense that control of the means of violence was indispensable to the exercise of fundamental political authority by states, translated into the view, accepted as general doctrine, that aggression in general and war in particular is a legitimate means of righting wrongs. From that basic premise, as Hathaway and Shapiro have recently argued, flowed many of the basic legal understandings of the ‘Old World Order’ - and order that extended from the early modern reliance on the customary and natural law

¹⁶⁰ See e.g. MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1985); In the EU context, the influential neo-functionalist school is closely based on that approach; see e.g. Phillipe Schmitter, ‘Ernst B. Haas and the Legacy of Neo-Functionalism’ 12 JOURNAL OF EUROPEAN PUBLIC POLICY 255 (2005)
foundations of the *ius gentium* through to the positivism of the transactional age.\footnote{OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS AND THEIR PLAN TO OUTLAW WAR (2017).} War and conquest were not only acceptable means of redress and retaliation in the face of grievances, but belligerents were granted various immunities and third parties remained bound to strict neutrality. Only with the signing of the Kellogg-Briand Peace Pact in 1928, and, more fully, with the development of the collective security system under the post-war UN framework, was a “New World Order” inaugurated in which aggressive war was outlawed and its consequences no longer given legal protection.

Simply put, this seismic shift compromised the capacity of sovereigns to *act like sovereigns* in their international dealings. It therefore bolstered the foundations of international agreements, over time and the gradual reshaping of expectations making them less dependent on the command of state sovereigns and more persuasively viewed as occupying a place of independent authority. Crucially, this should not be understood as a transfer of sovereign power in its traditional statist form to the international level. The international community has in some sense acquired from the states their previous monopoly of legitimate force. States remain the paramount authority in matters of the enforcement of internal security. Externally too, the picture is still a mixed one. The power to take collective military action to restore or maintain international peace and security under Art 42 of the Charter is weakened by perennial division in the Security Council, and is any case balanced by the maintenance of a state-based right of individual and collective action under Art 51. In addition, international law has no global police, and no world courts with compulsory jurisdiction worldwide. However, the *breaking* of the state monopoly over force is highly significant in its own right. As ‘international law now prohibits states from using force to enforce international law’,\footnote{Ibid 370} a space opens up for international law and institutions themselves to assert some of the attributes of sovereignty –
namely finality and supremacy – in certain areas, provided they can do so in a way that, except for the occasional application of the collective security framework, does not directly involve force.

How this is done takes many forms, but in general terms it involves the power, both material and reputational, to deny or withdraw the benefits of cooperation to rule-breakers, whether in particular areas of infraction or through broader forms of ‘outcasting’. In exercising these powers, the various international organisations and regimes we mentioned at the beginning of this section and more, tend to move beyond a rationing logic to the assertion of an authority which in its scope and effectiveness begins to attract the language of sovereignty, or at least sovereignty ‘fractions’. A measure of sovereignty which one was the preserve of the states may now be seen as having been ‘yielded’ to the international body or ‘divided’ between the state and the international body.

The example of the European Union again improves instructive. More so than any of the other regional economic organisations – although they often seek to follow its lead – they have extended beyond their core economic mission into many flanking areas of public policy - in social, environmental, fiscal and security matters in particular. In so doing, they have developed a sophisticated machinery of implementation and compliance, often relying on the enforcement powers of national authorities. Accompany these developments has been the gradual emergence of a discourse around the ‘pooling’ or ‘sharing’ of sovereignty rather than its mere restriction. There is also a well-established use of various sovereignty proxies

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163 See e.g. GARY WATSON, THE UNITED NATIONS AND COLLECTIVE SECURITY (2014).
164 HATHAWAY & SHAPIRO, supra note 161, ch.16.
165 KALMO & SKINNER, supra note 4.
166 Scott Cooper, Darren Hawkins, Wade Jacoby & Daniel Nielson, Yielding Sovereignty to International Institutions; bringing system structure back in, 10 INTERNATIONAL STUDIES REVIEW, 501 (2008).
167 See e.g. CARMEN PAVEL, DIVIDED SOVEREIGNTY; INTERNATIONAL INSTITUTIONS AND THE LIMITS OF STATE AUTHORITY (2014).
168 See e.g. Paavi Neuvonen, Transforming Membership? Citizenship, Identity and the Problem of Belonging in Regional Integration Organisations 30 EJIL 229 (2019).
in the legal narratives of integration, through the use of terms such as the ‘supremacy’ or ‘primacy’ of European law.\(^ {170} \)

