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Special Issue: Sovereignty Yesterday, Today, and Tomorrow?
Guest Editors: Raf Geenens and Nora Timmermans

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OPINION

Do We Want 'More or Fewer' Prosecutions of Opinions? The Geert Wilders Trial 2.0[*]

Jogchum Vrielink

To what extent should we tolerate the intolerant? This age-old question in legal theory has been tested on a daily basis by *provocateur par excellence* Geert Wilders, leader of the Party for Freedom (*Partij voor de Vrijheid*).

Wilders was convicted by a panel of three judges on 9 December 2016, in the first round of the second hate speech trial against him.[1]

What exactly had Wilders said, to merit prosecution? The trial concerned two sets of remarks made in The Hague around the time of the Dutch municipal elections in 2014. Firstly, during a campaign visit to a suburb of The Hague on 12 March 2014, Wilders said that a vote for his party would amount to a vote for 'a safer and more social city, with less expenses and, if possible, fewer Moroccans'. A week later, on the eve of the elections, Wilders asked a café filled with supporters whether they wanted 'more or fewer Moroccans'. The crowd chanted, 'Fewer, fewer, fewer!' to which Wilders responded: 'Well, then we'll arrange that'.

The public prosecution instigated criminal proceedings after police received some 6,000 complaints in response to Wilders's statements. The politician was charged with 'group defamation': he was claimed to have 'deliberately offended a group of people because of their race'.[2] Additionally, the prosecution claimed that Wilders's statements amounted to incitement to hatred and/or discrimination on the grounds of race.[3]

A particular group

Wilders was already prosecuted on the basis of the same criminal provisions in 2011, and at the time was acquitted of all charges. A number of media and experts suggested that the same thing was quite likely to happen again. Legally speaking, however, the recent case differed from the earlier one in several ways.

* This opinion is based, in part, upon an essay published prior to the ruling in Belgian daily *De Morgen*: J. Vrielink, 'Hoe strafbaar is de 'minder Marokkanen'-uitspraak van Geert Wilders? Voor u ontward: de knopen in het proces-Wilders,' *De Morgen*, 26 November 2016.

1 District court of The Hague, 9 December 2016, ECLI:NL:RBDHA:2016:15014. For an English summary, see: 'Wilders found guilty of insulting a group and incitement to discrimination,' *Press Release*, 9 December 2016, www.rechtspraak.nl.

2 Art. 137c Dutch Criminal Code.

3 Art. 137d Dutch Criminal Code.

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In 2011, Wilders's statements primarily concerned Islam,[4] while in the current case Wilders explicitly targeted a group of people, Moroccans. That distinction is important, since under Dutch legislation and prevailing case law you can hardly be convicted for the former but you can for the latter.

This has to do with the way in which the relevant criminal provisions are drafted – you either have to offend, or incite hatred or discrimination against a *group of persons*. Case law of the Dutch Supreme Court (*Hoge Raad der Nederlanden*) correspondingly requires that expressions 'unmistakably clearly refer to a particular group (…)'.[5]

After the murder of Theo van Gogh in 2004, someone hung a poster in his window that read: 'Stop the tumour that is Islam. Theo has died for us. Who will be next? Join the resistance now! National Alliance, we will not bow down to Allah. Join now'. That initially led to a conviction for group defamation. The Supreme Court overturned the conviction however, because the statement did not refer to Muslims as a (religious) *group* but only to Islam. Insulting a religion, the Supreme Court emphasised, does not constitute group defamation under Dutch criminal law, not even if the adherents' religious sentiments are hurt as a result. 'No criticism, however fierce, of views held by a group or of the behaviour of those belonging to the group comes within the scope of (…) the Dutch criminal code'.[6]

'We want a heterosexual city'

As far as speech targeting groups was concerned, it had also long remained unclear how far someone was allowed to go, legally speaking.

Traditionally, speech could be curtailed if it qualified as being 'unnecessarily offensive' (*onnodig grievend*). The problem with that 'criterion' is succinctly captured in the joke, 'I would like to say something unnecessarily offensive about you, but I am unable to think of anything unnecessary'. When exactly can something be regarded as '*unnecessarily* offensive'?

In 2014, the Dutch Supreme Court shed more light on this issue, albeit not in favour of the freedom of expression. A local Amsterdam politician, Delano Felter,[7] had said during a debate and in an interview that homosexuals are 'dirty men' with 'sexual deviations, who need to be actively opposed and controlled by heterosexuals'. His solution? We have to 'throw those people out', because 'we want a heterosexual city'.

4 Including his film *Fitna*, statements likening Islam to Nazism, and the Koran to *Mein Kampf*. See critically: Esther H. Janssen and Aernout J. Nieuwenhuis, 'Freedom of expression and hate speech on account of religion and race in the Wilders trial. An analysis of the 'trial of the century',' *Nederlands tijdschrift voor mensenrechten* 2 (2012): 177-207.

5 Supreme Court, 10 March 2009, ECLI:NL:HR:2009:BF0655.

6 *Ibid*.

7 At the time Felter was the leader of a fringe political party: the Modern Republican Party (*Republikeinse Moderne Partij*) (now defunct).

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Initially, Felter was acquitted by the Amsterdam court of appeal.[8] The court stressed that politicians are entitled to 'a wider freedom of speech' as compared to non-politicians. Referring to case law by the European Court of Human Rights (ECtHR),[9] the court of appeal claimed there was little scope under Article 10 § 2 of the European Convention on Human Rights (ECHR) for restrictions on free speech in the area of political speech. The court of appeal went so far as to say that even *if* Felter's statements fulfilled all basic requirements for a conviction for incitement to hatred or group defamation, he was still free to express them in light of Article 10 ECHR. In other words, political free speech trumped criminal liability (in the given circumstances, at least).

The Supreme Court considered this as going too far.[10] It confirmed that politicians must be able to freely comment on issues of public interest, even if in doing so they would 'shock, offend or disturb'. However, against this, the Supreme Court – also drawing on ECtHR case law – posited a greater *responsibility* on the part of politicians: they are not allowed to disseminate statements that 'conflict with the law and basic principles of a constitutional democracy'. Politicians, the court ruled, are no more warranted to overstep legal speech restrictions – including the ban on incitement to hatred, violence and discrimination – than private citizens.[11]

The Supreme Court reverted the case to the Amsterdam court of appeal for a retrial. The latter court applied the stricter criteria and convicted Felter.[12] Moreover, the same criteria also rendered a successful prosecution of Wilders (even) more likely as the parallels were obvious. Take, for instance, the court of appeal's conclusion that Felter's statements amounted to incitement to discrimination vis-à-vis gay people, since said statements aimed to 'oppose [homosexuals'] presence in the Netherlands, or at least in Amsterdam' (fewer, fewer, fewer homosexuals, anyone?). The court of appeal furthermore ruled that the remarks were 'unnecessarily offensive' for the fact that they violated (or proposed to violate) basic democratic principles based on a group's sexual orientation (again, replace sexual orientation by ethnic background).

A mere question?

Wilders was acquitted for his statements on 12 March 2014, for which the court did not consider it to be established that Wilders had had the (conditional) intent

8 Court of appeal of Amsterdam, 11 March 2013, ECLI:NL:GHAMS:2013:BZ3787.

9 Most notably: ECtHR, 23 April 1992, *Castells v. Spain*; and ECtHR, 22 October 2007, *Lindon v. France*.

10 Supreme Court, 16 December 2014, ECLI:NL:HR:2014:3583.

11 Quite the contrary in fact: the Supreme Court *de facto* held politicians to a higher standard, in so far that it claimed that they should – additionally – avoid 'incitement to intolerance'. The judges in the Wilders case avoided application of this particular (controversial) aspect of the Supreme Court ruling.

12 Court of appeal of Amsterdam, 1 February 2016, ECLI:NL:GHAMS:2016:296.

to merit a conviction for incitement to discrimination or hatred or group defamation. The court pointed out that there had not been any interaction with bystanders. Furthermore, witness testimony suggested Wilders's statement at the time to have been an off-the-cuff remark or slip of the tongue, which the court found plausible.

Concerning the second set of remarks, the question arose whether Wilders had actually said anything objectionable himself. Had he not, as he and his defence maintained, 'merely posed a question'? The court argued that this was a misrepresentation of what happened on 19 March 2014. Witness testimonies – not disputed or refuted by the defence – indicated that the public response had been carefully orchestrated, with the public being instructed on how to answer the questions Wilders would pose. Prior to Wilders's speech, a staff member had passed the tables, telling everyone: 'In a minute, you are supposed to chant 'Fewer, fewer!' you guys'.[13] For this reason the court concluded that the eventual message was the result of a (planned) interplay between Wilders and the audience.[14] Moreover, the public prosecution had anticipated this argument. It had charged Wilders not only with committing group defamation and incitement to discrimination, but also with its elicitation and with participation and complicity in its commission. Simply put, the prosecution cast its net wide enough to pre-empt the claim that Wilders had merely 'posed a question'.

Following that approach, the radical right-wing politician Hans Janmaat, leader of the Centre Democrats (*Centrum Democraten*), had been convicted in 1997 for *participation* in the commission of incitement to hatred, after having said during a public demonstration: 'We will abolish the multicultural society, as soon as we have the ability and the power". Not all that shocking, perhaps, but during the same demonstration others had chanted slogans such as 'Full is full' and 'Our own people first'. Precisely due to that heated atmosphere, and because of what the other protesters had shouted, Janmaat's statement could - in the view of the Arnhem court of appeal - 'not be understood otherwise than as being designed to remove (members of) ethnic minorities from Dutch society'.[15] The Supreme Court upheld Janmaat's conviction[16] and, moreover, dismissed a reconsideration request in 2003.[17]

13 Ed., 'Henk Bres bevestigt: 'Minder-minder moment van Wilders was van tevoren afgesproken',' *Omroepwest.nl*, 17 March 2016.

14 In addition to this, one could point out that even Wilders himself did not actually limit himself to posing a question. As mentioned, he answered the crowd cheering 'Fewer, fewer' with 'Well, then we'll arrange that'.

15 Court of appeal of Arnhem, 29 December 1997.

16 Supreme Court, 18 May 1999, *NJ* 1999.

17 Supreme Court, 6 May 2003, ECLI:NL:HR:2003:AF7895.

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A Moroccan race?

Another central argument of those who believed Wilders ought to have been acquitted was a textualist one concerning the term 'race'. Most notably, professor Paul Cliteur, who was called as a witness in the trial, argued that Wilders's statements about 'Moroccans' concerned nationality. The Dutch hate speech provisions however only mention 'race'; and 'nationality' cannot be equated with race. 'From this we must infer', said Cliteur, 'that the Dutch legislator chose not to criminalize speech concerning nationality'.[18]

In response, the court rightly pointed out that the Dutch hate speech provisions are, in part and since 1971, an implementation of the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The legislation's explanatory memorandum also explicitly refers to the ICERD on the meaning of 'race'. The Convention defines race as 'race, colour, descent, or national or ethnic origin'.[19] This is also the way in which the concept has been interpreted and applied for decades in national and European case law. That being said, the Convention does exclude from its scope distinctions 'between citizens and non-citizens'[20] or issues pertaining to 'nationality, citizenship or naturalization'.[21] However, the court argued that Wilders on 19 March 2014, in a manner that was clear and explicit to everyone, 'identified a group of fellow citizens by referring to their common origin', and used 'their nationality as an ethnic designation'. The term that was used, 'Moroccans', 'thus refers to the characteristics 'descent', 'national origin' and 'ethnic origin' as laid down in the ICERD and consequently concerns 'race' in the sense of the Dutch Criminal Code'.

One could add that while the Convention excludes nationality *stricto sensu* from its scope, the Convention also provides that distinctions on that basis may 'not discriminate against *any particular* nationality' (against Moroccans, for example).[22]

Fewer criminal Moroccans?

A literalist reading of the term 'race' was therefore rejected. But what about a *non-literalist* reading of Wilders's statements? According to some, including Wilders himself, the call for 'fewer Moroccans' pertained only to a particular *subset* of Moroccans, i.e. *criminal* Moroccans. Party for Freedom supporter Henk Bres put it this way: 'Everyone knows perfectly well that [Wilders] meant people who cut off

18 Paul Cliteur, 'De harde tucht van de strafwet en het cultuurgoed dat we moeten verdedigen. Kanttekeningen gemaakt door getuige-deskundige Paul Cliteur tijdens het proces tegen Geert Wilders,' *The Post Online*, 3 November 2016.

19 Art. 1 § 1 ICERD.

20 Art. 1 § 2 ICERD.

21 Art. 1 § 3 ICERD.

22 Art. 1 § 3 ICERD. Moreover, the exemptions concerning nationality apply to States Parties and not to individuals.

people's heads in Amsterdam, and not your average hardworking Moroccan'. Legally speaking, such an argument is not in itself implausible. While assessing allegedly illegal utterances, courts tend to take into account the broader signifying context including the intended meaning of what was said, as well as how it was understood by the audience.

In this case however, the court found such an analysis not to yield an obstacle to Wilders's criminal liability. The judges pointed to the care with which the speech was prepared, to argue against a *totum pro parte* interpretation: testimony suggested that Wilders had knowingly and consciously chosen not to restrict his question to criminal Moroccans in order to generate maximum media-exposure. Furthermore, the court pointed to the rousing manner in which Wilders built up his speech. Wilders began by announcing that he wanted to get clear answers to three questions 'that define our party, the Party for Freedom'. His first question was: 'Do you want more or less European Union?' The room chanted, 'Less, less, less!' The second question, 'perhaps even more important', was: 'Do you want more or less Labour Party?' Again, the crowd responded: 'Less, less, less!!' with even more clapping and cheers. Finally, Wilders posed his 'Moroccans question', even pausing to say that he was 'actually not allowed to say it, because people will file criminal charges'.[23]

All of this, the court argued, resulted 'in the clear and strong conclusion that was broadcasted directly into living rooms across the Netherlands'. The fact that Wilders subsequently stated that he had not wished to refer to *all* Moroccans did not, according to the court, make the message any less insulting. 'That message already came through loud and clear', the court added. The court concluded that Wilders's statements singled out 'an entire group of citizens without making any distinction'. Therefore, the statements could be regarded as being insulting for the entire group (group defamation) as well as amounting to incitement to discrimination.[24]

One could add to the court's analysis, in subordinate order, that the *totum pro parte* interpretation would still result in a distinction based on ethnic origin: even in that hypothesis only *Moroccan* criminals were targeted, while other (ethnic) groups are overrepresented in Dutch crime rates as well.

23 The ruling also points out that at the time Wilders knew that his earlier statements (on 12 March 2014) had already led to charges having been filed against him. The court considers this to imply Wilders 'had at least the conditional intent' concerning the insulting nature of his additional statements on 19 March 2014.

24 The district court found insufficient evidence for incitement to *hatred*, and Wilders was acquitted on that count. The court considered that hatred is 'an extreme emotion of deep disgust and hostility', and that incitement to hatred therefore required an 'enhancing element', whereby others are stirred up or called out to do something. Such an element was deemed absent from Wilders's rhetoric.

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To offend, shock and disturb?

'Finally, some argued that if it were to come to a conviction, as it now has, the European Court of Human Rights would blow the whistle on the Netherlands.' All things considered though, that seems highly unlikely.

A (if not *the*) core characteristic of the European Court is its aversion (bordering on allergy) of speech targeting ethnic and other minorities. It typically grants no scope whatsoever to speech that it regards as 'hate speech'.[25] At the same time, the European Court applies a very broad (and rather fuzzy) definition of what constitutes 'hate speech'. Speech is unprotected if it fails to comply with highly abstract values of 'tolerance' and 'social peace'. This leaves very little room indeed for free speech, rendering the European Court's oft-repeated mantra – i.e. that Article 10 applies 'not only to 'information' or 'ideas' that are favourably received, but also to those that offend, shock, or disturb the State or any sector of the population' – all but meaningless in this specific area.[26]

National 'hate speech' convictions are virtually never considered a violation of the Convention[27] and rarely even pass the admissibility stage. In the case of politicians engaging in hate speech in particular, there are literally *no* cases in which Article 10 was found to have been violated.[28] The European Court basically provides a *carte blanche* to states parties in this regard. It grants domestic authorities a strikingly wide margin of appreciation, contrasting starkly with the way in which it treats other speech restrictions affecting politicians and the political debate. In short, the chances of Wilders being vindicated in Strasbourg are virtually non-existent.

25 In this context, the European Court attaches far-reaching implications to the fact that the drafters of the European Convention sought to establish an institutional framework based on democratic values in order to overcome extremism, and it therefore considers some (allegedly) 'anti-democratic' or 'radical' forms of expression contrary to the Convention.

26 See ECtHR 7 December 1976, no. 5493/72, *Handyside v. the United Kingdom*, § 49 (since then repeated in countless cases).

27 Stefan Sottiaux and Jogchum Vrielink, 'Activism at the Admissibility Stage: A Threat to the Subsidiary Role of the European Court of Human Rights?' in *Liber Amicorum Marc Bossuyt*, ed. André Alen, Veronique Joosen, Riet Leysen and Willem Verrijdt (Cambridge: Intersentia, 2013), 663-679. A notable exception to this is the case of *Jersild v. Denmark*, decided 12 votes to 7, in which a journalist had been convicted for aiding and abetting in the dissemination of racially degrading or insulting speech, on account of him having interviewed members of a radical right-wing organization. This exception proves the rule however, to the extent that the Court did not protect the actual speech in this case but rather deemed the role that the journalist had played to be insufficient to warrant a criminal conviction, emphasising that Jersild had clearly dissociated himself from the persons he interviewed (ECtHR (GC) 23 September 1994, no. 15890/89, *Jersild v. Denmark*, § 34).

28 Unless you were to count *Perinçek v. Switzerland* (ECtHR (GC), 15 October 2015, no. 27510/08), but that was a highly atypical case, concerning the denial of the Armenian genocide. The claims of all politicians convicted for engaging in more similar speech as Geert Wilders (e.g. Le Pen, Féret, Gündüz, Soulas), were flat-out rejected by the Court.

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Political trial vs. the political process

Given all of the above, convicting Wilders seems the most legally defensible decision the district court of The Hague could take. Given the provisions and the higher case law governing this case, the chances of an acquittal were much smaller than the probability of a conviction.

That is not to say I am enthusiastic about the trial or its outcome; in fact, quite the contrary.

To begin with, banning and prosecuting hate speech is about as productive as trying to attach a button to water.[29] Positive results are hard to achieve, especially with politicians such as Wilders. The trial provided him with a lot of media attention, and his conviction enabled him to portray himself as a martyr for free speech[30] against the 'leftist elites' trying to muzzle him, causing people to feel sympathy for him who would otherwise not support his cause or ideas. Conversely, in (the unlikely) case Wilders is acquitted on appeal, he will emerge legitimized, and he and his supporters will feel warranted to engage in still more extreme speech.

On a more principled level, the prosecution is equally problematic. Yes, we should protect minorities against discrimination and inequality in the workplace, in education and in the criminal justice system. But we must, in the words of Ronald Dworkin, resist the temptation to 'try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish such unfairness or inequality'.[31]

The democratic majority should not have the right to impose its will upon whom it is forbidden to protest against the decision. Calling for discrimination is not the same as discrimination. Persons doing this must, in a democratic society governed by the rule of law, already accept that they will never be allowed to achieve their aims. Legally forcing them to remain silent about their wishes is a bridge too far and undermines 'our moral title to force such people to bow to the collective judgments that do make their way into the statute books'.[32] All the more since in doing so you rob people of their (non-violent) means of protest, and push them and their beliefs into illegality.

But if that is my position, why do I, unlike others, not just argue for an acquittal? Because my objections derive from legal theory rather than (also) being legal in

29 See extensively on the (often counterproductive) empirical effects of prosecutions for (racist) hate speech: Jogchum Vrielink, *Van haat gesproken? Een rechtsantropologisch onderzoek naar de bestrijding van rasgelateerde uitingsdelicten in België* (Antwerp: Maklu, 2010).

30 Which is ironic, given how little respect Wilders himself has for other people's freedom of speech. Take for instance his calls for banning the Koran. Compare Ian Buruma, 'Totally tolerant, up to a point,' *New York Times*, 29 January 2009.

31 Ronald Dworkin, 'Foreword,' in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), viii.

32 *Ibid*.

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nature.[33] It is impossible to deny that the existing Dutch hate speech legislation restricts free speech in a far-reaching manner, and changing that – if so desired – falls to the legislature, not the courts. And it could be added that Parliament, even now, does not consider legislative change desirable. Shortly after the ruling, the Dutch Chamber of Representatives discussed a bill that could have avoided Wilders's conviction. A vast majority chose not to support the initiative.[34]

Geert Wilders claims that his is a political trial and a travesty of justice, asserting that even the legal system in North Korea is preferable to that of the Netherlands. It is undoubtedly true that the countless tortured political dissidents in North Korea will have nothing but pity for the fact that Wilders was brought before that horrendous district court in The Hague.[35] More seriously, what judges decide is for the most part the result of what politics decided first, and that is how it should be. Here, the judges applied the law in the manner in which a democratically elected majority intended it to be applied; an acquittal would have been much more 'political'. In short, it is precisely *because* the Netherlands is not North Korea that Wilders is not above the law either, regardless of how unwise that law may be.

33 Not that there is a (sharp) divide between the two. However, given the statutes and precedents applicable to this case, there are limits to the arguments you can plausibly put forward. Put differently, the legal theory underlying the current Dutch legislation and case law departs fundamentally from the one I espouse.

34 See Christiaan Pelgrim, 'Tweede Kamer wil groepsbelediging niet uit de wet schrappen,' *Nrc*, 15 December 2016.

35 The court, moreover, limited itself to a declaration of guilt without imposing punishment (ex. Art. 9a Dutch Criminal Code). The court considered that the most important question in the case was whether Wilders had crossed a line; a simple guilty verdict already answered that question, and the court therewith found justice to have been done.

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INTRODUCTION

Sovereignty Yesterday, Today, and Tomorrow?

Raf Geenens & Nora Timmermans

Most of the articles in this special issue are the outcome of a lecture series entitled 'Sovereignty Yesterday, Today, And Tomorrow?' that we organized at the University of Leuven, Belgium, in the spring of 2015. The title of this lecture series secretly referenced a 1963 movie by Vittorio De Sica ('Ieri, oggi, domani'). This brilliant comedy, starring Sophia Loren and Marcello Mastroianni, does not have an actual plot but is in fact composed of three short stories that show three different couples in radically different settings. The only thing that weaves the stories together is that these couples are always played by Loren and Mastroianni.

Something similar happens in the case of sovereignty. This same word returns in radically different debates and contexts but what weaves them together is that somehow the concept of sovereignty is always at stake. This is clearly visible in a number of academic debates. In public law, political science, international relations, and legal and political philosophy, discussions on a wide diversity of problems always turn out to somehow involve the concept of sovereignty. The same phenomenon can be witnessed in political and legal reality. Whether the topic is populism, refugees, the jurisdiction of the ECJ, Brexit or the resistance against CETA, sovereignty is always involved. Although sovereignty has often been declared dead, the many debates in which sovereignty continues to play a role make it abundantly clear that sovereignty is still alive and remains an essential part of our legal and political reality and imaginary. This is also the red thread that runs through all the contributions of this special issue. All reflections start from the premise that sovereignty was highly relevant in the past, is a crucial category to understand the present, and probably will continue to inform our legal and political world even in the future.

The apparent ease with which one can connect such a broad range of issues to the notion of 'sovereignty' suggests that a variety of interpretations and conceptions of sovereignty is doing the rounds. This is the topic of the first article by Raf Geenens. It sets the conceptual stage for this special issue. The lack of a clear, let alone comprehensive or generally accepted definition of sovereignty is addressed here in a very straightforward manner, namely by distinguishing five different meanings of the term sovereignty: political sovereignty, legislative sovereignty, original constitutive power, constituted constitutive power, and external sovereignty. These different meanings are of course related (and in the classical Westphalian state order they were also practically entangled) but they are distinct and cannot be fully reduced to one another. The confusion between these different meanings is not innocent as it often renders ongoing debates vague or inaccurate.

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Moreover, it is grist to the mill of those who want to relegate sovereignty to the category of souvenirs.

Pavlos Eleftheriadis, in his contribution, operates with a slightly different categorization. He makes a distinction between a political understanding of sovereignty, which he associates with the relational concept of sovereignty developed by Martin Loughlin and a legalistic interpretation such as the one offered by Neil MacCormick. The former marks power as the necessary condition for law, the latter claims that law is necessary to generate power. While Eleftheriadis admits that these views appear fundamentally different, he insist that they are concerned with the same thing: 'sovereignty'. He continues by setting up a fruitful dialogue between these two understandings, arguing that the way power and principle interplay in the making of a constitution can be clarified by understanding law as self-reflective reason. The result is a constructivist interpretation of sovereignty as a necessary but not a determining element in the process of legal deliberation.

The article by Martin Loughlin elaborates a full-fledged defense of the political understanding of sovereignty that figures in Eleftheriadis's text, taking into account recent changes in the nature of government, such as those within the EU. The central argument of the article concerns the reciprocal relation between the concept of sovereignty and the juristic understanding of the state. Since the concept of sovereignty expresses the autonomy of the political domain, it has a foundational function that is necessary for the existence of any coherent system of public law. Likewise, the state functions as an institution of legal authority that allows us to see, understand and act from a political perspective. Loughlin accurately puts the finger on the failure of both political scientists and legal scholars to catch this crucial reciprocity. At the same time, he patently recognizes that the sovereignty/state paradigm is under pressure due to very real legal, political and economic changes, and he specifies his claim that sovereignty is being eroded within the EU especially, with plenty of examples from EU case law and regulation.

Even more embedded within legal practice – and EU legal practice more specifically – is the text by Elke Cloots. She criticizes the tendency of both the European Court of Justice and some of the domestic constitutional courts to confuse 'national identity' and 'constitutional identity', a criticism that she extensively substantiates with case law. Cloots argues that the claim to safeguard constitutional identity that is made by certain constitutional courts is informed by a particular conception of state sovereignty, one that implies a protectionist gesture of closure on behalf of the member states. Article 4(2) TEU, on the other hand, compels the EU as a multinational polity to respect the different national identities of the Member States. This obligation can be understood to embody a liberal concern for individual autonomy, thus demanding inclusion and openness. The latter consideration leads her to the conclusion that the focus of the EU Treaty on 'national identity' should be embraced. Accordingly, the distinction between 'national identity' and 'constitutional identity' adds a very interesting perspective to contemporary interpretations of sovereignty.

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It fits the purpose of this special issue to conclude not with a categorical statement about the nature of sovereignty, but rather with a very tangible example of the meaning and implementation of sovereignty in legal and political practice. Stephen Tierney presents the Scottish referendum in 2014 as a significant case study of how a sub-state community can adequately claim and exercise sovereignty.[1] The well-rehearsed critique of referendums as manipulative instruments in the hands of political elites has resulted in the undervaluing of their potential as constitution-making (or constitution-changing) devices. Tierney argues that these criticisms can in fact be handled within democratic theory by means of a thoughtful deliberative democratic design. He thus makes the feasibility of referendums conditional upon the degree of participation of citizens in the decision-making process, thereby explicating and substantiating the link between sovereignty and democracy.

The purpose of the lecture series on sovereignty, organized at Leuven's Institute of Philosophy and Faculty of Law, was to bring together an interdisciplinary set of thinkers who would be able to join critical reflections on the concept of sovereignty with important practical concerns. We believe that the texts brought together in this special issue live up to this ambition. They never take any given meaning of sovereignty for granted. Instead, they explicitly set themselves the task of engaging with the problematic character of sovereignty (and related concepts), investigate it from different perspectives, and keenly explore its importance for legal and political real-world issues.

1 The text by Stephen Tierney was written and completed before the Brexit referendum. It therefore does not take into account the ramifications of Brexit on the various arguments that are presented.

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ARTICLES

E pluribus unum? The Manifold Meanings of Sovereignty

Raf Geenens

Few concepts are of such perennial interest to legal and political thought as the concept of sovereignty. The idea of sovereignty has been – and continues to be – a cornerstone in the constitutional structures of our world. And in combination with the prefix 'popular' it is a staple of the discourse of democracy. In the last years, however, the concept has received a high number of death warrants and even the occasional 'requiem'.[1] Yet for now, the concept simply refuses to leave the stage. The death warrants even vivify the debate, thereby confirming the tenacity and importance of the idea of sovereignty.[2] Every reflection on the demise of sovereignty it seems demonstrates just how deep the idea of sovereignty is woven into the fabric of our political and legal world.

In this article, I will not contribute to the debate on sovereignty, at least not directly. I will not make claims about the 'true' or 'proper' meaning of sovereignty, and I will mostly abstain from statements about the status of sovereignty in today's complex world. Instead, this text is conceived as a taxonomic exercise. Due to its long and winding history, the term 'sovereignty' has taken up a bulky appearance, carrying with it an unusually broad range of meanings. The modest aim of my text is to create some clarity by providing a - probably not very controversial - classification of these different meanings.

This is not the same thing as a study of the different entities that can be called sovereign or that act in a sovereign manner. I will not provide a taxonomy of sovereign institutions, nor an inquiry into how, say, state sovereignty works in practice. I will also not attempt to recount the history of the notion of sovereignty, nor to provide an overview of different theories of sovereignty.[3] Inevitably, various thinkers of sovereignty will be mentioned, but my article is certainly not a comprehensive introduction to the – by now very broad – field of philosophical reflection on sovereignty. Even important doctrines, such as the English concep-

1 Michel Leroy, 'Requiem pour la souveraineté, anachronisme pernicieux,' in *Présence du droit public et des droits de l'homme: Mélanges offerts à Jacques Velu* (Brussels: Bruylant, 1992), 91-106.

2 Samantha Besson gives a good overview of the many intellectual conflicts caused by the concept of sovereignty throughout its history. See Samantha Besson, 'Sovereignty in Conflict,' *European Integration online Papers* 8(15) (2004).

3 Two recent books offer a summary of the term's historical trajectory: Amnon Lev, *Sovereignty and Liberty* (London and New York: Routledge, 2014) and Dieter Grimm, *Sovereignty. The Origin and Future of a Political and Legal Concept* (New York: Columbia University Press, 2015).

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tion of parliamentary sovereignty or the seminal idea of popular sovereignty, will only be touched upon very briefly.

Instead, I will limit myself to asking what we mean when we call a person—or a group of persons or an institution—sovereign. The term is used in a variety of contexts, but what exactly do we try to convey when using the words 'sovereign' or 'sovereignty'? I will argue that, when saying that X is sovereign, we can mean five very different things.[4] To list them very briefly: it can mean that X holds the capacity to force everyone into obedience, that X makes the laws, that the legal and political order is created by X, that X holds the competence to alter the basic norms of our legal and political order, or that X is independently active on the international stage.

Below, I will discuss each of these five meanings separately, and I will strongly focus on their differences. Of course, there are many relations between them, and it goes without saying that entities that are sovereign in one of these senses are often also sovereign in several others. But it is my contention that political and legal theorists are all too often misled into believing that the term sovereignty actually has only one meaning. In fact, these different meanings cannot easily be reduced to one another, and I believe theoretical reflections on sovereignty could be significantly enriched by paying more attention to these semantic distinctions.

1 Political sovereignty

Although the word sovereignty covers a wide variety of meanings, one element always returns and is hardly contested, namely the idea of 'supreme power' ('summa potestas'). Sovereignty has something to do with holding the highest or the most dominant position within a certain population.[5]
The most straightforward way to understand this notion of supreme power is in factual terms. Sovereignty can then be defined as the empirical capacity to impose one's will or enforce one's decisions within the bounds of a given community, territory or institutional structure. Like in an army, the sovereign is the supreme commander in the polity. I call this understanding of sovereignty 'political sovereignty'.

4 For a similar attempt to classify the different meanings of the term sovereignty, see Antonia Waltermann, *Sovereignties* (PhD-thesis) (Maastricht: Maastricht University, 2016). A very different attempt to order – what he calls – 'the internal variety' of the concept of sovereignty, is provided by Neil Walker. See Walker, 'The Variety of Sovereignty,' in *Sovereignty Games*, ed. Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen (New York: Palgrave Macmillan), 21-32.

5 But note that, historically, sovereignty did not necessarily indicate the 'highest' position; it simply indicated that one was in a position to govern. One could be sovereign all while being subordinate to a higher power, and there could be several sovereigns operating on the same territory. Cf. Dieter Grimm, *Sovereignty*, 14; Raymond Carré de Malberg, *Contribution à la théorie générale de l'etat. Tome I* (Paris: Dalloz, 2004), 74.

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Jean Bodin, Thomas Hobbes, John Austin, and Carl Schmitt, among others, are often read as advocates of such a command view of sovereignty.[6] Jean Bodin, in his *Six livres de la république*, defined sovereignty as 'the absolute and perpetual power of a commonwealth' and, in reference to the Hebrew term for sovereignty, he associated sovereignty with 'the highest power of command'.[7] Similarly, Thomas Hobbes's *Leviathan* is sovereign because he holds real, empirical power. For Hobbes, the status of the sovereign cannot be detached from his physical capacity to enforce law, prevent civil war, keep invaders out, and maintain the security of the citizens.[8] The command view of sovereignty finds its most blunt expression in John Austin's positivism. Austin unambiguously defines the sovereign as an individual or an entity habitually obtaining obedience within a society, yet itself not normally obeying the commands of any other individual or entity.[9]

In the command theory of sovereignty, the sovereign's empirical capacity to obtain obedience ('political sovereignty') is usually wedded to the sovereign's status as the source of valid law (cf. infra: 'legislative sovereignty').[10] Carl Schmitt's position in this regard is peculiar and is worth discussing in somewhat greater detail. Schmitt famously defines the sovereign as 'he who decides on the exception'.[11] For Schmitt, an entity (that is: an association of human beings) is sovereign if in critical situations, when there is an acute danger to the existence of the polity, it makes the ultimate decisions - no matter how exceptional such situations are.[12] This definition is intended to sever the usual connection between sovereignty and the day-to-day operations of a political and juridical system. For Schmitt, the sovereign cannot be identified by discovering who holds the dominant position within the institutionalized legal and political order, as the sover-

6 Although this is not necessarily the most accurate reading of their work (cf. infra).

7 Jean Bodin, *On Sovereignty* (Cambridge: Cambridge University Press, 1992), 1.

8 Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1996), 121 ff. Cf. Gérard Mairet, *Le principe de souveraineté* (Paris: Gallimard, 1997), 45 ff.

9 John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995), 181.

10 Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 127-8.

11 Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Chicago and London: University of Chicago Press, 2005), 5.

