ARTICLE

Sovereignty and Beyond: The Double Edge of External Constitutionalism

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This paper argues that the emergence and augmentation of the external dimension of state constitutional law is best understood as part of a broader process of the constitutionalization of state sovereignty since the eighteenth century. That gradual development should not be understood, as it often is, in purely reductive terms–as the legal containment and taming of a previously uncontained sovereign power. Rather, it should be understood in constructive terms–as a way of reconstructing the very idea of sovereign power for modern times along more abstract lines, embracing a high level of institutionalization, internal differentiation, and corporatization. The modern constitution, it follows, has been the enabler and means of articulation of sovereign power as much as its restraint, and this double significance–or 'double edge'–characterized the development and operation of external sovereignty as much as it did that of internal sovereignty. Today, we find increasing emphasis upon how the external norms of domestic constitutions are contributing to the building of a more communitarian international order, yet this threatens to be overstated. To the extent that the constitution necessarily remains an expression of as much as a constraint upon state sovereignty, there is an abiding tension between the legal empowerment of that external sovereign expression in unilateral terms and the more fundamental multilateral qualification of that sovereignty through legally mandated deference to or engagement with transnational or international norms and institutions. In acknowledging and addressing that tension, we see in state constitutional architecture today the evolution of a more intense form of 'demarcation sovereignty,' concerned with the staking and maintenance of boundaries deemed necessary to guarantee the continuing basic integrity of the sovereign unit in an increasingly legally interdependent world.

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I. INTRODUCTION: BEYOND REDUCTIVE CONSTITUTIONALISM

Within our framework of legal and political thought, constitutionalism–understood as endorsement of the idea and pursuit of the practice of government according to constitutionally-prescribed norms and through constitutionally-endorsed institutions and mechanism–has always been provoked by and addressed to questions of sovereignty. More particularly, the distinctive contribution of constitutionalism to the modern legal and political condition is often taken to lie in its moderation of the reach and impact of the state polity by confining the expression and pursuit of its sovereign power within certain legally specified and enforceable limits.[1] The primary focus of this way of thinking, certainly until recent years, has been on matters of *internal* sovereignty and their constitutional moderation. We refer here to the notion that all domestic legal authority is contained in the state and flows through its institutional apparatuses, and to the purported role of constitutional thought and practice in limiting and conditioning that sovereign internal authority. Yet a fuller understanding of the scope and logic of state sovereignty suggests that, to the extent that constitutionalism's sovereignty-moderating influence applies at all, it should apply equally in the area of *external* sovereignty. We refer here to the notion that the state has exclusive title to pursue its external relations and need not defer to any external authority in so doing, and to the purported role of the constitution in limiting and conditioning that sovereign external authority.[2]

A number of different terms might be used, and have been used, to describe this kind of constitutional containment of the internal and, by extension, external dimensions of sovereignty. These include 'liberal constitutionalism,'[3] 'legal constitutionalism,'[4] constitutionalism as 'limited government,'[5] and constitutionalism as '*jurisdictio*.'[6] The very familiarity of these terms, indeed, conveys just how deeply embedded the idea of constitutionalism is in the modern constitutional tradition as a force that mitigates and moderates sovereign power.[7] Yet as each of these labels has

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1 *See, e.g.*, Giovanni Sartori, *Constitutionalism: A Preliminary Discussion* 56 AM. POL. SCI. REV. 853 (1962).

2 *See generally,* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 14 (1999) (deploying the term 'international legal sovereignty' to describe the central feature of external sovereignty).

3 *See, e.g.*, Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 305 (1993).

4 *See, e.g.*, RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 142 (2007).

5 *See, e.g.*, Sartori, *supra* note 1, at 860.

6 CHARLES H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 144 (1940).

7 *See also*, Jeremy Waldron, *Constitutionalism: A Skeptical View*, *in* POLITICAL THEORY 23-45 (2016).

its own specific lineage and carries its own particular theoretical baggage, the term *reductive constitutionalism* is offered here as a less loaded and more apt way to capture such an influential understanding of the constitutional role. This term conveys the central message that the key function and contribution of constitutional thought and practice is, quite literally, to *reduce* sovereign political power to the terms and ultimate authority of (constitutional) law.[8]

Pursuing the second limb of the reductive constitutionalist argument, we would expect that, by taming sovereign power, the constitutionalization of external relations should operate, broadly speaking, as a civilising force in inter-state relations. It should help, in tandem with international law itself, to prevent or remedy an international state of nature in which all is either anarchy[9] or the self-interested preference of shifting coalitions of powerful states. The realist state of affairs that would prevail in such constitutionally 'unreduced' and unmoderated circumstances undoubtedly comes with profound costs and casualties. Weak states would be ever vulnerable to the selfish appetites of strong states. Global public goods requiring co-operative action that transcends immediate state self-interest, such as peace, sustainable environment, and global health, would be neglected or jeopardised. Likewise, the life-chances of these vulnerable groups–persecuted minorities, asylum seekers, migrants more generally–whose well-being requires forms of international co-operation that go beyond the narrow prism of state self-regard, would be prejudiced. In the reductive constitutionalist narrative, however, not only can these undesirable effects be avoided, but, since the exponential growth of the new rule-based international legal order after World War II, in conjunction with a new wave of internationally open constitutional settlements, they *have* in fact been addressed with increasing success.[10]

The purpose of the present article is to challenge a tendency of undue reliance on the reductive constitutionalist narrative, particularly as it applies to the external domain. While the reduction of sovereign power to law undoubtedly *does* serve and *has* served to moderate and condition that power, the framework of assumptions associated with the model of reductive constitutionalism rests on a partial (and therefore inadequate) understanding

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8 For the classic statement along these lines, *see* Sartori, *supra* note 1; *see also* Neil Walker, *Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship* 3 NETH J. L. PHIL. 206, 209 (2010) (discussing historical development of idea of the power-reductive function of constitutionalism).

9 *See* Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977).