Tellingly, the European Union more so than any other transnational organisation also draws heavily on the tradition of modern constitutionalism, with its deep involvement in the forms of modern state sovereignty. Sometimes this is a matter of language, and here constitutional self-reference can function as another of the proxy languages of sovereignty – and so as part of a rhetoric of self-assertion.\(^ {171} \) But it can also be a matter of practice. The project to make a first written Constitution for the EU in 2003-5 failed, but one of its legacies has been a gradual mainstreaming of a way of thinking about and seeking to reform the architecture of the EU in constitutional terms.\(^ {172} \) This covers typical constitutional subjects such as fundamental rights and questions of institutional balance. But also, and increasingly, it embraces the sovereignty-centred question of supranational Europe’s own constituent power. The question has been increasingly posed in the political arena as well as in the academy whether it is possible to imagine a constituent power and a popular sovereign at the EU level to rival the national sovereigns.\(^ {173} \) Or perhaps, in a telling modification, and creative extension, of the state-centred template of constitutionalized sovereignty, a ‘dual’ system in which the EU embraces a ‘double sovereign’ - derived from a ‘pouvoir constituant mixte’ made up of individual citizens in their dual identity as members of the already constituted individual states as well as the in-the-process-of-constituting European Union.\(^ {174} \)

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\(^ {171} \) See e.g. Miguel Maduro, *The Importance of being called a Constitution; Constitutional Authority and the Authority of Constitutionalism*, 3 INT’L J. CONST. L. 332 (2005)


\(^ {173} \) For discussion of recent developments, see e.g. Marcus Patberg, *Challenging the Masters of the Treaties; Emerging Narratives of Constituent Power in the European Union 7 GLOBAL CONSTITUTIONALISM 263* (2018).

\(^ {174} \) See e.g. Jurgen Habermas, *Citizen and State Equality in a Supranational Political Community; Degressive Proportionality and the Pouvoir Constituant Mixte* 55 JCMS 171 (2017); Patberg, *supra* note 172;
Another example of the use of the tropes and methods of constitutionalized sovereignty to develop a distinctive sense of the EU as a postnational polity concerns the emergence over the last 30 years of the techniques associated with what is often called ‘constitutional pluralism’.\(^\text{175}\) This refers to the unprecedented possibilities, and occasional practice, of a court-centred dialogue – or at least mutual consideration – between ‘sovereigns’ with systematically overlapping jurisdictions; on the one hand, the national apex courts seeking to assert and defend core features of national sovereignty, and, on the other, the Court of Justice seeking to assert and defend the autonomous authority of the supranational order. The exchange here may be largely one of strategic interaction,\(^\text{176}\) but there has also been tentative indications of the development of principles whose authority is ‘relative’\(^\text{177}\) – predicated on the relationship of mutual constraint and dependence, and so common cause, of the different players; rather than asserted as their self-standing sovereign prerogative.

If the adoption of a transnational sovereigntist discourse that goes beyond rationing the sovereignty of states has an inventive side, it also raises a number of concerns, which mirror the objection to the raising of sub-state sovereign claims. The first concerns the appropriateness of the assumption of a sovereigntist mindset, in however diluted and modified a form, by supranational entities which were founded just in order to tame the excesses and overcome the disorder of the existing system of sovereignty. The second concerns the reaction that the pursuit of international or supranational sovereigntist ambitions might invite from state sovereigns seeking ‘to take back control’.\(^\text{178}\)

\(^{175}\)See e.g. GARETH DAVIES & MATEJ AVBELJ (EDS), RESEARCH HANDBOOK ON LEGAL PLURALISM AND EU LAW (2018); see also Neil Walker, *Constitutional Pluralism Revisited*, 23 EUROPEAN LAW JOURNAL 333 (2016).

\(^{176}\)See discussion in section 4(e) *infra*


\(^{178}\)In the repeated and highly effective refrain of the Leave side in the 2016 UK referendum, which led to the UK’s exit from the European Union.
(e) Reinforcement

And so we turn to the response of a certain type of state sovereigntist orientation to the emergence or intensification of these non-state-centred sovereign sensibilities. Here, we should distinguish two quite different types of reaction. In the first place, the reinforcement of sovereignty speaks to the ways in which constitutional techniques are deployed in the task of securing the boundaries deemed necessary to ensure the continuing basic integrity of the state sovereign unit against encroachments—primarily from above, but also from below. Today this take shape through the development of an intense form of what we may call ‘demarcation sovereignty’.179

To understand how this works, and how it has emerged requires, first, a more general appreciation of the function that modern constitutionalism has historically performed with regard to the external domain of sovereignty. Just as the constitutionalized form of sovereignty today faces certain tensions in the internal arena, so too it does in its external perspective; not least the basic tension, similar to the gubernaculum/iurisdictio opposition internally, between the capacity to pursue the sovereign’s collective interests and the need to constrain that capacity in recognition of other rights and interests. Yet in the initial constitutional phase, since, unlike the internal case, these other rights and interests confronted externally were not those of members of the home sovereign community, that tension tended to be resolved in favour of the sovereign’s collective interest. Reflecting this tendency, the first examples of detailed constitutional attention to external sovereignty in particular spheres involved the ‘unilateral’180 expression of sovereign will. In the US Constitution, that included the very claim to possess the exclusive title to act in external matters that is definitive of external legal sovereignty.181