12 Carl Schmitt, *The Concept of the Political* (Chicago and London: University of Chicago Press, 2007), 38.

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eign only appears when the normal order is suspended.[13] Thus, sovereignty is here explicitly understood as the outside of legality. Not just in the sense that the sovereign decision cannot be codified or regulated by law, but also in the sense that it shows the legal order to be dependent on a decision that has little to do with juridical abstractions and everything with the 'power of real life'.[14] This is also why Schmitt – following Hobbes – has no patience for abstractions such as the 'sovereignty of law', which he derides as an empty and misleading phrase; the good observer knows that the 'sovereignty of law' really signifies 'the rule and sovereignty of men' who can appeal to this law to rule other men.[15]

Despite Schmitt's emphasis on rule by men over other men, it is of course more common to ascribe sovereignty to an impersonal entity, in particular to the state. The idea of the modern state implies precisely that it is an abstract institution, elevated above the citizens and even above the government, an institution that functions as the ultimate arbitrator in all domestic conflicts and that holds, at least in principle, the monopoly of violence. According to French constitutional scholar Raymond Carré de Malberg, this is the quintessential meaning of sovereignty: the term 'sovereign' points to a specific quality of the modern state, namely 'the supreme character of its power'.[16] For Carré de Malberg, this indicates simultaneously the state's external as well as its internal sovereignty. And he defines internal sovereignty as follows:

> Internal sovereignty implies indeed that the State posesses, in its relations to individuals who are its members or who find themselves on its territory, as well in its relations with all other private and public associations formed within it, a supreme authority; this means that its will predominates over all

13 The recently attempted coup d'état in Turkey (15 July 2016) provides a clear example of what Schmitt had in mind. While the coup plotters were already declaring on Turkey's state television that they now controlled the country's institutions, one appearance of Recep Tayyip Erdogan was enough to prove the contrary. In his famous speech on CNN Turk, channelled through a smartphone app, Erdogan commanded the population to go into the streets and physically resist the coup, a command that was obeyed by large sections of the population. At the same time, Erdogan gave instructions to police forces and to the country's muezzins, who equally obeyed. The combined efforts of police officers and ordinary citizens, encouraged by incessant calls from the muezzins, ultimately quelled the coup. Although the Turkish president justified his commands with references to the will of the people - among other things, he declared that 'there is no power higher than the power of the people' and 'Let them do what they will [with the coup plotters]' (Cf. Tim Arango and Ceylan Yeginsu, 'Turkey is Battlefield in a Coup Attempt,' *The New York Times*, July 16, 2016, A1) - Schmitt would argue that Erdogan proved himself the true sovereign: amidst a volatile crisis, it was his decisions that were ultimately obeyed.

14 Schmitt, *Political Theology*, 15. Because Schmitt connects the theme of sovereignty not only to the suspension but also to the *institution* of a legal order, he can equally be read as an advocate of sovereignty as constituent power. See below and see Andreas Kalyvas, 'Popular Sovereignty, Democracy and Constituent Power,' *Constellations* 12(2) (2005): 226, 228.

15 Schmitt, *The Concept of the Political*, 67.

16 Carré de Malberg, *Contribution à la théorie générale de l'etat. Tome I*, 70.

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> the wills of these individuals and associations, whose powers are inferior to the state's.[17]

Although Carré de Malberg emphatically believes it is properly an attribute of the state, he admits that sovereignty can also be ascribed to the concrete person holding the office which, within the state, carries the highest power. And indeed, historically this usage came first. Before being a property of the state, the term sovereign was used to describe the personal role of the monarch. Martin Loughlin explains well how the office of the monarch was slowly 'idealized' and how his various powers were gradually differentiated (into 'the king-in-council', 'the king's courts', et cetera). Eventually, this made it possible to ascribe sovereignty to the state apparatus rather than to the monarch himself.[18] Hobbes is sometimes credited as the first to consciously distinguish between the state, as an artificial person, and the individual person who, like an actor, carries the mask of the state and gives voice to it. But as Quentin Skinner notes, there are several authors before Hobbes (such as Bodin himself or, less well known, the royalist Dudley Digges) who occasionally used the word 'state' to indicate that abstract 'institution we create by the act of submitting to government'.[19] Yet as Skinner also emphasizes, Hobbes is certainly the first to appreciate the conceptual challenges that emerge when using the word 'state' in this way. One can for instance wonder how an abstract person can act, or why the citizens should submit to its purported actions.[20]

The distinction between the abstract institution of the state and the concrete person holding the highest power accompanies the rise of the modern state in the sixteenth and seventeenth century and was an historic breakthrough. But it long caused unease, for instance among contractarians (such as Locke) and republicans, who feared that attributing sovereignty to the state implies taking it away from citizens. It was also resisted in France, where absolute monarchs liked to think of sovereignty as an innate right which does not originate in the state but which they received by divine law, thereby turning sovereignty again into an individual attribute.[21] The distinction was also lost on Austin, and thereby on a lot of English positivist theorists.[22]

17 *Ibid*., 71.

18 See Martin Loughlin's contribution to this special issue ('The Erosion of Sovereignty') and see Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010).

19 Quentin Skinner, *Visions of Politics. Volume 2: Renaissance Virtues* (New York: Cambridge University Press, 2002), 400-2.

20 Hobbes's answer to the first question is that the state can be represented by a sovereign (the concrete person of the monarch) whose actions are attributed to the state. His answer to the second question is that the sovereign state's actions are the citizens' own actions, as they have authorized the state to act in their name. *Ibid*., 403-4.

21 To illustrate this evolution, Carré de Malberg (*Contribution à la théorie générale de l'etat. Tome I*, 78) cites Louis XV's well-known statement: 'Nous ne tenons notre couronne que de Dieu'.

22 Cf. Skinner, *Visions of Politics. Volume 2: Renaissance Virtues*, 406-7.

Summarizing all this, we can see that the term sovereignty, understood as political sovereignty, can be used to qualify at least two different entities: the abstract person of the state, and the concrete person(s) holding supreme power within this state. A third option can be added to this, namely the institutional 'organ' or 'office' of which these concrete persons are the temporary occupiers. It can for instance be said that sovereignty belongs to the office of the monarch (rather than to the person of the king or queen), to the institution of parliament (and not necessarily to its current members), or to the Roman consulate (rather than to the actual consuls). But no matter what type of entity one ascribes sovereignty to, in all these cases this ascription means that this entity wields supreme political power within a given territory or community.

The notion of political sovereignty can be split up further in *de jure* and *de facto*. Whereas *de facto* political sovereignty would imply the effective capacity to predominate over the wills of all individuals and associations, a *de jure* political sovereign would be an entity officially entitled to use force and obtain general obedience, without necessarily being able to do so.[23] This distinction can be relevant in times of unrest, civil war, or foreign occupation. Think of a country where the old state apparatus continues to be *de jure* politically sovereign, but is no longer capable of effectively playing that role, for instance because a hostile militia wields much more force and is now the only entity capable of obtaining general obedience within this territory. This military force (or the top of its chain of command) can then plausibly be described as *de facto* politically sovereign. A good example is the way Bashar al-Assad remains in many people's eyes *de jure* sovereign in the whole of today's Syria, even if in large parts of the country he clearly is not *de facto* sovereign anymore. Of course, such a separation between *de facto* and *de jure* political sovereignty is unlikely to be stable and workable for very long.

2 Legislative sovereignty

Political sovereignty is primarily *internal* in that it concerns the domestic institutions of an organized community. But the term sovereignty can also be used to point out another element that is internal to a community's institutional structure, namely what can be called the 'legislative sovereign' or the 'juridical sovereign'. Sovereignty, in this sense, indicates the highest source of valid law within a community, and possibly a source of valid law that is not itself subject to any higher norms. Legislative sovereignty differs – at least analytically – from political sovereignty, and one can easily imagine cases where they are also practically distinct. Think for instance of a sophisticated theocracy where a small club of wise theologians is considered the sole fountain of valid law (and thus functions as the legislative sovereign), while political sovereignty rests with another authoritative institution within the state (or is ascribed to the state itself).

23 Further differentiations are possible, cf. note 31.

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Of course, we are today accustomed to seeing political and legislative sovereignty as closely related, or even as indistinguishable. In the modern state as *Rechtsstaat*, political and legislative sovereignty are intricately interwoven.[24] The rule of law in such a state not only implies that public powers should be exercised in the name of the state and in accordance with its laws, it also implies that the state – as an abstract point elevated above citizens and officials – is the sole source of valid law. If in earlier times there could be sources of law, such as the church, that did not fall under the dominion of the political ruler, the modern state claims to be the exclusive origin of valid law on its territory. Only the laws made in accordance with the procedures stipulated in its basic statutes should be enforced, and the state should in principle have sufficient power to enforce all laws without tolerating any competing powers on its territory. Hobbes was, again, among the first to describe this apparently indissoluble link between political and legislative sovereignty. According to Hobbes, our civil condition depends on the presence of a state, capable of holding the monopoly of violence. In this civil condition, we accept the person(s) holding sovereign power as the unique source of valid law. If there would be competing sources of law or if we would refer to something as contestable as 'right reason' to legitimate laws, natural strife would return.

Despite this historical entanglement of political and legislative sovereignty, certain developments suggest that we are currently witnessing their disentanglement. In today's European Union, EU law has primacy over domestic law implying that the European lawgiver is now the legislative sovereign. Yet the member states jealously guard their political sovereignty and the EU has no means of its own to effectively enforce its laws. A Schmittian would probably argue that sooner or later this ambiguity will be resolved and that in a moment of crisis the true sovereign will be revealed.[25] But for the time being, the separation is maintained.[26]

Just like political sovereignty, legislative sovereignty can be ascribed to various types of entities. In Austin's view, the legislative sovereign (who is by definition also the political sovereign) is simply one person or possibly a group of persons. The presence of this person (or this group) is a sufficient condition for the existence of a legal system, as laws are nothing but the commands of this sovereign. However, as pointed out by later legal positivists and by Hans Kelsen and H.L.A.

24 Martin Loughlin writes that the political and legal aspects of sovereignty can 'be compared to the double helix of DNA, in which the political and legal run as anti-parallel strands' (see Loughlin, 'The Erosion of Sovereignty', in this special issue).

25 Cf. Stefan Rummens and Stefan Sottiaux, 'Democratic Legitimacy in the Bund or 'Federation of States': the Cases of Belgium and the EU,' *European Law Journal* 20(4) (2014): 568–87. As mentioned by Martin Loughlin in his contribution to this special issue, one could even argue that the emergency measures taken during the Eurocrisis prove – in this Schmittian manner – that the national governments have already lost their sovereignty.

26 Some authors argue that something similar is happening on a global scale. Cf. Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015).

Hart in particular, such a view is not particularly plausible.[27] The sheer possession of superior power is not enough to turn one's commands into law, nor to give addressees an obligation to comply. Typically one can only make valid laws after being formally appointed to do so. Also, making laws requires following certain procedures, procedures that bind even the purported sovereign. Moreover, laws tend to outlive the person (or persons) who issued them, raising the issue of continuity.

These well-rehearsed problems strongly count against ascribing legislative sovereignty to a concrete person (or group of persons). Certain contemporary authors even claim that these problems should make us abandon all talk of sovereignty in the domain of law. Pavlos Eleftheriadis, for instance, has made exactly this point. According to Eleftheriadis, lawmaking is a function within the normative framework of an ongoing legal system, and it is absurd to assume that the lawmaker would somehow have a supreme power that is not bound by this normative framework and that elevates him above it.[28] Hence, the very concept of sovereignty is incompatible with the rule of law and is simply out of place when thinking about the process of lawmaking.

A strategy that avoids these difficulties consists in ascribing legislative sovereignty to the state. An example of this strategy is Carré de Malberg's so-called 'organ-theory' of state sovereignty. Although the state, as an abstract entity, cannot directly act as lawgiver itself, various persons and institutions ('organs') can issue law in its name. And while such persons and institutions are bound to certain rules, it is the state itself that is seen as the ultimate depository and guarantor of these rules. Moreover, the state has a permanent existence across time, allowing law to attach itself to an unfaltering source of validity. Carré de Malberg's scheme, or some version of it, is today deeply embedded in our constitutional imagination. It is hardly possible to think of a reference point other than the state that can provide the stability which law needs so badly, which is why we still find it difficult to picture law without the state.

Yet if the state can only act as a lawgiver by making use of 'organs', would it not be more plausible to ascribe legislative sovereignty, not to the state in its entirety, but rather to the specific organ responsible for lawmaking? If this organ (or "office" or "institution") is excusively competent to create new laws, then it seems only logical to describe it as the legislative sovereign. This is the idea behind the English doctrine of parliamentary sovereignty, which gained dominance after the

27 Cf. Lars Vinx, 'Austin, Kelsen, and the Model of Sovereignty,' *Canadian Journal of Law and Jurisprudence*, XXIV(2) (2011): 473-90.

28 Pavlos Eleftheriadis, 'Law and Sovereignty,' *Law and Philosophy* 29(5) (2010): 535-69. Eleftheriadis repeats the gist of this argumentation in his article in this special issue ('Power and Principle in Constitutional Law'). This line of argumentation has a long and venerable history, going back to - at least - eighteenth century constitutionalism, see for instance Keith Michael Baker, *Inventing the French Revolution. Essays on French Political Culture in the Eighteenth Century* (Cambridge: Cambridge University Press, 1990), 41-4.

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Glorious Revolution.[29] Based on various sources ranging from medieval traditions to the political writings of Locke, parliamentary sovereignty implies that Parliament is the unique and supreme legislative power and can make any law it wants. There are no limits – especially no legal limits – to its authority, and no person or institution can override its legislation.[30] Parliament is of course understood here, not as the set of its current members, but rather as the formal institution that is convened and that produces law by following specific procedures, with a key role for majority voting.

Thus, just like political sovereignty, legislative sovereignty can be ascribed either to specific persons, or to the state as an abstract entitity, or to an organ, an office, or a specific institution within the state. But in all these cases, what we mean when we call such an entity sovereign is that it is the highest source of valid law within a given polity.

Can legislative sovereignty, like political sovereignty, be subdivided into *de jure* and *de facto*? I believe this is possible, although this opens a familiar can of worms.[31] From a strictly descriptive or positivist perspective, such a distinction is certainly problematic. For starters, it can be observed that *de facto* juridical authorities invariably claim that they are also *de jure* juridical authorities.[32] And if the task of legal theory is indeed to observe or describe the way empirically existent legal systems work, then we might have to agree that whatever entity is *de facto* accepted as legislative sovereign within a certain community is also the *de jure* legislative sovereign. This is also the lesson suggested by Hart. If we want to know what counts as valid law within a specific legal community, Hart recommends us to look for the rule of recognition that is operative within this community. Reaching beyond the rule of recognition is simply impossible, as this rule is not itself covered by any further laws or norms.[33]

29 Note that it is now often argued that the primacy of EU law has invalidated English parliamentary sovereignty, especially since the *Factortame* case in the early 1990s (cf. Nicholas Barber, 'The Afterlife of Parliamentary Sovereignty,' *International Journal of Constitutional Law* 9(1) (2011): 144-54). Obviously, Brexit might imply a reversal of fortunes for the doctrine of parliamentary sovereignty.

30 I am following here the classical account of A.V. Dicey as discussed by Jeffrey Goldsworthy. See Goldsworthy, *The Sovereignty of Parliament. History and Philosophy* (Oxford: Clarendon Press, 1999); Goldsworthy, *Parliamentary Sovereignty. Contemporary Debates* (Cambridge: Cambridge University Press, 2010), 274-5 and elsewhere.

31 Note that the distinction between *de facto* and *de jure* is somewhat ambiguous here. One can actually ask three relevant questions of a legislative sovereign. Does this sovereign entity, in the actual facts, function as the highest source of law? Is this entity, in the actual facts, accepted by the population as the rightful source of law? Is this entity—from a normative perspective—rightfully entitled to function as the highest source of law? As every question can be answered with yes or no, this results in eight types of legislative sovereignty. (One could do the same exercise for political sovereignty.) In the text, when discussing the possible distinction between *de facto* and *de jure* legislative sovereignty, I am merely inquiring whether a sovereign for whom the first two questions are answered positively, can nonetheless receive a 'no' on the third question.

32 As Joseph Raz, among others, reminds us. Cf. Raz, 'Authority and Justification,' *Philosophy & Public Affairs* 14(1) (1985): 3-29, at 6.

33 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994).

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According to Jürgen Habermas, this implies that even Hart collapses the dimension of validity into the dimension of facticity.[34] By emphasizing the rule of recognition as the ultimate source of legitimacy, Hart inevitably reduces the question of legal validity to the sociological question of what is *de facto* accepted as valid law within a given community.[35] Habermas also shows us a possible way out of this conundrum. According to Habermas's discourse theory, laws can only be valid if they are the consensual result of a rational procedure, that is, a procedure that is inclusive and in which only the force of the better argument counts. In consequence, there can be a *de facto* legislative sovereign (an entity that is functioning and that is accepted within a given territory as the highest source of valid law) which is not *de jure* sovereign (because the lawmaking procedures are insufficiently rational).

Theological natural law promises a different solution to this same problem. By postulating a transcendent source of valid law, it becomes conceivable that a *de facto* legislative sovereign (for instance a parliament creating laws) is not *de jure* sovereign; its very claim to legislative supremacy would already be a form of blasphemy.

3 Original constitutive power

When talking about political or legislative sovereignty, we talk about persons or entities occupying key roles within an institutionalized order. Yet in democratic thought it is generally assumed that such an order has its origins outside or before itself. The basic rules and norms that establish a community's institutional life might, legally speaking, have no further source or justification (concepts such as Hart's 'rule of recognition' and Kelsen's '*Grundnorm*' point exactly to these outer limits of legal logic). But it might still be possible to describe the legal system in its entirety as the volitional product of an entity that is somehow prior to the constituted legal order and hence prior to all legal norms. The traditional French name for this entity is '*pouvoir constituant*', usually rendered in English as constituent or constitutive power. In order to distinguish it from 'constituted constitutive power' (cf. infra), I will here use the formula 'original constitutive power' to refer to this extra-legal source of a legal system.

Invoking original constitutive power usually serves to justify a democratic institutional order, and this justification typically operates by describing this institutional order as somehow 'willed' or 'created' by the subjects themselves.[36] Depending on philosophical sympathies, the subjects qua *pouvoir constituant* can

34 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1996), 202.

35 One can of course also read Hart in a more charitable way, especially when taking into account the new 'Postscript' to *The Concept of Law*.

36 While the notion of sovereignty can potentially be used in the context of various political regimes, its usage to refer to original constitutive power is deeply interwoven with *democratic* politics.

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be given different names, such as ‘the people’, ‘the nation’, or ‘the multitude’. Yet in all these cases the basic idea is the same: original constitutive power is invoked to make it clear that the institutional rules, as well as the powers held by various officials and institutions, are not natural or God-given, but have their ultimate origin in the human beings that are subjected to these powers and institutions.[37]

Richard Tuck, in a recent book entitled *The Sleeping Sovereign*, argues that the usage of the term sovereignty to refer to constitutive power is *the* conceptual innovation of modern political thought, in particular because it opened the path towards democracy as we now know it.[38] For a very long time, conventional wisdom had it that democracy was impossible in large European countries, a belief that had its root in the association of democracy with direct popular participation in quasi-permanent, Athens-style councils. This fixation on the Greek example was eventually broken with the help of an all-important distinction that, according to Tuck, was first introduced by Bodin and Hobbes and received its most lucid expression in the writings of Jean-Jacques Rousseau.[39] This is the distinction between ‘sovereignty’ (‘*summum imperium*’ or ‘*summa potestas*’) and ‘government’ (‘*administratio*’).

As mentioned above, Bodin is often interpreted as an early advocate – or even the inventor – of the command view of sovereigny. Yet Tuck shows that Bodin also introduces a rather more subtle idea. When analysing the institutional structures of government one can discover who holds the highest political or legislative power within these structures. But for Bodin this is not the end of the story: ‘Hidden underneath those structures and possibly apparent only at very long intervals was [according to Bodin] a different kind of power which gave *legitimacy* to these other institutions’.[40] It is for this other power that Bodin ultimately reserves the term ‘sovereignty’. This sovereign is not necessarily involved in the actual government, but is responsible for choosing the type of government, laying down the basic laws, and appointing the magistrates. In consequence, it becomes possible that what appears to be a monarchy (because in day-to-day politics the highest power is exercised by a monarch) is in fact a democracy (because the citizens themselves instituted the monarchical form and appointed the king). Or, inversely, what appears to be a democracy (because the citizens themselves exercise power by sitting on various councils) might really be a monarchy (because it is a monarch who gave them these rights).

Tuck also undermines the Austinian reading of Hobbes. In his early works, Hobbes adopts Bodin’s distinction between sovereignty and government, yet

37 For a comprehensive overview of the different meanings that have historically been given to the term ‘constituent power’, see Joel Colón-Ríos, ‘Five Conceptions of Constituent Power,’ *Law Quarterly Review* 130 (2014): 303-36.

38 Richard Tuck, *The Sleeping Sovereign. The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016).

39 Note that Tuck’s history of constitutive power upends many received views of how this notion emerged (e.g. Andreas Kalyvas, ‘Popular Sovereignty, Democracy and Constituent Power’).

40 Tuck, *The Sleeping Sovereign*, 27.

adds a democratic twist to it. In *De Cive* he argues that men who join together to form a commonwealth, convene voluntarily and necessarily subject themselves to the will of the majority and are hence by default a democracy. Whether they decide to form an actual democratic government or, say, a monarchy, it matters little as in all these cases it is their will that reigns, be it through a popular assembly or in the person of the king.[41]

According to Tuck, Rousseau consciously follows in Hobbes's footsteps and equally believes that the general will originally resides in 'a democratic assembly governed by majority voting'.[42] Yet Rousseau modifies Hobbes's scheme on one important point. For Hobbes, the people in council can appoint a monarch without setting a date to meet in council again, in which case the people should be understood to have dissolved themselves. Sovereignty has then irreversibly been transferred to the monarch. Rousseau, in contrast, refused to believe that the 'sovereign legislature could transfer […] its sovereignty to another person or assembly'.[43] Rousseau had no problem accepting that the government acted as the sovereign's agent in the business of daily politics and even in making important decisions, for instance about war and peace. But the government could never represent the sovereign *as* sovereign. This means that Rousseau took the difference between sovereignty and government more seriously than anyone before him, leading to his famous conclusion that sovereignty lies in the general will, is inalienable, and cannot be represented. Of course, the sovereign does not have to be permanently active – something which Rousseau rejected as wildly implausible in a large, commercial society – most of the time it can be asleep. But at regular intervals it has to wake up and fulfil its task of making fundamental, 'general' laws. By redefining democracy in this way (the people do not have to be the actual government, it is enough that they are the sovereign) the road to democracy in the modern world was opened.

Despite the important contributions of Bodin, Hobbes, and Rousseau, it is the philosopher, revolutionary and politician Emmanuel Joseph Sieyès who became most famous for distinguishing the business of ordinary politics and lawmaking from the more fundamental task of establishing the constitution and erecting the various powers of government.[44] The former he called the domain of the constituted powers or '*pouvoirs constitués*', the latter is the domain of the constitutive power or '*pouvoir constituant*'. This vocabulary, first introduced in his 1789 pamphlet on the Third Estate, served to defend the people – or the 'Nation', as Sieyès

41 *Ibid*., 86 ff.

42 *Ibid*., 129

43 *Ibid*., 139. In this regard Rousseau comes closer to Locke, who similarly held that the people never completely lost their 'supreme power'.

44 Richard Tuck, in *The Sleeping Sovereign*, seems eager to discount Sieyès's contribution, in particular because Sieyès did not defend the idea that the people should exercise constitutive power through constitutional referendums (instead arguing that even constitutive power should be exercised through representative procedures) (*ibid*., 162 ff.). But this is somewhat arbitrary. Why would a theory of constitutive power only count as such when it includes the claim that constitutive power should be exercised through referendums?

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preferred to put it – as the fundamental, extra-legal and unrestricted source of constitutional law:

> Not only is a nation not subject to a constitution, it *cannot* and *should* not be [...]. However a nation may will, it is enough for it to will. Every form is good, and its will is always the supreme law. [...] There is no reason to be afraid of repeating the fact that a nation is independent of all forms and, however it may will, it is enough for its will to be made known for all positive law to fall silent in its presence, because it is the source and supreme master of all positive law.[45]

In this famous passage, Sieyès emphatically argues that the Nation, in contrast to the various constituted powers, is by definition prior to the constitution and can hence never be subjected to it. While Sieyès introduced the term '*pouvoir constituant*' with a clear and straightforward purpose (defending the rights of the commoners against the crumbling *Ancien Régime*), the term eventually gave rise to a wide variety of interpretations and theoretical speculations, especially with regard to the precise relation between this original power and the established order. One can for instance claim that original constitutive power is 'extra-legal' and 'prior' to the constituted powers in a merely *chronological* sense. In this case, original constitutive power refers to the power exercised by the persons who were present and participated when, in a revolutionary moment, the new polity was created.[46] Yet the term is more often used in a non-chronological sense so as to refer to a power that is *permanently* lurking underneath the constituted system. This sovereign power does not have to be constantly active – it can be 'sleeping' – yet it might wake up at any time to reassert its primacy over the constituted powers of government.

45 Emmanuel Joseph Sieyès, *Political Writings* (Indianapolis and Cambridge: Hackett, 2003), 137-8.

46 Antonio Negri sometimes uses the term in this sense, for example in his description of the events of the American Revolution. Negri strongly emphasizes the *material* character of this revolution: the establishment of armed militias in the colonies (the 'people-in-arms') was a real moment of innovation and a crucial act of 'constituent power' (Negri, *Insurgencies. Constituent Power and the Modern State* (Minneapolis and London: The University of Minnesota Press, 1999), 146 ff.). In general, though, Negri has something different and more fundamental (and more idiosyncratic) in mind when referring to constituent power. For Negri, true constituent power seems to be a radical, contestatory, destructive power that can always erupt; instead of aiming to take control of the state and institute law, it 'seeks rather to destroy State power altogether and refuse any relation to law' (Michael Hardt and Antonio Negri, *Labor of Dionysus: A critique of the State-Form* (Minneapolis: University of Minnesota Press, 2003), 294-5). See also Nora Timmermans, 'Terug naar het begin: Een onderzoek naar het principe van constituerende macht,' *Netherlands Journal of Legal Philosophy* 44(2) (2015).

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A related ambiguity concerns, again, the *de facto* versus the *de jure* usage of the term. In certain cases, the term is used in a clearly *de facto* manner.[47] Think for instance of an historical analysis where the notion of original constitutive power indicates the raw forces that generated the institutional order. The same would go for a sociological analysis that describes the constitutive forces upholding, on a daily basis, the constituted order. Constitutive power would then refer to the psychological fact of support by citizens, who, by their daily participation in the legal and political order (or at least by their acquiescence) allow this order to endure.[48] Yet the idea of original constitutive power can also be invoked in a *de jure* manner, without making any descriptive claim. In this case, the term refers to an entity that *should* be considered the source of all legal and political powers and therefore holds normative priority over these constituted powers. Think for instance of a situation where the constitution is promulgated 'in the name of the people', while it is openly admitted that the people played no role whatsoever in establishing the new order.

An extreme example of *de jure* usage is provided by the 1831 Belgian constitution as it is traditionally interpreted. A key article of this constitution (Art. 33) states that 'all powers emanate from the Nation', which suggests that the 'Nation' is the original constitutive power. At least since 1950, the official reading claims that the term Nation in this context indicates the complete set of all Belgians, including past, present and future generations.[49] Defined in this way, the Nation is clearly a *de jure* sovereign that can never appear in the actual facts.

Note that, in actual political practice, invoking original constitutive power is usually done for *symbolic* reasons. For opponents of *pouvoir constituant*, this is also the notion's greatest weakness. The absence of a materially existent constitutive power that genuinely precedes the constituted order,[50] as well as the legal impossibility of giving its will normative priority over all established rules, should be

47 When used in a strictly *de facto* manner, the notion of original constitutive power comes close to Schmitt's understanding of sovereignty, as the 'founding power' (*die begründende Gewält*) which in times of crisis appears and imposes its will in a decisive manner (cf. Kalyvas, 'Popular Sovereignty, Democracy and Constituent Power,' 226). The case of Erdogan is exemplary in this regard as well. By successfully imposing his will on the ongoing events Erdogan is not just recapturing state power, he is also restructuring Turkey's political and legal institutions to the point of constituting a new institutional order (with, for instance, restricted civil liberties, a stronger emphasis on Turkey's islamist identity, and an altered role for the army).

48 Think of Renan's famous definition of the nation as a 'daily plebiscite'.

49 This reading, unquestioningly transmitted by courts and constitutional scholars alike, has become dominant in Belgium in the postwar period, but is probably erroneous. See Raf Geenens and Stefan Sottiaux, 'Sovereignty and Direct Democracy: Lessons from Constant and the Belgian Constitution,' in *European Constitutional Law Review* 11(2) (2015): 293-320; Brecht Deseure, 'National Sovereignty in the Belgian Constitution of 1831. On the Meaning(s) of Article 25,' in *Reconsidering Constitutional Formation I. National Sovereignty*, ed. Ulrike Müßig (Sl: Springer, 2016), 93-157.

50 In an enlightening essay, Martin Loughlin has criticized this tendency to think of constitutive power as brute factuality, a tendency he describes as a 'materialist fallacy'. See Martin Loughlin, 'The Concept of Constituent Power,' *European Journal of Political Theory*, 13(2) (2014): 218-37.

sufficient to dispel this notion for good.[51] But this would be to overlook that even a merely symbolic invocation of original constitutive power might have important practical effects. For instance, the claim that the constituted powers of government derive from the people, even if factually inaccurate, does transform the relation between the government and its subjects, and might render resistance against the forces of government more acceptable. Think also of the Belgian case, where making the Nation (understood as a transgenerational entity) the original constitutive power has had the momentous effect of making national referendums unconstitutional.[52]

4 Constituted constitutive power

Pouvoir constituant is typically defined as the extra-legal or extra-constitutional source of a constitutional order. While regular laws are produced by the regular lawmaking organ (the 'legislative sovereign'), higher law (or constitutional law) is purportedly the product of this *pouvoir constituant*. Higher lawmaking might involve changes to the division of powers, redistributing competences across various policy levels, defining basic liberties, modifying the electoral system, and so on. Of course, most contemporary constitutional systems have specific procedures in place for making such changes, procedures that are usually more rigorous than the ordinary lawmaking procedures.[53] This leads to a paradoxical situation. When applying such procedures, we should say that constitutive power is at work because basic norms are being produced or redefined.[54] But this is strange as this exercise of constitutive power is established and framed by constitutional norms – it is 'constituted' – whereas constitutive power was defined as the very opposite of constituted power.

This situation should not surprise us. It was always difficult to imagine how original constitutive power would be exercised in absence of institutionalized proce-

51 See for example Eleftheriadis, 'Parliamentary Sovereignty and the Constitution,' 290; Eleftheriadis, Law and Sovereignty, 553 ff., 567.

52 Referendums, it is argued by Belgium's Council of State, would be an usurpation of the nation's will by a limited number of today's citizens. The nation's will can supposedly only be determined by the careful deliberation of elected representatives. See Raf Geenens and Stefan Sottiaux, 'Sovereignty and Direct Democracy: Lessons from Constant and the Belgian Constitution'.

53 The United Kingdom is a remarkable exception in this regard.

54 In Belgian jurisprudence, the term is used very explicitly (and apparently without any awareness of the paradox). The procedure for amending the constitution requires declaring a number of constitutional provisions open for revision, followed by the dissolution of the House of Representatives and the Senate. After new elections, the newly elected Parliament can effectively revise the constitution. It now acts – so it is typically said – as 'constituent power'. See Patricia Popelier and Koen Lemmens, *The Constitution of Belgium. A Contextual Analysis* (Oxford and Portland: Hart, 2015), 39 ff.

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dures.[55] Moreover, it is only natural that constitutional democracies want to entrench their basic norms and statutes more solidly than regular laws (and certainly do not want to make them dependent on random expressions of constitutive will). But for theories of constitutive power this remains an important puzzle. On the one hand, we like to define constitutive power as an extra-institutional, sometimes almost ontological power that founds the polity. But in practice, constitutive power turns out to be just another function of government, exercised through specific procedures that are stipulated in the constitution.

In French legal theory, the preferred solution for this theoretical puzzle consists in making a sharp distinction between on the one hand 'original constitutive power' ('*pouvoir constituant originaire*') and 'constituted constitutive power' ('*pouvoir constituant constitué*').[56] While the former refers to the purported extra-institutional source of political and juridical institutions, the latter refers to the competence of higher lawmaking as exercised through institutionalized procedures. Thus, when used in the sense of constituted constitutive power, sovereignty refers to the entity which, *within* the established order, is officially appointed to make fundamental changes to the legal and political system, typically by following rigid procedures.

While all democracies need some proceduralized way to alter their constitution, opinions as to what these procedures should be differ wildly. Rousseau himself, in his *Considerations on the Government of Poland*, proposed a system of mandated delegates.[57] Sieyès, during the French Revolution, argued in favour of a dedicated circuit of political representatives, distinct from regular representatives and not bound to an imperative mandate so as to allow for genuine deliberation.[58] In sharp contrast to this, the Girondin faction (including the marquis of Condorcet) came to advocate plebiscitary referendums: the introduction of a new constitution, but presumably all further constitutional revisions as well, had to be approved in a majoritarian vote by the complete electorate. Such 'constitutional referendums' were actually pioneered in Massachusetts in 1778, and are today widespread and often seen as the optimal way to organize constituted constitutive power.[59] On the other hand, it is clear that referendums have severe short-

55 This is the so-called 'paradox of constitutionalism': in order to constitute institutions and procedures, one cannot but make use of institutions and procedures. For further discussion, see Martin Loughlin and Neil Walker, ed., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

56 Yaniv Roznai claims that this distinction, which he also calls the distinction between 'constituent power' and 'amendment power', was born in the debates in the French National Assembly prior to 1791. Cf. Roznai, 'Towards a Theory of Unamendability,' *New York University Public Law and Legal Theory Working Papers* (2015): 15-22.

57 Tuck, *The Sleeping Sovereign*, 143 ff.

58 *Ibid*., 163 ff. Note that in 1789, Sieyès was still of the opinion that the new, upcoming constitution would have to be ratified in a general referendum. But he would soon abandon this position. See *Ibid*., 164 and see Lucien Jaume, 'Constituent Power in France: The Revolution and its Consequences,' in *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 70.

59 This opinion is strongly defended by Richard Tuck.

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comings as decision procedures, and it is increasingly admitted that referendums are ideally combined with deliberative processes so as to improve the quality of decision-making and stimulate the citizens' involvement.[60] In certain places, highly complex set-ups are being tested, involving citizen panels drawn by lot, mixed panels with elected politicians, interaction through social media, feedback from traditional political institutions, and possibly a referendum to close the process.[61] While the level of sophistication is new, the basic concern remains the same (and remains as paradoxical) as in the eighteenth century: how to let the people, qua constitutive power, appear and act within a system of constituted powers.

The term constituted constitutive power is relatively rare, but the notion of *Kompetenz-Kompetenz*, popular in recent debates about the European Union, can be considered a prime example of it. The *Kompetenz-Kompetenz* is the special competence to transfer political or legislative competences from one level of government to another, and it is often seen as a token of sovereignty.[62] It is for instance claimed that EU member states, although subjected to EU-law, nonetheless remain sovereign because their governments keep the *Kompetenz-Kompetenz* firmly in their own hands. The *Kompetenz-Kompetenz* is clearly a form of constituted constitutive power (it is a formally recognized competence of governments), distinct from both political and legislative sovereignty, as well as from the original constitutive power that might be its deep, extra-legal foundation.