10 *See e.g.* Christine Bell, *What We Talk About When We Talk About International Constitutional Law* 5 TRANSNATIONAL L. THEORY 241 (2014) (examining the trend towards the internationalization of constitutional law under transnational and supranational pressure and the tendency to understand that trend as ushering in a general legalization of relations between sovereigns).

of the relationship between the key variables in play: 'constitution,' 'statehood,' 'sovereignty,' 'international.' At root, this framework offers a one-sided appreciation of the relationship between constitutionalism and sovereign statehood. It views constitutionalism as resolving the apparent 'paradox'[11] arising out of sovereignty's inherent resistance to legal control in both its internal and external operations.

However, such a perspective courts two errors or omissions, each involving a failure to fully appreciate the *double edge* of constitutionalism as involving empowerment as much as constraint. In the first place, the reductive approach tends to ignore or understate constitutionalism's complicity in the very establishment of the modern conception of sovereignty. In the second place, it tends to neglect constitutionalism's continuing involvement in the sustenance of the sovereign power so established, and, it follows, is liable to overstate constitutionalism's ability to limit that power over the longer term. The constitutionalization of the modern state, therefore, rather than overcoming the two-pronged (i.e. both internal and external) paradox of sovereignty, instead both necessarily contributes to that paradox and is able to provide only a partial resolution of it. In a nutshell, constitutionalism remains both part of the problem posed by sovereign power as a form of power inherently resistant to control, and offers only a partial solution.

The application of this general conclusion to the external dimension of sovereignty becomes clear once we introduce the last of our key variables–that of the 'international.' The double significance of constitutionalism is not confined to the legal conduct of internal affairs but also has an effect upon the development of international law. This effect is twofold. On the one hand, there is a direct effect: to the extent that international law is the product of the self-regarding expressions by state actors of their constitutionalised external sovereignty, it inevitably mirrors some of the tensions attendant upon constitutionalism's double-edged quality–its combination of sovereign self-empowerment and sovereign self-constraint. On the other hand, there is an indirect effect. International law has never been understood as an entirely 'transactional'[12] affair, but from its earliest articulations was also conceived of as something more than the sum and negotiated outcome of sovereign state interests–and so as relatively

11 On this paradox, see David Dyzenhaus, *Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought*, 16 THEORETICAL INQUIRIES L. 337 (2015); for discussion, see Eyal Benvenisti, *The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks*, 16 THEORETICAL INQUIRIES L. 535 (2015).

12 *See* J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 GER. Y.B. INT'L L. 547, 551 (2004).

autonomous from these sovereign state interests.[13] Yet to the extent that international law contains elements of a self-standing *ius gentium*–a common law for all places[14]–its operation remains necessarily constrained by the constitutionalised structures of state sovereignty. Even in the most monistic internationalist mind-set, international law is rarely perfectly realised in its own terms at the domestic level. Instead, its effectiveness is dependent upon forms of implementation that are the product of domestic law emanating from the internal sovereign, and these forms of state-interested implementation may be more or less forthcoming and faithful to the material content and purpose of the international norms at issue.

The claim associated with the second limb of the reductive constitutionalist argument–that constitutional law and international law should operate in productive tandem to tame the selfish interests of states so as to overcome the international state of nature–is therefore rendered problematic. Certainly, we find many arguments both moral and pragmatic, studded throughout the history of international legal thought and particularly prevalent in contemporary reflections, concerning how sovereignty should be–and to some extent has been–'subdued'[15] in light of broader humanistic and cosmopolitan considerations, and how the development of international law has contributed and might contribute to this. Yet we should always approach these arguments with caution. To the extent that they present themselves as *ideal* arguments against which the reality of sovereign relations should be tested, we need bear in mind that they are merely aspirational. To the extent that they present themselves, alternatively, as *interpretive* arguments, as persuasive accounts of how the nexus of external constitutional law and international law already subdues sovereignty in practice, they risk understating the tensions both within international law as well as between international law and constitutional law, caused by the double-edged significance of constitutional authority.[16]

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13 *See e.g.*, Emmanuelle Jouannet, *Universalism and Imperialism: The True–False Paradox of* International Law*?*, 18 EUR. J. INT'L L. 379 (2007).

14 *See, e.g.,* Geoff Gordon, *Natural Law in International Legal Theory: Linear and Dialectical Presentations, in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 279, 281-90 (Florian Hoffmann and Anne Orford, eds., 2016); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Neil Walker *Out of Place and Out of Time: Law's Fading Co-ordinates* 14 EDINB. L. REV. 13 (2010).

15 Benvenisti, *supra* note 11, at 542 (Benvenisti's own thesis about sovereigns as 'trustees of humanity' is an influential example of a contemporary theory along these lines.).

16 See my critique of the ground-breaking work of Mattias Kumm along these lines; Neil Walker, *The Return of Constituent Power: A Reply to Mattias Kumm*, 14 INT'L J. CONST. L. 906 (2016); *see also*, Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 INT'L J. CONST. L. 697 (2016); 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 258 (Jeffrey L. Dunoff and Joel P. Trachtmann eds., 2009).

II. THE PARADOX OF SOVEREIGNTY

We can begin to unpack this set of arguments by defining what we mean by the two-pronged (internal and external) paradox of sovereignty, and asking how reductive constitutionalism responds to this paradox. The internal paradox is revealed by asking how the sovereign, if understood as the ultimate internal authority, can be subject to any form or degree of legal control over its domestic actions. The external paradox is laid bare by asking how any particular sovereign, if independent and exclusive of any other authority in pursuit of its external relations, can be required to respect the equal standing of other sovereigns as independently-entitled actors on the international stage, and how, more concretely, any particular sovereign can be compelled to adhere to agreements made or consensus reached with other sovereigns. In both cases, the paradox arises out of the fact that sovereign power is a power that was traditionally claimed to be, by its nature, absolute and illimitable as well as perpetual and indivisible.[17] By strict definition, therefore, sovereign power seems incapable of qualification or restriction–less still termination or distribution–whether through law or any other source or medium of authority. Instead, the sovereign is above the law, and, indeed, *before* the law–the very source of the law that binds others.