179 Neil Walker, supra note 69, 815-820.
180 See also the similar treatment, contrasting ‘unilateralist’ and ‘mutual recognition’ models of constitutional treatment of foreign affairs, by Tom Poole, The Constitution and Foreign Affairs, 69 CURRENT LEGAL PROBLEMS (2016) 143.
181 See e.g., US CONSTITUTION 1789 Article II Section 2
as well as the specific assertion of external sovereign authority in the area of war-making.\textsuperscript{182} And in other externally-relevant matters, such as the specification of the extra-territorial jurisdiction of domestic courts,\textsuperscript{183} the unilateral expression of sovereign will was also to the fore. Here however, anticipating later developments, rather than with self-assertion it was instead concerned with drawing the external boundary of the operation of internal sovereignty.

In addition, if we look beyond the few express provisions, there is a more general sense that the early constitutionalization of sovereignty, far from encouraging the development of a thicker framework of international legal obligation, tended to act as a silent brake upon that development. We noted earlier that the idea of international law as a force of positive law was little developed until the 19\textsuperscript{th} century, and its modest earlier achievements did not match the higher aspirations of many of the proponents of the \textit{ius gentium} as a more autonomously moralized framework of transnational norms. Few general rules shaped international intercourse, for in the \textit{realpolitik} of geopolitical relations early modern ‘states were both unable and uninterested in agreeing upon common standards of behaviour.’\textsuperscript{184} Outside of bilateral arrangements, such general regulation as there was, in addition to some basic rules of war, concerned matters such as the conclusion of Treaties, diplomatic rights and privileges and the capture of pirates, with states emphasizing continuing rights of self-preservation, self-defence and intervention. It was useful for the major powers to have such rules in place in order to reaffirm basic prerogatives and develop co-operative norms in clear areas of concurrent interests and mutual dependence. Beyond this, however, they sought maximum discretion, whereas it would have been in the interest of colonial entities and other less powerful states to have a more robust framework to curb the economic and military hegemony

\textsuperscript{182} US CONSTITUTION 1789 Article 1 Section 8

\textsuperscript{183} US CONSTITUTION 1789 Article III Section 2

of the few. In a nutshell, in its early stages, the constitutionalization of external sovereignty, as, indeed, of internal sovereignty, tended to act as a general form of consolidation of the authority of the major powers – an additional bulwark from which leading Western states, also the leading imperial actors, could assert sovereign self-interest against the prospect of any thicker conception of international law.

Yet the newly constitutionalised version of sovereignty was also gradually opened up to another and less state-empowering approach to external relations. Pre-modern jurisprudential doctrine had already countenanced the notion of limitations on sovereign power, and this was a resource that was available to the new constitutional thinking as it contemplated national and international domains alike. In particular, from Roman private law there emerged the idea of the limitation of sovereignty by rules of property law concerning usufruct as well as by those governing contract law and its breach. Early modern scholars in the natural law tradition, most prominently Grotius, were apt to invoke these classical ideas in support of a conception of sovereign obligation grounded in a universal human nature, and focused specifically on restraining the conduct of the sovereign in the international arena.

In addition, the development of the new constitutionalized sovereignty, as we have noted, both reflected and stimulated an emerging ethic of mutual recognition of the rights of free and equal peoples. That ethic could draw upon just the kind of vision of universal humanist morality favoured by the natural lawyers, but now gradually placed on a more secular footing and understood through the lens of a nascent popular sovereignty. Furthermore, the openness of constitutionalism to a more restrained operation of sovereignty in the international domain

185 See e.g. Benjamin Straumann Early Modern Sovereignty and its Limits 16 THEORETICAL INQUIRIES IN LAW 423 (2015)

186 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI [On the Law of War and Peace] (1625, Francis W. Kelsey trans., 1925) ; for discussion, see Straumann, supra note 185, 426-33

187 See e.g. Martin Loughlin, FOUNDATIONS OF PUBLIC LAW , ch.7.
was a matter of capacity as much as philosophy. If the immediate impact of the new constitutionalism was the consolidation of sovereign power, it was a consolidation achieved by force of law. Henceforth, every legal empowerment of the sovereign, however much an endorsement or enhancement of the sovereign’s material capacity, necessarily also involved a legal delimitation. The constitutionalization of external sovereignty, in other words, contained a suggestion of future restraint in an emerging multilateral framework of international relations and law.

Over time, as we saw in the previous sub-section, international law did gradually assert itself as a means of drawing upon the sovereign states to ration and rationalize their power in the name of a broader collective interest, and this shift was facilitated by the constitutionalization of external sovereignty. A new class of multilaterally engaged external constitutional norms include both active and passive sub-categories; provisions, more commonly, that regulate the procedural or substantive terms of the state’s participation of the state in the increasingly dynamic framework of international law, as well as provisions signalling the state’s acknowledgment and reception of international norms.