5 External sovereignty

The four meanings of sovereignty listed above are all 'internal' in that they refer to the domestic life of a legal or political community. In theory, the term sovereignty could meaningfully be used in any of these four senses even in a polity 'without an outside', e.g. a polity that does not interact with other polities or a unified world state. In reality, however, the term sovereignty rose to prominence in a Europe of Westphalian states and is therefore closely connected with the status of a polity as an autonomous actor that is present and active on the stage of independent states. This then points to a fifth meaning of the term, namely sov-

60 See Stephen Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012); and see Peter Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution,' in *Sovereignty and the Law*, ed. Richard Rawlings, Peter Leyland and Alison L.Young (Oxford: Oxford University Press, 2013), 154-64.

61 See for instance Hélène Landemore, 'Inclusive Constitution-Making: The Icelandic Experiment,' *Journal of Political Philosophy* 23(2) (2015): 166-91.

62 See for instance Cezary Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context,' in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart, 2003), 369. Note that even a judicious scholar of sovereignty, Michel Troper, uses the term sovereignty in this sense (when arguing that the French state, despite its membership of the EU, currently remains sovereign because the rules concerning the distribution of competences remain under its control), without clearly distinguishing it from other usages of the term. See Michel Troper, 'Sovereignty,' in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 359.

ereignty as ‘external sovereignty’. A polity is sovereign in this sense when it is not dependent on another state, when it does not usually suffer interference from other states in its domestic affairs, and when it is recognized as such by the international community of states.

Once again, there might be circumstances where the notion of external sovereignty is used in a strictly *de facto* manner (to refer to the effective condition of a country that is not interfered with by others), or in a strictly *de jure* manner (to refer to the official status of a country as a sovereign entity in international law and international institutions). Political history is filled with examples of countries that were *de jure* sovereign but not *de facto*, or the other way around.

Does external sovereignty require the presence of internal sovereignty? In principle it does not. One can imagine a territory and a population (for instance a stretch of desert, sparsely populated by nomadic families) that is respected as independent by the international community, even if it lacks the internal political and juridical structures of sovereignty. This shows that the meaning of external sovereignty is logically independent from other uses of the term sovereignty.[63] Yet in practice internal and external sovereignty are closely related.[64] Historically, external sovereignty has always required the capacity to conclude binding treaties with other states, and it is unclear how this could be done without an internal, centralised hierarchy.[65] This also suggests that external sovereignty, rather than being a mere expression of political and legal autarky, normally points to a form of mutual *recognition* in the community of interacting states. In the initial Westphalian system, state sovereignty could maybe still be understood in a more autocratic manner, as ‘existing apart from and prior to’ the international interactions between states.[66] But in the world that emerged after World War II, the *relational* aspect has become absolutely central to our understanding of external sover-

63 Cf. MacCormick, *Questioning Sovereignty*, 129.

64 Robert Jackson, in his introductory book on sovereignty, strongly emphasizes the interdependence of external and internal sovereignty. See Robert Jackson, *Sovereignty* (Cambridge: Polity, 2007), 12 and elsewhere.

65 As is also confirmed by the Montevideo Convention, which requires sovereign states to have a government and to be capable of establishing relations with other states. For a contemporary assessment of the Montevideo Convention, as well as a clear-eyed overview of the conceptual difficulties in defining sovereign states, see Thomas D. Grant, ‘Defining Statehood: The Montevideo Convention and its Discontents,’ *Columbia Journal of Transnational Law* 37 (1999): 403-57. Of course, it does not follow that external and internal sovereignty need to be exercised by the same entity. They can be exercised by different ‘organs’ of the same state, or they can be seen as different ‘powers’ of government (as in old theories about the separation of powers, such as Locke’s), but they can also be devolved to completely different levels of government.

66 Cf. Jean Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012), 201.

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eignty.[67] According to Jean Cohen, the principle of 'sovereign equality' formulated in the United Nations Charter (Art. 2) is expressly meant to emphasize this relational aspect. The United Nations embodies the international community, and states are today sovereign because they are recognized as equal holders of 'legal personality' within this community. This means that they 'have an equal entitlement to participate in the formation of international law (as legal subjects) and to take on international obligations'.[68] Just as domestic citizenship is inconceivable without the existence of a domestic legal and political order, so is sovereignty – citizenship in the global community – today inconceivable without the existence of well-ordered global institutions.

For Cohen, this also implies that the traditional connection between sovereignty and 'absoluteness', i.e. a government's entitlement to do whatever it wants both at home and abroad is definitively cut. Membership in the global community today depends on accepting certain limitations that are non-negotiable. For starters, the transition to the principle of sovereign equality already forced states to shed many of their external privileges: 'States gave up their 'sovereign' right to go to war, aggression and annexation became illegal, colonialism was dismantled, and 'empire' became a pejorative term'.[69] But the limitations also extend inwards. It is now a permanent fixture of our world that if a government gravely violates the human rights of its subjects, it opens itself to interferences from the global community, interferences that can range from mere naming and shaming to full-blown military invasions and long-term occupation. According to the so-called 'political conception' of human rights, this is the key role of human rights today: human rights are the triggering criteria for the suspension of external sovereignty.[70] In the words of Joseph Raz, human rights are these 'rights which set limits to the sovereignty of states [...]. They disable, or deny the legitimacy of the response: I, the state, may have acted wrongly, but you, the outsider are not entitled to interfere. I am protected by my sovereignty'.[71] This political conception of human rights, as advocated by Raz, Rawls, Cohen, and many others, is meant to describe today's sovereignty regime:[72] a world that is composed of sovereign states, but where the sharpest edges of sovereignty (e.g. governments hiding

67 Michel Troper argues that this relational element has always been a part of sovereignty: 'Being sovereign never meant to be unbounded by treaties. On the contrary, being bound by treaties to which he had consented meant that the sovereign was only bound by his own will. The capacity to make treaties and be bound by them was thus viewed not as a limitation but as an expression of sovereignty—Bodin placed it among the attributes of sovereignty, as part of the power of making war and peace' (Troper, 'Sovereignty,' 359).

68 Cohen, *Globalization and Sovereignty*, 200.

69 *Ibid*., 202.

70 Jeremy Waldron offers a very persuasive criticism of the political conception of human rights, see Waldron, 'Human Rights: A Critique of the Raz/Rawls Approach,' New York University Public Law and Legal Theory Working Papers. Paper 405 (2013).

71 Joseph Raz, 'Human Rights Without Foundations,' in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 328, 332.

72 Cf. Raz, 'Human Rights Without Foundations'; John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999); Cohen, *Globalization and Sovereignty*.

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behind their sovereign status to abuse their own subjects) are filed off by binding international norms.[73]

Appealing as this picture of the world may be, many authors claim that it is deeply anachronistic. They argue that we have decidedly moved beyond such a statist world, and have now entered a 'post-sovereign condition'. In the discipline of legal theory, Neil MacCormick was probably the first to emphatically push this point. In his 1993 text, 'Beyond the Sovereign State', he famously argued against those who worried about the United Kingdom's sovereignty within the EU:

> A different view would be that sovereignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means regrettable, and that current developments in Europe exhibit the possibility of going beyond all that. On this view, our passing beyond the sovereignty state is to be considered a good thing, an entirely welcome development in the history of legal and political ideas.[74]

The literature on post-sovereignty is too large to summarize here,[75] but it goes without saying that the end of sovereignty in the external sense of the word will also have profound effects on all other meanings of the term. Indeed, this is exactly Neil MacCormick's claim. According to MacCormick, the EU not only shows us a path beyond a system of states endowed with external sovereignty, it also puts into question the need to concentrate all political and legal authority in one single point, an article of faith in most classical theories of sovereignty. Moreover, MacCormick - as opposed to many other observers - is strongly convinced that our exiting the realm of sovereignty is not a threat, but rather a golden opportunity to democratize processes of government at all levels.[76]

6 Conclusion

The bulk of this essay has been dedicated to differentiating between the various meanings of the term sovereignty, leaving me with little room to answer the question announced in the title. Is it possible, out of these manifold meanings, to distil one 'master meaning' from which all the other ones naturally flow? Strictly speaking, I think the answer should be no. It is true that the element of 'supreme

73 For criticism of Jean Cohen's views on sovereignty, see Raf Geenens, 'The Emergence of Supranational Politics: A New Breath of Life for the Nation-State?' *Telos* 156 (2011): 24-46.

74 Neil MacCormick, 'Beyond the Sovereign State,' *The Modern Law Review* 56(1) (1993): 1.

75 A good starting point is the collection *Sovereignty in Transition* (ed. Neil Walker), which, as one reviewer put it, reads like a 'juridico-political bestiarium' that covers a wide range of theoretical alternatives to the traditional, statist sovereignty regime (cf. Jens Bartelson, 'The Concept of Sovereignty Revisited,' *The European Journal of International Law* 17(2) (2006): 474). See also David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty,' *Legal Theory* 8 (2002): 1-44.

76 MacCormick, *Questioning Sovereignty*, 133-6.

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power' is somehow present in all meanings of the term sovereignty. But even with that element of commonality, the term sovereignty still refers to such a variety of things that it is almost outlandish to always use the same term. The term appears in the doctrine of parliamentary sovereignty, in theories of *pouvoir constituant*, and in studies of international relations, yet the concepts at play are so different that the relation between these different usages of the word sovereignty comes close to being merely homonymic.

This is insufficiently recognized in the contemporary debate on sovereignty. All too often an impression is created that, because the same word is used, one is also discussing the same issue – even when this is patently not the case. For instance, those who argue against sovereignty because the concept is supposedly incoherent would do well to indicate what usage of the term is exactly under threat, as their criticisms might leave other usages untouched. Maybe not, but even clarifying this would require more conceptual attention to the term's manifold meanings. Similarly, those who claim that sovereignty no longer exists today usually start by describing the disappearance of 'external sovereignty' but then draw far-reaching conclusions about sovereignty in general, without taking into account that certain other forms of sovereignty might perfectly well persist.

This latter point is of particular importance. I am convinced that even in 'post-national' or 'post-sovereign' conditions, many aspects of sovereignty can and should be conserved. As I argue elsewhere, the myriad uses of the term sovereignty, despite their disparities, do all serve one unique and normatively valuable cause: no matter how the term is used, it always helps to create and sustain the perspective from where a political community can consciously understand itself as an autonomous agent.[77] In this regard, I would claim that there is a unity underneath the different meanings of the word sovereignty, but it *is* a unity of purpose rather than of meaning. That purpose is establishing an image of society as an autonomous entity. The term sovereignty always refers to some way or other in which society can be consciously steered, instead of being a loose collection of individuals whose interactions are controlled by merely empirical mechanisms. Whether it is a central office of command, a source of binding norms, a theory on political society as the volitional product of its subjects, the institutionalized capacity to alter society's basic norms, or the status of being recognized as independent by other societies; in all these cases the notion of sovereignty helps society to see itself in a specific way, namely as a unit of intentional collective action.

This is also why the idea of sovereignty is such a good match with the idea of democracy, and why the transition to a post-sovereign condition is usually perceived as a threat to democratic self-government, that is, to the possibility of *popular sovereignty*. If we do indeed evolve towards a world without sovereign states, citizens might no longer feel part of a collective agent able to steer its course on the basis of shared reasons, and might instead have the feeling that they are sub-

77 Raf Geenens, 'Sovereignty as Autonomy,' *Law and Philosophy* (2017) (forthcoming).

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jected to blind societal or economic laws. This makes it highly urgent to understand what elements of the sovereign state can be rescued in our post-sovereign world, and how. Certain meanings of sovereignty seem more important in this regard than others. Democracy as popular sovereignty at least implies that original constitutive power as well as constituted constitutive power are attributed to the people. Legislative and political sovereignty should probably be exercised in the name of the people as well, even if representation will always be involved and even though the need to centralize all legislative and political powers can be questioned. The link between popular sovereignty and external sovereignty seems contingent to me, although I have to admit that the internal and external meaning of sovereignty have been interwoven for so long that our imagination struggles to untie them.

But this is not the place to conduct this debate in full. My principal claim here is that this debate requires its participants to be more careful towards the different meanings of the term sovereignty than they usually are. And I strongly hope that the distinctions proposed in this article will help some way in that direction.

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Power and Principle in Constitutional Law*

Pavlos Eleftheriadis

Is sovereignty relevant to modern government? This is a question of great theoretical interest as well as of great practical interest. The current debates on the future of the European Union after the British referendum have touched on issues of sovereignty. Many people in the United Kingdom are worried, for example, about what they perceive to be an incursion into sovereignty by European institutions and believe that a withdrawal from the EU will restore sovereignty. This is what Prime Minister Theresa May said at a speech to the Conservative Party Conference in September 2016. She promised that leaving the EU would make the United Kingdom once again a fully 'sovereign' state. Does it make sense to speak of sovereignty in this way? Or is the ideal of absolute self-government a mirage? Can the idea of sovereignty carry the political burden placed upon it?

Many important philosophers and legal scholars believe that it cannot. The distinguished legal philosopher Neil MacCormick famously argued that processes of 'division' and 'combination' had already taken place in such a way that we are now 'beyond the sovereign state'.[1] MacCormick believed that international institutional developments, including the emergence of the legal structures of the European Union with the twin principles of the direct effect and supremacy of EU law, had rendered sovereignty largely irrelevant to modern states. In his view sovereignty had stopped being a useful idea, since a well-ordered state under the rule of law always disperses power to various bodies and sources both inside as well as outside its borders.[2] So we cannot become fully sovereign, in the sense of concentrating power in one institution or body. That is not how modern states work.

It seems to me that this view of the fragmentation of power and irrelevance sovereignty is now a dominant view inside the EU. An example of this attitude to sovereignty is the Opinion of the Court of Justice of the European Union on Accession to the European Convention on Human Rights, which declared that the law of the European Union is 'autonomous' from both member state constitutional law and public international law.[3] If European Union law is 'autonomous' it

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1 Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 133. I made a similar argument in Pavlos Eleftheriadis, 'Law and Sovereignty,' *Law and Philosophy* 29 (2010): 535.

2 MacCormick, *Questioning Sovereignty*, 129.

3 See Opinion 2/2013, *Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion of the Court (Full Court) of 18 December 2014, ECLI:EU:C: 2014:2454.

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does not derive form sovereignty in either of its manifestations: domestic or international. EU law is thus one element in a fragmented universe of legal structures where it is pointless to look for a foundational or ultimate rule.

Other theorists, however, disagree with this dismissal of sovereignty. Martin Loughlin, one of the leading scholars of public law in Britain, has criticised MacCormick for failing to appreciate the true nature of sovereignty. He believes that sovereignty as power is an essential precondition of any legal order.[4] Loughlin calls this view a 'relational' concept of sovereignty because for him political power is 'generated by the relationship between rulers and ruled'.[5] Loughlin's ambitious argument tells us that MacCormick's 'errors' were due to his legal positivist theoretical orientation and his insistence that political sovereignty could be reduced to a matter of law alone. Loughlin's view, by contrast, is based on social relations. The argument is based on an idea of 'constituent power' which resides with the people or the nation, and which is the 'repository of sovereignty in those regimes that adopt formal constitutions and allocate legal authority to designated organs of government'.[6] In Loughlin's view sovereignty, conceived as constituent power, is an essential element of all political activities and processes and is the 'generative principle' of public law.[7]

The disagreement between MacCormick and Loughlin is about the interplay between power and principle in constitutional law. It reminds us of the subtly different but also overlapping uses that the idea of power is being put to in legal and political theory. Loughlin uses sovereignty to *describe* power, namely the physical but also mental power that underlies the political essence of the state. The power of the people or of the multitude, Loughlin says, is the essential political core of state law.[8] By contrast, MacCormick deploys sovereignty as a technical concept that we use to *interpret* power or claims of right, namely the legal processes and constitutions that organise the state.

One could see this as a sign that there is no disagreement between them, since they are talking about different things. Loughlin is interested in power. MacCormick is interested in legal ideas. But such a conclusion would be a mistake. Loughlin and MacCormick are looking at the same thing. They are looking at the way in which law and power interact in setting up a constitution. Their subject matter is sovereignty. When one looks at their views in detail it becomes clear that for neither of them is there an object 'power' or an object 'law' that can be examined separately from one another. They are thus in agreement that some factual preconditions make law possible and that in some way the legal usage supervenes on the

4 Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004), 89-90.
5 Loughlin, *The Idea of Public Law*, 90.
6 *Ibid.*, 90.
7 *Ibid.*, 113.
8 See Loughlin, *The Idea of Public Law*, 113, where he writes: 'Constituent power cannot be entirely absorbed into norms nor wholly reduced to fact. It emerges because of the unbridgeable gulf that exists between governors and governed, and it expresses a form of power that mediates between the three orders of the political'.

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political process and changes it. Their conclusions, however, differ dramatically. For MacCormick, sovereignty was once able to guide constitutional law but has now been replaced by other ideas. Loughlin denies that this change has taken place.

In this essay I will look at this disagreement in order to unearth some of the complexities of constitutional law. I will be focusing on the ways in which power and principles interact in the creation of a constitution. My argument follows the practical and constructivist account of law as a project of deliberation, which I set out in an earlier book.[9] I will outline here a practical and constructivist account of constitutional law which is similar to the account I gave there of legal rights. I call it the 'deliberative constitution'. I will defend MacCormick because I think he draws the correct conclusions about power and sovereignty. Sovereignty is just another construction of practical reason that features in the process of legal deliberation on matters of constitutional law. But I will also defend Loughlin, because I will argue that real comprehensive and coercive power remains one of the most important dimensions and preconditions of constitutional law. Because law is a self-reflective reason that deliberates on what ought to be done and ultimately what ought to be enforced through the mechanisms of the state, all its basic concepts emerge from or through power.

1 Legal sovereignty

I start with legal sovereignty. What is it? Modern law provides us with no guidance. Most constitutional discussions of sovereignty refer to 'popular sovereignty', not to sovereignty itself. Popular sovereignty, however, is a constitutional principle, with a separate content. It is connected not to the theory of law but to theories of democracy. Legal sovereignty in this simple sense has had a sophisticated legal development in only one case, namely the constitutional law of the United Kingdom. The great Victorian constitutional scholar A.V. Dicey has said that parliamentary sovereignty was 'an undoubted legal fact.'[10] He said it was 'the dominant characteristic of our political institutions'.[11] For Dicey, the principle of parliamentary sovereignty had priority over all other principles of constitutional law in that an Act of Parliament could not ever be challenged by a court on the basis of any other principle. This would be the case even if this Act of Parliament violated constitutional principles, for example, if it abolished the court system or

9 Pavlos Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008).

10 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915; reprinted Indianapolis: Liberty Fund, 1982), 24. For the idea of sovereignty in English law, see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999); J. W. F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007); Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2008). For an effective criticism of the Diceyan view of the United Kingdom constitution, see T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution and the Common Law* (Oxford: Oxford University Press, 2013).

11 Dicey, *Introduction*, 3.

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imposed retroactive criminal punishment. It is important to emphasise that Dicey's sovereignty is something very different from popular sovereignty.

As is well known, this is a unique position in world constitutionalism. Most states have written constitutions that set some principled limits to the power of legislatures, even if they do not provide judicial enforcement of those limits. In Dicey's theory, no legal limits are even conceivable. The legal sovereign, whose sovereignty is a matter of fact, is incapable of restriction. Dicey defended this view on the basis of a deeper theory of law which he took from John Austin. Law, for Austin, is created by the actions and words of the sovereign, whenever these are effectively communicated to the subjects by way of 'commands'. He said that a legal order exists when a sovereign obeys the commands of no one and whose commands are obeyed by everyone.[12] Austin wrote that 'a command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded'.[13] In any legal system, Austin had argued, the sovereign is the only source of law. Dicey rejected some aspects of Austin's theory but accepted the most fundamental, namely the premise that the foundation of the legal order is the political fact of the existence of the sovereign.[14] This is a 'simple fact' theory of sovereignty or 'factual sovereignty' for short.

Austin's theory of sovereignty is, however, a very inadequate theory of law. H.L.A. Hart pointed out that under Austin's theory there cannot be any stable framework of government and no constitution since there can be no distinction between a higher law of the constitution and ordinary law.[15] If there is a sovereign, then every desire or wish he or she may have is law. Anything the sovereign says about the form of government and law is fully revised by his or her next pronouncement. Under such a framework there cannot be a constitution or constitution-making, since the fundamental law is always superseded by the sovereign's implicit or explicit wishes. Hart explained that Austin's theory was wholly incapable of accommodating a system where power was divided between the various branches of government and, indeed, exercised by the electors. The problem was also identified by Richard Latham when he noted that 'the King, Lords and Commons meeting in a single joint assembly, and voting by majority, or even unanimously, could not enact a statute'.[16] Legislation requires the Queen in Parliament acting according to the standing rules of law-making. Such rules have no place in

12 See John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995). For very illuminating discussions of Austin's legal philosophy, see John Austin, *The Legacy of John Austin's Jurisprudence*, ed. Michael Freeman and Patricia Mindus (Dordrecht: Springer, 2012).

13 Austin, *The Province*, 21.

14 Dicey noted that '[a]ll the speculative difficulties of placing any limits whatever on sovereignty has been admirably stated by Austin and by Professor Holland'; Dicey, *Introduction*, 18.

15 H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1993).

16 R.T.E. Latham, *The Law and the Commonwealth* (Oxford: Oxford University Press, 1949), 523, note 3.

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Austin's view of law.[17] To accommodate our ordinary experience of law and the distinction between higher and ordinary law, we need a distinction between laws that define what law is, or constitutional laws, and other laws.

In Hart's view, we need a distinction between primary and secondary rules, i.e. rules of conduct and rules about rules.[18] Such a distinction was impossible for Austin, for whom all legal rules were commands to do something. For Hart by contrast the very idea of a legal system depends on a structure of secondary rules, namely rules of competence that outline the offices of executive power, the legislature and the judiciary, and that tell us how law is made. This view appears consistent with British constitutional law.[19] In the United Kingdom the power to make laws is divided between the House of Commons, the House of Lords and the Monarch, a process which constitutional lawyers call 'the Queen in Parliament'. Such divided power was impossible to accommodate under Austin's theory, however, and Austin himself was led to the conclusion that the sovereign in the United Kingdom was only the body of 'electors'.[20] H. L. A. Hart endorses, therefore, a *complex fact* view of sovereignty according to which legal sovereignty is a legal *office*, which is the result of some fact of convergence of officials in attitude and belief. In this analysis, sovereignty is not itself a fact, as Austin had argued. It is a legal title, because law is made by appropriate bodies, according to appropriate procedures set out in the rule of recognition.

This is the view of sovereignty endorsed by Neil MacCormick. It is also the theory attacked by Loughlin. Hart explained the continuity of legislative authority by means of a 'firmly established rule' which gives a new legislator the 'right' to legislate. Such a rule exists because it is 'generally accepted by the group' during the lifetime of the incumbent legislator. Under such a general rule, 'Rex I is merely the particular person so qualified at a particular time'.[21] So for Hart, it is not power that gives rise to law. The law is created by a separate complex fact, namely the set of beliefs and attitudes or cognitive patterns that signal support for appropriate secondary rules, which Hart calls 'rules of recognition', 'rules of

17 Latham concluded that in the United Kingdom the sovereign is not an 'actual person' but a body whose designation 'must include the statement of rules for the ascertainment of his will, and those rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him'; see Latham, *The Law & the Commonwealth*, 523 (footnotes omitted).

18 Hart, *The Concept of Law*, 79-99.

19 The appearance may be deceiving. For a persuasive critique of the Hartian view of the British Constitution, see Allan, *The Sovereignty of Law*.

20 Austin spent a great deal of time trying to explain this in ever more implausible ways. For a detailed discussion, see Pavlos Eleftheriadis, 'Austin and the Electors,' *Canadian Journal of Law and Jurisprudence* 24 (2011): 441.

21 Hart, *The Concept of Law,* 58. (cf. footnote 18).

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change' and 'rules of adjudication', which jointly create the legal system. Power makes law only through the mediation of such rules.[22]

MacCormick explicitly endorsed this legally defined view of sovereignty: 'Sovereign power is that which is enjoyed, legally, by the holder of a constitutional power to make law, so long as the constitution places no restrictions on the exercise of that power…'[23] Many constitutional lawyers agree with this general point.[24] They are of the view that a constitution depends on rules of competence that apply to itself and to the rest of the law. From this idea it also follows that all offices of government, contrary to what Austinian sovereignty requires, divide power into different components that are kept separate by legal principles and rules, ultimately monitored by the courts. This is the familiar constitutional principle of the separation of powers. Under Hart's model of rules, no office is truly outside the law and there is no sovereign or any other ultimate 'creator' of the law. All law is made by impersonal secondary rules, the rule of recognition and the rules of adjudication and change. For Hart, legal sovereignty is true because it is subject to the rule of recognition, not the other way round.

2 Constitutional supremacy

Hart's idea of law as a system of rules gives rise to a third possibility, besides the two conceptions of sovereignty already mentioned. This is the possibility that law recognises the supremacy of certain rules and institutions, without any resulting sovereignty. Under Hart's own system it is perfectly conceivable to have power distributed according to a fundamental rule of recognition in such a way that no single person or single institution enjoys ultimate power. This is the position reached by MacCormick, captured by the idea of a 'post-sovereign' state. In this model, every institution and office is controlled by every other institution and office, under a system of checks and balances that may involve both domestic and international institutions.

We may call this possibility 'constitutional supremacy'. This is a common view in the United States, where the idea of sovereignty plays a secondary role. The American constitutional scholar Christopher Eisgruber, for example, speaks of a democratic constitution as a mechanism for *breaking up* power: 'If constitution-makers want to establish a democratic system of government, they should design

22 Hart's view is a continuation of earlier theories of legal sovereignty. See W. J. Rees, 'The Theory of Sovereignty Restated,' 496; H. W. R. Wade, 'The Basis of Legal Sovereignty,' *Cambridge Law Journal* 172 (1955). The same view is endorsed by Jeffrey Goldsworthy, for whom 'rather than being a transcendent creator of all laws, a sovereign law-maker is itself created by fundamental laws'; Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999), 14.

23 MacCormick, *Questioning Sovereignty*, 127. Nevertheless, MacCormick concludes that 'sovereignty is neither necessary to the existence of law and state nor even desirable' (p. 129).

24 See for example Goldsworthy, *The Sovereignty of Parliament*.

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institutions that are impartial rather than majoritarian'.[25] Eisgruber rejects the British model of sovereignty of an 'omnipotent national Parliament' and proposes that a more satisfactory constitution would choose instead 'to fragment power in order to increase the likelihood that the government will be responsive to the interests of minorities as well as majorities'.[26] For this view of the constitution, sovereignty is actually irrelevant. Eisgruber argues that the meaning and purpose of a constitution is a democratic one, namely to create 'a range of institutions to represent a people who would otherwise have no satisfactory way to act collectively'.[27] We gain nothing by supposing a source of overwhelming political power anywhere in that institutional framework.

As I understand it, Loughlin's argument is that both MacCormick and Eisgruber fail in their attempt to escape the idea of sovereignty. At most, MacCormick's 'post-sovereign' state describes a momentary retreat of the 'constituent' power that makes constitutional stability possible. And whatever their moral ambition, Eisgruber's democratic principles remain at the mercy of underlying political powers. Loughlin's claim is that 'constituent power' is the 'repository of sovereignty' and that this is true even where power is dispersed into different branches of government.[28] It is a power that *constitutes* not only the legal system, but the state itself. Loughlin writes that constituent power is the 'generative principle' of modern constitutional arrangements and gives 'juristic expression to those forces that constantly irritate the formal constitution, thereby ensuring it is able to perform its political function'.[29] I believe that Loughlin is wrong about this point. He is wrong to say that sovereignty *creates* law. He is correct, however, to say that law is ultimately *about* power, is born of power and has the duty of harnessing power for the sake of justice. This is what I will seek to explain in the next section.

3 The problem of amendment

Loughlin's argument is best understood when we apply it to the question of constitutional change. The question here is not what motivates or causes constitutional change. The answer to that is often simple. What causes constitutional change is a set of unsettling social and economic developments. When such developments take place, people will use their power to change the constitution. The question, rather, asks by what process a valid change in the constitution is made. How is the constitution amended in law?

This is the area where Loughlin believes that sovereignty always plays its part. After examining a series of historical examples and theories of the constitution, Loughlin suggests that constitutional change cannot follow legal constraints but

25 Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge, Mass.: Harvard University Press, 2001), 19.

26 Eisgruber, *Constitutional Self-Government*, 19.

27 *Ibid.*, 206.

28 Loughlin, *The Idea of Public Law*, 90.

29 *Ibid.*, 100.

is always subject to social processes uncontrolled by law. He argues that constitutional validity is not a matter of 'norms', but a matter of constituent power or practice, which cannot be captured by legal forms. While he admits that 'constituent power' is not a purely brute or factual power, he nevertheless concludes that constituent power 'is the power that gives constitutions their open, provisional, and dynamic qualities, keeping them responsive to social change and reminding us that the norm rests ultimately on the exception'.[30]

Loughlin's argument has an obvious connection to Hart's. Hart too relies on some non-legal event, a set of facts, a political episode or a general convergence of attitude and belief, as the foundation of the legal order. Loughlin observes, however, that any such factual foundation creates radical instability. If the constitution were created by the kind of social agreement described by Hart, then it would change every time that social agreement changed. It would not just be open to the possibility of change, but it would have to be taken to have changed merely by the change of opinion. Under Hart's framework we would have to accept that there are always two ways of amending the constitution. The first way would be through processes of law, i.e. through the formal processes of constitutional amendment as provided by the written constitution. The second way would be through a change in the relevant constitution-generating fact, i.e. through the relevant political episode or the type of common allegiance and belief that sustained the rule of recognition. This constitution-generating change would occur at the more fundamental level underpinning the law (or, more accurately, causing it to happen) through a shift in the social pattern which was the basis of the rule of recognition and which Loughlin calls 'constituent power'. Every such change would amend the rule of recognition and thus create a new constitution. Constituent power must be ever present.

But if such a second avenue of constitution-making were possible, it would be a constant possibility. Law's existence and authority would thus depend on ascertaining that relevant social facts were true. How could we ever assume that the Constitution was still in place, without checking first for the underlying factual background? In Hart's account, for example, everything should depend on the relevant facts about people's attitudes and beliefs and their required convergence. Hart's theory thus makes the constitution entirely unique. Unlike all other laws, the constitution cannot rest on its validity. It would exist only if people believed that it existed. Its legal status would be an empirical fact, not a proposition of law. It would thus be the most unstable of laws.

This is in fact the view of one of the leading British constitutional theorists of the twentieth century, Sir William Wade. In Wade's view, the unwritten constitution of the United Kingdom could change only through extra-legal, revolutionary

30 Loughlin, *The Idea of Public Law*, 113. For a parallel argument see Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice,' in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker, (Oxford: Oxford University Press, 2007), 27-48.

moments that could not be sanctioned by existing law.[31] Wade believed that if no statute could establish the rule that courts ought to obey Acts of Parliament without circularity, then, similarly, no statute could abolish or amend that rule either. He concluded that the fundamental constitutional rule of parliamentary sovereignty 'is above and beyond the reach of statute … because it is itself the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism'.[32] Wade's view is unusually rigid both politically and legally. Politically, because it largely contradicts the traditions of the British system of government, according to which the making of any law, including constitutional law, is open to the political process. Legally, because it contradicts Dicey's established view that 'fundamental or so-called constitutional laws are under the constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character'.[33] It turns out then that although Wade and Dicey are taken to be advocating the same 'orthodox' view of parliamentary sovereignty, they actually disagreed fundamentally on the nature of constitutional change.

This debate is sometimes called the disagreement between 'self-embracing' and 'continuing' theories of parliamentary sovereignty. On the first view, a Westminster statute can change the way a Westminster statute is ordinarily made and operates, so its power 'embraces' itself. Hart called this the 'self-embracing' theory of parliamentary sovereignty and accepted it as a plausible interpretation of UK law. Hart correctly observed that once we abandon Austin's simple view of sovereignty, it would be 'equally conceivable' that the rule of recognition allows parliament to limit the legislative competence of its successors.[34] We can make a choice, Hart says, between a 'continuing omnipotence in all matters not affecting the legislative competence of successive parliaments, and an unrestricted *self-embracing* omnipotence the exercise of which can only be enjoyed once'.[35] A similar view was expressed by Ronald Dworkin, who noted that in the absence of a written constitution determining this question, there is no reason to believe that the constitutional rules of the United Kingdom cannot change through law.[36]

31 Wade's views are to be found in H. W. R. Wade, *Constitutional Fundamentals* (London: Stevens, 1980); and Wade, 'The Basis of Legal Sovereignty'.

32 Wade, 'The Basis of Legal Sovereignty,' 187-8.

33 Dicey, *Introduction to the Study of the Law of the Constitution*, 37.

34 For other versions of the 'self-embracing' view see Latham, *The Law and the Commonwealth*, 522-525; R. F. V. Heuston, *Essays in Constitutional Law*, 2nd ed. (London: Stevens, 1964), 1-3; Sir Ivor Jennings, *The Law and the Constitution*, 4th ed. (London: University of London Press, 1952), 146-9; and Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), 35-57.

35 Hart, *The Concept of Law*, 149.

36 See Ronald Dworkin, 'Does Britain Need a Bill of Rights?' in Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1999), at 360. Dworkin commented on British constitutional law and the possibility of a more substantial constitution in 'Political Judges and the Rule of Law,' in Ronald Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1985), 7-32.

Wade, on the other hand, endorsed the 'continuing' view, namely the view that the status of an Act of Parliament cannot be determined by another Act of Parliament. This means that the Westminster Parliament cannot change the terms of its own supremacy. Wade accepted this unusual limitation as a reasonable price to pay for the clarity of constitutional law in a system without a written constitution. He was thus led to the view that sovereignty is not an ordinary legal rule. It is an immutable *fact* on which the unwritten constitution is based. For that reason, Wade thought that the *Factortame* decision of the House of Lords – the decision that accepted the supremacy of EU law over an Act of Parliament – was a true legal revolution, a legally unprincipled change of the rules.[37] For Wade, strictly speaking, there is no law of constitutional amendment in the United Kingdom. Social change is a necessary and sufficient condition.

It is somewhat inaccurate, however, to call this view one of 'continuing' sovereignty. The way in which sovereignty operates does not remain unchanged through this process. For example, accession to the European Union and the creation of the Human Rights Act have modified the way the constitution works. In each case change happened through a simple Act of Parliament. It was supplemented by one or more judicial decisions of the highest appeals court. On Wade's view, while these changes seem incremental, they are in reality legal 'revolutions'. But since these revolutions have become regular events, it is incorrect to call this theory one of 'continuing sovereignty'. It is a theory of constantly shifting sovereignty. The only thing continuous about it is its dependence on some background fact. There is no reason to call this dependence 'sovereignty'.

Wade's view is now widely considered to be an eccentric view of the law. It was unanimously rejected by the House of Lords in the *Jackson* judgement on the validity of the Hunting Act.[38] In that case the court endorsed Dicey's view, namely that the constitution of the United Kingdom is inherently flexible, which means that an Act of Parliament can change the constitution without any other formality or test. The House of Lords made no mention of the 'social change' view and did not even entertain the possibility that the Parliament Acts, which changed the way in which an Act of Parliament was made, was a revolutionary change, which went beyond the formal legal process. The *Jackson* ruling was strengthened by the *HS2* judgment of 2014, which introduced the idea that the constitution distinguishes between 'constitutional instruments' and 'ordinary' laws.[39] Most constitutional lawyers, though not all, agree with this interpretation of English law and

37 H.W.R. Wade, 'Sovereignty – Revolution or Evolution,' 112 *LQR* (1996): 568, discussing *R v. Secretary of State for Transport ex parte Factortame Ltd* (No. 2) [1991] 1 AC 603.