How does reductive constitutionalism try to answer this challenge? It does so by pointing to the special quality of *constitutional* law as a means of containing sovereign power. Under the model of reductive constitutionalism, constitutional law is seen as a kind of legal condensation of the polity that involves the auto-limitation of sovereign power in both its internal and external dimensions. Constitutional law is a higher juridical form that, rather like sovereignty itself, stands above and before ordinary law. Yet unlike sovereignty, the authority of constitutional law is normative in character. Its 'rule' is through the medium of *rules*–rules that specify the form, purpose, and limits of the institutions of government concerned with the legislation, execution and adjudication of ordinary laws.

From this perspective, then, modern constitutional law occupies a similarly elevated place in the legal and political imaginary to that traditionally filled by sovereignty itself. It can, as such, be viewed as a kind

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17 See the seminal texts of JEAN BODIN, THE SIX BOOKS OF A COMMONWEALTH, (Richard Knolles trans., 1962); for discussion, *see* Dennis Baranger, *The Apparition of Sovereignty*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 47 (Hent Kalmo and Quentin Skinner eds., 2010); Michel Troper, *The Survival of Sovereignty*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 132 (Hent Kalmo and Quentin Skinner eds., 2010); *see also* various works by Martin Loughlin, in particular, Martin Loughlin, *Why Sovereignty?, in* SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN AND INTERNATIONAL PERSPECTIVES 34 (Richard Rawlings et al. eds., 2013); Martin Loughlin, *In Defence of Staatslehre* 48 DER STAAT 1 (2009).

of comprehensive replacement for sovereign power by normative power, or at least as an instrument for direct engagement with sovereign power and for its effective subjugation to legal norms. In this ambitious reading, therefore, either we construe constitutional law as a form of normativity that entirely eclipses sovereignty in the privileged space once claimed by it;[18] or we see constitutional law as the authorised and channelled product of a revised and modernised sovereignty, now understood as the constituent power of the people, or 'popular sovereignty.'[19] Whichever is the case, sovereignty is effectively reduced to the register of (constitutional) law, which provides the code necessary and sufficient for the delimitation and restriction of the self-authorising power of the polity.

What is amiss with the argument made by reductive constitutionalism? What is involved in the counterclaim that constitutionalism, rather than resolving the paradox of sovereignty, instead both contributes to the reconfiguration and restatement of that paradox under political modernity and can provide at best only a partial resolution of it? Let us pursue these two matters in turn. And let us then, in our concluding sections, look at the implications of an only partially-resolved sovereignty paradox for the contemporary state of international legal relations.

III. CONSTRUCTIVE CONSTITUTIONALISM AND THE MAKING OF EXTERNAL SOVEREIGNTY

Constitutionalism contributes to the paradox of constitutionalism because, as we have already noted, it possesses a dual and double-edged significance. Constitutionalism does not simply tame and contain the sovereign authority of the modern state, as the model of reductive constitutionalism suggests, but it also helps to (re)construct the very idea of sovereignty. Again, there are a number of familiar oppositional labels by which this additional constitutive role of constitutionalism can be emphasized over its constraining role. These include 'republican' rather than 'liberal' constitutionalism,[20] 'political' rather than 'legal' constitutionalism,[21] constitutionalism as *gubernaculum* rather than constitutionalism as *jurisdictio*,[22] and 'positive' rather than 'negative' constitutionalism.[23] Let us opt once more, however, for a less theoretically-encumbered opposition, and suggest the idea of *constructive* constitutionalism as the best contrast and counterpart

18 *See, e.g.*, David Dyzenhaus, *The Question of Constituent Power*, *in* THE PARADOX OF CONSTITUTIONALISM 129 (Martin Loughlin and Neil Walker, eds., 2008).

19 *See, e.g.* POPULAR SOVEREIGNTY IN HISTORICAL PERSPECTIVE (Richard Bourke and Quentin Skinner, eds. 2016).

20 *See, e.g.*, A. TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

21 *See, e.g.*, BELLAMY, *supra* note 4, at 143-249.

22 *See, e.g.*, MCILWAIN, *supra* note 6, at 144.

23 *See, e.g.*, S. A. Barber, *Fallacies of Negative Constitutionalism*, 75 FORDHAM L. REV. 651 (2006).

to *reductive* constitutionalism. Constructive constitutionalism holds neither that constitutional authority replaces sovereign authority nor that it simply converts the raw *pouvoir constituant* of the popular sovereign into *pouvoir constitué*, as reductive constitutionalism would hold. Rather, constructive constitutionalism holds that constitutional authority is co-constitutive of the very modern idea of sovereign power. On this view, while the idea of sovereignty predates modern constitutional thought, design, and practice, constitutionalism is key to the transformation of our understanding of sovereignty in the modern age.

Our conception of sovereignty begins with the mediaeval figure of the sovereign–the dynastic ruler who has dominion over his subjects and who is under no legal obligation to any higher power.[24] That figure of the mediaeval sovereign already involved a process of abstraction from the purely personal and interpersonal–the King deemed to possess a 'politic body or capacity' in addition to his 'natural body.'[25] Gradually, however, as the early modern sovereign sought and acquired more extensive and more intensive resources and responsibilities of government, the detached quality of the office became more pronounced. Both the ruler and the ruled became more formalized categories. Sovereignty came to acquire its modern sense, referring to the existence of a singular ruling power, however institutionalized and internally differentiated within and 'corporatized'[26] across the organs of government, in which inheres final and absolute authority over the political community as a whole.

Sovereignty thus understood as an ideal of indivisible but impersonal authority, as articulated by early modern thinkers such as Grotius, Bodin, and Hobbes, resolved two key problems that had confounded mediaeval political theory.[27] Authority no longer needed to be concentrated in the hands of the one or the few in order to be considered a unity. Equally, its separation from a particular personage or personal office allowed for its continuity and commitment over space and time. Furthermore, and at a deeper level of political grammar, in answering both of these puzzles, the modern conception of sovereignty both reflected and encouraged a gradual shift away from a conception of legitimate authority based upon natural hierarchy or a metaphysically ordained order. Instead, and particularly evident in the development of ideas of popular sovereignty–the modern

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24 *See, e.g.*, MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 183-208 (2010).

25 *Calvin's Case,* 7 Co. Rep. 1a, 9b (1608), *per* Coke CJ; *see also*, E.H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL THEOLOGY (1957).