On the active side, many constitutions specify how Treaties in general are to be approved, rejected, amended, suspended, denounced, withdrawn from or otherwise addressed by domestic institutions in the exercise of external sovereignty. Some constitutions too, concern themselves with domestic participation in the foundational Treaties and other legal arrangements of specific international organisations, notably regional organisations such as the European Union. Less commonly, constitutional provisions specify broad substantive aims or conditions of participation in international law-making, from the promotion of regional

188 See e.g., the elaborate provision in the Constitution of the Republic of Chile 1980, Article 54.
189 For the range of approaches across EU member states, see L. Besselink, M. Claes, S. Imamović, and J. Reestman, National constitutional avenues for further EU integration. (Report for the European Parliament's Committees on Legal Affairs and on Constitutional Affairs; No. PE 493.046). DOI: 10.2861/52990 (2014)
integration and respect for fundamental rights to the pursuit of international justice and world peace.

On the passive side, many contemporary constitutions accept the normative authority of international law and international treaties in general, or of specific international regimes or judicial authorities. In so doing, they evince a tendency to rank international norms highly compared to domestic norms, in some cases equivalent to or even above constitutional norms themselves. With these developments, we note a new emphasis on the sovereignty-constraining dimension of external constitutionalism, but one closely tied up with the state’s ongoing involvement in the architecture of international organisation and the dynamics of international norm construction and application.

Yet, the constitution remains a double-edged sword. For there persists a tension between the legal conveyance of the expression of unilateral sovereign will and these more fundamental multilateral or communitarian compromise or rationing of sovereignty through a legally mandated engagement with transnational or international institutions and deference to transnational or international norms. What is more, it is the increased salience of the international normative order than lends this abiding tension its particular contemporary shape.

Early modern constitutionalism, as we have noted, had addressed an international arena

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190 See e.g., German Basic Law 1949, Article 23(1), Constitution of the Federal Republic of Nigeria 1999, Article 19(b).
191 See e.g., German Basic Law, 1949, Article 23(1)
192 See e.g., Constitution of the Republic of China (Taiwan) 1947, Article 141
193 See e.g., Constitution of the Republic of Chile 1980, Article 5; Constitution of the Federative Republic of Brazil 1988, Article 5(78)(2); Constitution of the Fifth French Republic 1958, Preamble (incorporating the Preamble to the 1946 Constitution), Constitution of Japan, 1946, Article 98.
194 See e.g., Constitution of the Argentine Nation Section 75(22) (listing ten international instruments recognized as on the same level as the constitution)
195 See e.g., with regard to the jurisdiction of the International Criminal Court, Constitution of the Republic of Chile 1980, Transitory Provisions 24; Constitution of the Federative Republic of Brazil 1988, Article 5(78)(4)
196 See e.g., German Basic Law 1949, Article 25; Constitution of the Argentine Nation Section 75(22)
197 See e.g., Constitution of the Kingdom of the Netherlands, 2008, Articles 94 and 120.
198 In addition to general international clauses, many constitutions of the member states of the EU now have special European clauses dealing with the relative standing of EU law and national law. For discussion, see e.g., Monica Claes, The Europeanisation of National Constitutions in the Constitutionalisation of Europe: some observations against the background of the constitutional experience of the EU-15 3 CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY 1(2007).
sparsely populated by norms in a manner allowing the external sovereign to occupy that arena on terms largely uninformed and unconstrained by law. One consequence was that even as the age of empire as a formal legal construct drew to a staggered close, states with unequal military and economic power could still do much to interfere with the effective sovereignty of other states by seeking ‘to influence or determine domestic authority structures’.\(^{199}\) Contrastingly, contemporary constitutionalism addresses an international arena that, largely due to the very international participation that constitutional norms now require and facilitate, is densely populated by norms. This density both limits and protects national sovereignty. Sovereign capacity for independent external action in such a crowded normative space is fettered, yet one consequence of this fettering is also to afford some greater protection to vulnerable sovereigns from direct forms of military and economic interference from powerful sovereigns.\(^{200}\) In such altered circumstances the external challenge to sovereign autonomy assumes a different and legalized form, and such protection as the sovereign continues to enjoy from that challenge is secured by other legal means.

In a nutshell, the legal expressions of unilateral sovereignty at its external border through constitutional means have become increasingly defensive rather than offensive in kind. They are concerned to prevent or control various emerging or abiding forms of encroachment upon sovereignty’s vital core associated with the normative density of the international domain rather than to push back sovereignty’s frontiers against that dense normativity. And it is that line-holding function, the staking and maintaining of boundaries deemed necessary to ensure the continuing basic integrity of the sovereign unit, which makes the idea of ‘demarcation sovereignty’ apt.

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\(^{199}\) Krasner, \textit{supra} note 9. This is what he refers to as ‘Westphalian Sovereignty’.