38 *R (Jackson) v. Attorney General* [2005] U.K.HL. 56.

39 *R (on the application of HS2 Action Alliance Limited) (Appellant) v. The Secretary of State for Transport and another (Respondents)* [2014] UKSC 3, [2014] 1 WLR 324, par. 206 (Lord Neuberger and Lord Mance, with whom Lady Hale, Lord Kerr, Lord Sumption, Lord Reed and Lord Carnwath agreed). For an analysis of the judgment, see Paul Craig, 'Constitutionalizing Constitutional Law: HS2', *Public Law* (2014): 373.

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accept the idea that constitutional amendment is primarily or exclusively a legal process.[40]

Yet, we are now left with a serious problem. As we have seen, if we endorse Austin's 'factual' view of sovereignty or Hart's 'legal view' of sovereignty, the most salient form of constitutional change would be a causal change in the underlying fact that makes the constitution possible. If the constitution rests on converging beliefs, then a change in the converging or diverging beliefs would change the constitution. This account invites all officials to form their own judgment about public sentiment and the level of support it gives to our basic institutions. There is no guarantee that the transformations in the social convergence that makes law possible will be rare. A legal revolution will always be in the cards.

If, for example, the required consensus is absent, then there is a legal 'revolution' and the old law disappears. The content of this revolution may be entirely negative. There may be no new consensus forming, and so no law left to take the place of the old, now obsolete, arrangement. For new law to emerge, we need a sufficiently coherent set of actual beliefs and attitudes. A new legal order is possible only under some new convergence, which is sufficiently solid to sustain a new constitution. But if the constitution moves with the tide of public sentiment, its long term stability would be very unlikely.

The problem is that such thought processes are foreign to constitutional law. Nothing like this kind of examination of underlying facts takes place. We do not test the constitution on the basis of its popularity. It exists regardless. In practice, all judicial decisions consider the constitution to exist as a matter of law. The British constitution, for example, is taken to apply to its own creation and amendment. This is the case for all constitutions, written or unwritten. The constitution must apply to its own change because otherwise it is not fully law. Hence, the factual account of sovereignty that emerges through the Austinian or Hartian theory of law, fails as an account of constitutional law.

Such theories end up undermining the idea of constitutional law. They tell us that the law is so much in flux and so much open to the ebb and flow of power, that the very distinction between the constitution and ordinary law or the distinction between the constitution and public opinion is open to indefinite and informal revision. This, more or less, follows from what Austin, Hart and Loughlin are saying. Loughlin alone, however embraces this finding wholeheartedly. He considers it an inescapable condition of political life. Under these views, the omnipotence, one way or another, of 'constituent' power is thus inescapable. The constitution

40 A theorist that seems to, more or less, side with Wade is Nicholas W. Barber, 'The Afterlife of Parliamentary Sovereignty,' *International Journal of Constitutional Law*, 9 (2011): 144. In the United States the best known proponent of regular extra-legal constitutional change is Bruce Ackerman. See Bruce Ackerman, 'Higher Lawmaking,' in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton: Princeton University Press, 1995), 63-88; and Bruce Ackerman, *We The People: Transformations* (Cambridge, Mass.: Harvard University Press, 1998), 3.

exists not as law, but as something like a cover for power. As Alf Ross puts the same point, the transition to a new legal order cannot be the outcome of a legal process but 'it is a fact, the socio-psychological fact that the community now accepts another custom as law or another basic norm as the corner-stone of its legal order'.[41]

This conclusion is fatal, however, to the idea of constitutional law. The idea of a higher law of the constitution, which is the ultimate law about law, assumes that all constitutional amendments should be legal in the mode of the self-embracing theory. Austin, Hart and MacCormick seem to be telling us that this is not possible. At the end of the chain there is a law-making fact. Constitutional change and constitution-making as a whole are thus ultimately matters of fact. So the constitution is and is not law. Loughlin sees and accepts this conclusion, which he calls the 'paradox' of constitutionalism. The paradox is that the constitution is both power and law at the same time.

4 The constitution as higher law

Is there a way of avoiding Loughlin's paradox and the conclusion that the constitution is not really law? Is there a way of showing that its claims to be self-embracing are not incoherent? I think there is, but it requires looking at law in an entirely different way. Austin, Hart, MacCormick and Loughlin are legal positivists and effectively legal *empiricists*. As we have seen, they view law as the result of some fact of authorship or other relevant fact. It is this assumption, a key thesis of legal positivism that creates the incoherence in constitutional law. The theory suggests that some relevant fact makes the law possible, creates it and determines its content and meaning. It is not simply the trigger for a legal order to exist, but the precondition for all legal rules and standards to exist. Sovereignty is presented by Austin and Wade as the cause of the law and the origin of its validity. A required convergence in opinion and belief is the cause of the law or rule of recognition for Hart and MacCormick. For Loughlin, 'constituent power' is the cause of a constitution. But if sovereignty or constituent power are *causes* of the law then they remain *outside* the law. And if they are outside the law, the constitution is not determined by law but by some extra-legal event. And if the constitution is created by a chain of events and not by legal tests of validity, then it is not fully law. It fails in its claim to be comprehensive: it determines all law except itself. Constitutional law becomes to that extent incoherent because it both is and is not the ground of all law. This is accepted by positivist theorists, who are happy to live with this instability.

It is not accepted, however, by judges or practitioners. All the judges who have looked at constitutional change in the United Kingdom have held that the constitution changes only through law. It is law all the way down, so to speak. It is always 'self-embracing'. They have never sought support in a causal story that

41 Alf Ross, 'On Self Reference and a Puzzle in Constitutional Law,' *Mind* 78 (1969): 4.

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explains validity through some extra-legal event.[42] The House of Lords thus heard legal arguments about the status of the constitution and its change in *Jackson* and concluded that the way we make Acts of Parliament had changed through legal means, not through extra-legal revolutions. In a parallel judgment, in the case of *HS2*, the Supreme Court ruled that there is a distinction between higher and ordinary law in the constitution of the United Kingdom, which was the result of gradual legal change. These constitutional changes were legal. They were not considered to be 'extra-legal' revolutionary changes, as Wade believed. Just as with constitutions in other jurisdictions, the British judiciary has taken the constitution of the United Kingdom to be law in the full sense, with all that that entails. It is *made* according to law, *amended* according to law and has *effects* according to law. So in legal practice, the constitution is not an external *cause* of law but *part of it*.[43]

The trouble here is, as Kelsen has explained in great detail, that if the constitution is fundamental law, i.e. the law that tells us how all law is made, then there is no way of saying how the constitution itself is made without circularity.[44] The existence of a written text is never the complete answer. But legal orders around the world, in the UK, Israel, India, Germany and perhaps the US, are united in assuming that this may not be a problem at all. The circularity of the constitution says that the constitution exists as a matter of law and the law exists as a matter of the constitution. If constitutional law is a law that tells us how all law is made and applied, then the creation and amendment of the constitution must itself be a fully legal matter and the constitution must apply to itself. But this does not create any problem in practice. This is what all the courts that have looked at the matter have said. It is not a problem if one considers the constitution a question of legal reasoning and argument, just like any other.

Practitioners seem to endorse a rival account of law, which I shall call a *moral* or *practical* account. This is a theory of law that predates legal positivism. It has been recently proposed by theorists such as Ronald Dworkin and Nigel Simmonds.[45] They follow arguments made earlier by Locke, Rousseau, Kant, Rawls, and others,

42 Lord Mance's reference to the rule of recognition in *Pham* being perhaps one exception. See *Pham v. Secretary of State for the Home Department* [2015] UKSC 19, at para 80, where he said: 'For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction to the relevant rule of recognition… But unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament so willed'. Nevertheless, I consider it unlikely that an occasional remark could signal acceptance of an empirical theory of the constitution.

43 The leading exponent of this view in the English judiciary is Sir John Laws, whose judgments have led the way in numerous areas of English public law. For his general view of the constitution, see John Laws, *The Common Law Constitution* (Cambridge: Cambridge University Press, 2014).

44 See Hans Kelsen, 'The Function of a Constitution,' trans., I. Stewart in *Essays on Kelsen*, ed. Richard Tur and William Twining (Oxford: Clarendon Press, 1986), 109. See also for a similar analysis Ross, 'On Self Reference and a Puzzle in Constitutional Law,' 4.

45 In works such as Ronald Dworkin, *Law's Empire* (London: Fontana, 1986) and Nigel E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

according to whom legal institutions are part of practical reason and need no causal background to explain how they proceed to make valid propositions of law. This theoretical view has been further explored and applied in constitutional law by constitutional scholars on both sides of the Atlantic, such as Ronald Dworkin, Lawrence G. Sager, David Dyzenhaus, T. R. S. Allan and many others. These theorists outline a moral theory of the constitution and explain how constitutional law works out its principles not as the product of some empirical fact, but as direct constructions of political morality.[46] For these theorists, once we abandon the causal paradigm, the circularity of law and the constitution can be seen to be a strength and not a problem.

How can we overcome Kelsen's warnings about a vicious circle? It has seemed to many that the only way would be to replace the causal chain with another kind of chain, where the foundation is some fundamental moral principle. But how can this principle be vindicated? Are we not committing ourselves to the worst excesses of natural law and the presupposition of some 'self-evident' truths, as in the arguments of classical natural law revived by John Finnis?[47] Unlike pure ethical thinking, legal reasoning must have a grounding in political decisions. This problem has been greatly illuminated by a discussion of the self-reflexive nature of law by N. E. Simmonds.[48] His response is that there is no foundational principle. Law, as all moral reasoning, is a dialectical, interpretive or self-reflexive practice of reasoning. However, because law as a moral idea requires that we take disagreement, compromise and political decision-making seriously, it also requires that we consider actual law-making or decision making under law as something with moral weight. The ideal of law requires us to respect the fact that legitimate, if imperfect, legal institutions are in place.

Simmonds starts from the observation that Hart's theory of the rule of recognition amounts to a denial of the reflexivity of law. Hart sees legal thought 'as fundamentally guided by a basic rule accepted by officials: it is not guided by, and does not require, reflection on the nature of law as such'.[49] Simmonds argues, against Hart, that legal practices are oriented towards the ideal of law in the sense that the ideal is the basis of any authority that the practice possesses and to which its participants make appeal. But being directed towards an ideal does not mean presupposing any fundamental form of the ideal. The abstract ideal and its particular manifestations in legal practice are connected.[50] The reasoning from

46 See for example Eisgruber, *Constitutional Self-Government*; Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004); David Dyzenhaus, 'The Idea of a Constitution,' in *Philosophical Foundations of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford: Oxford University Press, 2015), 9; and Allan, *The Sovereignty of Law*.

47 John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

48 See Nigel E. Simmonds, 'Reflexivity and the Idea of Law,' *Jurisprudence* 1 (2010): 1-23.

49 Simmonds, 'Reflexivity,' 2.

50 For a similar point, see the interesting arguments made in Stuart Lakin, 'Defending and Contesting the Sovereignty of Law: The Public Lawyer as Interpretivist,' 78 *Modern Law Review* (2015): especially 549-570, at 566-9.

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ideals to practices is always constant. Law is a process of reflection that turns to itself, like every other process of practical reasoning.[51] What counts as a constitution, therefore, is not merely a matter of an earlier event of somebody 'causing' it to exist or of someone 'authoring' it in the way that an author creates a text. It is not an ideal blueprint on the basis of some philosopher's vision either. It is a process of reflecting on the ideal as well as the practice of a constitution. The reflexivity is therefore between abstract ideals of constitutionalism or legality as explored by philosophical reflection and the embedded practices of a particular jurisdiction.

Legal reasoning seeks two things at the same time: first, to interpret law as a moral idea and, second, to recognise the authority of established legal institutions as they are delivered to us. Simmonds concludes that the 'project of reflection upon the idea of law is in that sense inherent in the practices of law' so that law is invoked as a justification for the exercise of any state power.[52] The justificatory project is constant; it has no beginning and no end. He concludes: 'In seeking a philosophical understanding of the nature of law we simply take seriously, and extend, the justificatory project that begins in the judicial judgment: for we endeavour to explain how law, by its very nature, provides a justification that can be invoked by the judge'.[53]

The argument illustrates the distinct practical problem faced by any citizen under the rule of law. The problem is how to act well while at the same time respecting political decisions reached by legitimate institutions in place.[54] The answer cannot be that we only accept the decisions that accord with our immediate or abstract moral ideals. This would amount to denying all authority to our existing political institutions. The answer is that each jurisdiction has to deploy both abstract ideals and the particular interpretations of these ideals that are evident in its own collective practices, as long as these practices meet tests of legitimacy. There is, of course, no blueprint for pursuing this task successfully. It is an interpretive task that can succeed or fail.

This is the key idea, in my view, in the process of understanding constitutional law as self-embracing law. The constitution is a judgment or a series of connected

51 Simmonds' analysis echoes some of the points about legal interpretation made by Hans Georg Gadamer in *Truth and Method*, 2nd ed. , trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum, 1996), 324-40, where Gadamer speaks of the 'hermeneutic circle' as it applies to law. Support for this 'constructivist' way of thinking about practical judgment that is guided both by abstract ideals and examples from practice is found in recent accounts of ethics inspired by Kant, for example Barbara Herman, *The Practice of Moral Judgment* (Cambridge, Mass.: Harvard University Press, 1993); and Onora O'Neill, *Constructing Authorities: Reason, Politics and Interpretation in Kant's Philosophy* (Cambridge: Cambridge University Press, 2015).

52 Simmonds, 'Reflexivity,' 7. Simmonds uses this argument to show the shortcomings of Hart's and Raz's legal theories in a subtle and sophisticated argument which I cannot reproduce here. He shows how legal reasoning proceeds through the interpretive or dialectic interplay between abstract premises and concrete judgments.

53 Simmonds, 'Reflexivity,' 7.

54 Similar answers to the same question have been given in Dworkin, *Law's Empire*.

judgments. It does not arise because of an event. It is not created by an act of authorship. The judgments of the constitution are both about abstract ideals and about concrete practices. The authority of the constitution is thus derived from within legal deliberation, in a reflexive process of reasoning that seeks to balance the requirements of abstraction with the requirements of practice. The constitution emerges through legal interpretation in light of all the relevant reasons that apply to us. The constitution is higher law and is self-embracing precisely because it is self-reflexive *deliberation*. Simmonds' argument effectively situates law in its social and political context. Because the ideal of law makes room for legitimate institutions of law, i.e. offices of law that create, enforce and interpret the law with authoritative force, we then see that our institutions have moral weight. Our existing institutions bind us both because they are legitimate and because they have been created by our political community. In this sense, the priority or validity of the Constitution is the result of a reflexive, deliberative judgment. Because the constitution is a practical judgment we make in light of the relevant values and the relevant facts, it needs no author. It is the product of practical judgment. Just like any other ethical idea, the constitution is a construction of reason in a process of deliberation.[55] The constitution is higher law because this is its appropriate practical role.

5 Constructivism and legal institutions

If the constitution has no causal foundations, how are we to determine what it is? An ethical theory of law like that advocated by Dworkin and Simmonds is open to the charge that it invites wishful thinking into law. We all start from different ethical priorities and assumptions. Are we simply to assume that our best conception of the ideal constitution is our inevitable starting point for all judicial decisions? That some model of the good or blueprint for an ideal society is the only basis for law, to be imposed perhaps on all other citizens, however unwilling? It would be absurd to believe that disagreement is an illusion or that some ethical theory can rise above all our disagreements.

I believe that we must begin from precisely the opposite assumption. We need to say that no such common theory of the good is available. If this is so, we must then begin from a theory that explicitly seeks a different ethical starting point, not that of a full theory of the good. One well-known way of doing this is the Kantian argument for law which proceeds from ethical constructivism about what is the *right* thing to do, not what is *good* in the world.[56] The Kantian argument begins from the assumption that ethical pluralism or pluralism about the good is

55 The same conclusion is reached by a different route by Frank I. Michelman, 'Constitutional Authorship,' in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (Cambridge: Cambridge University Press, 1998), 64.

56 For modern defences and manifestations of Kant's arguments about law, see A. Ripstein, *Force and Freedom* (Cambridge, Mass.: Harvard University Press, 2009); and Onora O'Neill, *Constructing Authorities: Reason, Politics and Interpretation in Kant's Philosophy* (Cambridge: Cambridge University Press, 2015).

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an inescapable element of the human condition. A supposed common realm of common or self-evident moral ideals, as assumed by some natural law thinkers, does not exist. We must begin with the thought that we are moral agents thinking for ourselves. We are independent, self-governing agents. We share the world with other free agents like us. If we are not to fall into obvious contradiction, we owe them equal moral standing as self-governing agents. This creates a formal constraint of reciprocity and equality. Our question then is this: what kind of social arrangements should there be for a community of equal and autonomous agents, as bearers of equal moral claims in the absence of a common ground of self-evident goods?

Kant's argument about law responds to this challenge with a *formal* argument about principles of constitutional justice. The argument is built on the formal assumption of the equality and reciprocity of persons as citizens. Its starting point is the equality of free agents and the absence of a dogmatic list of values or ends. Kant says that there is only one innate right, namely the innate right to freedom, which is as follows: 'Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity'.[57] Kant's argument presupposes innate equality, that is, independence from being bound by others to more than one can in turn bind them. It also presupposes the idea of being one's own master (*sui iuris*), as well as the idea of being beyond reproach.[58] A system of constitutional law is the response to the requirement that we respect the 'innate right to freedom' in a shared world. A purely private relation between two persons cannot possibly guarantee that their relations will respect their innate equality. A man who acts with respect towards all others has no guarantee that others will do the same towards him. He may be tempted to accept inequality out of some kind of virtuous self-sacrifice. But he has then violated the very terms of equal moral standing, because he has accepted that he can be the instrument of others. In a state of purely private monitoring and enforcement, there is no way of respecting equality. This is Kant's basic argument for creating law or 'public right' and a public and fair mechanism of law-making and law-enforcement which Kant calls the 'civil condition'.

This constructivist argument for law is thus not based on a dogmatic assumption that some values deserve priority. Its starting point is merely the statement of the problem of how to live side by side with other moral agents while respecting everyone's equal moral standing. Kant's answer is that this can only happen

57 MM, 6:238.

58 At the heart of Kant's argument is an ideal of dignity of all human beings: 'Every human being has a legitimate claim to respect from his fellow human beings and is turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things.' (MM, 6:462).

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through public institutions of law. He assumes that equality leads us to the 'universal principle of Right', which requires reciprocity under a *universal law*: 'Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law'.[59] The point here is that without legality, there is no equal citizenship. If equal citizenship has priority, then so does the constitution.

Simmonds explains the same Kantian idea in terms of an ideal of independence from the power of others. He argues that the ideal law respects the moral equality of agents as citizens, who disagree about the right and the good in a shared world. His view is that law 'represents the only possible set of conditions within which one can live in community with others while enjoying some domain of entitlement that is secure from the power of others'.[60] From the idea of reciprocity, we are led to constitutional law.[61] The argument is Kantian in inspiration and has been made in different ways by many different authors in recent times, including by John Rawls and Ronald Dworkin. We build an answer to a moral question by stating it clearly as a question. The question is how to have law and institutions for equal moral agents. The answer is a statement of the question in other words. We say that we must outline constitutional essentials that organise legality and jurisdiction in a way that could be accepted by moral agents on the basis of equality and reciprocity. Reflection about law starts with the statement of this problem of practical life, namely, of how to live together as equals. Constitutional law is its detailed solution.

How then does a constitution emerge? Because the constitution is as a matter of practical judgment about our common life, it changes only according to the principles of constitutional justice. These will be different in an established constitutional order or in an order that emerges from civil war. All we need to say at the most abstract level is that the constitution is a moral construction of political institutions that satisfy principles of legitimacy. Such institutions would, for example, satisfy the constitutional essentials of legality and jurisdiction as they apply among a community of equals. So we can say that a constitution exists when power and principle meet in the right way. Whether it exists is a judgment of practical reasoning, based on a public deliberative process that looks at both our most abstract values and our political experience. The relevant principles are the constitutional essentials for that state. For a constitution to be legitimate it must make good on its promise to treat people equally. It must have institutions of effective jurisdiction, or in other words, institutions that specify laws and exec-

59 MM, 6:230.

60 Simmonds, *Law as a Moral Idea*. In his view legitimate law 'forms part of a system of universality, necessity and independence: that is to say, a system of general rules and principles (universality) that are given peremptory force and are reliably enforced (necessity) as the only way in which political expression can be given to the idea of peremptory force (given the circumstances of the real world).' (p. 143).

61 I have given an account of reciprocity with special reference to the work of Lon Fuller in Pavlos Eleftheriadis, 'Legality and Reciprocity,' *Jerusalem Review of Legal Studies* 9 (2014): 1.

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utive decisions, and adjudicate coercive enforcement. These are the elements of a legitimate constitution. A constitution exists if the test of constitutional justice and legitimacy are met. As long as they are met, the constitution endures.

6 Sovereignty and Its alternatives

We can now return, after this necessary detour to legal and political philosophy, to our original question. What is the relevance of sovereignty? The key to the answer is our rejection of the legal positivist thesis. The constitution is not a causal chain of events. If law is a practical judgment and not the result of a causal chain, it does not need a factual foundation. Sovereignty or its equivalents in terms of a relevant factual basis of belief or 'constituent power' are therefore not required for a constitution to exist. A constitution relies on facts only in the sense that it requires legitimate political institutions actually operating in some place. But the fact that they exist features inside deliberation as an element of a practical argument. They do not determine alone the constitution's existence.

So MacCormick was right to say that sovereignty – or the state's political power – can be shared or indeed be abandoned on the basis of abstract principles. Nevertheless, Loughlin was also right to say that the power to shape the architecture itself, the political power to create and determine what law is, must exist somewhere. If such constitutional power is absent, then there is no constitution. But Loughlin was wrong to assume that constitutional authority is a fact. It is not, it is a matter of law like all matters of law-making. A constitutional architecture applies to itself because our practical judgments apply to themselves. Our practical judgments about right and wrong are always self-reflexive. They proceed from the particular to the abstract and back again. Although legal reasoning engages with political power, it is not determined by it. There is no causal chain between power and validity, as suggested by the legal positivists. The relation between power and law is interpretive, not causal. The constitution is not the result of an event, it is a judgment of practical reason.

For the constructivist view that I have defended, the constitution sets out a comprehensive institutional architecture of social life in terms of a set of higher order rules, which outline principles and official roles that are necessary on the basis of equality and reciprocity for any legitimate scheme of social cooperation. All laws are thus subject to a constitution according to principles which outline the role of courts, legislature, government etc. for each time and place. It follows that the circularity of law and constitution, the fact that the law makes the constitution and the constitution makes the law, is not a vicious circularity. It is part of an ordinary process of deliberation that moral agents engage in on the basis of all their moral judgments. There is nothing unusual about it. This process of reflection is just what we call living for human beings.

Such a deliberative view of the constitution makes sovereignty the subject matter of law, not its master. Hart's view of the state is the direct opposite and for this reason it is false. In his clearest comment on the subject, Hart notes that an imaginary society run by an absolute sovereign Rex would have ‘some of the important marks of a society governed by law’ and a certain ‘unity’ so that ‘it may be called a ‘state’.[62] For Hart, all that we need for such a unity is not equal citizenship or reciprocity but merely that ‘its members obey the same person, even though they may have no views as to the rightness of doing so’.[63] On this view, law is just the effective human arrangement that communicates directions from one powerful person to its subjects. But as we saw above, this way of looking at law without judgment and without deliberation does not explain how constitutional law stays together. The edifice of law, public or private, assumes deliberation about a particular ordering of social life which presupposes the distinction between higher and ordinary law, in that it subjects all official action of law-making, administration and adjudication, to a general framework of institutions at the service of equal rights. These self-embracing constitutional institutions are the conditions for political legitimacy. Constitutional law is therefore invested with a very distinct moral purpose: the construction of an effective and legitimate scheme of social co-operation that enables us to live side by side as free and equal citizens. Power alone cannot achieve this task. In this sense, legal reasoning just like moral reasoning needs no foundations. It is continuous with practical reason about how to be a person in the world. The constitution is a practical judgment, defended and justified like all others.

62 Hart, *The Concept of Law*, 53.
63 *Ibid.*, 53.

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The Erosion of Sovereignty*

Martin Loughlin

1 Introduction

Many of the assumptions underpinning the modern system of nation-states are now being placed in question. Increased global flows of capital, intensified networks of social interaction, and the emergence of transnational regulatory regimes on a significant scale are affecting the ability of national governments to regulate their economic conditions and improve their citizens' well-being. The effects of economic, technological and cultural change are having significant impacts on the activity of governing, the cumulative effect of which is experienced as a diminution in the efficacy of those levers of command and control that have been a common feature of the modern nation-state settlement. These developments have generated a great deal of policy analysis and scholarly examination.

It is not surprising to find such reviews regularly invoking the term 'sovereignty': the concept was, after all, shaped under conditions in which rulers turned inwards and sought to increase the intensity of their powers of rule, and today governments seeking to meet collective needs are increasingly obliged to focus their attention outwards and engage in co-operative inter-state ventures. This shift in orientation might indeed be having a significant impact on sovereignty. The problem is that many of those who claim that these developments are having a profound effect on the concept have failed adequately to explain its nature and significance.

Recent scholarly writing on sovereignty has been increasing at an exponential rate, virtually all of which asserts the need to re-work its meaning.[1] There has, in particular, been a remarkable proliferation in the use of novel adjectival qualifiers: shared, mixed, divided, pooled, cooperative, floating, multiple, perforated, fragmented, reconfigured, complex, decentralized, agonal, and polymorphous are just some of the terms to have been affixed to the concept.[2] But these 'innovative' studies seem only to generate deeper confusion. Some scholars have responded

* Earlier versions were presented at a workshop on 'Public Authority in an Era of Globalization' at the Whitlam Institute, University of Western Sydney in August 2013, in a lecture in the Faculty of Philosophy at Leuven University in February 2015, and at a Law Faculty seminar at the Hebrew University, Jerusalem in January 2016. I am grateful for the comments received on those occasions and also for discussions with my LSE colleagues: Damian Chalmers, Floris de Witte, Signe Larsen and Mike Wilkinson.

1 In 2009, Panu Minkkinen noted that, according to British Library records, around 330 books with sovereignty in the title have been published in the previous decade. Panu Minkkinen, *Sovereignty, Knowledge, Law* (London: Routledge, 2009), 6. The rate does not seem to be diminishing.

2 For more details see my paper 'Why Sovereignty?' in *Sovereignty and Law: Domestic, Regional and International Perspectives*, ed. Richard Rawlings, Peter Leyland and Alison L. Young (Oxford: Oxford University Press, 2013), 34-49.

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by suggesting that the concept should simply be abandoned. But if we are confused about what is being jettisoned, avoiding use of the concept is unlikely to improve the situation. And if, as I suggest, abandonment amounts to a rejection of the modern edifice of public law, then those making that case are obliged to offer an alternative conceptual architecture to explain governing authority today. This is a challenge few have recognized, and even fewer have sought to meet.

This paper therefore begins by outlining the concept of sovereignty that underpins the modern idea of law. In modern understanding, law is a product of political power and the special role performed by sovereignty is to stand as an expression of the autonomy of the political domain, by which is meant the distinctive way of understanding and engaging with the world grasped from the political point of view. Sovereignty signifies in jural form the essential relations of this political domain. In this sense, sovereignty is closely tied to the juristic concept of the state, understood as an institution that maintains supreme governing authority over a defined territory and which is to be differentiated both from its constituent people and its office-holders. State and sovereignty exist in a reciprocal relationship: state assumes sovereignty just as sovereignty assumes the state. Since these concepts of sovereignty and state are today much misunderstood, I start with a reprise of their meaning. Only with this clarification can the source of current confusion be identified and progress made in considering the impact of recent developments on the concept.

2 Sovereign, sovereignty, state

Considerable confusion exists today between the concept of sovereignty and the office of the sovereign.[3] The term ‘sovereign’ denotes the office of the ruler, and it signifies the authority of that office. When the expression was first deployed, it was accepted that the sovereign ruler was not legally obligated to any other power; a medieval king who remained subject to the control of the Emperor was therefore not a sovereign ruler. Once the office of the sovereign ruler was recognized, it was accepted not only that the ruler’s ‘sovereignty’ indicated independence from higher authority, but also that sovereignty signified the quality of the legal relationship between ruler and subject. The rightful authority of the sovereign ruler was absolute.

When in the early-modern period the ruler acquired more extensive governmental responsibilities, the representative nature of the office assumed a greater significance. Whatever the deference paid to the king’s majesty, it was accepted that the ruler did not exercise a personal power. Recognition of the representative – and therefore public – character of the office was achieved in circuitous fashion. Essentially, the monarchical image of the sovereign ruler was magnified and idealized. Once kingship took on the character of an ideal office, the way was open for the notion of ‘the king’s will’ to become institutionalized. Idealization of the

3 Here I draw on my *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 184-6.

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office was the precondition of its institutionalization. Institutionalization of the office of the sovereign led, in turn, to its corporatization. This was accomplished through internal differentiation. The 'sovereign' powers of government – what Bodin had called the 'marks of sovereignty'[4] – no longer inhered directly in the person of the ruler, but came to be exercised variously through the king-in-parliament, the king-in-council, the king's ministers, and the king's courts. This principle could be seen most clearly at work in the British doctrine that the Crown-in-Parliament is sovereign, but institutionalization also occurred in so-called 'absolutist' regimes. Sovereignty came to mean the absolute legal authority of the ruling power in its corporate capacity.

These related processes – institutionalization, internal differentiation and corporatization of the office of the sovereign – made it necessary to distinguish between the sovereign powers of rule and the concept of sovereignty itself. Specifically, the powers of rule could be divided, but sovereignty – the absolute authority of the ruling power – could not. As Bodin was the first to note, the concept of sovereignty had to be differentiated from its marks – the 'sovereign' powers of government. The tasks of the office of the sovereign could certainly be divided, but sovereignty could not.

This distinction between sovereignty and governmental tasks reached a new stage once it came to be accepted that sovereign right was not bestowed from 'above' (by God), but was conferred from 'below' (by 'the people'). Secularization of the foundation myth ushered in a variety of claims about the ultimate source of authority under the banner of 'popular sovereignty'. But since 'the people' exist *qua* people only once institutional arrangements of governing have been established, this type of claim is paradoxical. One way this difficulty came to be finessed was by changing the nature of the argument. Shifting from a historic to a normative mode of argument, the search for an ultimate source of authority was re-packaged as a virtual act: the political pact, otherwise known as the social contract. This pact came to symbolize the passage from natural to civil or political existence, even though it acquires this meaning only in retrospect.

Once the virtual character of this transition is acknowledged, it is evident that, other than in a symbolic sense, power is not delegated from the people (the multitude) to their governors. Yet it is only through this type of virtual exercise that the juristic construction of the political domain – the world of public law – can be brought into being. Understood as such, sovereignty is a representation of the power and authority created through the formation of that worldview. Sovereignty vests neither in the ruler, nor in the office of government, nor in the people: sovereignty vests in the set of relations that are formed in instituting this political domain.

4 See Jean Bodin, *The Six Bookes of a Commonweale* [1576], trans. Richard Knolles 1606, ed. K. D. McRae (Cambridge, Mass: Harvard University Press, 1962), Bk I, ch. 10.

The trajectory of development of this idea of absolute authority therefore moves from the establishment of a sovereign ruler, through the corporatization of the office, to a sense of sovereignty that is conceptually different from the actual institutional arrangements of government. Sovereignty now presents itself as a representation of the autonomy of the political/public domain; it expresses the absolute authority of that domain. This assertion of absolute authority involves a double juristic claim. First, this world of absolute authority (sovereignty) must assume an institutional form, and this is effected by conferring the office of government with a rightful power. Secondly, the power conferred equips government with unlimited competence to govern through the instrumentality of law. The first claim concerns the establishment of the authority of government by operation of political right (*potestas*); the second suggests that, through the operations of political right, an unlimited competence to govern by way of positive law is conferred (*potentia*).

Sovereignty, then, is simultaneously a political and a legal concept: it is the regulatory idea that enables us to conceive of an autonomous political domain and to grasp it in jural terms. As a representation of this autonomous domain, sovereignty might be compared to the double helix of DNA, in which the political and legal run as anti-parallel strands. The essential coding information of the political domain is contained within this structure, in which the political strand is power-generational and the legal is power-distributive. This configuration of coding information contains the basic elements of state formation. The type of power with which we are here concerned is political power; this is power generated *inter homines*, power created as a result of the symbolic drawing together of a multitude into a 'people' or a 'nation' and harnessed through institutional forms. The most basic institutional formation is the state, a complex juristic entity comprising three essential aspects: territory, people, and ruling authority.[5] And as a political domain it works according to an inclusionary/exclusionary dynamic in which political meaning is generated through a willingness to sacrifice individual interest to the collective good.[6]

In doctrinal terms, sovereignty expresses the principles of external independence, internal authority, and ultimate legal supremacy of the state. A people occupying a defined territory and equipped with institutions of self-rule presents itself to the rest of the world as a sovereign entity, signifying its independence from subjection to any higher authority. This principle forms the basis of international law, a sphere in which states contract with one another to regulate inter-state relations.[7] Although it is sometimes said that the existence of a body of interna-

5 See Loughlin, *Foundations*, ch. 7.

6 See Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: Univ. of Chicago Press, 2007); Bertrand de Jouvenel, *The Pure Theory of Politics* (Cambridge University Press, Cambridge, 1963); Paul W. Kahn, *Putting Liberalism in its Place* (Princeton: Princeton University Press, 2005).

7 See, e.g., UN Charter (1945), Art. 2, which recognizes the 'sovereign equality', 'territorial integrity' and 'political independence' of all states.

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tional law itself amounts to a limitation on state sovereignty, this is confused. States may have pledged to restrict the exercise of some of their governmental powers – their 'sovereign rights' – but this is not the same as a restriction on sovereignty. States sign and ratify treaties as sovereign entities: international law, far from being a limitation is in reality an explication of state sovereignty.

A similar point can be made with respect to internal authority. Sovereignty is an essential characteristic of a state. Every sovereign state possesses supreme, unlimited and indivisible authority. There can be no limitation on a state's authority to rule by means of law. In most regimes, constitutional rules allocate the 'sovereign rights' of rule – the 'marks of sovereignty' – among particular institutions of government, generally between legislature, executive and judiciary. Since the jurisdictional competence of each of these governmental institutions is established and limited by a formal constitution, none possess ultimate authority to rule. But this distinction does not amount to a limitation on sovereignty. British scholars wedded to the traditional principle of the absolute legal authority of the Crown-in-Parliament, in particular, have a tendency to become confused on this matter. In modern constitutional regimes, the ultimate sovereign authority becomes an abstract entity: 'the people' or 'the Nation', which is the bearer of 'constituent power'.[8] Constitutional arrangements do not limit or restrict sovereignty. They exemplify the existence of sovereignty.