26 Neil Walker, *Sovereignty Frames and Sovereignty Claims*, *in* SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN AND INTERNATIONAL PERSPECTIVES 18 (Richard Rawlings et al. eds., 2013).

27 *See, e.g.*, Jens Bertelson, *On the Indivisibility of Sovereignty*, 2 REP. OF LETTERS: J. FOR STUD. OF KNOWL., POL., & ARTS 85 (2011).

conception signalled the emergence of a world-view that justified the polity in terms of its responsiveness to the individual and collective interests of its members, now conceived of as free and equal persons.[28]

Crucially, however, the refinement, consolidation, and, in turn, the international dissemination of this more abstract and impersonal conception of sovereignty required the intervention of modern constitutional method. Only constitutionalism, with its intricate legal coding, could provide the normative suppleness necessary for the design of more complexly differentiated forms of governmental normative order; only constitutionalism, with its promise of normative durability, could guarantee the continuity of offices and stabilize inter-institutional relations; and only constitutionalism, with its appeal to the 'nation,' 'people,' or similar collective abstraction as its subject, could provide the symbolic framework for the authoritative relocation from personal to impersonal rule, and so from rule in the interests of the ruler to rule in the interests of the ruled. In this way, constitutionalism helped create a *new* form of sovereignty rather than simply rein in an *old* form of sovereignty.

The development of this more encompassing conception of sovereignty also begins to account for sovereignty's Janus-faced quality in the modern order–its simultaneous reference to the internal relations of the state polity and to its external relations. Let us recall that modern sovereignty denotes the finality, comprehensive remit, and indivisibility of the ruling power within a territory. In providing such a uniform–and uniformly dominant–template of authority, sovereignty under the emerging banner of constitutionalism distinguishes itself from the diverse pattern of overlapping and interlocking authority among dynastically sovereign, imperial, clerical, feudal, and other forms that were characteristic of mediaeval authority. It follows that modern sovereignty's interior and exterior dimensions become mutually conditioned and enabled. As the early constitution-makers in the United States and elsewhere appreciated, for the monopolistic authority of a state within its territory to be achieved and maintained, recognition was due *to* other similarly formed polities or aspiring polities, with their equally valid claims to be treated as communities of free and equal people under an emerging, modernist conception of political legitimacy. Similarly, and more urgently, recognition *from* such external polities, and their commitment to non-interference, was necessary.[29] Conversely, for states to exercise their external sovereignty as actors capable of entering into international legal

28 *See* Walker, *supra* note 8.

29 On the linkage of claims of internal and external sovereignty in the making of the United States, see DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE, A GLOBAL HISTORY (2007); *see also*, David Golove & Daniel Hulseboch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

commitments, the indivisibility and finality of their internal authority was required. It is no coincidence, then, that the birth and gradual development of an international society of states was 'coeval'[30] with the birth and constitutional development of the modern conception of the sovereign state.

How might we summarize the significance of this profound shift from pre-modern and pre-constitutional to modern and constitutional understandings of sovereign authority? In general terms, we may consider the deep structure of the emergent Janus-faced sovereignty along two closely related dimensions.[31] In the first place, and most fundamentally, there is an *epistemic* shift. Sovereignty in its mature constitutionalised form consists of a new 'social imaginary'[32]–a novel way of knowing and ordering the world that 'silently frames the conduct of much of modern politics.'[33] Sovereignty's mature frame is first and foremost a presuppositional frame that shapes perception, understanding and, in turn, practical reason. It implies the derivation of an ultimately authoritative 'unity (out) of a manifold'.[34] In other words, *e pluribus unum*–the explicit founding motto of the United States–is in fact implicit in the very idea of the constitutionalization of sovereignty. Constitutionalized sovereignty, therefore, supplies a representational and ordering device which envisages and identifies discrete polities that can act in the name of an undifferentiated collective notwithstanding an internal diversity of interests, values, and wills.

Importantly, as Martin Loughlin has argued,[35] in this deep framing sense, sovereignty is conceptually prior both to positive law as well as to the governmental and wider political system, and does not necessarily privilege either. Both politics and positive law, or at least the domain of public law,[36] are predicated upon and 'posited' in accordance with a constitutionalized conception of sovereignty. The security of positive law's commitments, its construction of a bounded order, its durability, and its expansive capacity for reflexive self-reproduction through the institutions of the broader

30 Antonio Cassese, *States: Rise and Decline of the Primary Subjects of International Community, in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 49, 50 (Bardo Fassbender and Anne Peters eds., 2012).

31 *See* Walker, *supra* note 26; *see also* Neil Walker, *The Variety of Sovereignty*, *in* SOVEREIGNTY GAMES: INSTRUMENTALIZING STATE SOVEREIGNTY IN EUROPE AND BEYOND 21 (R. Adler-Nissen and T. Gammeltoft-Hansen (eds.) (2008)).

32 CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES (2004).

33 *See, e.g.*, Robert Jackson, *Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape*, 47 POL. STUD. 431, 431 (1999).

34 Hans Lindahl *Sovereignty and Symbolization*, 28 RECHTSTHEORIE 347, 348 (1997).

35 *See generally,* Loughlin, *In Defence of Staatslehre*, *supra* note 17.

36 For discussion of alternative historical frames for the modern legal universe (in whole or in part), in particular the fluid tradition of 'common law(s)', see P. GLENN, ON COMMON LAWS (2005). *See also* Neil Walker, *On the Necessary Publicness of Law, in* THE PUBLIC IN LAW 7 (C. Michelon, G. Clunie, C. McCorkindale and H. Psarras (eds) (2012)).

political system, are all dependent on the axiomatic frame of constitutionalised sovereign power. The epistemic significance of constitutionalised sovereignty, in other words, is not to replace the raw political power of the pre-constitutional sovereign with a discipline that subordinates the everyday political sphere to law, but to construct positive law and the institutional matrix and active culture of politics as mutually supportive and mutually dependent elements of the overall 'body politic'.