\(^{200}\) Although, as a matter of law too, weaker sovereigns remain vulnerable to the predatory bilateral transactionalism of more powerful state players; see \textit{supra} section 4(d) and note 157.
A first form of demarcation sovereignty is concerned with external sovereignty proper. It involves longstop protection of the domestic sovereign’s control over its own affairs, both through ensuring that an independent capacity to act is retained or is capable of being recovered, and to ensure that this capacity embraces certain defining features of the sovereign. As already noted, the functional logic of boundaries extends to inner as well as outer boundaries, and so to the resistance of sub-state aspirations and of transnational claims alike. Rules securing the federal system and preventing or restricting secession guard the inner boundary. Often the power of these protections remains latent, but as we have seen with recent European sub-state independence movements, especially in the case of Catalonia, national sovereigns can be stirred towards very active forms of defence of the basic federal pact. 201

At the outer boundary, however, the demarcation strategy is typically more elaborate. One line of defence is to ensure that, notwithstanding membership of an increasing range of transnational organisations, an independent capacity to act as sovereign in external affairs is retained or recoverable. Aside from the power to withdraw from or denounce treaties, this may involve explicit constitutional provisions forbidding adherence to international agreements that would breach constitutional standards,202 or requiring prior constitutional amendment before entering into treaties at variance with existing constitutional standards.203 Another line of defence is the safeguarding of certain core features of the sovereign’s constitutionally shaped expression – or what is sometime called its ‘constitutional identity’204 – from threat by transnational organisations.

201 See supra section 4(c)

202 See e.g., Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 Article 33(f); German Basic Law, 1949 Article 23(1).

203 See e.g., Constitution of the Fifth French Republic 1958, Article 54.

204 See e.g., GARY J. JACOBSOHN, CONSTITUTIONAL IDENTITY (2010); ROSENFELD, supra note 61.
As we have seen most intensely with regard to the European Union, there is a growing body of constitutional jurisprudence in this area. While some of this may be viewed quite constructively, as the exploration of the dialogical and harmonizing possibilities of constitutional pluralism, as we also indicated it can also be read in more ‘arms-length’, strategic terms. From that perspective, it amounts to the mobilization of the national judiciary in response to and in reaction against those moves of the EU, or of its high judiciary, that are seen as threatening certain fundamental normative standards or claiming control over competences deemed to be indispensable elements of the constitutional independence of the Member States. The new defensive jurisprudence in the EU and elsewhere often relies on explicit constitutional provisions, but national constitutional or supreme courts have also become more prepared to discover unalterable or irreducible constitutional cores on the basis of a broader interpretation of the structural integrity and underlying ethos of the constitution.

In these types of situations, constitutional judges have been increasingly minded to oppose, write down, or qualify external authority in matters as diverse as nationally affirmed human rights standards, the maintenance of the basic integrity of the state as a self-governing representative democracy, and national direction and control over core policy issues of national security and monetary ‘sovereignty’.

A second form of demarcation is concerned with fixing the limits of the domain of internal sovereignty, in particular through specifying which actors and settings are internal and which are external to the constitutional order, and by excluding the external actors and settings

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205 See supra section 4(d)
206 See e.g. Roznai supra note 110, esp. ch.3
207 Again, the European Union has provided a fertile context for the development of this type of defensive jurisprudence, in particular through the influential judgments of the German Constitutional Court. See e.g. Monica Claes, The validity and primacy of EU law and the ‘cooperative relationship’ between national constitutional courts and the European Court of Justice, 23 MAASTRICHT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 151 (2016). See also Sergio Fabbrini and Andras Sajo, The Dangers of Constitutional Identity, 25 EUROPEAN LAW JOURNAL 2 457 (2019).
from structures of participation, authority and jurisdiction that represent the established domicile of internal sovereignty. Here we witness a remarkable intensification of a theme that, as we noted, was present from the modern constitutional outset. Contemporary constitutional documents and doctrines, far from relegating such work to the background, contain ever more elaborate specifications of this barrier. New constitutional designs are likely to contain provisions, often quite detailed, covering matters such as territorial limits, criteria of citizenship and other statuses of belonging, access to political rights, the rights and responsibilities of nationals abroad, the jurisdictional reach of courts and the treatment of refugees.

Again, we better understand this trend towards reinforcement if we appreciate how it functions as a fortification against increasingly insistent external pressures. For here state constitutions have tended to retain and extend a measure of unilateral influence in matters – asylum, immigration, legal jurisdiction, political rights, even citizenship status, that over the last three quarters of a century have also been the subject of extensive international political concern and a growing measure of international legal regulation.

For all that they adopt a defensive posture, both forms of demarcation sovereignty, should nevertheless also be seen as manifestation of a sovereignty surplus. They involve a novel deployment, or at least an unprecedented intensification of constitutional technique in the name of preservation of sovereign autonomy in circumstances of concentration of global authority and intensity of polity overlap that those who first imagined modern sovereignty could never have contemplated.