If sovereignty is a representation of the autonomy of the political domain, then we can appreciate how it is effectively a synonym for the juristic concept of the state. From a juristic perspective, the state is the entity that offers access to modern political reality. The state may be defined as an autonomous entity comprising three constituent elements of territory, people and institutional form. In a juristic sense, however, the state is better grasped as a scheme of intelligibility. As an institution, it is both an idea and its instantiation, but it cannot be reduced to any of its constituent parts. Through an exercise of representation, it brings into existence a comprehensive way of seeing, understanding and acting in the world.

This point was clearly understood by Michel Foucault who recognized that political reason involves 'a different way of thinking [about] power, the kingdom, the fact of ruling and governing; a different way of thinking [about] the relations between the kingdom of Heaven and the kingdom on Earth'. Political reason 'delineated the state as both its principle and its objective, as both its foundation and its aim'. He concluded that the state must be understood to be 'a principle of intelligibility and strategic schema, or, to use an anachronistic word … a regula-

8 I here set to one side the complicated – and contextual – question about the existence of a sovereign in this type of constitutional regime. The constitutional arrangements may govern in normal times, but that does not cover the situation of an exception in which extraordinary action must be taken as a matter of the state's self-preservation. Only at these moments might a sovereign reveal itself, hence Schmitt's claim that sovereign 'is he who determines on the exception'. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 5. But see also section 6 below.

tory idea'.[9] The state is, in other words, 'the regulatory idea of governmental reason'.[10] This concept of the state enables us to grasp the ways in which inherited institutions and practices form an autonomous set of relations. The state is 'the principle of intelligibility of an absolutely given reality, of an already established institutional whole'.[11] The state is absolute because it 'is organized only by reference to itself: it seeks its own good and has no external purpose'.[12] In particular, 'no positive law, of course, no moral or natural law, and in the end perhaps no divine law – but this is another question – at any rate, no law can be imposed on the state from the outside'.[13]

Foucault's idea of the state owes a great deal to Hegelian philosophy, and it is clearly expressed in Bosanquet's treatise on the theory of the state. Bosanquet follows Hegel in arguing that the state is 'not merely the political fabric' but 'includes the entire hierarchy of institutions by which life is determined, from the family to the trade, and from the trade to the Church and the University'.[14] The state, Bosanquet writes, is 'the structure which gives life and meaning to the political whole'; it therefore is not a person or a number of persons but 'a working conception of life'.[15] Recognizing the juristic character of this claim, Bosanquet similarly notes the necessity of embracing law as *Recht*, since this 'maintains the connection between the law and the spirit of the law' and 'prohibits the separation between positive law, and will, custom or sentiment'.[16]

3 An Infinite Labyrinth of Errors

Sovereignty is much misunderstood today largely because of its intrinsic political and legal dimensions. It is a fundamental concept in both political and legal thought, since it expresses the autonomous nature of the state's political power and its specific mode of operation in a distinctively juristic form. It is the concept on which received ideas of legitimate domination are founded. Those ideas have always been contested, not least because they involve the continuous struggle to establish the conditions of political authority in regimes founded on collective self-actualization. Today, however, the problem is that the contest over the conditions of legitimate domination is now being equated with the contestability of the concept of sovereignty itself. This leads to the misuse of language, generating

9 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78*, trans. Graham Burchell, ed. Michel Senellart (London: Palgrave, 2007), 286.

10 *Ibid*.

11 *Ibid*., 286-7.

12 *Ibid*., 290.

13 Foucault, *Security, Territory, Population,* 290.

14 Bernard Bosanquet, *The Philosophical Theory of the State* [1899] 4th ed. (London: Macmillan, 1923), 140.

15 *Ibid*., 140-1. Bosanquet's concept of sovereignty follows on similar lines. Hence, sovereignty 'resides in no one element' of the state but is essentially 'the relation in which each factor of the constitution stands to the whole'. Sovereignty 'resides only in the organised whole acting *qua* organised whole'. *Ibid*., 262.

16 *Ibid*., 240.

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analytical confusion, misdiagnosis of the issues, and even incoherence of proposed solutions. One reason for this is that during the twentieth century the dual legal and political dimension became a source of deep discomfort for scholars in the emerging academic disciplines of political science and law.

In their quest for scientific credibility, political scientists have been seeking to discover causal laws of political behaviour and, within such an empiricist mindset, sovereignty was felt to express the metaphysics of a bygone era. To the extent that political scientists continue to invoke the concept, they tend to conflate sovereignty and government. This is because of a failure to maintain the distinction between the concept and its particular 'marks'. Sovereignty expresses a principle of unity: it is an expression of illimitability, perpetuity and indivisibility. Any limit on sovereignty eradicates it, any division of sovereignty destroys it. Yet the powers of rule, the 'marks of sovereignty', not only *can* be divided and limited: for the purpose of generating political power and maintaining political authority, they *must* be so divided and limited. But this is a maxim relating to the phenomenon of governing, not to the concept of sovereignty.

This distinction between sovereignty and government forms a central pillar of public law thought. In Book II of his *Six livres de la république*, Bodin explained that there is a 'great difference between the state and the government of the state'.[17] It has since been treated as a commonplace of public law thinking. Bodin contended that the distinction 'seems to me more than necessary for the good understanding of the state of every commonwealth, if a man will not cast himself headlong into an infinite labyrinth of errors'.[18] Having forgotten the point of this distinction, this is precisely what now is happening.

Some errors are of the most elementary kind, as in the claim that federalism is incompatible with – or (the same thing) requires a division of – sovereignty. But mostly they arise because political scientists fail to acknowledge that sovereignty is a juridical concept. As a result, they confuse sovereignty with governmental competence, and therefore with ideas such as autarky, that is, with the ability of a nation-state to control its own material conditions and destiny. This stems from a blurring of the distinction between the *ability* to govern and the *right* to govern. This distinction relates to two different concepts of power: the former is *potentia*, the actual ability to control things, while the latter is *potestas*, the exercise of rightful authority. Political scientists tend to focus only on the former, whereas the latter is the critical aspect of the concept of sovereignty. Sovereignty involves the dialectical interplay between *potestas* and *potentia*, right and capacity.

At the same time as political scholars were seeking to burnish their scientific credentials, legal scholars, determined to establish the autonomous normative authority of law, were devoting their energies to the severance of any significant connection between law and political power. To the extent that lawyers continue

17 Bodin, *Six Books*, 199.
18 *Ibid*., 249-50.

to invoke the concept of sovereignty, they seem increasingly to be using it in a purely metaphorical sense, as the 'sovereignty of law'. This is in reality an attempt to overthrow the concept. In place of sovereignty and state, they assert the autonomy of law or constitution; this amounts to more or less the same thing since in this formulation 'constitution' stands merely as an ideal representation of legal form. The concept of law is here converted into an abstract entity called 'legality', a concept that not only is autonomous but also contains its own intrinsic morality and from which it derives its own source of authority.[19] Those who assert the autonomy of constitution rather than legality draw a distinction without a difference: these theories are variants of normativism, united in the abstract and ideal character of the directing idea of the autonomy of normative ordering.

Some jurists have explicitly recognized that this line of argument effects a 'paradigm shift' in public law. It requires the overthrow of 'the conventional statist paradigm' and its replacement with the 'cosmopolitan paradigm'.[20] If law is to be conceived as a normative order whose authority comes not from the state and not from sovereign authority but from its intrinsic moral properties, then it is obvious not only that the connection between law and political reason is sundered but also that no clear distinction can be drawn between the law of a state and international law. The claims of state sovereignty, it is asserted, must be rejected and in its place a monist system of law, in which there is a single universal legal order from which the validity of municipal legal orders derive, is postulated.

This innovation remains controversial, not least in being a theory of law far removed from the (political) world we inhabit. But it also contains a basic theoretical difficulty: it postulates a system of law as a normative scheme that somehow carries its own authority. The problem here is that norms do not of themselves act; legal norms acquire their authority only within the frame of a political power that ensures their application and enforcement. This political aspect of sovereignty expresses the essential factual conditions that underpin legal validity. It is this aspect that normativists seek to suppress.

4 The eclipse of sovereignty?

To this point, I have tried to show that sovereignty is a foundational concept for public law, that the challenge for those who have sought its overthrow is immense, and that those who have advocated its overthrow have either failed to

19 See, e.g., David Dyzenhaus, 'Constitutionalism in an old key: legality and constituent power,' *Global Constitutionalism* 1 (2012): 229-60; David Dyzenhaus, 'The Question of Constituent Power,' in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 129-45.

20 Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State,' in *Ruling the World? Constitutionalism, International Law and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 258-324.

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grasp its foundational nature or have avoided the problems raised by their proposed re-specification. There is, however, one jurist who did address this juristic challenge in a systematic manner and whose work is worth considering in some detail. This is the early-twentieth century French public lawyer, Léon Duguit. Following through the logic of emerging positivist social science, Duguit maintained that the processes of continuing social evolution that were leading to the establishment of an administrative state had rendered the modern (post-revolutionary) public law inheritance anachronistic. The entire scheme of public law founded on the principle of sovereignty, he argued, was being eclipsed. It needed to be reconstituted on a new foundation.[21]

Duguit claimed that the modern settlement of public law rested on two basic principles: state sovereignty, expressed primarily as the legal personality of 'the nation'; and individual autonomy, resting on the natural, imprescriptible rights of the individual. As a consequence, public law is founded on the creation of two primary subjects: the juristic person that formulates laws or commands (the sovereign/state) and its subjects who are obliged to obey (individuals). He noted that the state expresses the general will of citizens and therefore seeks to organize itself so as to ensure maximum protection of individual subjective rights. But he also recognized that although the individual is a bearer of rights, the collective person is superior to the individual person: the will of (the legal person of) the state is superior to the individual will.

This entire modern scheme of public law, Duguit asserted, rests on a mere fiction: not only is the idea of a general will fictitious but, since humans are social beings, so too is the assertion of the natural rights of the individual. If public law is to be grasped in scientific terms, this subjectivist system founded on sovereignty must be replaced by an objective jural principle. This objective principle is the principle of social solidarity. The authority of government thus derives not from rights but from duties. In reality, governments do not exercise the sovereign right to issue commands; their authority is based on the duties they perform. The 'real basis' of governmental authority is founded on the fact of 'social interdependence', and this has the consequence that there is 'an intimate relation between the possession of power and the obligation to perform certain services'.[22] What follows, Duguit maintained, is that 'public service' replaces sovereignty as the foundation of modern public law.

Duguit argued that once the significance of public service is recognized, 'a rigorously objective order' is instituted and it is 'controlled by principles equally imposed on the government and its subjects'.[23] The objective law is that which 'serves the public need and secures the co-ordination of modern corporate life'.[24]

21 Léon Duguit, *Les transformations du droit public* (Paris: Armand Colin, 1913); in English translated ad as *Law in the Modern State*, trans. Frida and Harold Laski (London: Allen & Unwin, 1921) [subsequent page references are to the English edition].

22 Duguit, *Law in the Modern State*, 43, 44.

23 *Ibid*., 54.

24 *Ibid*., 118.

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With the emergence of the modern administrative state, the sovereign right of command is replaced by the principle of organization as the basis of public law. Sovereignty is 'eclipsed' and is superseded by 'the formation of an objective governmental duty in regard to public services, the operation of which is legally guaranteed'.[25]

In this scheme of authority, the status of any legal rule is the product not of its source but of its function. Constitutional law is not fundamental because of its pedigree but because the object of this body of law 'is to give the state the best means of serving social needs'.[26] The significance of the claim to the primacy of this functional principle is radical. It suggests that no clear distinction is to be drawn between statute, executive decrees and administrative rules. Such a distinction is based on a formal hierarchical understanding which has its justification in the fiction of sovereign will; this type of distinction must now be supplanted by an assessment of purpose.[27] All legal acts thus become equally reviewable in the light of the 'objective law'.

Duguit offers a theory of public law founded on the entire eclipse of sovereignty. It develops the juristic implications of the social scientific theories of Saint-Simon, Comte and Durkheim, which maintains that society evolves through three main stages: the theological stage, followed by the metaphysical stage, eventually leading to the scientific stage. Sovereignty is claimed to be a product of the metaphysical era's borrowing from the theological and it has no place in the scientific era that is emerging. Modern society should no longer be viewed through the prism of individual and state; society must be conceived as a collection of groups and the key task for government is to provide some sound method for coordinating their activities. Following this line of analysis, the predominant legal mode of operation shifts from that of command to co-ordination. One consequence is that the juridical logic of legal/illegal is supplanted by the disciplinary logic of proportionate/disproportionate.

The emergence of objective social law also has implications for understanding the boundaries between national and international law, boundaries which had previously been recognized through concepts of state and sovereignty. Once determinate social groups (sc., nation-states) are organized in accordance with the discipline of objective law, bonds of solidarity are formed across groups, and these evolve into a type of 'intersocial law', an embryonic form of modern international law.[28] With the growing interdependence between members of different social groups, a sentiment of intersocial justice emerges and through the 'double sentiment of intersocial sociality and intersocial justice' international juridical norms are created. The authority of these norms does not rest on promulgation by supe-

25 *Ibid.*, 65.
26 *Ibid.*, 76.
27 *Ibid.*, 142-143.
28 Léon Duguit, 'Objective Law,' *Columbia Law Review* 20 (1920): 817-31 (Pt.I); *Columbia Law Review* 21 (1921): 17-34 (Pt.II); 126-43 (Pt.III); 242-56 (Pt. IV). See (Pt IV), 250.

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rior will: it rests 'on the consciousness existing in the individuals to whom it applies that this rule should be furnished with a sanction by compulsion'.[29] International law, Duguit argues, now establishes objective (social) norms that governments of all nation-states are obliged to respect.

The great value of Duguit's theory is to have presented the implications and underlying assumptions of his 'eclipse of sovereignty' thesis in a more systematic manner than those who today claim that we are entering an era of 'post-sovereignty'. It is not difficult to identify the developments that ground contemporary claims: since government is ubiquitous and functions mainly through an administrative modality, modern constitutional assumptions rooted in Enlightenment ideas of 'limited government' authorized by 'the people' are undoubtedly becoming strained. But unlike Duguit's theory, which offers a systematic juristic analysis rooted in sociological positivism and underpinned by a specific argument about scientific progress, these elements are invariably absent in those making similar claims about sovereignty today.

Failing to acknowledge the juristic nature of sovereignty, the former group conflates sovereignty with the ability of a nation-state fully to control the material conditions of its existence. There is no doubt that in contemporary conditions governments are obliged to co-operate with other actors, both within the nation-state and beyond. But as has already been explained, sovereignty is not an aggregation of competences. Competence concerns capacity, whereas sovereignty incorporates an intrinsic dimension of 'right'. Once this is recognized, the empirical assessment about the complexity of contemporary governmental networks can be accepted without it following that public law has entirely lost its symbolic power. The modern discourse of public law seeks to manage the tensions between the conceptual and empirical: it aims not only to identify the formal right to rule but also to specify conditions that maintain the capacity to rule. Consequently, while it can be accepted that the intricacy of contemporary governing arrangements imposes strains on the ability to manage these tensions, it is not obvious that this world of representation must now be treated merely as a façade masking the realities of power networks operating in the world today. Those who do seek to draw this conclusion are obliged to argue, it would appear, that we are now living in a post-jural world.

These arguments are mostly made by scholars who maintain that governmental developments have undermined the normative scheme of modern public law,

29 *Ibid*., 253. Cf. H. Patrick Glenn, *The Cosmopolitan State* (Oxford: Oxford University Press, 2013).

such that we are now living in a world of ubiquitous governmentalism.[30] But there are also certain jurists who make an almost opposite manoeuvre and accentuate the normative to the neglect of the empirical. This latter type of post-sovereignty claim founds itself on the argument that legal principles have now evolved beyond the site of the nation-state in which they were originally situated and should now be recognized as establishing a set of self-sustaining universal principles of constitutionality. Whereas the post-sovereignty argument made from the perspective of governmentality is that law has become entirely instrumentalized and has thereby lost its structural connection to legitimacy, the argument from hyper-constitutionality is that the concept of legality is now to be fused with legitimacy.

Those making the claim of hyper-constitutionality reject the idea that sovereignty constitutes a representation of the autonomy of the political realm, anchored by the political unity of a people or state. They argue instead that modern (i.e. liberal, rights-protecting) constitutions are constitutive of legality and, accepting the universality of the principles of liberty and equality they appear to contain, that this corpus of constitutional principles now possesses freestanding authority.[31] This is a thoroughly normativist argument which, although it signals the emergence of an important phenomenon – the rise of international 'juristocracy' – it otherwise does not bear a strong relation to the realities of today's political world.

Duguit's radical analysis focuses on the juristic challenges presented by the growth of administrative government. The administrative developments he documents are undeniable, but his argument that this leads to an eclipse of sovereignty is overstated. The emergence of an 'objective social law' – 'do what you must to promote social solidarity' – is a significant innovation. From the vantage point of the twenty-first century, however, it is evidently an account which is presented as social science but is underpinned by a collectivist political ideology. His objective law accentuates the claims of capacity but underplays those of political right, that is, the symbolic in the constitution of political authority. It envisages a world of *potentia* without *potestas*: there is no established 'right' to govern and the

30 This is the type of claim made by Foucault in his analysis of *gouvernementalité*. See Michel Foucault, 'Governmentality,' in Foucault, *Essential Works, vol. 3*, ed. James D. Faubion (London: Penguin, 2000), 201-22. In 1976, Foucault had argued that 'political theory has never ceased to be obsessed with the person of the sovereign'. The concepts of sovereign, law, and prohibition, he maintained, established a system of representation of power which was bolstered by theories of right. This, he claimed, was now anachronistic and what was needed is a political theory that does not revolve around the issue of sovereignty and prerogative: 'We need to cut off the king's head'. See Michel Foucault, 'Truth and Power,' in Foucault, *Power: Essential Works of Foucault, 1954-1984* (London: Penguin, 2001), vol. 3, 111-33, at 122.

31 See, e.g., Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law,' *German L. J*. 7 (2006): 341-69; Kumm, 'The Cosmopolitan Turn in Constitutionalism,' 258-324; Mattias Kumm, 'The Best of Times and the Worst of Times: Between Constitutionalism Triumphalism and Nostalgia,' in *The Twilight of Constitutionalism?*, ed. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), ch. 10.

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only justification for the exercise of governmental power is derived from the ends it pursues. The hyper-constitutionality argument, by contrast, promotes an argument of right that over-emphasizes the autonomous authority of legality and under-emphasizes the continuing power of the political dimension to sovereignty.

5 The erosion of sovereignty in the EU

The contemporary movements of governmentalism and hyper-constitutionalism are exaggerated and contradictory. But by highlighting the emerging tensions between right and capacity in the constitution of authority, they direct us towards the critical contemporary issues. The claim that sovereignty has now been eclipsed may be overstated but this is not to say that the concept remains unaffected by the trajectory of governmental developments. The threat is real but it is clarified only once misconceptions surrounding the concept of sovereignty have been removed. In the face of the misunderstandings outlined, it is tempting to retreat to a formal juristic account of sovereignty and maintain that changes at the level of governmental organization do not of themselves affect the concept of sovereignty: whenever there exists a sovereign ('the people') that possesses the 'constituent power' to legislate to alter existing governmental arrangements, the concept remains untouched. This, however, is a less than satisfactory response, not least because sovereignty has both legal and political dimensions. Since sovereignty expresses a relation between right and capacity, there may come a point when developments at the level of governmental organization impose such strains on the right-capacity nexus that sovereignty is unable to carry its meaning as a representation of the autonomy of the political realm. This is the critical issue. But it is better expressed not as an eclipse – a situation in which, because of some development, sovereignty disappears from view – but an erosion, a process of gradual diminution and loss in the meaning of the concept.

This argument can be advanced by first taking a relatively straightforward case, one which delineates the boundaries to the exercise of sovereign authority of a state. This is the case of a colony that acquires its independence from an imperial power. It is an easy case because it explains how, rather than eroding sovereignty, this development – which appears as a loss of sovereignty – in fact exemplifies the way in which modern understandings operate. In a formal sense, de-colonization signifies a revolutionary break, the effect of which is to extinguish any sovereign right the imperial authority once possessed with respect to that territory. The former colony takes its place in the world as a newly-established sovereign state, recognized as such by other sovereign states. But what if the imperial power seeks subsequently to re-assert its rule? If sovereignty is absolute, perpetual and illimitable, this re-assertion must be within the right of the imperial power. Yet we might surmise that any such attempt to assert authority over the former colony is likely to be ineffective. The right-capacity nexus demonstrates why.

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It might be noted, first, that once the subjects and officers of this new independent state have signalled allegiance to their new constitution and this state is recognized as such in international law, the former imperial power is unable any longer to assert a claim of right (*potestas*). But it is also the case that the break is likely also to destroy the imperial power's capacity (*potentia*) to re-establish its authority to rule. The reason is that, without a claim of right, any action to acquire governing power will be regarded by the relevant parties not as a re-assertion of legitimate domination but simply as the expression of naked force. Since sovereign authority rests on the dialectical interplay between *potestas* and *potentia*, this requires, at a minimum, some acceptance by subjects. Without this, the sovereign authority once exercised by the imperial power is, in the act of decolonization, effectively destroyed.

The straightforward case of decolonization helps to highlight the complexities revealed by contemporary governmental configurations that blur the distinction between national sovereign authority and the claims of international law. These are most clearly illustrated in the evolving arrangements of the European Union. Many of the recent confusions in the treatment of sovereignty have arisen in the context of such discussion and much of the literature about limited, divided etc. sovereignty has been generated in this context. It is with respect to this site of analysis that some scholars have claimed that the current configuration of European nation-states signals the emergence of a world of 'post-sovereignty'.

This claim is most forcefully made by Neil MacCormick, who argues that since no nation-state in the EU is in 'a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal sources', none can be regarded any longer as a sovereign state.[32] MacCormick amplified his analysis by claiming that 'absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community' on the ground that 'neither politically nor legally is any member state in possession of ultimate power over its own internal affairs'.[33] Yet one can accept that the EU 'exercises political power on some matters over member states' and that EU legislation 'binds member states and overrides internal state-law within the respective criteria of validity'[34] without it following that 'ultimate' authority ceases to remain within the member states. The elaborate inter-governmental arrangements of the EU have been created by its member states to meet the collective needs of their citizens. Unless the argument is that this arrangement is now permanent, such that it is no longer within the political authority of a member state to exercise the procedure for withdraw from these treaty arrangements,[35] then no issue of ultimate authority – and no question of sovereignty – is involved. This is an argument that no jurist has yet made. In fact, the argument about so-called 'unitary sovereignty' makes

32 Neil MacCormick, 'Beyond the Sovereign State,' *Modern Law Review* 56 (1993): 16.

33 Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 132.

34 MacCormick, *Questioning Sovereignty*, 132.

35 See Art. 50, TEU.

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little sense: it suggests that sovereignty is destroyed whenever a state adopts a federal system of government, or even when it adopts a modern entrenched constitution that allocates governmental competences among a variety of institutions.

Alongside this specifically legal positivist confusion, there exists a more general ambiguity in the European literature concerning the distinction between sovereignty and government. Much of this stems from an early ruling of the European Court of Justice which claimed that the arrangement 'creates a new legal order … for the benefit of which the States have limited their sovereign rights, albeit within limited fields'.[36] The first aspect presents no conceptual difficulties. Any number of legal orders can exist within the frame of a sovereign state. This is, after all, exemplified in the United Kingdom as well as being a critical aspect of federal systems. All that is required is for the sovereign authority to have established procedures for determining spheres of competence and rules of priority. Confusion arises because of the Court's reference to 'sovereign rights'. But this term simply means 'powers of government'. Certain powers of government – governmental competences – have undoubtedly been limited, restricted and pooled as a consequence of EU membership, just as certain powers of government are limited, restricted and pooled whenever a state enters into any treaty. Again, this has no direct bearing on sovereignty.[37]

The distinction between competences and sovereignty must be kept clear: competences can be limited, sovereignty cannot. Sovereign authority resides in the ultimate power of the people to determine the form of constitution of the state, and this can entail membership of the EU or withdrawal from it. Those who argue that the existence of EU law operating on the principle of primacy within the sphere of EU competence imposes a limit on sovereignty have it the wrong way round. Rather, as successive rulings of the German Federal Constitutional Court have indicated, it is the sovereignty of member states that impose limits on the competence of the EU. Far from limiting, dividing or decentralizing sovereignty, the obligations that a state assumes through treaties are manifestations of its continuing sovereign authority.

The distinction between sovereignty and its marks brings us to the crux of the matter concerning sovereignty within the EU. Bodin identified as the principal 'marks of sovereignty' the right to make laws, to declare war and make peace, appoint magistrates, determine controversies, pardon, coin money, establish weights and measures, and to impose taxes.[38] The critical question is: if an elabo-

36 Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

37 Although the Court of Justice of the EU has stated that, given the principle of the supremacy of EU law, it is for EU law to determine the relationship between national law and member law, this operates only at the level of interaction of legal orders. Those who suggest that this affects sovereignty are in reality adopting a type of legal normativism that aims altogether to displace the concept.

38 See Bodin, *Six Bookes*, Bk I. ch. 10. See also Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996) ch. 18.

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rate governing network has been instituted such that the bearers of sovereignty ('the people') retain the formal right but no longer possess the effective capacity to alter governmental arrangements then has sovereignty been eroded of meaning? Does the formation of governmental arrangements that can no longer easily be explained as exercises of the will of a sovereign people and can no longer easily be repealed by a sovereign people signify stages in the erosion of sovereignty?

At the level of general international law, this type of evolution can be seen in the creation of elements of international law that do not derive from the will of states. This is exemplified by the emergence of *ius cogens* and obligations *erga omnes*, that is, by the establishment of norms that bind even when their validity is rejected by certain states. Subjective right, based on the capacity of states to contract their international obligations, is to this extent being superseded by objective law that is not promulgated by the treaty-making authority of states but by a new entity which, for want of a better term, is commonly labelled the 'international community'. Even-handed enforcement of these norms remains the weakest aspect of this development, which suggests that presently this development is susceptible to being used as an instrument of domination. One illustration is provided by the establishment of International Criminal Tribunals relating to former Yugoslavia and Rwanda which were not established by treaty but by UN Security Council resolutions, and yet they assert their authority over the subjects and officials of those states.[39] This suggests that there are movements at the international level that are beginning to erode the basis of sovereignty claims. These, however, remain contested and relatively underdeveloped, and it is within the EU that we see the emergence of a right-capacity nexus that most directly threatens an erosion of sovereignty.

The reason for this is because of the peculiar way in which the right-capacity nexus operates within the structures of the EU. Member states have assigned extensive competences – legislative, executive and judicial – to EU institutions. The extent of these competences may not even be dissimilar to that of the federal level of a federal state. What makes the arrangement different from a federation is that the source of EU competences lies in the founding treaties: EU powers are derivative since member states, which possess sole authority to amend the treaties, remaining 'masters of the treaties'. In this respect, the EU remains an entity created under international law. But in other important respects it is, or has evolved into, a novel entity. The ambiguity over its status has remained a principal source of contention.

By virtue of its innovative rulings in the 1960s holding that citizens of member states are able directly to acquire rights from EU law and that EU law has primacy over conflicting provisions in domestic law, the Court of Justice has been able to promote the claim that EU law establishes a unique legal order which is distinct

39 See Rainer Wahl, 'In Defence of "Constitution",' in *The Twilight of Constitutionalism?*, ed. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), ch. 11.

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from both international and domestic law.[40] This is significant because, once accepted, member states lose certain controls over EU development. They might continue to regulate competence transfers through treaty amendment and primary rule-making but they cannot control competence creep through innovative rulings of the Court of Justice. The sovereign rights of member states are not simply pooled by consent; they are also curtailed by virtue of 'integration through law'.[41] This dynamic has been driven by the Court's teleological method, which dictates that EU law is interpreted in a manner that promotes continuing European integration (to achieve 'an ever closer union'). Consequently, the capacity of a member state to rule by means of law is restricted by virtue of novel rights and obligations declared by the Court of Justice and which assume priority over domestic law.

The erosion of sovereignty therefore derives from a combination of elements. The sharing of governmental tasks (competences) in itself is not corrosive of sovereignty; these are authorized by member states. Rather, it is the integrationist agenda that has been driven by EU institutions, especially the Commission and the Court, in ways not explicitly authorized by the treaties. This has imposed restrictions on the member states' ability to govern over a broad range of fields in the guise of promoting the 'four freedoms' of goods, services, capital and labour. Of particular significance is that this innovation has been used to promote economic over political freedoms, and using law as an instrument for realizing a liberalizing, de-regulatory agenda.[42] This instrumentalization of law, without the explicit authorization of member states, suggests the deployment of *potentia* without *potestas*. To this extent, it amounts to an erosion of sovereignty.[43]

This issue could be resolved, in theory at least, by bringing legal integration into alignment with political integration. But this solution, which would involve the reconstitution of sovereignty by the formation of a federation or even a federal

40 *Van Gend en Loos*, above n. 36; Case 6/64 *Costa v. ENEL* (1964) ECR 585.

41 Mauro Cappelletti, Monica Seccombe and Joseph H.H. Weiler, *Integration through Law: Europe and the American Federal Experience* (Berlin: de Gruyter, 1985); Karen J. Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001). Recent case law asserts the principle that, although the EU is a creation of international law, its own legal order is autonomous and it is able to displace the norms of international law. See, e.g., Opinion 1/09, 2011 ECR I-1137 (the Court of Justice held that the Patent Court established outside the EU institutional framework must respect the 'autonomy of the EU legal order': paras 67); Opinion 2/13 (Accession of the EU to the ECHR), 18 December 2014.

42 Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); Vivien A. Schmidt and Mark Thatcher, ed., *Resilient Liberalism in Europe's Political Economy* (Cambridge: Cambridge University Press, 2013).

43 Cf. Damian Chalmers and Luis Borroso, 'What Van Gend en Loos stands for,' *International Journal of Constitutional Law* 12 (2014): 105-34 (accepting the 'police logic' of EU law but following Agamben's argument that the essential element of sovereignty is the power over life, arguing that this instrumentalization of law does not erode 'sovereignty').

state,[44] is precisely what most member states and their citizens have not yet been prepared to countenance. While this remains the case, a gulf emerges between sovereignty and the exercise of its marks, the sovereign rights of rule, and this continuing ambiguity and obfuscation signifies an incremental erosion of sovereignty.

One significant check against erosion is found in the rulings of national constitutional courts that seek to protect the basic values of their national constitutions against perceived incursions from EU law. Although national courts mostly accept the principle of the priority of EU law,[45] they retain the capacity to determine the limits on EU competence transfers by reference to the necessity of preserving basic constitutional rights.[46] Most active in this endeavour has been the German Federal Constitutional Court (GFCC), which since the 1970s has maintained that the EU is a confederation (*Verbund*) of sovereign nation-states and therefore an institution whose governing arrangements do not affect sovereignty.[47] The German constitution (the Basic Law) states that the Federal Republic is a 'democratic and social federal state' in which 'all state authority derives from the people' and this is exercised through elections (Art. 20). The Basic Law provides for participation in the development of the EU, but the EU must be 'committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity' and it must guarantee 'a level of protection of basic rights essentially comparable to that afforded by this Basic Law' (Art. 23). The constitution, by Article 79(3), states that the democratic and federal character of the German state cannot be altered by constitutional amendment.

Although the Basic Law authorizes the transfer by law of 'sovereign powers' [sc. governmental competences] to the EU, the GFCC has held that no transfer of competence that affects the constitutional identity of the German state is permissible and since the 1970s it has been actively policing these transfers. Initially, its attention was drawn to the question of whether the EU paid sufficient regard to

44 There is, on this analysis, some similarities between the EU and Schmitt's theory of the federation. See Carl Schmitt, *Constitutional Theory* [1928] (Durham, NC: Duke University Press, 2008), chs 29, 30. But Schmitt treats the federation as serving 'the common goal of political self-preservation of all federation members' (383-4). The federation 'protects its members against the danger of war and against every attack', internally it 'necessarily signifies enduring pacification' (386), and it 'must also be able to decide on the means for the maintenance, preservation, and security of the federation and, if necessary, to intervene' (387). These criteria would suggest that the EU does not meet Schmitt's definition of a federation, not least because the EU lacks the powers of taxation and military force. See further the discussion in section 6.

45 This had been the ruling of the Italian Constitutional Court in the case of *Costa v. ENEL*, above n. 40, where the Court, drawing on the analogy with international law, had rejected the principle of priority of EU law. But after the European Court of Justice ruling it subsequently reversed its decision. Recently, however, some national courts have equivocated on the principle of priority.

46 Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart, 2006).

47 See, e.g., *IHT v. Einfuhr und Vorratsstelle für Getreide aund Futtermittel* [1974] 2 CMLR 540. For the experience in other member states, see Dieter Grimm, 'The Role of National Constitutions in a United Europe,' in Grimm, *Constitutionalism: Past, Present and Future* (Oxford: Oxford University Press, 2016), ch.13.

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fundamental rights guarantees under the Basic Law and in a series of rulings – the *Solange* decisions and its later judgments on the Maastricht and Lisbon Treaties – the Court reaffirmed the principle of the supremacy of Germany's constitutional rights over EU law. In the Maastricht Treaty case, the Court went further. Maintaining that democracy required 'the presence of certain pre-legal conditions, such as continuous free debate between opposing social forces, interests and ideas, in which political goals also become clarified and change course', it held that, since the EU lacked such a *demos*, there were distinct limits to the type and scale of powers that could constitutionally be transferred to the EU.[48] It also ruled that further powers could be transferred to the EU only if those transfers were approved by the German Parliament (*Bundestag*) and only if those powers were clearly defined and respected fundamental constitutional rights.

In recent case law, the GFCC has reinforced this position with respect to fundamental rights protection.[49] But of particular significance with respect to sovereignty claims is its Lisbon Treaty ruling of 2008, where the Court appeared to extend this argument and in effect set certain substantive limits to further EU integration. The Court held that so long as there is no common European *demos*, EU institutions must respect both the constitutional identity of member states and the core elements of its sovereign powers. It even went so far as to identify those essential 'marks of sovereignty'. Drawing on a distinctively German concept of *Staatsaufgabenlehre* (the doctrine of state tasks), it identified five areas in which any further transfer of competences would amount to an erosion of sovereignty. These are: (i) the state's monopoly on the use of military and police force; (ii) criminal law; (iii) basic fiscal decisions concerning taxation and public expenditure; (iv) social policy, especially family policy; and (v) cultural policies concerning education, religion, media, art and cultural life.[50] The Court then declared the need to protect 'sovereign statehood' which it defined as 'a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination'.[51]

These rulings of the GFCC present a strong defence of the sovereign authority of the German nation: the clear message is that, relying on the constituent power of the German people to express the constitutional form of their state, the Court will determine the precise limits of the legitimate authority of the institution of

48 *Brunner v. TEU* [1994] 1 CMLR 57, para 41.

49 See, e.g., BvGE 99/11, 8 December 2015 (in cases of individual protection of basic rights, in this case relating to the European Arrest Warrant procedure, the GFCC held that it is empowered to review sovereign acts determined by EU law if this is necessary to protect constitutional identity protected by Art. 79(3) of the Basic Law).

50 Note the similarity to Bodin's specification of the 'marks' of sovereignty (text above n. 18). The most significant distinction is that the Court accepts that control of taxation is a mark of sovereignty but silently assumes that monetary policy is not.