Secondly, and of even more direct relevance for our purposes, the mature age of sovereignty also involves a *systemic* shift. International relations theorists tend to talk in the language of 'system'–as in the 'system of states' or the 'Westphalian system.'[37] The template of mature constitutionalised sovereignty, with its symbiotically related internal and external aspects, presupposes and requires a general type rather than a unique instance. As already noted, it imagines a uniform world of sovereign states, mutually recognizing, mutually supportive, and mutually exclusive in their claims to the plenitude of internal authority. That is to say, the idea of mature sovereignty can only be understood and practiced in a systemic context, sustained through a path-dependent and self-reproductive cycle of formally identical polities operating according to certain uniform norms of engagement.

Of course, the 'real world' is much different from this idealized world of international law and relations, and always has been. The sovereign system in the high modern age was a partial and precarious accomplishment, denied to many conquered or aspiring peoples in the name of empire or the self-interest of the already self-chosen, and more generally vulnerable to unequal patterns of state aggression in a global system than as now lacking any central monopoly of legitimate violence. Yet, the systemic dimension gained and retained sufficient purchase–enough of a 'framing effect'–to provide a powerful and sustained logic of reproduction in global political relations.

IV. SOVEREIGNTY BETWEEN THE CONSTITUTIONAL AND THE INTERNATIONAL

The modern constitution, it follows in this constructivist vein, has been the enabler of sovereign power as much as its restraint, and this double significance has coloured the operation of external sovereignty as much as it has that of internal sovereignty. Certainly, the first modern documentary constitutions, including the key revolutionary constitutions of the United States and France, were primarily concerned with proclaiming the source

37 *See, e.g.*, Robert Jackson, *Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape*, 67 POL. STUD. 431 (1999).

and articulating the terms and conditions of internal sovereignty, in particular the composition, function and relations of domestic institutions of government, the powers and responsibilities of the state towards its citizens, and the rights of citizens vis-a-vis the state and others. Yet these early compacts were already also somewhat concerned with the external dimension of sovereignty–including the very claim to possess the exclusive title to act in external matters that is definitive of external legal sovereignty.[38]

Importantly, both that general claim and the first examples of detailed constitutional attention to external sovereignty in particular spheres involved the *unilateral* expression of sovereign will. Most prominently, as in the case of the United States Constitution, this involved the assertion of external sovereign authority in the area of war-making,[39] while in other externally-relevant matters, such as the specification of the extra-territorial jurisdiction of domestic courts,[40] the unilateral expression of sovereign will was concerned instead with drawing the external boundary of the internal sovereignty's operation. In their different ways–a diversity that, as we shall see, [41] finds an echo in contemporary patterns of constitutionalised sovereignty–these early measures served to underscore the sovereign-empowering rather than the sovereign-constraining function of external constitutionalism. Their stress on the unilateral promotion of sovereign authority, moreover, speaks to how the process of constitutionalization aided continuity as much as it announced discontinuity in its generous assertion of sovereign power. For, these early constitutionalised expressions of external sovereignty were as much concerned with consolidating and juridifying the legacy of pre-modern sovereign prerogatives (in military and judicial domains) as they were with building a new edifice of international relations.

And if we look beyond these few express provisions, there is a more general sense in which in the opening phase of political modernity the constitutionalization of sovereignty, far from encouraging the development of a thicker framework of international law, tended to act as a silent brake upon that development. We noted earlier that the idea of international law as a force autonomous from the self-interest of its state parts has always been present in jurisprudential thought and culture. Until the nineteenth century, however, the positive achievements of international law did not match the higher aspirations of many of the proponents of *ius gentium*. There were few general rules shaping international intercourse, for in the real world of geopolitical relations 'states were both unable and uninterested in

38 *See, e.g.*, U.S. CONST., art. II, § 2.
39 U.S. CONST., art. I, § 8.
40 U.S. CONST., art. III, § 2.
41 *See* discussion *supra* Part V.

agreeing upon common standards of behaviour.'[42] Such general regulation as there was, in addition to some basic rules of war, concerned matters such as the conclusion of Treaties, diplomatic rights and privileges and the capture of pirates, with states emphasizing continuing rights of self-preservation, self-defence and intervention. It was useful for the major powers to have such rules in place in order to reaffirm basic prerogatives and develop co-operative norms in clear areas of concurrent interests and mutual dependence. Beyond this, however, they sought maximum discretion, whereas it would have been in the interest of colonial entities and other less powerful states to have a more robust framework to curb the economic and military hegemony of the few. What we observe here, then, is how, in its early stages, the constitutionalization of (internal and external) sovereignty tended to act as a general form of consolidation of the authority of the major powers–an additional bulwark from which leading Western states, who were also the leading imperial actors, could assert their sovereign self-interest against the prospect of any thicker conception of international law.

Yet from the outset the newly-constitutionalised version of sovereignty was also open to another and less state-empowering approach to external relations. There are a number of contributing factors here. In the first place, pre-modern jurisprudential doctrine had already countenanced the notion of limitations on sovereign power, and this was a resource that was available to the new constitutional thinking as it contemplated national and international domains alike. In particular, from Roman private law there emerged the idea of the limitation of sovereignty by rules of property law concerning usufruct as well as by those governing contract law and its breach. [43] Early modern scholars in the natural law tradition, most prominently Grotius, were apt to invoke these classical ideas in support of a conception of sovereign obligation grounded in a universal human nature, and focused specifically on restraining the conduct of the sovereign in the international arena.[44] In the second place, the development of the new constitutionalism, as we have noted, both reflected and stimulated an emerging ethic of mutual recognition of the rights of free and equal peoples. This ethic could draw upon just the kind of vision of universal humanist morality favoured by the naturalists, but now gradually placed on a more secular footing and understood through the lens of a nascent popular sovereignty rather than the old dynastic sovereignty.[45] In the third place, the openness of constitutionalism to a moderated operation of sovereignty in

42 Cassese, *supra* note 30, at 54.

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

44 HUGO GROTIUS, DE JURE BELLIE AC PACIS LIBRI [On the Law of War and Peace] (1625, Francis W. Kelsey trans., 1925); *see* Straumann, *supra* note 43, at 426-43.