(f) Reduction

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208 Apart from the jurisdiction of domestic courts, see US CONSTITUTION 1789 Article III Section 2, already discussed above. Article IV Section 2(1) also introduces the fundamental status distinction between citizens and non-citizens (The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States).

Earlier we noted a tendency towards the synecdochal appropriation of the whole by the part - the assumption of the mantle of the People as an abstract sovereign unity by a particular popular movement - as a key feature of the revolutionary origins of certain modern constitutional projects. \(^{210}\) We also noted how a feature of a certain kind of Originalism was to insist that this identification of concrete part with abstract whole be maintained over time, and that the best understanding of the abstract People continued to rest on the concrete will of the revolutionary generation. Today, however, we see the intensification of a strain of populist understandings and applications of sovereignty that also involves a synecdochal appropriation of the abstract whole by the part. It does so, however, without Originalism’s focused appeal to past events and circumstances, or indeed an appeal to any time-limited sense of the identity of the People as a concrete entity.

This populist tendency which, like the tendency towards reinforcement, responds to and reacts against many of the other ‘surplus’ tendencies we have discussed, we refer to as one of reduction. We do so as it involves an attempt – or the performance of an attempt - to extract and recover the essence of a particular sovereign unity from what is claimed to be its corrupted or debased present form. It is a tendency, moreover, that continues to rely on many of the methods and symbols of constitutionalism, even as it criticizes much of the modern constitutional heritage as complicit in and contributory to the corruption of sovereignty.

To account for this trend, we must first specify what we mean by populism. Consistent with our emphasis on the importance of the deep framing devices of the political imaginary, we take an ‘ideational’\(^{211}\) approach that treats populism as a world-view and discourse. We can, therefore, endorse Muller’s description of contemporary populism as involving ‘a particular moralistic imagination of politics, a way of perceiving the political world that sets a

\(^{210}\) See supra section 4(a)

\(^{211}\) CASS MUDDE & CRISTOBAL KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION (2017) 5.
morally pure and unified - but…ultimately fictional - people against elites who are deemed corrupt or in some other way morally inferior’. On this view, the political arena is seen as involving - from the perspective of the populists at least - a binary opposition between ‘two homogenous and antagonistic camps’. Each has a very different conception of the public interest, but, according to populist ideology, only one – the populist constituency itself - has an authentic claim to represent the ‘true’ will of the People. Here, then, we see the synecdochal structure of the populist version of sovereignty in nuce. The ‘real’ People are equivalent to the morally deserving People, consigning all other persons and groups to inauthenticity and irrelevance. And so, just on account of that peremptory moral exclusion, the people-as-a-whole, as an abstract entity, cannot but be represented by this morally elevated part. There are no other candidates.

This, of course, is a stylized representation, one that may be more or less evident in different cases. As Urbinati says, ‘a popular movement that uses a populist rhetoric…is not yet populism’. Populism is not just a way of doing politics, but ultimately – and for us most interestingly - a technique of government from a position of sovereign authority. It is a technique that in different contexts may be more or less ‘embedded’ or ‘emergent’, and more or less successfully resisted by anti-populist forces. It can also occur in both Right and Left variants, although Left populism is more likely to retain a more heterogenous and inclusionary conception of the People. A more fundamental distinction is between populist and ‘popular’ variants of rule. Whereas popular forms of democracy and of democratic

213 MUDDE & KALTWASSER, supra note 211, 5.
214 NADIA URBINATI, DEMOCRACY DISFIGURED (2014) 129.
216 See e.g Paul Blokker, Populist Constitutionalism, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM, 113, 116-20 (Carlo de la Torre ed. 2019); see also CHANTAL MOUFFE, FOR A LEFT POPULISM, (2018).
constitutionalism, which again is more likely to be pursued, or at least articulated, from the political Left, involve a commitment to the bottom-up participation of a wide range of social groups in the construction and maintenance of a common sense of peoplehood and a common project of government, populism instead relies heavily on top-down charismatic leadership, and its claim to embody the will and aspirations of a homogenous People.

Populism so understood has undoubtedly been a recurrent phenomenon of recent decades. But in the era of Trump, Erdogan, Orban, Modri, Bolsonaro and many others, we are today confronted with a particularly high tide of populist movements and governments. It is a force, moreover, that is strengthened not only by the size and influence of the states that boast the most prominent populist leaders, but also by the significant measure of transnational support and co-ordination amongst the various nationalist tribes that make up the ‘populist international’. As populism is always concerned with a particular populace and with the identification of common traits or affects that allow for the plausible identification of that populace as a distinct corporate entity, we might assume that it would have little transnational resonance. However, opposition to forces that would deny or downplay the moral potency of nativist forms of belonging and self-interest supplies a common thread across various strands of populism. and provides the basis for a kind of negative solidarity across borders. It allows populists to discover common cause against a generic category of roles, interests, sensibilities and practices; namely what they view as a cosmopolitanism – often itself deemed to be associated with elite epistocratic or other privileged communities who enjoy high mobility and communicability - in which national particularity is downgraded as an important value.