51 *Lisbon Treaty ruling* [2009] BVerfGE 2/08, para 224.

the EU.[52] But these legal rulings, as formal elaborations of right, need to be set in context. First, the 'so long as' rulings have in reality provided an incentive for EU institutions to introduce fundamental rights protections and to 'constitutionalize' their arrangements: in this sense the *Solange* rulings provided an incentive for the constitutionalization of the EU, which serves to enhance its authority and legitimacy. Secondly, although the jurisdiction of the GFCC is regularly invoked whenever the powers of the EU are increased through new treaty provisions, the authority of the EU is extended not simply through formal treaty amendments; as we have seen, extension also takes place as a result of innovative interpretation of the Court of Justice of the EU and that is a more difficult jurisdiction to police. Thirdly, the GFCC has never actually declared any EU measure unconstitutional. Their rulings have always taken the form of 'yes, but': only after the measure before it is held to be valid does the Court go on to issue warnings about further extensions of EU powers. The protective barrier that the Court invariably adopts is to require all new EU measures first to be debated and approved by the Bundestag and it is difficult to see how it can proceed any further with this procedural line of protection. The problem here is that if such rulings amount to 'all bark and no bite', then the existence of this supervisory jurisdiction is in danger of being transformed into the means by which a slow erosion of basic constitutional protections is in fact being legitimated.

6 The erosion of sovereignty in the Eurozone

This problem of legitimation by 'yes, but' rulings has now come to a head as a result of the Eurocrisis. The Eurocrisis, which has persisted since 2009, arose because of the global banking crisis of 2007-08, which in turn generated a sovereign debt crisis that has had particularly harsh effects in certain Eurozone countries. The Eurozone had been established on 1 January 1999 in furtherance of a policy of pursuing European Monetary Union and with the adoption of the Euro (currently by 19 of the 28 EU member states), competence on monetary and exchange rate policy was transferred from member states to the European Central Bank (ECB). The crisis arose because the cost of establishing a uniform monetary policy across different national economies had meant that for some (e.g. Germany) credit policies were too tight, while for others (e.g. Portugal, Ireland, Greece, Spain) they were too lax. Consequently, when the 2008 banking crisis produced a credit squeeze, credit flows ceased, national governments were forced to bail out their banks, and within the Eurozone this generated a governmental debt crisis.

That general problem was exacerbated by the austerity measures imposed in response, not least because they have led to a decline in economic growth. As a result, certain Eurozone governments found themselves unable to fund their pro-

52 The German Federal Constitutional Court has not been alone in taking such a stand. See Jan Komárek, 'The place of constitutional courts in the EU,' *European Constitutional Law Review* 9 (2013): 420-50.

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grammes without substantially increasing their debt levels, thereby exposing structural gaps in government deficit and debt levels that had been hidden in order to meet the strict Maastricht criteria for joining the Euro. The crisis thus revealed a flaw in establishing a monetary union without a fiscal union, that is, of having a common currency while member states retained a central mark of sovereignty – the control of budgetary and tax measures. Consequently, by the end of 2012, and contrary to the 'no-bail out' provision in Art. 125 TFEU, five Eurozone members had been obliged to seek assistance in managing their debt payments.

The European response was to establish a series of financial stability measures: first, in 2010 the European Financial Stability Facility (EFSF), a legal instrument designed to maintain financial stability by providing financial assistance to Eurozone states in difficulty; then in 2011 the European Financial Stabilisation Mechanism (EFSM), which was an emergency funding programme; and finally in 2012 the European Stability Mechanism (ESM), a permanent rescue funding programme designed to succeed the previous temporary arrangements. Under the ESM, which came into effect in January 2013, the budgets of all member states in the Eurozone were required at least to balance, defined as ensuring that any deficit remains less than 3% of GDP. Any state found not to be in compliance was then obliged to take strict measures, effectively by reducing net public expenditure, to achieve this target.

These arrangements constitute a serious restriction on a critical mark of sovereignty, that of determining taxation and expenditure. In those countries seeking credits, the conditions imposed, which include controls over levels of taxation and a range of domestic social and labour-market policies, have imposed severe budgetary restrictions on governments. This has been most evident in the case of Greece where, faced with extreme austerity conditions, the formal right of the Greek state to withdraw from these European arrangements was tested both in general elections and a referendum and has been shown, on capacity grounds, no longer to be a real right. The episode provides a stark case of a severe erosion of sovereignty, and one which highlights more general issues concerning the governing framework established for the Eurozone.

Of particular significance is the fact that the ESM operates outside the structure of the EU. One result of its growing range of operation is to have distorted the institutional balances in EU governing arrangements. After the UK vetoed the adoption of a new treaty, the Fiscal Compact had to be established as an ordinary intergovernmental treaty, and this has undermined the principle of common evolution by fragmenting the governing arrangements of the Union.[53] It has resulted in the emergence of an entirely new governmental regime which, in Fritz Scharpf's words, 'establishes a sanctioned European power to direct and control the exercise of national governing powers without regard to the detailed alloca-

53 Treaty on Stability, Coordination and Governance in Economic and Monetary Union (TSCG) (Council of the EU, 2012).

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tion of European and national governing functions in Arts. 2-6 TFEU'.[54] The remarkable reach of its budgetary powers, which were to be introduced 'through provisions of binding force and permanent character, preferably constitutional',[55] imposes a potentially major limit on a key mark of sovereignty. Yet Scharpf claims that this new regime 'is not and cannot be specified in the authorizing legislation' and the exercise of powers under the regime 'is not and cannot be bound to pre-defined general rules'.[56]

These developments have had a considerable impact on the principle of sovereignty. The powers assumed under the Fiscal Compact severely restrict the exercise of those sovereign rights (governmental competences) which the GFCC in its Lisbon Treaty ruling regarded as essential marks of sovereignty. And it is also the case that the governmental response to the crisis has led to the creation of a new type of federal entity operating within the Eurozone. Dawson and de Witte have called this new entity a brand of 'executive federalism'. They argue that it is likely to undermine 'the ability of the EU to mediate conflicting interests' and that it is 'deeply problematic from the perspective of the long-term stability and legitimacy of the Union'.[57] A particular concern arises because of the uncertain legal basis of these newly-acquired powers. In its controversial ruling in *Pringle*, the Court of Justice rejected a challenge that the ESM was unlawful because it constituted an exercise in monetary policy, a type of action lies entirely within the EU's exclusive monetary authority. The Court here held that the ESM is a form of economic policy rather than monetary policy, and that this policy had been given separate authority through the Fiscal Compact Treaty. At the same time, the Court also made efforts to regularise the situation by interpreting Art.125 TFEU as imposing a duty on governments to promote 'sound budgetary policy'.[58] It has, however, been through litigation before the GFCC that the most serious sovereignty challenges have been presented.

Each of the financial stability measures taken by European institutions has been challenged in the GFCC. In its ruling on the Lisbon Treaty, the Court had held that the principle of democracy protected by the Basic Law meant that the Bundestag must determine and maintain accountability for the overall burden of taxation placed on citizens.[59] Given the German exposure to bailout of weaker economies, which under the ESM was estimated to exceed 704 billion euros, the

54 Fritz W. Scharpf, 'Sovereignty and Democracy in the European Polity: Reflections on Dieter Grimm's Essay, *Sovereignty in the European Union*,' in *Constitutional Sovereignty and Social Solidarity in Europe*, ed. Johan van der Walt and Jeffrey Ellsworth (Baden-Baden: Nomos, 2015), 65.

55 TSCG, above n. 53, Art. 3(2).

56 Scharpf, 'Sovereignty and Democracy,' 65.

57 See Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis,' *Modern Law Review* 76 (2013): 841, 843.

58 Case C-370-12, *Pringle v. Ireland*, para 135. For a critical analysis, see Paul Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology,' *Maastricht Journal of European & Comparative Law* 20 (2013): 1-11.

59 Lisbon Treaty judgment, above n. 48, para 256.

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basic challenge has been that the establishment of these mechanisms undermines one of the basic marks of sovereignty.

In September 2011, the GFCC rejected complaints that the first Euro rescue fund, the EFSF and other measures which authorized the bail-outs for Greece, Ireland and Portugal, breached these protections, holding that these fund arrangements did not amount to a sufficiently large financial commitment as to threaten the budgetary autonomy of the Bundestag. In February 2011, the Court issued another judgment on the EFSF, maintaining that it was unconstitutional to delegate all decisions on EFSF participation to a Budget Committee of the Bundestag and that, as a matter of principle, the entire Bundestag must approve Germany's involvement in the mechanism. And when the mechanism was given permanent form in the ESM adopted in July 2012, its implementation had to be postponed until the Court in September 2012 had confirmed in principle the legality of the arrangement. At that point, the Court refused an injunction that would have prevented ratification of the Fiscal Compact Treaty, but in summer 2013 it began hearing arguments on the substantive issue of the ECB's power to engage in selective purchase of Eurozone government bonds on the secondary markets, the so-called Outright Monetary Transactions (OMT) programme.

In January 2014, the Court held that, unless interpreted in a highly restrictive manner, the ECB's OMT programme lacked an adequate legal basis and that it also violated certain key aspects of Germany's constitutional identity as a sovereign democratic state. It then, for the first time in its history, made a preliminary reference to the Court of Justice.[60] The critical issue was whether OMT is to be construed as an exercise of economic or monetary policy and if the latter whether, contrary to Art.123 TFEU, it violated the prohibition of monetary financing of the budget. On 16 June 2015, in the *Gauweiler* case, the Court of Justice ruled that under the Treaties the OMT programme was lawful.[61] Following the method deployed in *Pringle*, which assumed that whether a measure is one of economic or monetary policy is to be determined by its objective rather than its effect, the Court held that in this case, since the OMT measures were intended to maintain price stability, the primary objective fell into the category of monetary policy. Giving considerable deference to the ECB's technical assessments, the Court also undertook a light proportionality review and held that the measure met the tests of suitability and necessity.

This ruling placed the issue back with the GFCC and in its ruling of 21 June 2016 the Court, once again, backed down. Although maintaining that the lack of democratic legitimation implied by the ECB's independence should lead a court to engage in a strict review of its mandate, the GFCC nevertheless held that, provided the conditions laid down in the Court of Justice's ruling were complied with,

60 BVerfG E 2728/13 (14 January 2014). For commentary, see the 2014 Special Issue of the *German Law Journal*, vol. 15, no. 2, http://www.germanlawjournal.com/volume-15-no-02.

61 Case C-62/14 *Gauweiler*. For commentary, see the 2015 Special Section of the *German Law Journal*, vol. 16, no. 4, http://www.germanlawjournal.com/volume-16-no-04.

the provisions of the Basic Law concerning constitutional identity were not violated.

The *Pringle* and *Gauweiler* cases throw into relief the limitations imposed on courts in policing the legality of technical areas of governmental action. But they also demonstrate the role that courts are able to perform in providing 'normative legitimization to the austerity model' being pursued within Eurozone governance and of legitimizing the ECB's role 'not only in monetary policy but also in shaping the general economic policy of the Union'.[62] They therefore provide illustrations of a general proposition that, although positive law might occupy a relatively independent domain, the court is likely to lose that autonomy the closer it intrudes on fundamental political matters. Such basic political questions, it has been claimed, ultimately 'can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party'.[63] But if they provide further examples of the manner in which law is being instrumentalized as *potentia* without attending to the conditions of rightful authority implied by *potestas*, what does this signify about sovereignty in Eurozone governance?

Some might say that these developments demonstrate that the EU governmental network is now asserting a sovereign power to determine the existence of an exceptional situation and to exercise the power perceived to be necessary to provide an effective response.[64] Others might even suggest that the exceptional has now been normalized and that we have either entered into an altogether new phase of sovereignty,[65] or that this degree of governmentalization of the state operates contrary to any logic of sovereignty and therefore amounts to its eclipse.[66] Although there is powerful evidence to support these various claims, the situation presently remains quite fluid. And while this remains the case, it seems better to characterize the development of Eurozone governance as a striking illustration of a contemporary erosion of sovereignty.

62 Takis Tridimas and Napoleon Xanthoulis, 'A Legal Analysis of the Gauweiler Case,' *Maastricht Journal of European & Comparative Law* 23 (2016): 39.

63 Carl Schmitt, *The Concept of the Political*, 27.

64 Carl Schmitt, *Political Theology*, 12: 'What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind'.

65 See Damian Chalmers, 'European Restatements of Sovereignty,' in *Sovereignty and Law: Domestic, Regional and International Perspectives*, ed. Richard Rawlings, Peter Leyland and Alison L. Young (Oxford: Oxford University Press, 2013), ch.11. Chalmers explains three ways of thinking about sovereignty, with the third being that of European sovereign government in which EU government acquires sovereign powers of rule (206-11). See further Damian Chalmers, 'Crisis reconfiguration of the European constitutional state,' in *The End of the Eurocrats' Dream: Adjusting to European Diversity*, ed. Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (Cambridge: Cambridge University Press, 2016), 266-98.

66 See Foucault, *Security, Territory, Population*, 286.

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7 Conclusion

In modern public law discourse, sovereignty signifies the autonomy of the political domain and provides the medium though which the idea of absolute legal authority can be grasped. This concept has been much misunderstood and this has come to light in recent years when, as a result of changes in the nature of the activity of governing, scholars have sought its re-specification. Sometimes this stems from the conflation of sovereignty with the figure of the sovereign, sometimes from the conflation of sovereignty and government. The responses have varied, but they all tend to be variations of an attempt to sever its legal and political dimensions.

Some scholars have sought to rework sovereignty as a purely formal legal concept and establish the 'sovereignty of law' in ways that ignores its political aspects. Others have argued that the emergence of an intricate governmental apparatus is indicative of a fracturing or dividing of sovereignty and the emergence of a political world of post-sovereignty. The former is a pipe-dream and the latter seems to envisage not so much the emergence of a new political world as the destruction of the political world. This is so because if sovereignty is eclipsed then the notion of public law – public law understood as the juridical expression of the autonomy of the political domain – disintegrates. What will remain is a much governed world, but one which follows its own structural imperatives shorn of a political imaginary that conceives authority as founded on some notion of collective self-actualization.

Once the world of the political is envisioned as a series of collective action problems to be mediated through a combination of market mechanisms, the aggregation of individual self-interest and expert knowledge, then Duguit's 'scientific' claims – albeit shorn of its progressive undertones – will have come to pass. Destroy the symbolic and we destroy the political, because in order to grasp the nature of political experience 'we need more than the philosopher's conception of reason, and more than the economist's conception of interest'.[67] To grasp the idea of the political as a world in which individuals are prepared to make sacrifices for the good of their state we also 'will need more than the communitarian's idea of community'.[68] There is little doubt that the changes in the nature of governing presently taking place within the European sphere are imposing strains on the modern political imaginary founded on the concept of sovereignty. But this is not yet sufficient reason to abandon the modern idea of sovereignty and right-capacity nexus that lies at that concept's core.

67 Kahn, *Putting Liberalism in its Place*, 18.
68 *Ibid*.

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National Identity, Constitutional Identity, and Sovereignty in the EU

Elke Cloots

1 Introduction

It is commonplace in European constitutional practice and theory to use the terms 'national identity' and 'constitutional identity' interchangeably. On the one hand, several Advocates General to the European Court of Justice have employed the concept of 'constitutional identity' to delineate what is protected under Article 4(2) TEU, even though, strictly speaking that Treaty provision refers to the Member States' *national* identities, inherent in their fundamental structures.[1] On the other hand, certain domestic constitutional courts which present themselves as the ultimate defenders of the identity of their constitution have pointed to Article 4(2) TEU to legitimate their assumed power to review secondary EU law against their constitutional identity.[2] Against this background, it should not be a

1 See, e.g., Case C–53/04, *Marrosu and Sardino*, Opinion of AG Poiares Maduro, EU:C:2005:569, para 40; Case C–213/07, *Michaniki*, Opinion of AG Poiares Maduro, EU:C:2008:544, paras 31–33; Case C–399/11, *Melloni*, Opinion of AG Bot, EU:C:2012:600, paras 137–8 and 142; Case C–62/14, *Gauweiler*, Opinion of AG Cruz Villalón, EU:C:2015:7, para 59.

2 See, esp., German Bundesverfassungsgericht, 2 BvE 2/08, 30 June 2009, paras 234, 240, 332 and 339; 2 BvR 2735/14, 15 December 2015, para 44. See also Spanish Constitutional Court, Declaración 1/2004, 13 December 2004, paras 35, 37–45 and 58; Sentencia 26/2014, 13 February 2014, para II.3; French Conseil Constitutionnel, Décision No 2004–505 DC, 19 November 2004, paras 10 and 12–13 juncto Décision No 2004–496 DC, 10 June 2004, para 7; Décision No 2006–540 DC, 27 July 2006, para 19; Décision No 2006–543 DC, 30 November 2006, para 6. But see German Bundesverfassungsgericht, 2 BvR 2728/13, 14 January 2014, para 29; Polish Trybunal Konstytucyjny, K 32/09, 24 November 2010, para III.2.1: 'An equivalent of the concept of constitutional identity in the primary EU law is the concept of national identity. … The constitutional identity remains in a close relation with the concept of national identity, which also includes the tradition and culture'.

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surprise that, also in academic commentary, there is a strong tendency to equate national with constitutional identity.[3]

This article swims against the tide. It defies the conflation of national and constitutional identity prevalent in European constitutionalism. To this end, it makes three central points. First, it is submitted that the said conflation is not founded on a solid theory of legal interpretation. Second, this paper advances the argument that the obligation to respect the national identities of the Member States, as enshrined in Article 4(2) TEU, rests on different normative assumptions than the claim, made by certain constitutional courts, that European law must comply with constitutional identity for it to be applicable in the domestic legal order. Whereas the Union's obligation to pay heed to *national* identity is grounded in a liberal concern for the respectful treatment of the members of a multinational political community, the constitutional courts' preoccupation with *constitutional* identity rests on a particular conception of sovereignty. In other words, the demands for respect for national and constitutional identity are informed by distinct theoretical narratives. Third, it is argued that the Treaty makers had good reasons for writing into the EU Treaty a requirement of respect for the Member States' national identities rather than the States' sovereignty, or their constitu-

3 See, e.g., Leonard F.M. Besselink, 'National and Constitutional Identity before and after Lisbon,' *Utrecht Law Review* 6 (2010): 36, 37 and 43–4; Leonard F.M. Besselink, 'Respecting Constitutional Identity in the EU. Case Note to Case C–208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr,' *Common Market Law Review* 49 (2012): 671, 672 and 682–3; Monica Claes, 'Negotiating Constitutional Identity or whose Identity Is it Anyway?' in *Constitutional Conversations in Europe*, ed. Monica Claes, Maartje de Visser, Patricia Popelier and Cathérine Van de Heyning (Antwerp: Intersentia, 2012), 205–6, 218 and 221; Pietra Faraguna, 'A Living Constitutional Identity: The Contribution of Non-Judicial Actors,' *Jean Monnet Working Paper* no 10/15, http://jeanmonnetprogram.org/paper/a-living-constitutional-identity-the-contribution-of-non-judicial-actors/, 7-11; Barbara Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause,' *Jean Monnet Working Paper* no 01/12, http://centers.law.nyu.edu/jeanmonnet/papers/12/1201.html, 8, 58 and 62–3; Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement,' *Cambridge Yearbook of European Legal Studies* 13 (2010–1): 195, 197; Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union,' *International Journal of Constitutional Law* 3 (2005): 473, 492; Franz C. Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union,' *International Journal of Constitutional Law* 9 (2011): 757, 765 and 781; François-Xavier Millet, 'National Constitutional Identity as a Safeguard of Federalism in Europe,' in *Deconstructing EU Federalism through Competences*, ed. Loic Azoulai, Lena Boucon and François-Xavier Millet, EUI Working Papers, Law 2012/06, http://cadmus.eui.eu/bitstream/handle/1814/21298/LAW_2012_06_Rev2.pdf?sequence=3, 58; Denys Simon, 'L'identité constitutionnelle dans la jurisprudence de l'Union européenne,' in *L'identité constitutionnelle saisie par les juges en Europe*, ed. Laurence Burgorgue-Larsen (Paris: Éditions A Pedone, 2011), 27; Gerhard van der Schyff, 'The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU,' *European Law Review* 37 (2012): 563, 567; Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty,' *Common Market Law Review* 48 (2011): 1417, 1419 and 1435.

tional identity, for that matter. The Treaties' focus on national identity should therefore be embraced and taken seriously.

2 An unjustified conceptual leap

Article 4(2) TEU requires the Union to respect the 'national identities [of the Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. This 'identity clause' was first introduced by the 1992 Treaty of Maastricht, albeit in a more concise form. Article F(1) of the original EU Treaty provided that '[t]he Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy'. The reference to democracy was dropped in 1997, when the Amsterdam Treaty amended the identity clause as follows: 'The Union shall respect the national identities of its Member States' (old Art. 6(3) TEU). It was the 2009 Treaty of Lisbon that gave the identity clause its current shape, by limiting its scope to those manifestations of national identity that can be found in the Member States' *fundamental political and constitutional structures*.

It is purportedly the abovementioned Lisbon amendment that has led several commentators to conclude that the clause's initial reference to national identity had been de facto transformed into a reference to *constitutional* identity.[4] This, however, is a conceptual leap that requires justification, and such justification is not offered by most scholars who defend this position. Their reading of the new identity clause does not seem to be based on a sound theory of legal interpretation. At best, there seems to be a tacit assumption that, by adding the said qualification to the identity clause, the drafters of the Lisbon Treaty sought to meet the demand from certain constitutional courts that EU law respect the identity of their constitutional order.[5] Yet for at least two reasons such an assumption is inadequate to serve as a firm basis on which this shift in the meaning of the identity clause can be founded.

For one thing, there is no evidence in the *travaux préparatoires* of the identity clause confirming that the clause is rooted in the jurisprudence of those national constitutional courts.[6] Nor do the preparatory materials make any mention of the concept of 'constitutional identity' or anything of the like. For another, giving a decisive role to the authors' intentions is a controversial method of ascertaining the meaning of a legal norm in the case of textual ambiguity. Several objections can indeed be raised against an 'intentionalist' approach to legal interpretation.

4 See, e.g., Besselink, 'National and Constitutional Identity,' 42-4; Faraguna, 'A Living Constitutional Identity,' 7 and 9; van der Schyff, 'The Constitutional Relationship between the European Union and its Member States,' 567–8; von Bogdandy and Schill, 'Overcoming Absolute Primacy,' 1419.

5 See, e.g., von Bogdandy and Schill, 'Overcoming Absolute Primacy,' 1419; Jan-Herman Reestman, 'The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity,' *European Constitutional Law Review* 5 (2009): 374, 380.

6 See also Reestman, 'The Franco-German Constitutional Divide,' 380.

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First, the intentionalist faces practical obstacles to discovering the relevant intentions. Even if the legislative history of a norm can be consulted, as is for example the case for the Lisbon amendment to the identity clause,[7] important difficulties remain: Whose and what sort of intentions matter? The intentions of the particular official who proposed the amendment, of the Member State delegates who supported it, of the chairman of the Convention working group that prepared the amendment, of the Commission? And are the relevant intentions merely those concerning the general objectives of the amendment (e.g., to enhance transparency,[8] to protect the Member States[9]), or do they also include drafters' opinions about, for example, the ways to achieve those ends (e.g., by designating 'areas of core national responsibilities'[10]) or the content of a specific legal term (e.g., 'national identity'[11])?

Second, using this sort of subjective intentions as a tool for interpreting the law has provoked more fundamental objections from leading legal theorists, including Joseph Raz,[12] Ronald Dworkin[13] and Jeremy Waldron.[14] They criticise intentionalists for making the law's legitimacy, that is, what makes the law worthy of respect and obedience, dependent on a supposed authority of the authors' opinions and beliefs. In their view, individual decision-makers lack the authority that is necessary to legitimate law's normative power.

In addition to the abovementioned practical and principled objections, it should be noted as a final point, that there is no intentionalist tradition of Treaty interpretation in the EU anyway. When called upon to interpret a Treaty provision, the Court of Justice does not habitually scan historical documents in a search for the intentions of the Treaty makers. Hence it seems unlikely that the Union institutions, the Member States or EU citizens would feel that their just expectations are disregarded if the Court failed to give effect, in its interpretation of a norm of primary EU law, to the opinions expressed in the drafting history of the Treaty. It follows that an intentionalist approach cannot find support in a doctrine of respect for legitimate expectations either.

7 Working documents of Working Group V, which prepared the amendment, have been published on the website of the European Convention http://european-convention.eu.int.

8 See, e.g., Final report of Working Group V, CONV 375/1/02 REV 1, 4 November 2002, 10 and 12.

9 *Ibid*., 11.

10 *Ibid*., 11. See also Paper by Mr Henning Christophersen, Working Group V, Working Document 5, 11 July 2002.

11 Paper of the Chairman Mr Henning Christophersen, Working Group V, Working Document 28, 24 September 2002, 5; Final report of Working Group V (n. 57) 11–12.

12 Joseph Raz, 'Intention in Interpretation' in Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009), 265-98.

13 Ronald Dworkin, 'How Law Is like Literature,' in Ronald Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 2001), 146-66.

14 Jeremy Waldron, 'Legislators' Intentions and Unintentional Legislation,' in *Law and Interpretation. Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford: Clarendon Press, 1995), 352–6; Jeremy Waldron, 'Legislating with Integrity,' *Fordham Law Review* 72 (2003): 373, 386–8.

It is, of course, one thing to say that a reading of Article 4(2) TEU that focuses on constitutional identity lacks grounding in a sound theory of legal interpretation, but it is quite another to ascertain how the meaning of the Treaty provision *should* be retrieved. Elsewhere I have made an argument for an interpretation of Article 4(2) TEU that is based on the text of the provision, on the way it has come to be understood in the practices of the Union institutions, and on the principles of political morality that undergird the provision.[15]

The text of Article 4(2) TEU, to start with, speaks of the '*national* identities [of the Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. Thus, judging by the text, the identity clause protects a Member State's national identity as it finds expression in the State's fundamental structures, most notably its constitution. One example of such 'fundamental structures' that may mirror a State's national identity is expressly cited in the text: those concerning regional and local autonomy.

Since the entry into force of the Lisbon Treaty, the ECJ has, on a few occasions, pronounced on the meaning of 'national identity' as protected under the identity clause. According to the Court, the national identities of the Member States referred to in Article 4(2) TEU include, amongst other things, 'the status of the State as a Republic'[16] and 'protection of a State's official national language'.[17]

Yet despite the clarifications that have been made to the concept of 'national identity' in the text of Article 4(2) TEU as well as in a number of ECJ judgments, the notion remains – to a large extent – vague and ambiguous. In cases where the text of the identity clause does not bring solace and no relevant case law yet exists, an interpretation of the clause founded on moral reasoning would be the most promising avenue for the ECJ to follow. In other words, when the content of the identity clause is indeterminate, the Court should base its reading of the clause on moral principles, that is, on the *value* or *merit* behind the identity clause. The following section sets out those values and shows that they differ from the normative assumptions underlying the constitutional identity doctrine as articulated by the constitutional courts of certain Member States.

3 The national identity versus the state sovereignty narrative

What are the moral background principles to which the identity clause gives effect? To cut a long story short, national identity ought to be respected by the Union, not because nations are valuable *for their own sake* but because the individual members of a national community have a compelling interest in the respectful treatment of their nation. Respect for nations and the people who feel attached to them is conducive to the realisation of six valuable, liberal goods. Those goods

15 Elke Cloots, *National Identity in EU Law* (Oxford: Oxford University Press, 2015), 127–34.
16 Case C–208/09 *Sayn-Wittgenstein*, EU:C:2010:806, para 92.
17 Case C–391/09 *Runevič-Vardyn and Wardyn*, EU:C:2011:291, para 86; Case C–202/11 *Las*, EU:C:2013:239, para 26.

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include individual autonomy, distributive justice, deliberative democracy, justice as equal respect, liberty, and the viability of the common, multinational political community. The former three liberal virtues are often considered to be goods that can best be achieved within the context of thriving, politically autonomous national groups, which deserve to be respected for that. The latter three, in contrast, are virtues stemming directly from national identity being respected by the central institutions of a multinational polity. Each of those goods is briefly described in the following paragraphs.

A first good that national societies are thought to help produce – and hence a first reason to treat nations with respect – relates to individual autonomy. More particularly, it has been claimed by liberal nationalists like Will Kymlicka that national societies provide individuals with a context in which they can exercise their autonomy in a meaningful way. To put it in Kymlicka's own terms, 'freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us'.[18] By a 'societal culture', Kymlicka understands 'a territorially-concentrated culture, centred on a shared language which is used in a wide range of societal institutions, in both public and private life (schools, media, law, economy, government, etc.)'.[19] Nations constitute the paradigm case of such a societal culture.[20]

A second liberal ideal to which national societies are instrumental is distributive or social justice. The view is commonly held that distributive justice is easier to realise in a political community where citizens share a national identity. Welfare redistribution through fiscal and social policies presupposes a willingness to pursue solidarity among the members of the political community, that is, a readiness to make (financial) sacrifices for one's fellow citizens. People will more likely be prepared to make such sacrifices if they identify with the potential beneficiaries and if they trust the latter to show solidarity with *them* when they are in need of support. Liberal nationalists believe that a common national identity offers the best prospect of citizens identifying with, and having faith in, each other.[21]

A third liberal good which is commonly associated with national societies is deliberative democracy. Deliberative democracy is predicated on the assumption that genuinely democratic decision-making requires more than casting votes: it also presupposes public participation in deliberation and discussion. A common national identity facilitates the attainment of this ideal in at least two ways. First,

18 Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), 83. See also David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), 42–5; Avishai Margalit and Joseph Raz, 'National Self-Determination,' in Joseph Raz, *Ethics in the Public Domain*, 2nd ed. (Oxford: Clarendon Press, 2001), 134–5; Joseph Raz, 'Multiculturalism: A Liberal Perspective,' in Raz, *Ethics in the Public Domain*, 175–7; Yael Tamir, *Liberal Nationalism* (New Jersey: Princeton University Press, 1993), 18 and 32–4.

19 Will Kymlicka, *Politics in the Vernacular* (Oxford: Oxford University Press, 2001), 25. See also Kymlicka, *Multicultural Citizenship*, 18 and 76.

20 Kymlicka, *Multicultural Citizenship*, 80 and 93.

21 Kymlicka, *Politics in the Vernacular*, 225.

when citizens are tied by linguistic and national bonds they experience fewer difficulties in communicating with one another, which benefits, in turn, the democratic debate, not only in the decision-making bodies but also in the media. Secondly, democracy can only work if there is sufficient confidence and trust among citizens themselves and among citizens and politicians. Only if people are convinced that their fellow citizens are interested in their opinions too and only if the losers in this election or debate are assured of a chance to win next time is true democracy possible. Moreover, in an indirect democracy, citizens need the confidence that their interests will be genuinely represented in parliament. Liberal nationalists believe that the high level of trust democracy requires is most likely to exist if citizens share a national identity.[22]

Admittedly, one may object that the conditions for individual freedom, distributive justice and deliberative democracy need not necessarily be shaped and maintained at the Member State level. Indeed, in a multinational polity like the EU, the argument from individual autonomy, social justice, and democracy may well work in favour of European nation-building and against the preservation of the Member States' national identities, rather than the other way around. However, this objection overlooks the close ties between people and their *own* national group. As is explained below, it may be feared that nation-building at the EU level for the sake of a *European* societal culture, distributive justice and deliberative democracy will come at the price of injustice as unequal dignity or respect. Though it cannot be excluded that, in the long term, the EU itself will become a fertile ground for the realisation of those liberal virtues, it may be argued that, at present, these goods are still largely the realm of sub-EU national groups, which deserve to be respected for that.

The reasons for lauding the inclusion of the identity clause that we have discussed so far all bear on the importance of national societies. Yet there are three additional and perhaps even stronger reasons for welcoming the identity clause, which are of a slightly different nature. Here, the focus is not on benefits associated with the presence of a common national identity in a political community but rather on goods that are realised when a multinational political community pays respect to the national identities of its constitutive political entities and their citizens. These goods include justice as equal respect, liberty, and the viability of the multinational polity. Unlike the three preceding arguments in favour of respect for national identity, the arguments to come have no particular link with liberal nationalist thought.

It has been noted that a lack of respect on the part of the central polity level for the national identities of the sub-polity units and their members is unjust. But in

22 Kymlicka, *Politics in the Vernacular*, 213–4 and 226–7; Miller, *On Nationality*, 96–8; Margaret Moore, 'Normative Justifications for Liberal Nationalism: Justice, Democracy and National Identity,' *Nations and Nationalism* 7 (2001): 1, 7–17.

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what does this injustice reside? It seems that many of its advocates[23] ground the injustice thesis in the double assumption that individuals have a vital interest in political respect and recognition for their identity and that part of what constitutes an individual's identity are her social affiliations, including – in many cases[24] – membership in her national group.[25] If people feel that their identities are not respected by their political institutions, or not treated with equal respect and dignity, then they are likely to experience their treatment as grossly unjust.

A second reason why respect for national identities on the part of a multinational political community like the EU may be thought to be a good thing is that it is supposed to be a safeguard for individual liberty. A leading advocate of this thesis is Jacob Levy. His view is that, in a political community in which public power is divided between the central level and smaller units, it is of vital importance that citizens remain loyal to those smaller units.[26] In the absence of such loyalty, Levy fears that the smaller units cannot serve as a genuine counterweight for the central polity's (potential) desire to aggregate power. As a result, public power risks being increasingly concentrated in the hands of central government and this tendency toward centralisation may threaten individual liberty.[27] The citizens' loyalty to their respective sub-entities must be strong enough to rival their loyalty to the central polity level, and Levy considers ethno-cultural and linguistic attachments to the sub-entities to be particularly suitable in generating such a robust loyalty.[28] It is therefore important that those ethno-cultural and linguistic identities be respected within the larger political community.

23 Will Kymlicka, however, seems to put greater emphasis on individual autonomy. See Helder De Schutter, 'The Linguistic Territoriality Principle – A Critique,' *Journal of Applied Philosophy* 25 (2008): 105, 108. Joseph Raz and Helder De Schutter deploy both individual freedom and identity valuation as a basis for their injustice-thesis. See De Schutter, 108; Margalit and Raz, 'National Self-Determination,' 133–9. Philippe Van Parijs, for his part, seems to prefer the argument based on a person's valuation of her identity. See Philippe Van Parijs, 'Linguistic Justice and the Territorial Imperative,' *Critical Review of International Social and Political Philosophy* 13 (2010): 181, 186 ('This strengthening of the argument does not rely on anything like a holistic right of each language to survive, or to have a fair chance to survive. Nor does it appeal to the need to preserve the societal culture associated with a particular community's inherited language as a necessary component of the resources required for leading a meaningful life').

24 As Bhikhu Parekh has noted, different people may attach weight to different social affiliations as well as different weights to the same social affiliations. Moreover, a single individual may evolve over time and identify with other social roles than she previously did. Bhikhu Parekh, 'Logic of Identity,' *Politics, Philosophy and Economics* 8 (2009): 267, 273–6.

25 See, e.g., De Schutter, 'The Linguistic Territoriality Principle – A Critique,' 107–8; Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture,' *Social Research* 61 (1994): 491, 501–6; Bhikhu Parekh, *A New Politics of Identity: Political Principles for an Independent World* (NY: Palgrave Macmillan, 2008), 41–59; Tamir, Liberal Nationalism, 72–7; Raz, 'Multiculturalism,' 178; Philippe Van Parijs, *Linguistic Justice for Europe and for the World* (Oxford: Oxford University Press, 2011), 117–20.