45 *See, e.g.*, Loughlin, *supra* note 27, at ch. 7.

the international domain was a matter not just of philosophy but also of capacity. While the immediate impact of the new constitutionalism was the consolidation of sovereign power, it was a consolidation achieved by force of law. In a formal sense, at least, therefore, constitutionalised sovereignty was, indeed, sovereignty *reduced* to law. Every legal empowerment of the sovereign, however much an endorsement or enhancement of the sovereign's material capacity, necessarily also involved a legal delimitation. Notice was thereby served of constitutionalism's potential to provide material constraints and conditions upon the sovereign it had empowered in pursuit of a new framework of international relations. The constitutionalization of external sovereignty, in other words, contained an intimation of future restraint.

Over time, these various factors came together and, however slowly and unevenly, the sovereign-limiting aspect of external constitutionalism began to register more strongly. The nineteenth and early twentieth centuries witnessed the incremental positivization[46] of general international law, signalled in an intensification of 'bilateral, contractual'[47] arrangements and the gradual emergence of a wider system of international treaties. And with the development of the United Nations and the 'International Bill of Rights'[48] following the abortive precedent of the League of Nations, a more robust framework of international organisations followed over the course of the twentieth century. International regimes now promised a level of resilience, representation, enforceability, and–especially in the case of the new human rights system–a direct relationship with citizens, which was unknown to earlier international law. Constitutionalism in its external aspect both helped to foster and responded to this denser and penetrative international legal structure. Not only were constitutional orders increasingly concerned with the relationship of the state and its citizens to the external world, but they were so in terms which acknowledged that many aspects of this relationship should no longer be considered to be within the unilateral gift of the sovereign state. Rather, constitutionalism both fed into and fed from a more *multilateral* international environment. It was an environment, indeed, whose relative autonomy from the immediate interests

46 *See, e.g.,* STEPHEN NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 221–60 (2014) (discussing the emergence and interaction of a variety of different schools of international legal positivism over the 19th century).

47 Weiler, *supra* note 12, at 549.

48 Consisting of the core human rights instruments of the UN - the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. On the deeper significance of the Post-War turn to rights in the international domain as a way of adapting internal sovereignty as much as external sovereignty. *See* CHRIS THORNHILL, A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS: SOCIAL FOUNDATIONS OF THE POST-NATIONAL LEGAL STRUCTURE (2016).

of individual states, and whose more direct concern with their citizens, which was marked out by a quite new language of international self-assertion. We see this, for example, in the development of legal narratives of 'international community,'[49] and, building on this following the success of the UN Charter and the international Bill of Rights, by initiatives depicting the new global regime as itself now worthy of the traditionally state-exclusive label of constitutionality.[50]

Reflecting its relationship of mutual influence with international law, this new class of multilaterally-engaged external constitutional norms includes both active and passive sub-categories; both provisions, more commonly, which regulate the procedural or substantive terms of participation of the state in the increasingly dynamic framework of international law, and provisions that signal the state's acknowledgment and reception of international norms. On the active side, many constitutions specify how treaties in general are to be approved, rejected, amended, suspended, denounced, withdrawn from or otherwise addressed by domestic institutions in the exercise of external sovereignty.[51] Some constitutions too, concern themselves with domestic participation in the foundational treaties and other legal arrangements of specific international organisations, notably regional organisations such as the European Union.[52] And in other cases, if less commonly, constitutional provisions specify broad substantive aims or conditions of participation in international law-making, from the promotion of regional integration[53] and respect for fundamental rights[54] to the pursuit of international justice and world peace[55] On the passive side, many contemporary constitutions accept the normative

49 *See, e.g.* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 19, 22, 25, 111 (1952) (demonstrating usage of 'international community'). Bruno Simma and Andreas L. Paulus, *The 'International Community': Facing the Challenge of Globalization*, 9 EUR. J. OF INT'L L. 266 (1998); Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. OF INT'L L. 961 (2002).

50 *See, e.g.*, Kumm, *supra* note 16; Christine Bell, *What We Talk About When We Talk About International Constitutional Law*, 5 TRANSNAT'L L. THEORY 241 (2014); BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY (2009).

51 *See, e.g.,* Constitución Política de la República de Chile (Political Constitution of the Republic of Chile), art. 54 (1980) (Chile).

52 For the range of approaches across EU member states, see LEONARD BESSELINK, MONICA CLAES, ŠEJLA IMAMOVIĆ, & JAN HERMAN REESTMAN, NATIONAL CONSTITUTIONAL AVENUES FOR FURTHER EU INTEGRATION. (Report for the European Parliament's Committees on Legal Affairs and on Constitutional Affairs: No. PE 493.046).

53 *See, e.g.*, German Basic Law 1949, art. 23(1); Constitution of the Federal Republic of Nigeria 1999, art. 19(b) (1999) (Nigeria).

54 *See, e.g.,* German Basic Law, 1949, art. 23(1)

55 *See, e.g.,* Zhonghua Renmin Gongheguo Xianfa (中華人民共和國憲法)(Constitution Law of the People's Republic of China), art. 141 (1947) (China).

authority of international law and international treaties in general,[56] or of specific international regimes[57] or judicial authorities.[58] In so doing, they tend to rank international norms highly in comparison to domestic norms and, in some cases, equivalent[59] to or even above[60] constitutional norms themselves.[61] With these developments–procedural and substantive, active and passive–we witness a new emphasis on the sovereignty-constraining dimension of external constitutionalism, but one closely tied up with the state's ongoing involvement in the architecture of international organisation and the dynamics of international norm construction and application.

V. THE EMERGENCE OF DEMARCATION SOVEREIGNTY

If reductive constitutionalism has always offered an incomplete key to the operation of internal sovereignty, does the growing reach and authority of international law and its increasingly close interpenetration with domestic constitutional law raise the prospect that the operation of external sovereignty be better understood in such legally-coded terms? Does the combination of a more open and internationally-friendly form of domestic constitutional law with a thicker framework of procedural and substantive international norms suggest that the conduct of the external sovereign is now contained and constrained by law in a more comprehensive manner than is or ever has been the case with the internal sovereign? To put it in starker terms, in the conduct of international affairs, is the sovereign in his various institutional manifestations, now better understood as an agent or even 'officer' of the law of a joined-up international order,[62] rather than as an entity that still in some sense precedes and constitutes that international order for its own ends?