219 Carlos De La Torre A Populist International?: ALBA’s Democratic and Autocratic Promotion, 37 SAIS REVIEW OF INTERNATIONAL AFFAIRS 83 (2017)
220 On the significance of the nativist/cosmopolitan opposition within populist discourse, see Pierre Ostiguy, Populism: A Socio-Cultural Approach OXFORD HANDBOOK OF POPULISM chapter 4. (CRISTOBAL KALTWASSER et al eds., 2019)
In an age of enhanced Euroscepticism, with Brexit opening up a new horizon of revanchist possibility for nativist parties across the continent, and the governments of Poland and Hungary, amongst others, emerging as powerful nationalist critics inside the tent of European integration, the EU is again a central arena of the new politics of sovereignty. With its far reaching sovereign-rationing, and even sovereign assertion, ‘Europe’ is a key focus of populist discontent and an important centre of activity and collaboration. But the populist strain of sovereignty reduction and reassertion, and the networking that accompanies it is clearly also a wider global trend.

Given the Manichean world view of populist leaders and movements, it is not immediately clear why constitutionalism would have any significant role to play in the populist version of sovereignty. Populist regimes are inherently sceptical towards all forms of intermediation between their conception of a pure and unified popular will and the exercise of its power. In particular, they tend to oppose a ‘diarchic’ understanding of the political whole, according to which the mechanisms of representative democracy create what they understand as an artificial division between the formality of political society and the energy of the populist base in civil society. This scepticism will often register as hostility or ‘resentment’ towards legal structures in general, and in particular the elevated legal structure of the constitution. For it is that structure that supplies the organogram of representative democracy, with its clear demarcation of government and its strict checks and balances between the different roles of government; that provides for the pluralist distribution of power, and is especially complicit in bolstering sub-state national movements that threaten the unitary

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222 URBINATI, supra note 214, 130.

223 Blokker, *supra* note 221, 548-51
articulation of peoplehood; that sets forth entrenched individual protections, often used by powerful interests opposed to the regime, against the collective will; and that brooks interference in the particular populist vision by reference to transnational or other supposedly universal or non-native norms.

Yet, it is by running these various scepticisms together that populism can find a voice within and not simply against the discourse of constitutionalized sovereignty. For, as I have argued previously in *I*CON, the populist critique speaks precisely to how the deep tensions or antinomies within modern constitutionalism noted earlier – between plurality, individualism and universalism on the one side, and, on the other side, unity, collectivism and particularism – can be seen to provide a mutually reinforcing set of ‘nested oppositions’, with the populists defining themselves on the side of that great divide that stands for the supposedly neglected unitary collective particular. In this perspective, the grievance of today’s populist can be construed and narrativized as but the latest instalment, amplified by a sense of increased threat from the sovereign ambitions of elite or other alien sources, in a familiar repetitive syndrome of constitutional action and reaction, protestation and redress, balance and counter-balance. In that conflict, the populists style themselves as the ‘true’ democrats and genuine constitutionalists, pitting themselves against the forces of a common enemy which goes under many names, perhaps most reductively that of ‘liberal constitutionalism.’

In so doing populists are not merely critics of the present way of striking the vital and always contentious balance between the opposing values of constitutionalized sovereignty – a critique that incorporates reasonable concerns - but can seem to criticize the very notion of balance as part of the problem they seek to tackle. Certainly, the instrumental approach they

224 Walker, supra note 215
225 Supra, section 3(b).
227 See Blokker, supra note 221, 545-8
take to the machinery of constitutional government is more obviously concerned with a one-way push rather than with the discovery of a new equilibrium. The practical constitutional strategies of populists, which may involve ‘abusive borrowing’ from both autocratic and liberal-democratic regimes, range from the ‘circumvention’ of existing rules and procedures deemed to present a skewed inheritance to the broader ‘commandeering’ of the general process of constitutional revision and renewal in name of their own unimpeachable vision.

Prominent amongst these various measures are reforms of the selection, tenure and jurisdiction of senior judges that compromise their political independence, removal of impediments to the exercise of executive authority, denial of freedom of information, manipulation of media ownership laws, and changes in electoral law favouring the incumbent government.

Importantly, in justifying and mobilizing support for these measures, populists also pass over the most basic opposition between founding authority and continuing consent. Where, as we have seen, those engaged in the recomposition of sovereignty seek to resolve the tension by reducing the difference in constitutional gravity and method between different phases of popular sovereignty – treating both origins and contemporary moments as worthy of wide involvement and broad reflection, and while Originalists insist that the authority of the foundational generation remains the basis for present consent, the populist simply refuses to acknowledge any such tension. The ‘real people’ as a moral unity are portrayed as timeless – neither ‘then’ nor ‘now’, neither original nor present, but always. Their self-constitution is fixed and their authority constant in a manner that recollects and reworks pre-popular conceptions of sovereignty as command – as a final rather than a merely originating and