26 Jacob T. Levy, 'Federalism, Liberalism, and the Separation of Loyalties,' *American Political Science Review 101* (2007): 459, 464–6.

27 *Ibid*., 464–6 and 472.

28 *Ibid*., 466–8.

A final good to which respect for a multinational polity's distinct national groups is often said to be instrumental is the viability of the multinational polity itself. Given that its citizens identify with distinct national groups (either at the polity or sub-polity level), the viability of a multinational polity may be precarious. The previous point on individual liberty indicates why this is so: people's loyalty to their national group is often so strong that it is able to rival their loyalty to the larger political community in which their nation is embedded. The advantage of citizens' solid loyalty to their own national group is, as we have just seen, that the exercise of power at the central polity level does not go unchecked. The potential downside of this strong national allegiance, however, is that the legitimacy and authority of the larger polity are not taken for granted by its citizens, which may endanger the stability and even the continued existence of the polity.[29] Hence, it is felt necessary to devise means for assuring multinational citizens' loyalty to their common political community. There has been a lively debate among political philosophers about what could bind the citizens of a multinational polity in a sufficiently durable way to their common political community. This is not the place to dig into the details of that debate. Suffice it to say for the present that, in order to gain the loyalty of its citizens, a multinational political community should make sure that citizens do not feel excluded or alienated from its institutions and practices – citizens are unlikely to endorse institutions or practices in that case.[30] To guarantee that a political community is truly *inclusive* so that all its citizens feel 'at home', citizens must feel that their identity, including their national identity, is respected. Consequently, and even though it might sound paradoxical, a multinational polity like the EU will need to pay heed to the loyalties its citizens feel towards their own national groups if it itself desires to become the object of its citizens' allegiance in order to secure its viability.

So far, this article has attempted to demonstrate that there is particular value in respecting national identity in a multinational polity such as the EU and that the identity clause of Article 4(2) TEU finds, therefore, at least part of its justification in moral principle. It is the moral concerns underlying the identity clause, rather than the intentions of its authors, that should guide the ECJ's reasoning in cases where the meaning of the identity clause is uncertain. What particular implications such a 'moral reading' of the identity clause may have, has been explored in detail elsewhere.[31] For present purposes, suffice it to recall one of the main conclusions of that study: the identity clause protects the features that make a national community what it is (e.g., its history, language, values, traditions), and

29 See also Kymlicka, *Multicultural Citizenship*, 181–2; Sujit Choudhry, 'Citizenship and Federations: Some Preliminary Reflections,' in *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, ed. Kalypso Nicolaidis and Robert Howse (Oxford: Oxford University Press, 2001), 387–90.

30 Andrew Mason, *Community, Solidarity and Belonging. Levels of Community and their Normative Significance* (Cambridge: Cambridge University Press, 2000), 137–9; Helder De Schutter, 'European Ties that Bind: Political or Cultural?' in *Federalism in the European Union*, ed. Elke Cloots, Geert De Baere and Stefan Sottiaux (Oxford: Hart Publishing, 2012), 185. See also Kymlicka, *Multicultural Citizenship*, 183, 185 and 189.

31 Cloots, *National Identity in EU Law*, 139–91.

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without which the community would no longer be the same, in so far as those features are mirrored in fundamental domestic structures, most notably constitutional law. Whether these structures are part of the identity of the domestic constitution, in the sense that they individuate the constitution and mark it out from others, is not relevant under Article 4(2) TEU. Nor should it be, given that national identity has an independent moral claim to respect from the Union. Conversely, norms belonging to a State's constitutional identity which do not incorporate an aspect of national identity do not fall within the scope of Article 4(2) TEU.[32]

Article 4(2) TEU's focus on *national* identity stands in sharp contrast to the preoccupation of certain domestic constitutional courts with *constitutional* identity. If the reasons why the Union ought to respect national identity are so compelling, why do constitutional courts use a different rhetoric, centred on the identity of their *constitution*?

One possible explanation is obviously that constitutional courts are established precisely to defend the national constitution. Protecting the constitution is simply what constitutional courts do, it is even the reason of their existence. In fulfilling their task, constitutional courts generally do not only care about the norms of their constitution which give expression to the State's national identity, although their jurisdiction may well be limited to infringements of specific constitutional provisions.[33] Moreover, it seems only natural that a constitutional court's primary concern is with those provisions which it considers part of the very identity of the constitution, that is, with the provisions that individuate the constitution and without which the constitution would no longer be the same.[34]

No doubt there is much truth in this argument, and it certainly helps explain why *national* acts are subject to constitutional review carried out by a constitutional court. However, it does not suffice, in itself, to justify why the *Union*, that is, a *different* legal system, should also be bound by national constitutional norms and have its actions reviewed by domestic constitutional courts. It is not axiomatic that the laws of one legal system must comply with norms originating in another system in order to be valid. Hence national constitutional courts need to come up with an additional reason to justify their assertion that Union legislation must respect the identity of their constitution, and to legitimise their power to engage in such identity review.

Many national constitutional courts have understood this, and have developed a theoretical basis for their claim that EU law must comply with the identity of their constitution. Significantly, they do not derive their theory from the afore-

32 This is not to deny that such norms may be covered by other basic precepts of EU law, such as Arts. 52(4) and 53 of the EU Charter of Fundamental Rights and the fundamental rights clause contained in Art. 6(3) TEU, all of which allude to the Member States' constitutions.

33 See, e.g., Art. 142 of the Belgian Constitution and Arts. 1 and 26, § 1, *Bijzondere wet op het Grondwettelijk Hof*.

34 Cloots, *National Identity in EU Law*, 167.

mentioned principles of political morality that call on the Union to respect *national* identity but rather from a particular conception of *sovereignty*. The foundation of the requirement of respect for constitutional identity in a sovereignty claim has been most clearly articulated by the German Constitutional Court. The notion of sovereignty is ubiquitous in its *Lisbon Urteil*, the ruling in which the Court proclaimed that its acceptance of the primacy of EU law is subject to the latter's compliance with constitutional identity.[35] More specifically, the Court described the so-called 'eternity clause' in the German constitution[36] as a guarantee of its constitutional identity and, therefore, of 'sovereign statehood for Germany'.[37] It also stated that the 'transfer of sovereign powers to the European Union' is conditional on the maintenance of 'the sovereign statehood of a constitutional state (...) on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity'.[38] Throughout the judgment, the Court made it abundantly clear that it conceives of the Union as a treaty-based association of States which remain sovereign and are 'the masters of the Treaties' (*Staatenverbund*).[39] In such a *Verbund*, the identity of the domestic constitution cannot be transferred to the Union, and it is for the national constitutional courts to review whether the law of the Union does not transgress these constitutional limits.[40]

The German Constitutional Court reiterated the sovereignty-based justification of this 'constitutional identity lock' in more recent decisions. Thus, in its 2014 *Gauweiler* order, the Court ruled that Union law affecting German constitutional identity would be inapplicable in Germany, because the domestic legislature cannot transfer to the Union sovereign powers the exercise of which would affect German constitutional identity.[41] Moreover, the Court reaffirmed in this ruling its power to engage in constitutional identity review of EU law.[42] In a similar vein, the Court decided in an order of 15 December 2015 that its constitutional identity review matches the special nature of the Union as a *Verbund* that is ultimately founded on international treaties concluded by the Member States, which remain the *Herren der Verträge*.[43]

A comparable link between constitutional identity and State sovereignty has also been established by other constitutional courts. In a 2004 ruling on the EU Con-

35 See also Jo E.K. Murkens, '"We Want our Identity Back" – The Revival of National Sovereignty in the German Federal Constitutional Court's Decision on the Lisbon Treaty,' *Public Law* (2010): 530, 538; David Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court,' *Common Market Law Review* 46 (2009): 1795, 1797-1805.

36 Art. 79.3 of the German Basic Law.

37 Bundesverfassungsgericht, 2 BvE 2/08, 30 June 2009, para 216.

38 *Ibid*., para 226.

39 *Ibid*., paras 229, 231, 235, 263, 271, 277-81, 298, 329, 334, 339, 343, 346-7.

40 *Ibid*., paras 230, 235, 239-41, 332, 334, 336, 339.

41 Bundesverfassungsgericht, 2 BvR 2728/13, 14 January 2014, para 27.

42 *Ibid*.

43 Bundesverfassungsgericht, 2 BvR 2735/14, 15 December 2015, para 44. See also para 47.

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stitutional Treaty, the Spanish Constitutional Court emphasised that the Spanish State, more particularly the Spanish people, has retained sovereignty,[44] and that the State's sovereign powers can be limited only if and insofar as EU law remains compatible with the fundamentals, that is, the identity, of the Spanish Constitution.[45] This doctrine has been lately reasserted in the *Melloni* case.[46] An analogous line of reasoning is apparent in the case law of certain Eastern European constitutional courts. Stressing the sovereignty of the Czech Republic and depicting the Member States as the 'masters of the Treaties',[47] the Czech Constitutional Court concluded in its Lisbon rulings that (at least) the 'material core' of the constitution takes precedence over Union law, and arrogated the power to review the compatibility of Union law with 'the identity of values'.[48] The Polish Constitutional Court, for its part, portrayed the EU as an international organisation of sovereign States in its 2010 decision concerning the European Arrest Warrant. From this claim to State sovereignty, the Court inferred that powers relating to Polish constitutional identity cannot be conferred upon the Union.[49] Finally, it is noteworthy that the UK Supreme Court now openly sympathises with the constitutional identity concerns voiced by certain constitutional courts.[50] The nub of the Supreme Court's reasoning is, again, the idea that sovereignty rests with the United Kingdom, more particularly with the UK Parliament.[51]

The above analysis allows us to conclude that the *constitutional* identity doctrine developed by certain domestic courts is essentially premised on an assertion of State sovereignty. The *national* identity clause embedded in Article 4(2) TEU, by contrast, should be regarded as the instantiation of basic moral principles that require a multinational political community to show respect for the identity of its constituent national groups. Given this different normative pedigree, it becomes hard to maintain that constitutional identity, as defined by the highest judicial bodies of the Member States, is what is protected under Article 4(2) TEU. Surely there may be considerable overlap between a Member State's constitutional identity and its national identity as reflected in its fundamental structures.[52] Yet it would be misguided to simply equate the predicate of the EU Treaty's identity clause with 'constitutional identity'. A separate question is, of course, whether the Treaty makers would have done better to include a requirement of respect for the

44 Spanish Constitutional Court, Declaración 1/2004, 13 December 2004, paras 37, 47, 50 and 58.

45 *Ibid*., paras 37 and 58.

46 Spanish Constitutional Court, Sentencia 26/2014, 13 February 2014, para II.3.

47 Czech Constitutional Court, Pl ÚS 19/08, 26 November 2008, paras 96-108 and 216; Pl ÚS 29/09, 3 November 2009, paras 146-9. See also Pl ÚS 5/12, 31 January 2012.

48 Czech Constitutional Court, Pl ÚS 19/08, 26 November 2008, paras 110-11, 120 and 216; Pl ÚS 29/09, 3 November 2009, paras 150 and 172. See also Pl ÚS 5/12, 31 January 2012.

49 Polish Constitutional Court, K 32/09, 24 November 2010, para III.2.1. See also paras III.1.1.2, III.2.2, III.3.1 and III.3.8.

50 UK Supreme Court, *Pham v. Secretary of State for the Home Department*, 25 March 2015, [2015] UKSC 19, paras 90-91.

51 *Ibid*., paras 76 and 80.

52 See also Cloots, *National Identity in EU Law*, 167.

Member States' sovereignty, or constitutional identities, rather than the States' national identities. It is to this issue that we now turn.

4 The Treaty reference to national identity: not a bad idea after all

As such, the concept of State sovereignty – or of sovereignty altogether – does not appear in the Union's basic Treaties. Including a requirement of respect for the Member States' sovereignty would have been a sensible option though. Not only is sovereignty something that Member States care deeply about; the protection of State sovereignty is also a recurrent theme in US constitutional law, which has often served as a model for the development of primary EU law. Whilst the text of the US Constitution does not make mention of 'sovereignty', the US Supreme Court has read a safeguard of State sovereignty into the Tenth Amendment to the Constitution,[53] which contains a principle akin to the EU's principle of conferral.[54] As the US Supreme Court has reiterated many times, 'State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."'[55] Does US constitutional law give us reason to regret the path chosen in the EU Treaty, which is the path of respect for national identity rather than State sovereignty? This may be doubted for at least three reasons.

First, the EU differs from the US in a fundamental respect: whereas the EU is essentially a multinational polity, the US is a mono-national federation. As was explained above, there are compelling moral arguments militating in favour of respect for the national identities of the constituent entities of a multinational polity like the EU. Although the imposition of a prohibition on the Union intruding on Member States' sovereign powers may certainly be conducive to a respectful treatment of the States' national identities,[56] it would not suffice. Other instruments for showing esteem for national identity are equally, if not even more, important; in particular national differentiation in EU law, and symbolic recognition of the Union's multinational character.[57] A narrow focus on State sovereignty in the Treaties would overlook these other promising and indispensable methods through which the Union may pay respect to national identity and meet the moral claims of its constituent national groups. Consequently, in a multinational polity like the EU, a national identity – rather than sovereignty-centred approach – seems to be perfectly justified.

53 See, e.g., US Supreme Court, *New York v. United States* 505 US 144, 156–7 (1992).

54 The Tenth Amendment reads as follows: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Compare Art. 5(2) TEU.

55 See, e.g., *New York v. United States*, above n. 53, 181; *Bond v. United States*, 564 US (2011); *National Federation of Independent Business v. Sebelius*, 567 US_ (2012).

56 See in more detail Cloots, *National Identity in EU Law*, 171-2.

57 See in more detail *ibid.*, 175-80.

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Second, including in the Treaties a reference to State sovereignty as understood by the constitutional courts of certain Member States would have been difficult to square with the Union institutions' own view of the locus of sovereignty. As has been convincingly argued by Gráinne de Búrca, the supremacy doctrine of the Court of Justice can be construed as a claim to sovereignty on behalf of the Union. Although a doctrine of supremacy is not necessarily founded on an assertion of sovereignty, a sovereignty claim seems to lie at the basis of the ECJ's reasoning in *Costa v. ENEL*, the judgment in which the supremacy of EU law was established.[58] The insertion of a requirement of respect for constitutional identity as conceived by those constitutional courts would, of course, have presented a similar difficulty. Advocate General Cruz Villalón made this point succinctly clear in his Opinion in *Gauweiler*:

> [It] seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as "constitutional identity". (...)
>
> Such a "reservation of identity", independently formed and interpreted by the competent – often judicial – bodies of the Member States (of which, it need hardly be recalled, there are currently 28) would very probably leave the EU legal order in a subordinate position, at least in qualitative terms.[59]

In the absence of a theory of sovereignty on which both the Member States and the Union can agree, it is plausible to assume that any Treaty reference to sovereignty would become a source of new tension and conflict. In this respect, too, the EU is different from the US. Unlike in the EU, there is a shared narrative of sovereignty that is widely accepted in the US: the federal Constitution permanently divided sovereignty between the nation and the States.[60] Admittedly, there used to be rival theories of sovereignty in the US as well; agreement on the location of sovereignty was not achieved overnight.[61] That being said, there are no obvious signs of an emerging convergence on a common European theory of sovereignty, despite valuable scholarly attempts to develop such a theory.[62] On the contrary,

58 Gráinne de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice,' in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart Publishing, 2003), 450-5. See also Hans Lindahl, 'Sovereignty and Representation in the European Union,' in *Sovereignty in Transition*, 109.

59 Case C–62/14, *Gauweiler*, Opinion of AG Cruz Villalón, EU:C:2015:7, paras 59-60.

60 See, e.g., US Supreme Court, *McCulloch v. Maryland* 17 US 316, 410 (1819).

61 See Jeffrey Goldsworthy, 'The Debate about Sovereignty in the United States: a Historical and Comparative Perspective,' in *Sovereignty in Transition*, 423-46; Robert Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford: Oxford University Press, 2009), 76-77.

62 See, e.g., Matej Avbelj, 'Theory of European Union,' *European Law Review* 36 (2011): 818; Stefan Rummens and Stefan Sottiaux, 'Democratic Legitimacy in the Bund or "Federation of States": the Cases of Belgium and the EU,' *European Law Journal* 20 (2014): 568; Schütze, *From Dual to Cooperative Federalism*, 72-73.

as demonstrated above, national constitutional courts increasingly resort to a rhetoric of constitutional identity that is founded on a claim to State sovereignty. At the same time, it is equally clear that the ECJ is unwilling to give up on the idea that the Union, too, has sovereign status.[63] In reaction to the fact that conflicting opinions on the subject are so strongly held, there is a tendency in European legal theory either to abandon the concept of sovereignty altogether,[64] or to develop a theoretical scheme that is able to accommodate the rival sovereignty claims currently made at national and EU level.[65] Against this backdrop, it seems unlikely that a widely shared view of the locus of sovereignty in Europe will emerge any time soon. Given the contentious character of the notion of sovereignty in the EU, the EU Treaty's focus on national identity provides an attractive alternative. It avoids that either the national constitutional courts or the ECJ have to drop their own sovereignty and supremacy claims. It avoids, in other words, anyone having to admit defeat,[66] which makes it easier for judicial bodies at both levels to embrace this Treaty provision, and may even turn the identity clause into a vehicle of judicial dialogue.[67]

A third reason for favouring a national identity approach over a State sovereignty approach in the Treaties is that, also in the US, the appeal of the idea that mutually exclusive spheres of sovereign powers coexist at the national and the State level has gradually declined. As Robert Schütze explains with characteristic clarity, this model of *dual* federalism was abandoned in the middle of the twentieth century and replaced by a new model, which he calls *cooperative* federalism.[68] In Schütze's view, cooperative federalism is a suitable constitutional theory for Europe as well. Also in the EU, the States' exclusive sphere of power has been progressively reduced[69] and the two levels of government increasingly cooperate within the areas of shared powers, for instance through minimum harmonisation at Union level.[70] What is more, the principle of subsidiarity, enshrined in Article 5(3) TEU, can be regarded as a constitutional commitment on the part of the

63 See, in particular, Opinion 1/09, 8 March 2011, EU:C:2011:123, para 65; Opinion 2/13, 18 December 2014, EU:C:2014:2454, para 157, in which the Court reiterated the reasoning it articulated in *Costa v. ENEL* with a view to legitimating its doctrine of EU supremacy. Significantly, the qualification 'albeit within limited fields', which the Court had added to its observation that 'the Member States have limited their sovereign rights', has now been replaced by 'in ever wider fields'.

64 See, e.g., Neil MacCormick, 'On Sovereignty and Post-Sovereignty,' in Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 123-36. See also Pavlos Eleftheriadis, 'Law and Sovereignty,' *Law and Philosophy* 29 (2010): 535.

65 See, e.g., Nick W. Barber, 'Legal Pluralism and the European Union,' *European Law Journal* 12 (2006): 306; Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action,' *Sovereignty in Transition*, 501-37.

66 Compare Barber, 'Legal Pluralism and the European Union,' 328.

67 See also Mary Dobbs, 'The Shifting Battleground of Article 4(2) TEU: Evolving National Identities and the Corresponding Need for EU Management?' *European Journal of Current Legal Issues* 21 (2015).

68 Schütze, *From Dual to Cooperative Federalism*, 75-126.

69 *Ibid*., 129-88.

70 *Ibid*., 189-240.

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Union to the spirit of cooperation.[71] Like the subsidiarity principle, the principle of respect for the national identities of the Member States fits neatly into the model of cooperative federalism. As has been argued elsewhere, the identity clause mandates nation-sensitive European law making and interpretation, and publicly recognises the multinational composition of the EU.[72] These methods of accommodating the Member States' interests, i.e., group-differentiation and recognition, are of increasing importance when both the autonomy of the Member States and their impact (individually and collectively) on the European decision-making process diminish. Carving out mutually exclusive spheres of sovereignty, in contrast, emanates from a desire to return to a past that is lost and gone, but will probably do little to protect national interests in a Europe where policy areas have become more and more intertwined.[73]

5 Conclusion

This essay has attempted to challenge the assumption – often taken for granted – that what Article 4(2) TEU protects is, in fact, constitutional identity, even though the Treaty provision speaks of national identity. It has been contended, first, that a reading of Article 4(2) TEU through the lens of constitutional identity does not rest on a sound theory of legal interpretation. Second, it has been demonstrated that a requirement of respect for constitutional identity, at least as envisioned by several domestic constitutional courts, is premised on a different normative proposition than the Treaties' requirement of respect for national identity. Whereas the *constitutional* identity doctrine articulated by certain national courts is based on a claim to sovereignty on behalf of the Member States, the *national* identity clause laid down in Article 4(2) TEU implements fundamental principles of political morality, which call on a multinational polity to pay heed to the identity of its constituent national communities.

A distinct but related issue addressed in this paper is whether it would have been *better* if the Treaties had concentrated on respect for the Member States' sovereignty, or constitutional identities, rather than the States' national identities. This question was answered in the negative. The Union's multinational character, the lack of a single theory of sovereignty that is generally endorsed, at Union as well as Member State level, and the observation that policy areas have become increasingly intertwined in Europe led us to conclude that the Treaties' focus on national identity is actually to be welcomed.

As a consequence, the concept of national identity should not be discarded lightly as being too vague or overly political. It is precisely the task of legal commentators to lay bare the meaning of the notion as it is employed in Article 4(2) TEU, and it is my view that in doing so they should take due account of the moral prin-

71 *Ibid*., 241-65.

72 Cloots, *National Identity in EU Law*, 175-80.

73 See also Schütze, *From Dual to Cooperative Federalism*, 348-52.

ciples underlying the identity clause. To be sure, this will not be an easy job. Moreover, it is only natural that legal scholars feel more comfortable with conventional legal concepts, such as constitutional identity. Yet this is no excuse for simply reading a reference to constitutional identity into Article 4(2) TEU, especially when the text of that provision does not make mention of the concept and compelling reasons exist for putting national identity, rather than constitutional identity or State sovereignty, front and centre in the Treaties.

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‘Should the People Decide?’ Referendums in a Post-Sovereign Age, the Scottish and Catalonian Cases*

Stephen Tierney

On 18 September 2014, Scottish citizens voted 55%-45% to stay in the United Kingdom. The turnout of 84.65% was the highest for any UK electoral event since the introduction of universal suffrage.[1] This process has brought into vogue the referendum as a mode of settling issues of nationalism. It has been watched keenly in other countries such as Canada, Belgium and Spain. In this paper, I address the connection between the referendum as a decision-making device and sub-state nationalism. It is certainly the case that when sub-state nationalists wish to assert constitutional claims, in particular the most fundamental claim - to statehood itself - they invariably turn to the referendum, and indeed the referendum is becoming an ever more prominent aspect of sub-state nationalist politics.

It is important to set sub-state nationalism in context and so I begin by discussing the tenacity of modern nationalism in Western Europe since the constitutional demands of sub-state territories such as Scotland and Catalonia show no signs of abating. Secondly, I discuss the wider proliferation of the referendum around the world, of which the context we are looking at today is only part. This itself raises very interesting questions about the health of representative democracy. The referendum is becoming a fixed feature in many states for many purposes and is arguably part of a broader demand by citizens for a greater role in constitutional decision-making. This consideration has led me to conduct a theoretical re-evaluation of the role of the referendum in constitutional politics, which is a somewhat neglected topic. In this paper I review the classical critique of referendums and I make the case that the use of referendums as a device in constitution-framing and changing can be defended within democratic theory. I then turn to the Scottish process in 2014, asking if it is indeed a case study in good democratic practice which others might use as a future benchmark. In the final part of the text, I return to the specific application of referendums in the context of sub-state nationalism, addressing what might be called ‘the *demos* question’. This question has now been addressed by the Supreme Court in Canada and it is implicit in the preparedness of the UK Government to allow a referendum in Scotland; it does however remain unresolved in Catalonia and I end with some remarks about this broader context.

* This text was presented in the spring of 2015 as a part of the lecture series *Sovereignty Yesterday, Today, and Tomorrow?* organised by the Law Faculty and the Institute of Philosophy at the University of Leuven. It draws upon my published work.

1 This number significantly trumped the 65.1% who voted in the 2010 UK general election and the 50.6% who bothered to turn out for the 2011 Scottish parliamentary elections.

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1 Sub-state nationalism in a globalising age: a paradox?

Sub-state nationalism in Europe remains strong. We see this for example in the Scottish referendum, in on-going demands in Wales for more powers, and in the current volatile situation in Catalonia. One question which is often asked about modern sub-state nationalism, particularly in Europe, is why this is the case? Why has nationalism emerged as such a strong force since the late 1960s, when nationalism had acquired such a bad name in the first half of the twentieth century and when the trajectory of Europe appears to be one of inter-state or even supra-state federalisation?

In general, the nationalist movements at sub-state level in Europe are not associated in any way with the kinds of ideologies that shaped the dark legacy of the twentieth century; this is certainly the case in Spain and the UK. The political programmes of these movements have helped make this clear, but there is of course also a burgeoning scholarship across a range of disciplines that helps to explain the nature of contemporary nationalism, and in doing so helps also to explain why the relationship between sub-state nationalism and contemporary globalisation is perhaps not as paradoxical as it might seem. It is all too easy to understand the term nationalism as having only one meaning, and then trying to lump in the Scottish or Catalan cases with some of the abhorrent movements we saw in the 1930s; some people continue to make this mistake. But various strands of new work have helped explain pretty fully that we can't proceed on this basis and that we need to rethink the late twentieth century stereotype of the nation as a backward and out-dated vehicle for democratic politics and instead focus upon the democratic opportunities which come with more localised vernacular politics.

We see the first challenge to the negative stereotyping of sub-state nationalism in the work of *sociologists* who have, since the 1960s, demonstrated the resilience of national identity and surprisingly the strengthening of it particularly at the substate level within democratic, liberal, tolerant states. Sociologists have found national identities to be resilient, but they have also found them not to be particularly thick, with markers of membership based decreasingly on ethnic markers and more on civic models of belonging.[2] They have also found that national identity remains strong even as cultural distinctions both within multinational states and around the world seem to diminish in an era of cosmopolitanism. The ever closer alignment of values among nations within states and the growing strength of nationalist sentiment within these nations, has been called 'Tocqueville's paradox' by Canadian politician Stéphane Dion.[3]

2 David McCrone, *Understanding Scotland: The sociology of a nation*, 2nd ed. (London: Routledge, 2001).

3 Stéphane Dion, 'Le nationalisme dans la convergence culturelle: le Québec contemporain et le paradoxe de Tocqueville,' in *L'engagement intellectuel: Mélange en l'honneur de Léon Dion*, ed. Raymond Hudon and Réjean Pelletier (Québec: Presses de l'Université Laval, 1991).

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Secondly, *political scientists* have addressed the constitutional aspirations of this new form of sub-state nationalism and found, contrary to many expectations, that political actors adopting the nationalist mantle are for the most part not backward-looking or reactionary, but espouse values wholly consistent with the plurality of opinion in modern, Western societies, for example on issues such as social welfare, citizenship and human rights.[4] Furthermore, they have advanced political programmes that run largely with the grain of changing state power, supra-state integration, and internationalisation of previously monopolistic state functions. Nationalists in Scotland, Catalonia and Quebec situate themselves within the context of their respective integrating continents in ways similar to state nationalists, and in some ways are in fact more pro-integrationist.[5] We certainly saw this in the Scottish referendum where the nationalist platform was built upon an 'independence in Europe' project and which attempted at every turn to contrast its position with the Euro-scepticism of the UK Conservative Party.

And thirdly we find in *political theory*, including perhaps surprisingly liberal political theory, a subtle turn that has served to question the notion that nationalism and liberalism are inherently incompatible. Political philosophers, most comprehensively Will Kymlicka, have found the aspirations of these national groups to be wholly consistent with liberalism and have in fact argued that liberalism has a duty to accommodate these political and constitutional aspirations, if it is to be true to its own values of liberty and equality.[6] A main strand of this approach is the contention that it is only in the context of individual people's societal culture that they can advance their own life goals in a fulfilled way, achieving the liberal ideal of free and equal citizens.[7] By this argument, the nation becomes the essential vehicle for the fulfilment of individual self-determination through the collective ties each individual shares with his or her primary political community.

Therefore, just as in empirical terms national identity has shown itself to remain strong, within the social sciences there is considerable evidence that it is also adaptable, and can remain fit for purpose in an internationalising world. It is a story in which national identities remain resilient, with people finding primary identity in their societal cultures, while at the same time becoming open to the opportunities that an increasingly cosmopolitan world has to offer. This should

4 Michael Keating, *Nations Against the State - The New Politics of Nationalism in Quebec, Catalonia and Scotland*, 2nd ed. (UK, Palgrave, 2001); Alain-G. Gagnon and James Tully, ed., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001).

5 Michael Keating, *Plurinational Democracy: stateless nations in a post-sovereignty era* (Oxford: Oxford University Press, 2001).

6 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Margaret Moore, 'Normative Justifications for Liberal Nationalism: justice, democracy and national identity,' *Nations and Nationalism* 7 (2001): 1-20; Ferran Requejo, ed., *Democracy and National Pluralism* (London: Routledge, 2001).

7 Will Kymlicka, *Politics in the Vernacular* (Oxford: Oxford University Press, 2001); Stephen Tierney, 'The Search for a New Normativity: Thomas Franck, Post-Modern Neo-Tribalism and the Law of Self-Determination,' *European Journal of International Law* (2002): 941-60.

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Table 1

4 types of referendum in the 'new wave'	Examples
Founding of new states	New states emerging from the former USSR and SFRY, Eritrea (1993), East Timor (1999), Montenegro (2006), South Sudan (2011), Scotland (2014).
Creation and amendment of new constitutions	Former republics of the USSR and SFRY, Iraq: ratification of the Constitution (2005), Egypt: constitutional reforms (2011).
Sub-state autonomy	Spain referendums: e.g. Basque Country (1979), Catalonia (1979), Galicia (1980). United Kingdom referendums: Scotland (1997), Wales (1997, 2011), Northern Ireland (1998).
European Union: treaty-making processes in respect of both integration and accession	Malta, Slovenia, Hungary, Lithuania, Slovakia, Poland, Czech Republic, Estonia, Latvia (all in 2004), Croatia (2013).

perhaps not be too surprising; it is also the story of on-going state nationalism in Europe. It seems that the error is in trying to understand state and sub-state nationalism as categorically different phenomena; they are not. Instead what we have seen is rival nation-building projects ongoing within the same state, with each approaching modernity and indeed post-modernity in similar ways.

2 The age of referendums

I will now turn to the second element in the story of sub-state nationalism: the referendum. Notably the increased use of referendums or at least the attempted use of referendums is part of a wider phenomenon. Over the past few decades the referendum has become a fixed feature of state and constitution-building across the globe. In Table 1 above, I offer a breakdown of how referendum use has grown in four main areas of constitutional practice.

The aspirations of sub-state peoples for constitutional change have been key to at least two of these processes. First, in the founding of new states, the referendum was widely used in the early nineties in the break-up of the USSR and SFRY and its use is now the default mechanism for the emergence of most new states as exemplified by Eritrea (1993), East Timor (1999), Montenegro (2006) and South Sudan (2011). And of course a referendum was held in Scotland in September 2014 with the question: 'Should Scotland be an independent country?'

Secondly, referendums were once very rarely used in the creation or amendment of constitutions, but again throughout Central and Eastern Europe and more recently in Iraq and Egypt, we see the referendum emerge both in the founding of new constitutions and within the text of these constitutions as part of future amendment procedures. This can also be traced to sub-state processes since many of those sub-state peoples in Central and Eastern Europe who achieved statehood

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by way of a referendum, either had a subsequent referendum to ratify the new constitution and/or included the referendum in the new constitution as central to future processes of constitutional amendment.

In some sense of course these two examples show how the referendum is used in processes that lead to the break-up of plurinational states. But referendums are also central, as a sub-set of the second group, in establishing complex new models of sub-state autonomy as we have seen in Spain and the UK in the late 1970s and 1990s respectively, and in ongoing processes of constitutional change as we saw in a referendum on further devolution for Wales in 2011. A related example is the referendum on the draft Charlottetown Accord in 1992 where distinct referendum processes were held respectively in Quebec and the rest of Canada.

Fourthly, it is also notable that we have seen a major proliferation in referendum use in the accession to and the transfer of sovereign powers from European states to the European Union. To take an example, of the first 15 countries to join the EU only Ireland and Denmark held referendums to ratify the decision. Of the 10 accession countries in 2004 only Cyprus did not; and we see the trend continue in January 2012 with Croatians voting in a referendum for accession in 2013.

3 Democratic issues

The rejuvenation of referendums in so many different directions led me to reassess the theoretical argument for and against referendums in my book *Constitutional Referendums: The Theory and Practice of Republican Deliberation*.[8] There are other legitimacy questions at stake, to which I will return in the final question, but a crucial issue when we think about the referendum in the context of sub-state nationalism is: is the referendum at all an adequate device for the making of significant constitutional decisions? I take it that there are within political theory three main objections, on democratic grounds, to referendums.

The first objection is what can be called the *elite control syndrome*. It is argued that referendums lend themselves by definition to elite control and hence to manipulation by the organisers of the referendum. This suggests that the executive staging of a referendum has wide discretion to set the rules for the referendum, without much in the way of oversight or control by the legislature. In particular, the initiation power lies in the hands of the executive which can decide when and on what issue to hold a referendum.

The second main criticism of referendums is that there is an in-built tendency of the referendum process merely to aggregate pre-formed opinions rather than to foster meaningful deliberation. This is the so-called *deliberation deficit*. In other words, referendums engage the voters simply at the time of voting which they do unreflectively without real reflection or collective discussion of the issues.

8 Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012).

A third criticism of referendums, which I call *the majoritarian danger*, is that they represent a model of majoritarian decision-making that imperils the interests of dissenting individuals and minorities. For many, this is the main objection to the referendum: not only is it a poor way of making decisions, it can be deeply dangerous. Referendums usually involve a simple 50% plus 1 majoritarian model leading to a winner takes all outcome; and in the end, a majority may simply vote to harm a minority. Of course, it is widely held that the point of democracy is not simply to give expression to the will of the majority but also to protect individual rights, and where possible to arrive at decisions that enjoy the broadest levels of support (or at least acquiescence) possible.

My research suggests that these criticisms are more issues of practice than of principle and that by applying the recent 'deliberative turn' in political theory and practice, it may be possible to overcome these concerns adequately. In other words, by trying to build more scope for citizen deliberation into the referendum process it is possible to enhance its democratic legitimacy. To achieve this end, legal regulation is crucial: a detailed legal framework for referendums, far from being a restraint on the popular will, can arguably help to facilitate a more profound engagement of citizens by offering a clear and properly regulated process for meaningful democratic deliberation that goes well beyond the mere casting of ballots. In this sense, law and constitutionalism can facilitate for citizens a meaningful expression of their voice, freeing them from easy manipulation.

The turn to deliberative democracy is to some extent traceable back to the work of John Rawls in the early 1970s,[9] but it was given a sustained push in the past 10 to 15 years in a number of directions, particularly among those who want to see a greater role for the citizen in democratic decision making. The work on deliberative democracy is by now a broad church and there are many areas of disagreement among theorists as to the key values of deliberative democracy. But a common commitment is that political decisions should be preceded by 'authentic deliberation', or what John Rawls calls 'public reason'.[10] According to this principle, people engaged in making decisions should reflect authentically and honestly before they do so, engage publicly with others, be prepared to defend their views and be open to persuasion by the arguments of others.