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56 *See, e.g.*, Constitución Política de la República de Chile (Political Constitution of the Republic of Chile), art. 5 (1980) (Chile); Constituição da República Federativa do Brasil (Constitution of the Federative Republic of Brazil), art. 5(78)(2) (1988) (Braz.); La Constitution (Constitution), Preamble (as incorporated in 1946) (Fr.); 日本國憲法 (Constitution of Japan), art. 98 (1946) (Japan).

57 *See, e.g.*, Constitution of the Argentine Nation, Sec. 75(22) (listing ten international instruments recognized as on the same level as the constitution).

58 With regard to the jurisdiction of the International Criminal Court, see Constitution of the Republic of Chile 1980, Transitory Provisions 24; *see also* Constitution of the Federative Republic of Brazil 1988, art. 5(78)(4).

59 *See, e.g.*, German Basic Law 1949, art. 25; Constitution of the Argentine Nation, Sec. 75(22).

60 *See, e.g.*, Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815 (Constitution of the Kingdom of the Netherlands of August 24, 1815), art. 94, 120 (2008) (Neth.).

61. In addition to general international clauses, many constitutions of the member states of the EU now have special European clauses dealing with the relative standing of EU law and national law. For discussion, see, e.g., Monica Claes, *The Europeanisation of National Constitutions in the Constitutionalisation of Europe: Some Observations Against the Background of the Constitutional Experience of the EU-15*, 3 CROAT. Y.B. EUR. L. & POL'Y 1 (2007).

62 As argued for by Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315 (2011).

For all the importance of developments in the UN age, surely not. In a purely formal sense, as already noted, we cannot deny constitutionalism's double-edge, and this works both ways. The constitution necessarily remains an expression of state sovereignty as much as a constraint upon it–in external matters as much as in internal matters. And, in the external domain as much as in the internal domain, this formal duality has substantive consequences because there remains a tension between the legal conveyance of the expression of sovereign will in unilateral terms and the more fundamental multilateral or communitarian compromise or pooling of sovereignty through a legally mandated engagement with transnational or international institutions and deference to transnational or international norms.

Today, however, this abiding tension assumes a particular shape, and does so in significant measure in recognition of and reaction to the increased salience of international normative order. As we observed, early modern constitutionalism addressed an international arena sparsely populated by norms in a manner that allowed the external sovereign to occupy that arena on terms largely uninformed and unconstrained by law. One consequence of that was that, even as the age of empire as a formal legal construct drew to a close, states with unequal military and economic power could still do much to interfere with the so-called 'Westphalian sovereignty' of other states by seeking 'to influence or determine domestic authority structures.'[63] By contrast, contemporary constitutionalism addresses an international arena that, in significant part due to the very international participation that constitutional norms now require and facilitate, is densely populated by norms. This density simultaneously limits and protects national sovereignty. The sovereign's capacity for independent external action in such a crowded normative space is fettered. Yet one consequence of this fettering is also to afford greater protection to vulnerable sovereigns from direct forms of military and economic interference from powerful sovereigns. In such altered circumstances, the external challenge to sovereign autonomy assumes a different form, and such protection as the sovereign continues to enjoy is secured by other legal means.

In a nutshell, the legal 'marks'[64] of sovereignty at its external border have become increasingly defensive rather than offensive in kind. They are concerned to prevent or control various emerging or abiding forms of encroachment upon sovereignty's vital core associated with the normative density of the international domain rather than to push back sovereignty's frontiers against that normative density. What we observe, in the round, is the development of a more intense form of *demarcation sovereignty*, concerned

63 KRASNER, *supra* note 2, at 20.
64 BODIN, *supra* note 17.

with the staking and maintaining of boundaries deemed necessary to ensure the continuing basic integrity of the sovereign unit. Demarcation sovereignty takes two general forms. The first concerns external sovereignty proper. It involves longstop protection of the domestic sovereign's control over international affairs, both through ensuring that an independent capacity to act is retained or is capable of being recovered, and by safeguarding certain core features of the sovereign's constitutionally shaped expression–or what is sometime called its 'constitutional identity'[65]–from erosion or interference as a result of the exercise of external sovereignty. The second form is concerned with fixing the limits of the domain of internal sovereignty, in particular through specifying which actors and settings are internal and which are external to the constitutional order, and by excluding the external actors and settings from structures of participation, authority, and jurisdiction that represent the established domicile of internal sovereignty.

Regarding the first strand of demarcation sovereignty, this is concerned with establishing barriers against the propensity of the new forms of international legal order and institutional regime that populate this crowded normative space to cause states to compromise their sovereignty by voluntary means–by invitation rather than by the kinds of subjugation associated with the older forms of interference with Westphalian sovereignty.[66] Quite apart from the power to withdraw from or denounce treaties, contemporary constitutions sometimes contain explicit provisions forbidding adherence to international agreements that would breach constitutional standards,[67] or requiring prior constitutional amendment before entering into treaties at variance with existing constitutional standards.[68] More broadly, as we have seen most intensely with regard to the European Union, there is a growing body of constitutional jurisprudence that seeks to guard against the possibility of international organisations to which states, through the exercise of their external sovereign authority, remain voluntarily joined, from acting in a manner which challenges the constitutional identity of these states. This could either be achieved by violating certain fundamental normative standards or by claiming control over competences deemed to be core elements of their constitutional independence. The new defensive jurisprudence often relies on explicit constitutional provisions, but national constitutional or supreme courts have

65 *See, e.g.,* GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY (2010); MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY (2010).

66 *See, e.g.,* KRASNER, *supra* note 2, at 20–24.

67 *See, e.g.*, ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ ආණ්ඩුක්‍රම ව්‍යවස්ථාව (Constitution of the Democratic Socialist Republic of Sri Lanka), art. 33(f) (1978) (Sri Lanka); German Basic Law, 1949 art. 23(1).