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229 Walker, supra note 215, 519-22
230 See e.g SADURSKI. supra note 86; see also TOM GINSBURG & AZIZ Z HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019).
Their synecdochal appropriation of the mantle of abstract unity is achieved through a process of reification. For the insistence on the status and continuity of the People as a ‘moral majority’ involves placing them outside and above history, attributing to them an essential thing-like quality – now but also invariably a perfect exemplification of the abstract role. Populism, in that sense, is always in the particular moment, a claimed to embody the collective will here and now, but it is not just of the particular moment, implying instead the ever-presence and perpetual legitimacy of its claim. That timeless suggestion is why, indeed, constitutional populism can be both nostalgic and prophetic. It sometimes involves a claimed redemption of a broken promise of original collective intent; but in conjunction with this, its constitutional politics will be forward-looking, the replacement of constitutional text and refashioning of constitutional institutions pursued not just as a commandeering strategy but also in symbolic affirmation of the renewal of political unity.

It is for these reasons that populists, despite their scepticism about a particular and quite dominant strand of constitutional government and philosophy, tend to be supportive not just of large-scale constitutional change or regime succession, but also of all the paraphernalia of constitutional events and moments – including referendums, constituent assemblies and other ceremonies of endorsement and entrenchment. The agenda of these demotic constitutional events is primarily one of affirmation and reinforcement. Their content and direction has typically been anticipated by the leadership of the populist insurgency. And even as it is fundamental to the populist credo that they take the People seriously as a concrete socio-political entity against the false representativeness of elites or the stirrings of other local or cosmopolitan claims, because the interests of the People are deemed to be self-evident and

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231 See e.g., Kalyvas, supra note 2.
232 On these two sides of Trump’s early-phase populism, see, e.g., Michael Kazin, Trump and American populism 95(6) Foreign Affairs (2016).
unchanging, the dangers of freezing this particular expression of popular sovereignty against later reconsideration, or more generally of dismantling the checks against governmental oversteering in favour of its present agenda, are likely to fail to register.

In summary, populist sovereignty may style itself as a form of reduction - of the recovery and retrieval of an essence. But by dint of its innovative and intensifying reworking of the sovereign frame, it is a reduction that also figures as one more instance of the sovereignty surplus.

5. Conclusion

Whenever and wherever we witness the reshaping or relocation of sovereignty today, whether with a view to the recomposition of the scheme of foundational collective commitment, or to raising new and rival claims from below, or to rationing and redistributing existing claims from above, or to reinforcing the jurisdiction of existing state-based claims, or to reducing these claims to a more primitive form, we are reminded of the strength and limitations, but also of the self-perpetuating dispensability of the sovereignty frame to our contemporary political imaginary and practice. As my own work has sought to demonstrate, sovereignty is by no means the only frame through which we understand and seek to fashion the world of law and politics today. But it remains the most influential one, and generates significant surplus value. Looking beyond itself, sovereignty’s monopolistic structure is such that it tends to absorb rather than accommodate alternative claims, including non-unitary perspectives on and challenges to final authority from infranational and supranational levels and sites, and, indeed, it encourages the spread and replication of its framing logic to these other levels and sites. Looking within itself, the same monopolistic structure means that the retention of the

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234 See e.g. NEIL WALKER, INTIMATION OF GLOBAL LAW (2015); see also HANS LINDAHL, FAULTLINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF A-LEGALITY (2013).
sovereignty frame remains axiomatic – the silent premise of all politics. The frame may be loosened (as in the case of recomposition) or tightened (as in the case of reduction) with a variety of constitutional techniques, but it cannot make itself redundant.

From Bodin and Hobbes onwards, sovereignty has dominated the political vocabulary and thought of modernity, and it is no exaggeration to say that the very idea of political modernity would be meaningless in its absence. Yet as well as being epistemically vital, and indeed through that epistemic vitality, sovereignty is also materially and symbolically central. It constructs the geopolitical game as one of winners and losers and awards itself the top prize in the game so constructed. It remains a vital means by which power and identity can be mobilized together to achieve our best collective ends. Yet it can also be a ruthlessly sought and jealously guarded asset, an impediment to transnationally coordinated action, the consolidator and exaggerator of political and cultural difference, the reifying support of the nation state, and the disappointer of diverse political expectations. Epistemic indispensability, material incentive and symbolic allure, and the wide variety of motives and predispositions associated with these, are all mixed together in the various contemporary framings on which we have focused. And as the challenge of contemporary populism indicates, sovereignty’s self-reinforcing dynamic brings disadvantages and constraints as well as benefits and opportunities, and carries no eternal guarantee of a long-term self-correcting equilibrium. If sovereignty cannot think beyond itself then the problems of the world can only be viewed addressed, ultimately, through sovereignty, including the problems that are an unacknowledged product of sovereignty’s own limiting frame. And as with all forms of limited self-awareness, this courts the dangers and deformations of self-caricature.