The key principles I have distilled from this work on deliberative democracy and which can be translated to referendum design, are the following ones:

- *Popular participation*: a referendum reminds us more than any other type of electoral event that the fundamental point of democracy is a determining role for the people. It seems that a key aim in any attempt to regulate a referendum adequately should be to maximise popular participation not only in terms of voter turnout but also in terms of awareness-raising and engagement with the issues.

9 John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press 1971).

10 John Rawls, 'The Idea of Public Reason Revisited,' *University of Chicago Law Review* 64 (1997): 765.

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- *Public reasoning:* a democratic referendum should be conducted in such a way that it provides a meaningful environment for reflection and discussion. This is important first at the elite level: do we see referendum rules being framed in a deliberative way, facilitating a fair debate between elites over the substantive issues? And secondly, do we see it fostered at the level of the citizen in a meaningful attempt to engage individuals and civil society throughout the campaign? There is also a role for civil society here, and in particular for the media. To what extent do private actors seek to inform and enlighten public debate, rather than to take an overtly partisan line?
- *Inclusion and parity of esteem*: is the referendum process inclusive? Are the franchise rules fair? Are sufficient efforts made to maximise both voter registration and turn-out? Do ordinary citizens, including marginalised groups and minorities, feel they have a voice and are being listened to?
- *Consent in collective decision-making*. Does the referendum lead to a result that reflects public opinion? Can it be said to be, in the end, a satisfactory exercise in collective decision-making? Is the process fair and democratic, so that the result is one which even the losing side can agree to, if not with?

In Table 2 below, I set out how the key principles mentioned above, drawn from the theory on deliberative democracy, can be applied to referendum design in order to remedy the democratic objections against referenda.

Table 2

The contribution of deliberation to the decision-making process	**Principles of civic republican deliberation**	**Addressing the following criticisms of referendums**
Who deliberates?	Popular participation within a broader system of representative government	Elite manipulation: 'the elite control syndrome'
How should they deliberate?	Public reasoning: reflection and discussion	Aggregation: 'the deliberation deficit'
Under what conditions?	Equality and parity of esteem	Majoritarianism: 'the majoritarian danger'
To what end?	Consent and collective decision-making	All of the above

4 The Scottish referendum

The referendum in Scotland offers an ideal case study to test the hypothesis of deliberative democracy as a remedy for criticism of referendums, as formulated in the previous section. Firstly, because it was organised within a healthy and fully-functioning democracy. Secondly, it was long in the planning: the Scottish Government announced its intention to hold a referendum in January 2012,[11] some

11 'Your Scotland - Your Referendum - A Consultation Document', Scottish Government white paper, January 25, 2012, http://www.scotland.gov.uk/Publications/2012/01/1006.

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two and a half years before the vote itself, thus offering a lengthy span of time within which channels of deliberative participation might be fostered. Thirdly, the UK already had a model of detailed regulation of referendums in place (Political Parties, Elections and Referendums Act 2000) which, *inter alia*, created an independent Electoral Commission and invested it with a detailed oversight role in UK referendums. The existing UK legal regime was very influential in the framing of the Scottish referendum process. Fourthly, the referendum process was framed against, and given additional legal authority and political credibility by the 'Edinburgh Agreement' between the UK and Scottish governments, the aim of which was to ensure the referendum delivered 'a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect'.[12] And finally, the referendum itself was regulated by two statutes passed by the Scottish Parliament - the Scottish Independence Referendum (Franchise) Act 2013 (hereafter 'Scottish Franchise Act'), and the Scottish Independence Referendum Act 2013 (hereafter 'Scottish Referendum Act') - which together offered a comprehensive framework of rules and constraints.

I will, therefore, assess how well this legislation has served, first to constrain elite control, and second to help foster meaningful deliberation, particularly among citizens. Scotland is not a divided society with readily identifiable minorities whose interests are clearly imperilled by an exercise in majoritarian decision-making. Therefore, I will not discuss the third criticism of referendums (*the majoritarian danger*) further here. It is notable however that the referendum decision was reached upon the basis of a simple 50% plus 1 majority rule. This has been a controversial issue elsewhere, particularly in Canada,[13] but it was never a focus of the debate in the Scottish context, and again for this reason I will not address it further here.

Constraining elite control?

The 'elite control syndrome' is generally the main objection to referendums. The charge is that referendums are organised by governments to effect political goals and are therefore only staged when the prospects of a successful outcome (from the government's viewpoint) are favourable. To this end an executive is able to shape – indeed manipulate – the various elements of process design to achieve the desired result. Besides the fact that they have the power of initiation, they can also set the question, choose the date, fix the franchise, decide whether and if so how the referendum will be regulated, and determine the funding and spending rules for the campaign.

How did the Scottish process measure up in response to this problem? It would seem that in fact elite power was well dispersed between the UK and Scottish

12 *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, October 15, 2012, http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence.

13 Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004), 320-2.

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Governments, with the two Parliaments also having significant roles to play. On 15 October 2012, the two governments signed 'the Edinburgh Agreement'.[14] In this agreement, the UK Government accepted the principle that the Scottish Government could hold a referendum and handed over most of the process issues to the Scottish Parliament.[15] In the course of 2013, the referendum was then regulated by two statutes passed by the Scottish Parliament that built upon existing UK law. For over a decade UK referendums have operated on the basis of a dedicated referendum law (PPERA 2000). Notably the PPERA 2000 only applies to referendums organised by the Westminster Parliament and so it did not regulate the proposed referendum in Scotland. Its terms however acted as an important benchmark for the Scottish Government in drafting the Scottish Franchise Bill and the Scottish Referendum Bill, and for the Scottish Parliament deliberating upon these drafts.[16]

PPERA also created the independent Electoral Commission which has various responsibilities, most of them related to funding and spending rules, but also in relation to the intelligibility of the referendum question. This body had no automatic role in relation to the Scottish referendum but such a role was in time guaranteed by the Scottish Franchise Act and Scottish Referendum Act, and by the actions of the Scottish Government. Eventually, the Commission played a major role in a number of areas, including the setting of the question, the provision of information to citizens, the regulation of funding and spending, and the management of the mechanics of registration and voting.

So in the end, by dint of the limited competence of the Scottish Parliament and the subsequent uncertainty concerning its power to hold a referendum, the initiation power for the Scottish referendum was in fact regulated more fulsomely and by a more plural array of actors than would an equivalent process organised by the UK Government. In short we can say that elite control was pluralised, that it was regulated by different pieces of legislation and that it was overseen by an independent commission.

14 Keating, *Nations Against the State*; Gagnon and Tully, *Multinational Democracies*.

15 This provided that the referendum should have a clear legal base, to be legislated for by the Scottish Parliament and to be conducted so as to command the confidence of parliaments, governments and people. This was formalised by an Order in Council (per Scotland Act 1998 s30) which devolved to the Scottish Parliament the competence to legislate for a referendum on independence which had to be held before the end of 2014. Scotland Act 1998 (Modification of Schedule 5) Order 2013, para 3, http://www.legislation.gov.uk/uksi/2013/242/made.

16 The Edinburgh Agreement (para 2) provided: 'Both governments agree that the principles underpinning the existing framework for referendums held under Acts of the UK Parliament – which aim to guarantee fairness – should apply to the Scottish independence referendum. Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA) provides a framework for referendums delivered through Acts of Parliament, including rules about campaign finance, referendum regulation, oversight and conduct.'

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Facilitating deliberation?

The second main criticism of referendums, by which they are often held in contrast to the purported merits of representative democracy, is that public reasoning – which allows for the informed reflection and discussion of ideas before decisions are reached – is absent from referendum processes. Various assumptions underpin this idea: referendums tend to be held quickly by way of a snap poll organised at the behest of the government; voters are presented with an issue which is itself confusing and can be made worse by an unintelligible question; voters themselves lack the time, sufficient interest in the matter at stake or the competence to understand or engage properly with the issue, and in effect turn up at the polling station, if they bother to do so at all, in an unreflective manner often following party cues in determining how to vote.

The regulatory design of the Scottish referendum answers a number of these criticisms. The franchise is the first of these mechanisms. In a mass popular engagement with democracy, both participation and deliberation are vital. It is not enough that those who make the decision do so in a reflective and discursive way, it is also essential that the process should generate the widespread engagement of citizens across the polity if the exercise is to be truly legitimate. That the franchise is defined in a properly inclusive way, is therefore the first step in achieving this goal. The body of voters in the Scottish referendum was largely uncontroversial: the franchise for the referendum was the same as for Scottish Parliament elections and local government elections,[17] mirroring the franchise used in the Scottish devolution referendum in 1997. One consequence of this franchise was that EU citizens who are resident in Scotland were able to vote in the independence referendum.

One major difference from the 1997 franchise, however, was the provision in the Scottish Franchise Act extending the vote to those aged 16 and 17.[18] Another notable provision of the Scottish Franchise Act excluded convicted persons from voting in the referendum if they were detained in a penal institution.[19] This has been a controversial topic in the UK ever since the European Court of Human Rights ruled that the blanket ban on prisoner voting in UK elections violated Article 3 of Protocol 1 of the European Convention on Human Rights.[20] It seemed clear, however, that section 3 of the Franchise Act did not violate the Convention, since A3P1 guarantees 'the free expression of the opinion of the people in *the choice of the legislature*' [emphasis added], which is generally taken to refer exclusively to parliamentary elections and to exclude referendums.[21] This view has

17 Scottish Independence Referendum (Franchise) Act 2013, s. 2.
18 *Ibid.*, s. 2(1)(a).
19 *Ibid.*, s. 3.
20 *Hirst v. the United Kingdom* (No 2) [2005] ECHR 681.
21 Stephen Tierney, 'Possible vires issue in relation to section 3 of the Scottish Independence Referendum (Franchise) Bill, Advice to the Scottish Parliament, Scottish Referendum Bill Committee paper, March 21, 2013, http://www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/20130321_Letter_to_DFM_on_prisoners_voting_rights.pdf.

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been endorsed by Lord Glennie in the Outer House of the Court of Session,[22] and subsequently by the Inner House[23] and the UK Supreme Court.[24]

Franchise is one thing, citizen engagement is quite another thing. Astonishingly 4,285,323 people (97% of the electorate) registered to vote and in the end 84.7% turned out, the highest figure for any UK electoral event since the introduction of universal suffrage, significantly trumping the 65.1% who voted in the 2010 UK general election and the 50.6% who bothered to turn out for the 2011 Scottish parliamentary elections. Turnout is of course only one marker of participation. Yet the story that could be heard time and time again from voters and campaigners alike is that citizens felt greatly empowered by the referendum and the role they had in making such a huge decision. There is evidence emerging of the extent to which people sought out information about the issue at stake and engaged vociferously with one another at home, in the workplace, in pubs and public meetings, and, to an unprecedented degree in British politics, on social media through online newspaper comment sections, Twitter, Facebook, blogs etc.[25] My own evidence is merely anecdotal, but as someone who lived through the referendum campaign, I can say that especially in the month before the vote, I experienced a level of public engagement with a major political issue the like of which I had never known before.

An intelligible question?

Do citizens understand the question posed in the referendum? If not, then meaningful deliberation in referendum is not possible. Here again the Scottish process worked well. The Scottish Government originally proposed 'Do you agree that Scotland should be an independent country? Yes/No'. The Scottish Government decided to send its proposed question for review to the Electoral Commission. This process was concluded quickly and the Commission reported back suggesting

22 *Moohan and others, Petitioners* [2013] CSOH 199.

23 *Reclaiming Motion: Moohan and others v. Lord Advocate* [2014] CSIH 56.

24 *Moohan and Another v. Lord Advocate* UKSC 2014/0183 (24 July 2014).

25 See Ailsa Henderson et al. 'Risk and Attitudes to Constitutional Change,' *ESRC Scottish Centre on Constitutional Change Risk and Constitutional Attitudes Survey*, August 16, 2014, http://www.futureukandscotland.ac.uk/sites/default/files/news/Risk%20and%20Constitutional%20Attitudes%20Full%20Survey%2014%20Aug.pdf and AQMen project https://www.aqmen.ac.uk/project/socialmedia.

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a change to the question.[26] The suggestion was accepted by the Scottish Government and the new question was included in the Scottish Referendum Act.[27]

The Electoral Commission also offered the view that the clarity of the question hinged not only on its syntax, but also upon the content of the independence proposal: 'Clarity about how the terms of independence will be decided, would help voters understand how the competing claims made by referendum campaigners before the referendum will be resolved.'[28] This is an interesting comment, reflecting as it does the requirement that a fully deliberative process is only possible if citizens know what they are voting for.[29] The Scottish Government published a White Paper in November 2013 which sets out its vision of independence,[30] followed by a White Paper and a draft Scottish Independence Bill, which sought to lay out proposals for both an interim and a permanent constitution for an independent Scotland.[31] Each of these were of course heavily criticised by the UK government and by the Better Together campaign. The November White Paper in particular led to a series of papers by the UK Government contesting many of the claims made in the White Paper. In the end, and surely inevitably, citizens were left with a debate in the context of the referendum campaign, rather than any agreed set of 'facts' about what independence would look like. These events highlight that public deliberation in a real democracy can never take place in a controlled vacuum. Citizens have to try to distil facts from the political debates, and even

26 The Electoral Commission took the view that 'based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase "Do you agree …?" could lead people towards voting "yes".' They therefore recommended the following question: 'Should Scotland be an independent country? Yes/No.' 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question,' The Electoral Commission, 2013, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.

27 Scottish Independence Referendum Act 2013, s. 1(2). See also 'Scottish independence: SNP accepts call to change referendum question,' *BBC News*, January 30, 2013, http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21245701.

28 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question,' The Electoral Commission, January 30, 2013, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf, para 5.41. See also generally paras 5.41-5.44, e.g., 'We recommend that both Governments should agree a joint position, if possible, so that voters have access to agreed information about what would follow the referendum. The alternative - two different explanations - could cause confusion for voters rather than make things clearer.' (para 5.43).

29 One of the main criticisms of the Quebec referendum in 1995 was that the proposal of sovereignty and partnership was not well understood by citizens. Tierney, *Constitutional Law and National Pluralism*, 293-9.

30 'Scotland's Future,' Scottish Government white paper, November 26, 2013, http://www.scotland.gov.uk/Publications/2013/11/9348.

31 'Scottish Independence Bill: A consultation on an interim constitution for Scotland,' Scottish Government white paper, June 2013, http://www.scotland.gov.uk/Publications/2014/06/8135/downloads.

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in some cases from the political deceit. But this obviously this goes for ordinary elections as well.

Sufficient time to understand the issue?

Another prerequisite of serious public deliberation is that people have time to consider the issue upon which they are being asked to vote. An element of control which was left to the Scottish Government by the Edinburgh Agreement was the timing of the referendum. In January 2012, it set its course for a referendum some two and a half years hence. This timing was of course strategic. The Scottish Government saw the autumn of 2014 as a propitious time. It allowed the Scottish National Party sufficient time to make the case for independence and it would coincide with a number of significant events. It would also come shortly before a UK General Election which would distract the UK parties and perhaps make them less inclined to work together. But, from the perspective of deliberative participation, a beneficial side effect of this procrastination was that the election debate was conducted over a very long period of time, permitting each side to make its case in full and allowing citizens the time and space necessary to consider the issues. Other important timing issues included in the legislation are the 16 week 'referendum period'[32] and the four week 'purdah period'[33] to which I will return.

Sufficient information available?

Citizens cannot deliberate properly without access to sufficient, reliable information. In many ways the existence of such a favourable environment depends more upon the health of a particular democracy and of its civil society than it does upon legal regulation. Indeed, excessive regulation can in fact serve to inhibit the free flow of ideas. In the Scottish referendum there were many sources of information: both governments,[34] each campaign group, other registered participants in the referendum campaign, and various other sources in civil society[35] including the media and academia.[36] As noted above, a particularly notable source of information was also social media, with Twitter, Facebook and blogs playing a major role in the dissemination of ideas and also in their discussion and debate.

The provision of information by the two campaigns has been touched upon in the context of the November White Paper, but another related issue is the provision, and indeed the very possibility of providing independent or neutral information to voters through the Electoral Commission. Among a number of statutory

32 Scottish Independence Referendum Act 2013, sched. 4, part 3.

33 *Ibid.*, sched. 4, para 25.

34 We have noted 'Scotland's Future', Scottish Government white paper November 26, 2013 op. cit. In June 2014 the UK government sent a 16-page booklet called 'What Staying in the UK Means for Scotland' to every household in Scotland, setting out the case for the No side. See 'UK "fact booklet" to be sent to Scots households', *The Scotsman*, June 12, 2014.

35 See for example on the franchise and mechanics of voting issued by the Citizens Advice Bureau, http://www.adviceguide.org.uk/scotland/law_s/law_civil_rights_s/law_government_and_voting_s/the_scottish_independence_referendum_s.htm.

36 See for example the major ESRC investment: 'Future of the UK and Scotland,' http://www.esrc.ac.uk/research/major-investments/future-of-uk-and-scotland/index.aspx.

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duties, the Commission was given by the Scottish Referendum Act the task of promoting public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum.[37] From the outset, this was going to be a very challenging duty given the deep disagreement between the two campaigns about what exactly was meant by 'independence'.[38] It was hard to see how the Electoral Commission could attempt to produce an objective account of a number of highly technical and fiercely contested issues, concerning not only international relations but also defence, economic relations, the question of a currency union, the disentanglement of the welfare state, national debt etc., particularly when so many features of the post-referendum landscape would be contingent upon negotiations between the two governments in the event of a majority 'Yes' vote. It was argued with evidence before the Scottish Parliament Referendum Bill Committee that it was simply not possible to perform such a role in a neutral way.[39]

In the end, the Electoral Commission intimated that it would 'not seek to explain to voters what independence means' but would offer information 'aimed at ensuring that all eligible electors are registered and know how to cast their vote.'[40] The Electoral Commission also concluded that both governments had a duty here to help explain the implications of either a 'Yes' or a 'No' vote and that a joint position on this would benefit voters. This was a brave attempt to improve the deliberative environment for citizens, even if in political terms such a joint position was never likely to be achievable. In the end though a document was published which contained a two page joint statement that sets out a useful summary of what would happen following a 'Yes' or a 'No' vote.[41] It does not try to explain what independence means, but it does discuss the need for negotiations in the event of a Yes vote, and the balance of devolved and reserved competences in the interim period.

Promotion, funding and spending

Other areas of regulation were a 16 week period in which the funding and spending of both campaigns was tightly regulated, and a four week purdah where the Scottish Government and a wide range of other public bodies could not engage in promotional activity. The UK Government also committed to be bound by equiva-

37 Scottish Independence Referendum Act, s. 21.

38 Stephen Tierney, 'Why is Scottish Independence Unclear?,' *U.K. Const. L. Blog*, February 25, 2014, http://ukconstitutionallaw.org/.

39 William Norton evidence before the Referendum (Scotland) Bill Committee, May 9, 2013, Official Report, http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8140&i=73882&c=1482666.

40 John McCormick, the Electoral Commissioner for Scotland, evidence to: Scottish Parliament Referendum (Scotland) Bill Committee, May 23, 2013, Official Report, col 431, http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8326&mode=pdf.

41 https://www.electoralcommission.org.uk/__data/assets/pdf_file/0012/170400/The-2014-Scottish-Independence-Referendum-Voting-Guide.pdf.

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lent restrictions in the Edinburgh Agreement.[42] In terms of funding and spending rules, the Scottish Referendum Act sought to ensure equality of arms between the two campaign groups. Final audited accounts are not yet available, but it seems to have been largely successful in ensuring a fairly level playing field.

As a conclusion, one could say that the Scottish referendum seems to have been quite successful in helping to provide an environment for democratic engagement and this precedent is likely to be of interest to many countries in which the referendum is a growing feature of constitutional politics, and not only in the sub-state context.

5 The demos question: the ultimate challenge of sub-state nationalism

In the final part of this paper, I return to the specific issue of sub-state nationalism and the fact that the referendum is a device that is becoming more and more popular for sub-state nationalists. One obvious reason for this popularity is that the referendum is a means to advance political claims. In the cases discussed in this text, the sub-state polity already has a level of autonomy, and with autonomy come institutions such as a sub-state government and legislature that are able to organise referendums, as we have seen in Quebec and Scotland, although not yet in Catalonia. But why has the referendum been chosen specifically? There are other ways to make political claims – for example, the victory of a nationalist party in elections. The answer seems to be that the referendum is seen to provide a particular form of validation. The people are expressing a specific view on a specific issue, which helps to endorse the particular political claim (i.e. of independence). People voting for a nationalist political party may do so for many reasons and may not want independence.

But is not just that the referendum brings to the table one single issue; crucially it also involves the people speaking directly and in doing so they can be seen to be engaging in a collective constituent act. This has tremendous symbolic and rhetorical power. Yet it also leaves us with one major question: it is all very well to claim that a referendum lets the people decide, but who are the people? This was the question Ivor Jennings asked in the decolonisation context of the 1950s. The very existence of any democratic polity and any political act made in its name implies a manifestation of ‘the people’. But how do we legitimately demarcate the political space within which a people can be said to exist and act politically? Political theorists call this the ‘democratic boundary problem’. It is perhaps not surprising that this preliminary question of democratic thought – who are the people? – invariably goes unarticulated in the day to day life of representative democracy. The most obvious and indeed practical reason is that there is no need to dwell on this: it is simply assumed that ‘the people’ is a synonym for the citizenry of the

42 For comment on this by Deputy First Minister Nicola Sturgeon, see Scottish Parliament Referendum (Scotland) Bill Committee, June 13, 2013, Official Report, cols 554 and 560.

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state.[43] The latter can be taken to encompass the former in most cases quite happily; and if the state works, leave it be. Another reason is that to explore this question too closely can in some cases be dangerous. In a number of polities the nature of the *demos* and even the territorial boundaries of the state are contested affairs. In such a situation, why not let sleeping dogs lie rather than invite a confrontation over inclusion and exclusion?

In referendums, however, and in constitutional referendums particularly, a more explicit identification of the people cannot be avoided even, or indeed especially, in hard cases. The constitutional referendum by definition implicates an anterior act of democratic border drawing – the framing of the self who will perform an act of constitutional self-determination and who will in doing so expressly articulate itself as a constitutional people. In one sense, any constitutional referendum as an act of popular self-determination requires a direct attribution of constitutional authorship. In this respect, all referendums are potentially constitutive, since they bring back the people – the ultimate source of democratic legitimacy for the polity.

There are two dimensions to this boundary-drawing: the first conceptualises the polity as a physical space; the second imagines it as a group of people. In this light, the constitutional referendum sets the boundary of the people by way of both territorial demarcation and franchise rules. The franchise issue can raise complex problems even when the territorial question is settled. There may be broad consensus that a referendum, if it is to be held, should take place within a particular territorial space, but the issue of who is entitled to vote can raise its own problems, as I have already briefly touched upon in relation to the Scottish referendum. Yet it is the territorial issue that is more relevant to the very fact of constitutive referendums in Quebec, Scotland, and possibly Catalonia. Of course the referendum has been important in other periods of territorial change as well – the post-WWI plebiscites; post WWII decolonisation; the collapse of the USSR and SFRY. It is about the assertion of a separate *demos* within the state and the legitimacy of that *demos* to determine its own future. It has a symbolic role in bringing together and hence declaring the voters to be – directly, equally and communally – a determining 'self'. What is now at the heart of the debates in the UK and Spain is the moral legitimacy of a sub-state people presenting itself as a self-determining entity. Why was the referendum only held in Scotland and not

43 For Dahl, the great philosophers have ignored this question because 'they take for granted that a people has already constituted itself'. See Robert A. Dahl, *After the Revolution? Authority in a Good Society* (New Haven: Yale University Press, 1970), 60-1. Others consider its neglect to be more surprising. Canovan has observed: 'Unlike "freedom", "justice", or even "nation", "people" has attracted hardly any analysis, even by theorists of democracy', a fact she deems 'astonishing'. See Margaret Canovan, 'Populism for Political Theorists?' *Journal of Political Ideologies (*2004): 241, 247. And Goodin comments: 'the first question for any democratic theory is who is included', but notes, '[t]his is a strangely under-explored issue within democratic theory'. See Robert Goodin, *Innovating Democracy. Democratic Theory and Practice after the Deliberative Turn* (Oxford: Oxford University Press, 2008), 3.

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throughout the UK? Why is the Scottish people treated as a people separate for the purposes of constituent power from the people of the whole UK?

The territorial conceptualisation sees the people in terms of space, the participants are those who can vote in a particular geographical area. The territorial boundaries of the *demos* are often taken for granted, as they are of course in a representative democracy, particularly when the referendum is held throughout the state. But this need not be the case and when there is disagreement, the referendum has the potential to escalate already existing territorial disagreements. My focal point here is indeed sub-state nationalists who argue that the territory of the sub-state nation contains within it a self-determining people. We see in this challenge how the *demos* question lies unconfronted in a world where we take for granted that the principles of democracy and formal equality of citizens apply automatically in each polity in the same way, and that each state contains one *demos*. The referendum is increasingly used by modern nationalism to challenge this orthodoxy, asserting the existence, or at least the possibility of multiple *demoi* within the state.[44]

Interestingly, international law does not come to the aid of Scottish or Catalan nationalists here. The right to secession is very tightly circumscribed and almost certainly does not include these territories. As a result, the issue is situated within constitutional law. The right of a province to negotiate secession from Canada was read into the Canadian constitution by the Supreme Court in the Secession Reference:

> [W]e are… unable to accept… that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other partici-

44 Normative challenges to the injustice of particular stately instantiations of the people have in recent times been offered by political theorists. See Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Margaret Moore, *Ethics of Nationalism* (Oxford: Oxford University Press 2001); Ferran Requejo, 'Liberal Democracy's Timber is Still Too Straight: The Case of Political Models for Coexistence in Composite States,' in *Europe's Constitutional Mosaic*, ed. Neil Walker, Jo Shaw and Stephen Tierney (Oxford: Hart Publishing, 2011).

> pants, as well as the rights of all Canadians both within and outside Quebec. (para 92)

The UK has arguably gone further in that the central government itself has accepted Scotland's right to leave in the Edinburgh agreement without the need for any judicial intervention; and indeed facilitated the process. A similar right exists for Northern Ireland in relation to reunification with the Republic, something which is often overlooked. Within this final agreement lies, in effect, a recognition that the UK is a plurinational union state. The idea of a union state is one which accepts that the state was forged from a union of nations, each of which continued to consolidate and build its national identity within the state. Processes of homogenisation did not occur. In other words its national pluralism is part of the very identity of the state and of its on-going lived experience. The principles of democracy and rights demand that this association continue to be voluntary.

This may be a difficult concept for some wedded to Westphalian views of the state as receptacles of one unitary people and one unitary source of sovereignty in the tradition of Bodin and Hobbes. But it should be less hard to appreciate in light of nearly 60 years of European Union within which national pluralism is lived reality, and in which the treaties now expressly enshrine a right of exit; a path down which the people of the United Kingdom have chosen to go after another referendum on 23 June 2016.

We see that national pluralism was an implicit understanding in the minds of the Scottish citizens as well. People in Scotland were mobilised in huge numbers to debate the issue and to vote. There was no boycott on the basis of illegitimacy or even any serious question about the legitimacy of the referendum; it was accepted that a nationalist party had been elected on a manifesto promise to hold a referendum. People may have disagreed about independence and questioned the prudence of a referendum on the issue, but there was and remains wide consensus that Scots have the right to decide.

Notably this is not a concession which Spain is prepared to make. Here the constitution itself or at least how it is widely interpreted, does not recognise this logic of national pluralism. The constitution does make a category distinction between its national societies and other regions. Spain is thus a mixture of a plurinational and a regional state. Catalonia is recognized as a nationality ('nacionalidad') and it is constituted as a self-governing unit of Spain ('comunidad autónoma'). But Article 1.2 of the Spanish constitution provides: 'National sovereignty belongs to the Spanish people, from whom all State powers emanate.' And Article 2 establishes: 'The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.' Secession is not ruled out, but the central state asserts that this would require a constitutional amendment, which is not out of line with the Canadian or even British approaches to negotiated secession. Crucially however it is maintained by the central state that a referendum of

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secession would also need an amendment. The Spanish Constitutional Court, in its Judgment 103/2008 of 11 September 2008, the leading case on referendums and secession, decided indeed that this would require an amendment to the Constitution at the beginning of the process. Also this would have to be done through 'constitutional amendment provided in Article 168, the hardest amending process of the Spanish Constitution.'[45] Both Canada and the UK accept that their sub-state territories are potentially self-determining and that they cannot be kept in the state against their will, which has not been conceded in Spain.

6 Conclusion

National pluralism is a reality in Europe today. In acknowledging it, we must adjust our constitutional understandings to accept that sovereignty can not only be pooled but that it can also be divided. A sharing of power among equal sovereign entities is the reality of the European Union, but it is also the reality of states within it. This reality brings with it a constitutional right of self-determination. To this end, the referendum has intervened in a crucial way and the Scottish process is likely only to enhance its legitimacy as a feature of constitutional debate in plurinational states. The Scottish Referendum Act, building upon the Edinburgh Agreement principles, helped set the conditions for a fair, lawful and democratic referendum.[46] As we cast the Scottish process into wider perspective, it is indeed notable that the leading strategist from the Yes campaign in the Quebec referendum of 1995, a referendum which suffered from a rancorous relationship between the two campaigns and the absence of agreed and independently overseen process rules, has written recently commending the UK for the way in which the Edinburgh Agreement fostered a mutually acceptable referendum process. He sees this breakthrough to be of great significance to other countries facing similar referendum processes: 'Nations that have been through this wrenching debate recently or who, especially in Catalonia, will navigate these waters soon, need the British government to keep offering a template of fair play and respect for democracy.'[47] The Scottish referendum is indeed an opportunity to provide a model of citizen engagement at a time when the referendum is proliferating

45 The amending procedure of Article 168 of the Spanish Constitution requires to follow these successive steps: (1) a two-thirds majority of the members of the Spanish Congress and the Spanish Senate would be required, (2) both of these houses would have to be dissolved, (3) elections would need calling to constitute a new Congress and a new Senate, (4) the decision passed by the previous houses would require ratification by a two-thirds majority of the members of each house and, finally, (5) the amendment would need to be ratified by a referendum submitted to the Spanish people.

46 A significant task for the Electoral Commission once the regulated period began, was to monitor how well the legislation in the Scottish Referendum Act and Scottish Franchise Act was implemented and how responsibly all of those engaged in referendum campaigning behave. So far the evidence is that it has approached its regulatory role in a vigorous way.

47 Jean-François Lisée, 'Well done, Britain, for a fair referendum – it's a shame Canada didn't manage it,' *The Guardian*, September 9, 2014, http://www.theguardian.com/commentisfree/2014/sep/09/britain-referendum-canada-scottish-independence-vote.

around the world like never before.[48] In the end the quality of Scottish, and indeed British, democracy was boosted by the way the decision was reached.

But the British process was important for a second reason. It dealt with the *demos* question by accepting that the Scottish citizens had the right to decide. Something which, ironically, prominent actors in the European Union were less inclined to concede. Admittedly, the Catalan experience is very different because there is a real impasse in the prior question of the constitutional right to decide.

Finally, the Scottish experience may be illuminating as well, because in the end the people voted to stay. Part of me wonders how many people, even subconsciously, made the decision that the kind of state which allows you the right to express sub-state constituent power, which allows sub-state institutions to organise the referendum, set the timing, franchise and question, is not the kind of state you want to leave. This may in fact be the ultimate lesson for a democratic Europe. Peoples can be governed only with their consent. Otherwise no polity, old or new, can claim for itself the ultimate source of legitimacy upon which the democratic state depends.

48 Lawrence LeDuc, *The Politics of Direct Democracy: Referendums in Global Perspective* (Peterborough, Ontario: Broadview Press, 2003), 29.

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SUMMARIES

E pluribus unum? The Manifold Meanings of Sovereignty

Raf Geenens

This article investigates and classifies the different meanings of the term sovereignty. What exactly do we try to convey when using the words "sovereign" or "sovereignty"? I will argue that, when saying that X is sovereign, we can mean five different things: it can mean that X holds the capacity to force everyone into obedience, that X makes the laws, that the legal and political order is created by X, that X holds the competence to alter the basic norms of our legal and political order, or that X is independently active on the international stage. These different usages of the term are of course related, but they are distinct and cannot be fully reduced to one another.

Power and Principle in Constitutional Law

Pavlos Eleftheriadis

Legal and sociological theories of sovereignty disagree about the role of legal and social matters in grounding state power. This paper defends a constructivist view, according to which the constitution is a judgment of practical reason. The paper argues that a constitution sets out a comprehensive institutional architecture of social life in terms of principles and official roles that are necessary for any legitimate scheme of social cooperation to exist. It follows that legal and sociological theories of sovereignty capture only part of the truth of sovereignty. Legal reasoning engages with political power, but it is not determined by it. There is no causal chain between power and validity, as suggested by the legal positivists. The relation between power and law is interpretive, not causal. It follows that the circularity of law and the constitution, namely the fact that the law makes the constitution and the constitution makes the law, is not a vicious circle. It is part of an ordinary process of deliberation.

The Erosion of Sovereignty

Martin Loughlin

This article presents an account of sovereignty as a concept that signifies in jural terms the nature and quality of political relations within the modern state. It argues, first, that sovereignty is a politico-legal concept that expresses the autonomous nature of the state's political power and its specific mode of operation in the form of law and, secondly, that many political scientists and lawyers present a skewed account by confusing sovereignty with governmental competence. After clarifying its meaning, the significance of contemporary governmental change is explained as one that, in certain respects, involves an *erosion* of sovereignty.

National Identity, Constitutional Identity, and Sovereignty in the EU

Elke Cloots

This article challenges the assumption, widespread in European constitutional discourse, that 'national identity' and 'constitutional identity' can be used interchangeably. First, this essay demonstrates that the conflation of the two terms lacks grounding in a sound theory of legal interpretation. Second, it submits that the requirements of respect for national and constitutional identity, as articulated in the EU Treaty and in the case law of certain constitutional courts, respectively, rest on different normative foundations: fundamental principles of political morality versus a claim to State sovereignty. Third, it is argued that the Treaty-makers had good reasons for writing into the EU Treaty a requirement of respect for the Member States' national identities rather than the States' sovereignty, or their constitutional identity.

‘Should the People Decide?’ Referendums in a Post-Sovereign Age, the Scottish and Catalonian Cases

Stephen Tierney

This article uses the rise of referendum democracy to highlight the tenacity of modern nationalism in Western Europe. The proliferation of direct democracy around the world raises important questions about the health of representative democracy. The paper offers a theoretical re-evaluation of the role of the referendum, using the 2014 referendum on Scottish independence to challenge some of the traditional democratic criticisms of popular democracy. The final part of the paper addresses the specific application of referendums in the context of sub-state nationalism, addressing what might be called `the demos question'. This question was addressed by the Supreme Court in Canada in the Quebec Secession Reference but has also been brought to the fore by the Scottish reference and the unresolved issue of self-determination in Catalonia.

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