68 *See, e.g.*, La Constitution (Constitution), art. 54 (1958) (Fr.).

also become more prepared to discover unalterable or irreducible constitutional cores on the basis of a broader interpretation of the structural integrity and underlying ethos of the constitution. With reference to both explicit and implicit constitutional norms, therefore, constitutional judges have been minded to oppose, write down, or qualify external authority on matters as diverse as nationally affirmed human rights standards, the maintenance of the basic integrity of the state as a self-governing representative democracy, and national direction and control over core policy issues of national security and monetary 'sovereignty.'[69]

Regarding the second strand of demarcation sovereignty, the degree of intensification of a theme that has always been present is remarkable. Specification of the boundaries of the domestic constitutional order might be considered the most basic–and most primitive–load-bearing wall that establishes the very distinction between internal and external domains within the constitutional edifice. So, we should not be surprised that the earliest constitutional documents engaged in some elementary building work.[70] Yet contemporary constitutional documents and doctrines, far from relegating such work to the background, contain ever more elaborate specifications of this barrier. New constitutional designs are likely to contain provisions, often quite detailed, covering matters such as territorial limits, criteria of citizenship and other statuses of belonging, access to political rights, the rights and responsibilities of nationals abroad, the jurisdictional reach of courts, and the treatment of refugees. [71] Again, we better understand this trend towards reinforcement if we appreciate how it functions as a fortification against external pressures. Here, state constitutions have tended to retain and extend a measure of unilateral influence in matters–asylum, immigration, legal jurisdiction, political rights, even citizenship status–that over the last 70 years have also been the subject of extensive international political concern and of a growing measure of international legal regulation. To change our metaphor, state constitutions continue to draw a broad but deep line in the sand, and to insist on their right to draw that line, over matters in which the fine particles of normative influence are increasingly mixed across both sides of that line.

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69 Again, the European Union has provided a fertile context for the development of this type of defensive jurisprudence, in particular through the influential judgments of the German Constitutional Court. *See, e.g.*, M. Claes, *The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the European Court of Justice*, 23 MAASTRICHT J. OF INT'L & COMPARATIVE L. 151 (2016).

70 For example, on the jurisdiction of domestic courts, *see* U.S. CONST. art. III, § 2, already discussed in Section 4 above. Art. IV § 2(1) also introduces the fundamental status distinction between citizens and non-citizens ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

71 *See, e.g.*, E. Benvenisti and M. Versteeg, *The External Dimensions of Constitutions* 57 VA. J. OF INT'L LAW 515 (2018).

VI. CONCLUSION

Demarcation sovereignty, then, is merely the mature manifestation of the constructive approach of an external constitutionalism committed to the double edge of sovereign self-assertion and sovereign self-binding in accordance with the restraints of a densely developed international rule-based order. As has been argued, the double-edged quality is inescapable, an inevitable product of a normative landscape in which constitutionalism is programmed to constitute and sustain national sovereignty as much as it is to moderate and limit its effects. With that inevitability in mind, let me briefly conclude with two closely related observations–one moral and the other prudential.

It was noted in the introduction that awareness of the inherent resistance of national sovereignty–even as mediated through constitutional law–to the comprehensive authority of an international normative order, cautions us against overstating the extent to which the global political system, including its national parts, has been or might be successfully reduced to a single holistic framework of law. Importantly, such awareness does not render illegitimate an argument from political morality that tries to locate sovereignty firmly within a cosmopolitan vision, and which advocates that particular sovereigns act in accordance with that vision.[72] However, any such argument has to be made–and won or lost–on its own terms, and with two countervailing considerations in mind.

First, local (as opposed to international) communitarian arguments that support the autonomy of national collectives must also be accommodated. And from that local communitarian basis, the articulation of national sovereignty in a manner that is resistant to the shared framework of norms necessary to sustain a cosmopolitan vision is not necessarily objectionable as a matter of politically morality.[73] To be sure, the legally-uncontained aspect of sovereignty is often linked to a litany of pathological manifestations and outcomes–to power exercised unpredictably and unaccountably, to chauvinistic self-interest, to aggressive intervention, to non-co-operation, to decisions that declare the exception rather than pursue the norm. Yet sovereign autonomy need not take these pathological forms, even when it is critical of the existing international normative framework, and of how it is exercised. It is, to repeat, a matter of argument, and unceasing advocacy, to what extent a strong cosmopolitan vision should prevail, rather than a matter of reliance upon the inherent force and momentum of a legally reductive conception of global normativity

72 Such as that of, Benvenisti, *supra* note 11.

73 For an excellent recent example from the field of migration, see D. MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION (2016).

Secondly, the actual rule-based international system that helps feed the cosmopolitan vision is a fragile and precarious accomplishment. Just as it is unjustifiable as a matter of political morality to rest a strong cosmopolitan case too heavily on the existing normative framework, that framework in any case stands on unsettled and unreliable material foundations. What is more, as developments in the theatre of global politics have sharply revealed, these foundations are today under increasingly intense pressure.[74] Perhaps more widely than at any time in the post-War era, populist leaders have been able to gain significant ideological traction before national audiences by warning of the erosion of national sovereignty in the face of the deracinated logic of cosmopolitanism.[75] For such leaders and their movements, the strategies of demarcation sovereignty are quite insufficient. They advocate a more aggressive reassertion of sovereignty against the claims of regional and global legal regimes, and, in so doing, they seek to assign blame for the sharpness of the nationalist reaction to the very culture associated with a cosmopolitan rule-based system for its arrogant disregard for national autonomy and overweening ambition to lock states into a progressively global normative order. Of course, these claims are caricatures and rarely rise above the crudest symbolic politics of nation versus cosmopolis. Nevertheless, they offer a powerful reminder that the post-1945 system is not set in stone. They caution us that an attitude which treats its progress as inevitable and unassailable, rather than a development which must be constantly justified and defended, is not only ill-founded but also risks provoking the very forces that would undermine it.

74 Diane Disierto, *Economic Nationalism in a New Age for International Economic Law: Recalling Warnings of Ludwig von Mises and the Austrian School*, EJIL: *TALK!* (Jan. 30, 2017), http://www.ejiltalk.org/economic-nationalism-in-a-new-age-for-international-economic-law-recalling-warnings-of-ludwig-von-mises-and-the-austrian-school/ (examining the relationship between the upsurge in economic nationalism in the United States, Europe and Asia and new forms of sovereigntist resistance to international law in the specific field of international economic law); *see also* Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Future* 27 EUR. J. INT'L L. 945 (2017).

75 *See* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016).